

Southampton Student Law Review  
Special edition: undergraduate dissertations 2012,  
volume 2, issue 2





# Southampton Student Law Review

## Southampton Law School

Published in the United Kingdom  
By the Southampton Student Law Review  
Southampton Law School

University of Southampton  
SO17 1BJ

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[www.southampton.ac.uk/law/lawreview](http://www.southampton.ac.uk/law/lawreview)

ISSN 2047 - 1017

This volume should be cited (2012) Vol. 2 (2) S.S.L.R.

## Editor's Note

It is my great pleasure to present to you the very best of undergraduate scholarship from the University of Southampton. This edition includes articles on various important contemporary legal issues. From the freedom of expression on the internet to the 'duty of candour' on the NHS, this edition superbly highlights the length and breadth of legal research at undergraduate level. 2012 has marked a momentous 60<sup>th</sup> anniversary Diamond Jubilee year for the University of Southampton. I believe that this special edition is a fitting tribute to the continued stimulating and thought-provoking legal research conducted within our proud law school.

*Louise Cheung*

*Southampton Student Law Review, Editor-in-Chief*

*December 2012*

## Acknowledgements

The Editors wish to thank our academic advisor Professor Oren Ben-Dor for his advice, commitment and support

The Editors also wish to thank all members of Southampton Law School who have assisted in the creation of this volume

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# Foreword

As the coordinator of the Legal Research and Writing Module, it gives me great pleasure to introduce this Special Dissertation issue of the Southampton Student Law Review. The LLB 10, 000 word dissertation, celebrated in this volume, has been one of the pillars of our LLB programme and testifies to both the uniqueness of the programme and to the sheer awareness, talent and research skills of our graduates. Supervised by our full-time members of staff, the dissertation is a compulsory module that involves independent research by third year LLB students on any topic of their choice.

But the creative process really starts upon students' first arrival at Southampton. With our unique first year Legal System and Reasoning Module in the first year students get unparalleled hands-on introduction to essential legal skills, styles of writings and legal argument as well as tasters for many critical interdisciplinary perspectives that enrich the manner legal texts can be looked at. This ethos continues with our way of teaching the core modules during the first and second year and the rich range of options during the third. Our students become insightful and confident to construct original doctrinal and theoretical problems as well as competent in the pursuit of cutting edge and independent research needed to traverse them. Our mooted and presentation task enhance student argumentative and persuasion skills. In sum, this dissertation testifies to the critical and friendly academic community at Southampton Law School.

This special issue publishes seven outstanding dissertations that were written by our third year undergraduates. They range from Information Technology Law, Intellectual Property Law, Tort, Medical Ethics and EU Law. Each of them is exemplary in expression, connection and design and evidences the ability to draw trends of arguments from wide range of materials; distil questions that cut across legal fields and combine general issues in Jurisprudence and political theory with legal doctrine. I hope that you enjoy these gems.

I would like to thank contributors for their terrific pieces, to all members of staff whose dedicated inspiration and supervision made this possible and to Joy Caisley, our Law Librarian who offered unparalleled guidance and support in using library resources throughout the LLB and in the Legal Research and Writing Module. Last but not least to Louise Cheung, Emma Nottingham and Thomas Webber and all other members of the editorial team of SSLR for their dedicated work.

*Oren Ben-Dor*

*Professor of Law and Philosophy*

*December 2012*





## Denial of Service Attacks: Ineffective U.K. legislative overkill, how the Americans ‘do it’ and the recurring issue of regulation

*Callum Beamish*

‘Arrest us. We dare you. We are the unstoppable hacking generation...’  
LulzSec – 19th July 2011

The rapid development of the Internet in the past 20 years has caused the network to become an essential tool, entrenched in our everyday lives. It has created a generation that cannot imagine life without it. However, it has also spawned a growing community of people who can, and do, abuse this dependency.

One might name those individuals “hackers”. A Denial of Service (DoS) attack, or a Distributed Denial of Service (DDoS) attack, is the archetypal 21st century hacker’s tool of choice; the term “hacker” here used incredibly broadly. It is clear that these types of attack cause vast damage in their implementation and wake. The victim base is not solely restricted to the target and can extend to an infinite amount of parties, whether this is through impaired use of the Internet or having compromised computers that are part of a Botnet. Moreover, the effects of these attacks can cause various degrees of damage, including great financial loss, reputation decline and security breaches.

The U.K.’s regulatory response is legislative and relies upon enforcement by the Crown Prosecution Service of the Computer Misuse Act 1990 (CMA) as amended by the Police and Justice Act 2006 (PJA). The amount of people prosecuted under the CMA since its inception is minimal, and the amount prosecuted for DoS or DDoS attacks is negligible. The issue here is more apparent when you take into account that, in 2004, over 4,000 attacks were estimated to be orchestrated per week, an estimate rising to 10,000 a day in 2007, and there were suggestions in 2011 that cybercrime was costing U.K. businesses over £27 billion per annum.

This paper asserts that the legal provisions relating to DoS attacks and cybercrime are currently inefficient, questioning whether there is a better regulatory model available. It breaks down the relevant U.K. legislation highlighting its strengths and weaknesses. It looks at where the legislation has come from, considering legal, political and social factors. The heavy-handed

legislature evidenced in the PJA is also discussed, considering if it has, in reality, rectified any issues or simply muddied the water.

There is comparison of the U.K. position with that of the U.S., where prosecution for online cybercrime is common place. Consideration is given to the Computer Fraud and Abuse Act (18 USC 1030) and particular reasons why this efficiency exists in the U.S. are explored. This takes into account factors outside the legislative sphere, with the aim of possibly learning something from those across the Atlantic.

This paper contemplates possible solutions to the current downfalls, considering the public private divide and regulation on an overarching scale, evidencing the development of the Internet into a network that can and should be regulated by government. There is focus upon regulatory models outside of command and control, considering their efficiency within the cyber sphere and whether they are better suited to deal with recurring issues. Thus, there is also indication as to how the issues can best be resolved.

## Introduction

When the World Wide Web was created and coupled with the Internet,<sup>1</sup> by Tim Berners-Lee, Robert Cailiau and others at CERN in 1990,<sup>2</sup> it was not expected to become such an entrenched tool in our lives. However, its development from a research based network to a military project was rapidly expanded in the 1990's with Berners-Lee's work and it now stands as a global network, with internetworldstats.com estimating its user base at 2,095,006,005, as of March 31<sup>st</sup> 2011,<sup>3</sup> with 16.2% of those being within the European Union.<sup>4</sup>

The Internet provides today's global society with an unfathomed amount of (what are generally accepted as) positive opportunities. For example: a vast and continuously expanding knowledge bank that can be accessed across the world; instantaneous communication to anywhere that has an Internet connection; and a platform for individuals to connect globally in a manner never before possible.

However, it must be stressed that the Internet is a tool and like any tool it can also be utilised to provide negative opportunities; a knife is an implement that can preserve life, but it can also take it. This paper will be focusing upon the negative opportunity of computer crime, which now stands as the 'fourth biggest threat to global stability'.<sup>5</sup> However, computer crime is an overarching

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<sup>1</sup> Hereafter collectively termed "the Internet".

<sup>2</sup> Janet Abbate, *Inventing the Internet* (1<sup>st</sup> edn, MIT Press 2000) 214

<sup>3</sup> www.internetworldstats.com <<http://www.internetworldstats.com/stats.htm>> accessed 7<sup>th</sup> December 2011

<sup>4</sup> *ibid* <<http://www.internetworldstats.com/stats9.htm>> accessed 7<sup>th</sup> December 2011

<sup>5</sup> The Daily Mail, 'Cyber attacks now fourth biggest threat to global stability, says World Economic Forum' (12<sup>th</sup> January 2012) <<http://www.dailymail.co.uk/news/article->

term for numerous offences and this paper will focus upon the culture of hacking.

Illustrious and glamorous images usually come to fruition when the terms “hacking” or “hacker” are used; historically, the title “hacker” was certainly alluring and implied academic endeavour. However, as Nehaluddin indicates in 2009:

‘[T]he new generation claiming to be hackers do not have computer science or programming backgrounds. Many are just petty criminals... who like to refer to themselves in terms that conjure up notions of importance rather than those of contempt...’<sup>6</sup>

This explanation shows the ease in which one can term themselves a “hacker” and it is therefore important to remember the type of person that is likely to be involved in modern cybercrime. Indeed, a rather fashionable movement online is “hactivism”; the ‘fusion of ethical motivation and the use of computer technique’.<sup>7</sup> As will be seen, the leading weapon in this movement’s arsenal is a Denial of Service (DoS), or Distributed Denial of Service (DDoS), attack.

These attacks cause a server to fail through flooding it with traffic. A DoS attack is a single user attacking a server, using a single Internet connection; this style is becoming less frequent and is the least threatening. The type of attack more commonly utilised is DDoS. Here, tens, hundreds, or thousands of computers are used to overload a server with traffic. The All Party Parliamentary Internet Group (APIG) defines a DoS/DDoS attack occurring:

‘[W]hen a deliberate attempt is made to stop a machine from performing its usual activities by having another computer create large amounts of specious traffic. The traffic may be valid requests made in an overwhelming volume or specially crafted protocol fragments that cause the [server] to tie up significant resources to no useful purpose. In a... [DDoS] attack a large number of remote computers... [attack] a target’.<sup>8</sup>

In both types of attacks (hereafter collectively termed DoS attacks unless indicated otherwise) the aim is common place; to render the server inaccessible. However, there are important differences, the most obvious being scale. A DoS attack is a more “low key” threat. Many servers can withstand one user’s attempt to cause down-time or, at least, identify the

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2085876/Cyber-attacks-fourth-biggest-threat-global-stability-says-World-Economic-Forum.html> accessed 14<sup>th</sup> January 2012

<sup>6</sup> Ahmad Nehaluddin, ‘Hackers’ criminal behaviour and laws related to hacking’ (2009) 15(7) CTLR 159, 160

<sup>7</sup> David Wall, *Cybercrime* (Polity Press 2007) 61

<sup>8</sup> All Party Parliamentary Internet Group, ‘Revision of the Computer Misuse Act: Report of an Inquiry by the All Party Internet Group’ (June 2004) 9

<<http://www.apcomms.org.uk/apig/archive/activities-2004/computer-misuse-inquiry/CMAReportFinalVersion1.pdf>> accessed 13<sup>th</sup> November 2011

attacker more easily; yet this is not always possible, evidenced in *DPP v Lennon*,<sup>9</sup> as discussed later.

A DDoS attack is of greater concern. They can be orchestrated from an infinite amount of Internet connections and thus the amount of data reaching the server can be unbounded. A server, can be put offline for hours, or even days, and much money in revenue can be lost, as well as loss in company reputation and other negative repercussions. Most DDoS attacks will be launched via a Botnet<sup>10</sup> giving the perpetrator full anonymity, causing significant problems in identifying them.

To provide an example of a DoS attack, the workings of the Internet must be briefly and simply explained. There are two software protocols that govern Internet connection and communication, Transmission Control Protocol (TCP) and Internet Protocol (IP). When a user connects these protocols are used to allow data to pass between the connecting computer and the server. The data is passed in broken down sections called “packets” which are then reconstructed at their destination by TCP. As Carne explains:

‘Communication in the Internet is facilitated by protocols... TCP... governs the reliable, sequenced, and unduplicated delivery of data... IP[’s]... major purpose is to make origination and destination addresses... to guide data across networks...’<sup>11</sup>

The most common connection of one computer to an Internet server is called the TCP three-way-handshake. A computer connecting via TCP sends a TCP-SYN(chronize) packet, the server then responds by sending a TCP-SYN-ACK(nowledge) packet from all open ports<sup>12</sup> that the computer can connect to, and the computer responds by sending a TCP-ACK packet back to the server. There is then a TCP socket connection (Internet connection) established and communication can continue.<sup>13</sup>

That understood, it is possible to explain “SYN flood”; a common type of DoS attack which exploits the TCP three-way-handshake. The “hacker” sends numerous TCP-SYN packets to the server using fake IP addresses. The server then returns many SYN-ACK packages from each open port, waiting for a response it will never receive; creating a “half open connection”. As the IP addresses are fake it is impossible for the server to send out a reset package closing the connection. Usually, the server would shut down the connection via a time-out system. However, before this can occur, more packets will be sent and the process restarts with more TCP sockets being connected to. Thus

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<sup>9</sup> [2006] EWHC 1201 (Admin)

<sup>10</sup> A network of compromised private computers, which can be controlled from one centralised point

<sup>11</sup> Bryan Carne, *A Professional's Guide to Data Communication in a TCP/IP World* (1<sup>st</sup> edn, Artech House 2004) 3

<sup>12</sup> An access point of communication

<sup>13</sup> James Edwards, Richard Bramante, *Networking: OSI, TCP/IP, LANs, MANs, WANs, Implementation, Management, and Maintenance* (2<sup>nd</sup> edn, Wiley 2009) 365-366

it becomes difficult, if not impossible, for users to connect via the TCP sockets.<sup>14</sup>

The occurrence of these attacks is ever increasing. In 2004 it was estimated that over 4,000 attacks occurred per week<sup>15</sup> and in 2007 that number rose to 10,000 per day.<sup>16</sup> In 2011 a Cabinet Office report showed that cybercrime is likely to be costing the U.K. £27bn per annum;<sup>17</sup> a £22bn increase upon a Home Office estimate in 2006.<sup>18</sup> Thus it is evident that cybercrime exists, and as David Emm, senior security researcher at Kaspersky Lab, stated 'The threat from cybercrime is real and growing.'<sup>19</sup>

Following the "WikiLeaks Scandal" in 2010, DoS attacks were brought heavily into the public domain by the "hacktivist" movement; a sudden spawning of hacking groups spread across the Globe in response to actions taken by businesses and governments. These groups then expressed their opinion through different cybercrimes, with DoS attacks as their leading weapon. Ball reported:

'Anonymous and LulzSec have engaged in a series of politically motivated hacks... in support of WikiLeaks... taking... Visa and Mastercard... offline in the wake of the WikiLeaks blockade, a hack on security firm HBGary... and attacks against the CIA and the U.K.'s Serious and Organised Crime Agency.'<sup>20</sup>

These attacks have continued, with Global intelligent analysis firm, Stratfor, targeted during the 2011/2012 Christmas<sup>21</sup> and, amongst others, the FBI, Universal Music, RIAA and Hadopi websites being taken offline by Anonymous in January 2012.<sup>22</sup>

Sabu, a LulzSec member, was noted saying that an achievement for the group was that their actions 'exposed the sad state of security across the media,

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<sup>14</sup> TechTarget, 'SYN Flooding' <<http://searchsecurity.techtarget.com/definition/SYN-flooding>> accessed 4<sup>th</sup> December

<sup>15</sup> All Party Parliamentary Internet Group (n 8) 9

<sup>16</sup> Ian Brown, Lilian Edwards and Chris Marsden, 'Information Security and Cybercrime' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3<sup>rd</sup> edn, Hart Publishing 2009) 674

<sup>17</sup> Detica in Partnership with the Office of Cyber Security and Information Assurance, 'The Cost of Cyber Crime' (February 2011) 18 <<https://update.cabinetoffice.gov.uk/resource-library/cost-of-cyber-crime>> accessed 7<sup>th</sup> December 2011

<sup>18</sup> Daniel Thomas, 'New bill to beef up e-crime law' (25<sup>th</sup> January 2006) <<http://www.computing.co.uk/ctg/news/1848730/new-beef-crime-law>> accessed 7<sup>th</sup> December 2011

<sup>19</sup> Steve Evans, 'Cyber Security Strategy: expert reaction' (25<sup>th</sup> November 2011) <<http://www.cbronline.com/blogs/cbr-rolling-blog/cyber-security-strategy-expert-reaction-251111>> accessed 7<sup>th</sup> December 2011

<sup>20</sup> James Ball, 'By criminalising online dissent we put democracy in peril' *The Guardian* (1<sup>st</sup> August 2011) <<http://www.guardian.co.uk/commentisfree/2011/aug/01/online-dissent-democracy-hacking>> accessed 31<sup>st</sup> October 2011

<sup>21</sup> BBC, 'Stratfor relaunches website after Christmas hack' (12<sup>th</sup> January 2012) <<http://www.bbc.co.uk/news/technology-16528421>> accessed 12<sup>th</sup> January 2012

<sup>22</sup> BBC, 'Hackers retaliate over Megaupload website shutdown' (20<sup>th</sup> January 2012) <<http://www.bbc.co.uk/news/technology-16646023>> accessed 21<sup>st</sup> January 2012

social, government online environments'.<sup>23</sup> Indeed, there is an underlying question in the WikiLeaks backlash along this theme; are the actions taken by these groups in the public's interest? For example, Anonymous brought down numerous child pornography sites using DoS attacks.<sup>24</sup>

Nonetheless, however busy these groups have been, "good" or "bad", one cannot ignore the international threat of cyberwarfare. It has been suggested that damaging DDoS attacks on Estonia were instigated by Russia<sup>25</sup> and Baroness Neville-Jones (the Prime Minister's previous special representative to business on cyber security) has said that both China and Russia are among countries involved with significant cyber attacks against the U.K.<sup>26</sup>

These attacks not only cause serious damage to companies, but also affect every Internet user. Legitimate users lose access to websites and their general connection slows when an attack is implemented locally. In a DDoS situation, innocent private parties' computers can be compromised giving rise to serious security issues.

Fortunately the gravity of these threats is causing some precautions to be taken. For example, The London 2012 Olympic Games organisers are taking steps to mitigate these attacks, running worst-case scenarios, and using an approach to their website that is a 'distributed one [minimising] the DDoS attack route'. These actions are sensible considering that 'during the... 2008 Beijing Olympics, China was subject to around 12 million online attacks per day'.<sup>27</sup>

It is clear, therefore, that these attacks are an issue of current concern, and the threat they pose is real, apparent and severe. This paper will assert that the current legal provisions relating to cybercrime, or more specifically DoS attacks, are ineffective and the U.K. should therefore consider a more appropriate form of regulation. It will therefore ask: what has the U.K.'s reaction been? What has the reaction been in other Internet rich countries such as the U.S.? How effective have those respective reactions been? And depending on that answer, have we got it right, have we missed something, or are we helpless?

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<sup>23</sup> Charles Arthur, 'Lulzsec hacker: 'we still have Sun emails, stored in China' The Guardian (10<sup>th</sup> October 2011) <<http://www.guardian.co.uk/technology/2011/oct/10/lulzsec-hacker-sun-emails>> accessed 31<sup>st</sup> October 2011

<sup>24</sup> BBC, 'Hackers take down child pornography sites' (24<sup>th</sup> October 2011) <<http://www.bbc.co.uk/news/technology-15428203>> accessed 31<sup>st</sup> October 2011

<sup>25</sup> The European Union Committee of the House of Lords, 'Protecting Europe against large-scale cyber-attacks' (9<sup>th</sup> March 2010) <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/68/6805.htm>> accessed 9<sup>th</sup> December 2011

<sup>26</sup> Daily Telegraph, 'Russia and China are behind cyber warfare attacks, says Baroness Neville-Jones' (1<sup>st</sup> November 2011) <<http://www.telegraph.co.uk/technology/news/8861605/Russia-and-China-are-behind-cyber-warfare-attacks-says-Baroness-Neville-Jones.html>> accessed 9<sup>th</sup> December 2011

<sup>27</sup> BBC, 'Cyber attack tests for Olympic Games computer systems' (10<sup>th</sup> October 2011) <<http://www.bbc.co.uk/news/technology-15244808>> accessed 31<sup>st</sup> October 2011

Chapter two of this paper will deal with the first question posed above, assessing the U.K.'s position and the history behind it. Chapter three will look to the second question, and follow a similar path to chapter two, but with a U.S. focus. Before concluding, chapter four will then consider the final question, looking at the concept of regulation.

## The UK Position

This chapter presents an overview of the U.K. position in relation to DoS attacks in three sections: "Before the CMA" analyses the historical basis of the Act; "Computer Integrity" focuses upon the Act's foundation; "The Act's Downfalls and DoS" looks to the Act's application to DoS attacks; and "Reform and Remaining Issues" considers the Act's reform and its effects.

The U.K. employs command and control regulation over DoS attack behaviour; as Baldwin explains, that is 'the exercise of influence by imposing standards backed by criminal sanctions'.<sup>28</sup> The imposed standards are within s.3 of the Computer Misuse Act 1990 (CMA), as amended by the Police and Justice Act 2006 (PJA), and are supported via differing criminal sanctions.

The CMA came into force on August 29<sup>th</sup> 1990; at this time the Internet was in its infancy. However, the network has grown substantially; allowing faster speeds and further reaching connections. Thus, with hindsight, it is clear the CMA was ultimately doomed before it had a chance, and 'suffered a premature birth, which left it weak and vulnerable when the Internet, as we know it, arrived'.<sup>29</sup>

### Before the CMA

Before the CMA, it was common place for the courts to apply traditional "real world" offences to their "virtual world" counterparts. For example, in *Cox v Riley*<sup>30</sup> the erasure of a computer program was seen as criminal damage under the Criminal Damage Act 1971 (CDA); arguments that the intangibility of the program rendered it not property were rejected. *R v Whiteley*<sup>31</sup> saw the CDA used to criminalise more invasive computer attacks through understanding a change in the magnetic particles on a Hard Disk's surface as tangible property being damaged, and that the damage itself did not need to be tangible.

Despite this 'flexible judicial approach',<sup>32</sup> that possibly works ad hoc, using this technique long-term would result in flawed decisions. There are certainly parallels between a "real" and a "virtual" world, but there are also vast differences. For example, automation, anonymity and remote actions are all

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<sup>28</sup> Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2<sup>nd</sup> edn, OUP 2012) 106

<sup>29</sup> Neil MacEwan, 'The Computer Misuse Act 1990: lessons from its past and predictions for its future' (2008) 12 Crim LR 955, 956

<sup>30</sup> (1986) 83 Cr App R 54

<sup>31</sup> (1991) 93 Cr App R 25

<sup>32</sup> Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4<sup>th</sup> edn, Routledge 2012) 116

available virtually; as Jewkes remarks '[C]yberspace... reconfigures time and space... offences can be initiated, and their consequences felt, in entirely different parts of the world'.<sup>33</sup>

The need for the courts to apply, or force, such offences into the pre-existing statutory framework was evidence of a legislature ignorant to the gravity such attacks would one day hold, and to the technology developing around them. This issue is still apparent today, with the U.S. Court of Appeals for the Ninth Circuit, in a non-cybercrime case *MGM v Grokster*,<sup>34</sup> realising that 'we live in a quicksilver technological environment with courts ill-suited to fix the flow of Internet innovation'.<sup>35</sup>

Fortunately, this questionable practice was short lived, and *R v Gold and Schifreen*<sup>36</sup> exemplified the issues. The case concerned the prosecution of two hackers, who obtained a password to the BT Prestel System, under s.1 of the Forgery and Counterfeiting Act 1981. The House of Lords confirmed Lord Lane's comments, from the Court of Appeal, that using this offence was a '[p]rocrustean attempt to force these facts in the language of an act not designed to fit them' and that it 'produced grave difficulties for both judge and jury'.<sup>37</sup>

Consequently, the Law Commission for England and Wales reported that the current law was inadequate and reform was necessary.<sup>38</sup> However, despite the report, it was not until Michel Colvin proposed a private members bill that the CMA was finally drafted.

### Computer Integrity

One must note at this point, that the CMA's legal framework was not born through the concept of "information theft", but was in fact conceived under the belief that there was a need to protect 'the integrity and security of computer systems'.<sup>39</sup> Indeed, the Law Commission steered clear of the question of tangibility in relation to computer information and property, leaving the concept 'well alone'.<sup>40</sup> Through assessing cyber offences as criminal, the legislature took account of the public importance in networks and computing.

The Law Commission explained that 'the... criminal offence of... hacking [did] not turn on the need to protect information',<sup>41</sup> and following this, the CMA was founded to ensure computer integrity within a public sphere; framing the offences away from property ensured that no confusion existed over the

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<sup>33</sup> Yvonne Jewkes, 'Policing the Net: crime, regulation and surveillance in cyberspace' in Yvonne Jewkes (ed), *Dot.Cons* (first published 2002, Willan Publishing 2003) 34

<sup>34</sup> 380 F 3d 1154 (9<sup>th</sup> Cir 2004)

<sup>35</sup> *Grokster* (n 34) 1167

<sup>36</sup> [1988] AC 1063

<sup>37</sup> *R v Gold and Schifreen* [1987] QB 1116, 1124

<sup>38</sup> Law Commission, *Criminal Law: Computer Misuse* (Law Com No 186, 1989)

<sup>39</sup> MacEwan (n 29) 957

<sup>40</sup> Hugo Cornwall, 'Hacking away at computer law reform' (1988) 138 NLJ 702, 307

<sup>41</sup> Law Commission (n 38) para 2.13

application of the CDA to computers and other property based offences. This direct move away from computer information being tangible, and considered “property”, clearly removed tortious actions that might have been available when considering DoS attacks, such as trespass or conversion.

This choice of scope for the legislation restricted its application to a purely criminal perspective, ruling out civil or private litigation. Many believe, including this author, that this was ‘a lost opportunity’<sup>42</sup> in developing the computer crime law; there are obvious advantages in allowing a civil route of action against “hacking”. For example, the opportunity of damages as a remedy might increase the will of businesses to bring proceedings; similar to the currently occurring file sharing copyright infringement cases.<sup>43</sup>

This issue is accentuated when one considers the frequent victims of DoS attacks are businesses; with much money being lost, as well as reputation. These companies have little to gain, but a lot to lose, from bringing criminal actions against the attackers and since there is no litigation option offering a greater incentive, prosecution does not occur.

### The Act’s Downfalls and DoS

Focusing upon the CMA’s development, Rowland highlights that ‘the CMA does not appear to have had conspicuous success in deterring or apprehending computer criminals’<sup>44</sup> and notably from 1990 to 2003, there were no prosecutions for a DoS attack.<sup>45</sup> Indeed, Wall comments that generally the ‘high levels of victimization contrast sharply with the remarkably low prosecution figures’<sup>46</sup> of cybercrime in the U.K.

This anomaly has been explained in varying ways by different commentators; Wall questions whether this is ‘a failure of law and of the police, or a problem relating to the nature of integrity offences’ and the APIG reported that ‘[companies]... knew of DoS attacks that were not investigated because “no crime could be framed”’,<sup>47</sup> implying that liability for the failure may well fall upon the law.

The APIG believed the main issue was ‘that when DoS... attacks occur... it is the particular circumstances of each attack that makes it obvious whether the CMA wording applies’.<sup>48</sup> However, considering the wording of the original CMA sections, it would have been difficult to provide a sufficient DoS case.

The first hurdle for the CMA’s application to DoS attacks was the use of the word ‘unauthorised’ in section 3(1) (a):

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<sup>42</sup> MacEwan (n 29) 957

<sup>43</sup> See, *Capitol Records v Thomas* 680 F Supp 2d 1045 (DC Minnesota, 2010) where damages currently stand at US\$54,000 reduced from US\$1.92million.

<sup>44</sup> Rowland, Kohl and Charlesworth (n 32) 118

<sup>45</sup> Until *R v Caffrey* (2003) (Unreported)

<sup>46</sup> Wall (n 7) 53-54

<sup>47</sup> All Party Parliamentary Internet Group (n 8) 10

<sup>48</sup> *ibid*

- ‘(1) A person is guilty of an offence if—  
 (a) he does any act which causes an unauthorised modification of the contents of any computer;...’

*Prima facie*, “unauthorised” seems a straightforward word for interpretation, and in the “real world” it can be seen as such; your presence is either authorised in a particular place or not. However, in the virtual sphere, its application has not been so simple. For example, in *DPP v Lennon* there was use of emails to overload an email server (a basic DoS attack) and the first instance judge found that the defendant’s actions were authorised; the server existed purely to receive emails, and the defendant’s use did not exceed this purpose. On this reasoning the judge stated there was no case to answer. This was a devastating blow to the CMA and worries were highlighted, giving weight to the reform shown below.<sup>49</sup>

On appeal, it was established that the implied consent given can be exceeded and thus the case was remitted to trial, however the court did not see ‘it... necessary to define the limits of the consent which a computer owner impliedly gives’.<sup>50</sup> On trial the defendant pleaded guilty, therefore leaving the question of authorisation and DoS attacks unanswered.

Moreover, the question of authorisation was not raised in the CMA amendments and ‘the CMA still leaves unresolved the scope of the... implied consent given by web servers’.<sup>51</sup> Therefore, despite some brief and broad discussion, we are still without a definitive answer to this crucial question six years later.

The second issue for DoS attack prosecutions, which *is* fatal to a charge under s.3, was the use of the word “modification”. DoS attacks do not “modify” a computer’s material in an unauthorised manner; they merely hinder or stop use of a server. When many people access a website a similar effect can be seen,<sup>52</sup> and people accessing the server is certainly not seen as unauthorised modification; there is an implied consent from a website for the public to access it. Thus, whether authorised or not, it is difficult to see how DoS attacks could be seen as modifying computer material.

### **Reform and remaining issues**

The issues were therefore obvious. Indeed, Worthy and Fanning, amongst other commentators,<sup>53</sup> state:

<sup>49</sup> Tom Espiner, ‘Teenager cleared of email attack charge’ *ZDnet.co.uk* (2<sup>nd</sup> November 2005) <<http://www.zdnet.co.uk/news/security-management/2005/11/02/teenager-cleared-of-email-attack-charge-39235359/>> accessed December 7<sup>th</sup> 2011

<sup>50</sup> *Lennon* (n 9) 4

<sup>51</sup> Brown, Edwards and Marsden (n 16) 678

<sup>52</sup> Jessica Shepherd, ‘Clearing 2011: Ucas website crash leaves anxious A-level students waiting’ *The Guardian* (18<sup>th</sup> August 2011) <<http://www.guardian.co.uk/education/2011/aug/18/ucas-website-crash>> accessed December 15<sup>th</sup> 2011

<sup>53</sup> Kit Burden, Creole Palmer, ‘Cyber Crime – A new breed of criminal?’ (2003) 19 *CLSR* 222, 223

'DoS attacks [expose] two key weaknesses in the construction of this prohibition:

- (i) the disruption is "delivered" through nominally authorised acts by playing on the automated TCP "hand-off"... the backbone of public internet architecture; and
- (ii) data is not always modified.'<sup>54</sup>

The APiG also recognised this in their report<sup>55</sup> and private member bills were drafted by the Earl of Northesk and Derek Wyatt (in 2002 and 2005 respectively) to try to rectify the issues. Both bills failed due to lack of parliamentary time, re-enforcing the argument that the legislature was not interested in these areas. In January 2006, however, Tom Harris's private members bill was put on the legislative agenda<sup>56</sup> two years after the APiG called for reform, an excessively long time considering the rate at which technology develops.

S.36 of the PJA created a new s.3 within the CMA, intended to cover DoS attacks, giving effect to the APiG recommendations and an EU Council Framework Decision requiring member states to criminalise interference with data and systems.<sup>57</sup> Therefore, 16 years after the implementation of the Act, a person is guilty of an offence if they do:

'[A]n unauthorised act in relation to any computer with knowledge that the act is unauthorised and the act is done with the intent to impair the computer's operation, to prevent or hinder access to a program or data, to impair the operation of a program or the reliability of data, or to enable any of these things'.<sup>58</sup>

Additionally, s.3(3) imposes the mens rea of "recklessness", as to whether the above effects materialise. This decision was not part of the APiG report recommendation, or the EU Framework Decision, but was 'a startling amendment... made in... the Committee Stage of the Bill'.<sup>59</sup> In fact, the APiG report provides an opposite recommendation, foreseeing 'some difficulties in framing such an offence when examining notions of intent or... by its "reasonable person" wording, recklessness'.<sup>60</sup>

The new Section is therefore much wider in scope. MacEwan purports that this change of mens rea 'could prove to be a costly example of legislative overkill' and indeed, this author finds it difficult to see the contrary; it does

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<sup>54</sup> John Worthy, Martin Fanning 'Denial-of-Service: Plugging the legal loopholes?' (2007) 23(2) CLSR 194, 195

<sup>55</sup> All Party Parliamentary Internet Group (n 8)

<sup>56</sup> Shakeel Ali, 'Law In Cyberspace: Addressing the inadequacies of Computer Misuse Act (CMA) 1990' (20<sup>th</sup> August 2009)

<[http://cipherstormgroup.com/research/cswp/law\\_in\\_cyberspace\\_%20inadequacies\\_of\\_computer\\_misuse\\_act\\_1990.pdf](http://cipherstormgroup.com/research/cswp/law_in_cyberspace_%20inadequacies_of_computer_misuse_act_1990.pdf)> accessed 31<sup>st</sup> October

<sup>57</sup> Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems [2005] OJ L/69, 67

<sup>58</sup> Rowland, Kohl and Charlesworth (n 32) 126

<sup>59</sup> MacEwan (n 29) 964

<sup>60</sup> All Party Parliamentary Internet Group (n 8) 11

seem ‘anomalous to lessen the mens rea requirements for the new s.3 while neither the new s.1 nor the new offence in s.3A [CMA]... mention... “recklessness”.’<sup>61</sup> Others have commented that ‘the wide and loose drafting of the provisions increases the risk of law-abiding citizens... unwittingly committing an offence’.<sup>62</sup>

Putting the Section and this assessment in context, Worthy and Fanning ask ‘[C]ould a posting on a discussion or gossip site which attracts... unwanted “spikes” in user traffic bring the site operator within this prohibition?’<sup>63</sup> And this author submits it clearly could if the section is applied strictly. Another practical example to consider is the “cyber-protests” that the APiG report was keen not to see criminalised<sup>64</sup> which now fall in the scope of Section 3. Ball sees this as a worrying position arguing that:

‘Future political leaders are often seasoned through protest and activism. This is naturally moving online. The current... rules criminalise dissent in this medium... when the time comes for a new generation to take the reins, we may find all too many behind bars.’<sup>65</sup>

Indeed, DoS attacks have been classed akin to digital “sit-ins” in Germany.<sup>66</sup> However, it is important to differentiate between DDoS and DoS attacks at this point. There is truth in Ball’s statement when considering a DoS attack that is orchestrated through many individual users manually accessing a website via their browsers to cause the server to crash. However, the main weapon of a modern “hactivist” is the DDoS attack, which can create unfathomed amounts of “protesting accesses” to the site from *one* user through the click of a button; clearly undermining any legitimacy in political protest such as “sit-ins”. Thus, this author agrees with Ball’s comment as far as an organised manual DoS attack is concerned, but no further.

It is conceded that, in recognising the seriousness of these attacks, the legislature has increased the Act’s scope to try to ensure greater prosecution rates. Indeed, had recklessness been the requirement in the case of *Lennon*, the decision would likely to have been different. However, this author contends that the inclusion of recklessness is “overkill” and intention would have sufficed in light of all the changes.

This overkill evidences a legislature that has taken an easy option to ensure catching those committing computer crimes. By lowering the mens rea boundary, as opposed to taking the more difficult path of refining the wording of the Act, the legislature has taken the “quick-fix” option.

Looking to the second change in the reform, “modify” has been omitted and “impair” left in place. This is a switch from an objective stance to a subjective

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<sup>61</sup> MacEwan (n 29) 964

<sup>62</sup> Lucy Trevelyan, ‘Computer law reforms tackle hacking, viruses and spam mail’ *LNB News* (6<sup>th</sup> June 2007) 1

<sup>63</sup> Worthy and Fanning (n 54) 196

<sup>64</sup> All Party Parliamentary Internet Group (n 8) 11

<sup>65</sup> Ball (n 20)

<sup>66</sup> OLG Frankfurt, Judgment of 22 May 2006, 1 Ss 319/05

one and is likely to cause issues on interpretation. The Oxford English Dictionary defines modification as ‘a change made’,<sup>67</sup> thus interpretatively it must be objective; either there was, or was not, “a change made”; Fafinski notes that ‘modification of data was relatively straightforward to establish’.<sup>68</sup> In contrast, the word “impairment” is a type of modification that has a range of negative outcomes; this range causes the word to be subjective. Indeed, the Oxford English Dictionary defines “impair” to mean ‘weaken or damage (something, especially a... function)’.<sup>69</sup>

Taking sight as a practical example: if A’s vision is modified, there is a change in that vision, without indication as to the type of change. If, however, A’s vision is impaired, then the vision is modified in a way that has created an unknown negative outcome; A’s vision could have dropped slightly from 20/20 or drastically. The only thing we can be objectively certain about is that there has been a change causing negative effect; one reasonable man’s slight impairment could be another reasonable man’s blindness.

With this switch from objective to subjective in mind, Fafinski emphasizes that impairment is also an undefined concept in Anglo Welsh law and

‘to complicate matters further, [the] impairment need only be temporary... the threshold at which a transient decline in system performance crosses the boundary into “temporary impairment” is likely to trouble the courts.’<sup>70</sup>

Thus, the subjective sword is now double-sided, not only is there room for issues in interpreting “impairment”, but also “temporary”.

Whilst accepting the necessity of casting a wide net to try to catch those committing DoS attacks, this may lead to more grief than clarity. Certainly, since the new Section has come into force, it is yet to be interpreted; another reminder that the change has not ‘[provided] the magic bullet and [delivered] the desired results’.<sup>71</sup>

Further, the remaining issue of “authorised access” has been avoided despite that ‘the key problem might in fact lie with the unaltered word “unauthorised”’.<sup>72</sup> A defendant can argue that their use of normal Internet protocols, for example SYN Floods, is authorised use.<sup>73</sup> This could be argued on similar reasoning to that in the first instance court of *DPP v Lennon*; web

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<sup>67</sup> Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11<sup>th</sup> edn, (revised) OUP 2006) 918

<sup>68</sup> Stefan Fafinski, ‘Computer Misuse: the Implications of the Police and Justice Act 2006’ (2008) 72 JCL 53, 58

<sup>69</sup> Soanes and Stevenson (n 67) 713

<sup>70</sup> Fafinski (n 68) 58

<sup>71</sup> Joseph Savirimuthu, ‘The Computer Misuse Act 1990 and Denial of Service Attacks: The Risk Society, Reflexivity and the Tragedy of the Security Commons’ *Liverpool Law School, University of Liverpool*, 3 <<http://web.si.umich.edu/tprc/papers/2007/750/TPRCv1.pdf>> accessed December 15<sup>th</sup> 2011

<sup>72</sup> Lilian Edwards, ‘Wikileaks, DDOS and UK criminal law: the key issues’ (22<sup>nd</sup> December 2010) <<http://ipandit.practicallaw.com/1-504-3391>> accessed 20<sup>th</sup> December 2011

<sup>73</sup> Worthy and Fanning (n 54) 196

servers are designed and intended to participate in the TCP three-way-handshake and thus any use of this process is authorised.

Although its success is a moot point, it does have weight to it, especially considering the open-ended precedent from *Lennon* on authorisation. However, 22 years on from the CMA's implementation and notwithstanding that in 2007 10,000 DDoS attacks were found to be taking place per day,<sup>74</sup> this issue is still not resolved.

The Government is however starting to make changes in the cybercrime sphere. The U.K. Cyber Security Strategy<sup>75</sup> gives an overview of the current Government's wishes for the U.K.'s development. Its aim is to implement all changes by 2015, with the overall vision:

'For the U.K... to derive huge economic and social value from a vibrant, resilient and secure cyberspace, where our actions, guided by our core values of liberty, fairness, transparency and the rule of law, enhance prosperity, national security and a strong society.'<sup>76</sup>

This is to be achieved via four main objectives, three of which relate directly to cybercrime.<sup>77</sup> Moreover, the Science and Technology Committee<sup>78</sup> highlighted that '[k]nowledge is the best defence against fear and... government-provided information [should focus] on how to be safe online rather than [warn] about the dangers of cyber crime.'<sup>79</sup> Which is the route now being taken. The Government is finally tackling this elephant in the room and considering options outside legislation. However, the U.K.'s current legal provisions are not satisfactorily controlling computer user's behaviour and there is a need for a change.

### **The U.S. Position**

This chapter will look to the U.S.'s position on DoS attacks, following their greater success in regulating this behaviour, with "Computer Fraud and Abuse Act" focusing upon the relevant legislation; "Recurring Issues" highlighting mutual problems, considering how these have been dealt with; and "Public v. Private" taking account of the civil route of action available.

#### Computer Fraud and Abuse Act

The U.S. was awake to these issues much earlier than the U.K. and in a way that the U.K. still is not. For example, in January 2001 a 16 year old, known as Mafiaboy, pleaded guilty to 56 counts relating to 'a DDOS attack [upon]

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<sup>74</sup> Brown, Edwards and Marsden (n 16)

<sup>75</sup> Cabinet Office, 'The UK Cyber Security Strategy Protecting and promoting the UK in a digital world' (25<sup>th</sup> November 2011) <<http://www.cabinetoffice.gov.uk/sites/default/files/resources/uk-cyber-security-strategy-final.pdf>> accessed 4<sup>th</sup> December 2011

<sup>76</sup> *ibid* 8

<sup>77</sup> Cabinet Office (n 75)

<sup>78</sup> Science and Technology Committee, *Malware and Cybercrime* (HC 2010-12, 1537-I)

<sup>79</sup> Science and Technology Committee (n 78) 26

CNN.com, Amazon.com, eBay, Dell Computer and others between February 8 and 14, 2000.’ Scott Dennis was also charged that month ‘with launching three DDoS attacks against the U.S. District Court for the Eastern District of New York’.

Both defendants were prosecuted under the Computer Fraud and Abuse Act (18 U.S.C § 1030); the main federal legislation criminalising DoS attacks. The Act focuses on computer crimes that ‘use or target computer networks’ and was created by Congress wishing ‘not [to]... add new provisions regarding computers to existing criminal laws, but rather... address federal computer-related offenses in a single... statute’. The Act has been amended eight times (1988, 1989, 1990, 1994, 1996, 2002, and 2008) since its implementation in 1986, evidencing a legislature awake to technological change.

DoS attacks are criminalised in 1030 (a)(5), which provides:

‘Whoever—

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss . . .

shall be punished as provided in subsection (c) of this section.’

1030 (a)(5) essentially criminalises behaviour that causes computer systems to operate in ways not intended by the owner. Implemented in the 1996 amendment this section criminalised DoS attacks in the U.S. ten years before the U.K. Anyone convicted can be imprisoned for one to ten years depending on the offence, its circumstances and outcome; if damage is equal to \$5,000 or more, then a ten year sentence is available. Interestingly, this ten year limit mirrors the U.K.’s sentencing guidelines since the PJA 2006 and, as will be seen below, much of the CMA does now reflect a lot of the CFAA’s framework. However, despite these similarities, there is variation and the U.S. has generally dealt with cybercrime more efficiently.

Section 1030 (a)(5) is broad in scope, acting as an overarching way to prosecute those who participate in cybercrime aimed at networks and has therefore survived the Internet. All subsections are arguably applicable to DoS attacks and (5)(B), like s.3(3) CMA, uses recklessness as the mens rea for damage.

Subsection (5)(A) requires proof of the knowing transmission of data, a command, or software to intentionally damage a computer without authorisation. This drafting shows a clear intention to cover attacks such as DoS; the recurring problem word “access” is omitted, an approach now mirrored in s.3 CMA.

### Recurring Issues

A feature seen in both sets of legislation is the use of the word “authorisation”. Although, in contrast to the U.K., there is consensus in the U.S. as to what this means; “exceeding authorized access” is defined within the act and case law has developed the definition for the more relevant of the two, “without authorization”.

It was established in *United States v Morris* that an intended-use conceptualisation of “authorisation” should be adopted. The court highlighted that ‘[the] conduct here [fell]... within... unauthorized access. Morris did not use either... features in any way related to their intended function’. However, obiter in *EF Cultural Travel BV v Explorica Inc* questioned this, asking if a “default rule” [is] that conduct is without authorization only if it is not “in line with the reasonable expectations” of the website owner and its users.’ Whether merit can be seen in this assessment, *United States v Phillips* established the position where Chief Judge Edith H. Jones summarised the law stating that:

‘Courts have... typically analyzed the scope of a user’s authorization to access a protected computer on the basis of the expected norms of intended use or the nature of the relationship... between the computer owner and the user.’

Thus the U.S. takes a commonsensical approach, which would deny the argument found in *DPP v Lennon*; there would be no “expected norm” for email bombardment. This approach is likely to be adopted by the U.K. if the question came before the courts. However, this position has developed through case law and it can only be suggested what stance might be implemented. Indeed, the U.K. continually avoids the question of authorisation and computers. This author suggests that this conceptualisation should be adopted to ensure that DoS attacks are covered; that the law reflects what would be seen as a majority norm and not a technical loophole.

To make out the offence there is also a requirement of damage; defined as ‘any impairment to the integrity or availability of data, a program, a system, or information.’ When considering DoS attacks, the use of the subjective word “impairment” is here qualified by the objective “availability”, removing any doubt in interpretation; the word “availability” is here objective due to the context of computing.

In comparison, the CMA uses the words “operation” and “reliability” when discussing impairment, resulting in a totally different scope. If there is impairment that affects availability (U.S.) there has been a negative change bringing about a denial of access, the amount of “impairment” is no longer important, nor variable. However, if a person intends to impair the operation of a computer (U.K.) there are two subjective elements to consider; the amount of negative change that reaches impairment and the computers measured operation. A computer can operate on many different levels, it may be fast or slow but it is still operating, the issue is actually one of performance. A computer is impaired, rendering it available, or not; a binary position. A

computer's operation being impaired, however, has to be measured on a varying scale.

### Public v. Private

Contrasting the U.K. statute, s.1030(g) allows civil litigation:

'Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action... to obtain compensatory damages.... Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages.'

Subsection (c)(4)(A)(i)(I) says that 'loss to 1 or more persons during any 1-year period... aggregating at least \$5,000 in value' is necessary. This \$5,000 limit is an easy boundary to pass considering the DoS attacks that occur today. For example, Mafiaboy, in four days over 12 years ago, 'allegedly caused more than US \$1.5 billion in damage... with [his] various DDOS attacks'.

Therefore, there are two routes of action for DoS attack victims, the public and the private. As already highlighted, from a business perspective, there is little benefit in publicly divulging that you have been attacked, Lind, Shepherd and Wiener-Levitt note that 'corporations do not report these crimes for fear of inviting copycat intrusions'. What will be more attractive to a company is bringing an action to obtain damages.

This understanding is strengthened when considering DoS attack cases in the U.S., such as *United States v Arabo*, *United States v Ancheta* and *United States v Borghard*, where private damages of \$504,495, \$75,000 and \$118,030, respectively, were granted. This civil route option is clearly one reason, among many, that prosecution rates in the U.S. for DoS attacks are higher than the U.K.

In 2000, James Dempsey highlighted that:

'Congress must recognize... the problem of Internet security is not one primarily within the control of the federal government.... [I]t is not a problem to be solved through the criminal justice system. Internet security is primarily a matter for the private sector'.

This call for recognition of differing regulation also shows a need for civil litigation to engage the private sector and Michael Vatis, Director of the National Infrastructure Protection Center FBI, also comments that '[M]ost of the victims of cyber crimes are private companies... successful investigation and prosecution of cyber crimes depends on private victims reporting incidents'.

In addition to the above, the U.S. has implemented far reaching parts of this legislation to ensure that cross-jurisdictional issues do not occur. Section 1030(e)(2)(b) defines the term 'protected computer' as a '[a computer] which is used in or affecting interstate or foreign commerce or communication....' This controversial legislative drafting extends the prosecuting arm to DoS attacks worldwide. Legal provisions such as these are a recurring issue in Internet regulation that, although invasive to a state's sovereignty, may be

necessary and legitimate. However, progression here should be taken carefully and bi-lateral agreements may be more appropriate, as opposed to single jurisdictions setting blanket standards (whether minimum or maximum).

### Summary

Thus, despite similarities, the U.S. has a more effective legal stance on DoS attacks in comparison to the U.K. They were awake to the potential dangers much earlier, and have been more open to enact amendments, ensuring that the legislation matches the current technology. The early wide drafting of the statute, and the subsequent amendments, have allowed the statute to evolve alongside a large volume of case law to ensure the Act can be utilised. Moreover, the U.S.'s awareness that the private sector is integral to the effectiveness of reducing these attacks, and the subsequent availability of a civil route to receive damages, has strengthened their position.

This paints an idyllic picture for the U.S., but issues still exist. For one example 'the Computer Fraud and Abuse Act... arguably does not reach a computer hacker who causes a large amount of damage... if no individual computer sustains over \$5,000 worth of damage.' And, as highlighted above, criminal sanctions might not be the most effective way to regulate cybercrime; there are recurring issues in both jurisdictions that relate to policing and prosecution such as resources, evidence and identifying perpetrators. Therefore, it must be asked if there is a regulatory model more appropriate to combat DoS attacks than command and control.

## **Regulation, Regulation, Regulation**

### Is-ism

The original Internet has characteristics that provide feelings of 'invincibility [for] cybercriminals'<sup>80</sup> and it may be concluded that it is unregulable. Certainly, there are issues of resources, evidence or simply the U.K.'s policing structure.<sup>81</sup> However, the recurring thorn in the legislative side, when contemplating DoS attacks, is regulability. It is crucial to understand that this position is not fixed; the Internet we know today is not what it was 20 years ago. Lessig comments upon this fallacy of "is-ism" – the mistake of confusing how something is with how it must be' stating 'there is... a way that cyberspace *is*. But how cyberspace *is* is not how cyberspace has to be', noting that 'this particular is-ism... is wrong'.<sup>82</sup>

Before looking to the potential regulation of the Internet, thought must be given to what "regulation" in cyberspace means. Lessig discusses three factors that must be known to regulate well: '(1) Who someone is, (2) where they are,

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<sup>80</sup> Jewkes (n 33)

<sup>81</sup> See, David Wall, *Cybercrime* (Polity Press 2007) Chapter 8

<sup>82</sup> Lawrence Lessig, *Code Version 2.0* (2<sup>nd</sup> edn, Basic Books 2006) 32

and (3) what they're doing' recognising that the original architecture of the Internet 'rendered life in this space less regulable'.<sup>83</sup>

Imagining an Internet where these three factors exist, one must then ask *how* to regulate. Lessig sees a model of 'four constraints [that] regulate[:)]... the law, social norms, the market and architecture'.<sup>84</sup> He sees each constraint as a "regulator" and states that 'we can think of each as a distinct modality of regulation'.<sup>85</sup>

The importance of this model is seen when one understands that these modalities already exist within the Internet and that the most crucial in cyberspace is "architecture", otherwise known as "code". This recognition is "digital realism"; that law, norms and the market can regulate, but their potency diminishes whilst architecture's grows.

Architecture, or code, is power. Law and norms revolve around a natural subjective element; regulatees have a choice. In the "real world" our architecture is nature; nature states that whatever goes up must come down, thus we are restrained by gravity. However, on the Internet, code governs nature; 'code is law'.<sup>86</sup> Code removes the capacity of choice, making it the strongest modality; the only way to act is through compliance.

This paper is not the place to discuss how code may affect people and their liberties if implemented.<sup>87</sup> However, what is important, is the concept's undeniably positive scope and its efficiency as a modality of regulation for the Internet and DoS attacks.

The main complexity is that governments do not often see regulation past law, as seen above with DoS attacks. Lessig asserts that 'law-talk typically ignores these other regulators and how law can affect their regulation'<sup>88</sup> with Brownsword commenting that, '[T]raditional command and control interventions... are not always an effective or efficient form of response'.<sup>89</sup> Thus, the answer may lie in recognition that law can still have a regulatory effect, but *indirectly*.

### Who did what, where?

Knowing that behaviour on the Internet is capable of being regulated it must then be asked how this can occur when the necessary corollary, 'who did what, where?'<sup>90</sup> is unanswerable. Indeed this question is a likely element affecting recognition of the "code" solution. However, it *can* be answered.

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<sup>83</sup> *ibid* 23

<sup>84</sup> Lessig (n 107) 123

<sup>85</sup> *ibid* 124

<sup>86</sup> *ibid* 5

<sup>87</sup> See, Lawrence Lessig *Code Version 2.0* (n 107) parts three and four.

<sup>88</sup> Lessig (n 107) 126

<sup>89</sup> Roger Brownsword, 'Code, control, and choice: why East is East and West is West' (2005)

25 *Legal Studies* 1, 1

<sup>90</sup> Lessig (n 107) 39

The Internet was built on the minimalistic end-to-end design principle named by Jerome Saltzer, David Clark and David Reed,<sup>91</sup> purely allowing connection over TCP/IP protocol. Therefore, where ‘authentication... is necessary, that functionality should be performed by an application connected to the network’,<sup>92</sup> and this has been the Internet’s evolution.

As the Internet has grown, so has the lack of anonymity; IP addresses allow reverse DNS lookups, Internet Service Providers (ISPs) can single out specific users and the development of cookies, pushed by the market, allows websites to authenticate. Thus, code, governed by commerce, is resolving the “who” issue.

Moreover, “deep packet inspection” systems are becoming common place; code monitors and regulates packet information as it passes across networks. Again, the parties involved are commercial and the market is pushing development. These systems clearly go to the root of the “what” issue.

Finally, the “where” issue was not something the Internet originally considered. However, IP mapping technology is now a useful commercial tool; as seen in the *Licra v Yahoo!*<sup>93</sup> litigation.

“Who did what, where?” is therefore answerable and the modalities are applicable out of the abstract. Government must recognise the technological opportunities before it is too late; as Wall comments, ‘the more criminal behaviour becomes mediated by technology... the more effectively it can be governed by the same technologies’.<sup>94</sup> The standard “command and control” regulatory model has lost its effect online alongside the growth of the Internet. Even in the U.S., where prosecution is more frequent and the legislature is adapting to technological change, the situation is not satisfactory. Moreover, it should be the Government instilling social values into the architecture of this global network, not commerce.

### The Modalities and DoS attacks

In applying the modalities of regulation to DoS attacks, it is clear that our Government is embracing the first, which is law, in a direct capacity through its criminalisation of the attacks via the CMA. However, there is still scope for the “authorised act” argument noted above and this issue must be clarified to ensure an unambiguous position on the matter.

Although law’s application directly is limited within the Internet, it is important to realise that law is not dead and that it can still regulate through exercising its weight over the other modalities; through indirect regulation. In contrast to Lessig, this author is of the belief that our Government is in a

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<sup>91</sup> Jerome H. Saltzer, David P. Reed, and David D. Clark, ‘End-to-end Arguments in System Design’ (1984) 2 ACM Transactions on Computer Systems 1, 9

<sup>92</sup> Lessig (n 107) 44

<sup>93</sup> *League Against Racism and Anti-Semitism (LICRA) and The Union of French Jewish Students (UEJF) v Yahoo Inc and Yahoo France* (2000), Interim Court Order, 20 November, the County Court of Paris, No. RG: 00/05308

<sup>94</sup> Wall (n 7) 158

position to take a leading role in shaping the evolving architecture of the Internet; that it must take the opportunity to embrace code and materialise legal control over all modalities.

As a by-product of criminalisation, our Government is also beginning to shape the second modality, norms; by attaching negative stigma to the attacks. However, this author contends the Government can go further here through the medium of education. If society was educated in simple cyber security, many attacks could be minimised; '80% of protection against-cyber attack is routine IT hygiene'.<sup>95</sup> Through education, the "darker sides" of hacking, such as DoS attacks, could be condemned and hacking as an academic endeavour could be promoted. Current Government has recognised this, noting in the U.K. Cyber Security Strategy<sup>96</sup> that:

'[I]t is clear that our approach to the risks in cyberspace must not rely on technical measures alone. Changes in attitudes and behaviours will also be crucial to operating safely in cyberspace.'<sup>97</sup> And 'We will... [l]ook at the best ways to improve cyber security education... so... people are better equipped to use cyberspace safely.'<sup>98</sup>

When considering the final two modalities of market and code, however, it is apparent that our Government is yet to embrace them properly. The above developments of the Internet have been via commercial pressures and the network is being shaped by commerce's values. Legal regulators must now recognise that they can, and must, control these commercial pressures and therefore "code"; Geist comments that 'governments may have been willing to step aside during the commercial Internet's nascent years, but no longer.'<sup>99</sup>

Government could use law to regulate the market, thus regulating code and therefore DoS attacks, through a number of different strategies. For example, many attacks are able to take place using security holes in software and, therefore, if more liability was imposed upon software developers, or even a development of minimum standards for software was imposed, then these downfalls could be avoided. Developers would take more responsibility when creating software, standing accountable for the software's downfalls and would arguably feel more inclined to update software when exploitable holes appear.

More consideration could also be given to ISP liability, ensuring that those intermediaries indirectly facilitating DoS attacks take precautions to reduce their prevalence. Focus could be given to preventing DoS attacks as and when they occur on networks, taking a reactive standpoint. Consideration should also be given to a more proactive approach that regulates the dissemination of computer articles being used for negative purposes; such as the infamous DoS

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<sup>95</sup> Science and Technology Committee (n 78) 19

<sup>96</sup> Cabinet Office (n 75)

<sup>97</sup> *ibid* 21

<sup>98</sup> *ibid* 30

<sup>99</sup> Michael Geist, 'Cyber law 2.0' (2003) 44 *Boston College Law Review* 323, 332 as cited in Lawrence Lessig, *Code Version 2.0* (2<sup>nd</sup> edn, Basic Books 2006) 62

tool, Low Orbit Ion Cannon (LOIC), which can be obtained with a simple Google search.<sup>100</sup> Further to this, there could be obligations imposed to regulate sites that promote and teach the use of tools such as this; if one “Googles” “how to use loic” you will receive 448,000 results in less than 0.40 seconds.<sup>101</sup>

Indulging this market regulation to the extreme, it could be favourable to ensure development of a new level of architecture, within the Internet, that uses code to regulate via identification procedures, thus controlling access to the network. Lessig highlights that Microsoft are currently leading a project that creates a virtual wallet of credentials to be used as an application on top of the current Internet.<sup>102</sup>

Further to the above suggestions, weight can be seen in simply allowing private litigation to occur within the U.K. akin to the U.S. An important part of the U.K. Cyber Strategy is to start a process that brings together the public and private sectors, unifying their approaches to online attacks. This recognition is pleasing to see and as Clemente notes, ‘public-private partnerships are essential’ for progression.<sup>103</sup>

Therefore, the current legal provisions, based command and control regulation, do not work on the Internet. Regulators should embrace other models and begin to exercise control over the remaining regulatory modalities to ensure DoS attacks can be controlled effectively. Law’s direct regulation is dead, long live law’s indirect regulation.

## Conclusion

This paper has endeavoured to give a comprehensive overview of the current regulatory models governing DoS attacks in the U.K. and U.S. It has taken into consideration the statutory frameworks that criminalise the attacks and commented upon the effectiveness of this legislation. From this analysis, it is clear the major difficulty is the regulatory model used. Lessig’s argument that ‘code is law’<sup>104</sup> was therefore explored, in search of a more satisfactory regulatory style.

In the U.K., it was apparent that technology was outpacing the legislature and that they did not recognise the real damage that could occur; evidenced in the ‘procrustean attempt’<sup>105</sup> used to force cyber offences into “real world” legislation. This downfall, highlighted by the judiciary, led to the development of the Computer Misuse Act 1990, designed to criminalise computer offences. Unfortunately, this legislation’s foundation was built upon the concept of protecting computer integrity and not on a property basis, thus any “civil

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<sup>100</sup>Source Forge < <http://sourceforge.net/projects/loic/>> accessed 16<sup>th</sup> December 2011

<sup>101</sup> Google.co.uk <<http://www.google.co.uk>> accessed 28<sup>th</sup> February 2012

<sup>102</sup> Lessig (n 107) 51

<sup>103</sup> Dave Clemente, ‘UK cybersecurity plan a “promising step” but with risks’ (25<sup>th</sup> November 2011) <<http://www.bbc.co.uk/news/technology-15893773>> accessed 9<sup>th</sup> January 2012

<sup>104</sup> Lessig (n 107) 5

<sup>105</sup> *Gold and Schifreen* (n 37)

litigation route” was negated. Moreover, its implementation fell alongside the birth of the Internet, which had devastating effects.

The Act remained unchanged despite the constant increase in cyber attacks, such as DoS. Finally, amendments came through the Police and Justice Act in 2006. These amendments increased the CMA’s scope dramatically, ensuring DoS attacks were undeniably criminalised. However, this was also overkill from a Government acting in haste. Many issues were left untouched; such as the fundamental question of authorisation. These amendments, therefore, had little to no effect on DoS attack regulation.

The position of the U.S. was different; preferable, but not ideal. There was evidence of a regulator aware of technological change much earlier than the U.K., having specific computer offence legislation from 1986. This was reinforced following the legislation’s numerous amendments taking account of technological development; for instance criminalising DoS attacks in 1996. The legislature also saw merit in allowing private actions, alleviating the problem that companies often see no benefit in criminally prosecuting attackers. The wide wording of the legislation from an early point, coupled with the U.S.’s litigious nature and this civil route, allowed case law to mature, and thus U.S. law has clarity somewhat beyond the U.K.

Issues found in both jurisdictions, such as policing and resources, illustrated that the outdated regulatory models were not able to cope in the modern cyberspace environment. Therefore, despite the U.S.’s favourable position, there were still areas that needed to be addressed.

Lessig’s argument that “code is law”, was therefore considered, noting its apparent flaws and evidencing that they no longer apply, realising its potency in relation to DoS attacks. Legal regulators were called to take this argument into consideration, seizing control of the Internet’s development from non-elected areas such as commerce. Indication was also given towards options that would provide the legislature with this necessary power.

Motivation is an outstanding issue within the code argument; why should Government act? Lessig brings attention to “Z-theory”, attributable to Professor Jonathon Zittrain, which notes that we have been far too pre-occupied with the ‘good stuff produced’<sup>106</sup> by the Internet, and have subsequently turned a blind eye to any negative effects. Z-theory states that the balance will tip and something unprecedentedly negative will happen, forcing Government into action. This author believes that moment is now.

As seen in this paper’s introduction, extreme “hacktivism” is rapidly increasing and cybercrime is being carried out under its banner. Cybercrime is becoming organised and tools capable of causing incredible damage are distributed freely and even rented out.<sup>107</sup> Moreover, countries are now recognising the power of cyberwarfare. Change is needed.

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<sup>106</sup> Lessig (n 107) 74

<sup>107</sup> Jack Schofield, ‘Did BBC botnet break the law?’ (12<sup>th</sup> March 2009)

<<http://www.guardian.co.uk/technology/blog/2009/mar/12/bbc-botnet-legality-questioned>> accessed 10<sup>th</sup> January 2012

If this continued and potentially devastating threat is not enough to tip the balance, then one must ask what will be? How much further will cybercriminals have to push the digital bits before they stir our legal regulators into action? It now falls upon the Government to gather its regulatory tools and begin combating the unfathomable arsenal held within the Internet in ways discussed above. It is time for the remark, 'Arrest us. We dare you. We are the unstoppable hacking generation...'<sup>108</sup> to become a relic of the past.

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<sup>108</sup> Lulzsec (19<sup>th</sup> July 2011) <<https://twitter.com/#!/LulzSec/status/93093868379193344>> accessed 1<sup>st</sup> November 2011

## Judicial Co-operation and Human Rights in Europe after the Treaty of Lisbon: A Twist in the Tale of Two Courts?

*Louise Campbell*

The comity developed between the Court of Justice of the European Union and the European Court of Human Rights over the past 40 years has long been discussed by academics. As the Court of Justice developed its own human rights case law with respect to both the European Convention on Human Rights and Fundamental Freedoms and the European Court of Human Rights decisions, the contradictory relationship the Union institutions held with human rights became increasingly apparent. This raised the parallel argument regarding European Union accession to the European Convention on Human Rights. These debates are considered at length, for it is believed that even the earliest elements and arguments put forward may have a bearing on how relations between the two courts will proceed in the light of the requirement for the European Union to formally accede to the European Convention on Human Rights under Article 6(2) TEU. Both debates have been inflamed by the decision to accede, for on the basis of the draft accession agreement, released for guidance from the Committee of Ministers, significant gaps are identified and the agreement is silent on many key concerns. To name a few, there is no mention on the future the “Bosphorus presumption”, by which the European Court of Human Rights privileges the European Union by assuming an equivalent level of protection to that under the Convention.

Additionally, there is no provision for prior Court of Justice involvement despite this being clearly desired by negotiators, court judges and academics alike. In the light of the latter consideration, some rumination on whether prior Court of Justice involvement is necessary and, if it is, how to effect this are examined. The current proposals, such as an Article 267 TFEU-esque reference procedure mechanism, are argued to be significantly flawed. However, many of these flaws hinge on the fact that decision making in both Courts is extensively time-consuming. Further to this, under the decision in *Kadi v Council and Commission*, the mechanism decided upon must not confer new powers on any institution in what may be conceived to be a concealed amendment to the Treaties. Some conclusions on the general effects of accession are explored, such as the possibility of the decisions of the Court of Human Rights becoming binding on the Court of Justice and whether the Court of Human Rights is to be granted too much power. Ultimately, in the

light of the tentative relationship between the two Courts the possibility of a renewed supremacy battle, if the relationship is not clarified in the final accession agreement, could delay the achievement of coherent human rights protection in Europe.

## Introduction

'Human rights protection and promotion have come to represent an important part of the European Union's identity today.'<sup>1</sup>

**T**his observation, undoubtedly correct, was realised largely through the work of the Court of Justice of the European Union (CJEU). The Supreme Court of the European Union's (EU) legal order began developing its own human rights jurisdiction 19 years after the creation of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR or the Convention). As will be explored, 'the problem of relations between the ECHR and European integration is almost as old as integration itself.'<sup>2</sup> The most prominent of these is that which developed between the CJEU and the European Court of Human Rights (ECtHR) for 'the story of human rights in the EU is largely the story of interaction between the Luxembourg and Strasbourg Courts.'<sup>3</sup> The growth of this relationship will be examined in relation to the acknowledgement of each other's case-law and the "dialogue" which has developed on a jurisprudential and a personal level between the Judges and Presidents of the two Courts.

Parallel to the development of human rights as fundamental principle of EU law ran the accession debate. Should the EU accede to the Convention? There were many public debates and publications, each evoking different observations on the current and future relationship between the two Courts should the EU be able to accede. Many key proposals were put forward by the European Commission (the Commission), suggesting the importance they placed on human rights in the early stages of the European Union. However, development of these proposals was arguably restricted until the common market was 'largely achieved'.<sup>4</sup> Many key themes, documents and observations of the accession debate will be discussed alongside the benefits and flaws of such proposals, perhaps explaining why movement in this area has been so slow, despite support from the EU institutions.

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<sup>1</sup> Gráinne de Búrca: 'The Evolution of EU Human Rights Law' in Paul Craig and Gráinne de Búrca (eds): *The Evolution of EU Law* (Second Edition, Oxford University Press, New York, 2011), 495.

<sup>2</sup> Jean Paul Jacqué: *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms* (2011) 48 *Common Market Law Review* 995, 995.

<sup>3</sup> Sionaidh Douglas-Scott: *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis* (2006) 43 *Common Market Law Review* 629, 630.

<sup>4</sup> *Ibid*, 661.

With the ratification of the Treaty of Lisbon<sup>5</sup> in 2009, the EU finally had competence to accede to the ECHR, which had previously been denied by the CJEU's damning judgment in *Opinion 2/94 Re: the Accession of the Community to the European Human Rights Convention*.<sup>6</sup> However, accession, now imperative under Article 6(2) TEU<sup>7</sup>, threw up a new set of challenges and will change the dynamic of the relationship between the two Courts irreversibly. Under the current draft accession agreement,<sup>8</sup> which has been released to the Committee of Ministers for observation and guidance, it appears that there are two possible avenues for development: a new battle for supremacy could occur if the gaps that have been identified in the agreement remain, or; a new era of greater coherence, understanding and protection of human rights could unfold. The more idealistic commentators consider the latter to be achieved smoothly – this will be argued not to be the case.

Alongside battling with the general effects of accession, the two Courts need to work out how the Charter of Fundamental Rights of the European Union<sup>9</sup> (the Charter), which also became binding under Article 6(1) TEU<sup>10</sup> will alter the rapport between them. Due to space constraints this will not be explored further than to say that this strengthens the possibility of binding ECtHR judgments over the CJEU. Weiss propounds that the Charter is now of the 'same legal value as the Treaties', thus has the status of primary law within the Union. However, he further posits that the status of the Convention will hover just above secondary law but below that of primary law due to Article 216(2) TFEU.<sup>11</sup> Many of the rights found within the Charter directly correlate to those in the Convention which Weiss refers to as 'incorporated rights'. Interestingly this poses the question of whether by virtue of the incorporated Convention rights, the CJEU will be bound by the decisions of the ECtHR on those provisions. It is argued that following the precedent of the Strasbourg Court would be logical in these circumstances to avoid divergent interpretations. Even if this is found not to be so, the status of these incorporated rights 'unavoidably has a bearing on the treatment of the relevant case-law of the ECtHR.'<sup>12</sup> In agreement with Douglas-Scott, the binding status of the Charter 'provides a reason for the [CJEU], when applying the Charter, to maintain contact with the Strasbourg Court and its jurisprudence.'<sup>13</sup>

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<sup>5</sup> Consolidated Version Treaty on the European Union and the Treaty on the Functioning of the European Union [2010] Official Journal C 83/1.

<sup>6</sup> [1996] 2 CMLR 265.

<sup>7</sup> Consolidated Version Treaty On European Union [2010] Official Journal 53 C 83/19.

<sup>8</sup> Steering Committee For Human Rights (CDDH): 'Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights' CDDH(2011)009 14.10.2011.

<sup>9</sup> [2010] Official Journal 53 C 83/02.

<sup>10</sup> [2010] Official Journal 53 C 83/19.

<sup>11</sup> Consolidated Version The Treaty On The Functioning Of The European Union [2010] Official Journal 53 C 83/144.

<sup>12</sup> Wolfgang Weiss: *Human Rights and EU antitrust enforcement: news from Lisbon* (2011) 32(4) *European Competition Law* 186, 190.

<sup>13</sup> Sionaidh Douglas-Scott: *The European Union and human rights after the Treaty of Lisbon* (2011) *Human Rights Law Review* 645, 655.

The primary concerns regarding accession are: whether the accession agreement would potentially allow for a review of EU law by the ECtHR for this is purely the prerogative of the CJEU; the future of the “*Bosphorus presumption*”<sup>14</sup>; the preservation of the autonomy of the Union Legal Order and the interpretive autonomy of the CJEU, and; the ‘need’ for the CJEU to have delivered a ruling prior to Strasbourg. A significant gap in the current draft accession agreement is how to ensure prior involvement of the CJEU in cases brought before the ECtHR involving EU law where the CJEU has not had the opportunity to pass judgment. Whether this is necessary, which many submit it is not, and the main proposals on how to achieve this will be explored. Thus exposing that despite the desirability of such a mechanism, finding and implementing one which is not significantly flawed will prove a challenge. These will be examined on the basis of the effect these may have on the relationship between the Luxembourg and Strasbourg Courts should they be instigated.

Overall, the *Tale of Two Courts*,<sup>15</sup> is not yet complete but there is still a fine story to tell as well as some speculations on how the story may end.

### **The current relationship between the two Courts**

Once completely distinct, the rise of human rights in the European Union which is ‘increasingly seeing itself as a human rights organisation’<sup>16</sup> has generated a growing affection between the CJEU and the ECtHR. Their relationship has become increasingly symbiotic as human rights became a fundamental principle of EU law. This relationship has at times been confusing and marred by a desire to avoid ‘appearing too deferential and subservient to a rival transnational ‘constitutional’ court.’<sup>17</sup> Whilst a ‘dialogue’ may have arisen between the two courts, a divergence of opinion on how to interpret certain provisions remains. The Presidents of the two Courts meet regularly to discuss the recent events of the Courts, therefore their perspective will be explored to truly analyse the scope of the Courts’ tempestuous romance. Accession of the EU to the ECHR poses another threat to this relationship for it could alter the dynamic entirely.

#### Human rights as a principle of EU law

The recognition of human rights as a general principle of EU law did not happen at the inception of the Convention in 1950. In fact, human rights protection was expressly rejected in the drafting stages of the Treaty of Rome<sup>18</sup> and this was reflected in the early CJEU judgment’s in *Stork v High Authority*<sup>19</sup> and *Sgarlata v Commission of the European Communities*.<sup>20</sup> In

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<sup>14</sup> (45036/98) *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, [154]-[156].

<sup>15</sup> Douglas-Scott: *A Tale of Two Courts* (n3), 629.

<sup>16</sup> Robin White and Clare Ovey: *Jacobs, White, and Ovey: The European Convention on Human Rights* (Fifth Edition, Oxford University Press, New York. 2010), 581.

<sup>17</sup> Douglas-Scott: *A Tale of Two Courts* (n3), 663.

<sup>18</sup> Treaty establishing the European Economic Community 25 March 1957, 298 U.N.T.S. 3.

<sup>19</sup> (1/58) [1959] ECR 17.

<sup>20</sup> (40/64) [1965] ECR 215.

agreement with Douglas-Scott, arguably this initial rejection of human rights was because the economic aims of the EU and the internal market needed to be achieved first.<sup>21</sup>

Koopmans identifies two approaches that the CJEU used to found EU legal principles: firstly, 'entrenching principles that underlie the basic elements and provisions of the Treaties', and; secondly, transcending to EU law the legal traditions of Member States in common with the EU.<sup>22</sup> In the case of human rights, the CJEU took the second approach as the genesis of human rights as a fundamental principle of EU law arose out of supremacy dispute in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*.<sup>23</sup> The German Constitutional Courts were refusing to apply EU law arguing it was incompatible with their constitutional rights. Many argue as a direct response to this challenge to the CJEU's supremacy, they conceded that 'the observance of fundamental rights belongs to the general legal principles, the upholding of which it is the European Court's duty to ensure'<sup>24</sup> completely departing from their earlier position in *Stork* and *Sgarlata*.

This changed stance was heralded a victory for human rights, and a storm of case-law ensued, amplifying the status of human rights. Especially as the Court recognised that international human rights treaties were another source of fundamental rights in EU law.<sup>25</sup> Most importantly, in *Rutili v Ministre de l'interieur*,<sup>26</sup> the CJEU officially named the Convention as an inspiration for human rights as a fundamental principle of EU. However, this muddied the waters between the Courts as effectively both now had 'authority to ultimately interpret the [Convention]'<sup>27</sup> - a turning point in the once closed relationship between the two Courts. This new era of human rights appreciation was not straightforward as following these cases, the scope of this appreciation was unknown. Former President of the CJEU Lord Mackenzie Stuart said in 1979 (before he became President) that '[the ECtHR's] rôle is to ensure the observance of the Human Rights Convention whereas ... our work is in a very different field.'<sup>28</sup> This suggests that even the most highly respected judges of the Court were grappling with the extent to which informal concession had been given to human rights.

Due to the uncertainty left by *Internationale Handelsgesellschaft* and the recognition of human rights as a fundamental principle of EU law, the CJEU

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<sup>21</sup> Douglas-Scott: *A Tale of Two Courts* (n3), 661.

<sup>22</sup> Thijmen Koopmans: *The Birth of European Law At The CrossRoads Of Legal Traditions* (1991) 39 *The American Journal of Comparative Law* 493, 496-497.

<sup>23</sup> (11/70) [1970] ECR 1125.

<sup>24</sup> *Ibid*, [55].

<sup>25</sup> *J Nold Kohlen- und Baustoffgrosshandlung v Commission of the European Communities* (4/73) [1975] ECR 985; *Hauer v Land Rheinland-Pfalz* (44/79) [1979] ECR 3727; *National Panasonic (UK) Ltd v Commission of the European Communities* (136/79) [1980] ECR 2033.

<sup>26</sup> (36/75) [1975] ECR 1219.

<sup>27</sup> Mark Janis: 'Fashioning a Mechanism for Judicial Cooperation on European Human Rights Law among Europe's Regional Courts' In Rick Lawson and Matthijs de Blois (eds): *The Dynamics of the Protection of Human Rights in Europe; Essays in Honour of Henry G. Schermers* Volume III (Martinus Nijhoff Publishers, The Netherlands. 1994), 217.

<sup>28</sup> John Mackenzie Stuart: *The Alexander Lecture* (1979) *Arbitration* 78, 78.

dealt with an influx of cases to clarify the scope of this. The CJEU rightly resisted the temptation to widen their jurisdiction by not following Advocate General Jacobs' recommendation that any human rights violation should be a matter for Community Law.<sup>29</sup> Such an extension of their jurisdiction would have overwhelmed the Court and made the ECtHR virtually redundant. Cases followed in which the CJEU determined the boundaries of their intervention in human rights matters.<sup>30</sup> These rulings suggest that 'any regulation by Member States of matters falling within the scope of the Community, measures taken by Member States must as a matter of Community Law comply with the Convention.'<sup>31</sup> Does this diminish the competence of the ECtHR in the eyes of potential applicants? Arguably the CJEU may provide 'potential advantages to litigants over actions in Strasbourg.'<sup>32</sup> Recent judicial activism in the CJEU in *Kadi v Council and Commission*<sup>33</sup> extended the jurisdiction of the Court to review measures of the institutions for compatibility with the Convention. Essentially this will be the aim of the ECtHR following the EU's accession to the Convention and it will be interesting to see how this develops in the future.

### Achieving the "dialogue" of the Courts

The incorporation of human rights as a fundamental principle of EU law expanded the jurisdiction of the CJEU, creating jurisdictional overlap with the ECtHR. Whilst some argue that it makes little sense for 'Europe to simultaneously maintain and promote two legal systems each with authority to ultimately interpret the [ECHR]'<sup>34</sup>, the two Courts have aimed to 'nurture constantly the dialectical relations necessary to ensure the harmonious co-existence of our respective case-law'.<sup>35</sup>

The possibility for jurisdictional overlap has long been discussed and criticised by academics and not without reason. In *Cantoni v France*,<sup>36</sup> the ECtHR considered whether France, in their verbatim implementation of an EU Directive, were in breach of Article 7 of the Convention. Whilst not finding a breach, the problem is that the ECtHR must have interpreted the EU Directive, which is outside of their jurisdiction, to assess compatibility with the Convention. This risk of conflict was thus created. This was heightened in

<sup>29</sup> (C-168/91) *Christos Konstantinidis v Stadt Altensteig-Standesamt* [1993] 3 CMLR. 401, 421-422.

<sup>30</sup> (C-299/95) *Kremzow v Austria* [1997] 3 CMLR 1289 established that National law not concerned with Community law implementation could not be considered. (C-5/88) *Wachauf v Germany* [1989] ECR 2609 held that National law implementing Community legislation could be considered and (C-260/89) *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* [1991] ECR I-6351 held that any derogations from Community law could be considered for compatibility with human rights.

<sup>31</sup> White and Ovey: (n16), 582.

<sup>32</sup> Douglas-Scott: *A Tale of Two Courts* (n3), 661.

<sup>33</sup> (C-402/05P) [2008] ECR I-6351.

<sup>34</sup> Janis (n27), 217.

<sup>35</sup> President Vassilios Skouris of the Court of Justice of the European Union: Speaking at: *Dialogue between judges: Fifty Years of the European Court of Human Rights Viewed by Its Fellow International Courts* (European Court of Human Rights, 30/01/2009) <[http://www.echr.coe.int/NR/rdonlyres/B35F6B38-C429-48D2-AB33-77A3C0CD9DA3/0/DIALOGUE\\_2009\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/B35F6B38-C429-48D2-AB33-77A3C0CD9DA3/0/DIALOGUE_2009_EN.pdf)> accessed 6<sup>th</sup> March 2012, 2

<sup>36</sup> (17862/91) [1996] Reports 1996-V ECHR

*Matthews v UK*<sup>37</sup> where the UK was found to be in violation of Protocol 1 of the Convention by the UK despite their actions being determined by EU legislation. A similar review of an EU Directive took place in *Dangeville v France*<sup>38</sup> where national legislation was found incompatible with the Directive it was meant to implement, but not contrary to the Convention. This review clearly infringes on the CJEU's jurisdiction and prerogative.

This underlying tension climaxed in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*<sup>39</sup> which was reviewed by both Courts in a 10 year long saga. Here, the ECtHR stated that 'State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, ... in a manner which can be considered at least equivalent to that for which the Convention provides',<sup>40</sup> thereby privileging the EU's Legal Order. 'As a result, the Court of Human Rights expanded the intersection of its jurisdiction with that of the [CJEU].'<sup>41</sup> They came to this decision after much consideration of the CJEU case-law, including the CJEU ruling in *Bosphorus*.<sup>42</sup> On this point, President Skouris of the CJEU stated that whilst this was 'an honour [and a] sign of confidence ... for our Court, it [was] also a reminder of a responsibility.'<sup>43</sup> This suggests a self-induced plurality between the two systems. It is unknown whether this presumption will remain once accession is affected.

Due to the rise in references to Strasbourg judgments in CJEU decisions, academics have argued that ECtHR jurisprudence has become a 'source of inspiration'<sup>44</sup> for the CJEU. The ECtHR's affection for the CJEU was formally reciprocated in *Elgafaji v Staatssecretaris van Justitie*<sup>45</sup> when it was openly stated that the Court took the case-law of the ECtHR into consideration when interpreting the scope of that right in the Community legal order. This level of respect for each other's case-law is frequently vocalised by the Presidents of the two courts as epitomised by former President Jean-Paul Costa of the ECtHR who stated 'both [the ECtHR] and the Luxembourg Court often ...: inspire itself from a very close judgment delivered beforehand, in the same matter, by [the other Court].'<sup>46</sup>

Despite this sentiment, it would be misleading to assume that the two Court's always agree. Critics suggest that the CJEU's judgment in *Opinion 2/94* on why the EU could not accede to the Convention was based on a selfish desire to remain supreme in the European Legal Order for they expressed no such

<sup>37</sup> (24833/94) (1999) 28 EHRR 361

<sup>38</sup> (36677/97) (2004) 38 EHRR 32

<sup>39</sup> (45036/98) (2006) 42 EHRR 1.

<sup>40</sup> *Ibid*, [155].

<sup>41</sup> Frederic van den Berge: *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?* (2010) 16 European Law Journal 112, 115.

<sup>42</sup> (C-84/95) *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications (Ireland)* [1996] ECR I-3953.

<sup>43</sup> Skouris: *Dialogue between judges* (n35), 10.

<sup>44</sup> Ane Maria Røddik Christensen: *Judicial Accommodation of Human Rights in the European Union* (DJØF Publishing, Copenhagen. 2007), 189.

<sup>45</sup> (C-465/07) [2009] ECR I-921, [28].

<sup>46</sup> Jean-Paul Costa: *The European Court of Human Rights: Consistency of Its Case-Law and Positive Obligations* (2008) 26(3) Netherlands Quarterly of Human Rights 449-454, 451.

objection to the accession of the WTO Dispute Resolution Body.<sup>47</sup> Arguably the statement of the Court in *Opinion 1/91 Re: Draft Treaty on a European Economic Area (No.1)*<sup>48</sup> that if the Community accedes to an international agreement which has its own court system, the decisions of that court 'will be binding on the Community institutions, including the [CJEU]'<sup>49</sup> confirms this theory. To renege on this purely because this is another European court system is highly chauvinistic and hypocritical.

There have been divergences of interpretation between the two courts in the past. Whilst minimal, this is no less disconcerting. According to Toth 'conflicting interpretations are likely to occur because both Courts follow the same "teleological" method.'<sup>50</sup> Both Courts interpret on the basis of objectives, the ECtHR on the Convention objectives and the CJEU on the Union objectives. In joined cases *Hoechst AG v Commission of the European Communities*<sup>51</sup> and *Orkem SA v Commission of the European Communities*,<sup>52</sup> there was no ECtHR case-law to draw upon in the interpretation of Article 8 of the Convention in relation to business premises and the CJEU ruled that this did apply to business premises. The opposite was subsequently decided by the ECtHR in *Niemietz v Germany*.<sup>53</sup> This led to a later modification of the CJEU position in *Roquette Freres SA v Directeur General de la Concurrence*,<sup>54</sup> effectively conceding to the precedent of the ECtHR. However, this differentiation is due to the fact that 'Luxembourg is aware that fundamental rights may not always have the same application in the EU context, at least where companies are asserting them'<sup>55</sup> Furthermore, the 'ECtHR has a much larger and diverse group of member states to take into consideration than the [CJEU]'.<sup>56</sup> The different context in which the two systems operate is aptly summarised by Costa who submits that a key difference in the "mission" between the two Courts is demonstrated by the 'the margin of appreciation' used by the ECtHR which shows that 'the Convention does not command or even aspire to strict uniformity throughout Europe in the protection of human rights' as opposed to the CJEU which 'is the guarantor of the uniformity of the whole system of EU law.'<sup>57</sup>

Nonetheless, cases in the Luxembourg Court have chosen not to follow rulings in Strasbourg. In *Emesa Sugar (Free Zone) NV v Aruba*,<sup>58</sup> concerning the right of parties to respond to the Advocate General's opinion under the

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<sup>47</sup> JHH Weiler and Philip Alston: 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' (1999) Harvard Jean Monnet Working Paper 1/99 <<http://centers.law.nyu.edu/jeanmonnet/papers/99/990101.html>> accessed 6<sup>th</sup> March 2012, 25.

<sup>48</sup> [1991] ECR I-6079.

<sup>49</sup> *Ibid.*, [39].

<sup>50</sup> A.G Toth: *The European Union and Human Rights: The Way Forward* (1997) 34 *Common Market Law Review* 491, 499.

<sup>51</sup> (46/77) [1989] ECR 2859.

<sup>52</sup> (227/88) [1989] ECR 3283.

<sup>53</sup> (A/251-B) [1992] 16 EHRR 97.

<sup>54</sup> (C-94/00) [2002] ECR I-9011.

<sup>55</sup> Douglas-Scott: *A Tale of Two Courts* (n3), 648.

<sup>56</sup> Røddik Christensen: (n44), 182.

<sup>57</sup> Jean-Paul Costa: *On the legitimacy of the European Court of Human Rights' judgments* (2011) *European Constitutional Law Review* 173, 180.

<sup>58</sup> (17/98) *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-675.

Convention right to a fair trial (Article 6), the CJEU refused to permit this despite an ECtHR judgment which suggested the opposite.<sup>59</sup> Despite this, the CJEU reasoned that the role and status of the Advocates General within the Community judicial system should be taken into account, concluding ‘that the relevant case-law of the [ECtHR] is not transposable’<sup>60</sup> to the role of the Advocate General. Critics suggested whilst the decision is not wrong, ‘the manner in which the application was dismissed is not really satisfactorily rigorous.’<sup>61</sup> In agreement with Stanley, this suggest that ‘there is a tension between different values which Article 6 of the Convention embodies’.<sup>62</sup>

Former President of the CJEU, Rodriguez Iglesias is credited with kindling personal and institutional links with the ECtHR. In 2002 he stated there was currently a “lacuna” concerning the relationship between the European Convention of Human Rights and the EU legal order, therefore ‘the two Courts have a special responsibility for organising relations between those two legal orders.’<sup>63</sup> This legacy has largely been achieved. On the basis of various speeches of the Presidents of both Courts, EU accession to the ECHR is clearly the objective dreamed of.<sup>64</sup> As the two Courts have ‘grown up together’,<sup>65</sup> ‘no one would understand why courts with jurisdiction in the area of protection of human rights would adopt – or base their decisions on – divergent legal approaches.’<sup>66</sup> In an earlier speech, Skouris maintained there was no hierarchy between fundamental freedoms as guaranteed by the CJEU and fundamental rights granted by the Convention, citing the *Eugen Schmidberger Internationale Transporte Planzuge v Austria*<sup>67</sup> case as an example of this.<sup>68</sup> Skouris and Costa both appear to consider the integration of human rights into EU law as a necessary ‘endeavour through their respective case-law’.<sup>69</sup>

In essence, the development of human rights as a principle of EU law inherently changed the EU Legal Order irreversibly. Whilst this may be considered a necessary addition to the jurisdiction of CJEU and compensated

<sup>59</sup> (19075/91) *Vermeulen v Belguim* [2001] 32 EHRR 15.

<sup>60</sup> Mielle Bulterman: *European Union Part B: Human Rights News* (2000) 18 Netherlands Quarterly of Human Rights 270, 271.

<sup>61</sup> Paul Stanley: *European Briefing* (2000) 144 Solicitors’ Journal 195, 195.

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

<sup>63</sup> Rodriguez Iglesias: *Discours a l’occasion de l’audience solennelle de la Cour européenne des droits de l’homme*, 31 January 2002, 3.

<sup>64</sup> Jean-Paul Costa: *Allocution d’ouverture de M. Jean-Paul Costa, Président de la Cour européenne des droits de l’homme* Luxembourg, 24 November 2008 <[http://www.echr.coe.int/NR/rdonlyres/A8E497FE-C85E-4B47-BC10-62A852B4DC33/0/125636812008\\_Luxembourg\\_CJCE\\_24\\_Nov.pdf](http://www.echr.coe.int/NR/rdonlyres/A8E497FE-C85E-4B47-BC10-62A852B4DC33/0/125636812008_Luxembourg_CJCE_24_Nov.pdf)> accessed 6<sup>th</sup> March 2012.

<sup>65</sup> Skouris: *Dialogue between judges* (n35), 1.

<sup>66</sup> *Ibid.*, 3.

<sup>67</sup> (C-112/00) [2003] ECR I-5659.

<sup>68</sup> Vassilios Skouris: *Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance* (2006) *European Business Law Review* 224, 237.

<sup>69</sup> Jean-Paul Costa: *Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year* 29 January 2010 <[http://www.echr.coe.int/NR/rdonlyres/02526B5A-039E-47B3-9F94-2393BDDDB6291/0/20100129\\_Speech\\_PresidentCosta\\_OpeningofJudicialYear.pdf](http://www.echr.coe.int/NR/rdonlyres/02526B5A-039E-47B3-9F94-2393BDDDB6291/0/20100129_Speech_PresidentCosta_OpeningofJudicialYear.pdf)> accessed 6<sup>th</sup> March 2012 see also Skouris: *Fundamental Rights* (n68), 238.

for by the “dialogue” between the two Courts, alternative arguments suggest the jurisdiction of the ECtHR has been undermined. How this will evolve following accession will be considered later. For now, the plurality between the two Courts may remain a fervent topic of discussion for academics.

### **The Accession Debate**

In parallel to the growth of human rights recognition within the CJEU, calls for human rights recognition across the EU institutions were brewing. From 1979 they spanned three decades before ratification of the Treaty of Lisbon. The early optimism in the debate was crushed by the CJEU’s judgment in *Opinion 2/94*. Thus “paradoxically”, the EU failed to accede to the ECHR at an earlier stage. The key documents and arguments in the accession debate will be explored as well as the current draft accession agreement.

#### Initial Accession Proposals

Accession of the EU to the ECHR is not an original initiative. It was primarily proposed by the European Commission in 1979 as a Memorandum Bulletin<sup>70</sup> in the midst of the development of CJEU case-law on fundamental rights and freedoms. However, concerns were raised about the relationship between the two courts and this was addressed as a “special problem” within the Bulletin. The main concern was how to ensure ‘that the [CJEU] is able to perform fully the supervisory functions vested in it by the Treaties.’<sup>71</sup> The Commission argued since the ECtHR can ‘hardly be envisaged’<sup>72</sup> to refer questions to the CJEU itself a procedure to enable this was needed. They envisioned a mechanism which obliged the Union to ask the [CJEU] for an opinion in cases concerning the compatibility of a Community act with the ECHR. They would then submit the CJEU’s conclusions and its own opinion to the Strasbourg organs.<sup>73</sup> This would be a complex and time-consuming process which would only weigh down an already overloaded CJEU. In contrast, Brown and McBride have argued that an Advocate General for the CJEU submitting an opinion to the ECtHR would be preferable, considering that the CJEU’s view may well have no effect on the decision.<sup>74</sup> This is an interesting proposal which will be discussed later.

Earlier in the Bulletin, the Commission conceded the Union’s legal system may well ‘be considered an internal legal system. It is therefore only logical that decisions of the [CJEU] should be treated in the framework of the ECHR as decisions of a national court.’<sup>75</sup> It is imagined the CJEU Judges would not

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<sup>70</sup> European Commission, ‘Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms’ COM (79) 210 final, (Bulletin of the European Communities, Supplement 2/79) 2 May 1979.

<sup>71</sup> *Ibid.*, [42].

<sup>72</sup> *Ibid.*

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

<sup>74</sup> L. Neville Brown and Jeremy McBride: *Observations on the Proposed Accession by the European Community to the European Convention on Human Rights* (1981) 29 *The American Journal of Comparative Law* 691, 704.

<sup>75</sup> COM (79) 210: (n70), [24].

take kindly to this interpretation. If the CJEU is to be treated as a national court, why should the opinion of the CJEU be sought in the event that the case has not already been considered by them? Opinions of this kind would not be sought from supreme national courts and this suggests a prioritisation of the EU over other subscribers to the ECHR. Furthermore, in accordance with procedure within the Strasbourg organs, a commissioner and judge would need to be appointed upon behalf of the EU thereby '[underlining] the autonomy of the Community.'<sup>76</sup> Commentators argue that objections regarding over-representation of the Member States are to overlook the independent capacity in which judges are appointed.<sup>77</sup> It is reasoned that '[g]iven the expansion of Community activity the Commission's plea for participation in all cases is not entirely without foundation.'<sup>78</sup> This view is well founded and underscores the autonomy of the CJEU. However, the proposal was not acted upon despite it appearing 'paradoxical'<sup>79</sup> for the Community not to accede to the Convention. Nonetheless, some intriguing concepts which will arise again throughout the debate.

The 'Commission Communication on Community Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols' revived the debate in 1990.<sup>80</sup> The Commission voiced their concern that 'no matter how closely the Luxembourg Court monitors human rights, it is not the same as scrutiny by the Strasbourg Court.'<sup>81</sup> The contradictory relationship the EU Institutions have with human rights was highlighted for 'while proclaiming its commitment to respecting democratic values and human rights, [they are] not subject to this control mechanism ... its institutions enjoy a sort of 'immunity' from the Convention.'<sup>82</sup> The European Parliament backed the idea of Community accession to the Convention in 1994.<sup>83</sup>

#### Opinion 2/94

This led to the European Council requesting an opinion from the CJEU under Article 228(6) EC<sup>84</sup> about the compatibility of accession to the ECHR with the EC Treaty and whether the Community is competent to negotiate and conclude an accession agreement. 'All this optimism [was] dashed by the

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<sup>76</sup> Ibid, [33].

<sup>77</sup> Kim Economides and Joseph H. H. Weiler: *Report of Committees: Accession of the Communities to the European Convention on Human rights: Commission Memorandum* (1979) 42 *Modern Law Review* 683, 692.

<sup>78</sup> Ibid.

<sup>79</sup> Brown and McBride: (n74), 692.

<sup>80</sup> European Commission: 'Commission Communication on Community Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols' 19<sup>th</sup> November 1990 SEC(90) 2087 Final.

<sup>81</sup> Ibid, 2.

<sup>82</sup> Ibid, 1.

<sup>83</sup> Resolution of 18 Jan 1994 on Community accession to the European Convention on Human Rights [1994] *Official Journal C* 44/32.

<sup>84</sup> As it then was. Consolidated Version Treaty establishing the European Community [1997] *Official Journal C* 340/271

[CJEU]<sup>85</sup> who ruled that the Community, at present, did not have the competence to accede to the Convention. Some consider this to be little more than 'a fudge to ensure that the [CJEU]'s position as Supreme Court of the EU was retained'.<sup>86</sup> Despite denying accession to the Convention, some interesting comments and proposals were made about the relationship of the two courts were the Union to accede.

Instead of considering the necessary provisions for Community participation in control bodies, including 'the future single Court of Human Rights',<sup>87</sup> they declared the question inadmissible on the basis 'it lacked information as to how the Community would submit to the judicial control mechanisms established by the Convention.'<sup>88</sup> However, they did muse upon whether this could this be accommodated by a permanent judge elected on behalf of the Community with the same status as the other judges, or should a 'special status' judge be implemented, purely to reside over cases concerning Community law?

Burrows raises a thought-provoking point, questioning whether 'when the [CJEU] applies a principle drawn from the Convention is it doing so in recognition that the Convention binds the Community or it is 'borrowing' a principle and translating it into a rule of the Community?'<sup>89</sup> This is critical going forward for the CJEU's usual practice of referring to ECtHR judgment's may become a binding requirement as expressed later in the Opinion.<sup>90</sup> However, Beaumont argues there is a possibility of the opposite occurring, that with accession 'either the [CJEU] loses its monopoly on inter-state disputes concerning the [Treaties] or the [ECtHR] ceases to have a monopoly on inter-state disputes concerning the ECHR.'<sup>91</sup> Neither is wholly acceptable but the recognition of this as a remote possibility may ease fears in the CJEU. In *Opinion 1/91*, the CJEU agreed to submit to any international court system which was part of an international agreement acceded to by the Union and this would not affect the Community legal order.<sup>92</sup> In certain circumstances, the CJEU will have to act as the final 'domestic' remedy for the applicant to exhaust before turning to the ECtHR. The Council of Europe rightly questioned whether this was the case only where the judgments of that court exclusively concerned international agreements or whether judgments which concern compatibility with Union Law were also covered. The CJEU did not dwell on this, perhaps because it is 'jealous of its jurisdiction',<sup>93</sup> yet given the decision that the compatibility question was inadmissible, this is unsurprising. On this, Beaumont highlights '[i]t is one thing to envisage an international

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<sup>85</sup> Malachy P. Cornwell-Kelly and Gavin McFarlane: *EC shut out from Convention* (1996) 146(6741) *New Law Journal* 596, 596

<sup>86</sup> Anthony Valcke: *The European Union and the International Legal Order: Discord or Harmony?* *Publication Review* (2003) 14 *European Journal of International Law* 1051, 1053

<sup>87</sup> *Opinion 2/94* (n6), 269.

<sup>88</sup> Noreen Burrows: *Questions of Community Accession to the European Convention Determined* (1997) 22 *European Law Review* 58, 59-60.

<sup>89</sup> *Ibid*, 61.

<sup>90</sup> *Opinion 2/94* (n6), 270.

<sup>91</sup> Paul Beaumont: *The European Community can not accede to the European Convention on Human Rights* (1997) *Edinburgh Law Review* 235, 240.

<sup>92</sup> *Opinion 1/91* (n48), [39].

<sup>93</sup> Burrows: (n88), 63.

agreement in one area of Community competence--for example, fisheries--and an international court being given power to adjudicate on matters within its scope. It is quite another to accede to the ECHR when the Court of Human Rights has the capacity to rule on matters across the whole spectrum of the Community's competence.<sup>94</sup> Therefore it is right that the decision to accede has not been taken lightly.

Many of the Member State Governments, when asked for their opinion queried the relationship between the CJEU and the ECtHR. If the Community were to accede, few think this would affect the autonomy of the Community legal order. The Belgian Government posited that due to a 'lack of any personal and functional link between the [CJEU] and the organs of the Convention'<sup>95</sup> the autonomy of the Community Legal Order is not affected whether or not the Convention provision is directly effective. The Danish Government added that the Convention case-law already had a strong influence on the CJEU, suggesting accession was compatible with the Treaty.<sup>96</sup> This suggests a general consensus in favour of accession. However, the Greek Government argued 'the fundamental principles and the institutional balances of Community law [must] be protected'<sup>97</sup>

Ultimately what *Opinion 2/94* shows is any accession agreement concluded 'would need to define the specific relationship between the European Courts of Justice and of Human Rights and define their respective jurisdictions'<sup>98</sup> for leaving this to the devices of the Courts is unlikely to yield positive results. In agreement with Burrows, the CJEU's opinion seems to be 'placing the question of protection of human rights squarely in the hands of [CJEU] itself. This cannot be satisfactory. The [CJEU] is not a Court of Human Rights.'<sup>99</sup>

#### Increased momentum post-2000

In 2002, the Final report of Working Group II<sup>100</sup> was published containing their conclusions on accession. They felt 'the principle of autonomy [did] not place any legal obstacle to accession'<sup>101</sup> despite the discomfort felt by others. They argued, in agreement with their 'expert panel' which included President Skouris of the CJEU and Judge Fischbach of the ECtHR, 'the [ECtHR] could not be regarded as a superior Court but rather as a specialised court exercising external control over the international law obligations of the Union resulting from accession to the ECHR.'<sup>102</sup> The division of competence would not be interpreted by the ECtHR. Furthermore, Fischbach argued that due to the nature of Strasbourg Court judgments, autonomy would not be infringed for it would not take over the interpretation of Union law, nor would it's

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<sup>94</sup> Beaumont: (n91), 241.

<sup>95</sup> Ibid, 283.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, 284.

<sup>98</sup> Beaumont: (n91), 241.

<sup>99</sup> Ibid.

<sup>100</sup> Final report of Working Group II: 'Incorporation of the Charter/ accession to the ECHR' CONV 352/02, WGII16, Brussels, 22.10.2002.

<sup>101</sup> Ibid, 12.

<sup>102</sup> Ibid.

competence be extended to allow it to annul Union acts, or suggest specific measures to remedy the infringement observed.<sup>103</sup> Arguably, this is rather optimistic. Perhaps agreeing with this, Skouris stated that 'It would come as no shock to me if, following accession, the [CJEU] lost its monopoly over ruling on infringement of the ECHR by a Community act.'<sup>104</sup> Even with the most careful accession agreement, the risk of stepping on the toes of the CJEU is apparent, yet due to the nature of Strasbourg judgements the effects would be less severe. Moreover, Skouris maintained that it was 'necessary not to overestimate the risk of possible contradiction between the decisions of the two European Courts'<sup>105</sup> and therefore the roles of the two Courts need not be set out in any accession agreement. This is contrary to Beaumont's argument, yet considering Skouris' authority, his opinion should hold weight in the drafters discussions.

On the notion of a reference procedure without accession, both Judges were against this as was the Working Group as a whole. They feared this would put an unnecessary strain on the two Courts and cause an unacceptable delay in already prolonged proceedings. The possibility of a 'functional' accession was also discussed and rejected by the two Judges. The idea subjecting to 'control by the European Court without the EU itself acceding to the ECHR with its own legal personality' was considered to hold nothing but 'disadvantages and complications'<sup>106</sup> and the inclination is to agree. The Working Group essentially determined that the 'incorporation of the Charter into the Treaties and the Union's accession to the ECHR should not be regarded as alternatives, but rather as complementary steps ensuring full respect of fundamental rights by the Union'<sup>107</sup> and developments progressed swiftly from here.

The Treaty of Lisbon, stipulates under Article 6(2) TEU that the EU shall accede to the ECHR, yet no time-limit for completion was established. Under the annexed declarations of the Treaty of Lisbon, the Conference noted 'the existence of a regular dialogue between the [CJEU] and the [ECtHR]<sup>108</sup> and proclaimed that this should be 'reinforced when the Union accedes to that Convention.'<sup>109</sup> Thus a duty was imposed upon the EU to accede to the ECHR. Keeping this in mind, 'the dynamic between Luxembourg and Strasbourg ... cannot be forgotten'.<sup>110</sup>

'Non-accession has adverse effects on the proper functioning of European justice as it imperils the coherence of the system of human rights safeguards in Europe.'<sup>111</sup> This epitomises the support that the European Parliament has

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<sup>103</sup> Summary of the meeting held on 17.09.02 chaired by Commissioner António Vitorino: CONV 295/02, WG II 10, Brussels, 26.10.2002, 3.

<sup>104</sup> Ibid, 9.

<sup>105</sup> Ibid, 10.

<sup>106</sup> Ibid, 6.

<sup>107</sup> CONV 352/02, WGIII16: (n100), 12

<sup>108</sup> Declarations Annexed To The Final Act Of The Intergovernmental Conference Which Adopted The Treaty Of Lisbon [2008] Official Journal C 115/335

<sup>109</sup> Ibid.

<sup>110</sup> Douglas-Scott: *The European Union and human rights* (n13), 682.

<sup>111</sup> Parliamentary Assembly: 'The accession of the European Union/European Community to the European Convention on Human Rights' Doc. 11533 18 March 2008, [6], 2.

had in favour of accession since the beginning.<sup>112</sup> The reasons given by the Parliamentary Assembly for this statement included that without accession the case-law of the two courts may not be ‘appropriately harmonised’<sup>113</sup> as expressed earlier. However, the European Parliament noted that accession could not be fully effective until the ECtHR sped-up its decision making process, and rejected reference procedure ideas because of this.

There is clearly strong support for the EU’s accession to the ECHR, yet all concerned seem unable to determine how to effect this without upsetting the autonomy of the CJEU. Furthermore, many of the opinions are idealistic in interpreting the dynamic between the two Courts following accession which may result in a weak accession agreement.

### The Draft Accession Agreement

The latest draft accession agreements was published in October 2011. This has been released to the Committee of Ministers for further comments and guidance. In the preamble, recognition is given that individuals ‘should have the right to submit the acts, measures or omissions of the European Union to the *external control* of the European Court of Human Rights’<sup>114</sup> suggesting ‘it was clearly desirable that an international control should exist ... the absolute autonomy of any legal order is desirable neither at national nor Community level where human rights matters are concerned.’<sup>115</sup>

Before continuing, it is necessary to briefly restate some of the concerns expressed in the introduction in order to aptly consider whether these will be resolved by the proposed draft accession agreement. The primary concerns going forward were: whether the accession agreement would allow for a review of EU law by the ECtHR; the future of the “*Bosphorus* presumption”; the preservation of the autonomy of the Union Legal Order and the interpretive autonomy of the CJEU, and; the “need” for the CJEU to have delivered a ruling prior to Strasbourg.

Contrary to popular opinion, particularly the Member State Governments, the draft accession agreement does not exclude the possibility for a review of EU primary law to take place before the CJEU. If the co-respondent mechanism is to be adopted under Article 3 of the draft agreement, then a review of primary law is presupposed for the EU Member States may only become co-respondents in circumstances where the ECtHR questions the compatibility of a provision of the EU Treaties with the ECHR.<sup>116</sup> This may be subject to controversy when put to the Member State Governments for approval.

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<sup>112</sup> See, for example, the Resolution of 18 Jan 1994 on Community accession to the European Convention on Human Rights [1994] Official Journal C44/32.

<sup>113</sup> Parliamentary Assembly: (n111), 2.

<sup>114</sup> Ibid, 5 (Emphasis added).

<sup>115</sup> Burrows: (n88), 61.

<sup>116</sup> Xavier Groussot, Tobias Lock and Laurent Pech: ‘EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011’ (2011) n°218 European Issues Policy Paper, Robert Schuman Foundation <[http://www.robert-schuman.eu/question\\_europe.php?num=qe-218](http://www.robert-schuman.eu/question_europe.php?num=qe-218)> accessed 6<sup>th</sup> March 2012, 9.

The urge to jump to the conclusion that this unacceptably infringes on the autonomy of the CJEU as the arbiter of EU law disputes must be resisted. This is for two reasons: firstly, the ECtHR *does not* provide binding judgments to the extent that it can strike down Union legislation or suggest alternative courses of action; secondly, many of the accession proposals outlined above strongly advocate the ‘need’ for a CJEU ruling on the matter before it comes before the ECtHR and therefore any ruling is likely to have foundation in this preliminary judgment. Whilst the draft agreement is silent on *how* to involve the CJEU prior to the ECtHR, under Article 3(6) of the draft agreement, this is clearly desired. The merits will be deliberated later.

Furthermore, any potential conflict between Article 55 ECHR and Article 344 TFEU<sup>117</sup> which would each grant exclusive jurisdiction to the ECtHR and the CJEU respectively has been avoided by Article 5 of the draft agreement which provides that ‘Proceedings before the [CJEU] shall be understood as constituting neither procedures of international investigation or settlement’<sup>118</sup> for the purposes of Article 35(2)(b) of the Convention, ‘nor means of dispute settlement within the meaning of Article 55 of the Convention’<sup>119</sup> therefore ‘the monopoly of the [CJEU] to examine disputes ... is preserved.’<sup>120</sup>

In the light of this, Johansen raises an interesting query: ‘what if the Union does not join the proceedings?’<sup>121</sup> This remains possible under the current drafting of the agreement. If this were to occur, how should the ECtHR proceed? Johansen suggests there are three possibilities: continue with the scrutiny of whether there is a violation of the ECHR by EU and ‘attribute the responsibility to the member state that happened to be chosen by the individual applicant as respondent in that case’<sup>122</sup>; dismiss the application; or retain the “*Bosphorus* presumption”.<sup>123</sup> None of these are wholly acceptable. The first option prevents the Union from being able to submit any defence, the second leaves the applicant without justice and the third option would make accession pointless. Arguably, this should be rectified before proceeding with the agreement. The draft agreement is silent on what shall become of the “*Bosphorus* presumption,” perhaps this will be left to the Courts to decide. There are strong arguments to suggest that it should be abandoned in the light of accession.

Ultimately, the efforts the accession debate, spanning over three decades, have finally resulted in some movement. The scope and shape of the draft accession agreement as it stands leaves gaps in the path to greater ‘coherence in human rights protection in Europe’.<sup>124</sup> The specific roles and relationship of the two

<sup>117</sup> Consolidated version of the Treaty on the Functioning of the European Union [2010] Official Journal 53 C 83/194.

<sup>118</sup> CDDH(2011)009: (n8)

<sup>119</sup> Ibid.

<sup>120</sup> Groussot, Lock and Pech: (n116), 10.

<sup>121</sup> Stian Øby Johansen: ‘European integration – the European Union’s accession to the ECHR’ (The View from Above, 6<sup>th</sup> December 2011) <<http://djilp.org/1573/european-integration---the-european-unions-accession-to-the-echr/>> accessed 6<sup>th</sup> March 2012.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Draft Accession Agreement Preamble: CDDH(2011)009: (n8)

Courts is not defined in the draft agreement as is desired by commentators, therefore clarity cannot be attained.

### **The Future Relationship**

The story so far has shown the development of human rights as a principle of EU law and the growing support for accession amongst the EU institutions. However, gaps in the draft accession agreement leave much uncertainty. Some ruminations on what may develop are explored here alongside theories on the general effects that accession may have on the relationship between the two Courts. These are made keeping in mind the comments in the introduction regarding the binding status of the Charter.

#### Achieving prior CJEU involvement

The current draft accession agreement suggests that prior involvement of the CJEU on cases involving EU law is preferred. Evidence suggests that ‘much of the debate focused on what would be the best mechanism to guarantee a “prior involvement” of the [CJEU].’<sup>125</sup> In spite of this, the draft agreement was silent on exactly how to accommodate this. An examination of the proposed mechanisms as well as arguments to suggest that a mechanism is not needed will be considered. A joint communication from the two court Presidents stated that ‘the reference for a preliminary ruling is not normally a legal remedy to be exhausted by the applicant before referring the matter to the [ECtHR].’<sup>126</sup> As pointed out by Jacqu e, the use of “normally” ‘leaves some uncertainty’<sup>127</sup> which, given the gravity of what may be at stake, is unacceptable.

#### Is a mechanism necessary?

The necessity of a mechanism to ensure prior CJEU involvement only arises if the national courts violate their Community obligations under Article 267 TFEU<sup>128</sup> to make a preliminary reference to the CJEU on questions of interpretation of EU law. On this point, commentators suggest that this compelled some “dissenting voices” to argue that ‘no specific mechanism would be required if one were to compel national courts of last resort to refer any case to the [CJEU] in which it is alleged that a Union act is not compatible with the ECHR.’<sup>129</sup> Jacqu e concurs, arguing it to be ‘most logical ... [to] supplement the *Firma Foto Frost v Hauptzollamt Lubeck-Ost*<sup>130</sup> case-law by requiring national courts to conduct a preliminary ruling in *all cases* in which the conflict between an act of the Union and the ECHR is invoked’.<sup>131</sup>

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<sup>125</sup> Groussot, Lock and Pech: (n116), 6

<sup>126</sup> European Court of Human Rights: ‘Joint communication from Presidents Costa and Skouris’ <[http://www.echr.coe.int/NR/rdonlyres/O2164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication\\_CEDHCJUE\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/O2164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf)> accessed 6<sup>th</sup> March 2012, 2

<sup>127</sup> Jacqu e: (n2), 1017

<sup>128</sup> Consolidated version of the Treaty on the Functioning of the European Union [2010] Official Journal 53 C 83/164

<sup>129</sup> Groussot, Lock and Pech: (n116), 6

<sup>130</sup> (314/85) [1987] ECR 4199

<sup>131</sup> Jacqu e: (n2), 1019. (Emphasis added)

Conversely, this extension of the preliminary reference procedure could result in the CJEU being inundated with references ‘as lawyers will quickly learn that a mere claim that the act is contrary to the Convention would make the reference automatic.’<sup>132</sup> This extension is not essential, for simple reinforcement of what the national courts are already compelled to do may preclude the need to introduce a lengthy reference mechanism. Alternatively, merely because the chances of such circumstances arising are small, does this mean that the consequences should not be accounted for? A clear advantage of this would be that the status quo between the two Courts would be maintained, each Court making their ruling free from restriction and the autonomy of the CJEU as ultimate arbiter of Union law would remain intact.

Another option is to retain the “*Bosphorus* presumption”, and the privilege held by the ECtHR for the EU legal order. Yet, this conflicts with the aim that the EU be treated like any other party to the Convention, thus many feel that the ECtHR will reject the principle in light of accession. Following accession ‘the need for the ECtHR to exercise comity will have ended. The justification for the exercise of comity was that the relationship between the two European courts is presently not fully clear.’<sup>133</sup> Whilst the validity of this observation is strong, it is submitted that even post-accession the relationship between the two Courts will not be clear for some time. Possibly the “*Bosphorus* presumption” may be extended, for currently it does not apply where primary law is being disputed, such as in *Matthews v UK*. The presumption only operates where the Community law in question could be contested before the CJEU which, if retained would restrict the number of cases the ECtHR would be able to hear. Given the binding status of the Charter, which includes protection of many Convention rights, perhaps privileging the EU legal order would not produce particularly adverse results. This would reduce the case-load of an already swamped ECtHR. However, in agreement with Groussot, Lock and Pech, a low standard of review is not required<sup>134</sup> to preserve ‘the specific legal order of the Union’<sup>135</sup> as stated in the draft agreement’s preamble, thus there is no reason for the EU to be treated differently to other parties to the Convention or for the ECtHR to continue to show deference to the CJEU.

Harpaz raises the paradoxical argument that if the CJEU placed stronger reliance on the Strasbourg Regime it ‘would contribute to normative convergence between the two Regimes, and such convergence may, in turn, “pre-empt” the Strasbourg Court’<sup>136</sup> from reviewing EU measures or measures implemented by Member States to fulfil their obligations to the EU. This was raised as a suggestion that would help the CJEU ‘better prepare’<sup>137</sup> for accession. Considering the scope of human rights case-law developed by the

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<sup>132</sup> Ibid, 1019-1020

<sup>133</sup> Tobias Lock: *The ECJ and the ECtHR: The Future Relationship between the Two European Courts* (2009) 8 *The Law and Practice of International Courts and Tribunals* 375, 396.

<sup>134</sup> Groussot, Lock and Pech: (n116), 9.

<sup>135</sup> CDDH(2011)009: (n8).

<sup>136</sup> Guy Harpaz: *The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy* (2009) 46 *Common Market Law Review* 105, 135.

<sup>137</sup> Ibid.

CJEU, greater reliance may only raise the potential for jurisdictional and normative overlap between the two Courts, an issue which needs to be minimised rather than exacerbated by accession.

Other proposals suggest changes to the composition and/or structure of the ECtHR may be more suitable. This could be through the creation of a separate chamber within the ECtHR to deal specifically with Union matters, or more simply by having an 'EU Judge' sitting in Union-related cases. According to Ress, the former proposal reflects 'the doubts raised if judges from states that are not members of the EU were to sit in EU cases.'<sup>138</sup> This approach may dispel those concerns by focusing the Court judges onto EU law matters and preventing unwarranted interference by non-Member State judges. Yet, the same problem arises: why should the EU receive preferential treatment? Again, this conflicts with the aims of the Steering Committee's draft agreement. In agreement with Ress, the 'mixed college of judges'<sup>139</sup> is an integral part of the ECtHR's composition. The latter proposal will almost certainly occur and this is where the required knowledge should stem from in EU cases.

Brown and McBride tendered whether the CJEU's Advocate Generals should have a role in ECtHR in cases where EU law is at issue. They felt that prior CJEU involvement may have no effect on the ECtHR's decision even if sought.<sup>140</sup> Since then, it appears that no one else has entertained this idea. The presence of the Advocate General could ensure the correct interpretation of EU law, the autonomy of CJEU case-law and would arguably be quicker than any reference procedure. Furthermore, the Advocate General has to 'deal with all the issues that may affect the outcome'<sup>141</sup> rather than simply what is necessary 'to dispose of a given case'<sup>142</sup> like the CJEU. In a human rights situation, this "all-inclusive" approach may be preferable.

Highlighted are some possible alternatives to lengthy reference procedure mechanisms which are currently favoured by the accession agreement drafters. These would minimise confusion and would largely retain the autonomy of both Courts without privileging the EU to a great extent.

#### Involving the CJEU after a violation has been found

The ECtHR does not have the authority or the jurisdiction to interpret the Treaties in a binding fashion. This strongly supports Lock's argument that prior involvement of the CJEU is not necessary to maintain the autonomy of

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<sup>138</sup> Georg Ress: 'The legal relationship between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights' in Herm.-Josef Blanke and Stelio Mangiameli (eds) *Governing Europe under a Constitution: The Hard Road from the European Treaties to a European Constitutional Treaty* (Springer, Berlin, 2006), 293.

<sup>139</sup> Ibid.

<sup>140</sup> Brown and McBride: (n74), 704.

<sup>141</sup> A. A Dashwood: *The Advocate General in the Court of Justice of the European Communities* (1982) 2 *Legal Studies* 202, 208.

<sup>142</sup> Ibid.

EU law.<sup>143</sup> It is proposed that after a violation of the Convention has been found in the ECtHR on a matter concerning Union law, the case could move onto either the CJEU or the Commission to decide whether to concur and invalidate the law concerned. In this scenario, the autonomy of the CJEU over Union law and the ECtHR over Convention rights would be maintained. Indeed, *Opinion 1/91* suggests that seeking a declaration of invalidity from the CJEU would be necessary following the finding of a violation in the ECtHR.<sup>144</sup> The CJEU would have the knowledge required to make a ruling soundly based on the interpretation of Convention rights for 'the assessment of the consequences of the decision is ... within the jurisdiction of the Union.'<sup>145</sup> Considering the attention the Luxembourg Court already pays to the rulings and interpretations of the ECtHR this would prevent divergences of opinion and allow for both Courts to contribute. This would allow for the relationship between the two Courts to blossom and enable a stronger foundation for fundamental human rights.

### Reference procedure mechanism

To preserve the subsidiarity principle, former President of the ECtHR Costa and President Skouris of the CJEU promulgated that a procedure be established whereby the 'the CJEU may carry out an internal review before the [ECtHR] carries out external review.'<sup>146</sup> The concept of introducing a type of preliminary reference procedure between the Luxembourg and Strasbourg Courts has been examined zealously by negotiators and academics alike. Opinion is divided on whether this should operate one way, the ECtHR to the CJEU or vice versa; each way, allowing both Courts to conduct a reference should they see fit, or at all. Introduction of such a procedure could be contrary to the autonomy of the EU legal order. 'What is certain however is that the mechanism ultimately chosen must not confer new powers on the EU institutions including the [CJEU] which are not already provided for in the EU Treaties.'<sup>147</sup>

The European Commission in 1979 envisaged a procedure which obliged the Community to refer cases to the CJEU in which Union legislation compatibility with the ECHR is questioned. This would be submitted alongside its own conclusions to the ECtHR.<sup>148</sup> Lock suggests this is the 'most plausible solution'<sup>149</sup> as the Commission is most likely to be the institution representing the EU before the ECtHR. Brown and McBride argued soon after the memorandum that through this suggestion the Commission was highlighting the importance they attach to the CJEU's opinion on alleged infringements of the ECHR.<sup>150</sup> However, interpretation of the ECHR is, and should remain, in the hands of the Strasbourg Court. The CJEU's role in

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<sup>143</sup> Tobias Lock: *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order* (2011) 48 *Common Market Law Review* 1025, 1047.

<sup>144</sup> *Ibid.*, 1037.

<sup>145</sup> Jacqu e: (n2), 1022.

<sup>146</sup> Joint communication from Presidents Costa and Skouris: (n126).

<sup>147</sup> Groussot, Lock and Pech: (n116), 15-16.

<sup>148</sup> COM (79) 210: (n70), [42].

<sup>149</sup> Lock: *Walking on a Tightrope* (n143), 1049.

<sup>150</sup> *Ibid.*

providing an interpretation should only extend as far as providing the ECtHR with the correct interpretation of the Union law at hand.

Despite this, Judge Timmermans of the CJEU recently argued that the Commission should be granted power to refer cases pending in the ECtHR to the CJEU to enable them to express an opinion on the compatibility of Union legislation with the Convention.<sup>151</sup> The Commission has similar powers under Article 263(2) TFEU<sup>152</sup> to require the CJEU to review legislation for compatibility with the Treaties and therefore the issue of conferring new powers should not arise. A concern expressed by Lock is: what would happen should the Commission fail to bring a case?<sup>153</sup> Under its current powers, the Commission may only refer legislation that it has introduced itself. This may make them reluctant to refer should concerns over human rights compatibility arise.<sup>154</sup> Jacqu e has questioned whether this reference procedure can be implemented ‘on the sole basis of the accession agreement’<sup>155</sup> without further Treaty revision. Time-constraints for making the reference also need to be resolved.<sup>156</sup> Many of the criticisms of accession and prior involvement of the CJEU hinge on the fact that cases in the CJEU and the ECtHR take so long to proceed and resolve. This indicates a short time-limit should apply, however, a short time-limit may have consequences on access to justice. These considerations should be taken seriously by the drafters.

A type of Article 267 TFEU-esque preliminary reference procedure, running between the two Courts was explored by academics. Yet which way this procedure should run is disputed. The French Government’s aim is apparently for a procedure to run from the ECtHR to the CJEU.<sup>157</sup> If the CJEU does not find a violation, the case would be referred back to the ECtHR. ‘There are a number of reasons why this approach is not recommended.’<sup>158</sup> Firstly, this would see the EU being privileged over the other parties to the Convention, contrary to the aim of the draft accession agreement and unfair on other parties. Accurately observed by Lock, other parties ‘are not given that possibility and thus cannot avoid the risk of violating the Convention by obtaining preliminary clearance from the [CJEU].’<sup>159</sup> Some might argue that due to the specific nature of the EU as a legal personality, this privileging may be justified. However, each party to the Convention has a slightly different legal order, yet this does not prevent it being subjected to the external

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<sup>151</sup> The Intervention by ECJ Christiaan Timmermans: *L’adh sion de l’Union Europ enne   law Convention europ en des Droits de l’homme*, at a hearing before the European Parliament’s Committee on Constitutional Affairs, 18<sup>th</sup> March, 2010

<<http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71235/20100324ATT71235EN.pdf>> accessed 6<sup>th</sup> March 2012, [9]

<sup>152</sup> [2010] Official Journal 53 C 83/162.

<sup>153</sup> Tobias Lock: *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg* (2010) 35(6) European Law Review 777, 793.

<sup>154</sup> Ibid.

<sup>155</sup> Jacqu e: (n2), 1020.

<sup>156</sup> Ibid.

<sup>157</sup> French Senate, Communication of Robert Badinter on the negotiation mandate (E 5248) 25<sup>th</sup> May 2010. <<https://www.senat.fr/europe/r25052010.html#toc1>> accessed 6<sup>th</sup> March 2012.

<sup>158</sup> Lock: *EU Accession to the ECHR* (n153), 793.

<sup>159</sup> Ibid.

supervision of the ECtHR. Christensen proposed that the 'ECtHR could be made a "national court" in the EU regime'<sup>160</sup> and thus follow the preliminary reference procedure. To her, '[t]he advantages of this model are obvious'<sup>161</sup> for the autonomy of the CJEU is retained and this system enables the uniform application of Union law.<sup>162</sup> However, the disadvantages are equally obvious. Primarily, the ECtHR is unlikely to accept procedure which deems it a "national court" even if simply for the purposes of this regime. Secondly, time-constraints are an unavoidable issue. Adding a preliminary reference procedure may add years to the process 'which might in itself be a violation of Article 6 of the Convention.'<sup>163</sup> To prevent this, Christensen raises the possibility of the opinion from the CJEU being more of an 'advisory opinion than a formal ruling' to shorten delays. Alternatively, in agreement with Jacqué, 'a simple consultation procedure is ... certainly not sufficient'.<sup>164</sup>

Some would prefer the CJEU to request references from the ECtHR to remove the risk of conflicting interpretations, as an authoritative interpretation of the Convention rights at issue would be given. Other advantages include possibly reducing court congestion, for, 'the ECtHR would only have to answer specific points and would not need to address unfounded arguments by the parties.'<sup>165</sup> However, these apparent advantages do not survive beyond 'first glance',<sup>166</sup> scrutiny reveals considerable weaknesses. With regards to the first advantage, following accession, the CJEU will have authority to interpret the ECHR for it will become 'an integral part of EU law.'<sup>167</sup> This dual authority comes at a price, for the right to interpret the Convention, previously the objective of the Strasbourg Court, should not easily be disturbed by the introduction of a formal hierarchy between the Courts.<sup>168</sup> On the second point, it may not be acceptable for the applicant to have to rely on the CJEU 'to ask the "right" questions.'<sup>169</sup> Considering the status and experience of the CJEU, the possibility of the "wrong" question being asked or not being considered at all is unlikely. Should this be implemented, allowance is not made for cases which do not reach the CJEU through fault of the national courts.<sup>170</sup> Therefore this proposal, if run without a reciprocal procedure, is flawed.

Many authors seem to agree that any reference procedure should see either Court provide an opinion on whether the disputed EU law is in violation of the Convention. This does not seem correct, for, either way this sees one Court taking over the prerogative of the other, be it interpretation of EU legislation, or interpretation of the Convention. Instead, should the opinion be limited to merely providing the other Court with the correct interpretation of the legislation or Convention right at hand? This would enable both Courts, depending on the way a reference procedure is decided, to assess compatibility

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<sup>160</sup> Røddik Christensen: (n44), 232.

<sup>161</sup> *Ibid.*, 233.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> Jacqué: (n2) 1021.

<sup>165</sup> Lock: *EU Accession to the ECHR* (n153), 794.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

with the correct tools and interpretations in mind. This would operate most effectively if a dual reference procedure were designed. As aforementioned, the CJEU will have authority to interpret the Convention following accession. A reference procedure which runs both ways combines the advantages of each singular reference proposal and in some cases would minimise the effect of the disadvantages. The problem of time-constraints is unavoidable whichever mechanism is decided upon. A dual reference procedure makes allowance for any failings of the national courts to refer the CJEU and secures justice for the individual. Moreover, the supremacy of each court cannot be disputed for each has the opportunity to provide their opinion.

Each reference mechanism outlined has significant problems. The biggest is the CJEU decision in *Kadi v Council and Commission* where the Court ruled 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [Treaties]',<sup>171</sup> therefore agreements 'must neither constitute a hidden amendment to the Treaties nor may it touch upon other constitutional principles in primary EU law, including fundamental rights.'<sup>172</sup> In *Opinion 1/09, Re: Draft Agreement on the European and Community Patents Court*<sup>173</sup> the CJEU showed their readiness to enforce this by declaring the draft agreement on the European and Community Patents Court to be incompatible with the Treaties for they were not convinced of the guarantees for CJEU involvement despite the similarity to the Article 267 TFEU preliminary reference procedure. This will undoubtedly cause a headache for the drafters.

### General effects of accession on the relationship

Regardless of the mechanism adopted, if adopted at all, accession to the ECHR will inevitably change the dynamic between the two Courts. A Council of Europe document suggests that once the EU accedes to the Convention, the 'CJEU's position will be analogous to that of national courts in relation to the Strasbourg Court'.<sup>174</sup> The severity and impact of the alterations explored here will vary, but cumulatively, they will transform the European Legal Order and the status of human rights in the EU as currently known.

An unsettling prospect for Luxembourg is that Strasbourg decisions may become binding upon them. It remains to be seen whether the CJEU will finally follow its infamous *Opinion 1/91* judgment and allow for an external court system's decisions to bind 'the Community institutions, including the [CJEU]'.<sup>175</sup> Despite the sentiments of the Court's President that it would be little surprise if the CJEU lost their monopoly over ruling on compatibility with the Convention of EU law,<sup>176</sup> for a Court which fought so hard for

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<sup>171</sup> *Kadi v Council and Commission* (n33), [285].

<sup>172</sup> Lock: *Walking on a Tightrope* (n143), 1031.

<sup>173</sup> [2011] 3 CMLR. 4.

<sup>174</sup> Council of Europe, 'Accession by the European Union to the European Convention on Human Rights: Answers to frequently asked questions' 30<sup>th</sup> June 2011 <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE\\_documents/EU\\_accession-QA\\_2011\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/EU_accession-QA_2011_en.pdf)> accessed 6<sup>th</sup> March 2012, 7.

<sup>175</sup> *Opinion 1/91* (n48), [39].

<sup>176</sup> CONV 295/02 WG II 10: (n103), 9.

supremacy, this may be difficult to stomach. Whilst the Luxembourg Court often refers to, and relies upon, the interpretations of the ECtHR, the possibility of this becoming a binding obligation will unsettle many. However, as the ECtHR decisions are only binding *inter partes*, the CJEU would only be bound by judgments involving the EU.<sup>177</sup> Furthermore, this is not a certain consequence of accession – the relationship between the two Courts needs defining in the draft accession agreement. So far the agreement is silent on this. One thing is certain, one Court will make an unhappy concession.

A further concern in Luxembourg, is that ‘one day Strasbourg could declare a [CEJU] decision void, opening up the Pandora’s box of a potential national judicial refusal to respect the primacy of EU law in the absence of sufficient human rights observance.’<sup>178</sup> This concern rests on the possibility that post-accession, the ECtHR will be able to review the decisions of the CJEU. This would clearly be in conflict with the supremacy of the EU legal order. Regardless, if this were to come to fruition, it should not be done lightly. Despite the appearance of a strong and mutually respectful relationship between the two Courts, their relationship is fragile. If one Court were to confront the case-law of the other, they run the risk of ‘reciprocally untying the authority of their increasingly overlapping legal orders’.<sup>179</sup> Through accession, both Courts have authority to interpret the Convention, if the ECtHR fails to show “correct” respect to the CJEU, Luxembourg may use their political strength to side-line the Strasbourg Court. ‘The European judges have indeed learned to prefer a mutual reinforcement of the two supranational courts, rather than run the risk of weakening both institutions by asserting a claim to be the “highest court” in Europe.’<sup>180</sup> If review of CJEU decisions by the ECtHR is not excluded by the final accession agreement, it is proposed that some level of deference should remain to enable the highest level of human rights enforcement and keep Pandora’s box firmly closed.

Many fear that post-accession the ECtHR may have too much power and authority. Predominantly, whether the ECtHR will have the power to undertake a review of primary law. Whilst the objections are obvious, the current draft accession agreement appears to make review of primary law a prerequisite to invoking the co-respondent mechanism.<sup>181</sup> However, the apprehension over this extension of the ECtHR’s review powers should not cause alarm for, as previously noted, this would only upset the autonomy of the CJEU if the ECtHR were able to interpret primary EU law in a binding fashion.<sup>182</sup> The proposed co-respondent mechanism has invoked academic critique on its meaning and effects. Fears that the previous drafts gave too much power to the ECtHR led to the current wording which states that the

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<sup>177</sup> Lock: *The Future Relationship* (n133), 397.

<sup>178</sup> Laurent Scheek: ‘The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship?’ in Filippo Fontanelli and Giuseppe Martinico (eds.) *The ECJ under Siege – New Constitutional Challenges* (Amicus Books, India, 2009), 182.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, 190.

<sup>181</sup> Steering Committee For Human Rights (CDDH): ‘Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’ CDDH(2011)009 14.10.2011, [42]

<sup>182</sup> Lock: *Walking on a Tightrope* (n143), 1038

Union may become a co-respondent ‘if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of [EU] law’.<sup>183</sup> The use of ‘appear’ suggests that the Strasbourg Court should ‘not engage in a thorough study of the situation and must accept the co-respondent when there is a *prima facie* case.’<sup>184</sup> In favour of this approach, once the EU has been adopted as a co-respondent, the draft agreement suggests it would be at this point that the CJEU would be called upon for a ruling if they had not previously had the opportunity.<sup>185</sup> Their comments along with those of the EU and the Member States could then be submitted to the ECtHR. However, perhaps it is unacceptable for ‘a discretion that would allow [the ECtHR] to interpret EU and the division of powers’<sup>186</sup> to remain with the Court.

In summary, accession of the EU to the ECHR is not without difficulty. Concerns over supremacy and the delicate relationship between the two Courts will likely be problematic should this not be defined by the drafters in the final accession agreement. Furthermore, Christensen remarks that post-accession forum shopping between Luxembourg and Strasbourg will be inevitable where both Courts are competent<sup>187</sup> which may cause further disarray.

## Conclusion

To conclude, the CJEU induced a plurality between itself and the ECtHR 4 decades ago through its decision in *Internationale Handelsgesellschaft*. The consequences created a “ripple effect”, causing an overlap in jurisdiction, some divergences of opinion and an ample display of deference on the part of both Courts. In parallel to this was the accession debate. Numerous reports and memorandums, spanning over three decades, considering whether the Union could, and should, accede to the ECHR. At the heart of this debate, besides creating a more coherent basis for fundamental human rights, was the question of what effect accession may have on the EU legal order and the delicate relations it held with the Strasbourg Court. However, with the ratification of the Treaty of Lisbon, the debate came to life creating an array of new concerns for the relationship between the CJEU and the ECtHR upon accession. The majority of proposals discussed have significant flaws and the lesser of many evils will have to be determined by the drafters. The concern is that these issues may result in a weak accession agreement attempting to appease the EU institutions and the Member State Governments. This would achieve little for individual human rights protection. Should a new ‘supremacy battle’ commence it could be years before unity in human rights protection is achieved. It is abundantly clear that the relationship between the CJEU and the ECtHR *must* be defined in the draft accession agreement in order to minimise confusion and prevent the two Courts from wasting time working

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<sup>183</sup> CDDH(2011)009 (n8), Article 3(2)

<sup>184</sup> Jacqu : (n2), 1015

<sup>185</sup> CDDH(2011)009 (n8), Article 3(6)

<sup>186</sup> Jacqu : (n2), 1015

<sup>187</sup> R ddik Christensen: (n44), 230

things out themselves. Furthermore, accession to the Convention is made increasingly difficult by the problems inherent within the Luxembourg and Strasbourg systems. Due to the backlog of cases and length of proceedings this makes many of the proposals problematic to implement effectively. Following the release of the draft accession agreement, the next step will be for this to be adopted by the Steering Committee for Human Rights and a consultation will take place in the Council of Europe Parliamentary Assembly. It will pass to the CJEU to provide an opinion on the validity of the agreement and that it will not violate EU primary law. If the agreement passes through these stages, it will become open for signature by the Member States.<sup>188</sup> Whichever route is taken, few things are certain. The first of these is that one of the Courts will have to concede to the authority of the other, an unhappy concession for either court. The second is that ‘much like the ‘first dimension’ of the relationship between the EU and fundamental rights, the ‘second dimension’ is still unfolding.<sup>189</sup>

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<sup>188</sup> Zuzanna Warso: ‘EU accession to the ECHR – at which stage are we?’ (Europe of Human Rights, 1<sup>st</sup> February 2012) <<http://humanrights.blogactiv.eu/2012/02/01/eu-accession-to-the-echr---at-which-stage-are-we/>> accessed 8<sup>th</sup> February 2012

<sup>189</sup> Rick Lawson: *Human rights: the best is yet to come* (2005) 1(1) European Constitutional Law Review 27, 32

## **Fighting the file-sharing war through notice-and-takedown regimes: Plunging a sword of copyright through the heart of freedom of expression on the Internet**

*Thomas Southey Capel*

The evolution of the Internet and technology that facilitates copying and sharing of copyright material has presented challenges to copyright holders. This paper looks at the use of notice-and-takedown regimes as a method of copyright enforcement against file-sharing technologies. The topic is characterised as one of conflicting interests, between the right holders' economic interests in their copyright, and the file-sharers' free expression interests. The notice-and-takedown procedure further muddies this picture by introducing a third stakeholder, the Internet Service Provider ('ISP'). An argument is constructed on the basis of the following thesis: the notice-and-takedown approach to copyright enforcement disproportionately values the rights of copyright holders ahead of the values of freedom of expression.

In addressing that thesis, the traditional justifications for copyright are examined, with their relevance in today's content industries questioned. A conception of copyright based on instrumentalist ideals, underpinned by social requirement, is put forward. The paper next analyses the notice-and-takedown regimes in action in the United Kingdom and United States of America in the context of their respective freedom of expression laws. In this regard it is concluded that the regimes disproportionately value the rights of copyright holders ahead of freedom of expression interests. An argument is made as to why the balance should be redressed in favour of freedom of expression. This will be supported by an analysis of the legitimacy of notice-and-takedown procedures, focussing on the role played by ISPs, and questioning the role of copyright as a destructive sword of 'immaterial imperialism'. The discussion here takes into account a broader range of considerations, examining the legitimacy of the procedures in the light of concerns about the overall regulation of the Internet. The theme in this part of the argument is one of policy, and the legitimacy of copyright as a tool to suppress the development of technology. The paper is characterised by the notion of 'creative capital' and economic

interests conflicting with interests of freedom of expression. This theme follows into the closing recommendation of market reform as a constructive solution to the 'file-sharing war'.

## Introduction

*'The greatest constraint on your future liberties may come not from government but from corporate legal departments laboring [sic] to protect by force what can no longer be protected by practical efficiency or general social consent.'*

John Perry Barlow.

The concept of copyright is centuries old, and yet it has never faced a challenge as great as that posed by the Internet. Much like copyright itself, this intangible, evolving concept has not reached the point where its limits can or should be defined, but its facilitation of communication and sharing of ideas and culture, both copyright protected and not, appears to be at odds with the protection granted by this intellectual property ('IP') right. A highly emotive issue in contemporary society, copyright infringement through file-sharing sees a clash of ideals and rights between right holders and file-sharers.

The idea for this paper stems from the landmark judgment of the High Court in *Twentieth Century Fox v BT* ('Newzbin2'), whereby a group of Hollywood studios were granted an injunction to force BT to block a file-sharing website, Newzbin2. This case represents the first time a British Internet Service Provider ('ISP') has been ordered to block such a site. It brings many issues to the fore, but I wish to focus on the function of copyright in such notice-and-takedown orders. The legitimacy of this apparent court-ordered censorship of the Internet and the nature of Internet regulation will also be discussed. The result of the case appears to place the copyright rights of the studios ahead of the principles of freedom of expression, which I submit underpin the very existence and purpose of the Internet and copyright. As such, this paper will proceed on the basis of the following hypothesis: the notice-and-takedown approach to copyright enforcement disproportionately values the rights of copyright holders ahead of the values of freedom of expression.

In order to address this hypothesis, I will first put forward a conception of copyright that I suggest is most appropriate in the digital age (Chapter I). In Chapter II I will examine the law relating to ISP liability for copyright infringement in America and the United Kingdom, and in particular the implementation of their notice-and-takedown mechanisms in combating file-sharing sites. Chapter III will see the discussions of the preceding two chapters tied together in order to examine where the balance of freedom of expression

and copyright protection should lie and question the legitimacy of the role of ISPs in this form of regulation. The purpose to which this discussion is working towards is to demonstrate that notions of free expression of ideas and creativity are inherent in the concept of copyright. When viewed in the context of our network society, seeking to protect the copyright of right holders against file-sharing through what is effectively censorship is contrary to the ideals underpinning the rights themselves. It will be suggested that constructive market reform is the best solution to the file-sharing phenomenon.

## **The Nature of Copyright**

### Traditional Justifications for Copyright

The notion of a statutorily enforced copyright can be traced back to the eighteenth century, to the Copyright Act 1709, commonly called the Statute of Anne. The Act conferred the '*sole right and liberty of printing books*' to the author of the work, with the right lasting 14 years from publication.<sup>1</sup> Much as the issues to be discussed in this paper arise out of the development of technology, this Act arose out of the development of the printing press.<sup>2</sup> Its 'contemporary relevance' can be viewed in the light of its motivations stated in the Preamble,<sup>3</sup> particularly outlawing piracy in books, and '*for the encouragement of learned men to compose and write useful books*'.<sup>4</sup>

These aims can be seen as underlying principles upon which copyright law is founded. Gillian Davies has identified four key principles underpinning copyright law, which will be outlined here before being considered below in relation to our digital society. The first is natural law, based on Locke's labour theory. This principle seeks to justify IP by marrying Locke's assertion that one has a property right in the labour of one's own body,<sup>5</sup> with the idea that mixing that labour with a previously unappropriated object grants property rights to that person over the whole object.<sup>6</sup> Thus an author has an exclusive property right in their work, giving control over the dissemination of that work, and a right to object to its copying or modification. This theory has survived the test of time, with its labour-based connotations being supported by Lord Bingham when he stated, '*[t]he law of copyright rests on a very clear principle... No one else may for a season reap what the copyright holder has sown*'.<sup>7</sup> Despite this modern affirmation of the natural law principle, it will be questioned whether it really is appropriate in contemporary copyright law, especially in the music industry.

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<sup>1</sup> David Llewelyn, Tanya Aplin and William Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7th edn, Sweet & Maxwell 2010) 401.

<sup>2</sup> Gillian Davies, *Copyright and the Public Interest* (2nd edn, Sweet & Maxwell 2002) 9.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid* 4-5.

<sup>5</sup> John Locke, 'The Second Treatise' in Peter Laslett (ed), *Two Treatises of Government* (CUP 1970) 305-6.

<sup>6</sup> Horacio M Spector, 'An outline of a theory justifying intellectual and industrial property rights' (1989) 8 EIPR 270, 270-71.

<sup>7</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL) 2418.

Likewise Davies' second principle, just reward for labour, is debatable. This simply states that given the value that creative works bring to our lives, the authors of such works should be remunerated when that work is exploited.<sup>8</sup> This principle is intertwined with the third, that copyright provides a stimulus to creativity.<sup>9</sup> The stimulus to creativity function was evident in the Statute of Anne in the quote from the Preamble above, whilst the great Victorian novelist, Anthony Trollope noted, '[t]ake away from English authors their copyrights, and you would very soon take away from England her authors.'<sup>10</sup> The final justification is that it is a social requirement that creative individuals should be encouraged to create and disseminate their work to the public.<sup>11</sup> It is this function of social enrichment that will underpin my argument as to how we should conceptualise copyright in the digital age.

### Copyright in the Digital Age

It is my intention in this section to suggest a conception of copyright that has the principle of social requirement at its heart. Notions of freedom of expression, I will argue, underpin copyright, and once this is established I will be able to show in subsequent chapters that to use it to inhibit freedom of expression using copyright defeats the very values it seeks to promote. The role of copyright as an '*engine of free expression*' has been noted above, in the way it incentivises creation through remuneration of creators and the promise of property rights.<sup>12</sup> However, that copyright can also stifle free expression is evident in the way that the rights granted to the creator not only prevent copying, but often access and dissemination of that material to the public as a whole.<sup>13</sup> This paradox of copyright<sup>14</sup> should be seen as an underlying issue throughout my discussion, and the balance between owner and user rights is fundamental to solving the issues at hand.

As noted by Deazley, once a creative work is published it enters what he describes as a 'public cultural space'; what I will term the 'intellectual commons'.<sup>15</sup> Once in the intellectual commons, the work will be available for use by the public (in the public domain) or may be accessible as copyright protected material. However, it is well documented that since the Statute of Anne, the rights of copyright owners has increased, while user rights and freedoms to interact with protected work have diminished.<sup>16</sup> For example, the duration of copyright was extended from the 14 years of the Statute of Anne to the creator's life-plus-70 years across the European Union ('EU'),<sup>17</sup> and in the USA the duration was likewise extended.<sup>18</sup> This has been driven by the

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<sup>8</sup> Davies (n 4) 14-15.

<sup>9</sup> *ibid* 15-16.

<sup>10</sup> Anthony Trollope, *An Autobiography* (Oxford Paperbacks 1999) 107.

<sup>11</sup> Davies (n 4) 16.

<sup>12</sup> *Harper & Row, Publishers, Inc v Nation Enters* 471 US 539 (1985) 558.

<sup>13</sup> Enrico Bonadio, 'File Sharing, Copyright and Freedom of Speech' (2011) 33 EIPR 619, 620.

<sup>14</sup> Neil Weinstock Netanel, *Copyright's Paradox* (OUP 2008).

<sup>15</sup> Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing 2006) 109.

<sup>16</sup> *ibid* 150.

<sup>17</sup> Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [1993] OJ L290/9 (Duration Directive) art 1.

<sup>18</sup> Copyright Term Extension Act of 1998, s 102.

recognition of copyright as a natural property right,<sup>19</sup> and increasingly as a fundamental human right.<sup>20</sup> Thus the problem with copyright in this most contemporary of legal issues is the rhetoric underpinning it.<sup>21</sup> I suggest therefore that the sphere of public domain has shrunk, whilst the sphere of copyright protection has increased, taking up a growing proportion of the intellectual commons. This is seen as an 'enclosure movement' by James Boyle, who argues that the extension of IP rights is leading to an encroachment on the public domain and a diminishment of the commons.<sup>22</sup> In his words, *'[w]e seem to be shifting from Brandeis's assumption that the "noblest of human productions are free as the air to common use" to the assumption that any commons is inefficient, if not tragic.'*<sup>23</sup>

This shifting balance is the true tragedy. We have entered an age whereby cultural material can be created by anyone with access to a basic computer and shared with the world instantly (national firewalls permitting). There is no doubt that Web 2.0 technologies such as YouTube, Facebook and the like offer not only a technologically brilliant platform for cultural exchange, but also present a new domain for creativity: an expanded public domain. Of particular relevance to this paper, file-sharing technologies offer a new opportunity for the exchange of cultural material that might otherwise remain undiscovered. These tensions when applied to the file-sharing war and the issue of notice-and-takedown actions are particularly evident. Clearly the right holders, the music and film companies, are battling for more extensive copyright protection, whilst users of file-sharing technologies are pushing for the expansion of the public domain, enabling more of the intellectual commons to be available for access and use by the online populace. The ISPs are in the contentious position of in theory being able to control the balance of this relationship, and thus the copyright-public domain equilibrium. The evolution of this tripartite relationship in the context of the file-sharing war will fundamentally affect the nature of copyright in the digital age, and will provide a background for resolution of further legal issues, such as censorship or other IP infringement, in the online world in terms of the relative weight accorded to property/economic rights and fundamental rights.

Which way should the balance be decided? As stated above, a traditional justification for copyright was that it incentivises creation through remuneration of creators, a concept that intertwines with the natural law right of property in the fruits of one's labour. Looking to the reality of the entertainment industry, particularly the music industry, I suggest that the true creators are not being properly remunerated for their work, yet we are still seeing creative work being produced. The royalty system in the music industry poorly remunerates the artist, whilst the record label, in a powerful bargaining position, gains far more from the creative work.<sup>24</sup> Indeed, this has led some

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<sup>19</sup> Copyright, Designs and Patent Act 1988, s 1.

<sup>20</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 17(2).

<sup>21</sup> Deazley (n 17) 161.

<sup>22</sup> James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law and Contemporary Problems* 33.

<sup>23</sup> *ibid* 40.

<sup>24</sup> Matthew David, *Peer to Peer and the Music Industry: The Criminalization of Sharing* (Sage 2010) 123-24.

to suggest that the real 'pirates' are the content industries themselves,<sup>25</sup> with Courtney Love declaring herself 'unafraid' of file-sharing technologies as she had been giving her music away for free under the 'old system' anyway.<sup>26</sup> This example demonstrates a mismatch between the purposes copyright is fulfilling in creative industries and the justifications outlined above. If copyright is no longer remunerating artists for their work, and control over their creations is divested to corporate entities, then it should be questioned whether copyright is still fulfilling its role as traditionally understood.

What the debate around file-sharing, and the evolution of the Internet generally, enables us to do is rethink how we approach copyright without disregarding its enforcement or significance. Instead what is needed is a change in attitude by powerful right holders to meet the realities of the online world. Copyright should perhaps be seen as a 'privilege' rather than a right,<sup>27</sup> in which those privileges are seen as derogating from the cultural space in the public domain rather than users having to defend any encroachment on the sphere of copyright protection.<sup>28</sup> Thus the focus of public interest should be seen as moving away from the encroachment on the public domain by extending the protection of copyright holders' rights, and towards greater user rights and access to copyrighted works.<sup>29</sup> This conception of copyright, with notions of free expression, sharing of ideas and creativity has at its heart the public domain and social requirement: copyright should be 'communistic' in character.<sup>30</sup> I therefore submit that copyright in the digital age should be underpinned by instrumentalist ideals.

This is not a nihilist argument against the IP system, but a belief drawn out of the reality of the world in which we now live, where digital culture is now the lifeblood of society, perhaps more so than we are consciously aware. All the music, videos and images that we share online, discuss in person, and enjoy on our own is the culture at stake here. As digital culture has risen to become the world's foremost religion, so too has its content become increasingly the subject of ownership rights.<sup>31</sup> Creative works, whether subject to copyright or not, *are* culture, and the Internet provides a unique platform for creation and exchange of this culture, with file-sharing technology one such tool of delivery. If file-sharing and the Internet is a tool of delivery of culture, then copyright is the medium of free expression for the digital age and should be viewed as such.

### Equivalence

Equivalence is the idea that there should be equal legal treatment between online and offline activities.<sup>32</sup> Clearly the evolution of the Internet and file-

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<sup>25</sup> *ibid* 120.

<sup>26</sup> Courtney Love, 'The Love Manifesto' <[http://www.salon.com/2000/06/14/love\\_7](http://www.salon.com/2000/06/14/love_7)> accessed 27 December 2011.

<sup>27</sup> Deazley (n 17) 161-62.

<sup>28</sup> *ibid* 160.

<sup>29</sup> Davies (n 4) 7.

<sup>30</sup> Thomas Edward Scrutton, *The Law of Copyright* (3rd edn, Clowes and Sons 1890) 290.

<sup>31</sup> Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin Books 2005) 12.

<sup>32</sup> Chris Reed, 'Online and offline equivalence: aspiration and achievement' (2010) 18 IJL & IT 248, 248.

sharing technologies has posed a new challenge for copyright holders through its facilitation of quick, easy and largely free (in terms of cost and access) sharing of copyrighted material. It is my belief that the unique nature of the Internet and the potential of file-sharing technologies should be recognised and thus the traditional approach to copyright, formulated for offline activities, should not be simply imported to online activities. Further, the online file-sharing debate has led us to bring a new consideration to the forefront of discussion about copyright, namely the balancing of interests between right holder's property rights, and the freedom of expression and information that users have been empowered with through the Internet.<sup>33</sup>

The decrease in control over copyrighted works has been said to necessitate an increase in the strength of copyright, which is what the entertainment industries are fighting for, and what the trajectory of copyright evolution is currently pointing towards.<sup>34</sup> The legislative history of copyright seems to accept this argument, with the Statute of Anne being enacted in response to the printing press, whereas control over the original manuscript was previously sufficient to prevent copying.<sup>35</sup> Meanwhile the Internet is continually prompting legislative response to its threat to copyright. However, I would adopt a contrary argument. The ease with which work can be disseminated without specialist equipment or technical knowledge suggests that right holders should accept that online activities cannot be policed in the same way as their offline equivalents can. For example, a digital version of a film can be copied as many times as the user wants for no cost in a way that is not possible with a version of that film in DVD format without specialist knowledge and equipment, not to mention possession of the DVD itself. In addition, the pressure on ISPs to help combat file-sharing sites poses unique problems for copyright law, as there is no offline equivalent to this Internet-specific actor.<sup>36</sup>

It is not only the nature of the technology and interests of unique shareholders that is problematic for right holders, but also the change in attitude by people engaging in online activities. I suggest that when people are engaged in online activities they do not think in terms of 'property' because digital property, IP, appears merely as text, an image, video, or audio. This does not correspond with the layperson's reified concept of property, which in this context would be a physical disc, which the average file-sharer would never dare steal from a record shop, for example. Whilst some may argue that equivalence is necessary to avoid the law's subjects having to make 'complex mental switches' in terms of conforming to different legal rules when going online, I believe that Internet users already undergo a change in attitude when online.<sup>37</sup> It is not so much that users intend or wish to infringe the law, but more that they don't feel constrained by the law. They are free.

You would be hard pressed to find someone who cannot but marvel at the wonders of the Internet, but its limitless possibilities cannot simply be

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<sup>33</sup> *ibid* 262.

<sup>34</sup> Boyle (n 24) 42.

<sup>35</sup> *ibid*.

<sup>36</sup> Reed (n 34) 272.

<sup>37</sup> *ibid* 253.

constrained when they become of particular irritation to one group of persons. The file-sharing war is not merely a conflict between property rights and the right to freedom of expression, but gives rise to broader consideration as to how the law should deal with technological evolution, and whether such development ought to be hindered by application of the laws of the offline world. The Internet and file-sharing technologies do allow for unlawful infringement of copyright, but they also demonstrate the creativity that the Internet itself embodies and which should be encouraged, not to mention the unparalleled level of global cultural exchange that they facilitate. Given that *'the whole of human development is derivative'*, I suggest that the best way to meet the social requirement function of copyright is to encourage those technologies that most enable freedom of expression.<sup>38</sup>

### ISP Liability

#### Why Notice-and-Takedown?

Litigation against file-sharing services has continued worldwide since the high profile case against Napster in its pre-commercial form,<sup>39</sup> as well as against individual file-sharers.<sup>40</sup> However, an emerging trend, mirroring that seen in defamation cases, has seen right holders initiate actions against ISPs because they are easily locatable and have 'deep pockets' to meet judgment.<sup>41</sup> This is in contrast to individual users of file-sharing services, who may be untraceable or be located in a jurisdiction where judgment against them would be hard to obtain. Central to an ISP's potential liability is their role as a 'gatekeeper' to the Internet,<sup>42</sup> meaning they are considered liable for the material they provide access to.<sup>43</sup> Given the increased efforts over the last decade to combat online file-sharing, the 'liability time bomb' that ISPs are sitting on looks ready to blow.<sup>44</sup>

Before considering in detail the law behind ISP liability, I want to consider what the entertainment industries hope to achieve by blocking file-sharing sites through ISPs. This discussion should be read in the light of, and in addition to, my preceding arguments on copyright. The powerful right holders' wish to rid the world of the plague of Internet 'pirates' exemplifies their view of creativity as capital, with their long established corporate monopoly over creativity threatened by the challenge posed by file-sharers.<sup>45</sup> Stopping the rot at the point of access can be seen as part of a *'plan to remake the Internet before the Internet remakes them.'*<sup>46</sup> This is not a war over 'property', but

<sup>38</sup> Justice Laddie, 'Copyright: over-strength, over-regulated, over-rated?' [1996] EIPR 253, 259.

<sup>39</sup> *A&M Records v Napster* 239 F 3d 1004 (9th Cir 2001).

<sup>40</sup> Andrew Charlesworth, Diane Rowland and Uta Kohl, *Information Technology Law* (4th edn, Routledge 2012) 333-48.

<sup>41</sup> Charlotte Waelde and Lilian Edwards, 'Online Intermediaries and Copyright Liability' (WIPO Workshop on Online Intermediaries and Liability for Copyright, Geneva, April 2005) 15 <<http://www.era.lib.ed.ac.uk/handle/1842/2305>> accessed 21 December 2011.

<sup>42</sup> *ibid.*

<sup>43</sup> Charlesworth et al (n 42) 341.

<sup>44</sup> Edwards and Waelde (n 43) 15.

<sup>45</sup> David (n 26) 119.

<sup>46</sup> Lessig, *Free Culture: The Nature and Future of Creativity* (n 33) 9.

economic survival.

The legitimacy of involving ISPs in the right holders' campaign to rid the Internet of file-sharing will be considered in Chapter III, but here I wish to point out that it illustrates the lengths they will go to maintain the status quo and how the battle reeks of hypocrisy. The protectionist stance of the entertainment industries over their creative capital stands in contrast to that of its formative years, which saw an industry built on piracy. Just as today file-sharers are challenging the monopoly of the creative industry, that same industry was seeking to subvert Thomas Edison's patent monopoly over filmmaking.<sup>47</sup> Rather than comply with the licensing system, the 'independent outlaws' started a movement using illegal and imported equipment and fled to California to escape the clutches of Edison's patents.<sup>48</sup> Twentieth Century Fox, one of the studios that obtained the injunction against BT in the *Newzbin2* case, was one such independent whose history lies in America's underground film market of the early twentieth century.<sup>49</sup> Further, one of the industry's most celebrated creative forces, Walt Disney, introduced an early embodiment of the much-loved character, Mickey Mouse, in the short film *Steamboat Willie* (1928), a cartoon parody of the film *Steamboat Bill, Jr* (1927).<sup>50</sup> This demonstrates that even such an eminent creator has borrowed and derived from the work of others. Fast forward eighty years, and the potential for file-sharing to provide the next Walt Disney with their creative impetus is evident.

Much like a forgotten star of Hollywood, that past has been consigned to the industry's history books. The past of piracy has been replaced by a present of protectionism over their intellectual capital.<sup>51</sup> Of course, it is not just the IP itself that they wish to protect; it is their business models, which are challenged by the zero-cost methods of delivery that file-sharing enables, and introduces a new competitor to the market – the consumer.<sup>52</sup> The consumer is permitted to compete in this online marketplace because of the access provided, and increasingly hosting capabilities, of their ISP. Thus by involving the ISPs in their battle, the right holders are able to stop the competitors at the source of their access to the market. Continuing the theme of preservation of profits, the notice-and-takedown method of enforcement places the financial and logistical burden of preventing access to infringing sites on the ISP, as clarified by the High Court when handing down the form of the order in the *Newzbin2* case.<sup>53</sup> This was the first time such an order had been handed down in the UK, but since the judgment, and the possibility for the granting of an injunction is known, it is likely that other ISPs will simply block the site rather than risk costly legal proceedings. For example, Sky blocked the same site later that year upon receipt of a court summons.<sup>54</sup> ISPs are large, visible

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<sup>47</sup> *ibid* 53.

<sup>48</sup> *ibid* 54.

<sup>49</sup> *ibid*.

<sup>50</sup> *ibid* 22-23.

<sup>51</sup> David (n 26) 55.

<sup>52</sup> *ibid* 57.

<sup>53</sup> *Twentieth Century Fox Film Corporation v British Telecommunications plc* [2011] EWHC 2714 (Ch).

<sup>54</sup> BBC News, 'Sky blocks access to Newzbin site after MPA move' (*BBC News*, 16 December 2011) <<http://www.bbc.co.uk/news/technology-16222425>> accessed 4 January 2012.

intermediaries and therefore their own commercial interests are best protected by not resisting the right holders' legal campaign.<sup>55</sup> A further point, though cynical, is that the ISP conducts the blocking so any uproar concerning censorship about the move is deflected towards the ISP, rather than towards the rights holder.

### The Law behind ISP Liability

I will now discuss how right holders are enforcing copyright through ISPs in the USA and UK in the context of both countries' free speech laws. I will look at how ISPs are used to attack the material itself, rather than pursue individual file-sharers as imagined by the Digital Economy Act 2010, for example.<sup>56</sup> For these purposes, I will define an ISP as an entity primarily providing access to the Internet, which may also provide online hosting facilities and content service provision to its subscribers.<sup>57</sup> The notice-and-takedown regimes have developed to reflect this increasing range of functions, although I will only examine the regimes in relation to the first two. Liability in the USA is governed by the Digital Millennium Copyright Act of 1998 ('DMCA'), whilst the position in the UK is governed by a patchwork of EU legislation.

The E-Commerce Directive<sup>58</sup> is implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002.<sup>59</sup> Articles 12-14,<sup>60</sup> E-Commerce Directive, deal respectively with those intermediaries acting as a 'mere conduit' (access provider), 'caching' material, and 'hosting' material. All three provide for immunity under certain conditions, but also allow for the possibility of injunctive relief against the intermediary to prevent infringement.<sup>61</sup> The hosting immunity is limited by the notice-and-takedown regime contained in those articles, requiring that upon receiving knowledge (actual or constructive) or awareness of the infringement, the ISP acts 'expeditiously' to block access to the material or remove the material.<sup>62</sup> It is this interplay between knowledge and removal of infringing material that forms the substance of the notice-and-takedown approach. This procedure is seen to be a limitation on liability, with the policy being to balance the need to limit ISPs' liability if they are to perform their function properly, with respect for a right holder's IP rights.<sup>63</sup> This should be read in the context of Art. 15(1), which prohibits Member States from imposing general obligations on ISPs to monitor their transmissions for evidence of infringement.

Section 512, DMCA provides a takedown regime for hosting ISPs that operates

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<sup>55</sup> Charlesworth et al (n 42) 73.

<sup>56</sup> Digital Economy Act 2010, ss 3-18.

<sup>57</sup> Broder Kleinschmidt, 'An international comparison of ISP's liabilities for unlawful third party content' (2010) 18 IJL & IT 332, 332-34.

<sup>58</sup> Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).

<sup>59</sup> SI 2002/2013.

<sup>60</sup> *ibid*, regs 17-19.

<sup>61</sup> E-Commerce Directive, arts 12(3), 13(2) and 14(3).

<sup>62</sup> *ibid*, arts 13(1)(e) and 14(1).

<sup>63</sup> Edwards and Waelde (n 43) 23.

in the same circumstances as the EU regime.<sup>64</sup> In contrast to the non-defined notice procedure in the E-Commerce Directive, which is for Member States to delineate,<sup>65</sup> the DMCA provides a detailed account of what should be included for a legitimate notice.<sup>66</sup> The requirements of notification being in writing, including a signature of the rights holder or an agent, contact information of the complaining party, as well as specific identification of the infringing material, imposes safeguards on the procedure that are not provided for in the EU legislation. This could have a substantial effect on the degree to which the procedure impinges on users' freedom of expression, as the risk of frivolous attempts to have material removed is lessened.

In terms of regulating ISPs as access providers, the Copyright Directive,<sup>67</sup> implemented by the Copyright and Related Rights Regulations 2003,<sup>68</sup> provides the possibility for injunctive relief against ISPs. In the UK the result is that an injunction can be granted against ISPs when they have actual knowledge of their service being used to infringe copyright.<sup>69</sup> As under the E-Commerce Directive, what constitutes 'knowledge' isn't defined, but the judgment in *Newzbin2* suggested a liberal interpretation based on 'use of the service to infringe' rather than on knowledge of specific infringements.<sup>70</sup> It seems notice by the rights holder could constitute knowledge,<sup>71</sup> setting up another notice-and-takedown mechanism underpinned by the threat of a court-ordered injunction.<sup>72</sup> This is born out of the recognition in Recital 59 of the Copyright Directive that such intermediaries are best placed to stop their services being used for infringing activities. This low threshold of knowledge is coupled with the fact that the 'conditions and procedures' of the injunctive measures are for Member States to decide upon, so in some cases technological measures could be implemented that are excessively strong.<sup>73</sup> There is, therefore, an increasingly broad avenue of enforcement for right holders at the cost of users' freedom of expression.

The DMCA provides a safe-harbour for ISPs providing Internet access provided they deal as a mere conduit. The statute narrowly defines a mere conduit along similar lines as the E-Commerce Directive, but differs in that it grants a broad immunity to the ISP.<sup>74</sup> Injunctive relief is only available against a mere conduit where it is to deny access to a specific, identified infringing subscriber, or to block access to a specific foreign site.<sup>75</sup> By not allowing or

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<sup>64</sup> Digital Millennium Copyright Act of 1998, s 512(c)(1)(A).

<sup>65</sup> E-Commerce Directive, art 14(3).

<sup>66</sup> Digital Millennium Copyright Act of 1998, s 512(3).

<sup>67</sup> Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Copyright Directive) art 8(3).

<sup>68</sup> SI 2003/2498, reg 27.

<sup>69</sup> Copyright, Designs and Patents Act 1988, s 97A(1).

<sup>70</sup> *Twentieth Century Fox v BT* (n 2) paras 147-48.

<sup>71</sup> Copyright, Designs and Patents Act 1988, s 97A(2).

<sup>72</sup> Toby Headdon, 'Beyond liability: on the availability and scope of injunctions against online intermediaries after *L'Oreal v Ebay*' [2012] EIPR 137, 144.

<sup>73</sup> Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16 (Enforcement Directive) recital 23.

<sup>74</sup> Digital Millennium Copyright Act of 1998, s 512(a).

<sup>75</sup> *ibid*, s 512(j)(1)(B).

incentivising widespread blocking of sites freedom of expression is protected to a greater degree than under the EU framework.

The EU legislation encourages right holders to send notices to ISPs and necessitates rapid action by ISPs to remove allegedly infringing material, meaning that action may be taken before investigations have been undertaken.<sup>76</sup> This practice could result in a 'chilling effect' of free expression of online material, and in the context of file-sharing, could stunt the evolution of a potentially valuable form of technology as ISPs block sites with an 'act now, ask later' attitude imposed upon them. These concerns mirror those arising from defamation cases, such as *Godfrey v Demon Internet*, in which an ISP was held liable for defamatory comments posted on a newsgroup that it hosted, which were falsely attributed to the claimant.<sup>77</sup> Demon Internet tried to claim a defence under s. 1, Defamation Act 1998 that it had no knowledge that its actions contributed to the publication of a defamatory statement, requiring a similar threshold of knowledge as under the EU provisions.<sup>78</sup> It was held that Demon Internet had received notification and that having failed to remove the post, was liable for libel. However, the post was said to have been made through a USA-based ISP, and so ascertaining the true identity of the poster would have required significant international cooperation, taking more time than the ten days over which the events were said to have taken place.<sup>79</sup> The case therefore indicates that an ISP could be caught between doing nothing and being denied protection of the immunity provisions, and removing material without being certain that it infringes copyright. This clearly has substantial implications for freedom of expression not only in terms of the legitimacy of preventing people accessing websites generally, but also in terms of the removal of public domain material.

The DMCA contains provisions that ameliorate those concerns to an extent. Section 512(f) provides that knowing misrepresentation of material as infringing, or mistake leading to removal of material, leaves that person liable in damages to that alleged infringer. Another vital provision allows for the content owner to file a 'counter notification' upon being told of the takedown order, receipt of which compels the ISP to automatically restore access to the material.<sup>80</sup> Meanwhile, there is not even a provision in the E-Commerce Directive that requires the operators of the alleged infringing site to be notified of the order, let alone defend themselves.<sup>81</sup> There is a startling lack of safeguards against false or unlawful encroachments on the free expression of users of the Internet under the European regime.

This seems to reflect the free expression laws laid down in both the USA and the UK. The USA's protection of 'free speech' is provided by the First Amendment, which gives unfettered protection to the right: '*Congress shall make no law... abridging the freedom of speech*'.<sup>82</sup> Following the enactment

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<sup>76</sup> Edwards and Waelde (n 43) 32.

<sup>77</sup> [2001] QB 201 (QB).

<sup>78</sup> Edwards and Waelde (n 43) 29.

<sup>79</sup> Ian J Lloyd, *Information Technology Law* (6th edn, OUP 2011) 580-81.

<sup>80</sup> Digital Millennium Copyright Act of 1998, s 512(g)(3).

<sup>81</sup> Edwards and Waelde (n 43) 32.

<sup>82</sup> Constitution of the United States, First Amendment.

of the Human Rights Act 1998, the UK's protection for freedom of expression comes from the European Convention on Human Rights ('ECHR'). Art. 10(1) grants the right of freedom of expression, but in contrast to the US Constitution, Art. 10(2) provides a series of limitations to this right. The greater controls and guidance in the USA's notice-and-takedown regime acknowledges the First Amendment's unfettered, entrenched protection of freedom of expression, by legislating for circumstances that could unduly corrode that security. In contrast, the fetters imposed by Art. 10(2) reflect the open-ended takedown provisions of the EU framework, which could present a far greater challenge to freedom of expression on the Internet. The Copyright Directive's injunctive remedy falls under the 'prescribed by law' qualification of Art. 10(2) so the right to freedom of expression has little protection.<sup>83</sup>

However, the situation is perhaps not as simple as that. In practice the DMCA appears to shift the balance of a user's right to freedom of expression and a right holder's property rights towards the latter, by initially allowing automatic application of the notice-and-takedown procedure without consideration of the credibility of the claim, as long as the notice criteria are met.<sup>84</sup> This differs to US laws governing ISP liability outside the realm of IP, which grants an almost blanket immunity to intermediaries for the unlawful content of third-parties, even if that intermediary was informed of it.<sup>85</sup> Under this legislation, users' free expression rights were protected over and above others' interests; for example, reputation in a defamation case.<sup>86</sup> In contrast, the E-Commerce Directive takes 'horizontal effect' towards intermediary liability, so the balance of interests is in theory the same regardless of the legal context.<sup>87</sup> By not adjusting the balance of interests when IP is involved, this initially gives the impression of more equal footing between fundamental rights, and economic and non-economic interests. However, the UK Regulations transposing that legislation maintain the requirement of expeditious takedown, as well as the elements of actual knowledge or awareness of some unlawful activity.<sup>88</sup> There is no qualification on that duty, such as France's liability requirement of knowledge of 'manifest' unlawful content, meaning that the UK scheme is likely to require automatic reaction, as in the USA, with the result that freedom of expression is inferior to right holders' interests.<sup>89</sup> Further, it implies that issues of copyright should be dealt with in the same way as child sex abuse, for example, eliciting further expediency in the takedown of material.

As well as standing as a mid-point between the between the competing interests of right holders and users, ISPs also have their own interests to protect as businesses in their own right, and so their actions also set up a similar interplay between themselves and users. There is an increasing burden placed upon ISPs by the EU framework to help combat online IP infringement,

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<sup>83</sup> *Twentieth Century Fox v BT* (n 2) para 177.

<sup>84</sup> Sophie Stalla-Bourdillon, 'The flip side of ISP's liability regimes: The ambiguous protection of fundamental rights and liberties in private digital spaces' [2010] CLSR 492, 495.

<sup>85</sup> Communications Decency Act of 1996, s 230(1).

<sup>86</sup> Stalla-Bourdillon (n 86) 494-95.

<sup>87</sup> Charlesworth et al (n 42) 74.

<sup>88</sup> Electronic Commerce (EC Directive) Regulations 2002, reg 19.

<sup>89</sup> Stalla-Bourdillon (n 86) 496.

which the European Court of Justice in *L'Oreal v eBay* has augmented through the introduction of a 'diligent economic operator' test to be able to take advantage of the intermediary immunities.<sup>90</sup> This imposes a self-regulatory duty on ISPs,<sup>91</sup> an approach that is traditionally the preference for US Internet regulation.<sup>92</sup> The use of the words 'economic operator' is apt, as an ISP's own economic interests would favour complying with an infringement notice without investigation due to the cost in terms of resources, time, and money that such an investigation would bring, as well as avoiding possible injunctive proceedings. The diligent economic operator seems to be a pre-emptive obligation to act, whether by takedown of material or site blocking.

There is a clear tension between the diligent economic operator test and the Art. 15(1) prohibition on general obligations to monitor.<sup>93</sup> On receiving knowledge or awareness of an alleged infringement, the ISP as a diligent economic operator, whose requirement to act is underpinned by the threat of an injunction, appears to be under a duty to prevent further infringement.<sup>94</sup> This concern is particularly acute when considering whether an injunction might force an ISP to prevent future infringements. It was held in *Newzbin2* that, applying *L'Oreal v eBay*,<sup>95</sup> an injunction could require an ISP to prevent future infringements of the same 'kind'.<sup>96</sup> This seems inconsistent with the approach in *Scarlet v SABAM*, in which the court guarded against active monitoring to prevent future infringement.<sup>97</sup> The potential scope of an injunction is therefore broad, and although its precise limits are unknown, the tension is resolved against users' freedom of expression.

### The Current Balance Between Copyright and Freedom of Expression

The EU notice-and-takedown procedure is characterised by its lack of standard procedure, which means that it is uncertain when the ISP has received sufficient knowledge or awareness, or what the limits to the scope of the injunctions are.<sup>98</sup> This fosters a culture of risk-avoidance, whereby the incentive to remove material outweighs the costs of not taking it down at all.<sup>99</sup> This exposes a fundamental flaw in the notice-and-takedown regime as its self-regulatory nature necessitates costs, which makes it less likely an ISP will invest resources in properly balancing its personal economic interests with

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<sup>90</sup> C-324/09 *L'Oreal SA v eBay International AG* [2011] ETMR 52, para 120.

<sup>91</sup> Francesco Rizzuto, 'The liability of online intermediary service providers for infringements of intellectual property rights' [2012] CTLR 4, 14.

<sup>92</sup> Charlesworth et al (n 42) 94.

<sup>93</sup> Rizzuto (n 93) 15.

<sup>94</sup> *ibid* 11.

<sup>95</sup> *L'Oreal v eBay* (n 92) paras 139-44.

<sup>96</sup> *Twentieth Century Fox v BT* (n 2) para 156.

<sup>97</sup> C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4, para 40.

<sup>98</sup> Ahlert C, Marsden C and Yung C, 'How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation' 10-11

<<http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf>> accessed 15 January 2012.

<sup>99</sup> *ibid* 11-12.

society's broader interest of freedom of expression.<sup>100</sup> Further, the apparent anti-censorship provision in Art. 15(1) has little impact on the availability and potential scope of injunctions against access providers.<sup>101</sup>

By contrast, the well-defined and standardised procedure of the DMCA means that US-based ISPs are aware of what constitutes proper notice for them to have to act and how they should act. Content publishers are able to respond, and the put-back mechanism ensures that material is not unduly removed from public access until the matter has been properly investigated. Further, the ISP will not be liable if this procedure is followed, meaning that their approach to notice-and-takedown is less risk averse.<sup>102</sup>

These conclusions are supported by the findings of Oxford University research known as the 'Mystery Shopper Tests'. Websites in the USA and UK were set up which contained extracts of public domain work and artificial complaints from an artificial association (which could be verified as such by an Internet search) were sent to US and UK ISPs to gauge their responses.<sup>103</sup> While the US ISP didn't remove the material, instead requesting more information in line with DMCA procedure,<sup>104</sup> the UK ISP removed the webpage the day after the complaint was sent and made no investigations.<sup>105</sup>

The move towards notice-and-takedown and intermediary liability generally is problematic in the sense that there are three stakeholders – users, copyright holders, and ISPs – with competing interests, which are being managed and balanced by the ISPs. Such is the result of the greater regulatory responsibility with which the European Court of Justice is bestowing on ISPs and the role which right holders wish them to take. Overall it seems that the balance reached by the notice-and-takedown procedure favours copyright holders rather than the free expression interests of the users on the Internet.

### **Tying the Issues Together**

#### Where Should the Balance Lie?

It is evident that there is a conflict between the views of the stakeholders in this tripartite relationship as to where the balance between copyrights and freedom of expression should lie. This is particularly sharp between those interests of the right holders and those of society as a cultural body, which, as should be evident from the preceding chapters, involves a discord between freedom of expression and copyright, characterised as creative capital (an economic interest). My contention is that the principle of freedom of

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<sup>100</sup> *ibid* 13.

<sup>101</sup> Patrick Van Eecke, 'Online service providers and liability: A plea for a balanced approach' (2011) 48(5) CMLR 1455, 1501.

<sup>102</sup> Lilian Edwards, 'Role and Responsibilities of Internet Intermediaries in the Field of Copyright and Related Rights' (WIPO Meeting on the Role and Responsibility of Internet Intermediaries in the Field of Copyright, Geneva, June 2011) 13  
<[http://www.wipo.int/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf)> accessed 15 January 2012.

<sup>103</sup> Ahlert et al (n 100) 17-18.

<sup>104</sup> *ibid* 19-23.

<sup>105</sup> *ibid* 24-26.

expression should be given greater weight in the file-sharing debate. It is only through adopting such an approach that we can properly reflect the open-ended form of the Internet in our digital rights agenda, enable maximum sharing of cultural content, and facilitate the evolution of new forms of technology.

File-sharing technologies not only represent a mechanism of receipt of creative works, but also provide a valuable outlet for a new breed of creative individuals to disseminate their works. As such, the traditional entertainment industry is not only under pressure from its consumers, but also from its potential contributors,<sup>106</sup> who are able to take advantage of the new democratisation of creativity facilitated by technology.<sup>107</sup> File-sharing enables a direct relationship between artist and audience, which symbolises the uninterrupted communication inherent in the architecture of the Internet, and epitomises the notion of freedom of expression.<sup>108</sup> As Lessig points out, copyright laws were not designed to make professional culture the only legal culture available for society.<sup>109</sup> This 'amateur culture' is not simply a flash-in-the-pan Internet phenomenon, but represents the way we have always conversed, expressed stories and the like.<sup>110</sup> It is only now that the Internet provides a platform to take this form of culture on a global scale that the question of its regulation has been raised, as non-commercial creativity is seen a threat to the commercial.<sup>111</sup> It is for this reason that the balance represented by the notice-and-takedown regime, particularly in the EU, must be redressed and proper weight given to freedom of expression.

There are increasing signs that a balance may at least be recognised, if not tilted in favour of my argument. The recent European Court of Justice ruling in *Scarlet v SABAM* is one such incidence.<sup>112</sup> In this case it was said that the injunction requested, which required an ISP to implement a filtering system to combat file-sharing, was so broad as to be incompatible with Art. 15(1), E-Commerce Directive.<sup>113</sup> Unlike the injunction requested in the *Newzbin2* case, the order was not 'clear and precise', and the technology was not readily available to the ISP at the time.<sup>114</sup> As such there was not a fair balance between the rights of the copyright holder and the ISP's freedom to conduct business under Art. 16, Charter of Fundamental Rights of the EU.<sup>115</sup> The court then went on to recognise that the effects of the injunction would not be limited to the ISP, but would impact upon the rights of the ISP's customers, particularly their freedom of expression, and that those interests needed to be properly

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<sup>106</sup> David (n 26) 41.

<sup>107</sup> Lawrence Lessig, *Code Version 2.0* (Basic Books 2006) 194.

<sup>108</sup> David (n 26) 146.

<sup>109</sup> Lessig, *Code Version 2.0* (n 109) 193.

<sup>110</sup> *ibid* 194.

<sup>111</sup> *ibid* 194-95.

<sup>112</sup> C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4.

<sup>113</sup> *ibid*, para 40.

<sup>114</sup> *Twentieth Century Fox v BT* (n 2) para 177.

<sup>115</sup> *Scarlet v SABAM* (n 114) para 49.

balanced.<sup>116</sup> This ruling at least draws an initial limit to the degree of regulatory responsibility to be imposed on an ISP, with that demarcation drawn through the language of fundamental rights and awareness that ultimately any sanction imposed on an ISP affects its customers. This approach was enabled by recognition that although IP is now a protected fundamental right, it is not inviolable.<sup>117</sup> This stands as an important check on the trend of strengthening copyright protection and could form the basis for a greater appreciation of free expression in online copyright discussion. Further, it reflects the balances inherent in copyright law, with the concept of the idea-expression dichotomy – the idea that copyright only resides the expression of ideas – providing a certain degree of free expression of ideas underpinning copyrighted works anyway.<sup>118</sup>

The notice-and-takedown regimes as they stand symbolise the ‘immaterial imperialism’ of the powerful right holders, and the attitude of copyright as a sword rather than a shield.<sup>119</sup> Copyright is has been faced with many technological developments before, and has the flexibility and durability to adapt to the digital age rather than become a casualty of it.<sup>120</sup> It is simply that the state of the Internet and increasing importance of human rights legislation disrupts the traditional normative order of property rights and other freedoms to make copyright subordinate to freedom of expression.<sup>121</sup> Our digital rights agenda must reflect this development to ensure copyright can carry out a contemporary instrumentalist justification of providing maximum social benefit.

### The Legitimacy of Notice-and-Takedown

Our digital rights agenda must be born in mind throughout the file-sharing debate. It appears that the future of both free expression values and the contemporary role of copyright are being driven forward by relatively few corporate right holders. It must be remembered that particularly freedom of expression is a fundamental human right, and that to entrust its future to corporate entities rather than the democratically elected government is deeply at odds with the right itself.<sup>122</sup> In this section I will discuss what I consider to be the central issue of legitimacy: the role of the ISPs.

As I mentioned in the previous chapter, notice-and-takedown regimes operate through a framework of self-regulation, with the ISPs enforcing the system.

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<sup>116</sup> Charter of Fundamental Rights of the European Union, art 11(1); *Scarlet v SABAM* (n 101) paras 50-53. See also C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (ECJ, 16 February 2012).

<sup>117</sup> *Scarlet v SABAM* (n 114) para 43.

<sup>118</sup> *Deazley* (n 17) 112-13.

<sup>119</sup> Brian Holmes, ‘The Emperor’s Sword: Art under WIPO’ (*World-Information Institute*, 11 December 2003) <<http://world-information.org/wio/readme/992007035/1078488424>> accessed 6 December 2011.

<sup>120</sup> Henning Wiese, ‘The justification of the information society in the digital age’ [2002] *EIPR* 387, 393.

<sup>121</sup> Michael D Birnhack, ‘Acknowledging the conflict between copyright law and freedom of expression under the HRA’ [2003] *Ent LR* 24, 31.

<sup>122</sup> Benoît Frydman and Isabelle Rorive, ‘Regulating Internet Content Through Intermediaries in Europe and the USA’ (2002) 23(1) *Zeitschrift für Rechtssoziologie* 41, 59.

This was described as ‘delegated self-regulation’ in the Mystery Shopper study to illustrate the way this duty has been imposed on ISPs through the ‘black veil’ of self-regulation.<sup>123</sup> To label the procedure as ‘privatised censorship’ sounds sinister, but it is the reality of a situation in which the one company is at once ‘judge, jury and enforcer’.<sup>124</sup> The crux of this whole discussion comes down to the question of why or, more pertinently, why not ISPs should undertake this role.

As Frydman and Rorive highlight, the nature of the Internet is such as to render national boundaries irrelevant, whilst government jurisdiction is so confined, causing a lack of effective control over online activity.<sup>125</sup> Through transferring the regulatory role to the ISPs who control the borderless communications, governments can regain a degree of control.<sup>126</sup> From their point of view this seems like a practical solution to the regulatory problem – everyone needs an ISP to gain access to the Internet, and they could be viewed as a regulatory ‘pinch-point’.<sup>127</sup> However, this fact is a reason why this type of responsibility should not be carried out by ISPs. In distinction from other intermediaries, amongst ISPs’ increasing repertoire of functions is that of access provision. This function is of huge importance to users as all other intermediaries’ services assume that users can access the Internet, and ISPs are therefore charged with both power and responsibility. There is an ongoing debate as to whether or not Internet access is, or should be, a human right, but it is indisputable that the Internet facilitates the exercise of traditional human rights in new ways.<sup>128</sup> It therefore follows that in providing access to the Internet, ISPs are increasingly becoming the foremost means of realising fundamental rights. The rise of file-sharing networks facilitating freedom of expression is just one example.

The importance of Internet access to a global network society necessitates a body other than an ISP to decide whether material should be lawfully taken down, if at all. The Article 19 civil rights group suggests that a judicial body should decide on what should be taken down, rather than a private company under duress from right holders.<sup>129</sup> However, an independent court would still have the task of recognising an ISP’s unique status amongst intermediaries and balancing the competing interests in a way that is appropriate for the digital age. *Scarlet v SABAM* suggests this could be possible, but a significant

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<sup>123</sup> Ahlert et al (n 100) 2.

<sup>124</sup> *ibid* 27.

<sup>125</sup> Frydman and Rorive (n 124) 44.

<sup>126</sup> *ibid*.

<sup>127</sup> Jim Killock, ‘Pressure for Private Internet Policing’ (*Open Rights Group*, 8 December 2011) <<http://www.openrightsgroup.org/blog/2011/private-policing-at-home-and-abroad>> accessed 17 January 2012.

<sup>128</sup> Vinton G Cerf, ‘Internet Access is Not a Human Right’ *The New York Times* (New York, 5 January 2012) <<http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?r=4>> accessed 11 January 2012.

<sup>129</sup> ‘European Commission: Freedom of Expression Needs Better Protection in Digital Communications’ (*Article 19*, 9 November 2010) <<http://www.article19.org/resources.php/resource/1652/en/european-commission:-freedom-of-expression-needs-better-protection-in-digital-communications>> accessed 19 January 2012.

jurisprudential shift is required to safeguard freedom of expression in relation to file-sharing technology. For example, counsel for BT in *Newzbin2* argued that BT's function was analogous to a postal service, whereby the infringing material was simply carried by BT and the infringement actually comes from using the services of another.<sup>130</sup> This analogy was rejected, with Justice Arnold preferring to hold that BT's services were used to infringe copyright.<sup>131</sup> The wide interpretation of 'use' increases the chances of an injunction being granted, further eroding online freedom of expression.<sup>132</sup> This decision clearly fails to recognise BT's role in simply providing access to its subscribers, with the impact that the site is blocked for all its subscribers, even those who would wish to use file-sharing technology for non-infringing purposes.

Preventing access to perfectly lawful material was an issue that the court in *Scarlet v SABAM* was concerned about, particularly as what is considered lawful will vary from country to country given the territorial nature of copyright laws.<sup>133</sup> A broader implication of this illegal removal of material is that the technology itself is at risk. When not even lawful material can be shared because of the proliferation of takedown notices the ability to take advantage of a hugely beneficial technology that could undoubtedly become a key communication tool is lost. Of course, this loss to society represents a victory for the right holders, whilst ISPs' business models would be largely unaffected. It is not this position of relative indifference that is problematic in ISPs' role of as policemen of communication but, as per Chapter II, the ease of compliance outweighs a process of thorough investigation and a careful balancing of the issues. Further, they lack the independence and expertise normally expected of a body fit to sanction encroachments on fundamental rights, and a lack of appetite to undertake that role is further detrimental to a regulatory scheme that requires the utmost engagement in the relevant issues. The issue of independence of thought is particularly prevalent nowadays as ISPs have expanded their range of services from just access provision to hosting, content provision, and many more besides. For example, three of the UK's largest ISPs in terms of subscribers also offer digital television packages.<sup>134</sup> This sits uncomfortably in the context of notice-and-takedown regimes, as it gives the impression of a convergence of interests between those wishing to remove material from the Internet and those doing the removing. Further, it distorts the role of ISPs away from simply providing the means for people to create and engage with online spaces. This development shifts the justification for participation in notice-and-takedown regulation from wishing to take advantage of the statutory immunities, to being a willing agent of the content industry. Given the highly competitive nature of the stakeholder industries, there is also an unfortunate possibility that anti-competitive practices could be carried out through the notice-and-takedown procedure, doing further violence to the purposes of copyright.<sup>135</sup>

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<sup>130</sup> *Twentieth Century Fox v BT* (n 2) para 101.

<sup>131</sup> *ibid*, paras 104-8.

<sup>132</sup> *Headdon* (n 74) 141.

<sup>133</sup> *Scarlet v SABAM* (n 114) para 52.

<sup>134</sup> 'Top 10 UK ISPs' (*ISP Review*, 15 November 2011)

<<http://www.ispreview.co.uk/review/top10.php>> accessed 20 January 2012.

<sup>135</sup> *Ahlert et al* (n 100) 11.

One suggestion to overcome these permutations could be to provide proper guidelines to ISPs to define acceptable limits to free expression and lay down guidelines against arbitrary censorship.<sup>136</sup> This would perhaps overcome problems of inexperience but questions of accountability would persist, as the scheme would still be self-regulatory. A solution could be the introduction of an independent public body into the relationship between right holders and ISP to manage their dialogue.<sup>137</sup> The Internet Watch Foundation ('IWF') performs a similar function in scrutinising takedown notices in the context of child sexual abuse material.<sup>138</sup> However, the IWF is not completely free of government interaction or influence as a legislative framework supports its task.<sup>139</sup> Further, its notice-and-takedown role still focuses on enabling ISPs to take advantage of the immunity provisions, rather than necessarily encouraging a fair balance of interests online.<sup>140</sup>

Solving this legitimacy issue takes us to the core of Internet regulation policy; namely, who should run the agenda on regulation – is it a public law concern, or one for private law? The notice-and-takedown procedures appear to regard the matter as one of private law, with non-compliance with a notice resulting in proceedings for an injunction. However, the overwhelming theme of this paper has been against leaving the future of fundamental rights with private actors. The global nature of the Internet and these issues arguably necessitate international cooperation, something that can only be achieved through government. This in itself is problematic in that such cooperation is near impossible given the wide range of aims and attitudes towards copyright and freedom of expression, with the differences between the DMCA and EU regimes evidence of that. It would be even harder to reach an international consensus when nations with more diverse legal, social and political beliefs are factored in. Government regulation of the Internet is still a controversial topic, with the likes of John Perry Barlow campaigning against their influence extending into online spaces.<sup>141</sup> It could also be that there would be a lack of appetite from some governments for performing a role similar to that currently played by ISPs. The US is in theory committed to the unfettered rights provided by the First Amendment, though this has been challenged by attempted legislative developments such as SOPA.<sup>142</sup> Meanwhile the consensus in Europe, at least on a supranational level, is that 'information society services' must thrive and contribute to the internal market, which arguably requires a free online market.<sup>143</sup>

These concerns should be read in the context of Waelde and Edwards' important observation that, *'[a]t its heart, this debate is as much about the*

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<sup>136</sup> Frydman and Rorive (n 124) 59.

<sup>137</sup> Edwards and Waelde (n 43) 33.

<sup>138</sup> 'About the Internet Watch Foundation (IWF)' <<http://www.iwf.org.uk/about-iwf>> accessed 20 January 2012.

<sup>139</sup> Charlesworth et al (n 42) 17-19.

<sup>140</sup> *ibid.*

<sup>141</sup> John Perry Barlow, 'A Declaration of the Independence of Cyberspace' <<https://projects.eff.org/~barlow/Declaration-Final.html>> accessed 20 January 2012.

<sup>142</sup> BBC News, 'Wikipedia joins blackout protest at US anti-piracy moves' (*BBC News*, 18 January 2011) <<http://www.bbc.co.uk/news/technology-16590585>> accessed 20 January 2012.

<sup>143</sup> E-Commerce Directive, art 1(1).

*regulation of technology as it is about copyright.*<sup>144</sup> For me, the file-sharing war needs to be seen as a more than just a two-party conflict, but as something that could set a template for our overall policy towards regulating the Internet and technology. A similar debate is occurring in the context of Google's Book Search Project, which aims to create an online library of books, which will variously be available in full, for preview, and for purchase.<sup>145</sup> However, this technology-enabled project is under threat from legal action by authors and publishers, who are contesting a deal proposed by Google whereby copyright holders would 'opt-out' if they didn't want their work to be included, as well as the fact that Google has to copy a whole book to display its 'snippets'.<sup>146</sup> The emphasis of the judgment was that copyright necessitated a right holder opting into such a project, rather than the reverse as proposed by Google.<sup>147</sup> This is the epitome of the 'permission culture' that Lessig fears, and the diminishment of the commons and encroachment of the public domain that was the subject of my first chapter.<sup>148</sup> Right holders, seeking to maintain their monopolies at the expense of society's benefit, could similarly hinder file-sharing technology. They have a history for this, with technologies from the piano roll to analogue tape recorders similarly threatened.<sup>149</sup> Technology will continue to develop, but with barriers being put in their way by an older generation seeking closure rather than competition, to what effect?<sup>150</sup>

It is important to consider the form these barriers take, given that they have effect in cyberspace. Lessig's *Code Version 2.0* argues that cyberspace demands a new form of regulation; one of code, as code is law in cyberspace.<sup>151</sup> A notice-and-takedown regime is a form of regulation by code, or West Coast regulation, as opposed to the 'command and control' East Coast regulation by legislation.<sup>152</sup> Laws directed towards real-world regulation rely on society's conformity, with punishments for deviating from a norm, but nevertheless do not preclude an individual from so deviating. The notice-and-takedown West Coast regime offers no alternative but to conform because the architecture of the online space has been designed to remove all element of choice.<sup>153</sup> As Brownsword argues, West Coast regulation is characterised by efficiency and control but at the cost of agent morality.<sup>154</sup> Whilst we lose the ability to do the 'wrong' thing, we also lose the choice to do the 'right' thing, leading to an erosion of a moral community.<sup>155</sup> It must be accepted that notice-and-takedown regimes are not in reality completely effective, as the same material

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<sup>144</sup> Edwards and Waelde (n 43) 59.

<sup>145</sup> <<http://www.google.com/googlebooks/library.html>> accessed 21 January 2012.

<sup>146</sup> Authors Guild v Google Inc., Class Action Complaint No 05 CV 8136 (SDNY); 'US Court derails Google book-scan plans' (*Out-Law*, 24 March 2011) <<http://www.out-law.com/page-11835>> accessed 21 January 2012.

<sup>147</sup> Authors Guild v Google Inc. (n 148) 35.

<sup>148</sup> Lessig, *Free Culture: The Nature and Future of Creativity* (n 33) 173.

<sup>149</sup> Giovanna Fessenden, 'Peer-to-Peer Technology: Analysis of Contributory Infringement and Fair Use' (2002) 42 JLT 391, 391-93.

<sup>150</sup> David (n 26) 57.

<sup>151</sup> Lessig, *Code Version 2.0* (n 109) 5.

<sup>152</sup> *ibid* 72.

<sup>153</sup> Roger Brownsword, 'Code, control, and choice: why East is East and West is West' (2005) 25 *Legal Studies* 1, 3-4.

<sup>154</sup> *ibid*.

<sup>155</sup> *ibid* 17-20.

can be placed elsewhere, and there are mechanisms to subvert technological barriers.<sup>156</sup> However, with the above discussion of the legitimacy of these code-based regimes in mind it seems wrong that we should be so dehumanised by private actors, losing not only the right to freedom of expression but also the ability to choose to freely express ourselves. The potential lack of accountability and transparency in West Coast regulation also sits uncomfortably with the prior mentioned possible abuses of the notice-and-takedown mechanism.<sup>157</sup>

### A Market-Led Solution

Throughout the research and writing process for this paper I have had in mind Lawrence Lessig's four modalities of regulation: law, norms, architecture, and market.<sup>158</sup> Solving the file-sharing debate of great importance, but equally of great difficulty. The analysis of Europe's notice-and-takedown procedure in Chapter II revealed a flaw in the legal provisions in that removal or blocking of material took precedent over users' freedom of expression. Further, ISPs as self-regulators created a regulatory framework that suffered from an inherent lack of legitimacy, whilst copyright was made to fulfill a suppressive role. The architecture of the Internet lends itself to regulation by code, but how and to what effect this would be implemented is unclear. Equally, the design of the Internet is based on and breeds freedom of expression and so constraining this through code is at odds with the values inherent in the Internet as an entity.

For me, it is important to recognise the context in which the law operates and particularly the relevance of the creative industries and their consumers. This entails a focus on the last two modalities, those of the market and norms. By looking at the issues through these modalities, a constructive solution might be found that could take advantage of these evolving technologies through new business models that will be embraced by consumers. This would represent a change from the attitude of 'forceful repression' that has seen right holders advance an increasingly strong copyright agenda through mechanisms such as notice-and-takedown.<sup>159</sup> The content industries have chosen to see file-sharing as representing contempt for copyright, rather than interpreting it as feedback of consumer dissatisfaction with their outdated delivery models.<sup>160</sup> Instead of seeking to relieve themselves of the technology, right holders should invest in it to create a mutually beneficial state of affairs in which consumers are happy with the services they are receiving and the content industry has control over their creative works.<sup>161</sup> The dominance of the Internet in modern life has fostered a culture of expecting everything and anything to be easily, quickly and cheaply attainable. This free culture represents a norm that must be accepted if the competing interests are to be reconciled, and puts an onus on the market to cater to it. The success of

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<sup>156</sup> Van Eecke (n 103) 1500.

<sup>157</sup> Brownsword (n 155) 14-17.

<sup>158</sup> Lessig, *Code Version 2.0* (n 109) 123.

<sup>159</sup> Aernout Schmidt, Wilfred Dolfsma and Wim Keuvelaar, *Fighting the War on File Sharing* (TMC Asser Press 2007) 145.

<sup>160</sup> *ibid* 186.

<sup>161</sup> Fessenden (n 151) 393-94.

services such as iTunes and Spotify represent one such constructive attempt to see some of the principles of file-sharing as an opportunity rather than a threat to right holders.

Of course, some users may spurn the opportunity to take advantage of such legally compliant mechanisms, but a concerted effort by the right holders to cater for the digital age would at least set up a constructive dialogue between stakeholders. Further, it would represent right holders embodying copyright's spirit of social enrichment by offering their works to the world. Whilst the market would not be as tightly controlled as it is in hard-copy creative works, it would undoubtedly be larger and overall is likely to represent an economically sound investment.<sup>162</sup> Crucial to this vision is that traditional file-sharing technologies could live on. The actual economic damage to the content industry is hotly debated, with some suggesting that, for example, downloads have not had a statistically significant effect on record sales.<sup>163</sup> Further, file-sharing can aid the sale of music by enabling users to sample music before purchasing it, and by allowing users to discover new artists who they might not otherwise have heard of whose music they might later buy.<sup>164</sup> It also allows undiscovered artists the opportunity to distribute their work and build a reputation without the expenditure of producing and marketing hard copies of their works. Bands such as the Arctic Monkeys already had an established fan base before signing with a record company thanks to the spread of their music by file-sharing sites, and are no doubt considered to be a valuable asset by their label.<sup>165</sup>

It is possible that by looking towards the state of the market for creative content a less destructive solution to the perceived problem of file-sharing could be found, which would instead see it as an opportunity. Viewed in this way, file-sharing technologies could even be beneficial to the content industry. A constructive approach to market reform would also do less violence to users' freedom of expression online, and would preserve the social enrichment function of copyright. Such a solution would not require copyright to continue on its trajectory of greater holder rights and a diminishing commons. Further, the position of ISPs as key facilitators of online communications would be preserved, rather than distorting them into virtual policemen along with the apparent privatisation of our digital rights.

## Conclusion

Throughout this paper, I have presented the file-sharing phenomenon as one of competing interests. There are those of the file-sharers, exercising their right to freedom of expression; and those of the right holders, seeking to

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<sup>162</sup> Boyle (n 24) 43.

<sup>163</sup> Felix Oberholzer-Gee and Koleman Strumpf, 'The Effect of File Sharing on Record Sales: An Empirical Analysis' (2007) 115 *Journal of Political Economy* 1.

<sup>164</sup> Lessig, *Free Culture: The Nature and Future of Creativity* (n 33) 68-69.

<sup>165</sup> David (n 26) 147-48.

protect their IP, which has become a byword for creative capital and monopoly. These have been joined by a third party, that of the ISPs, drafted into the war on file-sharing by the right holders, desperate to bring order to the expansive battle ground that is the Internet where the users occupy the high ground.

In Chapter I, I presented a view of copyright that had social utility at its heart, playing to the strengths of the digital world that we now occupy. If adopted, this instrumentalist view would represent a check on the steady encroachment on the intellectual commons by copyright, and would be complementary to the realities and possibilities the Internet now offers in terms of world-wide delivery of cultural material. However, a further investigation could be to question whether copyright is still relevant in the online context. Chapter II saw an analysis of the liability regimes for ISPs and the notice-and-takedown procedures operating in the USA and UK. The overall effect of these procedures was the erosion of users' freedom of expression with copyright as the suppressing tool, with the effect that the rights of copyright holders were disproportionately valued ahead of the right to freedom of expression. Chapter III suggested that the balance should be redressed in favour of freedom of expression and questioned the legitimacy of the self-regulatory role imposed upon ISPs. The regimes fail to recognise the distinguishing features of ISPs from other intermediaries; that in providing access to the Internet, they facilitate users realising fundamental rights. I highlighted the perpetuation of these issues caused by the uncertainty as to how the Internet as an entity should be regulated. A constructive solution of market reform, which would help to change user norms was suggested. It is hoped that such an approach would see the content industry embrace file-sharing technology to the mutual benefit of themselves and users. Perhaps then we could drop the ugly rhetoric of war surrounding this technological development and that has peppered my writing.

This debate has been sparked by the unique immaterial nature of IP, which has challenged right holders' monopolies based on the scarcity of traditional media.<sup>166</sup> Their attempts to prematurely extinguish this new technology are based on a fear for their profit margins, not creativity, and have been played out through a manifest abuse of the copyright system. There is a growing resistance by those who know the Internet best to the ongoing struggle to contain it. This was most evident in the recent backlash against the proposed SOPA<sup>167</sup> and PIPA<sup>168</sup> legislation in the USA, with many of the Internet's cornerstone sites speaking out against the Bills.<sup>169</sup> Wikipedia's statement included the pertinent phrase: '*We want the Internet to remain free and open, everywhere, for everyone.*'<sup>170</sup> This attitude has been fostered in relation to Web 2.0 services, and promisingly looks to define our expectations as to our freedom of expression on the Internet. Technology must be allowed to grow

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<sup>166</sup> David (n 26) 168.

<sup>167</sup> Stop Online Piracy Act (2011-2012) HR 326 (SOPA).

<sup>168</sup> Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (2011-2012) S 968 (PIPA).

<sup>169</sup> BBC News, 'Wikipedia joins blackout protest at US anti-piracy moves' (n 144).

<sup>170</sup> Sue Gardner, 'Wikipedia's community calls for anti-SOPA blackout January 18' (16 January 2012) <<http://blog.wikimedia.org/2012/01/16/wikipedias-community-calls-for-anti-sopa-blackout-january-18/>> accessed 24 January 2012.

for the benefit of everyone, everywhere, regardless of whether they seek to create or consume. Such an approach would encompass the popular appeal of a Number One song with the legacy of an Oscar winning picture.



## Protecting the reputation of defamation law: How defamation law can remain justified in an age of globalized communications, science, human rights and democratic values

*Charlotte Leigha Cruise.*

The 59,511 signature strong petition for libel reform clearly demonstrates the impetus for reform of Anglo-Welsh defamation law. This dissertation identifies the increased importance of freedom of expression in modern society as underlying the need for reform, with the emergence of the internet highlighting the inadequacies of the current law. It is argued that the increased importance of free expression is a result of three ideological developments in society; the ideal of representative and accountable governance, the ideal of the advancement of society and societal goods through science and the recognition of freedom of expression as a fundamental human right. This dissertation determines what limits theoretically should be imposed on the protection of reputation in order to achieve these ideals and compares this position to the protection afforded to reputation under the current law and in the coalition's proposals for reform. From this comparison the changes needed to meet the demands of modern society become apparent. To achieve the ideal of representative and accountable governance it is argued a new statutory defence for information which is conducive to political discourse and is honestly believed to be true should replace the Reynolds privilege. It is also considered a single publication rule bolster the protection of such material and provide a more principled and pragmatic approach to the reality of multiple publication over the internet. To assist the advancement of society and societal goods through science it is argued that it is justifiable on utilitarian grounds to provide absolute privilege to scientific expression.

To reflect the recognition of free expression as a fundamental human right it is proposed that further reforms are needed including limiting the right to sue in defamation to natural persons and implementing statutory reform of the defences of 'justification' and 'honest comment'. It is proposed that the defence of 'justification' is renamed 'truth' and should be available for imputations not complained of, as this may help the defendants demonstrate that the damage to the claimants reputation is not as extensive as alleged. It is proposed that the defence of 'honest comment' should be renamed 'honest opinion' and should require a public interest element. It is concluded that the implementation of these proposals will allow for a principled approach to the

protection of reputation that is aligned with modern demands. However, it is recognised that this may only be the first step on the road to achieving a balance between protection of reputation and freedom of expression that is appropriate to modern society. It is recognised to fully achieve this aim the disincentive to free expression, embodied in the potentially high cost of defending an action in defamation, must also be combated.

## Introduction

It has been argued that defamation law is 'unsatisfactory'.<sup>1</sup> Arguably this is mainly because the current law is too restrictive of free expression. This view is adopted by the government in justifying its proposals for reform in the Defamation Bill 2010<sup>2</sup>; they claim that consultation with interested parties and recent reports<sup>3</sup> demonstrate 'mounting concern ... that our defamation laws are not striking the right balance, but rather are having a chilling effect on freedom of speech'.<sup>4</sup> This statement signifies that it is ultimately the level of protection offered by the law itself that is the root cause of the unjustifiable inhibition of freedom of expression. Whilst there is clearly extensive literature which indicates that the costs of defamation cases are very high,<sup>5</sup> it is argued that fundamentally the cause of the concern that free expression is being unduly inhibited is that the substantive law does not offer protection to expression in scenarios in which modern values and interests demand that it should. It can be seen that if individuals felt that their expression was adequately protected, then they would not unduly censor their expression. This is because they would be confident that there was little risk of losing an

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<sup>1</sup> HL Deb 09 July 2010, vol 770, col 423

<sup>2</sup> Defamation Bill HL Bill (2010-2011) 55/1

<sup>3</sup> See Ministry of Justice, *Draft Defamation Bill Consultation Paper* (CP3/11, March 2011) pg 5. 'Parties' includes; 'non-governmental organisations; the media and publishing industry; the legal profession; internet-based organisations; and representatives of the scientific community'. 'Reports' include; Ministry of Justice, *Report of the Libel Working Group* (23 March 2010); Culture Media and Sport Committee, *Press Standards and Privacy, Second Report* (Cm 362, 2009); English PEN & Index on Censorship, *Free Speech is not For Sale: The Impact of English Libel Law on Freedom of Expression* (English PEN & Index on Censorship London, 2009)

<sup>4</sup> Ministry of Justice, *Draft Defamation Bill Consultation Paper* (CP3/11, March 2011) pg 3

<sup>5</sup> Data from a study of costs in 139 cases by the MLA shows the average (mean) of costs in defamation cases to be £135,000 (using only the cases in which the defendants costs were not skewed by being represented as zero due to the use of in house lawyers). Data analysis from; David Howarth 'The cost of libel proceedings: a sceptical note' [2011] CLJ 397 Based on figures from; Jackson L.J, *Review of Civil Litigation Costs: Preliminary Report*, Appendix 17. It is also claimed that the costs of defamation cases are on average three times more than the damages awarded; Jackson L.J, *Review of Civil Litigation Costs: Preliminary Report*, pg 342. Furthermore a comparative study of estimated costs of defamation proceedings claims that English Libel cases cost 140 times more than the European average; T. Larson and D. Leonardi, 'A Comparative Study of Costs in Defamation Proceedings across Europe', Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies University of Oxford (December 2008).

action brought in defamation, therefore having to pay the potentially considerable costs.

This dissertation aims to unpick the motivations behind the desire to greater protect of freedom of expression and reputation. Thus discovering how the balance the law strikes between two rights can be recalibrated to better serve modern values and interests. Chapter 1 identifies the situations in which modern sensibilities and values demand that the balance between protection of reputation and freedom of expression be reassessed. These will provide the principles to which, it is argued, defamation law must conform in order to remain justified. In Chapter 2 these principles will be employed to analyse the extent to which the current law is justified in light of modern values and interests. The current law, identified as having significant effect on the balance struck between freedom of expression and protection of reputation, will be compared to the principles uncovered in the first chapter, to discover how the law can be modified in order to remain justified in light of modern sensibilities. Where appropriate this task will be assisted through analysis of relevant proposals in the Defamation Bill.<sup>6</sup> Finally the extent to which implementing the modifications suggested can enable defamation law to remain justified will be considered.

### **To what extent should the law of defamation protect reputation to remain justified in modern society?**

This chapter aims to determine the extent to which the law of defamation should protect reputation. This will be done through uncovering why reputation is protected from the publication of falsehoods and balancing this against relevant reasons for which free expression is protected. From this the situations can be identified in which protecting reputation would be an unjustifiable infringement on free speech.

It can be seen a person's reputation needs protection because if they are defamed they suffer damage to their identity. Arguably if they are defamed they are subjected to damage in how they are perceived by others and in how they perceive themselves. It can be seen that an attack on an individual's reputation is damaging to their identity because reputation is inextricably linked to identity. Support for this viewpoint can be seen in sociological and psychological theories such as labelling theory<sup>7</sup> or the theory of self-fulfilling prophecy.<sup>8</sup> Following this a person who has been defamed is potentially subject not only to external damage of their reputation (as others now see them in a negative light) but they are susceptible to internalisation of this new identity, as they take on the characteristics that are imposed on them in a cycle of positive feedback of belief and behaviour. In this sense the defamed individual has had their original autonomous identity destroyed by the defamatory statement and replaced with a less favourable one. Arguably this is the primary harm that the protection of reputation aims to prevent; because a

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<sup>6</sup> Defamation Bill HL Bill (2010-2011) 55/1

<sup>7</sup> Stephen E Brown et al, *Criminology: Explaining Crime and Its Context* (7th edn, Elsevier 2010) 321-334

<sup>8</sup> See Generally; Robert K Merton, *Social Theory and Social Structure* (Free Press 1968)

claimant will not succeed in an action to protect their reputation (regardless of the negative social or financial ramifications of a lowered reputation) if such a reputation does not match their true identity. This can be seen in the operation of the defence of justification being such as to treat 'true accusations as ... lowering reputation only to its rightful level'.<sup>9</sup> From understanding that the exact harm that defamation law aims to protect is identity harm then we can begin to conceptualize scenarios in which such harm may be inflicted and therefore determine the situations in which free expression should be curtailed in order to sufficiently protect reputation.

It can be seen that a statement that is capable of lowering the reputation of an individual that is true, should not be protected by defamation law. This is because there is no risk of harm to the individual's identity, as the identity imposed on the individual through the statement corresponds to their actual identity. Therefore even if undesirable consequences flow from the statement such as differential treatment or financial repercussions these do not flow from harm to the individual's actual identity and therefore should not be protected by defamation law. The balance of harm to reputation can therefore be seen as falling in favour of free expression of the truth regardless of the circumstances of the expression.

If a defamatory statement is false then a greater tension arises between protection of reputation and free expression. This is because in the statement may cause identity harm, as the statement does not reflect the individual's original autonomous identity but dangerously imposes a less favourable one onto them. In order therefore to justify free expression in these circumstances we must identify the harm to the individual that arises from the prohibition of free speech and compare this to the identity harm caused by the expression to determine whether it is in the public interest to protect reputation against the free expression of falsehoods. Arguably the harm an individual sustains from being prevented from expressing themselves is also linked to identity. This is because the ability to express oneself freely is essential for one's 'freedom of conscience, personal identity and self-fulfilment'.<sup>10</sup>

Following this it can be seen that violation of this right is also tantamount to striking at an individual's identity. It can be seen therefore that protecting free expression and reputation directly conflict. Therefore a choice must be made as to which right should prevail, based on the level of harm to identity that may result from denying protection to either right in certain situations. This may be done by making a distinction between when someone believes a statement to be true and when they do not. Arguably expressing something you do not believe to be true is not expressing oneself in a way that is beneficial to identity. This is because it is argued the reason free expression enables self-understanding and development is that expressing one's own ideas makes them more concrete and accessible thus one understands them

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<sup>9</sup> Jenny Steele, *Tort Law; Text Cases and Materials* (2<sup>nd</sup> edn, OUP 2010) 771

<sup>10</sup> D Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edition, OUP 2002) 762-6 in Jenny Steele, *Tort Law Text Cases and materials* (2<sup>nd</sup> edition, OUP 2010) at 754

self more.<sup>11</sup> Thus expression of material that is not one's own idea cannot enhance the individuals understanding of themselves which is essential to identity. Therefore it can be seen that the harm to the defamed individual's identity to in such situations is greater than that to the person prohibited from self-expression. Furthermore as it is against the interest in protecting individuals identity through protection of reputation to allow statements that are untrue. Therefore arguably protection of free expression should not extend to situations which may encourage the expression of untrue statements. Consequently if a statement is false and not believed to be true it can be seen that defamation law should protect reputation at the expense of free expression.

This however leaves unresolved the conflict between the two rights in scenarios in which the individual believes their statement to be true. Here it is harmful to the identity of one individual to allow free expression but it is also harmful to another's identity to limit it. To afford proportionate protection to these competing rights, we must exercise an analysis of the comparable degrees of harm to find a solution that minimises the potential identity harm to both parties concerned. Arguably this should be that free expression of defamatory and false material should be allowed only when it is clearly in the form of an opinion, representing the honest belief of the person expressing it. This still allows for expression but minimises the potential harm to an individual's reputation because arguably people are less likely to uncritically attribute the new identity to the individual. This is because it is presumed that if the statement is not asserted as fact a reasonable recipient of the information arguably will not simply accept it as factual. Thus it can be seen that they will not automatically lower their opinion of the individual defamed. Instead they may be inclined to dismiss the expression as mere opinion or critically assess it which may lead to discovering of the truth. Therefore it can be seen that the harm done by such statements of opinion will be minimal. Thus it can be seen that the limit of the protection of reputation is reached when the statement in question is clearly an opinion and that opinion is one that is honestly held by the person expressing it.

If a statement is capable of lowering the reputation of an individual but cannot be proven to be true or false then we are arguably faced with the dilemma that one cannot identify whether it is more or less harmful to the individual to prohibit the publication of such material. If the statement is true from the analysis above it is clear there is more harm in prohibiting the publication. However if it is false there is more harm in publishing the material (unless it is a clear honest opinion). Therefore in order to find a justification for allowing or prohibiting the publication of such material we must look beyond conflicting concerns about where identity harm may lie. In such situations it has been argued that the only resolution can be to take a utilitarian approach.<sup>12</sup> Taking this stance if there can be proven to be greater good for the public as a whole in receiving particular information then this outweighs any harm caused to the individual whom the statement defames. The European

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<sup>11</sup> F Schauer, *Free Speech: A philosophical enquiry* (CUP 1982) 55

<sup>12</sup> This approach is adopted to justify free expression in; John Stuart Mill, *On Liberty* (The Liberal Arts Press, NY 1956) Ch 2

Court of Justice has explained that the importance of protecting free expression as 'one of the essential foundations of a democratic society and one of the basic conditions for its progress'.<sup>13</sup> From this it can be seen that free expression should be protected for reasons beyond the individual concerns previously discussed. It can be seen securing 'progress' and 'democracy' are in the interests of public as a whole. Therefore applying utilitarian reasoning it can be seen that anything which may advance these ideals should not be prevented on the basis that it harms the individual. Subsequently it is proposed that free expression should be protected at the expense of reputation if it can lead to the advancement of these which represent the greater good for society.

Arguably free expression is a basic condition for progress because progress can only be achieved through ascertaining the truth which requires free expression. This is because having the widest possible set of information in public circulation means debate can take place in which there is the opportunity for the truth to emerge<sup>14</sup> or for error to be replaced by truth.<sup>15</sup> Mill argues that this is because inevitably wrong ideas 'yield to fact and argument' but this is only possible if such fact and argument are allowed to face these ideas.<sup>16</sup> It can be seen however that only 'truths' which are capable of achieving the progress should be protected on the utilitarian grounds advanced above. Therefore the definition of progress and how this is achieved presently must be considered. Arguably progress is anything that advances the earthly 'comfort and happiness' of man.<sup>17</sup> It can be seen that for the conditions in which man lives to maximise his comfort and happiness anything which causes discomfort must be eliminated. Arguably the only way we can achieve this is through understanding the operation of the undesirable phenomena enough to understand how to eliminate them. Science can readily be seen as the predominant means by which society seeks to understand phenomena, therefore in order for progress to be achieved arguably scientific discovery and understanding is essential. Some argue that science understood as 'systemized positive knowledge' is the only human endeavour which can truly be seen as leading to progress.<sup>18</sup> Without the realisation of this more accurate or 'truthful' understanding of phenomena it is proposed such phenomena cannot be manipulated effectively to further advance the ends desired by society, consequently the ideal of progress cannot be attained. Therefore it can be seen that free expression should be protected in order to achieve the modern ideal of progress through science. Consequently it can be seen that in order to secure the ideal of progress any information regardless of its defamatory nature which could trigger investigative discourse eventually uncover the scientific truth should be allowed. Even demonstrably false defamatory

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<sup>13</sup> *Handyside v UK* (1976) 1 EHRR 737 [49]

<sup>14</sup> D Feldman, *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> edition, OUP 2002) 762-6 in Jenny Steele, *Tort Law Text Cases and materials* (2<sup>nd</sup> edition, OUP 2010) at 754

<sup>15</sup> John Stuart Mill, *On Liberty* (The Liberal Arts Press, NY 1956) 21, 25

<sup>16</sup> John Stuart Mill, *On Liberty* (The Liberal Arts Press, NY 1956) 25

<sup>17</sup> Robert K Merton, 'Science, Technology and Society in Seventeenth Century England' (1938),

Osiris 4, 360 at 592. For a sociological account of the development of this viewpoint and its relation to ideal of progress through science see 591-597

<sup>18</sup> George Sarton, *The Study of The History of Science* (Harvard University Press, 1936) 5

statements should be allowed in this vein because it can be seen that in the long term free speech in this area would prevent misinformation as scientific theories and practices may be critically discussed and the truth may be discovered. This hindrance of scientific discourse is one of the reasons it is claimed that the current law is unjustifiable. This can be seen in the libel reform campaign's use of proceedings brought against Dr Singh's criticism of medical claims made by certain chiropractors as an example of the need to better protect free speech.<sup>19</sup> Moreover the desire for greater protection of scientific discourse to aid progress through science is embodied by the 'keep libel laws out of science' campaign.<sup>20</sup>

Arguably the utilitarian argument can be applied similarly to justify the protection of free speech that secures the modern ideal of democracy. It can be seen that free expression is essential to democracy if one understands, as it submitted it commonly is, that the basic premise of democracy is that sovereignty is located in the population at large.<sup>21</sup> This is because it can be seen to ensure the exercise of their sovereignty the electorate need to receive all the relevant material that may be necessary to make a decision about how they should be governed.<sup>22</sup> Arguably limiting the dissemination of such information, through prohibiting free expression, hinders the capacity of the electorate to make a rational and informed decision regarding their governance thus their capacity for self-governance and ergo democracy is inhibited.<sup>23</sup> Furthermore if democracy requires the sovereignty lies in the people then it logically follows that governments are subservient to the will of the sovereign.<sup>24</sup> Therefore it can be seen that free expression is essential to allow the electorate to criticise the government and ensure that it is the will of the sovereign alone which is realised. To assess whether the government is ensuring that the best interests of the majority are met and to ensure that the electorate have the capacity to make decisions that can enforce their will it can be seen that it is essential that there is free expression surrounding serious social and political issues which indicate governmental failures or malpractice. Without political discourse surrounding major societal issues, participation in democracy would be reduced and thus the representative and democratic nature of governance would be reduced. Therefore it can be seen that free expression is essential to democracy.

However it has been proposed that protection of reputation itself serves democracy. Lord Nicholls recognised that protection of reputation is not only important for the individual but it is also important for the well being of society because it influences the decisions people make.<sup>25</sup> Arguably one of the

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<sup>19</sup> *British Chiropractic Association v Singh* [2010] EWCA Civ 350, 1 WLR 133; PEN & Index on Censorship, *Free Speech is not For Sale; The Impact of English Libel Law on Freedom of Expression* (English PEN & Index on Censorship London, 2009) 20

<sup>20</sup> Sense About Science, *Background; Launch of the Keep Libel Laws out of Science Campaign*. <<http://www.senseaboutscience.org/pages/history-behind-keep-libel-laws-out-of-science-.html>> accessed 20th February 2012

<sup>21</sup> F Schauer, *Free Speech: A philosophical enquiry* (CUP, Cambridge 1982) 35

<sup>22</sup> F Schauer, *Free Speech: A philosophical enquiry* (CUP, Cambridge 1982) 38

<sup>23</sup> F Schauer, *Free Speech: A philosophical enquiry* (CUP, Cambridge 1982) 38

<sup>24</sup> This argument is implicit in; F Schauer, *Free Speech: A philosophical enquiry* (CUP, Cambridge 1982) 39

<sup>25</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127, 200

most important decisions people make that affects others is how they are governed. Therefore it can be seen that in such situations it is essential that they the public are not misinformed by false defamatory statements. Arguably for the electorate to make 'an informed choice' they need to be 'able to identify the good as well as the bad'.<sup>26</sup> If the defamation causes them to overlook the good, it is detrimental to the realization of the will of the electorate. This is because they are prevented from identifying and electing an option that may best serve their interests. It can be seen that these considerations do not undermine the arguments advanced above that free speech is essential to democracy. This is because it is acknowledged that reputations will only suffer prolonged damage if there is no 'opportunity to vindicate one's reputation'.<sup>27</sup> Arguably with public figures such as politicians there is ample opportunity for them to protect their reputation against scandal because of the attention they demand. Therefore it can be seen that their reputation if wrongly defamed will only suffer temporary damage because they have the opportunity to re-assert their good name thus free expression can be seen as preventing the dangerous misguidance of the public.

However it is not guaranteed that every politically significant individual will have adequate opportunity to vindicate their reputation. Therefore it can be seen that certain safeguards to reputation must be put in place in order to prevent misguidance of the public which could hinder the operation of democracy. Arguably restricting speech to clear and honest opinions as previously suggested<sup>28</sup> would not be appropriate. This is because when an opinion based approach is taken serious issues that might be politically important may be trivialised as a matters of opinion rather stimulating important engagement or discourse. Furthermore not protecting material that may be conducive to political discourse, because it is not presented as a mere opinion, could have a chilling effect on important political information. This is because publishers may feel more confident in publishing mere opinions than factually orientated articles. Arguably this concern about the level of protection afforded to factual material causes the press to become 'polemical' and to avoid serious factually orientated publications.<sup>29</sup> It can be seen that an appropriate safeguard to prevent misinformation would be that the individual expressing opinion must honestly believed it is true. If someone does not honestly believe their statement to be truthful it can be seen that this indicates that it does not have a reliable basis thus is unlikely to be true.

In conclusion from the analysis it can be seen that for defamation law to remain justified it should not infringe upon free expression when: The statement is truthful. The statement takes the form of an opinion and that opinion is honestly held by the individual expressing it. The statement is in the public interest of enabling or promoting political discourse, provided that the expression is honestly believed to be true by the person expressing it. The statement is directed at scientific theory or practice.

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<sup>26</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127, 200

<sup>27</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127, 200

<sup>28</sup> See page 5

<sup>29</sup> Eric Barendt et al, *Libel and the Media: The Chilling Effect* (Clarendon Press 1997) 193

## **How can defamation law protect reputation to an extent that is justifiable in modern society?**

This section will analyse areas of the current law in which it is considered that the appropriate balance between freedom of expression and reputation as outlined above is not clearly struck.

### Justification

The first situation identified as requiring protection is when the defamatory statement made is truthful.<sup>30</sup> The defence of justification currently is the most robust form of protection such statements have. However it can be seen that defence does not offer a level of protection that is justifiable in light of modern values.

Firstly it can be seen the name 'justification' is potentially misleading thus may unjustly prohibit free expression. It is argued that this is because 'justification' conveys to the layperson that the defence applies only statements which have a valid reason for publication.<sup>31</sup> This may cause the belief that truthful publications, which are motivated by malice or are not in the public interest, will not be covered by the defence.<sup>32</sup> However the defence is available to those who are actuated by malice and for matters that are not in the public interest.<sup>33</sup> This potential confusion can be seen as leading to an unjustifiable suppression of free expression because individuals may be too afraid to make truthful expressions which are motivated by malice or are not in the public interest because they wrongly believe these would not be protected by the defence. This is an undesirable restriction on free expression as all statements which are truthful should be allowed to be expressed as no harm to an individual's autonomous identity can arise from them.<sup>34</sup> For this reason the proposal in the Defamation Bill 2010 that the defence be put on a statutory footing and renamed 'truth'<sup>35</sup> is arguably a welcome reform that may go some way to reducing the undesirable inhibition of free expression which may arise due to the public's misconceptions of the current law.

It can be seen that it is unjustifiable in light of modern interests for the defendant to have to justify a greater level of harm than they have actually inflicted because it offends the ideal of proportionate protection of convention rights.<sup>36</sup> Arguably however this may be a reality because of the way in which Section 5 of the Defamation Act 1952 operates. Section 5 is operative in scenarios in which the publication complained of contains 'two or more distinct charges.'<sup>37</sup> That is to say that the allegations in the publication can be

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<sup>30</sup> See pages 3, 9

<sup>31</sup> Patrick Milmo et al, *Gately on Libel and Slander* (11th edn, Sweet and Maxwell 2008) 309

<sup>32</sup> Patrick Milmo et al, *Gately on Libel and Slander* (11th edn, Sweet and Maxwell 2008) 309; See also 'The Faulks Committee', Report of the Committee on Defamation (Cmnd 7909, 1975) para 129

<sup>33</sup> With the exception provided under The Rehabilitation of Offenders Act 1974, s8(5); See also *Gately on Libel and Slander* (11th edn, Sweet and Maxwell 2008) 309

<sup>34</sup> See Chapter 1, pg 4

<sup>35</sup> Defamation Bill HL Bill (2010-2011) 55/1, s 4

<sup>36</sup> Chapter 1

<sup>37</sup> Defamation Act 1952, s5

distinctly separated as conceptually embodying two different defamatory meanings. If one charge cannot be justified but is insignificant in the harm it causes to the defendant once the truthfulness of the other charge is considered the defendant will not be liable for the harm arising from the unjustified charge.<sup>38</sup> Furthermore even if the harm is not insignificant in relation to the justified charge the evidence raised for the justified charge can operate like a partial defence of justification as the claimant will only be entitled to be compensated for the harm arising out of the unjustified charge alone.<sup>39</sup> This can be seen as reflecting modern interests because it only seeks protect the worthy reputation of the claimant. This is because arguably the right to free expression outweighs that to reputation when the reputation is not deserved, as there can be no harm to one's autonomous identity if reputation is merely lowered to its rightful level. A problem however arises if one considers that the protection afforded by section 5<sup>40</sup> can effectively be circumvented by the claimant in the framing of their claim. For example there may in reality be two distinct stings in one publication but claimant may choose to pursue only one of these. Therefore the defendant is in a worse position than if the complaint had been made about each allegation, as they are prevented from giving evidence relevant to justifying the allegation that was not complained of.<sup>41</sup> This means that the defendant is prevented from proving that the damage to the claimant's reputation is in fact insignificant or not as high in light of the truthfulness of the other allegations.

The Neill Committee<sup>42</sup> recommended that particular misconduct not covered by a plea of justification should be admissible evidence.<sup>43</sup> This would solve the problem highlighted that the defendant unfairly has to justify a greater level of harm than they have actually inflicted because defendants would be able to rely on any evidence to show that they had not caused as extensive damage as the claimant suggested. However it can be seen that such an extension of admissibility of evidence is not necessary and could have the unwelcome consequence of increasing costs in relation to the search for and presentation of evidence and may conflict with the claimant's right to privacy. Therefore it can be seen that the problematic nature of section 5 defence, offering differential protection to defendants based on the claimant's choice, must be addressed alternatively. Arguably this could be achieved through altering the rules on pleadings. In the cases where there may be distinct stings if distinct meanings all of these should be the subject of the proceedings (even those advanced by the defendants themselves).

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<sup>38</sup> Patrick Milmo et al, *Gately on Libel and Slander* (11th edn, Sweet and Maxwell 2008) 309; See also Jenny Steele, *Tort Law; Text Cases and Materials* (2<sup>nd</sup> edn , OUP 2010) 773

<sup>39</sup> Patrick Milmo et al , *Gately on Libel and Slander* (11th edn, Sweet and Maxwell 2008) 309; See also Jenny Steele, *Tort Law; Text Cases and Materials* (2<sup>nd</sup> edn , OUP 2010) 773; See also *Scott v Sampson* (1882) 8 QBD 491

<sup>40</sup> Defamation Act 1952, s5

<sup>41</sup> *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000

<sup>42</sup> The Report of the Supreme Court Committee on Practice and Procedure in Defamation, Chaired by Lord Justice Neill (July 1991)

<sup>43</sup> E Barendt et al, *Libel and the Media; The Chilling Effect* (Clarendon Press 1997) 22

### Honest Comment<sup>44</sup>

A further situation identified as requiring freedom expression is when a statement is in the form of an honest opinion. The current law protects such statements in the defence of honest comment. For the defence to be operative it also requires that there is a public interest in receiving the opinion<sup>45</sup> and sufficient factual basis for the opinion indicated within the publication.<sup>46</sup> It will be analysed whether these elements represent a disproportionate protection of reputation

It can be seen protecting only honest opinions on matters of public interest is an unjustifiable restriction on the freedom of speech because it disregards the personal nature of the right to free expression. The ideal of respecting persons by securing them certain freedoms, such as that of free expression guaranteed under the convention, requires ultimately that the individual's right is protected at a basic level against others interest. If such a right could only be enforced when it coincided with the public interest then it can be seen as devoid of meaning as a fundamental human right as it would become inseparable from other's interests. However as previously discussed this is not the case, freedom of expression is protected not merely because it is an essential means by which other public interests can be satisfied but because it is an important interest in itself for each individual. To proportionately balance free expression against protection of reputation it can be seen that it is essential that we do not forget that free expression is protected because it is integral to the individual not just society. As such honest opinions should be allowed even if defamatory, because the harm done to reputation will be the minimal necessary to ensure the actualization of an individual's right to express themselves. This is because the honesty requirement acts as a safeguard against the reckless expression of untruths. Whilst only allowing opinions to be expressed minimizes the potential harm to individual reputations as opinions are less likely to cause the recipient to lower their view of the defamed. Moreover this is not a disproportionate restriction of free expression as the individual is still allowed to express their ideas freely which it is argued is key to securing the underlying good emanating from free expression; namely the protection of an individual's right to an autonomous identity.

Arguably the injustice that results from the disproportionate balance between the competing rights of free expression and reputation caused by the public interest requirement is more keenly felt because of the emergence of the internet. This is because arguably the emergence of the internet has led to increased vulnerability of the general public to actions in defamation. Due to the significantly larger audience available, it can be seen that expression over the internet carries a greater risk than previous commonly available forms of

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<sup>44</sup> The defence previously known as 'fair comment' was renamed 'honest comment' in *Spiller v Joseph* [2010] UKSC 53, [2011] 1 AC 852 [117],[128]-[129]

<sup>45</sup> Milmo, P et al *Gately on Libel and Slander* (11th edn, Sweet and Maxwell 2008) 335; See also Richard Rampton et al, *Duncan and Neill on Defamation* (Lexis Nexis Butterworths 2009) 133; See also *Cheng v Paul* [2001] EMLR 777 (Lord Nicholls) [41]

<sup>46</sup> unless they are deemed easy ascertainable; *Kemsley v Foot* [1952] AC 345, 355-6; *Telinkoff v Matusevitch* [1992] 2 AC 343, 352

expression. Arguably legal action is more likely to ensue because the defamed individual is more likely to become aware of the defamation due to the greater audience. Moreover they may feel a greater desire to vindicate their reputation because more people may have lowered their opinion of them due to the defamatory statement. Furthermore much communication over the internet is accessible for a significant time after the initial act of expression,<sup>47</sup> arguably this increases the potential liability of the general public because expression moves from being merely slanderous if defamatory to being libellous. This is because previously it can be seen that speech was the most common form of communication which is only potentially slanderous.<sup>48</sup> Whereas now many people use the internet to communicate with others and express themselves<sup>49</sup> and the majority of communication over the internet is in (semi)permanent form which makes it potentially libellous.<sup>50</sup> Consequently the general public can be seen as experiencing greater risk of an action in defamation for expressing honest opinions because libel, unlike slander, is actionable without proof of special harm.<sup>51</sup> Therefore it can be seen that the development of the internet highlights the inadequacy of the public interest requirement of the defence of honest comment because as self expression moves online the risk of facing an action for expressing an honest opinion that is not in the public interest is increased. Subsequently it is proposed that in order for defamation law to remain justified in light of modern values the public interest requirement in the defence of honest comment must be abolished.

Removing the public interest requirement may also be beneficial as it removes a partial overlaps with the protection that may be afforded to information in the public interest by the Reynolds privilege.<sup>52</sup> The overlap of the defences may operate to cause unnecessary complexity in the law as the publisher may be uncertain whether to seek to rely on the defence of honest comment or the Reynolds privilege in relation to any action brought against publication of material that is in the public interest. This could hamper confidence in decisions concerning whether to or how to publish certain information. Publishers may unnecessarily censor material or expression in which the public interest in receiving that information outweighs any potential harm to the individual's reputation because they may feel that it has to fall under 'honest comment'. Through the separation of honest opinion and matters of public interest arguably publishers may more clearly see how material should be presented to best satisfy the public's interest in not being unduly misled, having informed discourse on matters in the public interest and giving proportionate respect to individual's rights.

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<sup>47</sup> Matthew Collins, *The Law of defamation and the Internet*, (2nd edn, OUP 2005) Ch 2

<sup>48</sup> Jenny Steele, *Tort Law Text Cases and materials* (2nd edn, OUP 2010) 760

<sup>49</sup> For example social networking sites have become popular means of interaction and so too has the use of blogs and chat rooms.

<sup>50</sup> David Price and Korieh Duodu, *Defamation; law procedure and practice* (3rd edn, Sweet & Maxwell 2004) 39, 421. Also see *Monson v Tussards* [1894] 1 QB 671 in which it was deemed a waxwork figure could be potentially libellous (but not slanderous) as it was not transient in nature.

<sup>51</sup> Jenny Steele, *Tort Law Text Cases and materials* (2nd edition, OUP 2010) 760

<sup>52</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 A.C 127; See subsection III above.

Arguably requiring the factual basis of the comment to be in the article itself is too restrictive on free speech because it can be seen that if information is deemed to convey merely an opinion then it will be less likely to be uncritically accepted as fact by the recipient and therefore it can be seen that there is little or no harm done to the reputation of the claimant. However having a factual basis (indicated in the article itself unless easily ascertainable) can be seen as essential to determining if the statement is merely an opinion or if it is an assertion of fact. This is because if an individual expresses themselves in a manner which grammatically asserts fact, even though this is an opinion, without the factual basis for the opinion being present or easily ascertainable then the recipient of the statement will not be able to discern the statement as opinion and may instead see it as an assertion of fact. Therefore it can be seen that undue harm will arise from the opinion as the recipient may accept it as factual, as it appears to claim to be so, thus they are more likely to lower their opinion of the defamed. Conversely if a factual basis is easily ascertainable or identified in the article then the recipient is more likely to identify that the statement, whilst grammatically taking a construction that asserts fact, is simply a conclusion that the author has drawn from the relevant information. Therefore it will be seen as an opinion and not an assertion of fact and thus it is less likely that damage to the defamed individual's reputation will ensue.

Moreover it can be seen that having such a factual basis is essential for the successful operation of the test of honesty. This is because the test cannot simply be a subjective one as every defendant could claim that their comment was an honest one even when it was not. Therefore there must be an objective element and this naturally must be that the defendant can demonstrate that considering the factual basis from which the opinion was construed the opinion is one that an honest individual could reasonably have reached. Due to these practical considerations it can be seen that requiring the factual basis of the opinion to be indicated in the publication does not represent an unjustifiable restriction on freedom of expression.

### The Reynolds Privilege

Statements in the public interest of promoting political discourse are identified as requiring protection. Such discourse is currently protected by bars on who can bring a claim in defamation and Absolute Privilege. For example 'a democratically elected body' cannot bring a claim in defamation<sup>53</sup> and statements in Parliament, in the course of judicial proceedings and forming a fair and accurate report of judicial proceedings cannot be subject to proceedings.<sup>54</sup> However given the wide recognition of information that can encourage political discourse, the protection afforded by these bars are not extensive enough. This is because statements that may be conducive to political discourse (through informing debate on social and political issues) which are defamatory to individuals or non-democratically elected bodies are not protected. Arguably this type of political discourse, which lays the foundations upon which governments can be held to account on the interests

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<sup>53</sup> *Derbyshire v Times Newspapers* [1993] AC 543, 547

<sup>54</sup> Defamation Act 1996, s14

of democracy, is currently best protected by the Reynolds privilege.<sup>55</sup> The Reynolds privilege is available to any information for which there is a public right to know irrespective of truth or falsity.<sup>56</sup> This 'right to know' and therefore the application of privilege depends on certain circumstances.<sup>57</sup> This section analyses whether the Reynolds Privilege can satisfy the public interest in allowing expression that is capable of being conducive to political discourse to prevail over protection of reputation thus securing the ideal of democracy.

It is argued that any honestly believed expression that is in the public interest in enabling political discourse should be protected because the value of the electorate being able to make informed choices and secure the ideal of democracy outweighs any harm to an individual's reputation caused by free speech in pursuance of this goal. Honesty is the only necessary safeguard because it can be seen that if something is not honestly believed that this is because it is likely to be untrue and since falsehoods hinder, instead of help, the electorate to make an informed choice anything that is not honestly believed to be true should not be permitted. However the current law poses restrictions for 'responsible journalism'<sup>58</sup> that arguably require the publisher to show far more than honest belief in a statement that is in the public interest of promoting political discourse. Such restrictions originate in Lord Nicholls judgement and operate to indicate whether privilege should be operative.<sup>59</sup> Reference to the 'nature of the information'<sup>60</sup> is one of the factors to be taken into account when considering if privilege should apply. Arguably this is unnecessary because simply restates that the information in question is in the public interest. It can be argued that having it as a separate consideration can only cause confusion over whether or how this requirement applies which may exacerbate the chilling effect on information that is important to political discourse as publishers may be unsure about the legal ramifications of publishing such material.

Reference to the seriousness of the allegation<sup>61</sup> is arguably also an unnecessary consideration. This is because the basis for this is that there should be less protection available to serious allegations as these have the potential of causing more harm.<sup>62</sup> Consequently it can be seen that

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<sup>55</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 A.C.

<sup>56</sup> Jenny Steele, *Tort Law Text Cases and materials* (2<sup>nd</sup> edition, OUP 2010) 793; See also *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127

<sup>57</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127 Lord Nicholls at [205]. The factors promulgated as relevant considerations by are: 1) 'the seriousness of the allegation'; 2) 'the nature of the information'; 3) 'the source of the information'; 4) 'the steps taken to verify the information'; 5) 'the status of the information'; 6) 'the urgency of the matter'; 7) 'whether comment was sought from the plaintiff'; 8) 'whether the article contained the gist of the plaintiff's side of the story'; 9) 'the tone of the article'; and 10) 'the circumstances of the publication, including the timing'.

<sup>58</sup> This phrase was used to describe the type of publication that receives protection under the Reynolds privilege in *Bonnick v Morris* [2003] 1 AC 300, [23]

<sup>59</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127

<sup>60</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 2 in the list (Lord Nicholls).

<sup>61</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 1 in the list (lord Nicholls).

<sup>62</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127

consideration only acts to diminish the protection afforded for serious allegations which is contrary to the public interest as it is arguable that it is more important such allegations are published because of their seriousness and therefore ability to inform political discourse and influence the decisions of the electorate. Furthermore it can be seen that this is a misplaced attempt to offer greater protection to reputation as it can be seen that the Reynolds privilege is not 'expressly concerned with the interests of potential defendants' and rather puts a higher value and emphasis on the 'desire to protect the democratic function of free speech'.<sup>63</sup>

Reference to the 'source' of the material<sup>64</sup> again seems an unnecessary consideration that can only serve to diminish protection of freedom of expression of material capable of informing political discourse, because it can be argued that if the information is potentially beneficial to informing political discourse then where it originated from should be irrelevant. It should be the material in question being in the public interest alone that determines whether it should be published. Moreover consideration of the source of the material presumes that publishers will irresponsibly publish material which they suspect is untrue because the source is unreliable. It seems this is farfetched especially considering that to do such a thing would be to invite claims in malicious falsehood as the publisher would be publishing material which they knew or suspected to be false.<sup>65</sup> Therefore it can be seen that this consideration is an unnecessary restriction on free expression that gives disproportionate protection to reputations against the public interest in securing the ideal of democracy. Further guiding categories in the Reynolds privilege can be seen as unnecessary restrictions on freedom of expression for the same reason, for example reference to verification of the information by the publisher<sup>66</sup> and the status of the information.<sup>67</sup>

Finally it can be seen that reference to whether there is comment from the claimant<sup>68</sup> or a gist of their side of the story<sup>69</sup> and the tone of the article are also unnecessary considerations that only serve to complicate the operation of the defence and therefore cause a chilling effect on the circulation of important political information. This is because these are issues that arguably will be dealt with when addressing the question of whether the statements complained of are capable of having the defamatory meaning alleged. When determining if the defamatory meaning is conveyed the operation of the doctrine of bane and antidote applies so if the sting of the article is effectively removed by further information in the publication then there will be no cause for action.<sup>70</sup> Arguably the tone, comment from the claimant and a gist of the

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<sup>63</sup> Jenny Steele, *Tort Law Text Cases and materials* (2<sup>nd</sup> edition, OUP 2010) 789

<sup>64</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 3 in the list (Lord Nicholls)

<sup>65</sup> Which would demonstrate a lack of belief in the truth of a false statement which is actionable as deceit malice; See Jenny Steele, *Tort Law; Text Cases and Materials* (2<sup>nd</sup> edn, OUP 2010) 99

<sup>66</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 5 (Lord Nicholls)

<sup>67</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 7 (Lord Nicholls)

<sup>68</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 8 (Lord Nicholls)

<sup>69</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204-5 Factor 9 (Lord Nicholls)

<sup>70</sup> *Rees v Law Society Gazette* unreported (2003); *Chalmers V Payne* (1835) 2 Cr M&R 156, 159

claimants argument are all potential 'antidotes' to the alleged defamatory sting and therefore as these will already have been considered to determine if the statement is actionable it seems an unnecessary and burdensome hurdle to consider them again when determining if a defence is available.

From the above analysis it therefore can be seen the Reynolds privilege does not strike the right balance between freedom of expression in the public interest and protection of reputation but instead causes confusion and the potential chilling of the circulation of important political information. Arguably the only viable solution would be to replace the Reynolds privilege at common law, with a defence that publisher will feel more confident to rely on, as suggested by the Draft Defamation Bill.<sup>71</sup> The Defamation Bill proposes that in its place should be a statutory defence of 'responsible publication in the public interest'.<sup>72</sup> Arguably this only achieves putting a slightly simplified version of the Reynolds privilege on a statutory footing, which may do little to combat the undesirable effect in this area as it merely clarifies but does not alter substantially the law.<sup>73</sup> This is because akin to Reynolds extensive considerations to determine what amounts to responsible publishing are outlined as guiding factors as to whether the defence is operative.<sup>74</sup> This can be seen as unnecessary and unlikely to achieve a more desirable balance between free expression and protection of reputation because as it has been considered previously anything that goes beyond the necessary considerations of public interest and honest belief in the truth of the statement is only conducive to creating complexity and exacerbating the chilling effect on the circulation of important political information. For these reasons it is suggested that statutory the Reynolds privilege is too complex and should be abolished and replaced with a statutory defence of 'responsible publication in the public interest'. However the public interest should be construed only as far as matters that have a social or political importance and can therefore enhance political discourse. Moreover the only consideration relevant for the publication to be deemed 'responsible' should be that the publisher has an honest belief in the truth of the statement.

### Absolute privilege

Publications that enhance scientific discourse are identified as requiring protection in the interests of the public, even if they have defamatory imputations, because they can lead to the discovery of the truth and therefore societal progress which outweighs any harm to the defamed individual's reputation. Any statement whether it be an opinion or assertion of fact is capable of informing important scientific discourse essential for progress. This is because potentially every possible criticism of scientific theory or practice

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<sup>71</sup> *Draft Defamation Bill Consultation Paper* (CP3/11, March 2011) [7]-[11]

<sup>72</sup> Defamation Bill HL Bill (2010-2011) 55/1, s1(5)

<sup>73</sup> Robin Shaw and Paul Chamberlin, 'No alarms and no surprises.' (2011) 155 *Solicitors Journal* 11

<sup>74</sup> Defamation Bill HL Bill (2010-2011) 55/1, s1(4). These include; the nature and context of the publication, 'the nature and seriousness' of the allegations, the steps taken to verify the publication, whether the claimant had an opportunity to comment, the urgency of publication and the extent of compliance with relevant codes of conduct or guidelines.

no matter how meekly or strongly expressed has the opportunity to revolutionise thinking in the field and ultimately advance practices towards more fruitful ends. Through debate weaker theories in light of new evidence and criticisms will be weeded out and material that was dangerously misleading to society will be disproven. Without an approach that weighs in favour of this continual and eventual enlightenment through debate, scientific progress and societal understanding of the world will become stagnant, thus the ideal of progress will become unachievable. However unfortunately it can be seen that the protection afforded to scientific discourse may not represent the public's interest in the achievement of the ideal of progress through science

Firstly, it can be seen that the protection afforded to scientific discourse is not extensive enough to achieve the ideal of progress through science because statements of fact which cannot be proven as true are not protected unless they fall under the defence of qualified privilege. Arguably it may be difficult for certain scientific criticism to be defended as it would be reliant on the operation of the Reynolds defence which may not be able to offer extensive enough protection. This is because if publication is to the public at large then there is a risk that the necessary interest in receiving the material is not met. This can be envisaged if the publication complained of is highly technical and requires specific expertise to be understood. Arguably receiving such information cannot be seen as directly in the public interest as the public as the general public will not possess the expertise necessary to engage with such material. This does not reflect the protection that should be afforded in the public interest, because it may prevent the communication of expression conducive to scientific discourse to those who may be able to understand and engage with it.

Moreover it can be seen that the protection afforded to scientific discourse is not extensive enough to achieve the ideal of progress through science because if there is a lack of honest belief in an opinion capable of informing scientific discourse then it is not protected.<sup>75</sup> Arguably this is irrelevant, because it aims to prevent the public being unnecessarily misled and reputations being unnecessarily harmed by statements that are likely to be untrue (indicated by the lack of honest belief in their truth). However in the context of scientific discourse it can be seen that misstatements of fact are not unnecessarily misleading or harmful to reputation. This is because progress through science is a gradual in which the disadvantages of being temporarily misled are outweighed by the benefits of such expression leading to the discovery of the truth. Science is effectively the rationalization of particular phenomena, and since the most truthful explanations will logically be the most rational it can be seen that when an error collides with the truth this will not lead to individuals being misled but instead enlightenment. Arguably in this context the collision of error with the truth is not unduly harmful but serves to

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<sup>75</sup> Under the defence of honest comment see above subsection II . Thus will have to rely on the defences of qualified privilege or justification which it may not be always be available. Due to a lack of corresponding duty and interest between the publisher and all recipients or a lack of interest to the public at large or inability to demonstrate the truth of the allegation.

highlight the superior rationality of the truth thus reinforces understanding and acceptance of the truth.<sup>76</sup>

Furthermore it can be seen that even where the law does purport to offer protection to free expression that can promote scientific discourse, this ideal is not actually achieved. This is because of the apparent ease by which an action can be brought against such material and the difficulties in defending such an action. This can clearly be exemplified in recent high profile cases. For example Dr Singh faced an action for publishing an article which made the defamatory comment that the BCA 'happily promote bogus treatments' reliant on his professional opinion that there was no reliable scientific evidence to support such claims.<sup>77</sup> Dr Singh in an official statement claimed the defending case has left him '£200,000 out of pocket' and cost him two years of life in which he was under considerable stress due to the potentially devastating financial risks of losing the case.<sup>78</sup> Arguably this litigation only serves to create further fear of legal repercussions for those who wish to engage in public evaluation of scientific endeavour. This is climate of fear is acknowledged by the government's proposals for reform aiming to respond to concerns that current defamation law is being used to frustrate scientific debate.<sup>79</sup>

If there is any fear of repercussion of legal action for the criticism of scientific endeavour then ultimately the public at large bear the sufferance, because society will continued to be plagued by issues that prevent individuals attainment of comfort and happiness. Without an approach that weighs in favour of this continual and eventual enlightenment through debate, societal understanding of the world and scientific progress will become stagnant and therefore progress cannot be made to increase the comfort and happiness of individuals. This is why it seems wholly inappropriate to maintain that the operation of defamation law in this area. It is clear that defamation law is not the correct mechanism by which such expressions should be regulated. Therefore it can be seen that to offer a more robust and appropriate protection to scientific discourse, criticisms of scientific endeavour should be protected by absolute privilege as this is the only way that the chilling effect in this area can be hoped to be irradiated. It can be seen that this is not a disproportionate protection of freedom of expression at the expense of the protection of reputation because arguably reputations can be sufficiently protected through open scientific debate. This is an opinion that is widely held in the scientific community for example in the popular Sense about science campaign to 'keep libel laws out of science'. Moreover this commitment is clearly embodied in the World Federation of Science Journalists statement that 'The WFSJ deplores the targeting of individual science journalists by such means as libel or any means other than full and frank discussion in a public

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<sup>76</sup> John Stuart Mill, *On Liberty* (The Liberal Arts Press, NY 1956) 21

<sup>77</sup> *Singh v British Chiropractic Association* [2010] EWCA Civ 350; [2011] 1 W.L.R. 133

<sup>78</sup> Statement by Simon Singh 1st April 2010 <<http://www.indexoncensorship.org/wp-content/uploads/2010/04/simon-singh-says.pdf>> accessed on 10th March

<sup>79</sup> Adrian O`Dowd 'Defamation threat leaves people " terrified " to publish articles' *BMJ* (2011); 342; Ministry of Justice, *Draft Defamation Bill Consultation Paper* (CP3/11, March 2011) page 5

forum'<sup>80</sup>. The ability of the scientific community to protect rightful reputation and the public interest without deference to the court is embodied by a commentator at the World Conference of Science Journalists who noted that; "The courts are not the place to settle such matters - unless you're afraid that the facts are not on your side!"<sup>81</sup>

### The republication rule

One of the ways in which it can be seen that the law no longer strikes a justifiable balance between freedom of speech and protection of reputation is the application of the republication rule, which dictates that each communication of the material to a new reader amounts to a new publication.<sup>82</sup> This is because the republication rule can be seen as unnecessarily restricting free expression because it may operate to impose liability on publications which cause no further harm to the claimant's reputation.

The development of the internet has highlighted the potentiality for unjustifiable restriction of free expression as copies of potentially defamatory publications are being made available in the form of online archives. Arguably such republications should not incur liability because they have limited readership which is unlikely to go beyond that of the original publication, therefore it is unlikely to cause any additional harm to the defamed individual's reputation. Moreover if such publications are not protected then not only is this an unjustifiable violation of the individual's right to free expression but it is also against the public interest in the availability of certain information. It can be seen that sue to the fear of legal action there may be a chilling effect on the republication of certain material. This is because after the original publication developments may have occurred which prevent the successful operation of a defence that may have previously been operative. For example the factual basis of an allegation may have been disproven which would prevent publishers from relying on the defence of Justification or honest comment as these require proof of factual basis to be operative. More likely however is that there is a risk that the 'public interest' requirement necessary to rely on the Reynolds defence may be lost as the concept of public interest is very context dependent.

The chilling effect on the republication of such material is arguably contrary to the public interest as archive material is recognised as 'an important source for education and historical research'.<sup>83</sup> Furthermore it can be seen as especially damaging if material that would pass the public interest test is prevented from republication due to a fear that at some point it will lose this

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<sup>80</sup> The World Federation of Science Journalists  
<<http://www.senseaboutscience.org/pages/the-world-conference-of-science-journalists.html>> accessed on 10th March 2012

<sup>81</sup> Sense about Science, Interview with Wilson da Silva of Cosmos Magazine, Australia at The World Conference of Science Journalists < <http://www.senseaboutscience.org/pages/the-world-conference-of-science-journalists.html>> accessed on 10th March 2012

<sup>82</sup> Jenny Steele, *Tort Law Text Cases and materials* (2<sup>nd</sup> edition, OUP 2010) 768; Originating from the decision in *Duke of Brunswick v Harmer* (1849) 12 QB 185

<sup>83</sup> *Times Newspapers v UK* [2009] EMLR 14, [45]

protection. This is especially damaging as it could prevent reflection upon serious issues which could in turn hinder the continuance of political discourse surrounding such issues which is essential for the operation of democracy. For these reasons the implementation of a single publication rule which will apply to 'publication of the same material by the same publisher' where 'the manner publication is not materially different'<sup>84</sup> can be seen as a welcome reform that will prevent the disproportionate restriction of free expression and reduce the chilling effect on the circulation of information which the public have an interest in receiving.

However arguably this proposal does not go far enough to tackle the potential injustice in this area because the clause does not cover the instances in which a different publisher republishes the same material after the one year limitation period. This is potentially a scenario which the internet has made highly likely as publications on the internet can be linked or framed. When material is linked a website redirects users who seek to access the link to the source publication of the material on the internet from which the link was made. When material is framed, the website from which the material was framed and the website framing the material appear simultaneously on the users screen. Internet users who link or frame defamatory material often may not be able to rely on the defence of reportage as rather than being a neutral reporting of allegations the publication is a direct carbon copy of the original defamatory material, therefore those who link or frame material may incur liability as they purposely make the information available to persons other than the defamed.<sup>85</sup>

Arguably the linked or framed material if there is not significantly different audience because there no further harm has been caused to the defamed individual's reputation. In this sense it can be seen that it is unfair the linking or framing party do not receive the same protection as an original author would in effectively republishing material in an archive if the nature of the new audience does not significantly differ from the original. The harm from the publication has already been done and therefore if it has been compensated or the limitation period has passed thus no further harm can legitimately be claimed as flowing from the publication regardless of the different publisher. Therefore it can be seen that the single publication rule should extend to situations in which the publication is identical and is published by a different publisher to an audience that is not materially different.

#### Who is capable of being defamed?

Currently the law is capable of offering protection to the reputations of 'any (legal) person'.<sup>86</sup> Therefore trading and non-trading corporations and companies, partnerships and unincorporated associations are capable of bringing a claim in defamation.<sup>87</sup> Arguably only natural persons should be

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<sup>84</sup> Defamation Bill 2010 HL Bill (2010-2011) 55/1, s10 (2)

<sup>85</sup> Matthew Collins, *The Law of defamation and the Internet*, (2nd edn, OUP 2005) 76

<sup>86</sup> Rampton et al, *Duncan and Neill on Defamation* (Lexis Nexis Butterworths 2009) 95

<sup>87</sup> Rampton et al, *Duncan and Neill on Defamation* (Lexis Nexis Butterworths 2009) 95 -99

protected by defamation law. This is because it is identified that reputation is primarily protected to respect the individual's right to autonomous identity. Arguably non-natural persons cannot suffer this same harm as the violation of the autonomous identity arises through the psychological process of internalizing the projected the less favourable identity imposed by the defamatory statement. Therefore it can be seen that the modern interest in prohibiting freedom of expression only as far as is necessary to proportionately protect of reputation is not served by the unnecessary protection defamation law offers to the reputations of non-natural persons. Arguably the harm to non-natural person's reputations should be prevented because false debasement of such reputations can cause the body to suffer unwarranted financial consequences such as a loss in business. It can be seen however that defamation law is not necessary to protect reputation in this context because it is protected already by the tort of malicious falsehood which is offers such persons relief when false statements are published recklessly and cause pecuniary damage or are published with a view of causing such damage to the claimant.<sup>88</sup> Furthermore it can be seen that this approach may be beneficial in reducing the chilling effect on the circulation of information which is in the public interest. This is because it has been argued that certain large corporations or associations are so financially well-resourced that they are perceived to pose a very high libel risk therefore publishers because of the threat of expensive defamation proceedings will not take the risk of publishing any material that is potentially defamatory towards them even if it is in the public interest. This has been referred to as 'structural chilling' and is recognised as being an unquantifiable but potentially significant hindrance to free expression which is in the public interest.<sup>89</sup>

## Conclusion

It has been identified that in order for defamation law to remain justified in light of modern ideals it must reflect the importance of proportionately protecting the individual's right to reputation and free expression. To achieve proportionate protection of these rights it is essential that the motivations for protecting these rights are considered. Therefore it must be acknowledged that free expression and reputation are important to the individual because protecting them ensures that the individual's autonomous identity is not threatened. Moreover when balancing these rights one must consider that there are wider communal interests at stake that must be factored in. These include the contribution reputation and free expression can have to the achievement of the ideal of democracy and the significance free expression holds to the ideal of achieving progress through science.

To achieve the goal of recalibrating the balance between protection of reputation and free expression to better reflect modern values and interests it

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<sup>88</sup> Rampton et al, *Duncan and Neill on Defamation* (Lexis Nexis Butterworths 2009) 305

<sup>89</sup> E Barendt et al, *Libel and the Media: The Chilling Effect* (Clarendon Press 1997) 191-3 in Steele, *Tort Law Text Cases and materials* (2<sup>nd</sup> edition, OUP 2010) at 758

has been proposed that significant changes to the substantive law need to be made. These include extending the reach of section 5 of the Defamation Act 1952, and restricting those who are capable of being defamed to include only natural persons. These reforms ensure that protection of reputation, which does not protect autonomous identity nor contribute to achieving the ideal of democracy, does not unduly restrict freedom of expression. Moreover it is considered that the defence of 'justification' be renamed 'truth' to prevent any potential chilling effect the misleading name may have on expression which is not harmful to identity or the achievement of the ideal of democracy. To serve the public interest in achieving the ideal of democracy it is proposed that the Reynolds privilege be simplified to bolster the protection offered to important political discourse. To serve the public interest in the advancement of goods through science, it is proposed that scientific discourse should receive complete protection through the operation of absolute privilege. It is also proposed that the single publication rule is abolished to reflect the emergence of the internet and prevent disproportionate protection of reputation.

#### Areas for further investigation

Whilst it is essential that such substantive changes in the law are made, to recalibrate the balance between protection of reputation and free expression, these changes may be limited in their efficacy of achieving a balance that reflects modern interests. This is because, even if the law does strike the right balance between protection of reputation and free expression, if publishers still consider that the risk of losing an action is too high then they may continue to unnecessarily censor their publications. Arguably this problem is likely to arise if a publisher stands a good chance of successfully defending a publication yet losing the case would be so devastating as to prevent them even taking the small risk of losing an action. Therefore it can be seen that investigation in to the alleged chilling effect the costs have on freedom of expression is needed to discover whether and how changes to the costs of defamation cases could help secure a balance between freedom of expression and protection of reputation that is justifiable in light of modern values and interests.

## In the Battle of Doctor vs. Patient: 'Sorry' really does seem to be the hardest word. The 'Duty of Candour'

*Kelly O'Brien*

This dissertation discusses the 'Duty of Candour' as a mechanism for encouraging openness within the NHS. It examines the emergent history of the duty of candour highlighting what has influenced the modern need for openness, and how these developments are reflected through differing perspectives on the current debate. It reviews the current desire for openness, and the respective barriers to openness, in order to formulate a four-fold hybrid of the objectives of candour. This analysis then influences the crux of the of this dissertations discussion: whether these mechanisms are likely to achieve candour within the NHS. It comments on the 'duty of candour' as a duty at common law; a statutory duty; and a contractual duty and their respective success in implementing a culture of openness, both idealistically and realistically, factoring in governmental objectives. The later discussion focuses on the current parliamentary debate surrounding the implementation of either the statutory or contractual duty of candour, considering the effectiveness of each proposed form of the duty's implementation. This highlights potential political motivations and varying incentives which has led to differing opinions on the form candour should take. Concluding by arguing the effectiveness of 'duty of candour' in achieving the four-fold aims and ultimately changing culture within the NHS, will be inhibited by relying on either of the discussed mechanisms alone. Finally suggesting the duty ought to be accompanied by the measures of; education; appraisal; and reform of the clinical negligence system.

### Introduction

**T**he NHS over the last decade has been criticised as "too secretive",<sup>1</sup> and professing a culture of blame and denial owing to 'anecdotal evidence'<sup>2</sup>, that patients do not receive the explanation or apology sought following the occurrence of medial error. There is currently a professional duty of

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<sup>1</sup> Department of Health, *Good doctors, Safer patients: proposals to strengthen the system to assure and improve the performance of doctors and to protect the safety of patients*, (2006) Sir Liam Donaldson.

<sup>2</sup> Department of Health, *Implementing a 'Duty of Candour'; a new contractual requirement on providers*, (Cm. 16501, 2011) p.7 para.2.6.

openness and honesty enshrined in General Medical Council (GMC) guidance,<sup>3</sup> in an attempt to create openness through individual responsibility, yet non-disclosure still occurs. Consequently the current debate centres on the implementation of a 'Duty of Candour' to secure a culture of openness within the NHS. This duty forms the subject matter of this dissertation. The 'duty of candour' is to be a duty imposed on healthcare providers to be open with patients when mistakes occur. Being open entails providing patients with an explanation, apology, and implementing lessons learned.<sup>4</sup> There has been extensive debate over the form this duty should take, namely whether it is to be statutory or contractual. The latter reflects the government's proposal: *Implementing a 'Duty of Candour'*,<sup>5</sup> currently at the consultation stage.

This duty proposes inserting a contractual mechanism into NHS standard contracts requiring all organisations to be open with patients, and publish a 'declaration of a commitment to openness'.<sup>6</sup> The requirement of openness will be managed by the commissioners of healthcare through the contract management process. Consequences for breach include; financial deductions for failure to publish the declaration; remedial action such as written apologies; and publication of breaches on the provider's website. This contractual duty of candour is a form of institutional responsibility, as opposed to holding doctors individually responsible for failures to be open. The communication required of organisations will be derived from the current *Being Open*<sup>7</sup> guidance, but will be reiterated in separate guidance to support the contractual obligation. This mechanism's scope would not extend to primary carers such as General Practitioners (GP's), as their contracts differ in construction. Further it would only apply to patient safety incidents resulting in moderate harm, severe harm, or death.

The alternative is a legal mechanism, which would require the Secretary of State to introduce a statutory duty of candour for all registered healthcare providers, by amending the Care Quality Commission's (CQC) registration regulations. This duty was moved as an amendment to the Health and Social Care Bill 2011,<sup>8</sup> in the House Lords on the 13<sup>th</sup> February 2012,<sup>9</sup> but was not passed. Amendment 17, so called, was supported by ten prominent patient and health organisations<sup>10</sup>, and lost by just thirty four votes. The duty would have been monitored in the same way as all other core essential requirements

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<sup>3</sup> GMC, *Good Medical Practice: Being Open and honest with patients if things go wrong*, 2009.

<sup>4</sup> Department of Health, *Implementing a 'Duty of Candour'; a new contractual requirement on providers*, (Cm. 16501, 2011) p. 6, para. 2.4.

<sup>5</sup> Department of Health, *Implementing a 'Duty of Candour'; a new contractual requirement on providers*, (Cm. 16501, 2011)

<sup>6</sup> *Ibid* p. 11, para. 4.4.

<sup>7</sup> National Patient Safety Agency, *Being Open* (2009)

<sup>8</sup> Health and Social Care Bill 2011.

<sup>9</sup> Session 2010-12, Public Bills before Parliament, Health and Social Care Bill, Amendment 17 < <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0119/amend/ml119-i.htm> > 2/03/12.

<sup>10</sup> *Ibid*, Column. 573: Action against Medical Accidents, National Voices, the Patients Association, the Health Foundation, the National Association of LINKs Members, Patients First, the Neurological Alliance, Rethink Mental Illness, Asthma UK and the Stroke Association.

regulated by the CQC. This legal duty is similar to the contractual requirement in that it relates explicitly to institutional rather than individual responsibility. However it differs in scope, encompassing all NHS care providers and not just hospital staff.

This dissertation explores the comparative merits of the statutory and contractual duty of candour, as mechanisms for achieving openness within the NHS. An exploration of the duty's historical origins, map its emergence into modern society whilst illustrating how differing objectives of candour, namely patient safety and patient rights, have played a role in defining the duties form. Building upon this contextual background, the objectives and respective barriers to openness will be explored, formulating the four-fold objectives of candour, which will inform an analysis of the current debate. Finally this dissertations conclusions and suggestions for progression will be submitted.

### **History of the duty to be candid**

Medical law is constantly required to change, update, and move forward to reflect the societal moral frame work, and medical advances of the time. However arguably the law 'moves more slowly than either the medical or public mores',<sup>11</sup> thus failing to keep pace with changing attitudes, and the current lack of a duty of candour could be such a case. In order to understand the need for a duty of candour, candour's emerging history will be explored, highlighting the development of the doctor-patient relationship in relation to disclosure. It shall become apparent that the doctor-patient relationship has endeavoured to become a 'partnership'<sup>12</sup> moving away from earlier paternalistic times<sup>13</sup>. The changing views throughout medical history are reflected in medical guidance, case law, academic and judicial commentary, and finally by the views of medical practitioners themselves. Each of these sources shall inform this historical discussion.

Notions of a duty to be candid can be traced back to the early twentieth-century and specifically to the English case of *Gerber v Pines* [1933],<sup>14</sup> which is analysed in some detail below. At this time the dynamics of the doctor-patient relationship were predominately paternalistic, and the 'general ethos among practitioners was one in which doctors would not readily admit mistakes'.<sup>15</sup> Therefore it remains unsurprising that notions of candour were relatively rare. As a basic principle, truth-telling, had been absent from the medical code since the time of the Hippocrates.<sup>16</sup> This is partially because doctors were viewed with a superiority, which encouraged secrecy as the

<sup>11</sup> Mason JK, and Laurie GT, *Mason and McCall Smith's Law and Medical Ethics*, 8<sup>th</sup> ed, (Oxford University Press, Oxford, 2010) p. 24 para. 1.59.

<sup>12</sup> Recent GMC guidance focuses greatly on 'partnership' see: GMC 'Consent: patients and doctors making decisions together' (2008) paras. 16-17.

<sup>13</sup> Teff, *Reasonable Care*, (Oxford University Press, Oxford, 1994)

<sup>14</sup> *Gerber v Pines* [1934] 79 Sol Jo 13.

<sup>15</sup> Nathan, V, 'Medical mistakes: a view from the British Medical Association' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p.197.

<sup>16</sup> Chris Docker, "Dying In Dignity, The Tort of Negligence at the End of this Century" (2003) 3 (2) *Mensa Sig News Journal*, 28.

practising norm. In 1871, Holmes instructed a graduating class that '*the patient has no more right to all of the truth than he has to all of the medicines in your saddle bag. He should get only get so much as is good for him*'.<sup>17</sup> This assumption, that it was good medical judgement to partially inform a patient about his condition, persisted well into the twentieth-century. At this time patients had no right to be warned about the risks inherent in medical procedures,<sup>18</sup> which actively encouraged medical paternalism. The case of *Hatcher v Black* [1954]<sup>19</sup> provides an example. In this case the doctor was accused of lying to his patient about the risks involved in a surgical procedure. Lord Denning's justification of his actions; 'he told a lie, but he did it because in the circumstances it was justifiable',<sup>20</sup> reflects the predominating view of mid-twentieth-century judges.

### Early notions of the duty to be candid

As established, prior to the 1970s a paternalistic view dominated medicine,<sup>21</sup> as confirmed by the textbooks of the time which claim 'the medical man may in *some* cases be entitled to exercise his discretion to withhold information from his patient or even give false answers'.<sup>22</sup> Emphasis is added to 'some' to indicate that at the time, 1957, there was some albeit limited interest in a duty of disclosure. The case of *Gerber v Pines* [1934]<sup>23</sup> is something of a diamond in the rough, providing a rare early example of liability for failure to tell the truth. In this case, during the course of a hypodermic injection the needle broke and part remained in the patient's body. When the doctor was unable to retrieve the needle, the patient was not informed. In an action brought by the patient, Mr Justice Parcq held there was no breach of duty in relation to the act itself. Instead the doctor was negligent for failing to inform the plaintiff or her husband of the mistake. Whilst this appears an early statement of the duty of candour, it has had minimal effect on English law, receiving fairly negative judicial treatment.

Some support can be found in the Irish case of *Daniels v Heskin* (1954),<sup>24</sup> albeit by the dissenting judge. The facts were similar to *Gerber v Pines* as a patient was not told a needle was left in her perineum. Maguire CJ supports Mr Justice Parcq, claiming his Lordship had 'laid down the rule correctly...no reason is given why the defendant should be excused what seems to me to be his obvious duty'.<sup>25</sup> The majority however, denied the existence of a duty to tell the patient what had gone wrong. These cases evidence a judicial minority desire for a duty of candour from the early twentieth century. However by

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<sup>17</sup> Holmes, O, 'Oliver Wendell Holmes on Telling the Patient the Whole Truth', (1982) 69 (5), *Pediatrics*, p. 528.

<sup>18</sup> Lord Nathan, *Medical Negligence*, (Butterworks &Co, London, 1957) p. 56.

<sup>19</sup> *Hatcher v Black*, (press report) *The Times*, (London), 2nd July, 1954.

<sup>20</sup> *Hatcher v Black* (press report) *The Times*, (London), 2nd July, 1954.

<sup>21</sup> Mason JK, and Laurie GT, *Mason and McCall Smith's Law and Medical Ethics*, 8<sup>th</sup> ed, (Oxford University Press, Oxford, 2010) p. 9.

<sup>22</sup> Lord Nathan, *Medical Negligence*, (Butterworks &Co, London, 1957) p.56.

<sup>23</sup> *Gerber v Pines* (1934) 79 Sol Jo 13.

<sup>24</sup> *Daniels v Heskin* (1954) 87 I.L.T. 189.

<sup>25</sup> *Daniels v Heskin* (1954) 87 I.L.T. 189 per Maguire CJ.

1972 even this minority support was shrinking and notions of candour were abruptly closed down by Lord Justice Edmund Davies. His Lordship described *Pines* as “a lone ranger in our law”,<sup>26</sup> before reinstating the position “that apart from such special circumstances, I do not think that the law recognises any obligation on the doctor to tell the truth”.<sup>27</sup>

This position was consolidated in the medical guidance of the time, and in 1981 'The Handbook of Medical Ethics',<sup>28</sup> reflected the perception that doctors possessed superior knowledge that patients were unable to contend with, stating “circumstances do arise which render it undesirable for a patient to be told the full implications of his conditions”.<sup>29</sup> There appeared to be a mutual understanding that open disclosure would cause unnecessary worry, unhelpful to patients, and even against their best interests.<sup>30</sup> Unsurprisingly then, early professional guidance makes no explicit reference to a duty, or even suggestion, that the doctors ought to be honest with patients when things go wrong. However it did recognise that “the commonest cause of problems between doctors and patients is failure of communication”<sup>31</sup>. A point still reiterated by guidance today.<sup>32</sup>

### Changing attitudes

In some respects, the mid-1980s marked the beginning of changing attitudes. The imbalance of power, arising from a failure to share information, began to be redressed as new bioethical tenants of the doctor-patient relationship commanded increasing respect. Beauchamp and Childress's four principles of biomedical ethics; respect for autonomy; non-maleficence; beneficence and justice,<sup>33</sup> profoundly influenced modern thinking about how doctors should conduct themselves. These principles support the view that doctors must behave ethically, and paternalism no longer prevails,<sup>34</sup> evidenced by the emerging principles of 'informed consent'. Whilst 'there is no English law doctrine of informed consent',<sup>35</sup> in *Sidaway v Bethlem* [1985]<sup>36</sup> the court recognised that the duty to disclose information to the patient prior to a medical procedure, is part of the doctor's duty of care. This relatively novel concept was developed 'a result of the growing importance of the principle of patient autonomy'.<sup>37</sup> It soon became no secret that autonomy based reasoning

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<sup>26</sup> Library & Lay Section, President Ruth Porter MRCP, Meeting 11 December 1972, *The Patient's Right to Know the Truth*, The Right Honourable Lord Justice Edmund Davies (Royal Courts of Justice, London) p. 535.

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

<sup>28</sup> British Medical Association, *The Handbook of Medical Ethics*, 1981.

<sup>29</sup> British Medical Association, *The Handbook of Medical Ethics*, 1981, para.1.10.

<sup>30</sup> Bok, S, *Lying: Moral Choice in Public and Private Life* (1999)

<sup>31</sup> British Medical Association, *The Handbook of Medical Ethics*, 1981, para. 2.17.

<sup>32</sup> GMC, *Good Medical Practice*, 2006, para.20. Also see GMC, *Consent Patients and Doctors making decisions together*, 2008, para.3.

<sup>33</sup> Beauchamp, T, Childress, J, *Principles of Biomedical Ethics*, (Oxford University Press, Oxford, 2001)

<sup>34</sup> M, Brazier, “Do no harm – do patients have responsibilities too?” 2006, 65(2), *Cambridge Law Journal*, 397-420.

<sup>35</sup> The Creutzfeldt- Jakob Disease litigation [1995] 54 BMLR 1 (QBD) per Lord Justice May.

<sup>36</sup> **Sidaway v Bethlem Royal Hospital Governors** [1985] AC 871.

<sup>37</sup> Jackson, E, *Medical Law Text Cases and Material*, (Oxford University Press, Oxford, 2006) p. 257.

had begun to dominate medical law,<sup>38</sup> owing to increased recognition that patients had a right to know sufficient information so as to exercise a level of control over their medical care. These albeit disputable notions of informed consent<sup>39</sup> began to address the imbalance of knowledge and power in the doctor-patient relationship, as part of the imbalance can be attributed to the patient's lack of information.<sup>40</sup>

### The duty of candour at common law

Amidst this growing emergence of patient autonomy, and consequent change in judicial attitude, notions of candour were resurrected. However *Sidaway* marks both a move away and move towards candour: the former due to the rejection of fiduciary duties, and the latter by influencing notions of candour as part of the duty of care. In the United States, there is considerable support for mandating disclosure on the basis of the judicial doctrine of fiduciaries duties.<sup>41</sup> American commentators argue the law imposes a 'trust' on doctors: a fiduciary responsibility stemming from the vulnerability of the patient, and the disparity of knowledge between patients and physicians.<sup>42</sup> The doctor is in breach of this fiduciary duty, by failing to disclose medical error, where the non-disclosure has caused them greater harm than if it were disclosed. However *Sidaway* confirmed fiduciary duties were not a basis for medical law. His Lordships expressly confined this judicial doctrine to the disposition of property and breach of trust,<sup>43</sup> for which it had been developed. Whilst it is arguable, that the doctor by failing to disclose information has abused his position of trust, the English courts took the firm view that to breach a fiduciary duty the doctor must stand to make a personal profit.<sup>44</sup> Due to the public nature of NHS care such personal gain does not occur, and accordingly the concept of fiduciary duties in healthcare is no longer entertained, and therefore could not form a basis for the duty of candour in this jurisdiction.

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<sup>38</sup> Mason JK, and Laurie GT, *Mason and McCall Smith's Law and Medical Ethics*, 8<sup>th</sup> ed, (Oxford University Press, Oxford, 2010)

<sup>39</sup> There is no doctrine of 'informed consent' in English law it is merely useful short hand. The judgements in *Sidaway* are by no means coherent, and neither is its application.

<sup>40</sup> Jones, M, 'Informed Consent and other Fairy Stories' (1999), 7, *Medical Law Review*, 103-134, p.129.

<sup>41</sup> *Hahn v. Mirda*, 54 Cal. Rptr. 3d 527, 532 (Ct. App. 2007); *Tresemmer v. Barke*, 150 Cal. Rptr. 384, 394 (Ct. App. 1978); *Wohlgemuth v. Meyer*, 293 P.2d 816, 820 (Cal. Dist. Ct. App. 1956); *Mangoni v. Temkin*, 679 So. 2d 1286, 1288 (Fla. Dist. Ct. App. 1996); *Schmucking v. Mayo*,

235 N.W. 633, 633 (Minn. 1931); *Tracy v. Merrell Dow Pharm.*, 569 N.E.2d 875, 878 (Ohio 1991); *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983); *Carson v. Fine*, 867 P.2d 610, 617-18 (Wash. 1994)

<sup>42</sup> Hafemeister, T, Spinos, S, 'Lean on me: A physician's fiduciary duty to disclose an emergent medical risk to the patient', 86, *Washington University Law Review*, 1167-1210. p.1187.

<sup>43</sup> *Sidaway v Bethlem Royal Hospital Governors* [1985] AC 871 per Lord Justice Dunn.

<sup>44</sup> *Ibid*, per Lord Browne-Wilkinson.

Despite the rejection of fiduciary duties, the emerging principle of the duty of candour as part of the duty of care is based on the contextual background of redressing the imbalance of power and disparity in knowledge, brought to the fore by *Sidaway*. Shortly after this case was decided in *Lee v South West Thames Regional Health Authority*,<sup>45</sup> Sir John Donaldson suggested that doctors failing to disclose information regarding performed treatment, may constitute some form of malpractice. His Lordship stated: 'if the patient is refused information to which he is entitled, it must be for consideration whether he could not bring an action for breach of contract claiming specific performance of the duty to inform'.<sup>46</sup> This obiter statement is rather problematic, considering there is no contract in NHS cases. However in reference to the duty to disclose procedural risks established in *Sidaway*,<sup>47</sup> his Lordship claims to 'see no reason why this should not be a similar duty' in relation to disclosure after treatment, asking 'why is the duty different from what it is afterwards?'.<sup>48</sup> Thus suggesting the duty of candour should take the form of an extension of *Sidaway* as part of the duty of care owed to patients.

Sir John Donaldson reiterated this view in *Naylor v Preston Area Health Authority*,<sup>49</sup> where his Lordship held, obiter, that there was a 'duty of candour resting upon the professional man', and this duty arose not only out of an implied contractual term, but also gave rise to a right in tort.<sup>50</sup> His Lordship identifies the contractual term would only benefit private patients and not patients of the NHS, and accordingly suggests the duty of candour 'is but one aspect of the general duty of care'.<sup>51</sup> As these early expressions of the duty were borne out of autonomous judicial reasoning, they focus primarily on the patient's right to receiving honest explanations. This position was reiterated in medical guidance issued in 1986, which stated: 'the patient is *entitled* to a prompt and sympathetic and above all truthful account of what has occurred'.<sup>52</sup>

Whilst the above judgements appear indicative that some form of duty to be candid exists in English law, few members of the judiciary agreed, and the existence of any enforceable duty was dismissed in *Powell v Boldaz* [1998].<sup>53</sup> This was confirmed in *Powell v United Kingdom* [2000]<sup>54</sup> where the European Court of Human Rights held, that Lord Butterfield correctly stated 'doctors have no duty of candour to the parents of a deceased child about the circumstances surrounding his death'.<sup>55</sup> This remains the case today, over a decade later. An exploration of *Boldaz* highlights the difficulties with enforcing the duty of candour at common law. In this tragic case, the plaintiffs

<sup>45</sup> *Lee v South West Thames Regional Health Authority* [1985] 2 ALL ER 385, 389-90.

<sup>46</sup> *Ibid*, per Sir John Donaldson.

<sup>47</sup> *Sidaway v Bethlem Royal Hospital Governors* [1985] AC 871.

<sup>48</sup> *Lee v South West Thames Regional Health Authority* [1985] 2 ALL ER 385, p. 389-90, per Sir John Donaldson.

<sup>49</sup> *Naylor v Preston Area Health Authority* [1987] 2 All ER 353, 360.

<sup>50</sup> Foster, C, 'An unknown horse's breakfast', (1994) 7, *The New Law Journal*.

<sup>51</sup> *Naylor v Preston Area Health Authority* [1987] 2 All ER 353, 360. per Sir John Donaldson.

<sup>52</sup> Medical Defence Union (1986) 2, *Journal of the MDU*, 2. [emphasis added]

<sup>53</sup> *Powell v Boladz*, CA [1998] Lloyd's Rep. Med. 116; (1998) 39 B.M.L.R. 35.

<sup>54</sup> *Powell v United Kingdom* (Admissibility) (45305/99) [2000] Inquest L.R. 19; (2000) 30 E.H.R.R CD362.

<sup>55</sup> *Powell v Boladz*, CA [1998] Lloyd's Rep. Med. 116; (1998) 39 B.M.L.R. 35.

sought to rely on the dicta of Sir John Donaldson, in order to find out information surrounding the death of their son. They argued that a doctor may owe a patient a duty of candour to disclose information after treatment, particularly when if informed, the plaintiff could choose to complain about the treatment he received. The Court of Appeal dismissed this strand of argument outright. Lord Stuart-Smith stated that the dicta 'affords no authority for the proposition that there is some kind of free standing duty of candour, irrespective of whether the doctor-patient relationship exists' and secondly that to hold otherwise would 'involve a startling expansion of the law of tort'.<sup>56</sup> The second reason appears just another variant of the floodgates argument. However the first reason taken together with his Lordships anxiousness to rely on the absence of a doctor-patient relationship to avoid this dicta, suggests a duty could only exist where there is a continuing doctor-patient relationship.<sup>57</sup>

If the duty of candour were dependent on the existence of the doctor-patient relationship, this raises issues of to whom the duty is owed in tort, and how long the duty would be owed after the doctor-patient relationship ceased to exist. If as suggested in *Lee v South West Thames*, the duty is a natural extension of the duty to inform the patient,<sup>58</sup> it would be a duty existing between doctor and patient to the exclusion of all others. However in *Lee*<sup>59</sup> the mother sought to find out information regarding her son's development of brain damage. Consequently such a limited duty cannot have been his Lordships suggestion, as this would leave the mother without an action. Further such a limitation would be inconsistent with *Gerber v Pines*,<sup>60</sup> where it was held that the doctor should have told the patient *or her husband* of the needle left in the patient's foot.

Further difficulties arise when categorising the duty of candour as part of the duty of care. Breach of this duty, which could be defined as a duty to disclose any error that occurred following or during treatment, needs to have caused harm 'but for'<sup>61</sup> the lack of disclosure. This may be problematic as non-disclosure occurs after the treatment, and therefore cannot be said to have caused the harm sustained. There is a plausible argument for extending the rules of causation, as in *Chester v Afshar* [2004]<sup>62</sup> the court expressed a willingness to do this in special circumstances. Such an extension could allow the categorisation of non-disclosure in loss of chance.

Loss of chance argues that the defendant's breach, which usually relates to misdiagnosis,<sup>63</sup> has diminished the claimant's chances of a better outcome. Consequently it could be argued that the doctor by failing to disclose the error, within a reasonable time period, has reduced the claimant's chance of recovery on the balance of probabilities. However in *Gregg v Scott* [2005]<sup>64</sup>

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<sup>56</sup> *Ibid*, per Lord Stuart-Smith.

<sup>57</sup> United Kingdom - *Medical Law Review* (1998) 6 (1): 99 Oxford University Press.

<sup>58</sup> *Lee v South West Thames Regional Health Authority* [1985] 2 ALL ER 385.

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

<sup>60</sup> *Gerber v Pines* (1934) 79 Sol Jol. 13 (KBD)

<sup>61</sup> *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068.

<sup>62</sup> *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134.

<sup>63</sup> See *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909.

<sup>64</sup> *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176.

whilst the minority of his Lordships were of the view that where there is 'a breach of this duty [of care] the law must fashion a matching and meaningful remedy',<sup>65</sup> the majority were reluctant to allow such loss of chance cases and limited the actionable reduction of chance to 50% or more.<sup>66</sup>

Finally Lord Donaldson's dicta did not directly address appropriate remedies, apart from indicating there ought to be 'specific performance of the duty to inform',<sup>67</sup> suggests a desire to mandate disclosure. In addition to mandatory disclosure, there could be some award of exemplary damages for breach of duty, but such analysis is speculative in the face of inconclusive judicial guidance. Therefore the duty of candour at common law are not easily implementable and such concepts are largely absent from current debate, serving only to illuminate past attempts to implement candour based on the rights of the patient.

### Modern History of the Duty of Candour

From analysing the history of the duty, what remains surprising is how far societal and judicial attitudes changed with regards to patient's rights, whilst the duty of candour continued to take a back seat. However this would not remain the case for long. Following the reinstatement of the lack of a duty of candour in *Powell v United Kingdom*,<sup>68</sup> reports and guidance came in abundance in attempt to rectify the lack of openness within the NHS. Prior to *Powell v Boladz*,<sup>69</sup> guidance hinted at a desire for openness by including 'to be honest and trustworthy',<sup>70</sup> as one of the duties of doctors registered with the GMC. However by 1998, guidance directly addressed the issue of being open, stating that if patient suffers serious harm 'you should explain fully to the patient what has happened and the likely effects',<sup>71</sup> and 'when appropriate you should offer an apology'.<sup>72</sup> This provides a marked step towards recognition of the need for openness, but at this time we were only beginning to understanding the size of the problem, and its ramifications.<sup>73</sup>

At the beginning of the twenty-first century the landmark report *An Organisation with a Memory*,<sup>74</sup> and the government's response, *Building a*

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<sup>65</sup> *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176, per Lord Justice Nicholls at [42]

<sup>66</sup> *Ibid* see Lord Hoffman's judgement.

<sup>67</sup> *Lee v South West Thames Regional Health Authority* [1985] 2 ALL ER 385, p. 389-90, per Sir John Donaldson.

<sup>68</sup> *Powell v United Kingdom (Admissibility)* (45305/99) [2000] Inquest L.R. 19; (2000) 30 E.H.R.R CD362.

<sup>69</sup> *Powell v Boladz* CA [1998] Lloyd's Rep. Med. 116; (1998) 39 B.M.L.R. 35.

<sup>70</sup> GMC, *Good Medical Practice*, 1995.

<sup>71</sup> GMC, *Protecting Patients, Guiding Doctors*, (1998) para.17.

<sup>72</sup> *Ibid*.

<sup>73</sup> Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p.4

<sup>74</sup> Department of Health, *An Organisation with a Memory*, Report of an expert group on learning from adverse events in the NHS, (2000) Chief Medical Officer.

< <http://www.dh.gov.uk/assetRoot/04/06/50/86/04065086.pdf>> accessed 15/01/2012.

*safer NHS*<sup>75</sup> recognised that in order to prevent error, previous errors must be learnt from. With this realisation, openness was viewed from a different perspective: improving patient safety through open reporting. This shift away from patient rights saw openness begin to centre on openness amongst professionals, as opposed to openness with patients. Although the 2001 GMC guidance<sup>76</sup> reiterated the need for doctors to provide patients with explanations, the government's primary focus became improving patient safety, and with this the National Patient Safety Agency (NPSA) was established in 2001.

### Improving patient safety

In 2003 the Chief Medical Officer (CMO) Sir Liam Donaldson issued '*Making amends*',<sup>77</sup> which reiterated that learning from previous mistakes can only occur, if errors are admitted and recorded openly. It recognised that secretive reactions stand 'in the way of learning and improvement of the health service'.<sup>78</sup> As a result Recommendation 12 provides the first formal proposal of a duty of candour. It was to be a statutory duty 'requiring clinicians and health service managers to inform patients about actions which have resulted in harm'.<sup>79</sup> However the government chose to continue their focus on openness amongst professionals and declined to implement this recommendation, instead establishing the National Reporting and Learning System<sup>80</sup> (NRLS). This system enables patient safety incidents to be anonymously reported in order to collate risks and hazards, which can then be learnt from. This evidences a desire for open reporting, but not necessarily a desire for open communication with patients.

Despite the establishment of the NRLS, the improvement of patient safety is still a key objective of candour. Whilst the NRLS is fairly successful with 4 million incident reports having been submitted to the NPSA since its establishment,<sup>81</sup> non-disclosure, and lack of reporting still occurs. It has since been recognised that the proper reporting of incidents requires 'an open and just culture so that healthcare professionals feel able to report'.<sup>82</sup> The rationale being: if doctors feel able to report to the NRLS, incident reporting

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<sup>75</sup>Department of Health, '*Building a safer NHS for patients: Implementing An Organisation with a Memory*', (2001) <<http://www.dh.gov.uk/assetRoot/04/05/80/94/04058094.pdf>> accessed 12/02/2012.

<sup>76</sup>GMC, *Good Medical Practice*, (2001) sets out a clear duty of disclosure; "*If a patient under your care has suffered serious harm, through misadventure, or for any other reason, you should act immediately to put matters right, if that is possible. You should explain fully to the patient what has happened and the likely long and short-term effects. When appropriate, you should offer an apology.*"

<sup>77</sup> Department of Health, *Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*, (2003) Publication, Sir Liam Donaldson.

<sup>78</sup> Ibid p.13.

<sup>79</sup> Ibid p.18.

<sup>80</sup> The NRLS was established in 2003 as part of the NPSA.

<sup>81</sup> NPSA, NRLS, About reporting patient safety incidents <<http://www.nrls.npsa.nhs.uk/report-a-patient-safety-incident/about-reporting-patient-safety-incidents/>> accessed 24/01/12.

<sup>82</sup> Department of Health, *Implementing a 'Duty of Candour': a new contractual requirement on providers*, (Cm. 16501, 2011) p.7 para. 2.5.

will increase leading to greater internal investigations, improving the understanding of why errors were made.<sup>83</sup> However instead of focusing primarily on improving medical culture, the government have favoured a more robust stance in attempting to increase reporting, and by 2010 reporting to CQC had been made compulsory.<sup>84</sup> However the improvement of patient safety is not the only potential benefit of open reporting. The reporting system also demonstrates the accountability of health professionals amidst lost public confidence,<sup>85</sup> a key objective of candour.

### Restoring public trust

In 2005, the first *Being Open* policy was issued by the NPSA, and by 2008 the GMC guidance added: 'never abuse the patients trust in you or the public's trust in the profession',<sup>86</sup> to the duties of doctors registered with the GMC. This additional duty is symptomatic of the recognition that public trust in healthcare was declining, partly due to increased media attention in the scandals of malpractice<sup>87</sup> following high profile cases, such as that of Harold Shipman.<sup>88</sup> With this a new dimension is added to the need for openness: a lack of trust. The 'cumulative picture of professionals who pose a danger to their patients erodes public trust',<sup>89</sup> as the unveiling of medical error undermines societies core moral expectations of doctors and can lead to 'breach of trust, suspicion and anger'.<sup>90</sup> This is illustrated by the steady rise in complaints.

The annual report of Fitness to Practise statistics shows the GMC received 7,153 complaints against doctors in 2010, compared with 5,773 in 2009<sup>91</sup>. In 2005 there were only 4,980 declining to 3,000 in 1999.<sup>92</sup> The Patients Association describes the figures as indicative of falling public confidence. Openness seeks to rectify this, as currently when patients have to fight for the truth 'they lose all confidence in the Healthcare system and are more likely to take legal and disciplinary action'.<sup>93</sup> Therefore open disclosure is seen as a way

<sup>83</sup> Paul Sankey 'Duty of candour plans watered down' Law Society Gazette , Sept. 2011.

<sup>84</sup> Care Quality Commission (Registration) Regulations 2009 SI 2009/3112 reg.18.

<sup>85</sup> Hayens, K, and Thomas, M, 'An Afterword: Moving the Patient Safety Agenda Forward' (2003) 9, *Medio-Legal Journal of Ireland*.

<sup>86</sup> GMC, *Consent: patients and doctors making decisions together*, (2008).

<sup>87</sup> Harpwood, V, *Medicine, Malpractice and Misapprehensions*, (Routledge-Cavendish, Oxon, 2007)

<sup>88</sup> David Batty, 'The Harold Shipman Case', *The Guardian*, August 2005,

<<http://www.guardian.co.uk/uk/shipman> > accessed 01/12/2011.

<sup>89</sup> Margot Brazier, 'Times of change?' (2005) 13(1), *Medical Law Review*, 1-16.

<sup>90</sup> *Ibid* p.3.

<sup>91</sup> GMC 'Record number of complaints and disciplinary hearings against doctors', (Press Release)

24 Oct 2011, < <http://www.gmc-uk.org/news/10866.asp> > accessed 24/02/2012.

<sup>92</sup> Jeremy Lawrence, Record number of patients complain about doctors, *Independent* July 2006.

<sup>93</sup> House of Commons, Session 2010-2011, *Candour in Healthcare*, (Westminster Hall, cmd. 101201, 2010)

<<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101201/halltext/101201h0001.htm>.>

accessed 28/02/12. Per Robert Syms, Column , 270WH.

of restoring trust, with the effect of reducing this rise in complaints. Similar attempts were made in relation in to decreasing litigation. In 2009, the NSPA re-distributed the *Being Open* guidance as a patient safety alert.<sup>94</sup> This strived to encourage effective communication with patients as research had shown patients are then more likely to forgive, and refrain from litigating.<sup>95</sup> Thus adding further dimensions to the need for openness: restoring public trust and patient satisfaction, leading to a reduction in litigation and complaints.

Thus far the exploration of the history of the duty of candour appears to suggest numerous motivations for openness within healthcare. These collectively constitute the four-fold objectives of candour which are; the improvement of patient safety; restoration of public trust; reducing clinical negligence litigation; and fulfilling patient expectations. The next chapter will explore these, whilst drawing upon their respective barriers to openness.

### **Arguments in favour of Openness vs. Barriers to openness**

#### Patient expectations

When the NHS was introduced after the Second World War, the general public received this new free healthcare with gratitude and 'grateful patients were reluctant to sue doctors in this environment when there was a strong culture of deference to professional people'<sup>96</sup>. Now the NHS is well established 'patients are no longer in awe of doctors'.<sup>97</sup>As demonstrated in the chapter 1, medicine has progressed since the Dark Ages where a patient's duty was merely to be a patient, and some even suggest it has moved on too far.<sup>98</sup> Either way the judicial recognition of patient autonomy has led to patients expecting more from their doctors, and consequently patient's needs are more tentatively catered for by the NHS. There is a fear that 'patient expectations of the healthcare system are unduly high',<sup>99</sup> and indeed patients can fail to understand that through no-one's fault, a perfect result to care is not always achieved.<sup>100</sup> Nonetheless honesty and openness sit at the heart of one's moral

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<sup>94</sup> NPSA guidance, *Being Open: communicating patient safety incidents with patients, their families and carers*, 2009 – 2010 ref no.1097, Safety alert.

<sup>95</sup> Vincent CA and Coulter A. Patient safety: what about the patient? (2002) 11, *Qual Saf Health Care*, 76–80.

<sup>96</sup>Harpwood, V, *Medicine, Malpractice and Misapprehensions*, (Routledge-Cavendish, Oxon, 2007) p. 60.

<sup>97</sup>Ibid p.68.

<sup>98</sup>Brazier, M, "Do no harm – do patients have responsibilities too?" (2006), 65(2), *Cambridge Law Journal*, (397-422)

<sup>99</sup>Mulchay L and Rosenthal M, 'Beyond blaming and perfection: a multi-dimensional approach to medical mishaps' In *Medical mishaps, Pieces of the Puzzle*, Rosenthal, M, Mulchay, L, Lloyd –Bostock, S, (Open University Press, Buckingham, 1999) p. 13.

<sup>100</sup>Nathan, V, 'Medical mistakes: a view from the British Medical Association', In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p. 201.

obligations, and society's expectations of professionals such as doctors, and thus openness is what patients expect.<sup>101</sup>

When patient expectations are not fulfilled, they are forced to seek alternative means of gaining the honest explanation sought, and turn to the law. Bismark and Dauer suggest that there are four motivations to medico-legal action, which commutatively constitute redress; restoration, including financial compensation; correction; communication, which may include an explanation or apology; and sanction.<sup>102</sup> The Medical Protection Society (MPS) weights the importance of these motivations concluding that 52% of patients think financial compensation is important,<sup>103</sup> whilst nine in ten think an apology is important.<sup>104</sup> This was further emphasised in *Making Amends*,<sup>105</sup> where it was found that even if patients receive financial compensation, they remain dissatisfied without an explanation.<sup>106</sup> Consequently if patient's expectations were met with honest explanations and apologies, the need to turn to the law would be diminished. Therefore an objective of candour is meeting patient's expectations, not only to ensure patients receive full redress, but in order to deter medical litigation.

### Clinical negligence and complaints

Through the tort of negligence patients can make a claim against the NHS if a doctor has caused harm through negligent treatment, litigation of this sort has been rising since 1976 albeit with a plateau in the 1990s.<sup>107</sup> The financial implications of this are worrying for the government. Therefore reducing litigation expenses is high on the government's agenda and openness has been identified as one way of achieving this aim. As suggested above, openness may achieve this aim as the law is used as a means of obtaining information, or because patients are angry about the lack of information and lack of apology received.<sup>108</sup> Therefore negligence litigation can be seen as a response to the lack of candour, however it also acts a disincentive to openness through its need to individualise blame.

The adversarial nature of law, as it does in all contexts, encourages parties to see themselves in opposition to each other.<sup>109</sup> This effect is extenuated in the

<sup>101</sup> Department of Health, *Implementing a 'Duty of Candour': a new contractual requirement on providers*, (Cm. 16501, 2011) p.10. para 4.1.

<sup>102</sup> M Bismark, E Dauer, 'Motivations for Medico-Legal Action -- Lessons from New Zealand' (2006) 27, *The Journal of Legal Medicine*, 55.

<sup>103</sup> MPS culture of openness Medical Protection Society, *Culture of Openness; The MPS Perspective*, <<http://www.medicalprotection.org/Default.aspx?DN=caa2c1a1-3e14-4be8-ba7b-867f103ee41e>> accessed 28/02/12. p.10.

<sup>104</sup> *Ibid* p. 8.

<sup>105</sup> Department of Health, *Making Amends: A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS* (2003)

<sup>106</sup> *Ibid* per Sir Liam Donaldson, Chief Medical Officer.

<sup>107</sup> National Audit Office, *Handling Clinical Negligence Claims in England* (London: NAO 2001) HC Paper 2000-01, No.403,17. HC Written answers, 6 Nov. 2001.

<sup>108</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12, column 581.

<sup>109</sup> Montgomery, J, 2<sup>nd</sup>ed, *Healthcare Law*, (Oxford University press, New York, 2003) p. 191-192.

medical context, due to the unique and personal nature of the doctor-patient relationship, and therefore the subjection of medicine to the general law is far from a simple matter.<sup>110</sup> Most doctors appear willing to be open, unless the patient seeks information with a legal army in place for battle, as doctors see complaints and claims as threats to their individual autonomy and integrity.<sup>111</sup> Therefore adversarial processes such as these are 'extremely blunt tools by which to identify and respond to mishaps...as they encourage the propensity to individualise blame'.<sup>112</sup> Clinical negligence is often argued as being damaging to the doctor-patient relationship and more hostile than complaints.<sup>113</sup> Yet they both involve making accusations, and therefore promote a defensive rather than conciliatory response.<sup>114</sup> These defensive reactions are escalated by a fear of liability due to the devastating implications both legal, and non-legal liability, can have on a physicians' reputation.<sup>115</sup>

Consequently clinical negligence litigation is particularly problematic in terms of securing openness within healthcare. It is both a response to, and cause, of the lack of candour, and thus appears to circularly maintain the culture of denial. The detrimental effects of clinical negligence do not end here. In addition to damaging the doctor-patient relationship, such litigation has also profoundly influenced institutional medical culture.

### Medical culture

Medical culture is predominately inhospitable to medical error, creating an environment which acts as a fundamental barrier to openness. This culture which exists among clinicians and management has been influenced by traditional attitudes, and negligence litigation.

For many years the general ethos among practitioners was one in which doctors would not readily admit mistakes.<sup>116</sup> Ian Kennedy in 1980, claimed doctors were hostile to any form of accountability due to the superiority they felt.<sup>117</sup> It became normal practice to assert that doctors didn't make mistakes; unless a court of law had proven that a specific doctor had made a specific error.<sup>118</sup> This still occurs as negligence through the element of causation has

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<sup>110</sup> Montgomery, J, 'Time for a paradigm shift? Medical law in transition' (2000) 53, *Current Legal Problems*, 363-408.

<sup>111</sup> Mulchay, L, and Rosenthal, M, 'Beyond blaming and perfection: a multi-dimensional approach to medical mishaps' *Medical mishaps, pieces of the puzzle*, Rosenthal, M, Mulchay, L, Lloyd –Bostock, S, (Open University Press, Buckingham, 1999) p.8.

<sup>112</sup> Ibid p. 7.

<sup>113</sup> Lloyd-Bostock, S, 'Calling doctors and hospitals to account: complaining and claiming as social processes' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999)

<sup>114</sup> Ibid.

<sup>115</sup> T, Keren-Paz, "Liability regimes, reputation loss, and defensive medicine" (2010) *medical Law review*, 18(3), 363-388.

<sup>116</sup> Nathan, V, 'Medical mistakes: a view from the British Medical Association' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p.197

<sup>117</sup> Ian Kennedy, *Kill All the Lawyers*, BBC Reith Lectures, Archive, 1980.

<sup>118</sup> Nathan, V, 'Medical mistakes: a view from the British Medical Association' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p.197

meant error must be blamed on a specific act, and thus errors are regarded as someone's fault,<sup>119</sup> despite the infamous view 'to err is human'.<sup>120</sup> In a professional culture that values perfection, disclosing error and admitting failure becomes psychologically difficult.<sup>121</sup> This unsatisfactory position is encumbered by the way mistakes are perceived, namely as the result of inattention, laziness, and carelessness.<sup>122</sup> Accordingly reports and proposals have argued that a 'blame culture' currently exists within the NHS, which inhibits health professionals from acknowledging their own errors and reporting the errors of others.<sup>123</sup>

There is evidence to suggest doctors want to be open, but 70% are left feeling they receive little or no support, due to the hostility of management towards medical error.<sup>124</sup> Baroness Masham of Ilton gives the anecdotal example of one doctor trying to be open, prevented only by hospital management and the National Health Service Litigation Authority (NHSLA).<sup>125</sup> This hostility occurs as despite the exclusion of liability in the Compensation Act 2006,<sup>126</sup> organisations still fear honest explanations as admissions of fault. Thus the institutional norms create a culture with a propensity to blame that encourages secrecy. Arguably this culture continues to grow; as much of the 'practice of medicine is learned through a form of apprenticeship'.<sup>127</sup> Thus junior doctors look to their supervisors for an exemplar of how to act, and covering up errors quickly becomes the norm.

The various objectives for securing openness within healthcare have been identified as; discouraging complaints and litigation; restoring public trust; increasing reporting of patient safety incidents; and meeting patient expectations. The above analysis suggests securing the four-fold objectives of candour depends upon changing medical culture from a 'culture of blame' to a 'culture of openness'. The question then remains as to how the duty of candour is to achieve this. The following chapters discuss the potential forms

<sup>119</sup> Leape, L, 'Error in medicine' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p.23

<sup>120</sup> Sir Liam Donaldson, World Health Organization's "World alliance for patient safety" conference, Washington, (2004)

<sup>121</sup> Cherri Hobgood et al, 'Profiles in Patient Safety: When an Error Occurs' (2004) 11, *ACAD.Emergency Med*, 766-768.

<sup>122</sup> Shaw, S, 'Changing a culture of blame into a culture of learning' Anglia Ruskin University, Cambridge and Chelmsford.

<[http://www.nscn.nhs.uk/\\_Attachments/Resources/256\\_S4.PDF](http://www.nscn.nhs.uk/_Attachments/Resources/256_S4.PDF)> 17/02/12.

<sup>123</sup> Merry A, and McCall Smith, *Errors, Medicine and the Law*, (Cambridge University Press, Cambridge, 2001). Also see *Learning from Bristol: The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984-1995* (Cmnd. 2507(1) 2001)

<sup>124</sup> MPS response to the Department of Health's consultation on implementing a 'Duty of Candour', 25/01/2012

<<http://www.medicalprotection.org/adx/asp/adxGetMedia.aspx?DocID=71d9f23f-174e-4211-ae27-081cffa9dba0>> accessed 24/02/12.

<sup>125</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12, Column 596, per Baroness of Masham of Ilton.

<sup>126</sup> The Compensation Act 2006 s.2, states "An apology, an offer of treatment or other redress, shall not in itself amount to an admission of negligence or breach of statutory duty".

<sup>127</sup> Nathan, V, 'Medical mistakes: a view from the British Medical Association' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p. 198.

of the duty of candour, in order to discern their comparative merits and likely success in meeting these objectives of candour, and implementing cultural change. This comparison draws upon the varying approaches to candour, identified in chapter's 1 and 2 as patient safety and patient's rights, and concludes by offering an explanation for the differing opinions regarding the duty of candour's form.

### **Professional Discipline**

Professional discipline, as a potential mechanism for enforcing candour, reflects to some extent the current regulatory attempts to secure openness in the form of GMC guidance, and option 1 of the consultation document 'to do nothing'.<sup>128</sup> It is a form of individual responsibility as opposed to institutional responsibility, as it holds doctors individually accountable. Theoretically this ought to be more threatening to the individual, as sanction by the GMC threatens physicians' careers, as opposed to the public purse.<sup>129</sup> However in reality sanction by the GMC is simply not a real fear for breaching the duty to be open. The idea of the GMC using its powers strike off a doctor for failure to be open is implausible, and to date there is not a single example of them bringing a case against a doctor for breach of this professional duty.<sup>130</sup>

Professional discipline is also a form of collective responsibility, applying to all those providing NHS funded care, and thus its scope is fairly wide reaching. This is beneficial as it applies holistically to all healthcare providers and recognises the historic premise, that candour is based on patient rights, and such moral obligations cannot be applied selectively. However its scope is fundamentally limited by failing to encourage institutional responsibility, namely holding organisations accountable for doctors' failures to be open. This is essential to securing candour, as cultural change 'must start with leadership',<sup>131</sup> due to the current lack of institutional support.

Despite these flaws, support for professional discipline, can be found in an interpretation of Baroness O'Neill's Reith lectures,<sup>132</sup> where it is suggested that increased accountability can build a culture of suspicion, and encourage professional cynicism. O'Neill claims 'professional life may not flourish if we constantly uproot it to demonstrate that everything is transparent and trustworthy',<sup>133</sup> a conceptualisation that may be applicable to healthcare professionals. Evidence of this can be found when analysing the correlation

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<sup>128</sup> Department of Health, *Implementing a 'Duty of Candour; a new contractual requirement on providers*, Impact Assessment, IA no. 5100, p. 11 para 1.

<sup>129</sup> Jon Robins, 'Clinical negligence: saying sorry', *Law Society Gazette*, July 2008. <<http://www.lawgazette.co.uk/features/saying-sorry>> accessed 02/11/11.

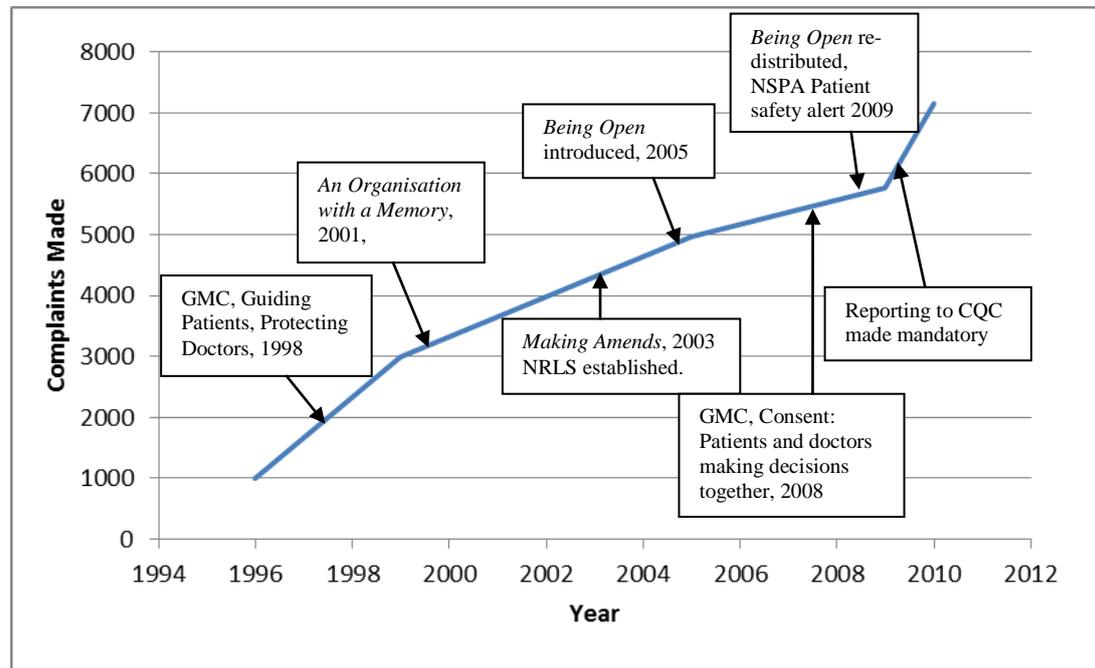
<sup>130</sup> *Ibid.*

<sup>131</sup> House of Lords 2011-2012 Session, *Hansard* Volume 735, Part 267, 13/02/12. Column 581, per Baroness Tyler of Enfield.

<sup>132</sup> Onora O'Neill, *A Question of Trust The BBC Reith Lectures*, (CUP, Cambridge, 2002)

<sup>133</sup> *Ibid* p.19

between rising complaints, and the implementation of new levels of accountability. See Fig.1<sup>134, 135</sup>



This theoretical analysis suggests that where there is an increase in guidance relating to openness, or the implementation of new mechanisms of accountability, complaints rise in steady correlation. Portraying that growing awareness of the lack of openness, followed by attempts to address it, may encourage defensive or secretive reactions from doctors symptomatic of professional cynicism to accountability. These reactions then prompt patient dissatisfaction, leading to increased complaints. Consequently 'to do nothing' may be favourable, however this would invariably make no difference to the rising complaints pattern within 'the currently most overregulated sector of professional life',<sup>136</sup> that is healthcare. At best by not introducing new mechanisms complaints could plateau but there are eternal influences on the rise of litigation, such as the 'no-win no-fee' culture<sup>137</sup> that would see this increase continue albeit potentially at a slower rate.

In conclusion professional discipline as mechanism of enforcement is too limited in scope to implement cultural change, failing to offer institutional responsibility. Thus even if the GMC took a more punitive stance to ensuring

<sup>134</sup> GMC 'Record number of complaints and disciplinary hearings against doctors', (Press Release)

24 Oct 2011, <<http://www.gmc-uk.org/news/10866.asp>> accessed 24/02/2012.

<sup>135</sup> Jeremy Lawrence, 'Record number of patients complain about doctors', *Independent* July 2006. <<http://www.independent.co.uk/life-style/health-and-families/health-news/record-number-of-patients-complain-about-doctors-407361.html>> accessed 1/01/12.

<sup>136</sup> Harwood, V, *Medicine, Malpractice and Misapprehensions*, (Routledge-Cavendish, Oxon, 2007) p. 147

<sup>137</sup> Ministry of Justice, Curbing compensation culture: Government to ban referral fees, September 2011. 'The 'no-win, no-fee' system is pushing us into a compensation culture', per Justice Minister Jonathan Djanogly. <<http://www.justice.gov.uk/news/press-releases/moj/newsrelease090911a.htm>> accessed 21/02/12.

openness, this would not address the unsupportive culture fostered at administrative level. Furthermore 'doing nothing' will fail to address falling public confidence, and more importantly for the government it will fail to relieve mounting political pressure. The high profile media coverage of medical malpractice has spurred public interest and 'raised the political temperature'<sup>138</sup> to such an extent that leaving securing openness to a version of current mechanisms is simply not an option for the government. Additionally it would fulfil the 2010 Coalition Agreements commitment to requiring openness.<sup>139</sup> Therefore this option neither achieves the cultural change required to meet the four-fold aims of candour, nor is it a realistic option for the government.

### **The 'Duty of Candour': statutory or contractual?**

The implementation of the duty of candour as either a statutory or contractual mechanism, informs the current debate. These mechanisms are realistic options for progression, and one is likely to be implemented in the near future. In order to discern their comparative merits and likelihood of achieving the four-fold aims of candour, these mechanisms shall be analysed in a comparison which illuminates their key similarities and differences, whilst exploring their effects.

#### Institutional responsibility

The statutory and the contractual mechanisms will, on a theoretical level, work in a similar way, both using institutional responsibility to promote cultural change through administrative processes. Thus they both entail holding the institution to account for the collective failings of hospital staff to be open with patients. The contractual mechanism differs, as its enforcement will be policed within healthcare institutions, rather than by a statutory regulatory body. Therefore it supports a move away from legalism in healthcare, instead aiming to improve forms of accountability and redress that rely on bureaucratic, rather than legalistic processes. A method preferred by academics such as Montgomery who suggests 'the source of norms most influential in practice may be found principally in the institutions of healthcare rather than those of law'.<sup>140</sup> This is not contested, however arguably both the statutory and contractual mechanisms would adhere to this premise.

Earl Howe, speaking for the government, claims that commissioners are better placed to regulate the duty of candour as ensuring 'openness needs to rest as close to the front line as possible, rather than being the responsibility of a remote organisation such as the CQC'.<sup>141</sup> Theoretically for candour to become

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<sup>138</sup>Harpwood, V, *Medicine, Malpractice and Misapprehensions*, (Routledge-Cavendish, Oxon, 2007)

<sup>139</sup>Cabinet Office, *The Coalition: our programme for government*, May 2010.

<sup>140</sup> Montgomery, J, 'Time for a paradigm shift? Medical law in transition' (2000) 53, *Current Legal Problems*, 363-408.

<sup>141</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12 per Earl Howe.

a cultural norm it ought to be promoted by those working closely with hospital staff, and indeed commissioners fulfil this role. However the CQC, the regulator of the statutory duty, will merely be monitoring the organisations compliance, the source of norms that doctors will adhere to will still come principally from hospital management, effectively nullifying this argument. Instead the government may be opposed to statutory regulation, as it renders them directly accountable through the Secretary of State and the CQC. Whilst the contractual mechanism places the power to hold the NHS to account as close as possible to the people affected by the lack of openness,<sup>142</sup> it also keeps the duty at arm's length from the government, allowing them to hive off criticisms to the organisation and commissioners in charge of regulating this duty.

Administrative institutional attempts at securing openness, by their very nature, run the risk of becoming a 'costly bureaucratic mechanism ... or one which would simply create a tick box exercise'.<sup>143</sup> Whilst the contractual mechanisms 'declaration of openness' has been criticised<sup>144</sup> as precisely this, this criticism does not hold weight in relation to the administrative implementation of openness. As demonstrated in the chapter 3 discussion of medical culture, it has become increasingly recognised that it is not necessarily the doctors' unwillingness that prevents honest disclosure, but those behind the organisation or the 'pen-pushers...who are afraid that the organisation will come into disrepute'.<sup>145</sup> Therefore if the management were driven by institutional financial incentives, or sanctions, this desire for openness could be reflected in management style and culture.

Such inferences can be drawn from the rail industry. The current structure of the railway was established by the Railways Act 1994.<sup>146</sup> The infrastructure manager is Network Rail, a monopoly, regulated by statutory Office of Rail Regulation (ORR). Under the Act, Network Rail receives a license to operate, and every five years the ORR determines how much money Network Rail receives to deliver the governments required outputs. Network Rail also has contracts with each train operating company for access to the tracks. These contracts require Network Rail to deliver the service at agreed levels.<sup>147</sup> Network Rail's expectations are therefore governed by statute and contracts, and the delivery of these outputs are financially motivated and implemented by management. The statutory and contractual expectations placed on Network Rail ensure management secure them, by focusing

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<sup>142</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12 per Earl Howe.

<sup>143</sup> Department of Health, *Implementing a 'Duty of Candour': a new contractual requirement on providers*, (Cm. 16501, 2011) p. 8 para 2.11.

<sup>144</sup> See The MPS press release, 'Build a culture of openness with patients not contract' <<http://www.medicalprotection.org/uk/press-releases/Build-culture-of-openness-with-patients-not-contract>.> Also see, Royal College of Surgeons response to implementing a 'Duty of Candour' consultation. <<http://www.rcseng.ac.uk/publications/docs/rcs-response-implementing-a-duty-of-candour> > accessed 22/01/12.

<sup>145</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12, Colum 581 per Baroness Tyler of Enfield.

<sup>146</sup> The Railways Act 1994.

<sup>147</sup> Email from Richard O'Brien, Network Rail, Wessex Route Managing Director, Received to kob1g09@soton.ac.uk on 24/02/12.

themselves and their teams on achieving these goals to avoid potential sanction. Thus adherence to governmental expectations has become the practicing norm for both management and staff dealing directly with customers.<sup>148</sup> This comparative indicates that either mechanism could secure a change in management style, which would communicate to doctors that being open is necessary in order to fulfil their statutory of contractual requirements, as opposed to preventing them from disclosing to patients, as currently occurs.

### Sanctions

Despite the fact both the statutory and contractual mechanisms encourage institutional responsibility, the Alzheimer's society suggest a statutory mechanism will be more effective in encouraging cultural change, as it has the 'force of law'.<sup>149</sup> Herein lays a contestable difference between the two mechanisms: the *degree* of influence they have on management. Across industries sanctions enforced by government regulators are typically more expansive and threatening than those stated in contracts, and the same could be true for healthcare.

Failure to comply with the contractual requirement of openness would result in a 'deduction of a percentage of the annual contract value'<sup>150</sup> capped at a maximum. Arguably this sanction is weakened by its financial nature, which the MPS argue will not foster the development of an open culture.<sup>151</sup> Sanctions for the statutory mechanism purportedly hold greater force, as the CQC's expansive enforcement powers under the Health and Social Care Act,<sup>152</sup> allows for licence suspension, and even criminal proceedings.<sup>153</sup> Fear of these sanctions will force organisations to implement systems and procedures, to ensure they are meeting statutory requirements. However the conceptualisation that CQC sanction gives the duty greater force, is somewhat flawed. As demonstrated through the discussion of professional guidance and the GMC, fear of sanction is voidable by failure to implement it in practice. In reality the CQC, for non-compliance that does not directly impact on people's safety, would examine a lesser sanction than license revocation, such as guidance.<sup>154</sup> The CQC favours less punitive measures such as working with hospitals to ensure they are compliant, the Queen's Hospital investigation

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<sup>148</sup> Email from Richard O'Brien, Network Rail, Wessex Route Managing Director, Received to kob1g09@soton.ac.uk on 24/02/12.

<sup>149</sup> Alzheimer's Society response to Implementing a 'Duty of Candour' A new contractual requirement on providers, 03/02/2010, <[http://alzheimers.org.uk/site/scripts/download\\_info.php?fileID=1308](http://alzheimers.org.uk/site/scripts/download_info.php?fileID=1308)> accessed 04/01/2012.

<sup>150</sup> Consultation doc Department of Health, *Implementing a 'Duty of Candour'; a new contractual requirement on providers*, (Cm. 16501, 2011)

<sup>151</sup> Medical Protection Society, *Culture of Openness; The MPS Perspective*, <<http://www.medicalprotection.org/Default.aspx?DN=caa2c1a1-3e14-4be8-ba7b-867f103ee41e>> 28/02/12.

<sup>152</sup> Health and Social Care Act 2008

<sup>153</sup> Care Quality Commission, *Our enforcement policy*, Oct 2010, <[http://www.cqc.org.uk/sites/default/files/media/documents/cqc\\_enforcement\\_policy\\_oct\\_2010.pdf](http://www.cqc.org.uk/sites/default/files/media/documents/cqc_enforcement_policy_oct_2010.pdf)> accessed 29/02/12.

<sup>154</sup> *Ibid* p.11 para.38

provides an example.<sup>155</sup> Here despite much more direct threats to patient care than failure to disclose, such as abusive staff, and poor clinical care,<sup>156</sup> the focus of the CQC remained on working with the hospital as opposed to threatening to close it. Consequently the practical enforcement of sanction, will be similar for both the statutory and contractual mechanism, and thus the effect the CQC and the Commissioners' are likely to have on hospital management, is analogous.

This leads to the conclusion that it is not the practicalities of the statutory mechanisms enforcement that gives it the force of law, rather it is the profound message it conveys: 'a legal duty to disclose gives physicians a tangible, concrete requirement that undercuts any rationalizing of a need for concealment'.<sup>157</sup> Furthermore reporting incidents, and thus securing openness between institutions, is a statutory duty.<sup>158</sup> Failure to mirror obligation this with a statutory duty of candour, which relates more directly to openness with patients', questions the governmental commitment to securing a culture of openness.<sup>159</sup> This divergence in priorities is explained by the government's patient safety approach to candour. Yet such prioritising hinders the contractual duty of candour, suggesting it is 'not really important at all'.<sup>160</sup>

### Scope

Differences in scope reflect the largest practical distinction between the contractual and statutory mechanism. The scope of each proposed mechanism influences their ability meet the four-fold aims of candour, and has particular impact on the reduction of litigation, and the restoration of public trust.

Both mechanisms are limited to ensuring open disclosure regarding patient safety incidents that result in moderate harm, severe harm, or death. Such limitations, as shall be explored, are likely to have an impact on the mechanism's ability to restore public trust. The statutory mechanism is wider in scope and encourages collective responsibility, not only in the sense of applying at a management level and to individual doctors, but it encompasses primary careers such as general practitioners and dentists. This wider application is more likely to secure holistic cultural change across the NHS, as opposed to just in hospitals, as proposed by the contractual duty.<sup>161</sup> These variations in scope impact on the mechanisms ability to reduce negligence

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<sup>155</sup> CQC, Investigation Report, Barking, Havering and Redbridge University Hospitals NHS Trust, Queen's Hospital and King George Hospital, Oct 2011.

<[http://www.cqc.org.uk/sites/default/files/media/documents/20111026\\_bhрут\\_investigation\\_report\\_final\\_0.pdf](http://www.cqc.org.uk/sites/default/files/media/documents/20111026_bhрут_investigation_report_final_0.pdf)> 05/03/12.

<sup>156</sup> Ibid p.5

<sup>157</sup> Thomas Hafemeister, Selina Spinos, 'Lean on me: A physician's fiduciary duty to disclose an emergent medical risk to the patient', 86, *Washington University Law Review*, 1167-1210.

<sup>158</sup> Care Quality Commission (Registration) Regulations 2009 SI 2009/3112 reg.18.

<sup>159</sup> AvMa Response to Department of Health Consultation on a "Duty of Candour" January 2012,

<[http://www.avma.org.uk/data/files/DoH\\_Consultation\\_on\\_Duty\\_of\\_Candour\\_Jan\\_12.pdf](http://www.avma.org.uk/data/files/DoH_Consultation_on_Duty_of_Candour_Jan_12.pdf)> accessed 22/02/2012.

<sup>160</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12. Column 574

<sup>161</sup> Department of Health, *Implementing a 'Duty of Candour'; a new contractual requirement on providers*, (Cmd. 16501, 2011) p.12 para. 4.10.

litigation. It is submitted, the contractual mechanism limitations on scope, are for reasons unrelated to its ability to secure openness. Such limitations hinge upon the governmental focus on improving patient safety whilst reducing NHS expenses, unconcerned with securing a holistic patient right. Consequently government fear the potential financial implications of the far reaching statutory duty. This shall be illustrated by the following discussion of litigation and public trust, and the final chapter's discussion of differing opinions.

### Litigation

The reduction of litigation has been identified as an objective of the duty of candour. However whether openness will lead to a less litigious society is debatable, and hinges upon conflicting evidence. A study conducted by Hickson et al,<sup>162</sup> suggests openness could lead to a decrease in litigation because, as previously explained, litigation is often an attempt to obtain information. Such findings are supported by a paper written by Obama and Clinton.<sup>163</sup> However Studdert et. al<sup>164</sup> suggests a 95% chance of an increase in litigation, as people will be prompted to make a claim on the basis of the information they received.<sup>165</sup> Therefore evidence is 'inconclusive',<sup>166</sup> and largely anecdotal,<sup>167</sup> so the government remain unconvinced as to which way the pendulum will swing,<sup>168</sup> and fail to make an estimation of the financial effects, in the consultations Impact Assessment.<sup>169</sup>

An expansive mechanism such as the statutory duty, would equate to increased disclosure, as it is applicable to a greater number of healthcare providers. This is beneficial if approaching candour from a patients' rights perspective, as it entitles more patients to this right. However increased disclosure will also have an increased effect on clinical negligence litigation, either dramatically increasing or reducing it, depending upon which evidence materialises as accurate. The financial implications of increased litigation would be undesirable for the government, and would run counter to a fundamental objective of candour: reducing negligence litigation.

The statutory duty of candour could have further financial implications. Transatlantic comparisons of the United Kingdom with the United States should be treated with caution as there are important structural differences in

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<sup>162</sup> Hickson B, Clayton W, Githens B, Sloan A, 'Factors that promoted families to file medical malpractice claims following perinatal injuries', (1992) *JAMA*, 11;267(10) 1359-1363.

<sup>163</sup> Clinton HR, Obama B, 'Making patient safety the centrepiece of medical liability reform, (2006) 354, *NEJM*, 2205-2208.

<sup>164</sup> Studdert M, Mello M, Gawande A, Brennan A, Wang C, Disclosure of Medical Injury to Patients; An Improbable Risk Management Strategy, (2007) 26, *Health Affairs*, 215-226.

<sup>165</sup> Department of Health, *Implementing a 'Duty of Candour; a new contractual requirement on providers*, Impact Assessment, IA no. 5100. p.8

<sup>166</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12. Column 581, per Baroness Tyler of Enfield.

<sup>167</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12.

<sup>168</sup> Department of Health, *Implementing a 'Duty of Candour; a new contractual requirement on providers*, Impact Assessment, IA no. 5100. p.8, para 2.23.

<sup>169</sup> *Ibid*.

both the health care and legal systems.<sup>170</sup> However the problems encountered with mandatory disclosure laws in the US, could inform theoretical discussions of the potential for a rise in litigation, following the implementation of the statutory duty. According to the MPS research, in the six States that have such a law,<sup>171</sup> there appears to be confusion around its interpretation.<sup>172</sup> Confusion manifests itself around the definition of a 'triggering event', namely one that demands disclosure, and the appropriate mechanism or mode of disclosure. This could indicate potential problems with 'different interpretations'<sup>173</sup> of the proposed amendment, such as what constitutes 'the reasonable opinion of a healthcare professional'.<sup>174</sup>

The amendment although drawing upon the existing wording and definitions used in the current CQC regulations, may still leave scope for debate under these new circumstances. The interpretation in itself may lead to litigation, and the 'Bolam test'<sup>175</sup> may be used to decide what is a 'reasonable opinion', leading to criticisms of practitioners regulating themselves, as it does in other contexts.<sup>176</sup> In terms of the mode of disclosure there is currently *Being Open* guidance, but this was not formulated on the basis it would hold statutory force. Thus complex questions surrounding the interpretation of the statutory duty, such as whether the organisation delivered the disclosure in the correct mode, may increase the need for litigation.

### Public trust

Both mechanisms limit their scope to the disclosure of patient safety incidents resulting in moderate harm, severe harm, or death. Such limitations appear merited, not only because the disclosure of all incidents would be too time consuming to be practical, but because offering too much information can be counter-productive. Whilst it is commonly assumed that providing individuals with more information is the key to building trust, some sorts of transparency actually encourage suspicion, and trust has seemingly receded as transparency has advanced.<sup>177</sup> Consequently it may be sensible to limit disclosure to incidents of necessity, in order to prevent public anxiety and increased apprehension in relation to low harm incidents. Similarly, limiting the publication of breaches on the providers NHS choices web page,<sup>178</sup> proposed by the contractual duty, to such incidents would ensure public accountability, without providing patients with unnecessary information that

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<sup>170</sup> Montgomery, J, *Health Care Law*, 2<sup>nd</sup> ed, (Oxford University Press, New York, 2003) p.207

<sup>171</sup> Pennsylvania, California, Florida, Nevada, New Jersey, Vermont, and Oregon.

<sup>172</sup> MPS a culture of openness Medical Protection Society, *Culture of Openness; The MPS Perspective*, <<http://www.medicalprotection.org/Default.aspx?DN=caa2c1a1-3e14-4be8-ba7b-867f103ee41e>> accessed 28/02/12.

<sup>173</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12. per Earl Howe.

<sup>174</sup> Amendment 17 s. 1E (a) Moved by Baroness Masham of Isilton.

<sup>175</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583.

<sup>176</sup> See the High Court of Australia's criticism in *Rogers v Whittaker* (1992) 109 ALR 625 at 632.

<sup>177</sup> Onora O'Neill, *A Question of Trust The BBC Reith Lectures*, (CUP, Cambridge, 2002) p.68

<sup>178</sup> Department of Health, *Implementing a 'Duty of Candour'; a new contractual requirement on providers*, (Cm. 16501, 2011) p. 16 para.7.6.

could arouse suspicion. Such limitations are pragmatic, however it should be borne in mind that deciding what incidents patients should be told of, appears much like the medical paternalism that caused an imbalance of power between the doctor and patient in the twentieth century, discussed in Chapter 1.

Despite these positive implications the duty of candour is may have on public trust, the ability of the statutory mechanism to restore trust is somewhat flawed, due to its regulation by the CQC. The government and the CQC have claimed that it does not have the resources to monitor the additional requirement of openness. Critics have termed this 'nonsensical',<sup>179</sup> as it questions the CQC's ability to monitor all other core standards. However the public have, and do, question the ability of the CQC to regulate. In 2011, it was revealed by the BBC that the Commission had failed in its duties, proving incapable of confronting abuse in residential care homes in [Bristol](#).<sup>180</sup> This media attention caused public unease. Consequently the public may not necessarily trust, or at least are suspicious of the CQC, and will therefore question its ability to regulate the duty of candour.

## Conclusion

The contractual and statutory duty in terms of practical effect are invariably similar, both offering a form of institutional responsibility. The sanctions imposed although different in how they encourage greater compliance, in practice hold similar force in relation to their effect on securing a culture of openness. As the comparison with Network Rail illuminated, financial incentives, as proposed by the contractual mechanism, are likely to have a profound influence on institutional compliance. However the contractual duty centres on a patient safety perspective to candour, and its scope is limited to hospitals, suggesting it will have lesser effects on cultural change, albeit with proportionately smaller risks of adverse financial implications.

Conversely the statutory duty is based upon a patient rights perspective, seen in the 1980s, and consequently has the added benefit of a wider scope. Its application to all NHS professionals arguably provides 'the robust framework necessary',<sup>181</sup> communicating the seriousness of candour to NHS staff, patient's rights groups, and society as a whole. As a result, one hundred and ninety eight members of the House of Lords,<sup>182</sup> and numerous prominent

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<sup>179</sup> AvMa Response to Department of Health Consultation on a "Duty of Candour" January 2012, Found at [http://www.avma.org.uk/data/files/DoH\\_Consultation\\_on\\_Duty\\_of\\_Candour\\_Jan\\_12.pdf](http://www.avma.org.uk/data/files/DoH_Consultation_on_Duty_of_Candour_Jan_12.pdf) >Last accessed 22/02/2012.

<sup>180</sup> The Independent, Care home fears raised months ago, 2 June 2011, <http://www.independent.co.uk/news/uk/home-news/care-home-fears-raised-months-ago-2292121.html> > last accessed 21/02/12.

<sup>181</sup> Alzheimer's Society response to Implementing a 'Duty of Candour' A new contractual requirement on providers, 03/02/2010, <[http://alzheimers.org.uk/site/scripts/download\\_info.php?fileID=1308](http://alzheimers.org.uk/site/scripts/download_info.php?fileID=1308)> accessed 04/01/2012.

<sup>182</sup> Amendment 17 had 198 contents.

patient and health organisations,<sup>183</sup> believe that the statutory duty of candour is the mechanism *most likely* to secure openness. However, the government and remaining members of the House of Lords disagree, and it is important to discern why.

### Differing opinions

The divergence in opinion can be explained through governmental motivations for candour. As established in Chapter 2, the government are approaching candour with the primary objective of improving patient safety through encouraging open reporting, as opposed to the moral perspective of securing patient's rights. While reducing error is a crucial aspect of medical care, this vigilant focus on patient safety coupled with the need to reduce NHS expenses, explains the detrimental limitations of the contractual duty's scope. The government have focused all current healthcare reforms, such as the Health and Social Care Bill 2011,<sup>184</sup> around reducing NHS costs. As previously demonstrated they remain sceptical about the financial effects of candour, and this fear is not unmerited. Greater regulation often leads to increased costs, and the evidence of candour's effects on litigation is conflicting. The wider scope of the statutory duty equates to greater risk, as it could exasperate the effects on litigation in comparison to the more limited contractual duty.

Earl Howe has suggested the government should 'undertake a future review of the effectiveness of the duty of candour after an appropriate interval'.<sup>185</sup> Accordingly the contractual mechanism could function as a 'test run' in order to gain a more concrete understanding of candour's effects, substantiating largely speculative evidence. Erring on the side of caution until less anecdotal evidence can be adduced may be wise. New governments are critiqued for introducing numerous untested healthcare reforms, but to no avail. Hammond satirically emphasises this point: "Healthcare secretary is seldom a good career move, and almost invariably ends in failure because you've stoked up expectations you can't hope to deliver ... so you panic and introduce wave upon wave of untested reforms".<sup>186</sup> Whilst this may be a comical exaggeration it bears truth. In 2005-2006, soon after Labour was re-elected, the Labour government issued a report titled "Compensation Culture"<sup>187</sup>, and soon afterwards the Compensation Act 2006,<sup>188</sup> and the NHS Redress Act 2006,<sup>189</sup> found their way into the statute books. Neither of these have been a runaway

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<sup>183</sup> Amendment 17 was signed by: Action against Medical Accidents, National Voices, the Patients Association, the Health Foundation, the National Association of LINks Members, Patients First, the Neurological Alliance, Rethink Mental Illness, Asthma UK and the Stroke Association.

<sup>184</sup> Health and Social Care Bill 2011

<sup>185</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12 per Earl Howe.

<sup>186</sup> Dr. P. Hammond, *Trust me, I'm (still) a doctor*, (Black and white publishing, Edinburgh, 2008)p. 66.

<sup>187</sup> House of Commons, Constitutional Affairs Committee, *Compensation Culture*, Third Report of Session 2005-06, HC 754-1 (2006)

<sup>188</sup> Compensation Act 2006 s.2

<sup>189</sup> NHS Redress Act 2006.

success; the latter has not been implemented, and the former has failed to encourage apologies following medical error, despite the statutory exclusion of liability. The new government has a lot to prove as the first full coalition government since 1945.<sup>190</sup> Failed statutory reform leading to increased NHS expenses in light of the current economic climate would reflect badly upon them.

### Suggestions for progression

Despite the differing opinions regarding which form of the duty of candour should take, it has been recognised that cultural change takes time,<sup>191</sup> and cannot be remedied by any form of the duty alone.<sup>192</sup> The duty of candour will merely mark a further commitment to openness within healthcare, and thus regardless of the chosen mechanism, the duty is somewhat symbolic of dedication to cultural change. Some may view this as mere cosmetics or lip-service<sup>193</sup> to securing openness, but it should be seen as a step in the right direction. However for the duty of candour, in either form, to achieve culture change it needs to break down the fundamental barriers to openness identified in Chapter 3. To achieve this, the duty ought to be accompanied by three crucial elements: education, appraisal, and the reform of the clinical negligence system.

### Education

Whilst the proposal suggests the ‘implementation of any lessons learned following a review of the failure’,<sup>194</sup> this statement appears vague and sweeping, undermining the importance that should be placed on learning.

As discussed in Chapter 1 since the millennium the NHS has focused primarily on improving patient safety through learning.<sup>195</sup> However this learning is crucially more absent regarding improving openness with patients. Although the *Being Open* guidance informs clinicians of how to communicate mistakes to patients, the premise of this debate is that guidance isn’t working. Reading about something is not the same as learning on a practical level. As suggested by the Royal College of Surgeons ‘a pragmatic alternative to financial penalty

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<sup>190</sup> Winston Churchill’s War cabinet was formed in 1940.

<sup>191</sup> Hadikin, R, O’Driscoll, M, *The Bullying Culture*, (Butterworth-Heinemann, Oxford, 2000) claims it take 30 years. Lady Masham, in House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12, states ‘I do not think for one moment that creating the regulation that I am seeking will, on its own, change culture and behaviour overnight’.

<sup>192</sup> House of Lords 2011-2012 Session, Hansard Volume 735, Part 267, 13/02/12 per Baroness Tyler of Enfield.

<sup>193</sup> National Voices and AvMA, *Health and Social Care Bill 2011, Joint Briefing for the House of Lords report* stage.<[http://www.nationalvoices.org.uk/sites/www.nationalvoices.org.uk/files/duty\\_of\\_candour\\_joint\\_briefing\\_for\\_lords\\_report\\_final.pdf](http://www.nationalvoices.org.uk/sites/www.nationalvoices.org.uk/files/duty_of_candour_joint_briefing_for_lords_report_final.pdf)> 27/02/12.

<sup>194</sup> Department of Health, *Implementing a ‘Duty of Candour’; a new contractual requirement on providers*, (Cm. 16501, 2011)

<sup>195</sup> Department of Health, *An Organisation with a Memory*, Report of an expert group on learning from adverse events in the NHS, (2000) Chief Medical Officer.

in some circumstances may be the provision of specific training and support'.<sup>196</sup> However it is not submitted here as an alternative, rather as a complimentary measure. As aforementioned much of medicine is learned by way of apprenticeship.<sup>197</sup> If senior clinicians are advocating secretiveness, this attitude will be absorbed and followed by junior staff. Consequently in order to begin a generational culture change, junior doctors need to learn from experienced clinicians how to approach the matter of medical error. Therefore *all* staff ought to attend training workshops, in which they would learn the correct protocol for disclosure through role play of specific scenarios. This should detail what they are required to say, in what circumstances and what this means in terms of liability, informing them of the Compensation Act 2006 exclusion of liability for apologies.

### Appraisal

At Network Rail, the subject of previous comparison, management staff receive yearly appraisals and bonuses for high performance, if they deliver the governmental outputs expected of them.<sup>198</sup> Similarly, in order to foster a supportive environment tolerant of error healthcare institutions ought to receive a form of appraisal for high quality and consistent delivery of open explanations. MPS support an appraisal approach and agree that 'the CQC should be monitoring all indicators of high performance on this issue as well as poor performance, highlighting Trusts who have improved as exemplars.'<sup>199</sup> Consequently the number of breaches should be recorded and published as currently proposed by the contractual mechanism, but the number of open disclosures should also be recorded and published, and individuals as well as institutions should be praised and rewarded for high compliance. The success of such an appraisal scheme could be hindered as low disclosing hospitals could be hospitals with few errors. Impeccable patient safety should not be penalised by misleading data indicating minimal open disclosure. As the NRLS currently publishes data on reporting mishaps,<sup>200</sup> a sensible approach for an appraisal scheme would be to mirror this report, detailing after each mishap whether there has been an open disclosure. Appraisal can then be monitored on a percentage basis, taking into account the number of errors in relation to the number of disclosures.

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<sup>196</sup> Royal College of Surgeons response to implementing a Duty of Candour, <<http://www.rcseng.ac.uk/publications/docs/rcs-response-implementing-a-duty-of-candour>> accessed 22/01/12.

<sup>197</sup> Nathan, V, 'Medical mistakes: a view from the British Medical Association' In Rosenthal, M, Mulchay, L, Lloyd, and Bostock, S, *Medical mishaps, pieces of the puzzle*, (Open University Press, Buckingham, 1999) p. 198.

<sup>198</sup> Email from Richard O'Brien, Network Rail's Wessex Route Managing Director to kob1g09@soton.ac.uk, received on 24/02/12.

<sup>199</sup> Royal College of Surgeons response to consultation Found at <<http://www.rcseng.ac.uk/publications/docs/rcs-response-implementing-a-duty-of-candour>> accessed 22/01/12.

<sup>200</sup> NSPA, NRLS, The Quarterly Data Summaries, <<http://www.nrls.npsa.nhs.uk/resources/collections/quarterly-data-summaries/>> accessed 4/03/12.

Reform of the clinical negligence system

The reform of the clinical negligence system has been a hotly debated topic for many years, and this brief discussion does not seek to provide a conclusive account. *Making Amends* provided the first formal proposition of a statutory duty of candour;<sup>201</sup> however this duty was not the focus of the report. It proposed reform of the clinical negligence system, to a *sui generis* system of care and compensation. This suggests that from as early as 2003 reform of the tort of negligence, and the implementation of candour, were seen as complimentary forms of securing openness within the NHS. The clinical negligence system encourages a propensity to blame, as discussed in Chapter 3, and therefore is a fundamental barrier to openness. In order to encourage openness with regards to error the law needs to become less punitive. Punishment is not the intended role of tort law, yet the law's translation into medical culture has had this effect.

Therefore compensatory systems which remove the battle between the medical profession and the public by bitter and protracted litigation,<sup>202</sup> such as 'no-fault' compensation are fairly widely supported.<sup>203</sup> 'No-fault' compensation means compensating patients without the requirement of proving fault, and therefore the doctor-patient relationship is not strained through the element of blame.<sup>204</sup> However the government are firmly opposed to any reform of the clinical negligence system. A 'no-fault' scheme was defeated by parliament in Westminster Private Members Bill,<sup>205</sup> the *Making Amends* proposals of a *sui generis* system were rejected, and the recent report, *Complaints and Litigation, 2011*,<sup>206</sup> rejected the scheme through fears of increased costs.<sup>207</sup> However it is submitted that such a stance may need to change, as ensuring patients are compensated should not have to occur at the expense of securing openness. Arguably a 'no-fault' scheme could provide such a balance, benefitting patients by ensuring they receive not only financial redress, but the full redress they seek<sup>208</sup> which necessitates openness.

There are strong opposing arguments to such a scheme; however the aim here is merely to emphasise that the Chief Medical Officer proposed the duty of candour, in the context of reform of the clinical negligence system, for good

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<sup>201</sup> Department of Health, *Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*, 2003, Publication, Sir Liam Donaldson. p. 11 and p.125. Recommendation 12.

<sup>202</sup> Brazier M, and Cave E, *Medicine Patients and the Law*, 5<sup>th</sup> ed, (Penguin Books, London, 2011)

<sup>203</sup> Most notably annual support from the British Medical Association. See BMA Funding *No Fault Compensation for Medical injuries* (July, 2003). See also *Mediation, Clinical Negligence Claims and the Medical Profession: A policy Paper* (2007).

<sup>204</sup> Mason and McCall Smith's, *Law and Medical Ethics*, 8<sup>th</sup> ed, (Oxford University Press, Oxford, 2010) p. 124

<sup>205</sup> National Health Service (Compensation Bill) 1991.

<sup>206</sup> House of Commons, Health Committee, *Complaints and Litigation*, (Sixth Report, Session 2010-12, HC 786-I).

<sup>207</sup> Brazier M, and Cave E, *Medicine Patients and the Law*, 5<sup>th</sup> ed, (Penguin Books, London, 2011) '£4bn annually' p.268.

<sup>208</sup> Bismark, M, Dauer, E, 'Motivations for Medico-Legal Action -- Lessons From New Zealand' (2006) 27, *The Journal of Legal Medicine*, 55.

reason.<sup>209</sup> As negligence has been identified as a fundamental barrier to openness, which has profound detrimental effects on medical culture, without some form of reform that removes the element of blame, the duty of candour's success will be invariably limited.

### Concluding Statement

The historical discussion sought to aid an understanding of how societal attitudes have influenced the need for the duty of candour, elucidating where the divergence in motivations for candour began. The formulation of the four-fold objectives of candour illustrated what openness seeks to achieve, highlighting the fundamental barrier to openness that is negligence, whilst illustrating that achieving these collective aims rests upon cultural change. This background informed the discussion of the current debate.

Weighing out the disparities between the statutory and contractual mechanism in achieving cultural change, does not leave the route for progression much clearer. As identified both mechanisms have their merits and respective shortcomings. However this analysis does illuminate that if approaching candour from patient right perspective the statutory duty is the obvious choice, as it gives all patients and not just patients of hospitals, the right to openness. However if taking a more sceptical or mindful approach, depending on one's view, the governments cautious or 'test run' approach to candour manifested in the contractual duty, may be favourable. Nonetheless, neither affords sufficient weight to education or appraisal nor breaks down the fundamental barrier to openness that is negligence.

The government appear to be 'set'<sup>210</sup> in their decision to implement a contractual duty. The consultation document suggests some, albeit weak, desire to focus on education, and the government are unlikely to hasten at implementing an appraisal scheme. However they are unwilling to reform clinical negligence due to its financial implications. Such an approach may be pragmatic due to the strained resources of the NHS, but it brings the question of openness down to one unfortunate conclusion that will determine its success: how much is securing openness worth? The answer is a political decision which only the government can decide.

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<sup>209</sup>Department of Health, *Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS*, 2003, Publication, Sir Liam Donaldson.

See recommendation 12. p.125.

<sup>210</sup> Government Response to the NHS Future Forum report, published May 2010. 'Duty of Candour...will be enacted through contractual mechanisms'.



## An 'Institutionalist' Perspective of European Integration: Evaluating European integration using the development of British agriculture under the Common Agricultural Policy

*Adam Turner*

Ever since the inception of the European Coal and Steel Community, and through its subsequent guise as the European Community and into its present form as the European Union, academics have been attempting to explain how European integration occurs and is sustained, and what the roles of the Member States and the supranational EU institutions are in the process. The two competing theories that have been favoured at different times throughout the existence of the EU have been neo-functionalism and intergovernmentalism. This study uses the development of Common Agricultural Policy (CAP) of the European Union, the most ambitious area of economic integration in Europe, to argue how a different theory of European integration, based on fundamental principles of historical institutionalism, can provide a far more accurate explanation of how European integration has occurred in the past. This study contends that reform, as the most fundamental stage of the integrative process, is the best barometer against which to judge the competing theories of integration. My argument will use the apparent failure of European integration to develop the British agricultural sector as quickly as it has developed the corresponding sectors in the other Member States to illustrate the accuracy of the integrative theory that I support. I believe this can be explained by the British government's attitude towards its own farmers in the implementation of the most recent substantial reform of the CAP, the Mid-Term Review. It is argued that the future direction of the CAP, which can be gauged from the recent proposals for the policy's reform, can validate the theory that my study seeks to support. I contend that the proposals provide evidence of the CAP moving away from the interests of British farmers, which is a gap that the principles of historical institutionalism on which I rely suggest will only continue to widen in the future.

## Introduction

**T**he Common Agricultural Policy (CAP) of the European Union (EU) is the most ambitious area of European integration. The policy represented 47% of the total expenditure of the EU in 2008, which equates to just over €55 billion<sup>1</sup>. The scale and ambition of the policy is reflected in what it aims to achieve, which is the successful integration of every agricultural sector within the EU. How European integration occurs has been the subject of intense academic debate. The two traditionally competing views have been those of the state-centric ‘intergovernmentalists’ and the ‘neo-functionalists’, who prefer to perceive the EU as an autonomous supranational body. However, my proposal is that a separate theory of European integration, based on the principles of historical institutionalism, provides a more accurate explanation of the integrative process, and the scale of the CAP makes it the best tool to use with which to prove this assertion.

The competing theories that will be analysed all place considerable emphasis on the role of the Member State in the process of European integration and also consider how European integration could affect the Member State on a national level. I intend to evaluate the role of the Member State in a particularly important aspect of the integration process, which is reform. Therefore, in terms of the CAP I will use the case study of British agriculture and consider how it has been affected by the most recent reform of the CAP, and the role of the British government in implementing the reforms, in order to prove that a theory of integration founded on principles of historical institutionalism is accurate. This will then allow me to identify how British agriculture could receive increased benefits from European integration.

At this particular moment in time we are fortunate that we can also use the future of the CAP as a lens through which we can evaluate the existing theories of European integration. This is because the European Commission has recently released proposals as to the reforms of the CAP due to take effect from 2014. I will assess these proposals and the reaction of British farmers to them, and establish whether the theory of integration I support can explain this reaction more adequately than intergovernmentalism and neo-functionalism can. This will allow me to evaluate what the European integration of the agricultural sector will mean for British farmers looking beyond the proposed reforms according to historical institutionalist reasoning, and what the consequences will be for the British agricultural sector if it leaves the CAP.

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<sup>1</sup> National Audit Office, ‘Financial Management in the European Union’ (2010) (HC 2010-11) 34, at p.12.

## **An Overview of the Common Agricultural Policy, European Integration and the Provisions of the Mid-Term Review**

### A brief introduction to the CAP

The Common Agricultural Policy (CAP) has been a fundamental feature of the European Union (EU) since the policy was first implemented in 1962. The objectives of the CAP were stated in the founding Treaty of Rome, and have remained unchanged to this day under Article 39 of the Treaty on the Functioning of the European Union (TFEU). These objectives are<sup>2</sup>:

- (i) To increase agricultural productivity;
- (ii) To ensure a fair standard of living for the agricultural community;
- (iii) To stabilise markets;
- (iv) To assure the availability of supplies;
- (v) To ensure supplies reach consumers at fair prices.

The policy was introduced by the Member States to facilitate recovery of the agricultural sector in Europe in the aftermath of World War Two. The Treaty of Rome made satisfying the quantitative needs of the Member States the primary objective of the European Economic Community's agricultural policy. In order to achieve this objective, the policy provided subsidies to farmers linked to the amount of food they produced<sup>3</sup>. Therefore, farmers were encouraged to produce as much food as they could in order to satisfy the food shortage in Europe. By the end of the 1970s, the CAP had succeeded in achieving a massive increase in productivity. However, this success was mitigated by the new problems that were affecting European agriculture, some of which were created by the short-term approach the CAP had adopted towards agricultural development.

In the short-term, a system of subsidies linked to productivity had addressed the European food shortage. However, this eventually generated a surplus of food that created a massive financial burden on the EU, as the cost of exporting excess food had to be subsidised. All of these issues had to be addressed while ensuring that the CAP was integrated successfully into an ever-expanding European Community, and the policy had to take account of the large disparity between the levels of rural development in each country. All of these issues contributed to the CAP using 70% of the EU's Budget in 1985<sup>4</sup>. There was becoming an evident need to restructure the policy in order to limit its spiraling cost.

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<sup>2</sup> Consolidated Version of the Treaty on the Functioning of the European Union (2010) OJ C83/50, Article 39.

<sup>3</sup> European Commission, 'The Common Agricultural Policy Explained'. <[ec.europa.eu/agriculture/publi/capexplained/cap\\_en.pdf](http://ec.europa.eu/agriculture/publi/capexplained/cap_en.pdf)> accessed 16/01/2012, at p.6.

<sup>4</sup> *ibid*, at p.6.

All policies must be adjusted over time in accordance to its context, which constantly evolves<sup>5</sup>. This is the process of reform. The 1992 'MacSharry' reforms<sup>6</sup> introduced a new architecture to the CAP, which was intended to make it more cost efficient. These two 'pillars' are:

- (i) Market and Direct Aid;
- (ii) Rural Development

The first pillar of this new structure of the CAP concerns the aid to the farmers in terms of subsidies. This is essentially what the CAP provided for before it was reformed. The introduction of the 'rural development' pillar suggests a change of emphasis of European agricultural policy, away from the short-term and towards the long-term. It is a commitment by the EU towards making its agricultural policy more sustainable, through developing European agricultural systems, so that firstly every Member State attains the same level of rural development, and, secondly, that level is progressively raised through implementation of the second pillar.

In summary, the objectives that the CAP has striven to satisfy have remained unchanged since its inception. However, although the policy was first created by the Member States to address the European food shortage in the wake of World War Two, the integration of the policy has created different challenges that the CAP has had to respond to through reform. This illustrates the importance of the process of reform in European integration, as it allows policy to adjust to address these new challenges. The analysis of the process of reform of the CAP can therefore help with the evaluation of the various theories of European integration.

#### An overview of the theories of European integration

European integration is the process in which the laws, policies and economic sectors of Member States are harmonized for the benefit of the Member States who participate in the process. The dominant theory as to how European integration occurs has constantly changed, as the reality of the EU's development has disproved the each favoured theory at a different point in its evolution. The theory that was favoured at the time the European Coal and Steel Community (ECSC) was formed was that of neo-functionalism. The neo-functionalist structure of integration asserts that a supranational authority is required when two or more states wish to integrate in a particular economic sector. In order to fully integrate that economic sector, it is necessary then to draw cognate economic sectors into that integrative web, an effect that was

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<sup>5</sup> Carsten Daugbjerg, 'Policy feedback and paradigm shift in EU agricultural policy: the effects of the MacSharry reform on future reform' (2003) JEPP 10(3) 421.

<sup>6</sup> 'The Common Agricultural Policy Explained (n 3), at p.6.

labelled 'functional spillover'<sup>7</sup>. Economic integration then leads to 'political spillover'<sup>8</sup>, where states become integrated to such a degree that the EU begins to represent a single state. Political spillover 'would require a process of loyalty transference'<sup>9</sup> of individuals from the national to the supranational realm, under the realisation that greater prosperity is available under supranational governance. This has proved to be the main empirical problem of neo-functionalism. It disregards the importance of the Member State and attributes 'greater autonomy to supranational actors than can be plausibly sustained' when the Member States 'remain the most powerful decision makers'<sup>10</sup> in the EU.

Intergovernmentalism regards the Member States of the EU as the 'primary actor in the development of European integration'<sup>11</sup>. Under this theory of governance the institutions of the EU act as mere 'faithful agents of intergovernmental bargains'<sup>12</sup>, whose role it is to facilitate the efficient negotiation of policies between Member States and which 'have little independent impact on integration at all'<sup>13</sup>. The role of the Member State under intergovernmentalism is therefore the polar opposite to its role under neo-functionalism. Although I support the liberal intergovernmentalist view of 'the relationship between society and government as one of principal and agent'<sup>14</sup>, where it is the role of the Member State to protect the interests of its individuals on the European level, this state-centric view of integration was again disproved by the development of the EU, as more authority and power have transferred to its central institutions.

The theory formulated by Stone Sweet and Sandholtz, viewing the EU as a multi-level structure of governance, is the concept that this study supports. It incorporates the fundamental historical institutionalist concept of 'path-dependence' in the process of institutionalization. Pierson, a strong advocate of historical institutionalism, describes 'path dependence' as 'a single alternative and continued movement down a specific path once initial steps are taken'<sup>15</sup>. An illustration of this concept is evident in the formative years of the CAP, where the policy continued to encourage food production even as a surplus was being generated, as this was the path the initial policy was placed on. The problem with integration based on historical institutionalism, therefore, is that policies can become 'locked-in'<sup>16</sup>; meaning the path the policy is placed on becomes difficult to alter. This links to the concept of 'critical junctures', which are 'crucial founding moments of institutional

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<sup>7</sup> Paul Craig, 'Integration, Democracy and Legitimacy', from 'Evolution of EU Law', Paul Craig and Gráinne de Búrca (2011), 2<sup>nd</sup> Edition OUP, at p.14.

<sup>8</sup> *ibid*, at p.14.

<sup>9</sup> Ben Rosamond, 'Theories of European Integration', (2000) Palgrave, at p.65.

<sup>10</sup> Paul Pierson, 'The path to European Integration: A Historical Institutional Analysis' (1996) 29(2) 123, at p.125-126.

<sup>11</sup> Ben Rosamond, 'Theories of European Integration' (n 9), at p.130.

<sup>12</sup> Alec Stone Sweet and Wayne Sandholtz 'European integration and supranational governance' (1997) JEPP 4(3) 297, at p.302.

<sup>13</sup> Paul Craig, 'Integration, Democracy and Legitimacy' (n 7), at p.17.

<sup>14</sup> *ibid*, at p.17-18.

<sup>15</sup> Paul Pierson, 'The path to European Integration: A Historical Institutional (n 10), at p.145.

<sup>16</sup> *ibid*, at p.146.

formation'<sup>17</sup> capable of determining or altering the path a policy will follow during the integrative process. Policy reform is the form of critical juncture that this argument will contend with.

Despite its parallels with historical institutionalism, Craig labels Stone Sweet and Sandholtz's theory<sup>18</sup> of European integration as 'new institutionalism'<sup>19</sup>. The theory introduces the concept of 'a continuum that stretches between two ideal-typical modes of governance: the intergovernmental (the left-hand pole), and the supranational (the right-hand pole)<sup>20</sup>, and each competence of the EU is at a different point on the continuum. This then explains 'the comparative development or lack of development of different policy sectors'<sup>21</sup>. I propose that the CAP represents a EU institution that is at the supranational end of this spectrum. This is because it conforms to Stone Sweet and Sandholtz's description of a supranational institution as a centralized government structure that possesses jurisdiction over a specific policy domain within the territory of the Member States.

The multiple levels of governance recognised by Stone Sweet and Sandholtz are 'subnational, national and supranational'<sup>22</sup>. This theory is therefore favourable because it does not neglect the importance of either the Member States or the EU in the process of European integration. They recognise that integration is the result of inter-state bargaining, so integration cannot occur without the involvement of the Member States. However, Stone Sweet and Sandholtz also propose that governments are 'powerful actors who cannot always impose their preferred outcomes on other players in the EC political system'<sup>23</sup>, as the EU institutions also have a significant amount of authority over the direction of European policy. The theory of institutionalism regards the subnational 'non-state' actors as the main beneficiaries of European integration, as they are the actors who initially created the need for States to integrate by transacting across States. In the context of the CAP, the non-state actors are farmers, and which leads to the conclusion that European integration should benefit European farmers.

### The context for change in the 21<sup>st</sup> century

At the turn of the millennium, the 'Agenda 2000' agreement between the Member States of the EU outlined the objectives for subsequent reforms of the

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<sup>17</sup> Kathleen Thelen, 'Historical institutionalism in comparative politics', (1999) ARPS 2 369, at p.387.

<sup>18</sup> Alec Stone Sweet and Wayne Sandholtz 'European integration and supranational governance' (n 12).

<sup>19</sup> Paul Craig, 'Integration, Democracy and Legitimacy' (n 7), at p.24.

<sup>20</sup> Alec Stone Sweet and Wayne Sandholtz 'European integration and supranational governance' (n 12), at p.302.

<sup>21</sup> *ibid*, at p.303.

<sup>22</sup> Gary Marks, Liesbet Hooghe and Kermit Blank, 'European Integration from the 1980s: State-Centric v Multiple-Level Governance' (1996) JCMS 341, at p.342.

<sup>23</sup> *ibid*, at p.312.

CAP over the next decade, with the intention of producing a CAP with more effective policies and a better financial framework. These objectives were<sup>24</sup>

- (i) To increase competitiveness of EU agriculture;
- (ii) To assure food safety and food quality;
- (iii) To maintain a fair standard of living for the agricultural community and stabilise farm incomes;
- (iv) To better integrate environmental goals into the CAP;
- (v) To develop alternative job and income opportunities for farmers and families.

Future reform would also have to handle the effects that the impending expansion of the EU would have on agricultural policy<sup>25</sup>. The former Communist states that were joining the EU had agricultural sectors that were seriously under-developed, which created a need for emphasis on the 'rural development' pillar that would help these countries modernise their agricultural systems. These countries also had a much higher rate of employment in the agricultural sector than in the present 15 Member States, illustrated by the 57% increase in EU farmers upon the joining of just 8 new Member States. The CAP therefore had to find a means to support a much greater number of farmers. This suggested that the CAP would need to promote sustainability and move away from a focus on productivity.

#### The interests of British farmers in the reform of the CAP

Every Member State of the EU had a personal interest in gaining the best possible bargain for their State under the reformed CAP. Each state had different priorities and concerns relating to their own unique agricultural systems, which is the main issue with a universal agricultural policy applying to the entirety of Europe. It is impossible to tailor a policy to suit every agricultural system throughout Europe, because of the difference in factors such as climate. However, because we are assessing European integration of the agricultural sector through using Britain as a case study, it is necessary to evaluate what British farmers wanted from the new CAP.

It was declared in 2002 that 'farming in the United Kingdom is in a state of crisis'<sup>26</sup>, which was primarily due to the outbreak of foot and mouth disease, which decimated over 2000 herds of livestock across the UK and resulted in the slaughter of 6 million animals<sup>27</sup> in 2001. British farmers therefore needed a form of income support that would protect them from the volatility of the agricultural market, which this episode highlighted. The initial outbreak of foot and mouth had cost the government £2.5 billion in compensation alone<sup>28</sup>. If there were to be another outbreak of the disease, then British farmers

<sup>24</sup> Joseph McMahon, 'The Common Agricultural Policy: From Quantity to Quality' (2002) 53 NILQ 9, at p.20.

<sup>25</sup> Katarzyna Kosior, 'New stakeholders in the common agricultural policy: a real burden to reform processes in the enlarged European Union?' (2005) ELJ 11(5) 566.

<sup>26</sup> Committee for Environmental, Food and Rural Affairs, 'The Future of UK Agriculture in a Changing World' (HC 2001-02) 550-1, at p.6.

<sup>27</sup> Figures are according to the Department of Environmental, Farming and Rural Affairs (DEFRA) <[www.defra.gov.uk](http://www.defra.gov.uk)>.

<sup>28</sup> *ibid.*

couldn't rely on the same level of government support. One means of reducing the financial pressure on the government would be to ensure that farmers still receive financial support from Europe even if they cannot produce food for the market.

The Committee for Environmental, Food and Rural Affairs also emphasised that 'the primary role of farmers is to produce food that consumers want'<sup>29</sup>. Subsidies linked to production do not encourage producing to the market. A policy that placed more emphasis on market orientation would benefit both the farmer and the consumer in Britain, as the farmer would obtain a better price for a commodity that is in demand in the market and there would be a plentiful supply of the commodity for the consumer, available at a fair price.

What is apparent from the Committee's report on the state of British agriculture and the impending reform of the CAP is that European policy must regard the role of farmers in agriculture primarily as producers of food, but in order to be subsidised by the taxpayer farmers must also deliver 'public goods' associated with farming as well. In terms of agriculture, these public goods would mainly consist of maintaining land so as to protect the environment. The problem with public goods is that there is no market for them and so a value cannot be put on their provision. However, after decades of inflated spending on the CAP, the government was anxious to justify its expenditure on the European agricultural policy by ensuring taxpayers received better value for money from the policy. The government therefore wanted a policy that rewarded farmers for maintaining rural areas, which would be to the benefit of the public as a whole.

### The fundamental reforms contained in the Mid-Term Review

After much deliberation and compromise, the final draft of the Mid-Term Review was adopted on the 26<sup>th</sup> June of 2003. The reforms under the Review were radical and addressed many of fundamental problems with the CAP that had emerged at the end of the 20<sup>th</sup> century. The provisions, which were codified in Council Regulation (EC) 1782/2003<sup>30</sup>, were accompanied by the declaration by Commissioner Fischler that the reforms would mean 'our products will be more competitive, and our agricultural policy will be greener, more trade-friendly and more consumer oriented'<sup>31</sup>. This section will identify the most significant changes to the policy that were contained in the Mid-Term Review.

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<sup>29</sup> Committee for Environmental, Food and Rural Affairs, 'The Future of UK Agriculture in a Changing World' (n 26), at p.11.

<sup>30</sup> Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1.

<sup>31</sup> Franz Fischler, 'The New, Reformed Agricultural Policy', (2003) Speech/03/326. <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/326&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 18/01/2012.

The most significant restructuring of the CAP in the Mid-Term Review was found under Title 3 of the Regulation<sup>32</sup>. This established the Single Payment Scheme, which has been implemented in the UK as the Single Farm Payment (SFP). This concept completely decoupled income support from productivity<sup>33</sup>. This addressed the problem of the growing surplus of food within the European market, and also helped to simplify the CAP, making it easier to understand for the farmers and easier to administer and implement for the national authorities. Linked to the introduction of the SFP was the establishment of cross-compliance requirements under Article 4<sup>34</sup>. These are requirements that farmers who receive direct payments from the EU have to satisfy in order to receive their full allocation of income support. Article 4(1) outlines the three areas in which such requirements can be imposed:

- (i) Public, animal and plant health;
- (ii) The environment;
- (iii) Animal welfare.

If a farmer fails to satisfy a cross-compliance requirement, then under Article 6<sup>35</sup> the EU is entitled to disallow a proportion or the entirety of a farmer's direct payment for that calendar year. The introduction of cross-compliance requirements allows the EU to impose duties on farmers that fall outside of food production, and recognise the role of agriculture in helping to address issues such as the environment. They also ensure that the quality of the process in which food is produced is a consideration in providing farm support, instead of under the previous system where only the quantitative amount produced was relevant.

The other significant restructuring of the CAP came in the form of modulation of the financial support to the two pillars of the CAP. Under Article 10<sup>36</sup>, money payable to each Member State in terms of direct support to farmers would reduce year-on-year, with the funds generated from the reductions being applied to schemes under the 'rural development' pillar of the CAP<sup>37</sup>. This provision was aimed at giving the CAP a more long-term outlook, as it would gradually reduce over a number of years the dependence of EU farmers on income support from the EU while aiding the development of individual agricultural systems throughout Europe.

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<sup>32</sup> Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1.

<sup>33</sup> Luc Bodiguel and Michael Cardwell, 'Evolving definitions of 'agriculture' for an evolving agriculture?' (2005) *Conv Sep/Oct* 419, at p.419.

<sup>34</sup> Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1.

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> Dr Bettina Rudloff, 'The Mid-Term Review of the Common Agricultural Policy: The Future of Rural Development' (2002). < [aei.pitt.edu/835/1/scop2002\\_3\\_2.pdf](http://aei.pitt.edu/835/1/scop2002_3_2.pdf) > accessed 18/01/2012.

Conclusion: the CAP after the Mid-Term Review

The CAP as it exists after the Mid-Term Review is very different from the policy that first emerged in the 1960s, which is due to the process of European integration. The implementation of the initial policy solved the European food shortage in the aftermath of World War Two, but it soon became a financial black hole, as it encouraged farmers to maximise their output while subsidising the cost of storing and exporting the surplus of food that was being generated. These new issues were addressed through reforming the policy, firstly through the 'MacSharry' reforms and most recently through the Mid-Term Review.

Not only did the Mid-Term Review address the problem of the European food surplus through introducing a subsidy decoupled from production, but the new form of European subsidy was also to the benefit of British farmers, as it gave them a stable source of income in a volatile market. This suggests that Stone Sweet and Sandholtz's theory of European integration is accurate, as in the instance of the CAP the farmers, or non-state actors, have benefitted from European integration. However, British farmers did not benefit from the Mid-Term Review to the extent other European farmers did. It will be the aim of the next chapter to explain this outcome through the Stone Sweet and Sandholtz's theory of European integration.

**The Implementation of the Mid-Term Review in Britain**

In the previous chapter, the most significant reforms to the CAP contained in the Mid-Term Review were identified, and the policy considerations behind these changes were highlighted. In this chapter I will explain how a Member State's implementation of European policy can help to illustrate the accuracy of Stone Sweet and Sandholtz's theory of institutionalism. I will then evaluate how Britain implemented the major reforms of Mid-Term Review and the effect this had on British agriculture and farmers and conclude with what institutionalism tells us about Britain's approach to the European integration of the agricultural sector.

How the role of the Member State in the implementation of European policy can aid the evaluation of European integration

Stone Sweet and Sandholtz's theory of European integration relies on transactions between non-state actors to generate the need for Member States to integrate economic sectors. Integration then develops transnational society and encourages further interactions between non-state actors, leading to further integration. Therefore, according to this theory, European integration should benefit the non-state actors who initially created the requirement for Member States to integrate. However, the NFU's advisor to the European Parliament has stated that the British government has a negative attitude

towards the CAP<sup>38</sup> that has affected the prosperity of British farmers under the policy.

I contend there is a link between the negative attitude of the British government to the CAP and the prosperity of British agriculture that supports an institutionalist perspective on European integration. This link emerges in considering how a Member State implements European policy. The principle of subsidiarity is fundamental in the application of EU law, as it is enshrined in the Treaty of European Union<sup>39</sup>. It is especially important in the instance of the CAP. The European Commission has stated that 'striking the appropriate balance between a common EU framework, on the one hand, and local specific situations, on the other, is one of the most important challenges faced by the system'<sup>40</sup>. The principle of subsidiarity is viewed as the most effective method of striking this balance through delegating as much authority over the implementation of the CAP to the Member States as is possible, as the Member States can adapt the policy to suit the needs of their specific agricultural system.

The importance of this principle was reiterated in the very recent decision of the ECJ in *Monsanto SAS and others v Ministre de l'Agriculture et de la Pêche*<sup>41</sup>. This case concerned a EU Regulation<sup>42</sup> on food safety that was established during the Mid-Term Review. Article 34 of this Regulation provides for a State authority to issue 'an emergency measure' when it is evident that a genetically modified (GM) crop was 'likely to constitute a serious risk to human health, animal health or the environment'<sup>43</sup>. The court had to decide whether the EU was to define such a situation or whether this was left to the competence of the Member States. The ECJ answered that the Regulation 'requires *Member States* (emphasis added) to establish...the existence of a situation which is likely to constitute a clear and serious risk to human health, animal health, or the environment'<sup>44</sup>. This judgment demonstrates how it is left to the Member States to define the extent of their obligations under the CAP. The level of authority Member States have in implementation is therefore very high.

If a Member State has a negative attitude to European integration then they can choose to implement European policy in a manner which inhibits the activity of the non-state actors who initiated the need to integrate, such is the degree of control the Member States have over implementation of European policy. This will then mean that integration doesn't occur as readily in the specific policy sector in that Member State, which will affect its development

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<sup>38</sup> Telephone interview with the NFU's advisor to the European Parliament, at 2:15 pm on 6/12/2011.

<sup>39</sup> Consolidated Version on the Treaty in European Union (2010) OJ C-83/01, Article 5(3).

<sup>40</sup> European Commission, 'Report from the Commission to the Council on the Application of the System of Cross-Compliance' (2007) COM 147, at p.13.

<sup>41</sup> Joined Cases C-58/10 to C-68/10, *Monsanto SAS and others v Ministre de l'Agriculture et de la Pêche* (2011) ECR O.

<sup>42</sup> Regulation (EC) No 1829/2003 of 22 September 2003 on genetically modified food and feed OJ L268/1.

<sup>43</sup> *ibid*, Article 34.

<sup>44</sup> *Monsanto SAS and others* (n 41), at paragraph 81.

and prosperity. Therefore, in order to prove that the institutionalist theory of European integration is accurate, it is necessary to identify ways in which the British government implemented the Mid-Term Review to the detriment of British farmers.

### Implementing a broader legal definition of the term 'farmer'

A significant consequence of the reforms contained in the Mid-Term Review was a result of the new 'single payment' subsidy system and the introduction of cross-compliance requirements. The requirements for financial support under the CAP are a means of identifying the legal definition of a farmer, especially under a single payment system where farmers receive remuneration for directly fulfilling what Europe perceives their responsibilities to be. When subsidies were directly linked to food production the definition of a farmer was a producer of food.

The new definition of the role of a farmer can now be found within EU legislation establishing the SFP. In order to receive financial support from the CAP an individual must prove that they are 'a farmer within the meaning of Article 2(a) of Regulation (EC) No 1782/2003'<sup>45</sup>. According to this provision, a farmer is someone who 'exercises an agricultural activity'. Therefore, the new definition of a farmer is dependent on what constitutes 'an agricultural activity' under European law. This is defined as:

*'(T)he production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established under Article 5.'*<sup>46</sup>

This definition of an agricultural activity obliges a farmer to maintain the countryside as well as produce food. According to the NFU<sup>47</sup>, rewarding farmers financially for maintaining their land was a positive development because, as Commissioner Fischler highlights, they are being 'rewarded for the quality products they supply, the environmental services they perform and their role in conserving country landscapes'<sup>48</sup>. The new system rewarded farmers for duties they have traditionally performed. Recognizing the role of a farmer as beyond that of producing food also helps to justify a subsidy that is decoupled from production, as farmers only receive their full entitlement of support by performing duties beyond food production. British farmers now have a stable source of income in a volatile market that can be hugely disrupted by factors such as weather and disease.

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<sup>45</sup> Commission Regulation (EC) No 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers OJ L141/1.

<sup>46</sup> Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1, Article 2(c).

<sup>47</sup> Telephone interview (n 38).

<sup>48</sup> Franz Fischler, 'Adjusting the CAP to Better Meet its Objectives', (2002) Speech/02/412. <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/412&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 16/02/2012.

The positive effect of the reforms for European farmers was mitigated in Britain in the manner they were implemented. In accordance with the principle of subsidiarity, the EU legislated that 'Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition'<sup>49</sup>. Therefore, the Member State defines the minimum thresholds to satisfy cross-compliance requirements. The government established this standard in The Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) (Amendment) Regulations 2004<sup>50</sup>. This legislation has subsequently been the subject of litigation before the ECJ.

The case of *Horvath v Secretary of State for Environmental and Rural Affairs*<sup>51</sup> suggests that the provisions of the 2004 Regulations do not prioritize promoting the economic activity of farmers in establishing minimum requirements. The case concerned an application for the judicial review of the provisions contained in the 2004 Regulations that placed obligations on farmers to maintain 'public rights of way'<sup>52</sup> as a condition of maintaining their land in good environmental and agricultural condition. This was challenged on the basis that such provisions 'cannot be considered as minimum requirements because they impose significant supplementary burdens on farmers'<sup>53</sup>. The contention was made that the minimum requirements referred to in the Regulation<sup>54</sup> must only relate to 'standards which are relevant in the agricultural sector'<sup>55</sup>, of which public rights of way were not.

The ECJ rejected this argument, stating that Member States can impose, under the 'good agricultural and environmental condition' requirement, an obligation on farmers 'for environmental purposes'<sup>56</sup>. The Court also stated that, when implementing cross-compliance requirements, Member States are allowed 'a certain discretion with regard to the actual determination of those requirements'<sup>57</sup>. This judgment illustrates both the level of authority a Member State has over the implementation of the CAP and how a Member State has the freedom to choose how far it participates in European integration. Member States fear that 'the imposition of anything but the lightest requirements on their farmers could lead to a competitive

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<sup>49</sup> Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1, Article 5.

<sup>50</sup> Referred to in future as 'the 2004 Regulations'.

<sup>51</sup> Case C-428/07, *R (on the application of Horvath) v Secretary of State for Environment, Food and Rural Affairs* [2009] All ER 233.

<sup>52</sup> The Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) (Amendment) Regulations 2005, Articles 27-30.

<sup>53</sup> Case C-428/07, *R (on the application of Horvath) v Secretary of State for Environment, Food and Rural Affairs* (n 51), at paragraph 21.

<sup>54</sup> Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1, Article 5.

<sup>55</sup> Case C-428/07, *R (on the application of Horvath) v Secretary of State for Environment, Food and Rural Affairs* (n 51), at paragraph 22.

<sup>56</sup> *ibid*, at paragraph 27.

<sup>57</sup> *ibid*, at paragraph 26.

disadvantage'<sup>58</sup>. As British farmers are having obligations placed on them that serve no agricultural purpose whatsoever, they are put at a competitive disadvantage by giving them responsibilities that distract them from agricultural concerns. This indicates that Britain has adopted a negative approach to participation in the European integration of the agricultural sector, as its attitude is hindering the activity of its non-state actors that integration looks to encourage.

### Implementing the new architecture of the CAP

The second major reform contained in the Mid-Term Review was the introduction of modulation between the two pillars of the CAP. This was another attempt to promote sustainable agricultural practices in the EU. While the first pillar of the CAP that concentrated on direct aid to farmers had always existed, the second pillar, which focuses on rural development, was only established in 1999<sup>59</sup>. The Mid-Term Review introduced compulsory modulation to begin to close the massive gap between the budgets of the two Pillars, and to quicken the process of making European agriculture self-sustainable.

Modulation involves reducing the amount of direct payments that were to be made to farmers receiving a single farm payment over €5000 year-on-year, beginning with a 3% reduction in 2005 rising to a 5% reduction in 2012. This 5% limit for 2012 was subsequently doubled to 10% in the 'health check' of the reforms in 2008<sup>60</sup>. As this is a universal standard that applies throughout the EU modulation should not be able to tell us anything about an individual Member States attitude to integration. However, Britain adopted a unique stance on modulation. It is 'currently the only Member State to apply voluntary modulation in the EU'<sup>61</sup>. It will voluntarily modulate an extra 9% of its Pillar 1 budget in 2012, which equates to a total modulation rate in Britain of 19%, meaning British farmers will see their direct support reduced by almost twice the amount of other European farmers. Although this money isn't taken out of British agriculture, as the extra funds are being used for British schemes under the 'rural development' pillar, the government are still taking direct support away from farmers in order to achieve better value for money<sup>62</sup>. This is harming the competitiveness of British farmers in the European market.

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<sup>58</sup> Michael Cardwell and Jo Hunt, 'Public rights of way and level playing fields' (2010) ELR 12(4) 291, at p.293.

<sup>59</sup> Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) OJ L160/80.

<sup>60</sup> Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers OJ L30/16, Article 7.

<sup>61</sup> NFU, 'Evidence for EFRA Select Committee: Examination of EU proposals to 'green' the Common Agricultural Policy'. < [www.nfuonline.com/.../CAP/NFU-evidence-on-other-aspects-of-CAP](http://www.nfuonline.com/.../CAP/NFU-evidence-on-other-aspects-of-CAP) > accessed 20/01/2012, at paragraph 5.

<sup>62</sup> Telephone interview (n 38).

The NFU have emphasised that they view the introduction of the second pillar of the CAP as a positive measure<sup>63</sup>. They also believe that the budget accorded to rural development schemes is insufficient. However, they also stress modulation is not the correct way to provide sufficient funding to the second pillar. The NFU, representing the farmers of Britain, view modulation as a negative measure because it means one pillar will benefit at the expense of the other<sup>64</sup>. Instead the NFU believes that the two pillars should have separate budgets, both of which are sufficient to satisfy the objectives of each pillar. Therefore, British farmers and the British government have completely opposing views on how to finance the new architecture of the CAP. Modulation may be a necessary feature on a European level as the CAP already has such a significant proportion of the Budget allotted to it. However, by taking direct support away from British farmers at a much faster rate than other European farmers, the British government is clearly not implementing the provisions of the Mid-Term Review in such a way as to promote the economic activities of their farmers.

The next issue to address is what the funds being generated through modulation are being spent on in Britain. The EU amended the Regulation that states the objectives of the second pillar of the CAP<sup>65</sup> in the 2008 'health check'. The NFU evaluated that this Regulation 'clearly identifies that one of its key aims and objectives is to improve the competitiveness of the agricultural sector'<sup>66</sup>. However, the NFU highlights that 'close to 80% of the available funds in England (are) currently spent on agri-environment actions'<sup>67</sup> which are 'largely focused on nature and biodiversity measures'. Therefore, instead of using the second pillar to improve the competitiveness of British farmers in accordance with European policy, the British government is using the funding on measures that will protect the environment, which is of much more interest to the general public. So while this approach may help the government justify CAP expenditure to the taxpayer, it is not helping the British farmers, who are the actors that European integration intends to benefit.

### Conclusion: Evaluating European integration through Britain's implementation of the Mid-Term Review

I have identified two major consequences of the major substantive reforms to the CAP contained in the Mid-Term Review that were outlined in the previous chapter. The first was the broader role a farmer was expected to perform under the new subsidy system and cross-compliance requirements, and the second was the consolidation of the two-pillar architecture of the CAP through modulation. The emphasis on subsidiarity meant that Member States had a

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<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> Council Regulation (EC) No 74/2009 of 19 January 2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ L30/100.

<sup>66</sup> NFU, 'Evidence for EFRA Select Committee: Examination of EU proposals to 'green' the Common Agricultural Policy' (n 61), at paragraph 24.

<sup>67</sup> *ibid.*, at paragraph 23.

significant power over how these changes were implemented into their national legal systems. However, what I believe I have established is that the British government has not prioritized the interests of its farmers in implementing the substantive reforms of the Mid-Term Review. Instead, the government have implemented the changes in a manner that appeases the taxpayer.

Rosamond submits that neo-functionalism has been the most widely accepted theory of supranational governance, stating that for ‘many, “integration theory” and “neo-functionalism” are virtual synonyms’<sup>68</sup>. According to this theory, when two or more countries integrate a specific economic sector this automatically generates an increased level of transactions between states, which requires regulation by central European institutions. However, Stone Sweet and Sandholtz<sup>69</sup> propose a theory that can explain the link between the negative attitude of the British government to European integration of the agricultural sector and the lack of prosperity of British agriculture under the regulation of the CAP. In their theory the interaction of non-state actors is crucial to explaining how the development of European integration occurs, and it is these actors who engage in transnational activity, such as farmers in the context of the CAP, which European integration is meant to benefit.

However, it appears that the British government has implemented the Mid-Term Review with the main priority of extracting as much value for money as possible from the policy. This is to promote the best interests of the taxpayer, who ultimately fund the considerable cost of the CAP. They have done this in three ways that are detrimental to British farmers:

- (i) By placing extensive obligations which do not relate to agriculture on farmers which they have to fulfil in order to receive their full annual subsidy through cross-compliance requirements, which is beyond the lightest possible obligations placed on farmers in other Member States;
- (ii) By imposing a voluntary modulation rate of 9% on top of the compulsory European rate of 10%, which takes direct support away from farmers and allots the money to the Rural Development Pillar, which the UK government views as providing better value for money than the Market and Direct Aid Pillar;
- (iii) By using the majority of the Rural Development budget on agri-environmental schemes that do not help to improve the competitiveness of British agriculture in the European market but which are more justifiable to taxpayers.

Institutionalist logic would then determine that if European policy were not being implemented to further the interests of the non-state actors who generated the need to integrate a specific sector then this would affect the participation of the Member State in the integrative process. This is because

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<sup>68</sup> Ben Rosamond, ‘Theories of European Integration’ (n 9), at p.50.

<sup>69</sup> Alec Stone Sweet and Wayne Sandholtz, ‘European integration and supranational governance’ (n 12).

integration is a cycle, linked by ‘three interrelated dimensions’<sup>70</sup>, which are transnational society, the EU organizations and EU rules. If one dimension is inhibited then the whole process of integration is affected. The NFU have stated that the reforms contained in the Mid-Term Review were all measures that will benefit European farmers in the short-term and long-term<sup>71</sup>. However, because the reforms were implemented in Britain in a way that had a detrimental affect on British farmers it has affected the development of British agriculture because British farmers are not receiving the full benefit of European integration that farmers from other Member States are receiving.

According to Stone Sweet and Sandholtz’s model of European integration, the outcome of participating in European integration is the ‘development of transnational society’<sup>72</sup>. European integration of the CAP should therefore aid the development of British agriculture. The supranational governance provided by the CAP is not hindering the development and prosperity of British agriculture. If British farmers wish to receive the full benefit of the CAP and future reforms, they need a government who implements the policy in the most beneficial manner for farmers, who are the transnational actors whose activities European integration is meant to encourage. In other words, Britain needs to more actively involve itself in the integration process in order for the CAP to provide better support for British farmers.

### **The Future of British Agriculture under the CAP**

So far this study has assessed the European integration of the agricultural sector in terms of its past and present. This final section will look to the future. We can identify the future direction of the CAP from the recently released proposals for its next reform, due to be implemented from 2014. My contention is that the reaction of the British farming community to these proposals can provide proof that the institutionalist integration theory is accurate, and I will conclude with what the theory can tell us about the long-term well being of British agriculture under European governance.

#### The new challenges faced by European agriculture

In order to understand the proposals for the new reform of the CAP it is necessary to identify the challenges that the proposals needed to address. The Commission identified the following concerns for European agriculture<sup>73</sup>:

- (i) Rising concerns about food security, both within the EU and worldwide;
- (ii) A need to enhance sustainable management of natural resources;
- (iii) Increasing pressure on production conditions caused by climate change;

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<sup>70</sup> *ibid*, at p.304.

<sup>71</sup> Telephone interview (n 38).

<sup>72</sup> Alec Stone Sweet and Wayne Sandholtz, ‘European integration and supranational governance’ (n 12), at p.314.

<sup>73</sup> European Commission, ‘The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future’ (2010) COM 672 final.

- (iv) A requirement to make better use of the diversity of farm structures and production systems within the enlarged EU;
- (v) To make CAP support more equitable and balanced;
- (vi) To simplify CAP implementation.

These challenges were then formulated in the three objectives that the reforms should pursue<sup>74</sup>:

- (i) Viable food production;
- (ii) Sustainable management of natural resources and climate action;
- (iii) Balanced territorial development.

Within the objective of viable food production was the recognition of the need to contribute to farm incomes and 'limit farm income variability'<sup>75</sup>. This meant that the Single Payment Scheme was likely to survive the reform process, as it provides farmers with a guaranteed yearly income. However, the report did highlight the need to provide a better targeting of income support leading to a more equitable distribution of the budget allotted to the first pillar<sup>76</sup>. This suggested that the impending proposals would contain significant changes to how a farmer would qualify for the single payment and the method that dictates the size of the subsidy.

The second objective of CAP reform recognizes that agriculture is 'an industry peculiarly vulnerable to the effects of climate change'<sup>77</sup>, such as how crop yields can be affected by rises in temperature and increased competition for water, and livestock can be harmed by new diseases that can thrive in a warmer climate. The Commission outlined two types of measures needed for agriculture to effectively deal with climate change. The first type were measures that encouraged greener agricultural practices under the Rural Development Pillar, which included 'adopting new technologies, developing new products, changing production processes, and supporting new patterns of demand'<sup>78</sup>. The second form of measures that was required, according to the Commission, would mitigate the impact of climate change on European farming, so as to 'reduce the negative effects of climate change'<sup>79</sup>.

The third objective the Commission set for CAP reform focuses on the development of rural society. These measures should, according to the Commission, focus on encouraging and supporting employment in agriculture, and help ensure that people stay in rural areas and do not migrate to urban areas. The emphasis placed on ensuring the wellbeing of rural communities by the Commission was further evident in highlighting of the need to 'optimize the use of additional local resources'<sup>80</sup> and 'improve the conditions for small

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<sup>74</sup> *ibid*, at p.7.

<sup>75</sup> *ibid*, at p.7.

<sup>76</sup> *ibid*, at p.8.

<sup>77</sup> Michael Cardwell, 'European Union agricultural policy and practice: the new challenge of climate change' (2011) *ELR* 13(4) 271, at p.272.

<sup>78</sup> European Commission, 'The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future' (n 73), at p.7.

<sup>79</sup> *ibid*, at p.7.

<sup>80</sup> *ibid*, at p.7.

farms and develop local markets because in Europe'. Better support of small farms and local agricultural resources and services will ensure greater economic prosperity for the agricultural sector. This is why the Commission's report stresses the requirement to ensure the long-term social wellbeing of agriculture through CAP reform.

### The proposed reforms of the CAP

The Commission's proposals retain the two-pillar structure of the current policy. However, they contain extensive changes to first pillar. It was indicated in the Commission's report prior to the proposals that there would be significant changes to how a farmer qualifies for the annual payment and how the payment would be distributed, which the proposed Single Payment Regulation<sup>81</sup> proved to be accurate. The proposals introduce a new 'active farmer'<sup>82</sup> criteria for farmers to satisfy, which is done through the two limbs of the following test:

- (i) The 'economic' limb: the annual amount of direct payments an individual receives must not be less than 5% of the total receipts the individual obtained from non-agricultural activities in the most recent fiscal year;
- (ii) The 'land management' limb: an individual must perform the minimum activity established by the Member State on their agricultural areas naturally kept in a state suitable for grazing or cultivation.

Under the current system, to qualify for a direct payment as a farmer it is necessary to own land on which 'an agricultural activity'<sup>83</sup> has been carried out. However, this system can attract claims such in the case of *MacPherson v Scottish Ministers*<sup>84</sup>. The claimant in this instance bought land that at the time was the subject of a grazing agreement with a third party, which subsequently expired. It was argued that, as an agricultural activity was being carried out on the land at the time it was bought, the claimant was eligible to claim a Single Farm Payment. The claim was rejected on the basis it was made during the period of transition between the old subsidies and new single payment scheme, and during this period only farmers who had previously qualified for support were recognised as eligible for the new single payment. The individual in question perhaps could have succeeded if the timing of the claim had been different. The more strenuous 'active farmer' criteria will ensure that the EU is only supporting farmers who are contributing to Europe's food security, and not individuals who claim support for simply maintaining agricultural land, such as was the case in *MacPherson*.

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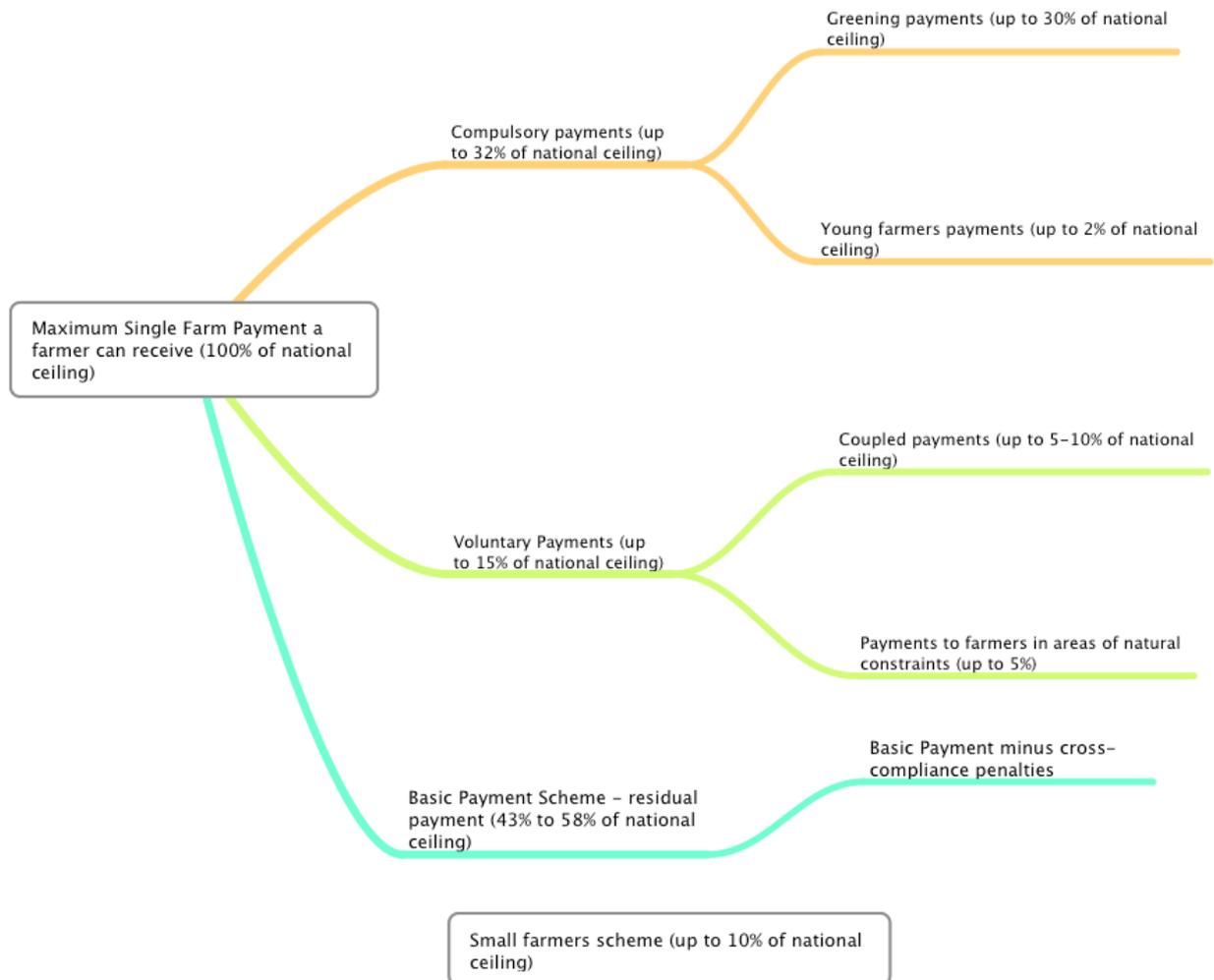
<sup>81</sup> European Commission, 'Proposal for a Regulation of the European Council and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy' (2011) COM 625 12/10/2011.

<sup>82</sup> *ibid*, Article 9.

<sup>83</sup> Council Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers [2003] OJ L270/1, Article 2(c).

<sup>84</sup> *MacPherson v Scottish Ministers* (2008) SLCR 86.

The Commission also completely restructured how direct payments are distributed in order to provide a more equitable subsidy system. The current system is very simple, with a payment being allotted to each farmer with deductions being made for failing to comply with cross-compliance requirements. However, under the new proposal each Member State is accorded a 'national ceiling'<sup>85</sup>, equates to the total value of all direct payments made to farmers from that Member State. The ceiling is then distributed under a number of different payments, as depicted below:



**Figure 1 The proposed new structure of the Single Farm Payment**

Figure 1 displays how a farmer will only receive a maximum of 58% of the Single Farm Payment that they currently receive under the proposed new structure in return for the obligations they currently fulfil under the Basic Payment Scheme. However, in order for a farmer to receive up to 88% of their current Single Farm Payment a farmer must fulfil additional 'greening' requirements on their land. There are 3 such requirements<sup>86</sup>:

<sup>85</sup> European Commission, 'Proposal for a Regulation of the European Council and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy' (n 81), Article 6.

<sup>86</sup> *ibid*, Article 29.

- (i) To have 3 different crops on arable land exceeding 3 hectares in size, with each crop covering no less than 5% and no more than 7% of the eligible land;
- (ii) To maintain permanent grassland;
- (iii) To ensure that at least 7% of their land is maintained as an ecological focus area.

The introduction of greening payments is aimed at achieving the sustainable management of natural resources, and ‘unequivocally confirmed that Pillar 1 support could be employed as an engine for the delivery of climate change objectives’<sup>87</sup>. Cardwell categorizes this payment as an enhanced form of cross-compliance requirement. I dispute this label, as a deduction for failing to comply with a cross-compliance requirement is a penalty imposed for a farmer failing to meet obligations which farmers traditionally assumed were part of their duties to the countryside, whereas greening payments impose additional, much more strenuous obligations upon farmers. I believe it was because the ‘obligation to maintain all agricultural land in good agricultural and environmental condition has received “light touch” implementation across most Member States’<sup>88</sup> that this new system is being proposed, as it limits the amount that Member States can lessen their farmers’ environmental obligations through implementation.

The ‘small farmers scheme’<sup>89</sup> allows farms that qualify for this payment to receive a lump sum that cannot exceed 15% of the average single payment per farmer in that Member State<sup>90</sup>, but which isn’t subject to sanctions for not complying with cross-compliance requirements and without having to meet the additional greening obligations. This aims to provide more viable food production, as smaller farms can focus on being much more productive if they are not being distracted by all the regulations that would have to otherwise comply with to receive their full annual subsidy. The scheme also recognises that small farms who will qualify for this subsidy will have a negligible environmental impact compared to the large farms who have to comply with the more strenuous requirements concerning green agricultural practices. Finally, small farms are also more likely to use local resources and services than large farms as it is more cost efficient, which will mean the money provided by this payment will stay in rural areas and help them develop.

The proposals also introduce a progressive reduction, or cap, on the subsidies the largest farmers receive from the EU<sup>91</sup>, with the minimum threshold for capping set at €150 000. This provision is an attempt to quicken the process of making farmers less reliant on the CAP and encourages them to be more self-sufficient. By targeting larger farmers to begin with, the EU is making a statement that the levels of support previously provided are no longer viable

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<sup>87</sup> Michael Cardwell, ‘European Union agricultural policy and practice: the new challenge of climate change’ (n 77), at p.276.

<sup>88</sup> *ibid*, at p.279.

<sup>89</sup> European Commission, ‘Proposal for a Regulation of the European Council and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy’ (n 81), Title V.

<sup>90</sup> *ibid*, Article 49.

<sup>91</sup> *ibid*, Article 11.

and that large farms should by now have the resources to cope with a reduction in their annual payment after being supported by the CAP directly throughout the last decade.

The final substantial provision of the reform proposals I wish to highlight is the measure that increases the flexibility in funding between the two pillars of the CAP<sup>92</sup>. This presents itself in the form of the reintroduction of voluntary modulation, where Member States can use up to 10% of their national ceiling available for direct payments for the period 2014 to 2020 for rural development measures instead. Also, for the first time there is the opportunity for certain countries whose national ceiling is less than 90% of the average national ceiling for direct payments to use up to 5% of the budget allocated to rural development measures for direct payments instead. The consequence of this measure is that the two pillars of the CAP become even more interdependent in terms of how they are financed.

### The reaction of British farmers

The NFU, who represent British farmers, identified four aspects of the agricultural policy that needed improving through the reforms in order for the CAP to provide better support for British farmers, which are<sup>93</sup>:

- (i) Simplicity;
- (ii) Commonality;
- (iii) Market Orientation;
- (iv) Competitiveness.

The NFU wanted the reforms to produce a simpler policy for farmers that will reduce red tape and paperwork, so farmers can concentrate on being as productive as possible<sup>94</sup>. For small farmers this may have been achieved through the small farmers scheme. However, the NFU have highlighted that the UK has 'larger than average farm structures'<sup>95</sup>. The proposals therefore present a much more complicated subsidy system for the majority of British farmers. There is already a considerable amount of paperwork and red tape for farmers, who will receive a maximum of 58% of their current Single Farm Payment under the Basic Payment Scheme. In order to receive any further payments, such as through the greening scheme, farmers are likely to have to complete a considerable additional amount of paperwork.

'Commonality' essentially means that the provisions of the reforms should be implemented in a universal form throughout Europe<sup>96</sup>. The NFU highlighted that the Mid-Term Review contained 'proposals that were generally helpful but unfortunately our own government implemented them in a way which was

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<sup>92</sup> *ibid*, Article 14.

<sup>93</sup> Telephone interview (n 38).

<sup>94</sup> *ibid*.

<sup>95</sup> NFU, 'Initial reaction to CAP package' (2011) 12/10/2011 <<http://www.nfonline.com/Our-work/Economics-and-International/CAP/Initial-reaction-to-CAP-package-proposals/>> accessed 10/01/2012, at p.2.

<sup>96</sup> Telephone interview (n 38).

unequal for English farmers'<sup>97</sup>. The NFU wanted British farmers placed back on an equal footing in Europe. However, the proposal to cap the payments large farms will receive will 'disproportionately affect UK farmers'<sup>98</sup>, according to the NFU, because the UK has larger than average farm structures. The NFU also strongly believes that voluntary modulation is 'damaging and distortive'<sup>99</sup>. The introduction of reverse modulation will further distort the budget allotted to each country for each pillar of the CAP. The NFU believes that either there should be no modulation between pillars or a compulsory and universal modulation rate is enforced throughout Europe<sup>100</sup> so as to not put farmers from Britain, the only Member State to implement voluntary modulation, at a competitive disadvantage.

The concepts of market-orientation and competitiveness are linked, because if a farmer is restricted in their ability to produce to the demands of their market then this will harm their ability to compete in that market. The greening payment appears to be the main obstacle to a policy with better market orientation. The requirement for a farmer to put a minimum of 7% of their land effectively out of production and into 'an ecological focus area'<sup>101</sup> makes little sense when cereal prices are currently extremely high because of market demand. Therefore, a farmer cannot cultivate all of their land and therefore maximise their arable output. The requirement to ensure that a diversity of crops is maintained also harms the ability of farmers to produce to the market, as a farmer cannot produce use more than 70% of his land to grow a particular cereal that the market may have a particularly high demand for. This greening requirement will therefore restrict the ability of farmers to meet the demands of their market, and it will harm their ability to compete with farmers who do not operate under such restrictions.

### Conclusion: Evaluating the future of British agriculture under European governance

The Mid-Term Review contained provisions that were devised in the interests of British farmers. However, the new proposals display how the interests of the EU and the interests of British farmers have diverged. Stone Sweet and Sandholtz's theory claims historical institutionalism can explain why 'significant gaps emerge between member state preferences and the functioning of EC policies and institutions'<sup>102</sup>. Pierson also highlights how the competing theories of integration struggle to explain this development<sup>103</sup>. Intergovernmentalists believe that the EU is 'essentially a forum for interstate

<sup>97</sup> NFU & CLA, 'NFU and CLA respond jointly to CAP Reform proposals', (2011) 12/10/2011. <[http://www.nfuonline.com/Media\\_centre/2011/NFU\\_and\\_CLA\\_respond\\_jointly\\_to\\_CAP\\_Reform\\_proposals/](http://www.nfuonline.com/Media_centre/2011/NFU_and_CLA_respond_jointly_to_CAP_Reform_proposals/)> accessed 26/01/2012.

<sup>98</sup> NFU, 'Initial reaction to CAP package' (n 95), at p.2.

<sup>99</sup> *ibid*, at p.1.

<sup>100</sup> Telephone interview (n 38).

<sup>101</sup> European Commission, 'Proposal for a Regulation of the European Council and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy' (n 81), Article 29.

<sup>102</sup> Alec Stone Sweet and Wayne Sandholtz, 'European integration and supranational governance' (n 12), at p.313.

<sup>103</sup> Paul Pierson, 'The path to European Integration: A Historical Institutional Analysis'(n 10).

bargaining'<sup>104</sup>. This means that the interests of the EU should not be able to diverge from those of the Member States, as it is not capable of having its own autonomous interests. Pierson highlights that neo-functionalism attributes too much autonomy to the EU institutions, and does not adequately explain 'why, in an open confrontation between Member States and supranational actors, the latter could be expected to prevail'<sup>105</sup>, especially when the Member States control important aspects of the institutions such as their budget. Therefore, neo-functionalism does not explain why Member States would allow the EU institutions to create policies that worked against their interests.

Pierson contends that 'intuitionism provides a clear account of why gaps emerge in Member State authority'<sup>106</sup> through the concept of path dependence. According to Pierson's reasoning, which is adopted by Stone Sweet and Sandholtz, the preferences of the Member States will change after the critical juncture that determines the path a policy will follow. The Mid-Term Review was a critical juncture where the path of the CAP was altered from a policy that encourages the productivity of European farmers to a policy that started to address concerns about the sustainability of agriculture through the introduction of cross-compliance requirements. Britain's preferences have moved towards a competitive policy since the Mid-Term Review, but the emergence of the greening payment suggests that the CAP has become locked into a path in which environmental concerns have become a priority. In their current form, the proposed reforms are not a critical juncture changing the integrative path of the CAP, like the Mid-Term Review. Instead, they are a continuation of the integrative process that began with the Mid-Term Review, which will further restrict the policy to a path down which British farmers do not want to go.

The final issue to address is the future hold for British farmers under the CAP. Stone Sweet and Sandholtz's theory indicates that once gaps emerge between the preferences of Member States and the supranational institutions, the 'states cannot simply close them'<sup>107</sup> as the policy has become locked into the path it has been placed on by previous reform. The British farming sector is reaching its own critical juncture where it can either continue investing into a policy that is likely to continue to move away from its interests, or leave the CAP. However, leaving the CAP is a decision with severe economical implications, not only because it would deprive farmers of the Single Farm Payment. Pierson highlights the issue of sunk costs is also relevant, as Britain has invested many billions of pounds in the CAP and if Britain were to leave the CAP now it would lose the benefit of, for example, the rural development projects that it has helped to fund. Pierson states that 'continuing integration could easily reflect the rising costs of "non-Europe"'<sup>108</sup>. In other words, the longer Britain continues to involve itself in European integration the more it stands to lose from potentially exiting the process.

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<sup>104</sup> *ibid*, at p.124.

<sup>105</sup> *ibid*, at p.142.

<sup>106</sup> *ibid*, at p.147.

<sup>107</sup> Alec Stone Sweet and Wayne Sandholtz, 'European integration and supranational governance' (n 12), at p.313.

<sup>108</sup> Paul Pierson, 'The path to European Integration: A Historical Institutionalist Analysis' (n 10), at p.145.

## Conclusion

The main contention of my argument in this study is that the theory of European integration proposed by Stone Sweet and Sandholtz, based on principles of historical institutionalism, is an accurate representation of how European integration occurs. The example of how the CAP has been integrated supports the main principles and concepts that Stone Sweet and Sandholtz have formulated.

A central feature of Stone Sweet and Sandholtz's theory asserts that European integration is a dynamic cycle that is initiated at the subnational level and continues through the national and supranational levels of governance, which will ultimately benefit the transnational actors who generated the initial need to integrate. The CAP was established to encourage the prosperity of farmers who were devastated by the effects of the Second World War, through introducing production subsidies. The reforms contained in the Mid-Term Review changed the direction of the policy again through provisions aimed at the transnational actors, primarily in the form of the Single Farm Payment. This demonstrates the accuracy of the first aspect of Stone Sweet and Sandholtz's theory, that the need for integration is generated at the subnational level through transnational actors, such as farmers, and it is at the subnational level where integration is first achieved.

Further than this, it is the transnational actors who sustain the process of European integration. If they do receive any benefit from European integration then they will not drive the need for further integration through transacting across states, which will hinder the development of a particular economic sector. The development of the British agricultural sector under the CAP illustrates this facet of European integration. The reforms contained in the Mid-Term Review were beneficial to all farmers across Europe, but the British government implemented the provisions in a manner that minimized the benefits to British farmers. The development of the British agricultural sector since the Mid-Term Review has been slower than that seen in the agricultural sectors of the other Member States because the activity of farmers are not as encouraged in Britain as they are throughout the EU. This displays the direct correlation between the activity of transnational actors and the development of the economic sector in which those actors operate that is a fundamental concept of the theory of European integration proposed by Stone Sweet and Sandholtz.

The CAP is also in a unique position being able to display the trend of path dependence that is a central feature of historical institutionalism and the theory of Stone Sweet and Sandholtz, which is fundamental to explaining why gaps emerge between European policy and Member State preferences. Previous academic theory has not been able to demonstrate in practice how previous decisions made at a critical juncture concerning a specific policy will 'lock in' the *future* integration of that policy down a specific path. However, I believe the CAP provides a practical example of this integrative process, illustrated by the proposed reforms for the future of the policy. The proposals are heavily influenced by environmental concerns, which indicate that the policy is now

locked into a path focused on sustainable agriculture, although British farmers would prefer a policy that promotes competitive agricultural practices. However, the further the CAP follows this integrative path the more difficult it will be for the policy to change its focus, and the more difficult it will be for Britain to exit the policy due to what it has invested in the policy. The CAP can therefore validate the concept of path dependence because we can assess the future direction of the policy. Path dependence allows historical institutionalism to explain the future development of the CAP and the British agriculture sector under the process of European integration in a way that the competing theories neo-functionalism and intergovernmentalism cannot, and that ultimately is why I believe it is the most accurate theory of European integration.

#### Further avenues of research

The theory of European integration of Stone Sweet and Sandholtz for which I have argued relies heavily on the interaction between the EU at a supranational level and transnational society. However, due to constrictions on space in this study, what I have not analysed in any depth is how, and to what extent, the transnational actors can influence the process of devising policy on a supranational level. I would research this avenue, in the context of the British agricultural sector, through considering the influence of the National Farmers Union in the previous and current reform processes. The NFU has a direct presence in the European Parliament, who I interviewed in the course of this study. It is their role to represent the interests of British farmers on a European level. According to Stone Sweet and Sandholtz, the greater the level of European integration then the larger the influence the transnational actors can exert on a supranational level. Therefore, the level of influence organizations such as the NFU can have on devising European policy could both be explained in terms of the theory I have relied upon in this study and clarify the level of integration that the CAP has achieved

## A Preference for Innominate Terms: The Good, the Bad Bargain and the Ugly

*Oliver Williams*

At less than ten pages in length, the succinct judgment of Lord Justice Diplock in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* succeeded in altering the legal landscape of modern contract law forever.<sup>1</sup> In departing from the traditionally accepted a priori determination of an innocent party's entitlement to elect to terminate for breach of contract, based on classification of the term, the innovative 'innominate terms' doctrine shifted attention to the consequences resulting from the breach.<sup>2</sup>

Subsequently, this emerging doctrine flourished as it was soon recognised, first by Lord Justice Roskill in the Court of Appeal,<sup>3</sup> and thereafter by the House of Lords, that where there is a discretion in classifying a term as a condition or innominate term, favour should be given to the latter, save in the context of time clauses in mercantile contracts.<sup>4</sup> The preferential treatment afforded to innominate terms, entrenched by over three decades of legal pedigree, and as loyally restated in the most recent High Court decision regarding the construction of contractual undertakings,<sup>5</sup> has become a well-established rule of thumb when constructing contracts. Notwithstanding the longevity of the preference, this essay challenges the reasoning underpinning the judicial reluctance to classify terms as conditions in the context of non-time clauses in commercial transactions.

This essay critiques the preference for innominate terms by examining the development of the right to terminate from a defence against an action for non-performance of a 'condition precedent'. By ascertaining the purpose of the right to terminate, this essay is able to compare and contrast the success of both types of term in achieving 'the good' envisaged by the rule in the context of the 'characteristic commercial contract' in English law (contracts for the

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<sup>1</sup> [1962] 2 QB 26 (CA) 65-73 (Lord Justice Diplock).

<sup>2</sup> *Hongkong Fir Shipping* (n 1) 72 (Lord Justice Diplock).

<sup>3</sup> *Cehave Nv v Bremer Handelsgesellschaft MBH, The Hansa Nord* [1976] QB 44 (CA) 70-71 (Lord Justice Roskill); 61 (Lord Denning MR).

<sup>4</sup> *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 (HL) 715-16 (Lord Wilberforce); 727 (Lord Roskill).

<sup>5</sup> *RG Grain Trade LLP (UK) v Feed Factor International Ltd* [2011] EWHC 1889 (Comm); 2011 WL 2747730 (HC).

carriage of goods by sea),<sup>6</sup> and contracts for the sale of goods and commodities. As this is entwined with the broader function of contract law as an 'engine for trade',<sup>7</sup> this is considered in conjunction with the ability of innominate terms to facilitate competitive exchange, encapsulated by the market-individualism ideology promulgated by Adams and Brownsword.<sup>8</sup>

This essay also questions whether the importance the judiciary place on preventing the discharge mechanism being 'misused' to escape a 'bad bargain' can be rationalised by the market-individualism and consumer-welfarism ideologies.<sup>9</sup> To exemplify the multifarious and contesting policy issues of relevance to this exploration, a distinction between 'predatory termination' and '*terminatio ex culpa*' is pioneered, exemplifying the significance of the fault of the party in breach in answering this question.

By undertaking the aforesaid research this essay exposes the inadequacy of the reasoning supporting a preference for innominate terms. The present attitude towards termination, influenced by the belief in the need to prevent termination enabling escape from bad bargains, neither accords with the purpose of the law nor oils the engine of trade. Moreover, the inability of the law to scrutinise the fault of the party in breach, as necessitated by market-individualism and consumer-welfarism, exposes an ugly truth: it's time for a new approach to discharge for breach.

## Introduction

Described as 'one of the most perplexing problems in the English law of contract',<sup>10</sup> the cause of action available to an innocent party following a breach of obligation by his contractual counterpart is of notable theoretical and practical significance. Of the options available, the right to bring contractual performance to a premature end by terminating the relationship is one of the most highly valued,<sup>11</sup> yet it is also one of the most draconian.<sup>12</sup> Although much judicial ink has been spilt in furtherance of justifying the position taken by English law, the current law is by no means immune from criticism.<sup>13</sup> This essay seeks to reinvigorate the debate concerning the determination of a right to terminate for breach of contract

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<sup>6</sup> Lord Goff, 'The Future of the Common Law' (1997) 46 ICLQ 745, 751.

<sup>7</sup> Lord Irvine, 'The Law: An Engine for Trade' (2001) 64 MLR 333.

<sup>8</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 Legal Studies 205; R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83; R Brownsword, 'Static and Dynamic Market-Individualism' in Halson (ed) *Exploring the Boundaries of Contract* (Darmouth, 1996); Brownsword *Contract Law: Themes for the Twentieth Century* (2<sup>nd</sup> edn, Oxford University Press, New York 2006); Adams and Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn, Sweet and Maxwell, London 2007).

<sup>9</sup> JN Adams and R Brownsword (n 8).

<sup>10</sup> GH Treitel, 'Some Problems of Breach of Contract' (1967) 30 Mod L Rev 139, 139.

<sup>11</sup> JW Carter, 'Intermediate Terms Arrive in Australia and Singapore' (2008) 24 JCL 226, 226.

<sup>12</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' [2003] JBL 102, 102.

<sup>13</sup> Notably, T Weir, 'Contract – A Buyer's Right to Reject for Defective Goods' [1967] CLJ 33.

under English law by questioning the validity of the reasoning advocated for a preference for innominate terms.

### A Right to Elect to Terminate in English Law

Contemporary English law determines a right to elect to terminate using the test enunciated in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.<sup>14</sup> This test is composed of two distinct stages. The first stage involves classifying the term in question by constructing the contract in order to ascertain which approach to apply in the latter stage. Although classification may result from Statute,<sup>15</sup> judicial precedent,<sup>16</sup> or by the parties themselves,<sup>17</sup> this essay is only concerned with the method used by the judiciary to classify the hitherto uncategorised term to which the aforementioned options provide no guidance. The method of construction for such stipulations remains unaltered by the *Hongkong* doctrine,<sup>18</sup> and can trace its ancestry to the defence against an action for non-performance of a 'condition precedent'.<sup>19</sup>

Construction is achieved by 'looking at the contract in light of the surrounding circumstances' to identify the objectively ascertained intention of the parties.<sup>20</sup> Subsequent rulings have reaffirmed that construction should not be confined to the 'four corners of the document' but should have regard to the 'factual matrix'.<sup>21</sup> If the contractual undertaking in question is such that inaccuracy is likely to compromise the 'substance and foundation of the adventure which the contract is intended to carry out', using a hypothetical inaccuracy (i.e. breach) as guidance, the term in question is a condition.<sup>22</sup> By contrast, if the substance and foundation of the contract is unlikely to be

<sup>14</sup> [1962] 2 QB 26 (CA).

<sup>15</sup> Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994 and the Sale of Goods (Amendment) Act 1995), ss 12-15 (implied terms). See also Sale of Goods Act 1893.

<sup>16</sup> For example, in contracts for the carriage of goods by sea, 'seaworthiness clause (innominate) *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (n 14); 'expected ready to load' clause (condition) *Meraedelanto Compania Naviera SA v Bergbau-Handel GMBH, The Mihalis Angelos* [1971] 1 QB 164 (CA); 'legitimate final voyage instructions' (innominate) *Torvald Klaveness A/S v Arni Maritime Corporation, The Gregos* [1994] 1 WLR 1465 (HL).

<sup>17</sup> *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 (HL); *Lombard North Central Plc v Butterworth* [1987] QB 527 (CA). cf. *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL); *Rice (T/A the Garden Guardian) v Great Yarmouth Borough Council* (2000) July 26 *The Times*; (2000) WL 823961 (CA); J Thomas, 'Some recent commercial cases on termination for breach of contract' (2001) 12(1) *ICCLR* 27.

<sup>18</sup> *Bunge Corporation v Tradax* (n 17) 727 (Lord Roskill).

<sup>19</sup> *Hongkong Fir Shipping Co Ltd* (n 14) 67 (Lord Justice Diplock). See also *Pordage v Cole* (1669) 1 Wms Saund 319; 1 Sid 423; *Boone v Eyre* (1773) 1 H Bl 273 (Lord Mansfield).

<sup>20</sup> *Bentsen v Taylor, Sons & Co (2)* [1893] 2 QB 274 (CA) 281 (Lord Justice Bowen); Lord Devlin, 'The Treatment of Breach of Contract' [1966] *CLJ* 192, 196.

<sup>21</sup> *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (HL) 995-7 (Lord Wilberforce); *Bunge Corporation v Tradax* (n 17) 717 (Lord Scarman).

<sup>22</sup> *Bentsen v Taylor, Sons & Co (2)* (n 20) 281 (Lord Justice Bowen). See also, 'so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all' *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 (CA) 1003 (Lord Justice Moulton-Fletcher); 'substantial ingredient in the "identity" of the thing sold' *Couchman v Hill* [1947] KB 544 (CA) 559 (Lord Justice Scott).

affected by breach of the undertaking, the term will be a warranty, sounding in damages only.<sup>23</sup> Following the Sale of Goods Act 1893, this division was treated as exhaustive but this was exposed as a fallacy,<sup>24</sup> and the innominate label was designed to fill the lacuna created by the rigidity of the 'black and white' condition-warranty division.<sup>25</sup>

In practice, it is the distinction between 'condition', and 'innominate term' which is of most significance. This is because the latter stage of the *Hongkong Fir* test is a hybrid, balancing the operation of two separate approaches to determine when an innocent party is justified in terminating. The traditional approach, retained for breach of terms classified as conditions and warranties, centres on the 'nature of the term' breached;<sup>26</sup> breach of condition will *always* justify termination whereas breach of warranty will never justify termination.<sup>27</sup> By contrast, a right to terminate for breach of a term classified as an 'innominate' or 'intermediate'<sup>28</sup> stipulation is determined by reference to the 'nature of the events resulting from the breach',<sup>29</sup> and will only give rise to a right to terminate if the breach deprives the innocent party of substantially the entire benefit he expected to receive under the contract.<sup>30</sup>

Thus the thin line dividing conditions from innominate terms has a particular practical importance; fall within the former and termination is justified for any breach regardless of the consequences flowing from it, but fall within the latter and a right to terminate is contingent on the occurrence of substantial deprivation.

The difficulty, as noted by Lord Justice Kerr, is that when classifying terms, judges are confronted with a 'value judgment' concerning the 'commercial significance of the term in question', thus conferring an inevitable discretion on the judiciary.<sup>31</sup> However, this discretion is not unfettered and a series of authoritative judgments following *Hongkong Fir Shipping* have sought to curtail the power of the judges in this instance. As first stipulated by Lord Justice Roskill in the Court of Appeal,<sup>32</sup> and subsequently approved by the House of Lords, judges should prefer to classify terms as innominate, save time stipulations in mercantile contracts.<sup>33</sup> Although in practice judges do not

<sup>23</sup> Sale of Goods Act 1979, s 61(1), formerly Sale of Goods Act 1893, s 62.

<sup>24</sup> 'To read the subsection [of the Sale of Goods Act 1893] as a guide to a comprehensive classification on contractual terms is to convert it into a will-o-wisp leading the unwary away from the true path of the law' *Bunge Corporation v Tradax* (n 17) 718 (Lord Scarman). See also *Hongkong Fir* (n 14) 69 (Lord Justice Diplock); *Cehave Nv v Bremer Handelsgesellschaft MBH, The Hansa Nord* [1976] QB 44 (CA) 61 (Lord Denning MR); 73 (Lord Justice Roskill).

<sup>25</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192, 197.

<sup>26</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192, 196.

<sup>27</sup> *Bentsen v Taylor, Sons & Co (2)* (n 20) 281 (Lord Justice Bowen).

<sup>28</sup> *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109 (HL) 113 (Lord Wilberforce); *Bunge Corporation v Tradax* (n 17) 717 (Lord Scarman)

<sup>29</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192, 195.

<sup>30</sup> *Hongkong Fir Shipping* (n 14) 72 (Lord Justice Diplock).

<sup>31</sup> *State Trading Corporation of India Ltd v M Golodetz Ltd (Now Transcontinental Affiliates Ltd)* [1989] 2 Lloyd's Rep 277 (CA) 282 (Lord Justice Kerr).

<sup>32</sup> *The Hansa Nord* (n 24) 70-71 (Lord Justice Roskill).

<sup>33</sup> *Bunge Corporation v Tradax* (n 17) 715-16 (Lord Wilberforce).

treat the obligation to 'lean in favour'<sup>34</sup> of innominate terms as absolute,<sup>35</sup> the preference continues to be relevant as shown when construing terms of a contract, as acknowledged by the recent High Court decision of *Grain Trade v Feed Factor International*.<sup>36</sup>

### The Focus of this Essay

The aim of this essay is to provide a unique insight into policy underpinning the law for discharge of breach by scrutinising the appropriateness of a preference for innominate terms from two perspectives.

Chapter I seeks to understand how a preference for innominate terms corresponds with the purpose of the right to terminate. The extent to which innominate terms achieve 'the good' intended by the right is appraised by examining why the law provides a mechanism empowering one party to prematurely discharge the contract for breach and comparing the adequacy of conditions in meeting this aim. As this investigation takes place against the backdrop of commercial contracts, the attainment of this aim is entwined with the broader function of contract law as 'vehicle through which planned exchanges can take place'.<sup>37</sup> This is succinctly encapsulated by the market-individualism contract ideology.<sup>38</sup>

The research highlights the incompatibility of innominate terms with the hallmarks of the market-individualism which not only fail to provide adequate protection to the category of claimants the right developed to protect, but also significantly hinder the operation of contract law as a framework through which to carry out planned exchanges.

Chapter II focuses on the impact escape from 'bad bargains' has had on the development of the law for breach of contract. This chapter utilises the contract ideologies of market-individualism and consumer-welfarism<sup>39</sup> to analyse the propriety of preventing termination motivated solely by external factors where the innocent party does not suffer substantial deprivation of contractual benefit.<sup>40</sup> This chapter questions whether, in the commercial context, is it necessary to prevent termination accompanied by 'insubstantial deprivation'.

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<sup>34</sup> *Tradax International SA v Goldschmidt* [1977] 2 Lloyd's Rep 604, 612 (HC) (Mr Justice Slynn).

<sup>35</sup> For example, in *The Mihalis Angelos* (n 16) and *The Gregos* (n 16) time related stipulates were held to be innominate terms.

<sup>36</sup> *RG Grain Trade LLP (UK) v Feed Factor International Ltd* [2011] EWHC 1889 (Comm); 2011 WL 2747730 (HC).

<sup>37</sup> J Poole, *Textbook on Contract Law* (9<sup>th</sup> edn Oxford University Press 2008) 11.

<sup>38</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205.

<sup>39</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205.

<sup>40</sup> As in *Arcos Ltd v EA Ronaasen and Son* [1933] AC 470. See also R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83.

It is clear from the House of Lords in *The Gregos*,<sup>41</sup> and the Court of Appeal in *The Hansa Nord*<sup>42</sup> that the judicial pursuit of preventing 'insubstantial deprivation' termination has vastly influenced the preference for innominate terms. However, this chapter criticises the oversimplification of the issue, instead pioneering a distinction between so-called 'predatory termination' and '*terminatio ex culpa*' to assist in understanding the conflicting policy behind preventing such termination.

This essay concludes with an ugly truth, using the research undertaken to exemplify the inadequacy of a preference for innominate terms in meeting the aim of the law and in further failing to create a coherent, sustainable argument in favour of preventing termination accompanied by 'insubstantial deprivation'.

### Consumer-Welfarism and Market-Individualism

Through a substantial corpus of academic literature,<sup>43</sup> Adams and Brownsword have pioneered the contract ideologies of consumer-welfarism and market-individualism with the aim of providing 'a resource which enables us ...to understand more clearly what is going on when judges resolve contractual disputes'.<sup>44</sup> McKendrick's summation of market-individualism and consumer-welfarism as 'the conflicting demands of freedom to contract, on the one hand, and fairness on the other' is an apt starting point, albeit an oversimplification.<sup>45</sup>

Market-individualism centres around the notion that the purpose of contract law is to facilitate competitive exchange,<sup>46</sup> and Scott suggests this embodies the 'classical law of contract' approach based on individualism and market economy.<sup>47</sup> According to the market-individualist, competitive exchange is facilitated by the 'market' ideology, requiring clarity and certainty of rules, and supported by 'individualistic' ideology, promoting freedom to contract and upholding the sanctity of contract.<sup>48</sup>

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<sup>41</sup> *The Gregos* (n 16) 1475 (Lord Mustill).

<sup>42</sup> *The Hansa Nord* (n 24) 70-71 (Lord Justice Roskill).

<sup>43</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205; R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 *JCL* 83; R Brownsword, 'Static and Dynamic Market-Individualism' in Halson (ed) *Exploring the Boundaries of Contract* (Dartmouth 1996); R Brownsword, *Contract law: Themes for the Twentieth Century* (2<sup>nd</sup> edn, Oxford University Press, New York 2006); JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn, Sweet and Maxwell, London 2007).

<sup>44</sup> JN Adams and R Brownsword, 'The Ideologies of Contract Law' (1987) 7 *Legal Studies* 205, 206.

<sup>45</sup> E McKendrick, *Contract Law: Text, Cases and Materials* (4<sup>th</sup> edn, Oxford University Press 2010) 11.

<sup>46</sup> JN Adams and R Brownsword, 'The Ideologies of Contract Law' (1987) 7 *Legal Studies* 205, 206.

<sup>47</sup> J Scott, 'Empirical Studies Strike Back Against the Force of Contract Theory' (1997) 4 *UCL Juris Rev* 256, 256-57.

<sup>48</sup> JN Adams and R Brownsword, 'The Ideologies of Contract Law' (1987) 7 *Legal Studies* 205, 206-07

While the consumer-welfarist still desires contract law to facilitate competitive exchange, in contrast to the 'minimal restraints' of market-individualism, consumer-welfarism promotes greater regulation of the market.<sup>49</sup>

Discharge for breach of contract, contend Adams and Brownsword, is guided by aspects of both ideologies, *viz.*, the consumer-welfarism principles of good faith and proportionality, and the market-individualism principles of certainty and the sanctity of contract.<sup>50</sup>

### **'The Good'**

This chapter aims to identify the extent to which innominate terms accomplish the purpose the right to terminate was developed to achieve, as ascertained by tracing the origin of the modern right to terminate from a defence excusing non-performance. This is motivated by recent remarks criticising the judicial and academic focus on *whether* a right to terminate exists instead of *why*.<sup>51</sup>

In seeking to ascertain the extent to which a preference for innominate terms accords with the purpose of the right, there is inevitably overlap with the function of contract law in general as an 'engine for trade'.<sup>52</sup> Therefore, this chapter simultaneously appraises the effectiveness of a preference for innominate terms in meeting the needs of the market in accordance with the hallmarks of the market-individualism contract ideology.<sup>53</sup>

#### The Purpose of the Right to Terminate

A right to terminate a contract for breach owes its existence to 'the rules of pleading' and historically was not expressed to be a right at all but a defence against an action for non-performance.<sup>54</sup> Non-performance of an obligation (termination) was only excused when the said obligation was a 'mutual condition' which was 'precedent' to the contractual counterparts unperformed

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<sup>49</sup> JN Adams and R Brownsword, 'The ideologies of Contract Law' (1987) 7 *Legal Studies* 205, 210.

<sup>50</sup> JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn, Sweet and Maxwell, London 2007) 166-67.

<sup>51</sup> M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) *ICLQ* 911, 914-15.

<sup>52</sup> Lord Irvine, 'The Law: An Engine for Trade' (2001) 64 *MLR* 333.

<sup>53</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 *Legal Studies* 205; R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 *JCL* 83; R Brownsword, 'Static and Dynamic Market-Individualism' in Halson (ed) *Exploring the Boundaries of Contract* (Darmouth, 1996); Brownsword *Contract Law: Themes for the Twentieth Century* (2<sup>nd</sup> edn, Oxford University Press, New York 2006); Adams and Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn, Sweet and Maxwell, London 2007).

<sup>54</sup> *Hongkong Fir Shipping* (n 14) 67-68 (Lord Justice Diplock); *Pordage v Cole* (n 19); *Boone v Eyre* (n 19)

obligation.<sup>55</sup> The test used to determine a 'conditions precedent' was only satisfied where 'mutual covenants go to the whole of the consideration on both sides'.<sup>56</sup> The language of 'termination' was otiose, argues Carter, until the development of the Common Law Procedures Act 1852 and the subsequent Sale of Goods Act 1893 transformed the defence into a positive right.<sup>57</sup>

The combination of the defensive nature of the provision linked with the requirement for a deprivation of contractual benefit suggests the emergence of this rule of law developed to provide a mechanism which excused a party from failing to adhere to his contractual obligations when, as a result of his contractual counterparts breach, continuation of the contract would no longer furnish him with the envisaged consideration, as evidenced by the contract.<sup>58</sup>

The focus on 'substantial deprivation' in the seminal modern decision of *Hongkong Fir Shipping* suggests this is a plausible reading of the historic case law and also suggests the purpose remains unchanged by time.<sup>59</sup> Brownsword compiles a list of six grounds on which an innocent party may wish to seek to terminate for breach,<sup>60</sup> however on the strength of the historic reading, the 'intended beneficiary' for the purpose of this essay will be restricted to a party who has suffered 'substantial deprivation' as a result of a breach.

In theory, the test of substantial deprivation introduced by *Hongkong Fir Shipping* harmonises the protection afforded by conditions and innominate terms to the intended beneficiary of the right to terminate, albeit with the former incidentally affording protection to a wider category of claimants and the latter confining protection exclusively to those having suffered such deprivation. However, it is in the practical operation of the right to terminate where differences materialise.

### Conditions - Certainty

*'It is important for those who enter the market to know where they stand'*<sup>61</sup>

In commerce, certainty is a desideratum, a view which can be traced back to 1774 where Lord Mansfield, in a statement undeniably underpinned by market-individualism, opined:

In all mercantile transactions the great object should be certainty; and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other.<sup>62</sup>

<sup>55</sup> *Hongkong Fir Shipping* (n 14) 67 (Lord Justice Diplock).

<sup>56</sup> *Boone v Eyre* (n 19); *Hongkong Fir Shipping* (n 14) 67 (Lord Justice Diplock)

<sup>57</sup> JW Carter, 'Intermediate Terms Arrive in Australia and Singapore' (2008) 24 JCL 226, 226.-27.

<sup>58</sup> *Boone v Eyre* (n 19) in *Hongkong Fir Shipping* (n 14) 67-68 (Lord Justice Diplock).

<sup>59</sup> *Hongkong Fir Shipping* (n 14) 72 (Lord Justice Diplock).

<sup>60</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83, 92-3

<sup>61</sup> JN Adams and R Brownsword, 'The Ideologies of contract' (1987) 7 Legal Studies 205, 207.

<sup>62</sup> Lord Irvine, 'The Law: An engine for Trade' (2001) 64 Mod L R 333, 334.

This exemplifies the high regard in which certainty is held and the advantages of certainty have similarly been advocated by modern judges such as Lord Wilberforce who defined certainty as 'the most indispensable quality of mercantile contracts',<sup>63</sup> echoing Lord Justice Megaw who praised the advantage of 'a firm and definite rule for a particular class of legal relationship'.<sup>64</sup>

The simplicity of identifying whether a right to terminate exists for breach of condition is a key advantage to the intended beneficiary, invariably empowering them to terminate the contract without the need to adduce evidence indicating resultant detriment.<sup>65</sup> As Weir summarises: 'the innocent party simply [has] to go to the filing-cabinet [and] consult the contractual document',<sup>66</sup> and thus, by excluding consideration of the gravity of the breach, conditions support a rule which is 'not hedged around with qualifications which leave contractors constantly unsure of their position'.<sup>67</sup> This supplies intended beneficiaries of the right with 'confidence in the legal result of their actions' by enabling them to determine the legality of the cause of action available to them.<sup>68</sup>

The effect on the market generally, however, is mixed. The foregoing reasons support commerce by assisting in the resolution of commercial disputes by delivering a fixed, ascertainable outcome, and minimise the disruption caused to business activity by diminishing the difficulty in identifying the cause of action available.<sup>69</sup> Adams and Brownsword believe this exemplifies the 'virtues of certainty, which are dear to Market-Individualism'.<sup>70</sup> However, this is not entirely accurate as in some circumstances, as the Law Commission identified,<sup>71</sup> the rigidity of conditions can work against parties; if the outcome seems unjust a court may hold that the term was not breached at all. This is exemplified by the approach of Lord Denning MR in *The Hansa Nord* holding the obligation to provide goods of 'merchantable quality' to be breached only if a commercial man would hold the breach was 'such that a buyer should be able to reject the goods'.<sup>72</sup> This adds a further element of unpredictability in the law and has received equally undesirable statutory recognition in the context of the sale of goods via s15A Sale of Goods Act 1979,<sup>73</sup> introducing

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<sup>63</sup> *Bunge Corporation v Tradax* (n 17) 715 (Lord Wilberforce).

<sup>64</sup> *The Mihalis Angelos* (n 16) 205 (Megaw LJ).

<sup>65</sup> *Bunge Corporation v Tradax* (n 17) 720 (Lord Lowry).

<sup>66</sup> T Weir, 'Contract – The Buyer's Right To Reject Defective Goods' [1976] CLJ 33, 36.

<sup>67</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205, 207

<sup>68</sup> *Bunge Corporation v Tradax* (n 17) 720-1 (Lord Lowry).

<sup>69</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' [2003] JBL 102, 104.

<sup>70</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205, 207.

<sup>71</sup> Law Commission and Scots Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987) para 2.26

<sup>72</sup> *The Hansa Nord* (n 24) 62 (Lord Denning MR)

<sup>73</sup> Sale of Goods Act 1979, s 15A (as inserted by the Sale and Supply of Goods Act 1994).

ambiguous terms such as 'slight' and 'reasonable'<sup>74</sup> and injecting uncertainty into the class of terms which were so labelled to avoid uncertainty.<sup>75</sup>

Furthermore, while market-individualism suggests 'security of transactions is to be promoted',<sup>76</sup> the ease with which a contract can be vitiated, as a result of allowing termination for any breach of condition whatsoever, unqualified by the consequences of the breach, undermines this. If the law makes it relatively easy to exit an agreement, the ability for a party to identify a relatively trivial or technical defect in performance to alleviate them from the burden of complying with the now onerous contract means parties cannot be sure that the transaction will survive its intended duration. The desire to take such action is exacerbated in times of economic instability where a bargain can fluctuate from favourable to financially ruinous in a relatively short period of time thus compounding insecurity and uncertainty. This will be discussed further in Chapter II.

### Innominate Terms - Uncertainty in identifying the cause of action available

*The very first need of the business community is legal predictability*.<sup>77</sup>

Although in theory a party who finds his agreement significantly altered still has a right to elect to terminate, in practice, the 'nature of the events resulting from the breach' approach of innominate terms<sup>78</sup> places formidable boundaries in the way of termination, hindering certainty and predictability and, a fortiori the intended beneficiary of the right to terminate.

### Ambiguity of 'substantial'

In *Hongkong Fir Shipping*, the courts set the 'yardstick' for discharge at 'substantial' deprivation of the expected contractual benefit, in line with the doctrine of frustration, and expressly rejected notions such as when 'fair' or 'reasonable'.<sup>79</sup> Nonetheless, when deprivation is 'substantial' is far from certain and this ambiguity contradicts the market ideology requiring clear ground rules.<sup>80</sup> As Adams and Brownsword note, 'how can an innocent party ever be confident that a court will treat the consequences as being serious enough to justify withdrawal?'.<sup>81</sup> Treitel suggests 'substantial deprivation', along with the similar metaphor 'root of the contract', is 'not particularly helpful in analysing the law or in predicting the course of future decisions'.<sup>82</sup>

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<sup>74</sup> Sale of Goods Act 1979, s 15A (as inserted by the Sale and Supply of Goods Act 1994); Law Commission Report (n 62).

<sup>75</sup> E Peel, *Treitel on The Law of Contract* (12<sup>th</sup> edn, Sweet and Maxwell 2011).

<sup>76</sup> JN Adams and R Brownsword, 'The Ideologies of contract' (1987) 7 *Legal Studies* 205, 207.

<sup>77</sup> Lord Irvine, 'The Law: An Engine for Trade' (2001) 64 *Mod L Rev* 333, 334.

<sup>78</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] *CLJ* 192, 195.

<sup>79</sup> *Universal Cargo Carriers Corporation v Citati* [1957] 2 *QB* 401 (Mr Justice Devlin) followed in *Hongkong Fir Shipping* (n) (Lord Justice Diplock).

<sup>80</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205, 207.

<sup>81</sup> JN Adams and R Brownsword, *Understanding Contract law* (5<sup>th</sup> edn Sweet and Maxwell, London 2007) 171.

<sup>82</sup> E Peel, *Treitel on The Law of Contract* (12<sup>th</sup> edn, Sweet and Maxwell 2011). 870 [18-026].

An analogy can be drawn with the United Nations Convention on the International Sale of Goods 1980 (hereafter 'Vienna Sales Convention') which allows termination<sup>83</sup> when a breach is 'fundamental'.<sup>84</sup> This shares common ground with the English law approach inasmuch as it requires assessment of the consequences of the breach. Bridge powerfully articulates the difficulty in identifying when the circumstances are such as to make a breach 'fundamental' as opposed to 'very serious' or 'serious'; he opines:

It is almost impossible to present a principled case for stopping at an intermediate point on a graduated scale. The difficulty here is largely embedded in the very concept of fundamental breach and ensures unpredictability in the availability of avoidance.<sup>85</sup>

It has even been suggested 'the conclusion that a breach is "fundamental" is a matter of judicial discretion in which particular factors may or may not play a prominent part'.<sup>86</sup> The 'individualistic' aspect of market-individualism has a strong focus on the freedom to contract which, inter alia, necessitates that the parties are to be the masters of their own bargains.<sup>87</sup> The aforementioned factors suggest this approach is irreconcilable with the individualism ideology as, if correct, the only definitive way parties can know the precise meaning of their agreement is by judgment of a court or arbitrator and thus they are reliant on the a third party and prevented from regulating their own agreement.<sup>88</sup>

It is here that the advantages of conditions are apparent as no such interpretation need be attempted, thereby requiring minimal intervention from the courts and lawyers and respecting the essential individualistic principle of freedom to contract.<sup>89</sup> Labelling a term as a condition means the parties are equipped with all the necessary tools to regulate their own agreement; it is simply a matter of identifying whether the term is a condition, and deciding on whether termination is an advantageous addition to claiming damages.

### Evidential Difficulties

Whereas the requisite data to determine the legitimacy of termination for breach of condition is to be found in the 'filing cabinet',<sup>90</sup> under the *Hongkong Fir Shipping* consequential approach, the requirement to assess the

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<sup>83</sup> Referred to as 'avoidance', United Nations Convention on the International Sale of Goods 1980, Article 49

<sup>84</sup> United Nations Convention on the International Sale of Goods 1980, Article 49

<sup>85</sup> M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) ICLQ 911, 921.

<sup>86</sup> M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) ICLQ 911, 920.

<sup>87</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205, 208

<sup>88</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205, 209

<sup>89</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205, 208

<sup>90</sup> T Weir, 'Contract – The Buyer's Right to Reject Defective Goods' [1976] CLJ 33, 36

consequences of the breach involves considering 'not words, but events'.<sup>91</sup> Crucially, difficulty can arise in ascertaining the cause of action available to the innocent party at the time of breach because 'consequences tend to occur after their causes'.<sup>92</sup> As succinctly summarised by Lord Devlin, the 'nature of the event' which must be known in order to identify whether termination is justified 'cannot be ascertained until it has occurred, and the aggrieved party ... cannot wait upon the event'.<sup>93</sup> The longevity of charterparties, binding parties for years in some circumstances, compounds the problem of inadequate foresight as the requisite event depriving a party of contractual consideration may not materialise until months after the causative breach of contract.

Prior to the materialisation of the event, there are further implications with regard to managing risk. Although a party may foresee the *risk* of substantial deprivation of contractual consideration, it may be impossible to accurately calculate the likelihood that the risk will materialise into an *actual* substantial deprivation, validating termination. In such a circumstance, an innocent party is faced with two options, neither of which may prove adequate.

Firstly, an innocent party can 'wait and see'<sup>94</sup> if a substantial detriment arises, however, in doing so they are exposed to the additional risk that this will count as waiver or affirmation of the contract.<sup>95</sup> Consequently, notwithstanding substantial deprivation of contractual consideration, the intended beneficiary of the right to terminate will be prevented from terminating and confined only to a remedy of damages.

Furthermore, in some circumstances it may be inappropriate to expect an innocent party to impotently 'wait and see' if the detriment materialises rather than take positive measures to manage the risk to which they are subject. Such is the case where a breach results in minor exposure to the possibility of consequences of a severe magnitude. Using an example from the carriage of goods by air, Lord Devlin persuasively illustrates this point by reasoning:

If there were the slightest danger than an aeroplane would not arrive safety at its destination, it would be no use assuring a prospective passenger that the chances were 9 to 1 that it would and that his executors would be paid damages if it did not.<sup>96</sup>

Alternatively, the innocent party can terminate the agreement in light of the risk of substantial deprivation of contractual benefit, but they themselves will be in repudiatory breach of contract unless that risk actually materialises.<sup>97</sup> Takahashi observes that the effect of being in repudiatory breach is particularly severe in the context of international commodity contracts as the

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<sup>91</sup> T Weir, 'Contract – The Buyer's Right to Reject Defective Goods' [1976] CLJ 33, 36.

<sup>92</sup> T Weir, 'Contract – The Buyer's Right to Reject Defective Goods' [1976] CLJ 33, 36.

<sup>93</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192, 197.

<sup>94</sup> *Bunge Corporation v Tradax* (n 17) 719 (Lord Lowry)

<sup>95</sup> *Yukong Line Ltd of Korea v Rendsburg Investment Corporation, The Rialto* [1996] 2 Lloyd's Rep 604.

<sup>96</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192, 198.

<sup>97</sup> As in *Honkong Fir Shipping* (n 14).

amount of damages can be 'enormous' due to volatile markets and the vast quantities associated with bulk shipments,<sup>98</sup> and Adams and Brownsword equally believe this is an unjust outcome.<sup>99</sup>

This also adversely affects the market as it prevents both parties to the contract from planning and managing risk, conversely introducing further risks and uncertainty. The foregoing discussion has been directed at the protection of the intended beneficiary of the right to terminate, however, from the perspective of the market as a whole, it could also be argued that subjecting the party in breach to uncertainty is equally as disadvantageous. Not only will the uncertainty surrounding exposure to such a risk be likely to be ruinous to the market activity of an innocent party due to the inability to accurately calculate and manage risks, the party in default is similarly unlikely to conduct business in a normal manner when the continuation of the contractual relationship between the parties is contingent upon the absence of an unidentifiable or speculative event in the future.

In contradistinction to the right to terminate for breach of innominate term under English law, the right to avoid a contract for a 'fundamental breach' under the Vienna Sales Convention is dependent on the consequences of the breach being foreseeable.<sup>100</sup> To an extent this ameliorates the abovementioned uncertainty faced by the party in default, however it simultaneously affords less protection to the intended beneficiary of the right to terminate. In this sense, a tension can be identified between creating certainty and protecting an innocent party from substantial loss of consideration howsoever caused.

Further complications arise in both carriage contracts and international commodity transactions as the relevant events 'may be in the China Sea rather than in the head office where the decisions are taken'.<sup>101</sup> This leaves the intended beneficiary exposed and has resulted, argues Weir, in 'an undeniable loss of speed and sureness of decision-making', adversely affecting the market as a whole.<sup>102</sup>

Adams and Brownsword note, 'to introduce the consequential approach interstitially ... presents no problems to market-individualists',<sup>103</sup> but a preference for innominate terms seeks to go further than this and make it the norm. As, in accordance with the freedom to contract, parties retain the ability to classify the terms of their agreement themselves, subject to limited

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<sup>98</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' (2003) Mar, JBL 102, 104

<sup>99</sup> JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn Sweet and Maxwell, London 2007) 171

<sup>100</sup> United Nations International Convention on the International Sale of Goods 1980, Article 25

<sup>101</sup> T Weir, 'Contract – The Buyer's Right to Reject Defective Goods' [1976] CLJ 33, 36

<sup>102</sup> T Weir, 'Contract – The Buyer's Right to Reject Defective Goods' [1967] CLJ 33, 36

<sup>103</sup> JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn, Sweet & Maxwell, London 2007) 169

exceptions,<sup>104</sup> the judicial labelling of a term is merely a default rule. MacNeil emphasises how uncertainty produces a default rule which ‘cannot properly fulfil its function as a gap filler’ creating ‘risks for the contracting parties when they decide what must be expressly agreed and what can safely be left to the general law’.<sup>105</sup>

It is submitted that the cumulative impact of the above factors is such that when a term is labelled innominate, the division between lawful termination and unlawful termination is blurred. To provide a right which does not conform to the prescribed level of certainty may in many circumstances be akin to providing no such right at all. Commenting on the need to assess the gravity of the breach to termination under the Vienna Sales Convention, Bridge notes, ‘the very uncertainty of the right to avoid a contract for fundamental breach then becomes a powerful disincentive to avoidance’.<sup>106</sup> An innocent party who is legally entitled to terminate the contract is unlikely to do so if he is unaware or unsure of this right and unable to ‘take quick and sure advice about the legal consequences of the practical options open to [him] when something goes wrong with [his] transaction’.<sup>107</sup>

Moreover, even if a party is unhindered by the aforesaid difficulties in determining the cause of action available, innominate terms increase the likelihood that the decision to terminate will be subject to a prolonged dispute to prove the legality of the exercise.<sup>108</sup> This is particularly true in the context of commodity and charter contracts where parties ‘are prepared to appeal cases all the way to the House of Lords in order to achieve an appropriate remedy’.<sup>109</sup> Ellinghaus observed that between 1904 and 1986 charterparties formed the greatest percentage of cases litigated before the House of Lords, thus showing that ambiguous rules can prove expensive in this area of law.<sup>110</sup> Furthermore, while arbitration clauses are common in standard form charterparties,<sup>111</sup> this does not prevent determined parties from appealing to the higher courts on a point of law. The prospect of lengthy review by a court or arbitrator may equally deter an innocent party from relying on their legal rights and therefore an intended beneficiary of the right is afforded less protection.

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<sup>104</sup> See n 17.

<sup>105</sup> I MacNeil, ‘Uncertainty in Commercial Law’ (2009) 13(1) Edin LR 68, 75.

<sup>106</sup> M Bridge, ‘Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods’ (2010) 59(4) 911, 916.

<sup>107</sup> T Weir, ‘Contract – The Buyer’s Right to Reject Defective Goods’ [1976] CLJ 33, 36

<sup>108</sup> For example, the right to terminate legitimately exercised in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri, Benfri and Lorfri)* [1979] AC 757 (HL).

<sup>109</sup> J Scott, ‘Empirical Studies Strike Back Against the Force of Contract Theory’ (1997) 4 UCL Juris Rev 256, 267.

<sup>110</sup> M Ellinghaus, ‘An Australian Law of Contract?’ (1989) 1 Journal of Contract Law 13, 19-20 noted in J Scott, ‘Empirical Studies Strike back Against the Force of Contract Theory’ (1997) 4 UCL Juris Rev 256, 267.

<sup>111</sup> NYPE 1993, clause 45 (ln 509); Asbatankvoy 1977, clause 24; Gencon 1994, clause 19 (ln 383).

### Commercial Convenience

*'Contract's concern to avoid market inconvenience is a measure of its commitment to the market-individualist policy of facilitating market dealing'*<sup>112</sup>

In *Bunge Corporation v Tradax*, Lord Lowry asserted 'there are enormous practical advantages in certainty',<sup>113</sup> and Adams and Brownsword praised 'contract's concern to avoid market inconvenience' as integral to 'facilitating market dealing'.<sup>114</sup> Conditions facilitate commerce by supporting business practice, because, as Lord Lowry identified, by prohibiting consideration of consequences, prolonged litigation is avoided and disputes can be resolved quickly thereby minimising legal fees and time lost and maximising the commercial resources available to the company for further transactions.<sup>115</sup>

Moreover, as was stated by Roskill QC, counsel to the charterers in *Hongkong Fir Shipping*, the most trivial of breaches can carry with it the 'seeds of disaster'.<sup>116</sup> The 'nature of the term' approach enables the intended beneficiary to avoid the practical difficulties associated with proving the seeds sown by the other party's breach will germinate into disaster, alleviating the burden on the innocent party.

By contrast, as labelling a term innominate 'encourages litigation',<sup>117</sup> the intended beneficiary of the right to terminate may be subjected to the financial burden and disruption associated with defending the legality of termination. This is also adverse for the operation of the market in general inasmuch as it inconveniences both parties and diverts time and money away from the course of business.

### Consistency

*'It is undesirable if termination of some contracts on a string is allowed but termination of other contracts on the same string is not allowed for the same breach'*<sup>118</sup>

As well as the advantages of commercial convenience, there is great merit in a system of termination for breach which reduces reliance on legal advisers and the court through allowing parties to 'learn by experience what [is] likely to

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<sup>112</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205, 208

<sup>113</sup> *Bunge Corporation v Tradax* (n) 720 (Lord Lowry)

<sup>114</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies 205, 208

<sup>115</sup> *Bunge Corporation v Tradax* (n 17) 720 (Lord Lowry)

<sup>116</sup> *Hongkong Fir Shipping* (n 14) (Roskill QC) 53

<sup>117</sup> JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn Sweet and Maxwell, London 2007) 171

<sup>118</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' (2003) Mar, JBL 102, 104

happen in a given situation'.<sup>119</sup> This is achieved by conditions because the cause of action available on breach is invariably an entitlement to damages to compensate loss, accompanying a right to elect to termination, unqualified by the gravity of the breach.<sup>120</sup>

This is particularly advantageous in the context of 'string contracts', where goods are purchased for the purpose of resale, meaning 'today's buyer may be tomorrow's seller'.<sup>121</sup> As a result, and as also necessitated by the multiplicity of contracts simultaneously managed by a single string-contractor, Takahashi emphasises 'the law should, therefore, be capable of producing consistent results',<sup>122</sup> concurring with Lord Lowry who reinforces 'so-called string contracts are not made, or adjudicated upon, in strings'.<sup>123</sup>

This assists the commodity trade by facilitating string-contracts as well as ensuring commercial parties in general can acquire knowledge identifying when termination is legal. In the individual case, the intended beneficiary is also better protected as if the law is consistent it removes ambiguity over when the right can be legitimately exercised and may prevent parties being liable for damages for repudiatory breach as the result of a good faith decision to terminate on the basis that they were entitled to do so for a similar breach encountered in the past.

### **'The Bad Bargain'**

It is a hitherto unquestioned assumption that contract law should not allow an innocent party to use a trivial or technical breach of contract to resile from a bad bargain. So forceful are the calls to prevent such 'abuse'<sup>124</sup> of the right to terminate that this is one of the most frequently advocated reasons for classifying terms as innominate instead of conditions, shown by the classic judgment of Lord Justice Roskill in *The Hansa Nord*, cautioning judges not to be 'over ready ... to construe a term in a contract as a "condition" any breach of which gives rise to a right to reject',<sup>125</sup> and reinforced by the House of Lords in *The Gregos*, Lord Mustill noting, 'I would not for my part wish to enlarge the category [of conditions] unduly, given the opportunity which this provides for a party to rely on an innocuous breach as a means of escaping from an unwelcome bargain'.<sup>126</sup>

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<sup>119</sup> *Bunge Corporation v Tradax* (n 17) 721 (Lord Lowry)

<sup>120</sup> *Bentsen v Taylor, Sons & Co (2)* (n 20) 281

<sup>121</sup> *Bunge Corporation v Tradax* (n 17) 720 (Lord Lowry)

<sup>122</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' (2003) Mar, JBL 102, 104

<sup>123</sup> *Bunge Corporation v Tradax* (n 17) 721 (Lord Lowry)

<sup>124</sup> GH Treitel, 'Some Problems of Breach of Contract' (1967) 30 Mod L Rev 139, 153; GH Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Law Lectures: Oxford University Press, New York 2002) 119.

<sup>125</sup> *The Hansa Nord* (n 24) 70-71 (Lord Justice Roskill)

<sup>126</sup> *The Gregos* (n 16) 1475 (Lord Mustill)

This chapter explores whether the court's negative perception of such termination is justifiable and thus whether the resultant preference for classifying terms as innominate is sustainable.

### Bad Bargains and Breach of Contract

Due to the vast quantities and expansive duration typical of commercial contracts, an advantageous agreement can become ruinous as a result of moderately small fluctuations in the market value of the relevant goods or services. If able to terminate the contract, the buyer is able to capitalise on the changing market,<sup>127</sup> which may yield a significant financial benefit, particularly where economic volatility increases the severity and unpredictability of fluctuations. Bad bargains are not peculiar to exchange on markets with readily available substitutes; similarly an agreement will become undesirable if a party no longer has any use for the goods or service, as exemplified by the *Mihalis Angelos*.<sup>128</sup>

Nonetheless, when subject to a contractual relationship, the buyer of goods, or the recipient of services (and vice versa), is contractually obliged to accept delivery and produce payment in full, even if the price of the goods or service is substantially inflated in comparison to the current market rate.

However, when one party fails to comply with his respective obligations under the contract, in certain circumstances the law affords the other party relief by excusing him from performance of his own obligations, and he is thus, *incidentally*, able to capitalise on the declining market. Breach of condition is one of these ways, and it is the imprecise way in which an entitlement to terminate is established for breach of condition which makes the mechanism susceptible to misuse by those seeking to circumvent the general rule that the parties 'are supposed to remain bound by the price initially agreed regardless of the subsequent fluctuation of the market price'.<sup>129</sup> The 'nature of the term' approach, prohibiting consideration of the consequences of the breach,<sup>130</sup> means a court is incapable of preventing the innocent party from terminating once it has been established that the term breached is a condition, even if the innocent party suffered no prejudice.<sup>131</sup> The propensity for misuse is compounded by the absence of a general concept of good faith in English law and thus discharge for breach of condition may result in outcomes 'so harsh as to be inequitable'.<sup>132</sup>

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<sup>127</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83, 86

<sup>128</sup> *The Mihalis Angelos* (n 16)

<sup>129</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' [2003] JBL 102,106

<sup>130</sup> *Bentsen v Taylor, Sons & Co (2)* (n 20); Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192

<sup>131</sup> *Arcos Ltd v EA Ronaasen & Sons* [1933] AC 470 (HL)

<sup>132</sup> Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192, 201

The problem is intensified once a stipulation has been labelled a condition, especially for industries where standard form contracts are commonplace.<sup>133</sup> As summarised by Lord Devlin ‘once a condition, always a condition’,<sup>134</sup> meaning that termination is valid ‘even though in a particular case the breach caused no serious (or any) prejudice to the injured party’.<sup>135</sup> Although the extent of the problem in the context of the sale of goods has been ameliorated by s 15A of the Sale of Goods Act,<sup>136</sup> as Treitel observes, it has not removed the problem altogether.<sup>137</sup>

The common law is littered with examples of parties seeking to capitalise on a falling market and identifying a trivial breach to conceal their real, insufficient motive for terminating. Takahashi contends international contracts for the sale of commodities are particularly prone to attempts of such termination,<sup>138</sup> as Winsor concurs,<sup>139</sup> however it is equally true of any type of contract where freely available substitutes can be acquired. *Arcos v Ronaasen*, is an apt example; the House of Lords affirmed the termination of a contract for the sale of timber which was still usable for the intended purpose, but did not conform with a contractual condition by millimetres.<sup>140</sup> Similarly, in *Re Moore & Landauer* the Court of Appeal upheld a buyer’s rejection of tinned fruit delivered in consignments of twenty-four tins as opposed to the stipulated thirty.<sup>141</sup> These cases have been criticised as ‘excessively technical’<sup>142</sup> and demonstrate the low, easily accessible threshold which can vitiate the binding force of a contract with relative ease by legitimising termination.<sup>143</sup>

To combat this, a second circumstance in which a party is entitled to terminate was developed: breach of innominate term. This has been ‘welcomed with open arms’<sup>144</sup> for introducing flexibility into the law,<sup>145</sup> Lord Wilberforce commended the development of the law along ‘rational lines’.<sup>146</sup> The calculation of a right to terminate for breach of innominate term is more sophisticated and requires assessment of the ‘nature of the events resulting

<sup>133</sup> The charter industry for example – New York Produce Exchange 1993; Gencon 1994; Baltimore 1939; Asbatankvoy 1977

<sup>134</sup> Lord Devlin, ‘The Treatment of Breach of Contract’ [1966] CLJ 192, 197

<sup>135</sup> GH Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Law Lectures: Oxford University Press, New York, 2002) 100. See also *The Hansa Nord* (n 24) 82 (Lord Justice Ormrod)

<sup>136</sup> As inserted by the Sale and Supply of Goods Act 1994

<sup>137</sup> E Peel, *Treitel on The Law of Contract* (12<sup>th</sup> edn, Sweet and Maxwell 2011)

<sup>138</sup> K Takahashi, ‘Right to Terminate (Avoid) International Sales of Commodities’ [2003] JBL 102, 104.

<sup>139</sup> Winsor, ‘The Applicability of the CISG to Govern Sales of Commodity Type Goods’ [2010] *Vindobona Journal of International Commercial Law and Arbitration* 83, 90.

<sup>140</sup> *Arcos v Ronaasen & Son* (n 122).

<sup>141</sup> *FW Moore & Co Ltd v Landauer & Co, sub nom Re An Arbitration between Moore and Company, Limited and Landauer and Company* [1921] 2 KB 519 (CA).

<sup>142</sup> *Reardon Smith Line v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (HL) 998 (Lord Wilberforce)

<sup>143</sup> See also *Cunliffe v Harrison* (1851) 6 Exch 901.

<sup>144</sup> JW Carter, GJ Tolhurst, E Peden, ‘Developing the Intermediate Term Concept’ (2006) 22 *Journal of Contract Law* 268, 268

<sup>145</sup> JW Carter, ‘Intermediate Terms Arrive in Australia and Singapore’ (2008) 24 *JCL* 226

<sup>146</sup> *Reardon Smith Line* (n 21) 998 (Lord Wilberforce)

from the breach' before granting a right to terminate.<sup>147</sup> Termination is only valid when the innocent party is deprived of 'substantially the whole benefit which it was the intention of the parties as expressed in the [contract] that the [party] should obtain from the further performance of their own contractual undertakings', *viz.-a-viz.*, when the breach 'goes to the root of the contract'.<sup>148</sup> As this aspect is evidently absent from cases in which the sole reason for termination is to capitalise on the changing market, it becomes impossible to use a breach of innominate term as a façade to conceal the external reason for termination.

### 'Insubstantial-Deprivation' Termination

Varying terminology has been used to describe the situation in which a party, having suffered little or no detriment as a result of breach, seeks to terminate the agreement to capitalise on changing external factors: 'economic opportunism',<sup>149</sup> 'abuse of the right to rescind',<sup>150</sup> 'unmeritorious termination',<sup>151</sup> and 'termination for a bad reason'.<sup>152</sup> For the sake of clarity, this essay will avoid using a label which refers to the external nature of the motive as in practice external considerations are always taken into account when deciding whether to terminate.<sup>153</sup> The qualifying factor is the lack of detriment caused by the breach and so this type of termination will be referred to as 'insubstantial deprivation' termination – *insubstantial* in contrast to the 'substantial deprivation' threshold required to fall within the 'intended beneficiary' category identified above.<sup>154</sup>

It is submitted that it is an oversimplification to regard cases of termination accompanying 'insubstantial deprivation' as homogeneous. Sub-categorisation can be achieved by departing from the traditional emphasis placed on the action of the party seeking to terminate and instead scrutinising the party in default. This distinction is crucial in order to appraise the reasoning underlying the preference for innominate terms because there is a distinct

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<sup>147</sup> *Hongkong Fir Shipping* (n 14)

<sup>148</sup> *Hongkong Fir Shipping* (n 14) 64 (Lord Justice Upjohn); 72 (Lord Justice Roskill)

<sup>149</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83

<sup>150</sup> GH Treitel, 'Some Problems of Breach of Contract' (1967) 30 Mod L Rev 139, 153; GH Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarence Law Lectures: Oxford University Press, New York 2002) 119.

<sup>151</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' [2003] JBL 102, 110.

<sup>152</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83

<sup>153</sup> In an newsletter addressed to clients, the international law firm Ashurst offers the following 'practical point': 'Can you use the other party's default to your advantage, for example, to get out of an otherwise unprofitable contract or negotiate more favourable terms?' Ashurst 'Litigation Update: Repudiatory Breach of Contract: Traps for the unwary' Ashurst, 'Repudiatory breach of contract: traps for the unwary' (Litigation Update, March 2005) <[http://www.ashurst.com/listing.aspx?id\\_content=26&id\\_queryContent=4795&id\\_ContentType=13](http://www.ashurst.com/listing.aspx?id_content=26&id_queryContent=4795&id_ContentType=13)> accessed 12 January 2012

<sup>154</sup> *Hongkong Fir Shipping* (n 14)

division within the case law and the assimilation of judicial reasoning into both categories is met with varying validity.

### 'Terminatio Ex Culpa'

*Terminatio ex culpa* ('termination out of fault') is the label this essay gives to termination resulting from a breach caused by the fault of the party in breach. Thus the preposition 'ex' (from Latin, meaning 'out of', or 'from') identifies the source of the termination arises out of the fault of the party in breach.

This sub-category is typified by the case of *Arcos v Ronaasen*; in the Court of Appeal, Lord Justice Scrutton condemned the 'cheerful indifference to the ordinary commercial transactions' with which the defaulting party flouted the contractual undertaking.<sup>155</sup> The culpable state of mind in *Arcos* appears to have been recklessness, however it is suggested termination should fall within this category for any culpable state of mind from an intentional breach up to and including breach caused by failure to exercise due diligence (the latter in line with the standard set by numerous international Conventions for the carriage of goods).<sup>156</sup>

### 'Predatory Termination'

This can be distinguished from a second category in which the terminating party 'preys' on a defect in performance which has not arisen as a result of the fault of his contractual counterpart. Such a situation is epitomised by the proverbial missing nail rendering a ship unseaworthy which may easily remain undetected even when due diligence is exercised.<sup>157</sup> With such breaches, absolute compliance with the obligation may provide an unduly onerous task for contractors which hinders market activity; indeed, it may be that the 'breach' is a technicality and strict compliance is near impossible.

### Historical Origin

In the foregoing chapter, the 'intended beneficiary' of the right to elect to terminate was identified as a party who has suffered substantial deprivation of contractual consideration.<sup>158</sup> Therefore, from the perspective of historic fidelity, preventing termination accompanying 'insubstantial deprivation' is justifiable as such cases involve, by their very definition, the termination of a contract in a situation where the innocent party has not been deprived of requisite consideration. Historic fidelity aside, this chapter considers the jurisprudential question of whether termination ought to be allowed in such circumstances.

<sup>155</sup> (1932) 43 Ll L Rep 1 (CA) 5 (Lord Justice Scrutton) aff'd in [1933] AC 470 (HL).

<sup>156</sup> Hague Rules as amended by the Brussels Protocol 1968, Article III Rule 1; United Nations Convention on the Carriage of Goods by Sea 1978 (The Hamburg Rules) Article 5 Rule 1; United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (Rotterdam Rules) Article 14.

<sup>157</sup> *Havelock v Geddes and Others* (1809) 10 East 555 (Chief Justice Lord Ellenborough); *Hongkong Fir Shipping* (n 14) 62 (Lord Justice Upjohn).

<sup>158</sup> See pages 9-11.

### Consumer-Welfarism - Fairness and Justice

*'An innocent party's remedies for breach should be proportionate to the seriousness of the consequences of the breach'.<sup>159</sup>*

The prevention of termination accompanying 'insubstantial deprivation', and a fortiori, a preference for innominate terms, is most frequently justified by the concept of 'fairness'.<sup>160</sup> This is underpinned by the consumer-welfarist preference for increased market regulation, with business freedom curtailed by the 'operative principles and conceptions of fairness and reasonableness'.<sup>161</sup> As these are nebulous concepts which are carelessly used in common parlance with a cavalier disregard for their precise meaning, Adams and Brownsword offer guidance, suggesting fairness entails 'good faith' when exercising legal rights,<sup>162</sup> and importantly, it also manifests itself into the need for an innocent party's remedy to 'be proportionate to the seriousness of the consequences of the breach'.<sup>163</sup>

According to this view, preventing termination accompanying 'insubstantial deprivation' creates 'fairness' by ensuring that a party in default is not subjected to a disproportionate response for a trivial breach. This is exemplified by contrasting the outcome of *The Hansa Nord*, with *Arcos v Ronaasen*.<sup>164</sup> In the former case, the buyer was held to have unlawfully terminated an FOB contract for the sale of citrus pulp worth £100,000 when not 'shipped in good condition', contrary to the contract.<sup>165</sup> Subsequently, in what has been described as a 'particularly spectacular example of sharp practice',<sup>166</sup> the same consignment of goods was purchased for £30,000 by the original buyer and used for the purpose originally intended. By labelling the term innominate, the Court of Appeal prevented 'insubstantial deprivation' termination, creating an outcome which was fair for the seller.<sup>167</sup> By contrast, in *Arcos v Ronaasen*, noted above,<sup>168</sup> by holding the term breached a condition, the House of Lords subjected the seller to a disproportionately severe response for a minor breach.<sup>169</sup>

However, it is contended that the current definition of fairness is selective and focuses solely on the actions of the party seeking to terminate, presupposing that scrutinising his exercise of the right to terminate and only validating it in

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<sup>159</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 *Legal Studies* 205, 210.

<sup>160</sup> *The Hansa Nord* (n 24); *The Gregos* (n 16); *Schuler v Wickman* (n 17).

<sup>161</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 *Legal Studies* 205, 210.

<sup>162</sup> JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn, Sweet and Maxwell, London 2007) 166-7.

<sup>163</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205, 210.

<sup>164</sup> *Arcos v Ronaasen* (n 122).

<sup>165</sup> *The Hansa Nord* (n 24).

<sup>166</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 *JCL* 83, 91.

<sup>167</sup> *The Hansa Nord* (n 24).

<sup>168</sup> See page 26-27.

<sup>169</sup> *Arcos v Ronaasen* (n 122).

situations in which he suffers substantial deprivation is the most appropriate way to judge what is 'fair'. Alternatively, 'fairness' could be defined by reference to the fault of the party in breach instead of by reference to the degree of hardship suffered by the innocent party, thus shifting attention to the party in breach. The inability to separate these two scenarios under the current condition – innominate term division begins to expose the inadequacy of the current law. At present fault is irrelevant,<sup>170</sup> however, if the distinction between '*terminatio ex culpa*' and 'predatory termination' is utilised, it offers a plausible solution.

If 'fairness' is judged by fault, when the breach which enables the innocent party to terminate is not induced by fault (predatory termination) the 'operative principles ... of fairness and reasonable' require the blameless party to be protected. By contrast, the converse applies where termination is made possible through the fault of the breaching party ('*ex culpa*') so as to hold the party responsible for his actions. Fairness is further introduced by allowing contractors to ensure the contract remains binding simply by adhering to the standard imposed on them.

The consumer-welfarists riposte may be to suggest that regardless of the fault, either type of termination will be unfair unless it is accompanied by substantial deprivation. However, this essay submits the relevance of fault to the determination of a right to terminate can be sustained by reference to the purpose common to market-individualism and consumer-welfarism – to facilitate competitive exchange.<sup>171</sup>

### Facilitating Competitive Exchange

*It is widely accepted that contract law aims to facilitate competitive exchange*<sup>172</sup>

The overarching purpose of contract law, acknowledged by both market-individualists and consumer-welfarists, is to facilitate competitive exchange.<sup>173</sup> 'Competitive' is the operative word; to 'compete' is defined as to 'strive to gain or win something by defeating or establishing superiority over others who are trying to do the same'.<sup>174</sup> Of particular relevance is 'superiority'; to be 'superior' is to be 'higher in rank, status, or quality'.<sup>175</sup>

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<sup>170</sup> *Arcos v Ronaasen* (n 122).

<sup>171</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 *Legal Studies* 205, 206.

<sup>172</sup> Brownsword, *Contract Law: Themes for the Twentieth Century* (2<sup>nd</sup> edn Oxford University Press, New York 2006) 39.

<sup>173</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1978) 7 *Legal Studies* 205 Scott, 'Empirical Studies Strike Back Against the Force of Contract Theory' (1997) 4 *UCL Juris Rev* 256.

<sup>174</sup> Oxford English Dictionary, 'Compete' <<http://oxforddictionaries.com/definition/compete?q=compete>> accessed on 12 January 2012.

<sup>175</sup> Oxford English Dictionary, 'Superior' <<http://oxforddictionaries.com/definition/superior?q=superior>> accessed on 12 January 2012.

The most obvious way a business can compete is by offering goods or services of a higher quality than competitors - promising a more durable product, or a more efficient service, for example. Additionally, and of most relevance to this essay, there is scope for businesses to compete when performing these promises. Inferiority can be inferred where a party fails to accurately comply with the obligations he promised to undertake. If through fault a party is unable, or unwilling, to deliver goods or services in precise accordance with the terms of their contract (*terminatio ex culpa*) they are inferior to a party who delivers similar goods or services without fault. Even if the level of culpability is relatively miniscule, the breach is still demonstrative of differentiation within the market. Therefore, to prevent an innocent party from terminating in this situation because they have not suffered enough detriment does not facilitate competitive exchange; competition is survival of the fittest and to disallow termination when there has been a culpable breach protects the weak by insuring they do not lose the benefit of the contract. As Weir observes, at present 'the guilty party is to get all that he bargained for [minus damages] unless the innocent party gets no part of what he bargained for'.<sup>176</sup>

Thus, when a party falls short of meeting the standard of the contract, prohibiting termination fails to create a competitive framework for contract law. Weir summarises this as 'rewarding incompetence', but the 'protection of the incompetent' seems a more accurate description.<sup>177</sup>

In contradistinction, where breach is not induced by fault, it is not indicative of a lack of competitiveness and therefore the abovementioned reasoning is inappropriate. In such an instance, preventing predatory termination does uphold competition by ensuring that the playing field is level.

### Market-Individualism - Individualism – The Sanctity of Contract

*'One aspect of the matter that makes the rationalization of [termination] difficult is that many policy arguments ...could be used indifferently to support or oppose [a right to terminate]'.<sup>178</sup>*

Preventing 'insubstantial-deprivation' termination has equally been justified by reference to market-individualism. The 'sanctity of contract', 'the general idea that once parties duly enter into a contract, they must honour their obligations under that contract',<sup>179</sup> is a 'linchpin' of the individualistic ideology.<sup>180</sup> Significantly, this demands 'the courts should not lightly relieve

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<sup>176</sup> T Weir, 'Contract – A Buyer's Right to Reject Defective Goods' [1976] CLJ 33, 36

<sup>177</sup> T Weir, 'Contract – A Buyer's Right to Reject Defective Goods' [1976] CLJ 33, 36

<sup>178</sup> M Bridge, 'Avoidance for Fundamental breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) ICLQ 911, 915

<sup>179</sup> Cornell University Law School 'Legal Information Institute: Sanctity of Contract', <[http://www.law.cornell.edu/wex/sanctity\\_of\\_contract](http://www.law.cornell.edu/wex/sanctity_of_contract)> accessed 12 January 2012.

<sup>180</sup> JN Adams and R Brownsword, 'The ideologies of contract' (1987) 7 Legal Studies 205, 208

contractors from performance of their agreements',<sup>181</sup> and Brownsword links this with the binding nature of contracts.<sup>182</sup>

Prima facie, from the perspective of market-individualism there is a need to prevent termination accompanied by 'insubstantial deprivation' as a matter of 'practical wisdom ... or else', Bridge contends, 'the binding force of contract would be weakened by permitting avoidance for all and every trivial breach'.<sup>183</sup> The propensity for the discharge mechanism to be misused is exacerbated by the myriad of obligations contained in contemporary commercial contracts which increases the possibility of a trivial or technical defect in performance being used to escape a bad bargain. It is evident this reasoning was paramount to the classic statement 'contracts are made to be performed and not to be avoided according to the whims of market fluctuation' of Lord Justice Roskill in *The Hansa Nord*.<sup>184</sup>

Although the Court of Appeal, in seeking to prevent termination for 'insubstantial deprivation' through establishing a preference for innominate terms, was aiming to adhere to the sanctity of contract by being 'ever-vigilant in ensuring that established or new doctrines do not become an easy exit from bad bargains',<sup>185</sup> the correlation between the prevention of 'insubstantial deprivation' and upholding sanctity of contract differs depending the category of 'insubstantial deprivation' termination in question.

It will be recalled that while the citrus pulp in *The Hansa Nord* was still useable, and indeed used, for its envisaged purpose,<sup>186</sup> the court acknowledged it was 'far from perfect',<sup>187</sup> as evidenced by the fact the market decline did not entirely account for the discount in price on judicial sale.<sup>188</sup> It is unapparent from the facts of the case whether the sellers were at fault in failing to procure and ship the citrus pulp in 'good condition', however the significant departure from the contractual specification prima facie appears demonstrative of a failure to exercise due diligence. If this is a case of 'ex culpa' termination and the Court upheld the contract notwithstanding the culpable breach by the sellers, the outcome fails to recognise that leaving an unscrupulous party free to intentionally depart from his theoretically inviolable contractual obligations, only forfeiting his right to receive consideration from the other party if he provides 'beans instead of peas'<sup>189</sup> fails to ensure the seller is 'abiding by that same principle'.<sup>190</sup>

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<sup>181</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205, 209

<sup>182</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 *JCL* 83, 93

<sup>183</sup> M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) *ICLQ* 911, 915

<sup>184</sup> *The Hansa Nord* (n 24) 70-1 (Lord Justice Roskill)

<sup>185</sup> JN Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205, 210

<sup>186</sup> *The Hansa Nord* (n 24) 61 (Lord Denning MR)

<sup>187</sup> *The Hansa Nord* (n 24) 77 (Lord Justice Roskill)

<sup>188</sup> T Weir, 'Contract – A Buyer's Right to Reject Defective Goods' [1967] *CLJ* 33, 34

<sup>189</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 *Journal of Contract Law* 83, 96.

<sup>190</sup> M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) *ICLQ* 911, 914.

Therefore, far from acting as the guardians of the sanctity of contract, by declining to validate termination, the Court of Appeal set precedent which undermined the inviolability and binding nature of the contract by enabling a party to decide to what degree it will perform its contractual obligations and to what degree it will supplement inadequate performance by compensation. The resulting liability for damages may be unproblematic to those who favour the maximisation of wealth theory of contract law as everything can be reduced to monetary value,<sup>191</sup> but as Brownsword notes, 'contracts are, after all, for performance, not for compensation in lieu of performance'.<sup>192</sup>

The need to prevent termination accompanying 'insubstantial deprivation' is more convincing, however, if the failure to provide goods which conformed to the contractual specification occurred notwithstanding the exercise of due diligence (predatory termination). In such circumstances, it is less objectionable to restrict the innocent party's ability to terminate as the party in default has not consciously contravened the binding force of the contract and thus the Court of Appeal's outcome achieves its purpose of protecting the sanctity of contract by ensuring the contract cannot be brought to a premature conclusion.

### Market-Individualism

#### Market – Encouragement and Deterrent

*'The settled availability of a presumptive right of withdrawal might act as a deterrent against non-performance'.<sup>193</sup>*

Deterring non-performance also appears to underlie the reasoning of *The Hansa Nord*, Lord Justice Roskill asserting 'the court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations', concluding this is best achieved by a preference for innominate terms.<sup>194</sup> In theory, this is a way in which the sanctity of contract can be preserved and the quality of goods and services in the market can be maintained.

The conclusion that innominate terms encourage performance is premised on the idea that if a term is a condition and the bargain turns bad, the party is encouraged to bring performance to a premature conclusion by identifying a trivial or technical breach in performance. However, as with the desire to protect the sanctity of contract, the biased scrutiny of a right to terminate for breach of innominate term failed to acknowledge that there is no deterrent to stop the party in breach from deviating from the contractual specification.

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<sup>191</sup> J Scott, 'Empirical Studies Strike Back Against the Force of Contract Theory' (1997) 4 UCL Juris Rev 256, 267

<sup>192</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83, 95

<sup>193</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83, 104

<sup>194</sup> *The Hansa Nord* (n 24) 71 (Lord Justice Roskill)

The need to use the termination remedy as a mechanism for deterrence is illustrated by the inadequacy of damages as a deterrent; Brownsword accordingly concludes termination is the most effective deterrent.<sup>195</sup> In a claim for damages the burden of proof lies on the innocent party, whereas when termination occurs the party in breach has the burden of challenging its legitimacy. Secondly, if the party in breach is unable to discharge the burden of proof, he is to get nothing from the agreement, in contrast to awarding damages where the party in breach still receives the contractual benefit subject to a reduction for compensation. As Weir summarises, under the current approach ‘the guilty party is to get all that he bargained for [minus payment in compensation, if any] unless the innocent party gets no part of what he bargained for’.<sup>196</sup>

Thirdly, damages are rarely punitive or exemplary<sup>197</sup> instead designed to place a party in the position he would have been in but for the breach,<sup>198</sup> therefore prohibiting claims for profit made as a result of a deliberate breach of contract.<sup>199</sup> Furthermore, the problem is compounded by the illegality of penalty clauses,<sup>200</sup> requiring all contractual damage clauses to be a genuine pre-estimate of loss.<sup>201</sup>

Therefore, it is not uncommon to find a party may gain a greater financial advantage by breaching the contract and subtracting the probable financial liability in damages, thus incentivising a seller to tender inadequate performance and ‘play the market and compensate their buyers only in damages’.<sup>202</sup> This was the situation in both *The Naxos*<sup>203</sup> and *Tradax Export SA v Italgrani di Francesco Ambrosio*,<sup>204</sup> two cases which would fall within the ‘*terminatio ex culpa*’ label.

In *The Naxos*, the Court of Appeal, with whom the House of Lords agreed, was wary of preventing ‘insubstantial deprivation’ termination, *a fortiori*, labelling the term innominate, because to do so ‘would give [the sellers] a considerable advantage over the buyers’.<sup>205</sup>

<sup>195</sup> R Brownsword, ‘Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract’ (1992) 5 JCL 83, 104.

<sup>196</sup> T Weir, ‘Contract – the Buyer’s Right to Reject Defective Goods’ [1976] CLJ 33, 36.

<sup>197</sup> *Addis v Gramophone Co Ltd* [1909] AC 488

<sup>198</sup> *Robinson v Harman* (1848) 1 Ex 850; *Golden Straight Corporation v Nippon Yusen Kaisha, The Golden Victory* [2007] UKHL 12; [2007] Bus LR 997.

<sup>199</sup> *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 961; cf *AG v Blake* [2001] 1 AC 268.

<sup>200</sup> *Dunlop Pneumatic Tyre Co. Ltd. v New Garage & Motor Co. Ltd.* [1915] AC 79 (HL).

<sup>201</sup> *Dunlop Pneumatic* (n 191) 86 (Lord Dunedin).

<sup>202</sup> *Compagnie Commerciale Sucre Et Dentrees v C Czarnikow Ltd, The Naxos* [1991] 1 Lloyd’s Rep 29 (HL); R Brownsword, ‘Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract’ (1992) 5 JCL 83, 104.

<sup>203</sup> *The Naxos* (n 193).

<sup>204</sup> [1983] 2 Lloyd’s Rep 109 (HC).

<sup>205</sup> [1989] 2 Lloyd’s Rep 462 (CA) 469. See also R Brownsword, ‘Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract’ (1992) 5 JCL 83, 91-92.

Lord Justice Kerr explained:

If prices were rising ... a seller would be able to dispose of any available sugar at a higher price by selling "spot" in preference to fulfilling contracts in the present form, provided that he was willing to pay the necessary demurrage.<sup>206</sup>

Similarly, in *Tradax v Italgrani* Mr Justice Bingham noted:

If ... the market were falling sharply, it could well pay the seller to keep the vessel waiting, on payment of demurrage, until shortly before the end of the period, only then buying in the goods and making delivery.<sup>207</sup>

Therefore enabling termination for 'insubstantial deprivation' is necessary in certain circumstances. 'Substantial' deprivation, as the Law Commission accepts, is a high standard,<sup>208</sup> and 'a difficult test indeed to satisfy', reinforces Bridge, 'systematically workable in English law only because so many important contractual terms are promissory conditions'.<sup>209</sup> Where classification exponentially favours innominate terms, the consequential marginalisation of the right to terminate and the corresponding inability to discharge the contract for any breach failing to meet this high standard, is actually detrimental to the possible function of the remedy as a deterrent against non-performance, giving 'potential contract-breakers less incentive to take their contractual obligations seriously'.<sup>210</sup>

The deliberate breaches of *The Naxos* and *Tradax v Italgrani* provide clear-cut examples of '*terminatio ex culpa*' however it is not impossible to envisage a plethora of situations in which the opaqueness of innominate terms disguises the unscrupulous behaviour of businesses. The consequence of preventing 'insubstantial deprivation' termination in these circumstances is that the acceptable standard of goods and services in the market place declines, legitimising the inadequate and delayed performance of the obligations under the contract. For example, in *The Naxos* it would have acknowledged that a valid transaction can involve a deliberate delay in the provision of a service provided compensation is paid, and in *The Hansa Nord* the law suggested the acceptable standard of performance included the provision of inadequate goods supplemented by compensation. This is clearly inconsistent with that classic view of contract law to 'encourage people to ... keep their promises, and generally be truthful in their dealings with each other'.<sup>211</sup>

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<sup>206</sup> [1989] 2 Lloyd's Rep 462 (CA) 469 (Lord Justice Kerr)

<sup>207</sup> [1983] 2 Lloyd's Rep 109 (HC) 115 (Mr Justice Bingham)

<sup>208</sup> Law Commission and Scots Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987) para 2.25

<sup>209</sup> M Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) ICLQ 911, 920.

<sup>210</sup> JN Adams and R Brownsword, *Understanding Contract Law* (5<sup>th</sup> edn Sweet and Maxwell, London 2007) 171

<sup>211</sup> PS Atiyah, *Essays on Contract* (Clarendon, Oxford 1986) 15

The outcome of *The Naxos*<sup>212</sup> and *Tradax v Italgrani*<sup>213</sup> exemplify it is the converse rigidity of conditions, allowing termination which falls short of the 'substantial deprivation' threshold, which provides a mechanism through which to dissuade others from breaching contracts.

An important caveat to note is that the deterrent function is only operative where the defaulting party is culpable as it is only in this situation that allowing termination will encourage parties to do all they can to comply with their agreement and dissuade deliberate or negligent non-compliance. Where the innocent party's attempt to terminate can be categorised as predatory, validating termination achieves no purpose other than to penalise his faultless contractual counterpart for a technical or trivial breach.

## Conclusion

### 'The Ugly'

The aim of this essay was to explore the reasoning underlying a preference for innominate terms through analysing 'the good' produced by the right to terminate when properly used in accordance with the purpose of the rule and questioning the propriety of restricting the rule to prevent the escape a 'bad bargain'.

Chapter I raised serious concerns about the adequacy of innominate terms in meeting the purpose of the right to elect to terminate. The uncertainty, unpredictability and inconsistency created by innominate terms diminishes the protection afforded to the intended beneficiary of the right to terminate not only by concealing the legality of the cause of action to be taken, but also by deterring him from exercising that right by introducing the possibility of lengthy judicial scrutiny of his action, and hefty liability in damages for repudiatory breach if he is unsuccessful in defending his decision to terminate, regardless of whether the right was exercised in good faith. Furthermore, the role of contract law as a mechanism to facilitate trade is also impeded by the classification of terms as innominate by promoting a litigious commercial forum, these factors cumulatively questioning the desirability of a preference for innominate terms.

Conversely, by contrasting innominate terms with conditions, it appears there are compelling reasons to lean in favour of the latter. The resultant predictability of the cause of action available following breach would not only assist in protecting the intended beneficiary of the right to terminate, but it would have a positive impact on commerce in general, enabling parties to plan and manage risk while minimising time and money expended in resolving disputes.

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<sup>212</sup> R Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83, 104.

<sup>213</sup> *Tradax v Italgrani* (n 195).

Although this suggests that the court should lean in favour of conditions, this conclusion is premature as the desirability of a preference for conditions cannot be determined in isolation from the corresponding increased propensity for the right to terminate to be misused by those seeking to exit a bad bargain.

The judicial desire to prevent 'insubstantial deprivation' termination has been a predominant force in developing the law and is directly responsible for the preference for innominate terms. However, Chapter II observed that while purporting to comply with market-individualism and consumer-welfarism, the reasons given by the judiciary to rationalise their decision to prevent 'insubstantial deprivation' termination amount to an inchoate exploration of the issues. The problem, as this essay sought to illustrate, is that the current approach exclusively scrutinises the actions of the party seeking to terminate, leaving the party initially in breach immune from investigation. From the perspective of market-individualism, the adverse consequence of this is that the need to prevent 'insubstantial deprivation' termination based on the sanctity of contract is inadequately reasoned, overlooking the damage caused to the sanctity of contract by failing to scrutinise the party in breach. From the perspective of consumer-welfarism, by defining 'fairness' solely by reference to the hardship suffered by the innocent party and requiring a proportionate relationship between fault and detriment, the law fails to recognise the inherent unfairness caused by the situation in which a seller deliberately breaches the contract to gain financial advantage.

This erroneous reasoning casts doubt on the correctness of the development of the law and suggests 'bad bargains' have played an unjustifiably influential role in developing the law.

The significant differences affecting predatory termination and *ex culpa* termination justify treating such scenarios independent of one another, for example, in circumstance in which there is a deliberate breach of contract ('termination *ex culpa*') which is indicative of a party's inability to compete, the judicial concern to prevent 'insubstantial deprivation' appears ill-founded, whereas there appears to be merit in preventing (predatory) termination if the defect in performance was unrelated to the fault of the party.

And thus this essay arrives at the ugly truth: in the same way 'conditions' were unable to regulate termination depending on the deprivation suffered by the innocent party, innominate terms fail to regulate the right to terminate depending on the fault of the party in breach and the inability of the current mechanism for discharge for breach to allow '*termination ex culpa*' and predatory termination to be judged independently is unacceptable and has led to specious reasoning. Nor do conditions offer a solution, subjecting neither party to scrutiny.

Nonetheless, the mere identification of the division between predatory termination and '*ex culpa*' termination does not provide a '*deus ex machina*' to

resolve this defect in the law as implementing this regime into the contract framework, thereby requiring parties to demonstrate the exercise of due diligence or the absence of recklessness or intention, could raise serious evidential difficulties akin to those associated with innominate terms, condemned by this essay for introducing uncertainty and failing to comply with market-individualism. The implementation of a regime based on fault could provide an equally meritorious topic of study.

Consequently, the utility of this essay lies not in the end itself, but in the means to the end, *viz.*, in highlighting the fallacy and inchoate reasoning underlying the present preference for innominate terms and exploring the influence of the consumer-welfarism and market-individualistic ideologies. Pending a solution to resolve this problem, this essay has proven that although the determination of the right to terminate under English law will continue to be an interesting and fruitful topic, ripe for dissection by academics, this is to the detriment of the intended beneficiary of the right to terminate and the market alike, by favouring a preference for innominate terms which is uncertain, uncompetitive, unjust and injurious to the framework of commercial contract law