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# **Two years later: revisiting the Supreme Court's decision to eliminate expert immunity**

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## Introduction

Close to two years ago, the UK Supreme Court, by a majority of five to two, decided that experts appointed by parties to legal proceedings would no longer be immune from claims for professional negligence brought by their clients.<sup>1</sup> In arriving at this decision, the Court overruled *Palmer v Durnford*<sup>2</sup> and *Stanton v Callaghan*<sup>3</sup>. Lord Hope and Baroness Hale, in dissent, preferred not to depart from the established position that experts would be entitled to immunity as regards their evidence given in court as well as where there was a close connection between the expert's advice and legal proceedings.

Soon after the judgment, commentators such as Sir Robin Jacob described the Court's decision as a development which was 'waiting to happen', given that English courts had been chipping away at expert immunity in the last decade.<sup>4</sup> Foremost on their mind were the decisions in *Meadow v General Medical Council*<sup>5</sup> (where it was held that an expert can be the subject of professional disciplinary proceedings in respect of evidence given in court) and *Phillips v Symes*<sup>6</sup> (where the court held that experts could be liable for a 'wasted costs' order under section 51 of the Senior Courts Act 1981).

This note aims at looking at the broader picture, without making assumptions about the 'inevitability' of the majority judgment in *Jones v Kaney*, but with the benefit of hindsight, looking back at the period gone by since the Supreme Court's decision. Was the majority correct in deciding that the rationale for expert immunity was attenuated? Did the justifications offered by the majority warrant the elimination of the 'long established rule' (as Baroness Hale described it) that disappointed litigants cannot turn against their 'friendly experts'? Has this decision produced unexpected consequences for the English civil justice system? The analysis will seek to establish that although on point of principle the Supreme Court's decision was the correct one, some of its justifications were problematic. In other words, a more robust body of reasons could have been offered for what turned out to be the correct decision. Further, the Court's decision could have unexpected consequences, one of which is demonstrable through the developments after the judgment.

## Critical analysis of the underlying justifications of expert immunity

Each of the seven judges touched upon the justifications for and against expert immunity and the relevant weight to be accorded to them. The ensuing analysis considers these justifications and seeks to determine how convincing they are. It should be emphasised that although these justifications are considered in separate sub-sections, they overlap and should not be treated as though they have sealed borders.

### Arguments in favour of retaining expert immunity

#### (i) The 'chilling effect' on experts

One of the arguments that was put forward by the defendant in *Jones* was that the removal of immunity for experts would produce a 'chilling effect', i.e. that it would constitute a disincentive for experts to come forward and provide evidence in connection with legal proceedings. Interestingly, however, Lord Hope did not attach much importance to this justification in his dissenting judgment, since it was a speculative claim made without supporting empirical evidence.

1 *Jones v Kaney* [2011] 2 AC 398.

2 [1992] 1 QB 483 (holding that experts were immune from claims so far as it was necessary to prevent them from being inhibited from giving truthful and fair evidence in court).

3 [2000] QB 75 (deciding that expert immunity applied to claims made against an expert by the party retaining him in respect of his conduct in preparing a joint statement in conjunction with the expert instructed by the other party to the proceedings).

4 Sir Robin Jacob, 'Jones v. Kaney - Where Next?' The Expert Witness Institute Newsletter (Autumn 2011).

5 [2007] QB 462.

6 [2004] EWHC 2330 (Ch).



The majority provided a formidable response to this argument. The standard of proof required to establish negligence is particularly high. Under the law of England, establishing negligence requires a claimant to prove that the 'Bolam' test<sup>7</sup> has been met. In other words, it must be established that a professional made a decision which no reasonable professional would have made. The high threshold means that only professionals who make decisions that fall outside the reasonable range of possible alternatives could be held liable. What was left unsaid by the majority was that we must invest our faith in the ability of courts to distinguish between errors of judgment and professional negligence.

Lord Phillips laid down some cost considerations to establish that there was not much of a realistic chance that vexatious claims would result from the removal of expert immunity. In cases of negligence, the aggrieved party would need to appoint another expert to establish that the advice of the previous expert was negligent—something that no rational litigant would do unless he has a strong claim. Further, lawyers would refuse to enter into conditional fee arrangements in the absence of a good claim in such cases. Although these arguments sound convincing in theory, their normative force is not backed by observable practice. To begin with, Lord Phillips' argument should apply to all cases involving experts. Yet, we know that fraudulent claims supported by expert evidence are not uncommon. Judge Hawkesworth QC, sitting in the Huddersfield County Court, was clearly concerned about the increasing proportion of such claims:

...fraudulent claims are now legion. Just about every variant of a fraudulent claim comes before the court, including deliberately staged collisions, damage caused to vehicles which have never been in collision at all... and claims in which a driver will assert that his car was carrying other members of his family including his children, when in fact none were present but all of whom have reported to a hospital or their general practitioner that they have been injured, and *who are then able to produce an apparently independent expert's report confirming the fact of such injury*.<sup>8</sup>

Moreover, in deciding whether to take up cases on a conditional fee basis, lawyers maintain a diversified portfolio of claims, bearing different levels of risk, just as fund managers do.<sup>9</sup> The same argument would apply to contingency fee agreements or damage based agreements<sup>10</sup> (in which the lawyer carries the costs of the litigant in exchange for an interest in the proceeds of the case), which were unlawful at the time at which *Jones* was decided, but which are scheduled to become lawful in April 2013.<sup>11</sup> Lord Dyson's response was that a professional's decision of whether to act as an expert would involve a range of considerations, well beyond the possibility of being sued.

Although these arguments are tenable (subject to the qualifications that I have just made), a stronger argument lies in opposition of this justification. The 'chilling effect' argument rests on the questionable assumption that what restrains disgruntled litigants from suing their 'friendly experts' is the existence of expert immunity. This is far from the truth. Unmeritorious claims can be struck out<sup>12</sup> and courts can give summary judgment against claimants who have no real prospect of success.<sup>13</sup> Courts have a broad discretion to quantify costs and decide whom they should be borne by under the CPR. While making costs orders, courts take a range of factors into account, including whether even successful parties have exaggerated their claims.<sup>14</sup>

As Zuckerman points out, the thrust of the court's jurisdiction in relation to costs is to encourage reason-

<sup>7</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

<sup>8</sup> *Khan v Hussein* (Huddersfield County Court, 16 May 2007) (emphasis added).

<sup>9</sup> A Reisberg, 'Funding Derivative Actions: A Re-Examination of Costs and Fees as Incentives to Commence Litigation' (2004) 4 J Corp L Stud 345.

<sup>10</sup> Donald Wittman, *Economic Foundations of Law and Organization* (Cambridge University Press, Southport 2006) 273.

<sup>11</sup> Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which extends damage based agreements to civil litigation, is scheduled to come into force on April 1, 2013.

<sup>12</sup> CPR 3.4(2)(a).

<sup>13</sup> CPR 24.2(a)(i).

<sup>14</sup> CPR 44.3.





able litigation practice<sup>15</sup> (and naturally, taking it a step further, to discourage futile claims). As a last resort, orders restraining vexatious litigants from issuing claims without the permission of the court can be made,<sup>16</sup> although this suggestion is less practical, given that it takes several years and repetitive unmeritorious litigation for such orders to be secured.<sup>17</sup>

Thus, disappointed litigants would be deterred in much the same way that a patient's relative is deterred by the rules of civil procedure from making a negligence claim against the doctor who followed a reasonable course of conduct, but was unable to save the patient. As a matter of procedural design, one of the challenges for a civil justice system is to deter claimants from making baseless claims. This challenge is not exacerbated when it comes to expert witnesses. If vexatious claims are endemic in the system, the answer is to increase deterrents against such claims across the board. This can be done in a number of ways, including by enhancing cost implications for unmeritorious claimants and requiring lawyers to certify reasonable prospects of success in claims for damages.<sup>18</sup>

## (ii) The 'fuzzy edges' of the law of expert immunity

Interestingly, judges in the minority and the majority in *Jones* referred to the uncertainty of the scope of expert immunity to support their contrasting positions. Lord Dyson in the majority held that the uncertainty in defining expert immunity constitutes a good reason to eliminate it altogether. Lord Hope raised concerns about whether the elimination of the immunity would also apply to family and criminal cases, while Baroness Hale questioned whether the elimination would apply to only contractual duties, or would also encompass torts.

Both sets of arguments are ill founded. Their opinions seem to make an implicit assumption—that the value of certainty lies atop a pyramid of values that a civil justice system seeks to promote. Although Rawls was right when he said that certainty allows citizens to 'arrange their lives'<sup>19</sup>, it is not a value that constitutes a trump card. Certainty can, and often is, balanced against other important values in the civil justice system.<sup>20</sup> These values include equal protection of the law (for instance, when an existing advantage or disadvantage<sup>21</sup> (in this case, expert immunity) that is no longer justified is eliminated) and the overriding interests of justice (for example, when established precedent is overruled or its application is restricted, where its perfunctory application would produce an unjust outcome).

Further, what is the uncertainty that is being referred to in this case? Uncertainty about whether an expert giving evidence would be entitled to immunity. Any expert giving evidence would only need to be aware that his opinion must fall within the range of acceptable possibilities. On meeting this low threshold, the uncertainty dissolves, because the expert would not be in the wrong, irrespective of whether the immunity exists or not. In other words, the sphere of uncertainty is only restricted to cases where doubt may be cast upon whether the expert's opinion attained the standard of a responsible body of medical opinion<sup>22</sup> or where the body of opinion supporting that standard had no logical basis<sup>23</sup>. Although the 'Bolam test' does not necessarily sanctify the lowest common denominator of medical practice,<sup>24</sup> the standard of care it requires is, as a

15 Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet and Maxwell, London 2006) 1011.

16 Senior Courts Act 1981, section 42.

17 Didi Herman, 'Hopeless cases: race, racism and the "vexatious litigant"' (2012) Int JLC 27.

18 Pam Stewart and Maxie Evers, 'The Requirement that Lawyers Certify Reasonable Prospects of Success: Must 21st Century Lawyers Boldly Go where No Lawyer has Gone Before?' (2010) 13(1) Legal Ethics 1. This possibility must naturally be considered carefully, since it involves its own complications—most significantly, that it entails lawyers performing the role of a judge before a claim can be filed.

19 John Rawls, *A Theory of Justice* (Clarendon Press, Oxford 1972) 235-43.

20 See Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 German Law Journal 1469.

21 See T Koopmans, 'Retrospectivity Reconsidered' (1980) 39(2) CLJ 287.

22 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

23 *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771.

24 Harvey Teff, 'The Standard of Care in Medical Negligence - Moving on from Bolam?' (1998) 18 OJLS 473.



matter of fact, very modest.

### (iii) Multiplicity of legal proceedings

In addition to these arguments in favour of retaining expert immunity, a few others were briefly discussed in *Jones*. The argument that removal of expert immunity would promote a multiplicity of proceedings was, in the judgment of Lord Collins, belied by the fact that this had not happened when the immunity for barristers was swept away in 2002.<sup>25</sup> This assertion is questionable. It is tenuous to compare barristers to experts,<sup>26</sup> particularly in the context of civil litigation. It is quite easy to understand the reason for which disgruntled litigants would approach suing a barrister with more trepidation (a barrister being 'in' or 'a part of' the legal system) than they would as regards the question of suing their expert. What rebuts the 'multiplicity of claims' argument more effectively is the fact that the civil justice system already contains safeguards and mechanisms (some of which have been pointed out above) to prevent claimants from issuing baseless claims against their lawyers, doctors, accountants, or indeed anyone else.

Thus, none of the principal arguments in *Jones* seeking to justify the retention of expert immunity are convincing.

## Arguments in favour of the removal of expert immunity

### (i) 'When there is a wrong, there must be a remedy'

In his judgment, Lord Brown pointed out that one of the benefits of removing expert immunity was that a client who loses a case on account of the negligence of his appointed expert would not be deprived of his rightful claim altogether. He would have the opportunity of suing the expert for damages. In dissent, Lord Hope's concern was that it would be problematic to apply this principle to some immunity claims (such as the immunity ordinarily conferred on experts for advice in connection with legal proceedings) and not to others (for example, expert immunity from defamation for statements made in court, which are absolutely privileged).

This justification does not withstand scrutiny. The first question that we must ask is: when expert immunity was in place, did an aggrieved party have a remedy when the negligence of his expert had an adverse impact on his claim? Although at first glance the answer to this question may appear to be that he wouldn't, he in fact would have a remedy. The Court, consistent with CPR 35.4, would have the power to permit the party to appoint a fresh expert.<sup>27</sup> If the loss had already materialised or the negligence of the expert was discovered after the conclusion of the case, the remedy would be more complicated: the case could possibly be reopened, since there would be no 'alternative effective remedy'.<sup>28</sup> However, reopening of final appeals is rare and would require the claimant to establish that the 'integrity of the earlier litigation process' had been 'critically undermined'.<sup>29</sup> The fact that a proceeding produced an incorrect result would not be sufficient for the Court of Appeal or High Court to exercise its jurisdiction to reopen an appeal. The instant objection to these suggestions could be that Courts would be reluctant to appoint fresh experts or reopen finally decided cases, save in exceptional circumstances. These remedies, it may be argued, are far more difficult to pursue compared to a fresh negligence claim. To begin with, the case law concerning fresh expert evidence is in a state of flux.<sup>30</sup> The High Court of Justice held that the decision of whether to allow a party to adduce fresh expert evidence falls within the broad discretion of the judge.<sup>31</sup> Thus, it is quite plausible to say that making a suc-

<sup>25</sup> *Arthur Hall v Simmonds* [2002] 1 AC 615.

<sup>26</sup> I will address this argument in detail subsequently.

<sup>27</sup> See, for eg, *Stallwood v David* [2006] EWHC 2600 (QB).

<sup>28</sup> See CPR 52.17.

<sup>29</sup> *U (Re-Opening of Appeal), Re* [2005] EWCA Civ 52.

<sup>30</sup> Susan Carr, 'Removal of Immunity for Expert Witnesses' (2011) PN 128.

<sup>31</sup> *Singh v O'Shea* [2009] EWHC 1251 (QB).





cessful claim of negligence against an expert would be as easy (or as difficult) as securing the appointment of a fresh expert in the original proceeding. Naturally, reopening an appeal places a far greater burden on the claimant than a negligence claim. Having said that, the majority in *Jones* was still incorrect in describing the situation as one without remedy.

What impact did the removal of expert immunity have on remedies? The more satisfactory conclusion is that it merely shifted the remedy from one avenue (the original proceedings, where a new expert may be sought or in exceptional cases, an appeal reopened) to another (a fresh claim for negligence against the expert). As already stated, each of these remedies places a test of a high threshold on the claimant (although the threshold would be considerably higher where a final appeal is sought to be reopened). The shifting remedy might well be considered a desirable development, since it would be more equitable to provide a remedy against a negligent expert rather than permit the appointment of a fresh expert or reopen a finally adjudicated decision, even assuming that the opposite party has a weak case. The shifting remedy, to put it differently, probably promotes finality and efficiency in the conduct of litigation. However, this finds no mention in the opinions and is therefore, it is argued, an unintended consequence of *Jones*.

This analysis is not merely speculative, but is corroborated by recent decisional practice. In *Ridgeland Properties v Bristol City Council*<sup>32</sup>, which was one of the first judgments to cite *Jones*, the High Court refused to allow the claimant to establish a fresh case, based on the possibility of suing the expert in question for negligence. The Court held:

...the ability of the Appellant to obtain redress... [from the expert] is a powerful reason... for not permitting the Appellant to mount an entirely new valuation case before the Tribunal.<sup>33</sup>

This case could mark the beginning of the 'remedy shifting' trend unintentionally brought about by the Supreme Court in *Jones*.

## (ii) 'All immunities must be justified on grounds of public policy'

One of the focal points of disagreement between the majority and minority in *Jones* was the appropriate starting point for determining whether expert immunity should be eliminated. According to the majority, the immunity could not be assumed valid and must be justified on grounds of public policy. Lord Hope and Baroness Hale preferred the approach that since witness immunity was a 'long established' principle (an assertion which was contested by some in the majority), any exceptions to the immunity must be justified.

The majority's approach is preferable. What the minority overlooked is the fact that even if an immunity is long established, its status as an immunity does not transform over time. It would still remain an immunity, immunizing or exempting a person from the application of a rule which has deeper roots than the immunity itself. Thus, the sustained validity of any immunity (in this case, expert immunity) should be contingent on the continuing relevance of its rationale.

An example will be used to develop this argument. Let us assume that a rule of law, A, came into being in the year 1850. In 1925, an exception (B) is carved out of A. In such a scenario, when questioning the rationale of retaining B, it would be illogical to argue that the starting point of analysis must be that B is valid since it is long established, given that the original rule (A) is even more entrenched than B. The only plausible argument favouring this starting point would be retention of the status quo, a view which Lord Hope and Baroness Hale did not articulate. The minority failed to recognise the subtle distinction between the es-

<sup>32</sup> [2011] EWCA Civ 649.

<sup>33</sup> *Ridgeland Properties v Bristol City Council* [2011] EWCA Civ 649 [47].



established character of a rule and the status quo in terms of the existing position of law.

### (iii) The analogy between advocates and experts

Experts play a dual role in the civil justice system: they owe the party retaining them a contractual duty to exercise reasonable skill and care, while owing a duty to assist the court on matters falling within their expertise. Their duty to the court, however, 'overrides any obligation to the person from whom experts have received instructions or by whom they are paid'.<sup>34</sup>

In *Stanton v Callaghan*<sup>35</sup>, the Court of Appeal sought to justify expert immunity with the immunity that was provided to advocates in respect of the management of proceedings before the Court. The justification was on the basis that the expert's function was analogous to that of an advocate, who owes a duty to the client as well as to the court. Subsequently, in *Arthur Hall v Simons*<sup>36</sup>, the House of Lords removed the immunity for advocates from claims of negligence, finding that no such immunity was required in order to ensure that they adhered to their duty to the court. In *Jones*, Lord Dyson stated that if this analogy is treated as good, it no longer applies, since the immunity for advocates has been eliminated. Other judges on the majority also relied on this analogy, further asserting that the removal of immunity did not result in the shrinking of the duty of advocates to the court. Zuckerman has similarly argued that the removal of advocates' immunity offered a good ground to re-examine the immunity accorded to experts.<sup>37</sup>

Reliance on the analogy between experts and advocates is troubling. It is a reflection of the kind of circuitous arguments that can develop when an analogy is carried too far. What did the majority in *Jones* effectively hold? That: (1) since in *Stanton v Callaghan*<sup>38</sup>, the analogy between advocates and experts was drawn and (2) since in *Arthur Hall v Simons*<sup>39</sup> (which questioned the analogy between advocates and experts), the immunity conferred upon advocates was removed, (3) the immunity for experts should be removed as well (or at the least, the immunity for experts should be reconsidered). In *Jones*, the Supreme Court, to bring into parity the position of experts with that of advocates, sought to rely on a decision which itself called the analogy into question. Though analogies may sometimes be useful, over-analogising can often result in logical flaws, as was the case in *Jones*. For this reason, although there are certain similarities between the advocate and the expert, arguments for analogous immunity should not be accorded much weight.

### (iv) Wasted costs orders and disciplinary proceedings

Lord Phillips stated that realistically speaking, the position of experts would not be affected much by the removal of immunity, since in any event, they could be subjected to wasted costs orders under CPR 48.7<sup>40</sup> and disciplinary proceedings by professional bodies.<sup>41</sup> He posited that there would be no real conflict between the duties of the expert to the client and to the court, and in any event, the expert would be retained on the undertaking that he would perform the functions set out in the CPR. Lord Hope disagreed with this hypothesis. According to him, there was a difference between such proceedings and vexatious claims, which would be 'embarrassing and time-consuming proceedings'.

Lord Hope's reasoning is tenuous. It is difficult to understand how wasted costs orders and (particularly) disciplinary proceedings would be less embarrassing (albeit not as time consuming) an affair so as to comprise less of a deterrent than claims by disgruntled litigants. Experts may even find disciplinary proceedings more embarrassing, as a panel consisting of their fellow professionals could reprimand them. In fact, the logic un-

<sup>34</sup> CPR 35.3.

<sup>35</sup> [1999] 2 WLR 745.

<sup>36</sup> [2002] 1 AC 615.

<sup>37</sup> Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet and Maxwell, London 2006) 736.

<sup>38</sup> [2000] QB 75.

<sup>39</sup> [2002] 1 AC 615.

<sup>40</sup> *Phillips v Symes* [2004] EWHC 2330 (Ch).

<sup>41</sup> *Meadow v General Medical Council* [2007] QB 462.



derlying the concurrent evidence (or 'hot tubbing') system in Australia is that it is *other experts* that constitute an effective check and have a deterrent effect on experts.<sup>42</sup>

(v) The availability of insurance

Many of the judges in the majority in *Jones* also pointed out that experts could insure themselves against professional negligence claims. Lord Hope disagreed, stating that 'insurance cover, if available, is not a universal remedy'. This argument is correct to the extent that it could result in the disappearance of experts working on a one-off basis, who are typically unpaid and uninsured.<sup>43</sup> But on the whole, this argument seems idealistic, particularly in an era of litigation where the norm has shifted from 'expert professionals' to 'professional experts'.

An unintended consequence of the judgment could be however, that it could increase the costs of litigation. As Sir Robin Jacob has pointed out, an increase in insurance premiums could result in a corresponding increase in experts' fees and eventually, the costs of civil litigation.<sup>44</sup> Longer delays and the time required for more careful work in the preparation of the expert's report could also have a direct impact on experts' fees and litigation costs.<sup>45</sup>

## Conclusion

Although the judgment of the majority in *Jones* was not without its flaws in reasoning, in point of principle, it arrived at the correct decision. Lord Brown's argument that the benefits of eliminating expert immunity outweigh its costs is sound, but probably not with the balance sheet that he had in mind. While none of the arguments for retaining expert immunity withstand scrutiny, the argument requiring justification of all immunities, the argument based on wasted costs orders/disciplinary proceedings, as well as the contention based on professional indemnity insurance are persuasive. The judgment does, however, produce some unintended consequences, including 'remedy shifting' (which is already becoming observable) and an increase in the costs of litigation. Perhaps this is one of the reasons for which the minority preferred to set the matter aside for Parliamentary intervention.

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42 Gary Edmond, 'Secrets of the "hot tub": expert witnesses, concurrent evidence and judge-led law reform in Australia' (2008) CJCQ 51.  
43 Sekai Nyambo, 'The abolition of expert witness immunity: implications of *Jones v Kaney*' (2012) Construction Law Journal 539. However, Lord Hope's argument can only be considered sustainable if it is also proved that the disappearance of one-off experts is undesirable.  
44 Sir Robin Jacob, 'Jones v. Kaney - Where Next?' The Expert Witness Institute Newsletter (Autumn 2011).  
45 Sekai Nyambo, 'The abolition of expert witness immunity: implications of *Jones v Kaney*' (2012) Construction Law Journal 539.



# **Engaging law with social reality for the legal protection of un- married cohabiting couples**

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## Abstract

*The law affecting unmarried cohabiting couples is chaotic. It comprises a patchwork system which straddles equity, property, contract, family, and restitution law. It is full of internal contradictions and arbitrary distinctions. For several decades there has been mounting academic pressure for a fundamental overhaul of the cohabitation regime and a number of unsuccessful reform attempts. The law's binary response to relationships is growing increasingly problematic in light of evidence of a rising trend in unmarried cohabitation in the UK and an increase in the number of adults and children left in poverty upon relationship breakdown.*

*This article takes a snapshot view of the law affecting cohabitants by focusing on two of the most pertinent disparities in the legal protection offered to married couples and unmarried cohabiting couples: asset distribution upon relationship breakdown and the availability of occupation orders in situations of domestic violence. The current law governing these areas works an injustice and in some instances the differential treatment amounts to inequality. It is the role of the family justice system buttressed by human rights law to remedy this. The author argues that although the state is entitled to promote marriage, the law must genuinely engage with the nature of human relationships to assess whether differential legal treatment is justified. Drawing upon the Scottish experience, the author suggests that an alternative to marriage, such as heterosexual civil or registered partnerships could provide a viable option for some unmarried cohabiting couples.*

## Introduction

Despite the difficulties in presenting conclusive statistical evidence on the prevalence of cohabiting relationships in England and Wales, the number is rising. The 2001 Census documented over two million unmarried cohabiting couples in England and Wales and the Government Actuary's Department has predicted that this will rise to over one in four couples by 2031.<sup>1</sup> This is set against the backdrop of evidence which demonstrates increasing social acceptance of cohabitation as an equivalent to marriage.<sup>2</sup> For decades there have been calls to reform the current inadequate and disorganised legal regime affecting cohabitants but the responses have failed to fully engage with the phenomenon of cohabitation.<sup>3</sup>

This article focuses on two areas of the law affecting unmarried cohabiting couples rather than the broader group of cohabitants. These are: the law governing asset distribution on relationship breakdown and the availability of occupation orders in situations of domestic violence. The author argues that the current law works an injustice and in some instances the differences in treatment results in inequality. It is the function of the family justice system buttressed by human rights law to remedy this injustice. Although the state is entitled to promote marriage as a social ideal this should not be pursued to the detriment of other relationship forms. The author suggests that the law adopt a 'relational autonomy'<sup>4</sup> approach which genuinely engages law with the social reality of human relationships to assess whether differential treatment is justified. In doing so, the law can strive towards equality within relationships. Drawing upon the Scottish experience, the author proposes that an interim measure of heterosexual civil or registered partnership could provide a practical alternative for some unmarried cohabiting couples and satisfy many of the purported justifications for differential legal treatment.

## Married couples and unmarried cohabiting couples

The law currently adopts a binary response to couple relationships. Heterosexual couples are either married

<sup>1</sup> Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 1.10.

<sup>2</sup> Alison Park, John Curtice, Katarina Thomson, Miranda Phillips, Mark Johnson, Elizabeth Clery (eds) *British Social Attitudes: The 24<sup>th</sup> Report* (Sage 2008) 7.

<sup>3</sup> *Cohabitation: the financial consequences of relationship breakdown* (n 1); Cohabitation Bill HL Bill (2008-2009).

<sup>4</sup> Jonathan Herring, 'Relational autonomy and family law' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds) *Rights, Gender and Family Law* (Routledge 2010), 261.





or not married. Homosexual couples are either in a civil-partnership<sup>5</sup> or not, although the UK Government recently completed a consultation into the possibility of introducing same-sex marriage into British law.<sup>6</sup> The results of the consultation will add an interesting dimension to the current debate about the differential legal treatment of those who have formalised their relationship and those who have not. If same-sex marriage is introduced, this will unequally skew the balance because no option of civil partnership is offered to heterosexual couples. As the outcome of the consultation is yet to be announced,<sup>7</sup> this current study will be confined to a comparison of married couples with unmarried cohabiting couples only.

The legal recognition of particular relationships is significant because it determines the boundary between the public and private spheres. The state is entitled to regulate and legally protect married couples because the couple have willingly entered into a publicly recognisable contract whereas the role of the state is restricted in relation to unmarried cohabiting couples. This often results in the misguided assumption that individuals in cohabiting relationships will undertake some form of private ordering, or will act in a legally rational way in conducting their affairs.<sup>8</sup> On the contrary, there is a notable dearth of knowledge of existing available arrangements for cohabiting couples and a persistent “common law marriage myth” where couples mistakenly believe they acquire legal rights by virtue of living with a partner after a sustained period of time.<sup>9</sup> Unfortunately, the result is that ‘many adults and their children are left in poverty at the end of a cohabiting relationship’.<sup>10</sup> Given the increasing social trend in cohabitation there are calls for the state to adopt a quasi-paternalistic position to remedy this mischief in the law.

### The differences in the legal treatment

It is well-documented that the law affecting cohabitants is problematic and in need of reform. However, in framing a solution, it is of paramount importance that the precise problem with the existing law is identified. Is the law simply problematic because it is disordered and inconsistent or does the differential legal treatment of married couples and unmarried cohabiting couples result in *inequality*? If it does lead to inequality is this acceptable and is it in compliance with international legal obligations?

The discussion in this article is informed by two conceptual types of equality identified by Glennon: equality *between* relationships and equality *within* relationships.<sup>11</sup> The former necessitates assimilation of the rights and treatment accorded to married couples and unmarried cohabiting couples. In this vein, functionalists often argue that unmarried cohabiting couples have taken on many of the functions of marriage and thus ought to be treated identically to married couples.<sup>12</sup> The latter type of equality looks to achieve equality between the partners in the relationship and looks beyond the form or function of the particular relationship. In other words, equal treatment does not require identical treatment but seeks to achieve fairness between those affected on relationship breakdown.

This article commences with a brief analysis of two of the most pertinent disparities in the legal protection offered to married couples and unmarried cohabiting couples: asset distribution upon relationship breakdown and the availability of occupation orders in situations of domestic violence.

5 Civil Partnership Act 2004.

6 See Government Equalities Office, *Equal civil marriage: a consultation* (March 2012). HM Government, *Equal Marriage: The Government's Response* (December 2012) available at: <http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/consultation-response?view=Binary>.

7 In January 2013 (after writing this paper) the UK Government introduced the Marriage (Same Sex Couples) Bill available at: <http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0126/2013126.pdf>.

8 Anne Barlow and Janet Smithson, ‘Legal assumptions, cohabitants’ talk and the rocky road to reform’ [2010] CFLQ 1, 2.

9 Anne Barlow, Carole Burgoyne, and Janet Smithson, *The Living Together Campaign: An investigation of its impact on legally aware cohabitants* (MoJ 5/07 July 2007), 5.

10 HL Deb 13 March 2009, vol 708, col 1413.

11 Lisa Glennon, ‘The limitations of equality discourses on the contours of intimate obligations’ in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds) *Rights, Gender and Family Law* (Routledge 2010) 169.

12 See John Eekelaar, *Family Law and Social Policy* (Weidenfeld & Nicholson 1978); Barlow and Smithson (n 7), 8.





## Asset Distribution and Property rights

Upon relationship breakdown, former spouses can refer to an established statutory regime, the Matrimonial Causes Act 1973 (hereinafter the 1973 Act), for ancillary relief. Recent case-law<sup>13</sup> in this area signifies a move towards 'genuine equality in the sharing of matrimonial assets between the parties on the breakdown of marriage'.<sup>14</sup> To use the terminology of Glennon, there is a marked shift towards equality within relationships.<sup>15</sup> In contrast, former cohabiting couples without any legal interest in the family home must rely on inapt property law principles in order to establish an equitable interest in the property under a trust.

### Matrimonial Causes Act 1973

The most significant discrepancies in treatment between married couples and unmarried cohabiting couples concern the available pool of resources and the available scope of judicial discretion. In divorce proceedings, the 1973 Act deals with the entirety of the former spouses' assets, whereas former cohabiting couples' assets are mostly confined to the family home. Furthermore, section 25 of the 1973 Act grants the court discretion in making an award in accordance with the criteria laid down in subsection two, which includes future needs and future resources such as pension entitlements. There is no corresponding consideration of these in the general law applicable to former cohabiting couples.<sup>16</sup>

In order to assess why needs and future resources are relevant considerations upon marriage breakdown it is necessary to analyse the common law principles and rationales guiding judicial discretion. Under section 25 the courts have developed three general principles to guide the division of assets: needs, compensation, and sharing.<sup>17</sup> A fourth principle of autonomy was added to this in a subsequent case.<sup>18</sup>

### Needs

In *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC, Lord Nicholls expressly recognised that 'every relationship of marriage gives rise to a relationship of interdependence' which 'begets mutual obligations of support'.<sup>19</sup> Therefore, the needs of both parties on relationship breakdown must be taken into account in asset division. First and foremost, the welfare of any children must be considered then financial and housing needs will be provided for. The court also retains discretion to consider needs which do not arise directly from the marriage, for example the disability of one of the partners in the relationship.

### Compensation

Secondly, the principle of compensation recognises the economic sacrifices made by either party during the relationship, for example the foregoing of a potentially lucrative and ongoing career for the sake of the family.<sup>20</sup> In determining compensation the courts have been willing to recognise contributions as 'money-earner, home-maker and child-carer'.<sup>21</sup> This is evidence of an increasing willingness to establish equality within relationships upon the breakdown of a marriage.

Furthermore, both needs and compensation are regarded as crucial considerations in achieving fairness upon relationship breakdown and it is not possible to contract out of these through a nuptial agreement.<sup>22</sup>

13 *White (Pamela) v White (Martin)* [2001] 1 AC 596 (HL); *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 (HL).

14 Judith Bray, 'The Financial Rights of Cohabiting Couples' [2009] Fam Law 1151, 1151.

15 Glennon (n.11).

16 See Welfare Reform and Pensions Act 1999.

17 [2006] 2 AC 618 (n 12), 619.

18 *V v V* [2011] EWHC 3230 (Fam), para 38.

19 [2006] 2 AC 618 (n 12), 632, para 11.

20 *ibid*, para 13.

21 [2001] 1 AC 596 (n 12), 605.

22 *Radmacher v Granatino* [2011] 1 AC 534, 565 para 81.



## Sharing

According to Baroness Hale, '[a] third rationale is the sharing of the fruits of the matrimonial partnership'.<sup>23</sup> This derives from an understanding of marriage being 'a partnership of equals'<sup>24</sup> and the court will determine a 'fair' sharing ratio for each party. It is however possible for parties to opt out of sharing in a nuptial agreement which suggests that it is less fundamental to the idea of fairness than needs and compensation.<sup>25</sup>

## Autonomy

The principle of autonomy recognises that where informed parties have freely entered into a nuptial agreement to govern asset distribution, the court should give weight to their autonomy in the balancing exercise.<sup>26</sup> This allows married couples to slightly shift the boundary between the public and private regulatory spheres although the ultimate decision remains with the state.

From the foregoing analysis it can be noted that the recent case-law under the 1973 Act signifies a shift away from a welfare-based rationale (determined by the contributions of each partner) towards an entitlement-based rationale.<sup>27</sup> The law accords legally enforceable rights to former spouses based on the needs and sacrifices brought about *by the relationship itself* in order to achieve equality within relationships. On this reasoning it is unclear why factually similar couples are not accorded the same protection merely because they are formally different, that is, unmarried.

## Property interests under a trust

One of the most controversial and well-documented aspects of the law affecting cohabiting couples is the inadequate property rules which govern in the absence of a valid contract. Bray notes that '[t]he rules are notoriously complex and have long been criticised for failing to reflect a couple's true understanding of their property rights'.<sup>28</sup> If the property in question is not in joint names and there is no formal declaration as to the parties' respective shares in the property, a situation which is commonplace for the majority of cohabiting couples,<sup>29</sup> then the former cohabitants must rely on the rules incrementally developed by judges in equity. The parties to a former cohabiting relationship must either establish an interest under a resulting trust, constructive trust or a proprietary estoppel. The court will only consider the *nature* of the relationship once a trust has been established.<sup>30</sup>

## Resulting trust

In order to establish an interest under a resulting trust there must be proof of a direct financial contribution to the *acquisition* of the property.<sup>31</sup> This specifically excludes non-financial contributions typical of the home-maker and child-carer.<sup>32</sup> It also excludes contributions to household expenses. Instantly, there is a lack of congruence between the willingness to recognise home-making and child-caring roles under the matrimonial asset division scheme and the scheme available to unmarried cohabiting couples. The refusal to recognise these roles is incompatible with the situation in reality where many couples value the non-financial contribu-

23 [2006] 2 AC 618 (n 12), 660, para 141.

24 *ibid*, 632, para 16.

25 [2011] 1 AC 534 (n 16), 565, para 82.

26 [2011] EWHC 3230 (n 16).

27 Glennon (n 11), 178.

28 Bray (n 14) 1151-2.

29 John Haskey, 'Cohabiting Couples in Great Britain: Accommodation Sharing, Tenure and Property Ownership' (2001) 103 *Population Trends* 26, 33.

30 *Stack v Dowden* [2007] UKHL 17 (HL), para 101.

31 *Lloyds Bank plc. v Rosset and Anor* [1991] 1 AC 107 (HL), 132 (Lord Bridge).

32 *Burns v Burns* [1984] 1 All ER 244, 328.



tions to the family home as much as the initial financial contribution to the purchase of the property.<sup>33</sup> Furthermore, couples rarely think of the significant legal implications when dividing their contributions towards a common home.

### Constructive trust

If the requirements for a resulting trust cannot be met, the individual can claim an equitable interest under a constructive trust if there is proof of an agreement, arrangement, or understanding between the legal owner and the claimant which the latter relies upon to his or her detriment.<sup>34</sup> The requirement for an express discussion as to the division of property is an equally unrealistic expectation of the practice of both unmarried cohabiting couples and married couples. Bray states that '[i]t is more likely to be the very well informed or the very cynical who take the trouble when setting up home together to expressly discuss shares in the family home'.<sup>35</sup>

Significantly, in *Le Foe v Le Foe* [2001] 2 FLR 970 the Court of Appeal *implicitly* approved the suggestion that the paying of household bills *might* give rise to an inference of common intention to share the beneficial interest in the property.<sup>36</sup> However, this is a far cry from an established regime which explicitly recognises contribution to household expenses as giving rise to a proprietary interest in the family home. Furthermore, the incremental judicial development of these rules and the costs involved in claiming an interest under an implied trust pose practical problems for former cohabiting couples. Probert recognises that although judges might be willing to extend the reasoning of equality within relationships to cohabiting couples, they are constrained by the facts of the particular case before them.<sup>37</sup> Therefore, even if the property law regime had the potential to address the problem faced by unmarried cohabiting couples, it has not been fully realised.

The existing property law principles which apply to cohabiting couples in the absence of any formal regime have serious evidentiary problems which stand in stark contrast to the increasingly discretionary approach adopted in the area of ancillary relief. As Bailey-Harris argues '[t]he fundamental problem... is that the equitable jurisdiction is by nature merely declaratory: its objective is the ascertainment of existing interests in property, not their fair distribution'.<sup>38</sup> In addition, many property lawyers are uneasy about the idea of upsetting the logic of property law principles by extending its application to complex and multifarious family relationships.<sup>39</sup> The result has been a continuous to-ing and fro-ing between Parliament and the courts without any tangible and meaningful change.

Property law and family law have essentially different starting points and objectives which make the former an inappropriate tool for the social objective of protecting vulnerable individuals in cohabiting relationships.<sup>40</sup> Thorpe LJ argues that 'the characteristic that should predominate is not that the parties were homeowners or home sharers but that they were in a family relationship'.<sup>41</sup> Failure to consider this factor leads to an inequality within relationships and an inequality between relationships. The law must engage with and respond to the nature of cohabiting relationships in order to ascertain the purpose of regulation and propose a rationale for state intervention in this area. The potential for the law to achieve this is considered later below.

### Domestic violence remedial orders

33 Bray (n 14) 1154.

34 [1991] 1 AC 107 (n 29).

35 Bray (n 14) 1155.

36 *James v Thomas* [2007] EWCA Civ 1212, para 27.

37 Rebecca Probert, *Cohabitation: Current Legal Solutions* (2009) 62 *CLP* 316, 336.

38 Rebecca Bailey-Harris, 'New Families for a New Society?' in Stephen Cretney, *Family Law: Essays for the new Millennium* (Jordan Publishing 2000) 70.

39 See John Mee, *The Property Rights of Cohabitees* (Oxford 1999).

40 *ibid* 71.

41 Rt Honourable Lord Justice Thorpe, 'Property Rights on Family Breakdown: An Address to the Family Law Conference, October 2002' (2002) 32 *Fam Law* 891, 892.



In situations of domestic violence, the law provides particular remedies to victims but, disconcertingly, there are discrepancies between the remedies offered to married couples and unmarried cohabiting couples. The law privileges the legal form of marriage and proprietary or contractual rights which has resulted in inconsistencies in the availability of occupation orders.<sup>42</sup>

### Occupation orders

In situations of domestic violence, the Family Law Act 1996 (hereinafter the 1996 Act) allows the court to grant an occupation order regulating who can occupy the family home.<sup>43</sup> Section 33(1) of the 1996 Act provides that individuals who are joint tenants of the home or who have an interest under a trust are 'entitled applicants'. This includes spouses and civil-partners who acquire 'home rights' by virtue of their official relationship.<sup>44</sup> In contrast, 'non-entitled applicants' are former spouses or civil-partners, cohabitants, and former cohabitants 'with no existing right to occupy' the home.<sup>45</sup> Therefore, the majority of unmarried cohabiting couples who are unable to meet the strict criteria of the resulting or constructive trust are categorised as non-entitled applicants.

The distinction between entitled and non-entitled applicants appears justifiable if one accepts that the law must recognise and protect the proprietary rights of individuals. Unfortunately, in practice, the distinction has led to an unequal and unfair assessment of the severity of the domestic violence situation with potentially dangerous consequences. For entitled applicants, the court is obliged to make an order if the harm suffered by the applicant is greater than the harm caused to the respondent; this is known as the 'balance of harm test'.<sup>46</sup> In contrast, for non-entitled applicants the court only needs to 'have regard' to this test.<sup>47</sup> This judicial discretion is guided by the 'status' of the relationship, which under section 36(6)(e) includes the *level of commitment* involved in it.<sup>48</sup>

The law also makes another sub-distinction in the non-entitled category between former spouses/civil-partners and (former) cohabitants. For non-entitled spouses and civil-partners, an occupation order can last for six months and can be continually extended for further six-month periods.<sup>49</sup> For non-entitled (former) cohabitants, the order can last for six months but can only be extended for *one* further period of six months.<sup>50</sup>

### Non-molestation orders

In contrast, there are no distinctions made between spouses, civil-partners, and cohabitants for the issuance of non-molestation orders. A non-molestation order is aimed at preventing the violent individual from threatening violence, intimidating, harassing, or pestering the victim.<sup>51</sup> This order is not tied to any property interest, so the law makes no distinction based on the formal relationship between perpetrator and victim. As Bailey-Harris argues, it is difficult to justify these differences in the same field of law.<sup>52</sup> The inconsistency amounts to an inequality within relationships by effectively confirming that the proprietary rights of one individual transcend the right to the physical safety and security of another individual.

As Eekelaar and Maclean identify, it appears as though the 1996 Act is trying to enhance the status of marriage by explicitly lowering 'the legal protection given to unmarried cohabitants and former cohabitants'.<sup>53</sup>

42 Bailey-Harris (n 38) 69.

43 Family Law Act 1996, ss33-38.

44 *ibid* s33(1)(a)(ii).

45 *ibid* ss35-38.

46 *ibid* 33(7); 37(4).

47 *ibid* S33(6).

48 Domestic Violence, Crime and Victims Act 2004, s2(2).

49 Family Law Act (n 43), s35(10).

50 *ibid* s36(10).

51 *ibid* s42.

52 Bailey-Harris (n 38) 71.

53 John Eekelaar and Mavis Maclean, *The Parental Obligation* (Hart Publishing 1997) 144.



However, the legal protection of individuals in different formal relationships is not a zero-sum game. Evidence demonstrates that there is no difference in the likelihood of domestic violence occurring in cohabiting relationships as opposed to marriage.<sup>54</sup> Furthermore, the state is obligated under international human rights law to exercise due diligence to protect, investigate, punish, and remedy domestic violence regardless of relationship status.<sup>55</sup>

The distinction between entitled and non-entitled cohabitants in the 1996 Act was drawn in direct response to the public controversy surrounding the 1995 Bill which would effectively allow cohabitants without any property rights to exclude abusive partners who had rights to occupy the home.<sup>56</sup> However, media portrayal and public protestation overlooked the fact that this was already possible under the previous legislation<sup>57</sup> as confirmed in *Davis v Johnson* [1979] AC 264. The kneejerk response to social demand has left a weakly supported two-tier system.

Supporters of the distinction emphasise the priority of proprietary rights and the need to promote the ideal of marriage in society. These considerations lend strong support to the need for a statutory time limitation of an occupation order for non-entitled former cohabitants because it grants a reasonable period of time for the victim of domestic violence to make arrangements and seek protection and/or legal action in balance to the legal rights of the homeowner. In other words, the inconsistency in the length of time periods for occupation orders does not amount to an inequality within relationships. However it is more difficult to justify the discretionary application of the balance of harm test for non-entitled applicants. This requires a value judgement as to the nature and commitment of a relationship in situations where a partner is potentially at risk of immediate violence. As discussed below, there are many misperceptions about the nature of unmarried cohabiting relationships and the level of commitment in such unions which are in danger of entering through the back door through broadly drafted judicial discretion. The balance of harm test ought to be applied in accordance with the principle of equality between relationships. In other words, the balance of harm test should apply equally to entitled and non-entitled applicants regardless of the formal relationship.

### Is differential legal treatment justified?

It is beyond doubt that the current law is 'inconsistent and inadequate in its application to cohabiting couples'.<sup>58</sup> However, the fact that the current law is in need of reform does not necessarily mean that differential legal treatment of married couples and unmarried cohabiting couples cannot be justified. Some of the arguments advanced as explanation for the legal disparities will be considered briefly below in order to ascertain the weight to be accorded to each. These are: policy concerns, the need for a legal trigger, autonomy, and financial considerations.

### Policy concerns

The current Coalition Government has stated that 'strong and stable families of all kinds are the bedrock of a strong and stable society'<sup>59</sup> which suggests a willingness to recognise a plurality of family forms. However this is not matched by equal treatment of these family forms in the law. The historical and continually prevalent political attitude maintains that marriage is the preferred and privileged form of relationship which the state should promote; marriage is placed on a pedestal. There is an understandable degree of apprehension about recognising equality *between* different relationship forms because it might encourage cohabiting rela-

54 Jo Richardson, Jeremy Coid, Ann Petruckevitch, Wai-Shan Chung, Stirling Moorey and Gene Feder, 'Identifying Domestic Violence: Cross Sectional Study In Primary Care' (2002) 324 British Medical Journal 274, 276.

55 See CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38, available at: <http://www.unhcr.org/refworld/docid/453882a422.html> [accessed 7 May 2012].

56 Family Homes and Domestic Violence HL Bill (1995).

57 Domestic Violence and Matrimonial Proceedings Act 1976, s1(1)(c).

58 Probert, 'Cohabitation: Current Legal Solutions' (n 37), 317.

59 See HM Government, *The Coalition: our programme for government – Families and Children* (20 May 2010) 19.





tionships and discourage marriage. This is seen as undesirable in light of evidence which demonstrates that married couples are, on average, more stable than cohabiting couples.<sup>60</sup> As Probert suggests, '[i]f marriage continues to perform a useful social function then there may be reasons for the law not only to retain it as a legal concept, but also to promote it as far as it is possible to do so'.<sup>61</sup> Therefore, *prima facie*, the Government has a clear interest in seeking to preserve the institution of marriage in society.

Nonetheless, a desire to maintain social stability cannot be used to warrant a blanket policy which repeatedly privileges married couples over unmarried cohabiting couples nor can it justify the express lowering of protection of one group (unmarried cohabiting couples) in order to promote another group (married couples). The Centre for Social Justice asserted that differential treatment is justified because there is a need to encourage a 'high-commitment culture' in the UK through promoting marriage.<sup>62</sup> Although it might be true that *some* married couples are more committed than *some* unmarried cohabiting couples, it is a dangerous generalisation to assert that marriage automatically involves a higher degree of commitment. As Duclos observes, 'marriage is not a monolith, although we are socialised to think of it as such'.<sup>63</sup> The variation evident in cohabiting relationships is equally present in married relationships and effective legal protection ought not to be attached to erroneous assumptions about the nature of married and unmarried cohabiting relationships.

Studies have identified the multifarious nature of cohabitation. The Living Together Campaign Research Project identified four types of cohabiting couples: 'Ideologues', 'Romantics', 'Pragmatists' and 'Uneven Couples'.<sup>64</sup> Briefly, Ideologues are those in a long-term committed relationship but one or both partners have an ideological objection to marriage. Romantics expect to marry in the future. Pragmatists decide whether to marry or cohabit on legal or financial grounds. Uneven Couples either have one partner who wishes to marry and another who does not, or one partner who is more committed to the relationship than the other. Unmarried cohabiting couples comprise a complex group which is far from homogenous, and although it may not be practical or desirable to offer legal protection to all of these groups, it is nonetheless critical that the law recognises and responds to the variation within the category of 'unmarried cohabiting couples'.

Significantly, policy arguments demonstrate that the Government is attempting to use the law to influence social behaviour. The state is, in effect, using law as a 'second kind of politics'.<sup>65</sup> There are two problems with this logic. Firstly, it assumes that people consider the legal consequences of their relationship when deciding whether or not to enter into marriage. Evidence suggests that this assumption is incorrect.<sup>66</sup> In fact, the continuing prevalence of the common-law marriage myth demonstrates widespread general ignorance of the legal consequences of particular relationships.<sup>67</sup> Secondly, the use of law as a 'second kind of politics' obfuscates the true purpose of family law. Although family law seeks to create a supportive and stable environment for families and children this is not equivalent to the promotion of marriage at all costs. The state is justified in promoting marriage but it must do so on the basis of accurate assessments of unmarried cohabiting relationships which can only be achieved through genuine engagement of the law with social reality.

### Trigger for legal rights

Another purported justification for the differential legal treatment is the need for a trigger for legal rights. As the courts have highlighted, '[a] marriage certificate proves itself; cohabitation has to be inferred'.<sup>68</sup> Argu-

60 See Kathleen Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe' (2004) 26 Law and Policy 33; John Ermisch and Marco Francesconi, 'Patterns of Household and Family Formation' in Richard Berthoud and Jonathan Gershuny (eds), *Seven Years in the Lives of British Families* (Bristol, 2000).

61 'Cohabitation: Current Legal Solutions' (n 37), 326.

62 Centre for Social Justice, *Every Family Matters: An in-depth review of family law in Britain* (July 2009) 79.

63 Nitya Duclos, 'Some complicating thoughts on same-sex marriage' (1991) 1 Law and Sexuality 44, 44.

64 *The Living Together Campaign* (n 9), 8-9.

65 Marc Galanter, 'Law Abounding: Legalisation around the North Atlantic' (1992) 55 MLR 1, 23.

66 Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21<sup>st</sup> Century Britain', (2004) 67 MLR 143, 161.

67 *ibid*, 156; British Social Attitudes (n 2).

68 See *Kimber v Kimber* [2000] 1 FLR 383 (Fam).





ments under this head emphasise the importance of the *form* of marriage; there is a clear starting point and an agreement to undertake marital obligations. In contrast, cohabiting 'arrangements' rarely have a specific starting date and division of responsibilities. Research in the USA has identified the phenomenon that cohabiting couples tend to 'slide into' rather than 'decide to' cohabit.<sup>69</sup> Although care must be taken not to read trends in America as applicable to the UK, the informal nature of cohabitation is a universal trait. This makes it difficult to ascribe legal rights to the parties. In this vein, Clive recognises that although marriage is a convenient legal concept for ascribing legal rights, it is not a necessary concept.<sup>70</sup>

The law undeniably relies on constructed, sometimes fictional, concepts in order to function effectively. It depends upon nuanced definitions and categorisations in order to articulate rights and duties. However, expediency in itself cannot convincingly justify inequality between or within relationships. In fact it could be argued that if a legal trigger is required then a 'convenient' legal concept for unmarried cohabiting couples ought to be introduced. Seeing as calls for the introduction of civil partnerships for heterosexuals in the UK have been unsuccessful, the motivation for the differential legal treatment appears to go beyond the mere need for a legal trigger.

### Autonomy

Raz outlines that '[t]he ruling idea behind autonomy is that people should make their own lives'.<sup>71</sup> In the area of family law, it is argued that the state ought to respect the autonomy of individuals who have not contracted into an agreement of marital obligations and thus should not have obligations imposed upon them; relationship choice is a personal matter. One key proponent of this argument is Baroness Deech who states that we should not try to stereotype every couple into the traditional marriage mould.<sup>72</sup> Few people would disagree with the sentiment behind this argument. Unfortunately, as already stated, there exists a general lack of awareness about the legal protection available to cohabiting couples. Few are aware of the alternatives to marriage and some mistakenly believe they are legally protected. For childless couples, it might be enough to pursue educational initiatives aimed at remedying these issues without infringing the autonomy of individuals through the imposition of a statutory regime.

However, the situation transforms when the consequences of private decisions impact upon children. The state is obligated to ensure that the child's welfare is protected. Herring has argued that 'individualistic autonomy...is simply inconsistent with family life as it is understood and experienced by most'.<sup>73</sup> He offers an alternative theory of 'relational autonomy' which 'recognises the interdependency and vulnerability of both children and adults' which is better suited to the role of family law.<sup>74</sup> This requires the law to engage with the reality of human relationships so that it can better respond to social trends and meet the obligations of human rights law.

### Financial considerations

From a practical perspective there are genuine concerns that opening up the family courts to disputes on cohabitation breakdown will 'open the floodgates'. Baroness Deech argues that 'a new law on cohabitation would be a bonanza for lawyers at a time when private family law work is declining for lack of legal aid and

69 See Scott Stanley, Galena Rhoades and Howard Markman, 'Sliding Versus Deciding: Inertia and the Premarital Cohabitation Effect' (2006) 55 *Family Relations* 499.

70 Eric Clive, 'Marriage: an unnecessary legal concept?' in John Eekelaar and Mavis Maclean (eds) *Family Law* (OUP 1994) 186.

71 Joseph Raz, *The Morality of Freedom* (OUP 1986), 369.

72 Ruth Deech, 'Cohabitation' [2010] *Fam Law* 39, 40.

73 Herring (n 4) 261.

74 *ibid*, 275.



resources'.<sup>75</sup> Financial concerns about family law in general have resulted in greater private ordering,<sup>76</sup> yet paradoxically it then becomes more difficult to monitor the influence of law on social practices. This concern cannot be lightly dismissed, after all a perfectly constructed legal regime is futile if it cannot be accessed and implemented in practice. Cretney has famously warned that

[o]f course it is right to provide a remedy for injustice but care must be taken that the cure is not provided at too great a cost. It is not the function of the legal system to provide a remedy for every situation in which someone could argue that she has plausibly suffered loss.<sup>77</sup>

With this in mind, it is important to note that while the *status quo* is unacceptable, the solution is not to accord equal treatment to every relationship form. A more pragmatic response would be to improve awareness of marriage alternatives and offer an option to some unmarried cohabiting couples in clear need of legal protection.

## Reform

Both the Law Commission<sup>78</sup> and Lord Lester<sup>79</sup> have attempted to reform this area of law, yet both endeavours 'have fallen on deaf legislative ears'.<sup>80</sup> It is submitted that the current problematic law and failure of past reform efforts are a result of the 'highly conformist strategy of determining accessibility to prevailing social norms'.<sup>81</sup> Marriage is presented as the perfect ideological model to which all other relationship forms should aspire, but as already discussed this is based on a number of incorrect assumptions about the nature of married and unmarried cohabiting relationships. The law needs to adopt a 'relational autonomy approach' which pays attention to the real lives of individuals<sup>82</sup> and recognises and responds to the motivations behind the increasing trend in cohabitation. In doing so, it will reconstruct the marriage pedestal.

Some academics argue that a functionalist (as opposed to a formalist) approach to relationships ought to be adopted.<sup>83</sup> The argument runs: if unmarried cohabiting couples perform the role of married couples just as effectively, then there is no justification for their differential legal treatment. There are two problems with this reconceptualisation of relationships. Firstly, evidence shows that married couples, on average, continue to perform family functions *more effectively* than cohabiting couples.<sup>84</sup> Therefore, protection will continue to be denied to a vast majority of unmarried cohabiting couples in need of some form of legal protection. Secondly, evaluating the functions of a family is an inherently value-laden exercise for which it would be very difficult to establish clear rules. Three possible functions of the family have been identified by Probert: to 'provide a stable environment for bringing up children',<sup>85</sup> to provide 'a mutually supportive environment for the parties involved',<sup>86</sup> and to enable 'role specialization without risk'.<sup>87</sup> Questions pertaining to the 'stability' of a particular familial environment encroach into dangerous political territory and reveal the nuanced and dynamic nature of intimate relationships. Dewar recognises this and concludes that family law is necessarily and normally chaotic.<sup>88</sup> Given that the current law is based on many misinformed assumptions about the nature of relationships, it would be foolish to invite further uncertainty through value-laden assessments

75 Deech (n 72), 41.

76 Herring (n 4), 281.

77 HL Deb 30 April 2009, vol 710, col 413.

78 *Cohabitation: the financial consequences of relationship breakdown* (n 1).

79 Cohabitation Bill HL Bill (n 3).

80 Barlow and Smithson (n 9), 1.

81 Glennon (n 11), 177.

82 Helen Rhoades, 'Concluding thoughts: The enduring chaos of family law' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds) *Rights, Gender and Family Law* (Routledge 2010), 283.

83 See Eekelaar, *Family Law and Social Policy* (n 10); Barlow and Smithson (n 9), 8.

84 'Cohabitation: Current Legal Solutions' (n 37), 325.

85 *ibid*, 322.

86 *ibid*, 323.

87 *ibid*, 324.

88 John Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467-8.



about the effective performance of particular family functions.

While the chaotic and ‘antinomic’<sup>89</sup> nature of family law paints a bleak future for any ‘perfect’ enduring family law system it does not justify the current contingency system which fails to offer any meaningful form of legal protection. The family justice system must ‘attempt to understand the emotions, intentions, and dependencies underlying the human relationship’.<sup>90</sup> This includes looking at how the law is *understood* as well as what the law *is* which requires a close analysis of the prevalent common-law marriage myth. This is not to say that the law should ‘chase the practice’.<sup>91</sup> If family law were to be conditioned by all social considerations it would cease to be a normative system and kneejerk responses will only result in further confusion and inconsistencies, especially when change in this area of law could have a ‘deep-seated effect’.<sup>92</sup>

### Lessons from Scotland

The problems encountered by the Scottish legal system may be useful in informing legislative proposals in the UK.<sup>93</sup> McCarthy identifies three potential rationales for redressing cohabitation breakdown through asset distribution: the community property model, the compensation model, and the restitutionary model.<sup>94</sup>

The first model affirms that all property acquired through the joint endeavour of the couple is to be considered as community property which each partner has a presumed equal share in.<sup>95</sup> This approach is similar to the principle of sharing in ancillary relief but, as considered earlier, it does not appear to be essential to achieving fairness upon relationship breakdown because spouses may contract out of sharing in a nuptial agreement.<sup>96</sup> Adoption of the community property model would undoubtedly achieve equality between relationships, but it appears largely inappropriate for unmarried cohabiting couples based on the justifications considered earlier, namely autonomy and financial considerations.

The compensation model affirms that the party who has been economically disadvantaged by the relationship is entitled to payment to make good their loss.<sup>97</sup> The restitutionary model states that any gains made by one partner as a result of the contributions of the other partner, which cannot be legally justified, must be restored to the disadvantaged cohabitant.<sup>98</sup> These latter two models have a remedial basis for which there is little justification for drawing a distinction between spouses *vis-à-vis* unmarried cohabiting couples. They recognise and value roles such as the home-maker and child-carer and aim for equality *within* relationships based on entitlement rather than relationship form. It is therefore submitted that any future regime for the distribution of assets upon the breakdown of some unmarried cohabiting relationships ought to use a variant of these two bases.

### An interim measure

As an interim measure before full reform, introducing the civil-partnership or registered-partnership model to heterosexual couples might be a step in the right direction. The model would provide an alternative trigger for legal rights and respects the autonomy of parties because it is a purely opt-in arrangement. It is imperative that no hierarchy between marriage and civil partnership is established; in this case there ought to be equality *between* relationships because although the form differs, the commitment is to be treated the same. This will provide an alternative to marriage for the ‘Ideologues’.<sup>99</sup> This step is also welcome alongside the

89 Frederic Jameson, ‘The Antinomies of Postmodernity’, in *The Seeds of Time* (Columbia UP 1994), 1-2.

90 Thorpe LJ (n 41), 895.

91 Centre for Social Justice (n 62), 79.

92 *ibid*, 81.

93 Family Law (Scotland) Act 2006.

94 Frankie McCarthy, ‘Cohabitation: lessons from north of the border?’ (2011) 23 CFLQ 277, 284.

95 *ibid*, 285.

96 See para 3.1.1.3 Sharing.

97 McCarthy (n 94), 285.

98 *ibid*, 285-6.

99 See paragraph 4.1. Policy Concerns.



possible introduction of same-sex marriage in the UK because it will prevent what Probert calls 'unequal asymmetry' between heterosexual and homosexual couples.<sup>100</sup>

Admittedly, this proposal fails to address the fact that couples rarely enter arrangements for legal reasons and does not provide for the 'common-law marriage' myth. Therefore, it must be coupled with an educational initiative aimed at raising awareness about existing self-help remedies such as cohabitation contracts. Furthermore, recognition of heterosexual civil-partnerships will foreseeably place greater demand on legal advice services and could potentially spawn more litigation. However this is more desirable than allowing *all* unmarried cohabiting couples to litigate and it also provides a safeguard against 'nuisance claims'.

## Conclusion

It is neither feasible nor desirable for the law to regulate all types of relationships; the law must respect autonomy as far as possible and be pragmatic about the financial impact of regulation. However, there is clearly a need for some form of legal protection for some unmarried cohabiting couples. In the areas of asset distribution on relationship breakdown and the availability of occupation orders in situations of domestic violence the current law works an injustice. It is the function of the family justice system buttressed by human rights law to remedy this by preventing exploitation within the family and protecting vulnerable victims of violence.

The state is entitled to promote marriage as a social ideal but not to the detriment of other relationship forms leading to inequality. The law should adopt what Herring terms a 'relational autonomy' strategy which engages the law with the nature of human relationships to assess whether differential treatment is truly justified. In doing so, the law can strive towards equality within relationships. Specifically, the entitlement-based rationale of the current ancillary relief system ought to be read across to a system for the protection of factually similar unmarried cohabiting couples. Furthermore, the balance of harm test for the availability of occupation orders ought to apply regardless of the form of the relationship. In reforming the law in this area, the state can draw upon the Scottish experience and introduce a regime with a compensatory or restitutionary basis for asset distribution which recognises and values the home-making and child-caring roles of unmarried cohabitants. In this respect, an interim measure of heterosexual civil or registered partnership could provide a practical alternative for some unmarried cohabiting couples and satisfy many of the purported justifications for differential legal treatment. This should be coupled with an educational initiative explaining the current situation of unmarried cohabiting couples and the available self-help remedies.

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<sup>100</sup> Rebecca Probert, Which adult relationships the law chooses to regulate and how it chooses to regulate them (16<sup>th</sup> March 2012) available at <http://www2.warwick.ac.uk/fac/soc/law/ug/current/materials/half/35fam/podcasts/?podcastItem=podcast1.mp3>.



# **Derivative Actions in the UK: Revised yet unimproved – Im- age about derivatives market**

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## Abstract

*Following public consultation and much consideration, a new statutory derivative action was finally incorporated into the UK Companies Act 2006. This paper explores the role of this new procedure in constraining managerial misconducts. After highlighting the common law position on derivative actions, this paper goes on to assess the recent statutory addition. It concludes that this new rule is not a significant constraint on managerial malpractices in light of its inherent deficiencies and the existence of other strong protective mechanisms.*

## 1. Introduction

Under the *Foss* rule, a director's malpractice does not entitle individual shareholders to initiate litigation seeking redress; the Company itself is the only proper plaintiff to initiate such action. Derivative actions are one exception to this rule in entitling individual shareholders to bring actions against wrongdoers. Formerly, case law surrounding derivative action in the UK was complex and received considerable criticisms. Reform was consequently initiated by the Law Commission<sup>1</sup> and endorsed by the Company Law Review Steering Group.<sup>2</sup> This reform was finally implemented by the Companies Act 2006 (hereafter "CA 2006"), which established a brand new form of derivative action.

This paper will examine the role of derivative action in the UK. It will first briefly explore common law principles in this area, identifying the law and its inherent deficiencies. It will then analyse the new statutory derivative claim, assessing its procedural framework for obtaining leave to continue a claim. Lastly, this paper will discuss the role of derivative actions in the UK. This will require an examination of the principal legal mechanism and non-legal mechanisms available. The paper will conclude that the role of the new statutory derivative action remains negligible in constraining managerial misbehaviours in the UK due to its inherent shortcomings and the existence of other strong protective mechanisms.

## 2. Derivative actions in common law

### 2.1 The *Foss* rule

*Foss v Harbottle* is a seminal case in the law relating to derivative action. In this case the Court established two principles: the Proper Plaintiff principle, establishing that the proper plaintiff in an action regarding an alleged wrong against a company is the company itself; and the Majority Rule principle, enabling a simple shareholder majority to ratify management misconduct, thus preventing an individual shareholder's entitlement to initiate litigation with regard to that matter.

### 2.2 Exceptions to the *Foss* rule

Whilst the English courts have imposed restrictions on the application of derivative actions, it is clear that this traditional rule did not afford shareholders adequate protection. Four exceptions to the *Foss* rule were therefore identified and developed: *ultra vires* or illegal acts,<sup>3</sup> breaches of special resolution procedures,<sup>4</sup> personal rights and fraud on the minority.<sup>5</sup> Shareholders can only bring derivative actions in circumstances characterised by the existence of one or more of these exceptions.

1 Law Commission, "Shareholder Remedies" (Consultation Paper No. 142, 1996); Law Commission, "Shareholder Remedies" (Law Com Report No. 246 1997)

2 Company Law Review Steering Group, "Modern Company Law for a Competitive Economy: Final Report" (July 2001)

3 *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 210.

4 *Edwards v Halliwell* [1950] 2 All ER 1064.

5 *Burland v Earle* [1902] AC 83,93.





### 3. Problems under common law

The circumstances in which individual shareholders could bring derivative actions were generally restricted by common law. Only in some specific exceptional situations was litigation permitted. Thus, the *Foss* rule was unable to cover new situations and provide strong protections for minority shareholders. This led to increasing recognition of the need to reform this rule.<sup>6</sup> As a tool of corporate governance, derivative action has attracted international attention. Mindful of this fact, the English Law Commission recommended that the *Foss* rule be abolished.<sup>7</sup> In doing so, it outlined four main problems with the current state of the law, proposing the establishment of a new derivative action on a statutory basis.<sup>8</sup>

The Commission highlighted that the rule established in *Foss v Harbottle* was inflexible and outdated. The *Foss* rule is not located in any rules of court; it is rather found in case law, and having been decided many years ago, is inevitably rigid and obsolete. A proper understanding of the rule necessitates an examination of numerous cases decided over the last 150 years. It is therefore almost impossible for lay people to garner an understanding of the law in this field without specialist legal assistance.

Secondly, the effect of exceptions to this rule is that an action to recover damages suffered by a company by reason of a director's breach of fiduciary duty cannot be brought unless the wrongdoers have control of the company. It is unclear what the meaning of "control" is in these circumstances. Indeed, whilst it is not confined to voting control, the applicability of this exception of this exception beyond such situations is unclear. This is problematic, especially in some larger corporations where directors can control companies without possessing majority shares.

Thirdly, under the exceptions to *Foss* rule an action to recover damages suffered by a company by reason of director negligence cannot be brought by a minority shareholder unless it is possible to prove that the negligence confers a benefit on the controlling shareholders, or that the failure of the other directors to bring an action constitutes a fraud on the minority.<sup>9</sup>

The Law Commission's Consultation Paper also highlighted the difficulties associated with the need for shareholders seeking to initiate derivative actions to first establish their standing to do so in the course of establishing a *prima facie* case on the merits at the preliminary stage.<sup>10</sup> Indeed, if effective case management is absent this pre-requisite can increase the cost and length of the litigation.<sup>11</sup>

The view of the *Foss* rule and its exceptions as overly problematic was maintained by the Law Commission even after much consideration and public consultation, and was supported by the Company Law Review Steering Group (hereafter CLR). The CLR agreed that the old *Foss* rule should be changed and that a new statutory basis was needed for derivative action.<sup>12</sup> A 2002 White Paper on Modernizing Company Law made similar proposals, recommending investigation into whether "a workable scheme can be devised."<sup>13</sup> In March 2005, A White Paper on Company Law Reform confirmed that a statutory basis of derivative action would present a solution.<sup>14</sup> Having been widely accepted in both law reform and academic circles, a statutory derivative action was finally enacted in the CA 2006.

6 Andrew Keay, "Derivative Proceedings In a Brave New World For Company Management and Shareholders", 2010 (3) *Journal of Business Law*, pp 151-78.

7 *Foss v Harbottle* (1843) 2 Hare 461.

8 Law Commission Consultation Paper 142, para 14.1 to 14.4.

9 *Ibid*, at p76.

10 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.

11 See *Prudential v Newman Industries*(No.2)[1982]Ch.204; *Wallersteiner v Moir*[1974]1 W.L.R.991

12 CLR *Developing the Framework* para 4.127; CLR Final Report para 7.46.

13 White Paper of Modernizing Company Law(2002) p79.

14 White Paper of Company Law Reform (2005). At 3.4.



## 4. The new statutory derivative action

The introduction of a new statutory derivative action in effect replaced the *Foss* rules, constituting an exclusive method of bringing derivative actions. For example, plaintiff shareholders no longer need to demonstrate that wrongdoers control the company in question as such a rule would make it impossible to bring successful derivative claims. Instead, the CA 2006 adopted the Law Commission's proposal for a "new derivative procedure with more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action".<sup>15</sup>

### 4.1 General principles

#### 4.1.1 Scope of application

The new statutory rule in the CA 2006 extends the scope of application of derivative actions in three ways:

First, the scope of *locus standi* in bringing a derivative action has widened. Under Section 260(5)(C), a derivative action can now be initiated either by a shareholder or by a person who is not a member of the company but to whom shares in the company have been transferred or transmitted by operation of law.<sup>16</sup> In addition, there is no threshold for shareholder ownership, making it theoretically possible for a claimant to purchase only one share in a company with a view to commence derivative litigation. The new statutory rule also retains the common law position that a shareholder is entitled to raise proceedings even where the cause of litigation arose before he or she became a member of the company. The justification for this is that derivative action is intended to "benefit the corporate entity as opposed to any individual shareholder".<sup>17</sup> It has therefore been found that "it never can be held that the acquiescence of the original holder of stock in illegal acts of the directors of a company will bind a subsequent holder of that stock to submission to all future acts of the same character".<sup>18</sup>

Secondly, the causes of derivative action have been extended. To begin with, the new statutory procedure applies in favour of individual shareholders where the cause of action is vested in the company and the shareholder seeks relief on behalf of the company.<sup>19</sup> A derivative claim under Part 11 of the CA 2006 can be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.<sup>20</sup> That means that a derivative action could be initiated where the general duties of directors in Chapter 2 of Part 10 of the CA 2006 are violated. The inclusion of negligence also broadens the scope of the procedure's application, as previously no derivative actions could lie where directors were accused of "negligence or error of judgment".<sup>21</sup> Moreover, the common law requirements that fraud be committed on the shareholding minority and wrongdoers be in control of the company have also been abolished. This striking change has been well received as the previous requirement of wrongdoers control made it highly unlikely that individual shareholders of a widely-held company could succeed in bringing a derivative action. Lastly, individual shareholders were formerly allowed to raise proceedings at common law only where "directors use their powers intentionally or unintentionally, fraudulently or negligently, *in a manner which benefits themselves at the expense of the company*".<sup>22</sup> This restriction was also eliminated making the new form of derivative action available for any breach of a director's duty even if "the delinquent directors ... have [not] profited or benefited from their

<sup>15</sup> See the report of Explanatory Notes to the Company Law Reform Bill, para 6.15.

<sup>16</sup> Companies Act 2006, Section 260(5)(C).

<sup>17</sup> S. Griffin, "Alternative shareholder remedies following corporate mismanagement – which remedy to pursue?" 2010 Co.L.N. 281, 1, at 1

<sup>18</sup> *Bloxam v Metropolitan Rly Co* (1868) 3 Ch App 337 at 354 per Lord Chelmsford LC

<sup>19</sup> Companies Act 2006, Section 260(1).

<sup>20</sup> Companies Act 2006, Section 260(3).

<sup>21</sup> *Pavlides v Jensen* [1956] Ch 565 at 576 per Danckwerts J.

<sup>22</sup> *Daniels v Daniels* [1978] Ch 406 at 414 per Templeman J.



misconduct”.<sup>23</sup>

Thirdly, the scope of prospective defendants has been broadened in two respects. First, the new statutory rule provides that a cause of action may be brought against a third party other than a Director.<sup>24</sup> However, this provision does not mean that any third party not relevant to a director could be a defendant. It should be born in mind that this situation only applies to persons who have assisted directors in the breach of their duties.<sup>25</sup> Second, a former director or a shadow director is treated as a director and thus, he or she could still be held liable in a derivative action.<sup>26</sup> This approach was criticised during the Grand Committee Stage of parliamentary debate as there were concerns that talented and skilled persons might be discouraged from serving as directors. It is argued that it is imprudent to expect shadow directors to bear the full brunt of responsibility for all that occurs in a company as the nature of shadow directors is one that renders their role ill-defined in a company's operations.<sup>27</sup> Nevertheless, whilst acknowledging that shadow directors may not always be responsible for everything occurs in a company, Lord Hodgson maintains that they may be intimately involved in an issue which causes a derivative action.<sup>28</sup>

In sum, it seems clear that the new statutory regime widens the scope of derivative claims, thus making it easier to bring such claims than under common law. While this ‘opening up’ policy has been regarded by some scholars as a welcome liberalization of the rules, providing strong protections for companies and minority shareholders, it also creates concerns about the increased risk of the “proliferation of vexatious or near-vexatious litigation”.<sup>29</sup> There is also a risk that directors be discouraged from taking up directorship because of the widening of directors’ duties under Part 10, and the fact that the new statutory derivative action regime makes it easier to enforce such duties. It is argued that this so-called “double whammy” would increase the already heightened fears of directors, especially non-executive directors.<sup>30</sup> However, these concerns were rejected for reasons identified by Lord Goldsmith: first, the judicial control of derivative actions still remains tight under the new regime. Second, as it is the plaintiff shareholders who bear the heavy legal costs of unsuccessful litigation, the calculation of costs and benefits before raising proceedings should militate against vexatious claims. Third, this new regime is a fail-safe mechanism rather than a protective mechanism of first resort in the UK.<sup>31</sup>

#### 4.1.2 Procedural aspects

In response to concerns regarding a possible chilling effect on directorship appointment and an increased risk of unmeritorious claims, the CA 2006 incorporates a two-stage test to be met by claimants before permitting a case to proceed to the merit stage. Under the *Foss* rule, individual shareholders had to demonstrate that a claim fell within one of the exceptions mentioned above in order to bring a derivative action. Now, whilst an individual shareholder can readily initiate such litigation against directors for breach of duty, they must nevertheless apply to the Court for permission to continue.<sup>32</sup>

At the first stage in the process, claimants must satisfy the Court that the evidence filed in support of their claim discloses a *prima facie* case, otherwise the Court is obliged to dismiss the claim and may make any consequential order it considers appropriate.<sup>33</sup> Where a claim meets this *prima facie* threshold, the Court

<sup>23</sup> *Iesini v Westrup Holdings Ltd* [2009] EWHC 2526 (Ch) at para.75 per Lewison J

<sup>24</sup> Companies Act 2006, Section 260(3).

<sup>25</sup> David Kershaw, *Company Law in Context: Text & Materials* (OUP,2009), at p556.

<sup>26</sup> Companies Act 2006, Section 260(5).

<sup>27</sup> Hansard HL Vol 679, Official Report, 27/2/06, col GC17.

<sup>28</sup> Hansard HL Vol 678, Official Report, 6/2/06, col GC247.

<sup>29</sup> 679 HL Official Report (5<sup>th</sup> series) col GC13 (27 February 2006)

<sup>30</sup> L Roach, “An Equitable Solution for Non-Executive Directors” (2006) 17 *International Company and Commercial Law Review*, at pp 117- 19.

<sup>31</sup> Hansard HL Vol 679, Official Report, 27/2/06, col GC4-5.

<sup>32</sup> Companies Act 2006, Section 261(1).

<sup>33</sup> Companies Act 2006, Section 261(2).



may give directions as to the evidence to be obtained in the case and may adjourn proceedings to enable this evidence to be secured.<sup>34</sup> Initially, the government was reluctant to impose pre-conditions occasioning the need for preliminary stages in such case, preferring instead that they proceed straight to a substantive hearing on the factors set out in Section 263 (3) of CA 2006. This preference was based on the desire to avoid time-consuming mini-trials.<sup>35</sup> Criticisms regarding a lack of sufficient filters to prevent malicious actions led to a change in government position, inducing agreement that the courts should be empowered to dismiss vexatious litigation at an earlier stage without involving the target company.<sup>36</sup>

The CA 2006 also deals with the situation where a company has brought a claim and the cause of action on which the claim is based could be pursued as a derivative claim.<sup>37</sup> It seems that this new provision is beneficial to minority shareholders as the cost and effort of resort to the courts is assumed by the company rather than individual shareholders. Nonetheless, there may be circumstances in which a company is prevented from pursuing this litigation diligently, thus failing to fulfil certain criterion laid down in the Act.<sup>38</sup> In such situations, the Act provides that an individual shareholder is entitled to apply to the Court for permission to continue the litigation as a derivative action on the ground that: (1) the manner in which the company commenced or continued the claims amounts to an abuse of the process of the Court; (2) the company has failed to prosecute the claim diligently; and (3) it is appropriate for the member to continue the claims as a derivative claim.<sup>39</sup> The third condition reflects the view of the Law Commission that it is not desirable that “individual shareholders ... apply to take over current litigation being pursued by their company just because they are not happy with the progress being made”.<sup>40</sup> However, the Act does not stipulate in which circumstances it is not appropriate for a member to continue a claim. On hearing an application, a Court may (1) give permission to continue the claim as a derivative claim on such terms as it thinks fit; (2) refuse permission and dismiss the application, or (3) adjourn the proceedings on the application and give such directions as it thinks fit.<sup>41</sup>

If the court decides that a *prima facie* case for permission to continue a claim as a derivative claim has been established in the application and evidence submitted, it will enter into a second stage of considerations in which the company itself may file evidence and be heard. This stage involves a range of criteria which the Court has to consider in deciding whether permission should be granted. Section 263 sets out situations in which the Court must refuse permission to continue a claim, as well as the factors that a Court must take into account in making such a determination. To be specific, permission must be refused if the Court is satisfied that:

a person acting in accordance with Section 172 (duty to promote the success of the company) would not seek to continue the claim; or

where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorized by the company; or

where the cause of action arises from an act or omission that has already occurred, that the act or omission was authorized before it occurred or has been ratified by the company since it occurred.<sup>42</sup>

<sup>34</sup> Companies Act 2006, Section 261(3).

<sup>35</sup> Hansard HL Vol 679, Official Report, 27/2/06, col GC22,27.

<sup>36</sup> The power of the court to dismiss a claim at an early stage is reinforced by s261 (2)(b) of the CA 2006, which stipulates that the Court may make any consequential order it thinks fit if the application is dismissed. This enables the Court to deter an applicant with a civil restraint order or penalise him or her with costs orders. See Brenda Hannigan, *Company Law* (2<sup>nd</sup> edition, OUP, 2009), at p451.

<sup>37</sup> Companies Act 2006, Section 262(1).

<sup>38</sup> For example, when a director who is also a defendant in the litigation controls the company, it is conceivable that the company is unlikely to pursue the litigation diligently.

<sup>39</sup> Companies Act 2006, Section 262 (2).

<sup>40</sup> Law Commission, “*Shareholder Remedies*” (Law Com Report No. 246 1997), at para 6.63

<sup>41</sup> Companies Act 2006, Section 262 (5).

<sup>42</sup> Companies Act 2006, Section 263(2).





These three factors constitute an absolute bar on a grant of permission to continue a derivative claim. If a Court is not required to refuse a claim under Section 263(2), it must exercise its discretion in deciding whether permission can be granted. Section 263(3) sets out a list of factors that the Court must take into account in exercising its power:

whether the member is acting in good faith in seeking to continue the claim;

the importance that a person acting in accordance with Section 172 (duty to promote the success of the company) would attach to continuing it;

where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be authorized by the company before it occurs or ratified by the company after it occurs;

where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

whether the company has decided not to pursue the claim; and

whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.<sup>43</sup>

It is worth noting that the above list of factors is intended to act as a non-exhaustive and non-hierarchical set of guidelines.<sup>44</sup> Thus the Act does not exclude other factors that the Court may consider relevant in deciding whether to exercise its discretion.

## 4.2 Assessment of the statutory derivative actions

Some commentators argue that it might be too early to assess the impact of this new procedure in practice.<sup>45</sup> Nevertheless, the statutory derivative action regime has been in force since October 2007 and several cases have emerged since that time. As such, it is necessary to examine how the courts have interpreted the new rules in practice, particularly given the considerable powers conferred on courts in determining whether derivative claims should be granted.

### 4.2.1 The first stage

At this stage the applicant is required to submit evidence to demonstrate that a *prima facie* case is established. However, the type of documentation required for submission to the Court at this stage remains unclear as the Act fails to make any explicit stipulation. Some assert that the meaning of this concept is elusive.<sup>46</sup> Nevertheless, it has been suggested that the requirements for overcoming the first stage are not strict either at common law or under the new regime. At common law, case law provides little evidence that the test formerly presented any considerable obstacle to minority shareholders.<sup>47</sup> Moreover, following the enactment of statutory derivative claims in CA 2006, there are few cases in which applicants have failed to establish a *prima facie* case. This creates the impression that interpretations of the Act at the initial stage are broadly unanimous or at least less controversial, though an examination of recent cases demonstrates that this is not so. In *Wishart*, the Court held that:

<sup>43</sup> Companies Act 2006, Section 263(3).

<sup>44</sup> See David Kershaw, n25, at p563.

<sup>45</sup> Davies asserts that "although the new statutory derivative claim is doctrinally very different from the common law it replaces, it is not clear what its impact on the levels of derivative litigation will be." (See P.L.Davies, *Principles Of Modern Company Law* (8<sup>th</sup> edition, Sweet & Maxwell, 2008), at p626.); Reisberg also holds that "it is still early days and one cannot predict with any degree of accuracy how things will develop." (See Arad Reisberg, *Derivative Actions and Corporate Governance* (OUP, 2007), at p159.)

<sup>46</sup> *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396 HL at 404.

<sup>47</sup> Andrew Keay, n 6..





*“The question is not whether the application and supporting evidence disclose a prima facie case against the defenders to the proposed derivative proceedings, but whether there is no prima facie case disclosed for granting the application for leave”.*<sup>48</sup>

This statement suggests that the Court imposes a low threshold at the first stage, an approach that would be advantageous for claimants. However, in *Stimpson v Southern Landlords Association* the Court held that the factors set out in Section 263 (2)(3)(4) should be considered in determining an application at the initial stage.<sup>49</sup> Consideration of such factors would naturally have implications regarding the filing burden on plaintiffs in raising a suit.

A further feature of first stage proceedings is that they may, in fact, be merged into the second stage, as occurred in *Franbar Holdings Ltd v Patel*. Here, the judge explained this approach as follows:

*“Franbar has not so far sought to establish a prima facie case for permission to continue its derivative claim [...and thus] “it would be appropriate for me to deal with the entirety of the application for permission to continue at a single hearing.”*<sup>50</sup>

It is submitted that conflation inevitably undermines the valid legislative purpose behind the adoption of a two-stage procedure in such actions.<sup>51</sup> In practice, the Courts are willing to permit the application at the first stage and thus the two-stage procedure could be conflated if both parties reach agreement.

#### 4.2.2 The second stage

A derivative claim will proceed to the second stage if the Court is satisfied that the evidence filed by the applicant in support of the claim discloses a *prima facie* case. At this stage, the Court must take into account several factors in deciding whether to grant permission (presuming it is not required to refuse the application under Section 263(2)). The interpretation of these factors is therefore extremely important in respect of the implementation of derivative claims. Unfortunately, however, an examination of recent cases highlights that the exact import of these factors remains elusive.

For instance, most defendants rely on Section 263(3)(a) to allege a lack of good faith on the part of the plaintiff, thus necessitating rejection of the claim.<sup>52</sup> However, the precise implication of good faith in this context is unclear. Keay and Loughrey suggest that it is less likely that a Court will find an absence of good faith where a company could benefit from the action being brought, whereas such an absence is more likely to be found where the action is not in the company's interests.<sup>53</sup> Addressing the difficulty of defining the concept of good faith, the judge in *Swansson v Pratt* acknowledged that a lack of good faith may exist where the applicant could not honestly believe that the action would benefit the company, or where the action is an abuse of the process.<sup>54</sup> In *Stimpson v Southern Landlords Association*, the Court refused permission to continue an action on the basis of lack of good faith, after the judge found that the claimant had initiated the claim to retain control of the company.<sup>55</sup>

Another illustration of the uncertainty surrounding the interpretation of factors to be considered at the second stage of continuation determinations can be found under Section 172. The duty imposed in this section

48 *Wishart* [2009] CSIH 65.

49 *Stimpson v Southern Landlords Association* [2009] EWHC 2072(Ch).

50 *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch)

51 The main purpose behind providing two stages in the process is to protect the company from being sued unnecessarily, as these enable the court to reject unmeritorious claims without involving the company.

52 Until 2012, the only case in which a defendant did not use “good faith” as a defence was *Fanmailuk.com v Cooper* [2008] EWHC 2198(Ch).

53 A. Keay and C. Loughrey, “Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action Under the Companies Act 2006” 2008 (124) *Law Quarterly Review*, at 469.

54 *Swansson v Pratt* [2002] NSWSC 583.

55 *Stimpson v Southern Landlords Association* [2009] EWHC 2198(Ch).



is probably the most controversial factor in determining permission to continue. The “success” of a company is a difficult concept to ascertain, making it likewise difficult to apply under this section. In *Franbar Holdings*, the judge listed factors that might be considered in applying Section 172. These included the claim’s prospects of success; the ability of the company to recover any damages awarded; the disruption caused to the development of the company’s business by having to focus on the claim; the costs involved and any possible damage that might be done to the company’s reputation.<sup>56</sup> The judge in *Wishart*, the judge further found that the amount at stake and the prospects of securing a satisfactory result without litigation should also be considered;<sup>57</sup> however, these factors were criticised for being “...essentially a commercial decision, which the Court is ill-equipped to take, except in a clear case”.<sup>58</sup>

In sum, although the new statutory derivative action has lessened the burdens on plaintiff shareholders seeking to raise proceedings against corporate wrongdoers, it seems that it was never intended to make the litigation process materially easier for shareholders as a result of the two-stage test. Moreover, the recent cases referred to above suggest that judicial interpretation of the factors listed in Section 263 has been somewhat chaotic. This resultant uncertainty may deter prospective claimants from proceeding with such claims for lack confidence and an inability to obtain clear advice as to the merits of their application for permission to continue a derivative claim. Furthermore, the funding rule of derivative action remains unaltered, thus continuing to discourage the initiation of derivative litigations by shareholders. Indeed, the Courts have traditionally been reluctant to permit derivative claims.<sup>59</sup> Thus, despite the replacement of common law with and new statutory form of derivative actions it remains difficult for individual shareholders to commence litigations. Whilst unfettered standing to bring derivative actions might create the risk of a multiplicity of suits, including malicious litigation, the above discussion seems to imply that the balance between protecting company interests and enhancing the efficiency of corporate management has not been achieved under the new statutory rule. In light of this, it is necessary to examine the role of derivative action in the UK.

## 5. The role of derivative action in the UK

As noted above, the new statutory form of derivative action has some inherent deficiencies that inevitably affect the function of this rule. However, as a tool in disciplining corporate management, derivative action may still have a key role to play in protecting the interests of minority shareholders where other protective mechanisms are ineffective. Nevertheless, this section will demonstrate that alternative mechanisms for the protection of company interests and minority shareholders in the UK are effective to the extent that they render the role of derivative action in such protection unimportant. There are numerous legal and non-legal mechanisms to constrain the behaviour of managers in the UK. Examples of these include the rights vested in shareholders to bring personal claims when the duties established between both parties are violated; the unfair prejudice remedy when the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members and winding-up mechanisms when the Court is of the opinion that it is just and equitable to do so.<sup>60</sup> In respect of non-legal mechanisms in the UK, four market mechanisms have been identified in disciplining corporate management.<sup>61</sup> As a full exploration of all such mechanisms is beyond the scope and purpose of this paper, it will focus on examining two principle mechanisms: the unfair prejudice remedy in legal mechanisms and the market for corporate control in non-legal mechanisms.

<sup>56</sup> *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch)

<sup>57</sup> *Wishart* [2009] CSIH 65.

<sup>58</sup> *Iesini* [2009] EWHC 2526(Ch).

<sup>59</sup> Xiaoning Li, *A Comparative Study of Shareholders' Derivative Actions*, (Kluwer, 2007) at p33.

<sup>60</sup> For further details on minority shareholder’ protections in the UK, please see Victor Joffe QC, et,al: *Minority Shareholders: Law, Practice and Procedure* (4th edition, OUP, 2011).

<sup>61</sup> These are product market, labour market for managers, capital market and market for corporate control. See David Kershaw, *Company Law in Context: Text and Materials*, (OUP, 2009), at p177.



## 5.1 Legal mechanisms: “Unfair Prejudice”

### 5.1.1 “Unfair prejudice”: a broad remedy for minority shareholders

Section 994 of the CA 2006 provides a flexible and probably useful protection for minority shareholders. This section allows a member of a company to petition the Court for an order on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or some part of the company's members (including at least himself), or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.<sup>62</sup> If the Court is satisfied that such a petition is well founded, it may make such order as it thinks fit to grant relief with regard to the matters complained of. Remedies include regulating the future conduct of the company's affairs; requiring the company to do or abstain from doing certain acts; authorising civil proceedings to be brought in the name and on behalf of the company; providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.<sup>63</sup>

A brief of the evolution of the modern unfair prejudice system provides some considerable insight into the mechanism. Initially, it was designed to replace the winding up method contained in Section 210 of Companies Act 1948 which allowed members to petition the Court when they fell victim to oppression.<sup>64</sup> However, this mechanism proved to be ineffectual and impractical owing partly to a restrictive interpretation of the term ‘oppression’.<sup>65</sup> The first attempt to replace it began with Section 75 of the Companies Act 1980 which adopted the statutory unfair prejudice, and was then consolidated in Section 459 of the Companies Act 1985. After the long legislative process of the CA 2006, the “unfair prejudice” rule was restated without reform in Sections 994-998. It is not expected to change significantly in the near future.<sup>66</sup>

The first important aspect of the “unfair prejudice remedy” is the definitions of unfairness and prejudice: a petition may only be granted where the conduct complained of is unfairly prejudicial to the interests of members. Unfortunately, neither of these terms are clearly defined. Initially, efforts to define unfairness focused on objectivity,<sup>67</sup> but recent cases have cast some doubt on this approach.<sup>68</sup> The most important decision in this regard was made in *O'Neill v Phillips*, where Lord Hoffman stated that a member would not be generally allowed to complain of unfair prejudice unless there has been: (1) some breach of the terms on which the members agreed that the affairs of the company should be conducted; or (2) some use of the rules in a manner which is contrary to good faith.<sup>69</sup> Although this test encounters some challenges in practice,<sup>70</sup> its application was widely used and accepted as authoritative, at least in Scotland.<sup>71</sup> Under the first circumstance, which has been found to cover several wrongful acts such as misappropriation of assets,<sup>72</sup> improper

62 Companies Act 2006, Section 994(1).

63 Companies Act 2006, Section 996.

64 Companies Act 2006, Section 210.

65 Consultation Paper para 9.1. In *Scottish Co-operative Wholesale Society Ltd v Meyer*, Viscount Simonds defined ‘oppressive’ as “burdensome, harsh and wrong”, while Lord Keith suggested in the same case “a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members.” [1959]AC 324, 342.

66 Arad Reisberg, *Derivative Actions and Corporate Governance* (OUP, 2007), at P277.

67 For example, In *Re Bovey Hotel Ventures Ltd* (1981), Slade J held that “the test of unfairness must, I think, be an objective, not a subjective, one.... The test, I think, is whether a reasonable bystander observing the consequences of their conduct would regard it as having unfairly prejudiced the petitioner's interests.” This was endorsed by the case *Re Ra Noble Sons (Clothing) Ltd* [1983] and *Re Macro (Ipswich) Ltd* [1994].

68 In *Re Saul D Harrison Sons plc* (1995), Hoffmann LJ doubted whether the objective assessment is necessarily “the most illuminating way of putting the matter” and thus whether such an approach is the most appropriate test was questioned.

69 [1999]1 WLR 1092.

70 For example, see *Hall v Gamut Technologies Ltd* 1999 SLT 1276; also *Anderson v Hogg* 2002 SC 190.

71 Robert Goddard, “The Unfair Prejudice Remedy”, 2008 (12) *Edinburgh Law Review*, at pp 93-98.

72 See *Re Little Olympian Each-Ways Ltd* (No3) [1995] 1 BCLC 636.



allotments,<sup>73</sup> and mismanagement,<sup>74</sup> a petition is more likely to succeed. In the latter situation, a company typically giving rise to such equitable constraints is a 'quasi-partnership'.<sup>75</sup> In this type of company, it is assumed that minority shareholders act in reliance on the promises or understandings that form the basis of the relationship between the majority and the minority. Therefore, if such understandings, promises or agreements are breached, the innocent party may be entitled to petition the Court. Several understandings have been identified at common law and their violation may well attract the unfair prejudicial remedy. These include: understandings as to participation in management,<sup>76</sup> understandings regarding participation in financial returns<sup>77</sup> and the understandings on the basis of the relationship.<sup>78</sup>

However, the existence of the above circumstances does not necessarily guarantee a successful petition; such a petition might yet be struck out by the Court for other reasons. If, for example, a petitioner has received an offer to provide all the relief he could expect to receive from the Court, then the petition is unlikely to be granted.<sup>79</sup> Indeed, unfair prejudice litigation often costs a significant amount of time and money, a fact that has been notably criticised.<sup>80</sup>

Further issues are raised by the fair price valuation of purchased shares. Being at the Court's discretion, the available remedies for the finding of a breach are very broad.<sup>81</sup> However, the most common disposal for such cases in practice is a court order for the respondent to purchase the petitioner's shares at a fair price. The basic rule for determining a fair price share valuation distinguishes between two types of company:<sup>82</sup> the quasi-partnership, where the pro rata valuation can be used; and the non-quasi-partnership company where a discounted value is applied. However, this approach has sparked controversy and been challenged in practice. Thus in *Strahan v Wilcock*, it was argued that the pro rata valuation rule for quasi-partnerships should be suspended.<sup>83</sup> Moreover, for non-quasi-partnership companies, different elements must be considered. It is, thus, very difficult to secure a uniform criterion for the valuation of shares, particularly when the valuation needs to be fair not only to the company and the majority but also to the petitioner.

### 5.1.2 The dominant role of the "unfair prejudice remedy"

Despite some challenges and uncertainties surrounding this remedy, it has proved to be a very popular form of recourse in protecting minority shareholders owing to its coverage of a wide range of conduct and the flexibility of the relief offered.<sup>84</sup> The key question, therefore, is whether the unfair prejudice mechanism could be applied where a derivative action can be initiated. If so, this may partly explain why the application of derivative actions is inactive and the Courts are reluctant to accept such claims.

An examination of the wording of Section 994 of the CA 2006 and cases thereon highlights that the right vested in individual shareholders to lodge a petition under the unfair prejudice regime can be used to obtain redress for wrongs done to a corporation. Section 994 stipulates that a company's members will be protected

<sup>73</sup> See *Re Coloursource Ltd, Dalby v Bodilly* [2005] BCC 627.

<sup>74</sup> The courts are always reluctant to interfere with the internal management of a company and are therefore unlikely to accept a petition which only involves a disagreement over managerial issues. However, when mismanagement induces an actual financial loss to the company (see: *Re Macro(Ipswich) Ltd* [1994] 2 BCLC 354.) or the breach of statutory rights (*Fisher v Cadman* [2006] 1 BCLC 499), a petition becomes possible.

<sup>75</sup> *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 ALL ER 492. However, this term is not clearly defined and the factors which can be considered to be a quasi-partnership are also not elaborated further. See *Fisher v Cadman* [2006] 1 BCLC 499.

<sup>76</sup> *Brownlow v G H Marshall Ltd* [2000] 2 BCLC 655.

<sup>77</sup> *Grace v Biagioli* [2006] 2 BCLC 70.

<sup>78</sup> *O'Neill v Phillips* [1999] 2 BCLC 1.

<sup>79</sup> *Ibid.*

<sup>80</sup> For example, in the case of *Re Elgindata Ltd* [1991] BCLC 959, the hearing lasted 43 days and costs £320,000. The disputed shares were worth far less this sum, and further litigation costs were also incurred on an appeal.

<sup>81</sup> Companies Act 2006, Section 996.

<sup>82</sup> *Re Bird Precision Bellows Ltd* [1984] BCLC 195.

<sup>83</sup> *Strahan v Wilcock* [2006] 2 BCLC 555 CA.

<sup>84</sup> Arad Reisberg, n66, at p277.





if their interests are unfairly prejudiced, thus protecting their interests as well as their rights. Naturally, a wrong perpetrated against a company can be expected affect the interests of its shareholders. As such, unfair prejudice petitions can be used to respond to the same situations covered by derivative actions. This is supported by case law. A number of decided cases have shown that a breach of fiduciary duties owed to a company can give rise to a valid unfair prejudice petition when the same facts might also found a derivative action. For example, cases involving a conflict of interests<sup>85</sup> or the diversion of corporate funds<sup>86</sup> could lead to both an unfair prejudice petition and a derivative action.

Indeed, in 1962, the Jenkins Committee, which recommended the introduction of the “unfair prejudice remedy”, already predicted that the remedy would have a key role in addressing wrongs done to a company.<sup>87</sup> Similarly, in 1995, a specialist Chancery Working Group also expressed the view that the unfair prejudice remedy could be instituted where formerly a derivative action would have been initiated.<sup>88</sup> During the legislation of the CA 2006 some commentators even suggested the amalgamation of derivative action procedures with the “unfair prejudice remedy”, though such proposals were rejected by the Law Commission.<sup>89</sup> Indeed, the overlap between these two mechanisms does not mean they have the exact same functions. Nevertheless, the broad applicability of unfair prejudice has undoubtedly overshadowed derivative actions and plays a dominant role in protecting company and minority shareholder interests in the UK.

## 5.2 Non-legal mechanisms: the market for corporate control

The theory of the market for corporate control is quite straightforward: if directors are competent and manage a company well, the price of that company's shares will not be discounted, rendering the company bid-proof and improving the directors' own marketability. However, if managers benefit themselves at the cost of the company's interests, the value of the company's shares declines, risking a corporate takeover. In such instances, inefficient or self-serving managers would be removed; thus, management personnel have a strong incentive to maximize shareholder returns by enhancing corporate performance.

It is submitted that if the market for corporate control is effective, this partly explains why derivative actions are relatively unimportant in the UK. Although the market for corporate control cannot replace the derivative actions system, being unable to provide compensation to shareholders, if it is strong it may nevertheless weaken the function of derivative actions. At this point, it is useful to undertake a comparative examination of UK and US market forces.

It is argued that the market for corporate control in the UK is quite potent when compared to the US. Miller observes that the UK has a less regulated and more robust takeover market than the US, with fewer formal legal constraints on takeovers even after the introduction of Part 28 of the CA 2006, implementing the EU Directive on Takeover Bids. However, in the US, the federal principles which generate strong pressures for anti-takeover legislation at the state level are not present in the UK.<sup>90</sup> The disparity between the effectiveness of market forces in the UK and the US may stem from political differences.<sup>91</sup> In the US, corporate law is dominated by federal state governance, aligning political forces against hostile takeovers, and inevitably generating legislation and judicial decisions that suppress takeover activities. This is not the case in the UK, with its more unitary system. Here, the political system is generally more comfortable with hostile takeovers. For example, the UK government has decided that the provisions in the EU Directive on Takeover

85 See *Re Stewarts (Brixton) Ltd.* [1985] B.C.L.C.; *Re London School of Electronics* [1986] Ch. 211;

86 See *Lowe v Fahey* [1996] 1 B.C.L.C. 262.

87 *Report of the Company Law Committee* (Cmnd 1749) (1962) para 206.

88 Published in *Access to Justice: an Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (June 1995).

89 The reasons for the Law Commission rejecting this view can be found in its Consultation Paper.

90 G. Miller “Special Symposium Issue: Political Structure and Corporate Governance: Some Points of Contrasts between the United States and England” (1998) 51 *Columbia Business Law Review*, at p56.

91 Arad Reisberg, n66, at p40.





Bids<sup>92</sup> relating to so-called 'reciprocity' will not be implemented in the UK. This reciprocity provision applies where member states allow corporations to voluntarily choose to opt in to Articles 9 and/or 11 of the Directive and companies choose to do so. Here, Member States can exempt opt-in corporations from the relevant provisions when they are the target of a bid from a corporation that is not itself subject to such provisions. One of the UK's reasons for refusing to implement this option is that it could affect the current state of takeover markets and thus, undermine the benefits of the open market regime. Moreover, it is asserted that the execution of reciprocity provision may have adverse consequences on international trade as it would be seen as ring-fencing UK companies from takeovers by third country companies.

## 6. Conclusion

Traditionally, the right to bring a derivative action was considerably restricted at common law as only those actions which fell within permitted exceptions could be raised. This restriction was abolished and replaced with a brand new form of derivative claim aiming to provide a speedy, fair and cost-effective mechanism for relief. The scope of the application of derivative actions has been extended and it is expected that individual shareholders will be able to raise proceedings to protect the interests of the company and themselves more readily. Further analysis of the regime suggests that these objectives do not seem to be met. This is partly because of the "flawed nature of the reforms themselves"<sup>93</sup> and partly on account of the way that the Courts have interpreted the criteria to be met in bringing such a claim. Moreover, other mechanisms provide strong protections for minority shareholders. The "unfair prejudice" mechanism offers a wide range of remedies for shareholder, whilst the market for corporate control also plays a significant role in disciplining corporate management. As such, the role of derivative actions in protecting shareholders from managerial misconduct remains the same as it was under common law, despite its substantial revision.

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92 Directive 2004/25/EC[2004] OJ L 142/12)

93 A.Keay, J. Loughrey, n53 at p177.



# **Religious Hate Speech Regulation: Counteracting Inequality or Counterproductive?**

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## Abstract

*Religion and the freedom of expression have a long and acrimonious relationship. In recent years the competing claims of religion and freedom of expression have led numerous legal systems to consider the criminalisation of religiously offensive expression. The question whether religious hate speech should be expressly criminalised has been increasingly answered in the affirmative.*

*The purpose of this paper is to consider the desirability of legal prohibitions on religious hate speech, and, in particular, whether such prohibitions, contrary to their purported aims, actually damage social cohesion. The paper falls into three Parts. Part I places the topic in its theoretical context, sketching the philosophical foundations upon which its conclusions will rest. Part II critically appraises the jurisprudence of the European Court of Human Rights in supervising legislative measures adopted by states. Part III considers the UK Racial and Religious Hatred Act 2006, contrasting it with the Australian (Victorian) Racial and Religious Tolerance Act 2001. The overall tenor of this paper will suggest that legislation prohibiting religious hate speech legislation is, in principle and in practice, undesirable.*

## Introduction

Since the first sustained writings in English on the extent of free speech, whether in Milton's 'Areopagitica',<sup>1</sup> Locke's 'A Letter Concerning Toleration'<sup>2</sup> or Mill's 'On Liberty',<sup>3</sup> religion has been a central and controversial topic.<sup>4</sup> While acknowledging that many other types of speech have had a troubled relationship with the principle of free expression,<sup>5</sup> this paper will focus on religious speech, a subject which has witnessed a proliferation of legislation and litigation over the past two decades. Contemporary controversies concerning the relative claims of freedom of expression and religion have brought the issue to the fore, with the publishing of crude cartoons of the prophet Mohammed under the inflammatory headline 'Mohammed Ansigt'<sup>6</sup> by the Danish Newspaper *Jyllands-Posten*,<sup>7</sup> the trial of Dutch MP Geert Wilders for anti-Muslim comments (including comparing the Koran to *Mein Kampf*),<sup>8</sup> and the infamous actions of US pastor Terry Jones, whose threats to burn the Koran sparked a global outcry which many feared had the potential to threaten world peace.<sup>9</sup> In modern plural societies, the right to freedom of expression operates as a central tenet of the democratic process and is codified in numerous domestic and transnational human rights instruments.<sup>10</sup> Nevertheless, freedom of expression is not an unlimited right and debates about how far acceptable limitations may be justified remain the subject of much disagreement amongst academics.<sup>11</sup> In a religious context, this leaves

1 John Milton, *Areopagitica* (Harlan Davidson 1951)

2 John Locke, *A Letter Concerning Toleration* (Basil Blackwell 1946)

3 John S Mill, *On Liberty* (Penguin 1985)

4 Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 289

5 For example pornographic material; see Catherine McKinnon, *Only Words* (Harvard UP 1993); James Weinstein, *Hate Speech, Pornography and the Radical Attack on the Free Speech Doctrine* (Westview Press 1999); see also Andrea Dworkin, *Men Possessing Women* (Women's Press Ltd 1981); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996), 214-226

6 'The faces of Mohammed'

7 Flemming Rose, 'Mohammed Ansigt' *Jylland-Posten* (Aarhus, 30 September 2005)

8 Aaron Gray-Block, 'Dutch Court Rejects Wilder's Trial Plea' *Reuters* (30 March 2011) <<http://nz.news.yahoo.com/a/-/world/9104471/dutch-court-rejects-wilders-trial-plea/>> accessed 6/4/2011

9 Janet Daley, 'US nutter plans to burn copies of the Koran: can one idiot really 'threaten world peace'? *The Telegraph* (London, 9 September 2010) <<http://blogs.telegraph.co.uk/news/janetdaley/100052970/us-nutter-plans-to-burn-copies-of-the-koran-can-one-idiot-really-threaten-world-peace/>> accessed 20/11/2010

10 Notably: The First Amendment to the United States Constitution, Section 10 HRA, Article 9 United Nations Universal Declaration on Human Rights, Article 10 ECHR & Article 19 International Covenant on Civil and Political Rights

11 See Eric Barendt, *Freedom of Speech* (2 edn, OUP 2005); Titia Loenen & Jenny Goldschmidt (eds), *Religious Pluralism and Human Rights* (Intersentia 2007)



us with the underlying normative question which this paper will seek to explore: is it appropriate to limit freedom of expression in order to protect religious sensibilities from criticism and offence? If so, how far is this consistent with a strong commitment to the importance of free speech?<sup>12</sup>

Part I will begin by placing this question in a theoretical context, sketching the philosophical foundations upon which this paper will rest many of its conclusions. Adopting an anti-prohibitionist approach, the central argument expounded here will be that religious hate speech prohibitions, purportedly aimed at facilitating minority viewpoints and encouraging social cohesion, are not only ineffective, but counterproductive. Part II will critically consider the jurisprudence of the European Court of Human Rights (“ECtHR”) in supervising legislative measures adopted by states. The discussion will conclude by suggesting that the weak case law of the ECtHRs on religiously offensive speech threatens not only Article 10 rights, but also the Court’s credibility as a supranational arbiter of rights. Finally, Part III will consider the UK Racial and Religious Hatred Act 2006 (“RRHA”), highlighting it as a tightly drafted, if unnecessary, example of hate speech legislation. In support of this conclusion, the author will contrast the broadly constructed Australian (Victorian) Racial and Religious Tolerance Act 2001 (“VRRTA”), pointing to its potentially dangerous implications for social cohesion and freedom of expression. Notwithstanding this positive comparison, the section will conclude by aligning itself with the foregoing discussion on hate speech regulation, suggesting that the RRHA simply cannot avoid the discriminatory tendencies of hate speech prohibitions, which ultimately make it counterproductive.

## **Part I: Free Speech Theory – An Anti-Prohibitionist Perspective**

### **Introduction**

Part I will be brief, due to the interplay between its contents and the remaining Parts. While it is clearly impossible to treat the complex questions arising from speech theory in full, it is the goal of this Part to sketch the analytical tools which will be employed in examining the soundness of legal responses to religiously offensive speech. The thrust of the approach taken here will not be to adopt any existing free speech theory; instead, it will develop a progressive anti-prohibitionist approach, synthesising different aspects of both viewpoint absolutism and democratic legitimacy. After outlining both theories under sections 1.2 and 1.3, this Part will proceed, under section 1.4, to combine the two theories, disposing of the core criticism of these positions presented by prohibitionists. The ultimate aim of this exercise will be to demonstrate the complementary nature of both theories and exhibit how they may be combined in a progressive anti-prohibitionist theory which, for the purposes of simplicity, will be referred to as “democratic absolutism”.

### **Democratic Legitimacy**

The argument for democratic legitimacy recognises the inherent value of speech to the maintenance of democracy, holding that each individual must have the potential to influence the outcome of public discourse through ideas and arguments.<sup>13</sup> The removal of this right is, in turn, a removal of the right of society to impose its laws on that individual. As Dworkin cogently argues, it ‘may be near overwhelming to make exceptions to that principle to declare that people have no right to pour the filth of pornography or race-hatred into the culture in which we all must live. But we cannot do that without forfeiting our moral title to force such people to bow to the collective judgements that do make their way onto the statute book’.<sup>14</sup>

<sup>12</sup> Ivan Hare, ‘Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 300

<sup>13</sup> Ian Cram, ‘The Danish Cartoons, Offensive Expression, and Democratic Legitimacy’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 328; see also Robert Post, ‘Hate Speech’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009)

<sup>14</sup> Ronald Dworkin, ‘Foreward’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), vii



## Viewpoint Absolutism

Viewpoint Absolutism is defined both positively and negatively:

*'Under the positive definition... (i) protection of speech or assembly that (ii) expresses any ideas, including those deemed to be, in themselves, iniquitous or dangerous, including racist, sexist, homophobic, anti-religious, extremist religious, and other such forms of speech deemed to be intolerant. Under the negative definition... (i) rejection of prohibitions on speech or assembly that are (ii) imposed solely because the state deems some ideas in themselves to be iniquitous or dangerous, including those same types of speech.'*<sup>15</sup>

For the purposes of this paper, the positive definition lends itself more effectively to an understanding of the ECtHR's approach<sup>16</sup> and the negative definition to a discussion of legislative measures.<sup>17</sup> Ultimately, viewpoint absolutism is concerned with the fact that 'at their very heart, hate speech bans, despite their task of strengthening equality, tolerance or democratic citizenship, do much to undermine those values',<sup>18</sup> tacitly promoting discrimination by protecting some groups over others. This criticism reveals the inherently counterproductive nature of hate speech prohibitions and operates as a central theme throughout this paper. In limiting the position adopted here, it should be noted that 'the guarantee of free speech does not embrace 'profane, indecent, or abusive remarks directed to the person of the hearer' that are likely to provoke violence and disturb the peace.'<sup>19</sup>

## Prohibitionist Criticism

Those adopting a prohibitionist stance - Communitarians for example<sup>20</sup> - argue that restraints on 'offensive and racist expression can be cast and defended as the product of majoritarian rule-making that reflect prevailing norms such as tolerance and equal worth... and are enforced for the good of the whole community'.<sup>21</sup> Communication theory also suggests that 'repeated use of racist expressions like "nigger" and "beaner" constructs a social reality of intolerance that translates to unequal treatment'.<sup>22</sup> In a similar regard, it has been argued that offensive speech 'undermines the culture of mutual respect necessary for effective expression and fair consideration of diverse points of view'.<sup>23</sup> However, applying a viewpoint absolutist standard, it is argued that such a causal link has never been proven.<sup>24</sup> While the link may be superficially appealing, prohibitions often have quite the opposite effect in tacitly promoting discrimination, silencing fringe viewpoints and reinforcing dominant social narratives, as will become clear throughout this paper.

In relation to democratic legitimacy, the words of Robert Post ring most resonantly: 'the cleansing of public debate that results [from hate speech regulation] may please the squeamish but only at a cost to public discourse as the norms of a particular section of society are privileged'.<sup>25</sup> If, as the viewpoint absolutist model

15 Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) MLR 543, 546

16 Discussed below, II

17 Discussed below, III

18 Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) MLR 543, 545

19 James Weinstein, 'Extreme Speech, Public Order and Democracy: Lessons from The Masses' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 35

20 Mari Matsuda, Charles Lawrence, Richard Delgado & Kimberly Crenshaw (eds), *Words that wound: critical race theory, assaultive speech and the first amendment boulder* (Westview Press 1993)

21 Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 329

22 Clay Calvert, 'Hate Speech and Its Harms: A Communication Theory Perspective' (1997) 47(1) Journal of Communication 4, 12

23 David Brink, 'Millian Principles, Freedom of Expression, and Hate Speech' (2001) 7 Legal Theory 119, 141

24 Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) MLR 543, 577; the debate surrounding a causal link is theoretically analogous with the discussion surrounding a supposed causal link between pornography and female subjugation as argued by Catherine McKinnon, *Women's lives - men's laws* (HarvardUP 2005); cf Nadine Strossen, *Defending pornography: free speech, sex and the fight for women's rights* (Abacus 1995); Wendy McElroy, *XXX: A woman's right to pornography* (St Martin's Press Inc 1997), chapters 3 & 4

25 Robert Post 'The constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v





suggests, this cost to the public discourse is not genuinely offset by the benefits of hate speech prohibitions, this type of legislation reveals itself as not only discriminatory, but also contrary to the notion of democratic legitimacy. This exhibits how viewpoint absolutism may augment the argument for democratic legitimacy, while still benefitting from the compelling justification it offers for avoiding speech prohibitions, namely the fair functioning of democracy. Thus, democratic absolutism reveals itself as a coherent anti-prohibitionist theory.

## II: The European Court of Human Rights and Religiously Offensive Expression

### Introduction

Over the past two decades, ‘challenges to restrictions on free speech in the name of religion have formed a small but regular and controversial part of the jurisprudence of the ECtHRs.’<sup>26</sup> Despite continuity in the flow of cases brought before the Court, it is disappointing that the Court has failed to construct a coherent approach to resolving these questions. The ECtHR’s approach to hate speech regulation can be broken down into three broad categories: laws prohibiting blasphemy or offence; laws prohibiting defamation of religion; and laws prohibiting hate speech.<sup>27</sup> As Leigh accurately observes, ‘in principle blasphemy protects religious ideas per se whereas religious insult and religious hatred protect the persons holding religious beliefs.’<sup>28</sup> This Part will proceed by briefly outlining the framework of rights within which the ECtHR’s operates when considering hate speech prohibitions under section 2.2. It will move on to consider each strand of case law separately under headings 2.3-2.5. Criticism of the Court’s approach will form the main body under sections 2.6-2.8, focusing on the Court’s inadequate standard of review.<sup>29</sup> In contrasting the Court’s jurisprudence on blasphemy regulation with its approach to laws prohibiting defamation of religions, it will be argued that inconsistencies and deficiencies in the Court’s jurisprudence have a chilling effect on expression, which disproportionately disadvantages minority religious groups. The effect of this malaise is to undermine the protection of Article 10 and the Court’s credibility as a supranational arbiter of rights.<sup>30</sup>

### The Framework of Rights

Questions on the legality of religiously offensive speech are determined under Article 10 of the European Convention on Human Rights: the right to freedom of expression. Article 10 is not an absolute right and restrictions or infringements upon it may be justified under article 10(2). The Court’s jurisprudence on Article 10(2), as Ian Leigh accurately summarises, has produced a sophisticated series of questions which need to be answered in order to justify a limitation:

*‘The state’s actions will be justified only if the limitation has a clear legal basis (is ‘prescribed by law’), is directed towards one of the specified societal objectives (‘a legitimate aim’) and is proportionate to that aim and meets a pressing social need (the Court’s tests under the ‘necessary in a democratic society’*

Falwell’ (1990) 103 HarvardLRev 605, 632

26 Ian Leigh, ‘Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack’ 17(1) Res Publica 55, 55

27 Venice Commission, ‘Report on the relationship between freedom of expression and freedom of religion: The issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred’ (Study 406/2006, 17–18 October 2008)

28 Ian Leigh, ‘Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack’ 17(1) Res Publica 55, 58

29 A similarly inadequate standard of review can be seen in the Court’s jurisprudence on the wearing of religious symbols; *Leyla Şahin v Turkey* (2007) 44 EHRR 5, Dissenting Opinion of Judge Tulkens, 140; *Dogru v France* (2009) 49 EHRR 8, 77; See also, Nicholas Gibson, ‘Faith in the Courts Religious Dress and Human Rights’ (2007) 66(3) CLJ 657, 689

30 Stefan Sottiaux ‘Leroy v France: apology of terrorism and the malaise of the European Court of Human Rights’ free speech jurisprudence’ (2009) 3 European Human Rights LRev 415, 415



requirement).<sup>31</sup>

While this may appear an effective mechanism for protecting expression in the field of religious offence; particularly when taken in conjunction with the ECtHR's repeated confirmation that Article 10 protection extends to even those ideas 'that shock, concern or offend the State or any sector of the population',<sup>32</sup> it is surprising that 'looking at the case law of the ECtHR regarding the protection of religious feelings, it emerges that the ECtHR has created a content-based exemption to freedom of expression.'<sup>33</sup> Rather than subjecting the assertions of the state to a high standard of review under the Article 10(2) mechanism, 'in respect of expression that touches upon religious subjects, freedom of expression has proved something of a chimera as the Strasbourg Court (though sometimes opposed by the Commission) has readily backed away from interfering with national authorities' interference with expression'.<sup>34</sup> Thus, the Court's approach fails to supervise prohibitions on religiously offensive speech, undermining the protection of Article 10.<sup>35</sup> The effect of this is to 'permit the censoring of unpopular or controversial expression, thereby preventing orthodoxies being held up to critical examination',<sup>36</sup> the antithesis to the purported purpose of regulating offensive speech.<sup>37</sup>

## Blasphemy

Blasphemy laws are, for many, 'anachronistic survivors'<sup>38</sup> of a bygone age. However, for the ECtHR they are valid instruments for the protection of religious feeling and have repeatedly been held consistent with the rights laid down in the ECHR. Nevertheless, recent dissenting opinions may encourage a departure from the established case law.

The seminal case of *Otto-Preminger Institute v Austria*<sup>39</sup> involved the seizure and forfeiture of a satirical religious film - "*Das Liebeskonzil*" - by the Austrian authorities. 'The play was presented as a story within the story of Panizza's trial'<sup>40</sup> and involved numerous religiously offensive scenes, such as the portrayal of 'the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the devil'.<sup>41</sup> In assessing the claims of the state, 'of greatest weight... was the Court's view that the interference... was justified in order to protect the rights of others, "for the peaceful enjoyment of the freedom of religion guaranteed by Article 9 of the Convention"'.<sup>42</sup> However, the Court's emphasis on Article 9 is misleading: the Convention does not, in terms, guarantee a right to protection of religious feelings. Moreover, this right cannot be derived from the right to freedom of religion, which in fact

31 Ian Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' 17(1) *Res Publica* 55, 56

32 *Handyside v United Kingdom* (1976) 1 EHRR 737, para49; *Sunday Times v United Kingdom* (1979) 2 EHRR 245, paras59&65; *Barthold v Germany* (1985) 7 EHRR 383, para55; *Lingens v Austria* (1986) 8 EHRR 407, para41; *Muller v Switzerland* (1988) 13 EHRR 212, para33; *Otto-Preminger Institute v Austria* (1994) 19 EHRR 34, para49

33 Niraj Nathwani, 'Religious cartoons and human rights - a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad' (2008) 9 *European Human Rights LRev* 488, 495

34 Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 315

35 Discussed below, 2.6

36 Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 317

37 Discussed below 2.7

38 Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 301

39 *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34

40 *ibid*, para66

41 *ibid*, para22

42 Kathleen Kavanaugh, 'Policing the margins: rights protection and the European Court of Human Rights' (2006) 4 *European Human Rights LRev* 422, 433



'includes a right to express views critical of the religious opinions of others'.<sup>43</sup> Thus, the court relied upon an illusory rights clash with Article 9 in finding in favour of the State.<sup>44</sup> The correct approach would have been to consider the infringement through the Article 10(2) gateway.

The conclusion in *Otto*<sup>45</sup> was followed by the ECtHR's in both *Wingrove v UK*<sup>46</sup> and the more recent case of *I.A. v Turkey*.<sup>47</sup> In *I.A.*, the court narrowly upheld the conviction of the author of a novel containing abusive attacks on Muhammad. Nevertheless, the Court placed less emphasis on Article 9,<sup>48</sup> instead referring to the duty under Article 10(2) 'to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory'.<sup>49</sup> However, after identifying the correct mechanism, the Court failed to deploy the test under Article 10(2) with sufficient intensity.<sup>50</sup>

In contrast to the approach of the majority in *I.A.*, the powerful dissents of Judges Costa, Cabral Barreto and Jungwiert argued that society 'is not a theocratic one',<sup>51</sup> noting the chilling effect of a criminal conviction<sup>52</sup> and calling on the Court to 'revisit the *Otto*-Preminger and *Wingrove* judgements'.<sup>53</sup> As raised at the outset, these opinions may be indicative of a move away from the Court's previous jurisprudence. Indeed, some commentators have argued that the Court's more recent case law on protection of religious feelings would seem to indicate such a change.<sup>54</sup> However, this strand of case law can be distinguished, as it applies a completely different standard of review, based on the Court's consideration of the nature of the speech.<sup>55</sup> Thus, it remains open to the Court to retire to the shade of the margin of appreciation, where it finds the speech not to be journalistic or in the public interest.<sup>56</sup> The problem with this is that the Court's instrumental approach to assigning value to different kinds of speech is grossly under-protective, undermining the supposed protection of offensive speech offered by Article 10. This point is discussed fully in Section 2.8.

## Defamation of Religion

The case law on defamation of religion stands in stark contrast to that on the law of blasphemy. In these types of cases, the Court has adopted a much narrower margin of appreciation.

In the case of *Giniewski v France*,<sup>57</sup> the applicant published an article which criticised a papal encyclical. The article in question suggested that the particular theological doctrine, associated with the Catholic Church, had contributed to anti-Semitism and the resultant holocaust. In arriving at its decision, the Court placed a particular onus on the importance of the debate to which Giniewski had contributed, referring to its 'indisputable public interest in a democratic society'.<sup>58</sup> The Court thus differentiated the case from those dis-

43 *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 Joint Dissenting Opinion, para6

44 See Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26(4) Netherlands Quarterly of Human Rights 517, 534-536

45 *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34

46 *Wingrove v UK* (1997) 24 EHRR 1

47 *I.A. v Turkey* (2007) 45 EHRR 30

48 see Ian Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' 17(1) Res Publica 55

49 *Wingrove v UK* (1997) 24 EHRR 1

50 Discussed below, 2.6-2.8

51 *I.A. v Turkey* (2007) 45 EHRR 30 dissenting opinion, para5

52 *ibid*, para6

53 *ibid*, para8

54 Peter Cumper & Tom Lewis, 'Last rites and human rights: funeral pyres and religious freedom in the United Kingdom' (2010) 12 Ecclesiastical Law Journal 131, 146

55 See *Lingens v Austria* (1986) 8 EHRR 407

56 See Andrew Geddis 'You can't say "God" on the radio: freedom of expression, religious advertising and the broadcast media after *Murphy v Ireland*.' (2004) 2 European Human Rights LRev 181; this point is illustrated in the discussion of the Court's approach to defamation of religion under Section 2.4

57 *Giniewski v France* (2007) 45 EHRR 23

58 *ibid*, para51



cussed above, on the grounds that 'the article was not gratuitously offensive or insulting, [as it] did not incite disrespect or hatred'.<sup>59</sup> Furthermore, the Court considered the potentially chilling effect of criminal sanctions on free speech in assessing the proportionality of the measures taken.<sup>60</sup>

In the case of *Klein v Slovakia*,<sup>61</sup> which considered *Giniewski*, the Court again found a violation of Article 10. In this case, the applicant had published a disparaging article, criticising a senior member of the Roman Catholic Church in Slovakia. In its decision, the Court relied on its characterisation of the article as a personal attack on the bishop, rather than a more general attack on Roman Catholics. The fact that Roman Catholics may have been affected by the personal attack was not relevant.

### Incitement to Hatred

The case law on incitement to hatred, like that on blasphemy, fails properly to consider speech under Article 10(2). Instead, in the case of *Norwood v UK*,<sup>62</sup> the Court invoked Article 17 in declaring the application inadmissible. The case concerned the display of a sign which read 'Islam out of Britain,' with a star and crescent covered by a prohibition sign, all of which was set against a picture of the 9/11 disaster. In invoking Article 17 in these types of cases, the Court bypasses Article 10(2), requiring no justification for the infringement. Thus, the actions of the state are left completely unchecked and a vague category of unprotected speech is established, with the Court offering little guidance on what speech will or will not fall under this ambiguous standard.

### Margin of Avoidance

The case law on blasphemy emanates from an improper application of the framework of rights, relying on an illusory protection invented under Article 9. However, putting this concern aside, even in the more recent cases of *Wingrove*<sup>63</sup> and *I.A.*,<sup>64</sup> which admittedly place less emphasis on Article 9, the Court still fails to provide a satisfactory level of scrutiny, employing rhetoric rather than reason.<sup>65</sup> The effect of this is twofold: first, it undermines the protection of Article 10, particularly in relation to minority groups; and secondly, it undermines the Court's credibility as a supranational arbiter of rights.

The fundamental problem with all of these cases is that the ECtHRs provides 'too much distillation and not enough dissection'.<sup>66</sup> As McGonagle accurately argues, the Court refers in an almost sloganistic manner to the values enshrined in the convention, subsequently failing to apply them to the facts of the case.<sup>67</sup> For example, in reaching its decision in *I.A.*, the Court reemphasises the importance of Article 10 and the right it offers to impart offensive or disturbing ideas,<sup>68</sup> noting the fact that the interference must correspond with a pressing social need and be proportionate to the aim pursued.<sup>69</sup> Yet the Court subsequently fails to provide any serious analysis of the necessity of the measure, instead asserting that the Turkish Government had not overstepped its margin of appreciation, and ultimately offering only one paragraph justifying its decision.<sup>70</sup>

59 *ibid*, para52

60 *ibid*, para55

61 App no 72208/01, (ECtHR, October 31 2006)

62 *Norwood v UK*, (2004) 40 EHRR 11

63 *Wingrove* (n46)

64 *I.A. v Turkey* (2007) 45 EHRR 30

65 See *I.A. v Turkey* (2007) 45 EHRR 30 dissenting opinions *paras* 1-2

66 Frederick Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982), 85

67 Tarlach McGonagle, 'An Ode to Contextualisation: *I.A. v Turkey*' (2010) 1 Irish Human Rights LRev 237, 245

68 *I.A. v Turkey* (2007) 45 EHRR 30, para29

69 *ibid*, para26

70 *ibid*, para 29





The joint dissenting opinion in this 4-3 decision vividly illustrates this point with reference to the right to offend enshrined in *Handyside*.<sup>71</sup> 'We consider that these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court.'<sup>72</sup> In applying the notion of "gratuitous offence" the court also comes dangerously close to allowing individuals to be judged by the prejudices of others, relying not on the intention of the speaker, but on the subjective reaction of the listener. This is an extremely dangerous development, given that stifling speech on account of offence to religious believers threatens to undermine progressive social change because religious doctrine is by its very nature conservative and uninterested in social progress. Finally, it is submitted that these cases are, in any event, considered under the wrong standard of review. This is because there is uniformity of opinion about respect for pluralism, tolerance and the freedom of others which these laws offend, as well as the fact that the wide margin of appreciation granted relies on a deficient characterisation of religious speech as "non-political," as will be argued under section 2.8.

While O'Donnell rightly states that the Margin of Appreciation refers to the 'latitude allowed to the member states in their observance of the Convention accounting for their diversity and best placement ascertain local necessity for exceptions to qualified Convention rights,'<sup>73</sup> it is similarly true that 'the margin of appreciation doctrine must not be allowed to become a smoke screen behind which States and the European Court can hide, instead of facing up to complex, divisive issues.'<sup>74</sup> In relation to religiously offensive speech, the Court fails to offer guidance on where the limits of the margin may lie, merely stating that: 'the margin of appreciation is "not unlimited" in *Wingrove*... the Court provides no explanation, either in *Otto-Preminger-Institut* or in *Wingrove*, of the kinds of limits that its judicial supervision might require... It thus left utterly undefined any sense of a clear limit to that concept as a constraint on speech.'<sup>75</sup> The effect of this omission is to provide no sufficient basis to the individual upon which he may regulate his conduct. Thus, it is submitted that the ECtHR's approach compels 'people to silence themselves "to 'chill' speech," not only because some speech incurs coerced penalties, but also because they simply cannot tell which speech is and is not lawful and must protect themselves through silence.'<sup>76</sup>

In opposition it may be argued that the Court has begun taking into consideration the chilling effect of speech regulation, as exemplified in the cases of *Giniewski*<sup>77</sup> and *Aydin Tatlav v. Turkey*.<sup>78</sup> This may appear to be a step in the right direction; however, it is not clear that the Court will continue to apply such a consideration in cases where it deems the speech to be of little value.<sup>79</sup> For example, the Court failed to apply any such considerations in the cases on blasphemy or in *Norwood*.<sup>80</sup>

Thus it is concluded that, while the Court maintains its current position on the regulation of religiously offensive speech, European level supervision will continue to be at worst absent and at best inconsistent, undermining the credibility of the ECtHR as a supranational arbiter of rights.

71 *Handyside v United Kingdom* (1976) 1 EHRR 737, para49

72 *I.A. v Turkey* (2007) 45 EHRR 30 dissenting, para1

73 Thomas O'Donnell 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 HRQ 474, 475

74 Tarlach McGonagle, 'An Ode to Contextualisation: *I.A. v Turkey*' (2010) 1 Irish Human Rights LRev 237, 251

75 Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) MLR 543, 559; The court also fails to elucidate any further directions in *I.A.* (n47)

76 Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) MLR 543, 564

77 *Giniewski v France* (2007) 45 EHRR 23, para55

78 *Aydin Tatlav v Turkey* app no 50692/99, (ECtHR, 2 mai 2006), para30 (only available in French)

79 Expanded below, 2.8

80 *Norwood v UK*, (2004) 40 EHRR 11





## Margin & Minorities

As Nathanwi accurately states, 'the enabling of the expression of views which are not dominant is the very core purpose of Art.10 ECHR.'<sup>81</sup> Therefore, it is extremely concerning that the Court's current approach has repeatedly compromised minority viewpoints, allowing dominant social groups to regulate content, selectively disavowing certain ideas and removing them from public discourse altogether.<sup>82</sup> In all three blasphemy cases discussed above, the law protected the dominant majority, Catholics in *Otto-Preminger*,<sup>83</sup> Christians in *Wingrove* and Muslims in *IA*. Specifically in the case of *IA*, Cram accurately argues that 'the censorious views of the majority of Turkish society were indulged and an alternative, minority, and non-Islamic conception of the moral life stifled for fear of upsetting the prevailing religious sentiments of the community'.<sup>84</sup> This reveals the capacity for regulation of speech to restrict, rather than facilitate, minority access to public discourse, placing a 'clumsy instrument' in the hands of the state, with the potential to silence what ought not to be silenced, and the potential to be used for the underhand purposes of opportunist politicians.<sup>85</sup>

On the other side of the coin, *allowing* offensive speech may in fact *encourage* minority participation in public discourse, Cram convincingly illustrates this point with reference to the Danish cartoons scandal: 'public discourse in Europe was inundated by a range of Muslim perspectives and responses to the cartoons. Indeed, far from alienating Muslims from the state, or silencing them in public discourse, it could be argued that these participants in public debate demonstrated a healthy commitment to the idea that they could shape the contours of public policy'.<sup>86</sup> Thus it is even more concerning that, had 'the Danish prosecutors acted over the cartoons of the Prophet published in *Jyllens-Posten* in 2005, the convictions could have been justified under Article 9'.<sup>87</sup>

If freedom of expression is to be provided to those minorities most in need of the protection it can offer, the Court must conduct a much more rigorous analysis under Article 10(2), rather than simply referring to the margin of appreciation and abdicating responsibility for supervision of state action. Such an approach 'is hardly apt to foster public faith in its ability to mediate between the interests of individuals and society'.<sup>88</sup>

## Valuing Speech Instrumentally – "Gratuitous Offence"

At the heart of the ECtHR's case law on religiously offensive speech is the distinction between speech which is deemed valuable and speech which is not. Comparing the cases of *Otto Wingrove* and *IA* with those of *Giniewski* and *Klein*, it becomes clear that the defining factor the Court employs in valuing religiously offensive expression is the type of material in question, protecting journalistic speech which is deemed to be in the public interest, but allowing restrictions on satirical literature, or purely religious speech.<sup>89</sup> This approach cannot be acceptable, primarily because at the heart of this distinction lies a fallacy: namely that re-

<sup>81</sup> Niraj Nathwani, 'Religious cartoons and human rights - a critical legal analysis of the case law of the European Court of Human Rights on the protection of religious feelings and its implications in the Danish affair concerning cartoons of the Prophet Muhammad' (2008) 9 European Human Rights LRev 488, 490

<sup>82</sup> Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 315-317

<sup>83</sup> Despite making up 87% of the population of South-Tyrol

<sup>84</sup> Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 325

<sup>85</sup> Peter Jones 'Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue? 17(1) Res Publica 75, 89; This point is discussed in relation to the RRHA, see below 3.7-3.8

<sup>86</sup> Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 330

<sup>87</sup> Ian Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' 17(1) Res Publica 55, 61

<sup>88</sup> Nicholas Gibson, 'Faith in the Courts Religious Dress and Human Rights' (2007) 66(3) CLJ 657, 683

<sup>89</sup> *Murphy v Ireland* (2003) 38 EHRR 212



religious speech is invariably “non-political”. Cram identifies this point in relation to the case of *I.A.*, arguing that with regards Islam, when one accounts for its theocratic ambitions, speech relating to it is at least partly of a political, rather than of a purely religious, nature.<sup>90</sup> Furthermore, ‘in a broader context, participation in democracy may include forms of religious expression. Contributing to the social narrative is what develops political thought and it is difficult, if not arbitrary to separate differing types of speech as either political or not political’.<sup>91</sup> Thus, it is submitted here that the Court should not apply such a light touch review to matters concerning religious speech based on this artificial distinction.

The Court characterises the distinction through the notion of “gratuitous offensive”, gratuitous in the sense that the speech in question ‘does not contribute to any form of public debate capable of furthering progress in human affairs.’<sup>92</sup> The Court’s approach to valuing speech in this manner reveals ‘an underlying presupposition that to be valuable free speech has to be socially useful’.<sup>93</sup> Leigh convincingly argues that the ultimate result of this approach could be the loss of protection for religious speech altogether, given the fact that it is by its very nature assured of its own truth and often ‘uninterested in social progress’.<sup>94</sup> While this is an astute point and is significant to the conclusion of this paper, here we are concerned with a more fundamental point: namely that the social utility approach adopted by the Court is a deficient mechanism for valuing speech. As discussed in Part I, in order for fair democracy to exist it requires a “democratic background”: ‘it requires each citizen to have not only a vote but also a voice.’<sup>95</sup> Barendt develops the dangers of the loss of legitimacy in this context, arguing that ‘[denying] those holding extreme views the freedom to contribute to public discourse... [makes] it more difficult to justify to them the application of non-discrimination laws.’<sup>96</sup> Thus, we see that a robust defence of free speech is necessary in a democracy. Cram accurately summarises these issues in relation to the cases discussed above: ‘the Court’s failure to address the problem of offensive speech within a framework of arguments about the democratic legitimacy of regulation constitutes a serious omission’.<sup>97</sup> If the Court had undertaken such an analysis, ‘it is difficult to see how any of these restrictions could have been sustained.’<sup>98</sup> The Court’s failure to engage in a discussion of this kind, therefore, threatens significantly to inhibit the public discourse essential to the fair functioning of democracy, a reality which is diametrically opposed to the requirement under Article 10(2) that restrictions must be ‘necessary in a democratic society’.

As discussed in Part I,<sup>99</sup> opponents of this position argue that it is necessary to regulate the speech of some in order to facilitate the speech of others.<sup>100</sup> Supplementing the above arguments with those made under the democratic absolutist model, it is submitted that this analysis relies on a ‘causal assumption that hate speech deters participation in public discourse, yet its proponents have never undertaken or cited serious empirical research to show that, in longstanding, stable, and prosperous democracies any such causal relations exist’.<sup>101</sup> Indeed, as argued in relation to the Danish Cartoons scandal, hate speech may in fact spur participation in public discourse. Moreover, the facilitation of minority speech was clearly not a point at stake in any of the decisions which upheld prosecutions of religiously offensive speech. Conversely, all of these decisions

90 Ian Cram, ‘The Danish Cartoons, Offensive Expression, and Democratic Legitimacy’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 323

91 *Lindon, Otchakovsky-Laurens and July v France* (2007) 46 EHRR 35

92 *Handyside v United Kingdom* (1976) 1 EHRR 737

93 Ian Leigh, ‘Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack’ 17(1) *Res Publica* 55, 71

94 *ibid*

95 Ronald Dworkin, ‘Foreward’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), vii; See above, 1.3

96 Eric Barendt, ‘Religious Hatred Laws: Protecting Groups or Beliefs?’ (2011) 17(1) *Res Publica* 41, 47

97 Ian Cram, ‘The Danish Cartoons, Offensive Expression, and Democratic Legitimacy’ in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 330

98 *ibid*, 330

99 See above, 1.4

100 Mari Matsuda, Charles Lawrence, Richard Delgado & Kimberly Crenshaw (eds), *Words that wound: critical race theory, assaultive speech and the first amendment boulder* (Westview Press 1993)

101 Eric Heinze ‘Wild-West Cowboys *versus* Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Extreme Speech’ in James Weinstein & Ivan Hare (eds), *Extreme Speech and Democracy* (OUP 2009), 198



upheld majority religious positions, undermining the central justifications posed for speech prohibitions.

In a similar vein, some individuals arguing for an instrumental theory of rights consider that 'hate speech regulations can have significant symbolic value by curbing the most extreme expressions of discriminatory attitudes.'<sup>102</sup> Again, this reasoning does not feature in the facts of any of the above cases and it is, in any event, an unrealistic position. As Malik convincingly argues, more extreme forms of hate speech are unlikely to have widespread influence. Instead, she suggests that "normalised" sources of hate speech, such as stereotyping in the main stream media, are much more likely to have a pernicious effect.<sup>103</sup> A much more effective mechanism for combating this pernicious effect would be to encourage 'government social policy and community investment in order genuinely to 'increase capacity within minority groups to respond to "hate speech",<sup>104</sup> rather than blindly relying on counterproductive hate speech legislation.

## Conclusion

The ECtHR's approach to religiously offensive speech is riddled with contradictions and inconsistencies. It is fundamentally flawed in respect of its application of the margin of appreciation and its method of assigning value to speech under the social utility model. It has been argued that the Court should reconsider its approach in this respect, avoiding an artificial distinction between speech which is either "political" or "non-political", "valuable" or "not valuable", and considering the genuine effects of speech prohibitions on those minorities it is supposed to protect. Doing so would allow the Court to avoid the blanket removal of protection for some forms of speech under Article 17 and jettison the notion of "gratuitous offence", instead requiring all states to justify restrictions through a rigorous application of the Article 10(2) criteria.<sup>105</sup> Regardless of the conclusions drawn about the effect of speech prohibitions, excessive recourse to the margin of appreciation alongside the Court's deficient approach to assigning value to speech undermines European level supervision, seriously damaging confidence in the Court's abilities as a transnational arbiter of rights.

## III: The Racial and Religious Hatred Act 2006

### Introduction

The RRHA was the last of four legislative attempts under the Labour Government to introduce a crime of incitement to religious hatred.<sup>106</sup> The Bill took a tumultuous course through parliament, forming the subject of two government defeats in the Commons<sup>107</sup> and the source of intense public debate. It famously drew criticism in its original form from Rowan Atkinson and Stephen Fry,<sup>108</sup> along with the writers' organization English PEN<sup>109</sup> and influential pressure group Liberty.<sup>110</sup> The Bill eventually received royal ascent on the 16<sup>th</sup> February 2006 in a substantially different form to that originally proposed by the Government. This was the result of significant amendments made in the Lords, designed to curtail the Act's implications for freedom of

102 David Brink, 'Millian Principles, Freedom of Expression, and Hate Speech' (2001) 7 *Legal Theory* 119, 141

103 Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17(1) *Res Publica* 21, 39

104 *ibid*

105 See Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26(4) *Netherlands Quarterly of Human Rights* 517

106 Religious Offences Bill in 2001. the Anti-Terrorism, Crime and Security Bill 2001; the Serious Organised Crime and Police Bill November 2004 and (successfully) in the Racial and Religious Hatred Bill, introduced June 2005

107 The second of which was lost by only one vote, with the then prime minister Tony Blair omitting to vote, 'Ministers lose religious bill bid' <[http://news.bbc.co.uk/1/hi/uk\\_politics/4664398.stm](http://news.bbc.co.uk/1/hi/uk_politics/4664398.stm)> accessed 27/1/2011

108 Richard Woods & Abul Taher, 'Blackadder's revenge hits the hate bill', *Times* (London, 9 October 2005) <<http://www.timesonline.co.uk/tol/news/uk/article576449.ece>> accessed 01/4/2011

109 Lisa Appignanesi, 'The latest coverage of the Racial and Religious Hatred Bill' [http://www.englishpen.org/news/\\_1333/](http://www.englishpen.org/news/_1333/) accessed 01/4/2011

110 'Racial and Religious Hatred Act 2006', *Guardian* (London, 19 January 2005) <<http://www.guardian.co.uk/commentisfree/liberty-central/2008/dec/16/racial-religious-hatred-Act>> accessed 31/1/2011;



speech. It is worth noting that the title of the final Act is something of a misnomer, given that it deals solely with religion.

This Part undertakes a detailed analysis of the RRHA, alongside the Victorian Racial and Religious Tolerance Act 2001 (VRRTA). It considers, in turn, the key elements of the offences: Sections 3.1-3.6 respectively; the definition of religion or 'religious groups'; the *actus reus* of the crime - threatening words or conduct;<sup>111</sup> the *mens rea* of the crime - specific intent;<sup>112</sup> the saving for free speech;<sup>113</sup> and finally, the procedural and human rights safeguards available. In analysing each aspect of the legislation, this paper will focus on the impact of the legislation on freedom of expression. In this regard, the author will argue that, while the RRHA has produced an extremely narrow area of liability and has been criticised for doing so,<sup>114</sup> this has resulted in a tightly drafted piece of legislation with relatively little uncertainty in its application. The result of this approach is twofold: one, it reins in the RRHA's potential to chill speech and two, it mitigates the legislation's potential to produce vexatious litigation which may ultimately undermine the purpose of such legislation in creating harmony between religious groups. In arriving at this conclusion, this Part will contrast the VRRTA,<sup>115</sup> citing it as a stark example of the 'collateral damage that can result from hate speech laws that are poorly designed and insufficiently targeted.'<sup>116</sup>

The argument will then turn to conclude on the RRHA itself, considering under Section 3.7 the public order framework in which the RRHA exists. Ultimately it will be argued that, notwithstanding the RRHA's tight drafting, it continues to embody the discriminatory character of hate speech prohibitions. The result of this is a tacit endorsement of discrimination, which threatens the very minorities the RRHA was supposed to appease.<sup>117</sup>

## Defining Religion

What constitutes a religious group, or 'religion', is left substantially undefined by the RRHA.<sup>118</sup> In the absence of such a definition, it is left to the UK courts to define which groups will benefit from the legislation.

In its previous facilitation of the indicia of religion, English courts have tended to continue in the 'Socratic tradition, defining religion with reference to its 'essence' or 'core' characteristics.'<sup>119</sup> In the leading cases of *Barralet v A-G*<sup>120</sup> and *Segerdal*,<sup>121</sup> the definition was 'rooted in theistic conceptions'.<sup>122</sup> This approach has been criticised for being under inclusive, presupposing 'an Islamo-Judaeo-Christian conception of religion'.<sup>123</sup> Notwithstanding this fact, the explanatory notes to the Act set out a non-exhaustive list of religions which include those (such as Buddhism and Rastafarianism) which would fall outside of the courts traditional definition.<sup>124</sup> This inconsistency has led some to suggest that the RRHA 'does not provide a suitable

111 Racial and Religious Hatred Act 2006, s29B

112 *ibid*

113 *ibid*, s29J

114 See Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 MLR 89

115 Establishing the offence of religious vilification under s8

116 Peter Parkinson, 'Religious vilification anti-discrimination laws and religious minorities in Australia: The Freedom to be different' (2007) 81 Alternative LJ 954, 960; Independent MP Russell Savage called the Act 'the worst legislation he had ever seen passed', 'Speaking freely is risky business, rally told' <<http://www.theage.com.au/news/national/speaking-freely-is-risky-business-rally-told/2006/08/08/1154802889839.html>> accessed 02/04/2011

117 Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 310

118 It does, however, state that it includes lack of a belief.

119 Rex Adhar & Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005), 118

120 [1980] 3 All ER 918, 924

121 *R v Registrar General, ex p Segerdal* [1970] 2 QB 697, Denning MR 707

122 Clifford Hall, 'Aggiornamento: Reflections upon the Contemporary Legal Concept of Religion' *Cambrian* 27 LRev 7, 22

123 Julian Rivers 'Religious Liberty as a Collective Right' in Richard O'Dair & Andrew Lewis (eds), *Law and Religion* (OUP 2001), 237

124 Explanatory Notes to the RRHA, para13





basis upon which an individual may regulate his conduct with sufficient clarity'.<sup>125</sup> Strasbourg jurisprudence also offers little guidance, failing to espouse any clear definition of what constitutes a religion under Article 9.<sup>126</sup>

A fuller proof solution may have been, as Norris has argued, to include an exhaustive list of religions, thereby avoiding the potentially chilling effect of any ambiguity. In any event, even if a broader method for defining religion is adopted, as Edge has suggested,<sup>127</sup> it would be unlikely to have any significant impact on prosecutions, due to the procedural and human rights safeguards available,<sup>128</sup> as well as the simple fact that the other elements of the offence constitute an extremely narrow area of liability.<sup>129</sup>

In a similar vein to the RRHA, the VRRTA leaves the definition of religion to the courts. Historically, Australian courts have adopted a more inclusive method of defining religion, preferring a 'family resemblance' approach,<sup>130</sup> including a number of different indicia for religion.<sup>131</sup> This extends the definition beyond a narrow theistic perception of religion, resulting in larger number of groups falling under the VRRTA's protection. When coupled with the broad scope of the offence discussed throughout this Part, the VRRTA represents a potentially vast area of liability. The broad definition, therefore, exacerbates the chilling effect on freedom of expression, growing the basis for vexatious litigation from obscure groups, which could otherwise be avoided by initially not defining them as religions. The potential for this type of unmeritorious litigation is exhibited in the recent case of *Fletcher v Salvation Army*,<sup>132</sup> which involved a Wiccan, a "religion" the UK courts have already refused to acknowledge.<sup>133</sup>

### Threatening Words or Material: *Actus Reus*

Probably the most remarkable part of the definition of the *Actus Reus* under the RRHA is not what it includes, but what it excludes. The active element of the offence is defined under the Act as, 'A person who uses threatening words or behaviour, or displays any written material which is threatening...' <sup>134</sup> This dramatically narrows the ambit of the offence, as Barendt accurately summarises: 'The religious hatred offence is confined to the use of *threatening* words or behaviour, as distinct from the use of threatening, insulting or abusive words or behaviour, all of which may attract a prosecution for incitement to racial hatred.'<sup>135</sup> Given that one of the justifications of the Act was to counteract the discriminatory coverage of the Racial Hatred provisions, which covered Sikhs and Jews, but not Christians or Muslims,<sup>136</sup> it is incongruous that the RRHA diverges in this way.

The question of whether words or behaviour are 'threatening' in the public order context has been deemed a question of fact.<sup>137</sup> While it follows that 'reported decisions on the interpretation of words and behaviour alleged to be threatening... have amounted to no more than examples of the way in which the courts have

125 D Norris, 'Are Laws Proscribing Incitement to Religious Hatred Compatible with Freedom of Speech?' (2008) 1 UCL Human Rights LRev 102, 111

126 Peter Edge, 'Current Problems in Article 9 of the European Convention on Human Rights' [1996] 1 Juridical Review 42, 43

127 Peter Edge, 'Extending Hate Crime to Religion' (2003) 8 JCL 5, 19

128 See below, 3.5

129 Helen Fenwick, 'Civil Liberties and Human Rights' (Routledge-Cavendish 2007), 507

130 Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell Publishers Inc 2001), 27

131 *New Faith*, 154 CLR 120, 136

132 *Fletcher v Salvation Army* [2005] VCAT 1523

133 *R v Williamson* [2005] UKHL 15, [2005] 2 AC 246, [57]

134 s29B(1)

135 Eric Barendt, 'Religious Hatred Laws: Protecting Groups or Beliefs?' (2011) 17(1) Res Publica 41, 43

136 see, *Mandla v Dowell Lee* [1983] 2 AC 548

137 *Director of Public Prosecutions v Clarke* (1991) 94 Cr App R 359, a decision on the POA 1986 s5; based on the approach taken in *Brutus v Cozens* [1973] AC 854, [1972] 2 All ER 1297





applied the approach,<sup>138</sup> it was made clear in *Hammond v DPP*<sup>139</sup> that it is necessary to take Article 9 and 10 of the European Convention of Human Rights into account in dealing with this point.

Notwithstanding the narrow definition of the *actus reus*, the offence could have been narrowed further, given that it does not require a need to show that disorder was in fact caused, and there is no need to show religious hatred is actually stirred up or even that it was likely to be stirred up.<sup>140</sup> However, as discussed below, the requirement of intent significantly mitigates this problem, requiring specific intent to commit the offence and thus avoiding any reliance on the peculiar religious sensibilities of the speaker's audience. Again, while some commentators have criticised this 'decision to confine incitement to religious hatred to threatening speech',<sup>141</sup> viewing it as having 'probably narrowed the new offence to the point of non-existence',<sup>142</sup> this author views the restrictive *Actus Reus* as necessary to protecting freedom of expression, reducing the likelihood that it will catch undeserving speech and avoiding any reliance on the more nebulous concepts of offence or insult.

In contrast to the UK legislation, Section 8(1) VRTTA includes 'serious contempt for, or revulsion or severe ridicule'. Judicial interpretation of this standard has also been set dangerously low, with Morris J understanding the Act to mean 'incit[ing] strong negative passions'.<sup>143</sup> Thus, the VRTTA's net is spread much more widely than the RRHA, catching conduct which may be not only justifiable, but also necessary in a democratic society on issues which people may 'reasonably take opposing views'.<sup>144</sup> The potential for this approach to undermine essential human rights is clear, particularly when one considers that there was no human rights analysis of any kind either in Parliament during the passing of the legislation, or in the cases decided under the VRTTA.<sup>145</sup> As Feenan accurately observes, 'the lack of a human rights infrastructure and jurisprudence in Australia severely hinders adequate balancing of the claimed right to freedom of expression with the rights and responsibilities inherent in the religious vilification laws'.<sup>146</sup> This has significantly contributed to the lack of protection of freedom of expression.<sup>147</sup> However, as discussed in full under section 3.6, this may be in the process of changing following the introduction of the Victorian Charter of Rights, which introduces powers similar to those under s3 and s6 HRA 1998.

### Intention: *Mens Rea*

Intention forms the *mens rea* of the incitement to religious hatred offence. The relevant provision is found at s29B(1) RRHA: 'A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence *if he intends* thereby to stir up religious hatred.'<sup>148</sup> Thus, intention operates as an obstacle to prosecutions under the new Act, requiring courts to 'look into the mind'<sup>149</sup> of the accused, rather than relying on the reaction of third parties. Notably, the Act omits any 'or likely to' notion of intent, in contrast to the offence of stirring up racial hatred.<sup>150</sup> The bill had originally included such a provision; however, it was removed following amendments proposed by the Liberal Democrat peer Lord

138 Anthony Jeremy, Legislative Comment 'Practical implications of the enactment of the Racial and Religious Hatred Act' (2006) 9 Ecclesiastical Law Journal 187, 191

139 *Hammond v DPP* [2004] EWHC 69 (Admin), (2004) 168 JP 601

140 Helen Fenwick, 'Civil Liberties and Human Rights' (Routledge-Cavendish 2007), 505

141 Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 MLR 89, 310

142 *ibid*

143 *Fletcher v Salvation Army* [2005] VCAT 1523

144 Dermot Feenan, 'Religious Vilification Laws, Quelling the Fires of Hatred?' 31(3) Alternative LJ 153, 156

145 *ibid*, 154

146 *ibid*, 155

147 *ibid*, 155

148 *Emphasis added*

149 Anthony Jeremy, Legislative Comment 'Practical implications of the enactment of the Racial and Religious Hatred Act' (2006) 9 Ecclesiastical Law Journal 187, 195

150 POA 1986, s 18(1) b



Lester, who described the original bill as suffering from ‘the twin vices of vagueness and uncertainty and over-breadth and a lack of proportion’.<sup>151</sup> Indeed, the lack of a need to prove intent was a central criticism of the now defunct law of blasphemy, leaving it potentially very broad and inconsistent in its application.<sup>152</sup>

The requirement of specific intent is notoriously difficult to satisfy and some commentators have criticised it thusly: ‘it is easier to circumvent legislation which requires intention because of the evidentiary issues and high standard of proving subjective intention’<sup>153</sup> meaning ‘prosecutors will fear bringing a case’.<sup>154</sup> In the context of the RRHA, Goodall argues that a ‘likely to’ test of intention should have been included,<sup>155</sup> providing that: ‘the offence would be committed if the words, behaviour or material were likely to be seen or heard by any person in whom they were likely to stir up such hatred.’<sup>156</sup> In support of this contention, Goodall argues that an identical test was included in the Racial Hatred Provision 1976<sup>157</sup> and no floodgates were opened.<sup>158</sup> However, prosecution rates are a defective mechanism for assessing the impact of speech prohibitions, as they fail to reflect the chilling effect of this type of legislation. This criticism is bolstered by the broader ambit of religious speech, which dramatically increases the basis on which the offence may be founded, increasing the potential for a “flood” of litigation. Moreover, this author would argue that the requirement of specific intent should be characterised as an essential safeguard, ‘[protecting] innocent expression by focusing on the mental state of the defendant rather than the unpredictable actions of third parties’.<sup>159</sup> This defends the speaker against other people’s often unpredictable religious sensibilities. Vance has argued that this contributes to making the ‘inclusion of intention essential’.<sup>160</sup> Thus, the inclusion of specific intent sharpens the certainty with which individuals may speak and blunts the potential for vexatious litigation. Indeed, the VRRTA is a prime example of the pernicious potential of religious hate speech prohibitions without a requirement of intent.

The VRRTA stands in diametric opposition to the RRHA on the question of intent. Under the VRRTA intent or motive is irrelevant:<sup>161</sup> ‘intention or motive to... engage in conduct which incites hatred, though it may be relevant so far as remedies are concerned, is not a necessary condition of liability.’<sup>162</sup> The lack of a requirement of intent has intensified criticism of the VRRTA. As Blake justifiably asks, ‘how can religious leaders know whether a statement about another religion will be reckoned to be so ill-informed, misconceived, ignorant or otherwise hurtful to adherents of the other faith that it will be regarded as unreasonable?’<sup>163</sup> This ‘penumbra of uncertainty surrounding [the] application’<sup>164</sup> of the VRRTA has led to a proliferation of ‘publicity about unmeritorious vilification claims’<sup>165</sup> which ‘ultimately threatens to undermine the intentions of the Racial and Religious Tolerance Act’,<sup>166</sup> damaging the very social cohesion it was supposed to encourage. As Parkinson accurately argues, whatever the outcome of cases under the Act, the proliferation of litiga-

151 HL Deb 25 October 2005, vol 438, col 1074

152 *Whitehouse v Lemon* [1979] 2 WLR 281, Diplock 635D, Scarman and 635G

153 David Norris, ‘Are Laws Proscribing Incitement to Religious Hatred Compatible with Freedom of Speech?’ (2008) 1 UCL Human Rights LRev 102, 112; A notable difficulty under the United Kingdom’s Race Hate Laws, Anthony Jeremy, ‘Religious Offences’ (2003) 7(33) Ecclesiastical LJ 127, 137

154 Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70 MLR 89, 113

155 As was the case prior to the Lords amendments

156 Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70 MLR 89, 89; paras 5-11, Bill 11 54/1, which would have been inserted as sections 18-23 of the POA

157 POA c64 s18(1)b

158 Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70 MLR 89, 111

159 *ibid*

160 Susannah Vance, ‘The Permissibility of Incitement to Religious Hatred Offences under European Convention Principles’ (2004) 14 Transnat’l L & Contemp Probs 201, 205

161 VRRTA s8(1)

162 *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284, para 23

163 Garth Blake, ‘Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK,’ (2007) 81 Australian Law Journal 386, 404

164 Peter Parkinson, ‘Religious vilification anti-discrimination laws and religious minorities in Australia: The Freedom to be different’ (2007) 81 Alternative LJ 954, 959

165 *ibid*, 960

166 *ibid*



tion will force speakers into self-censorship,<sup>167</sup> particularly those unable to fund a defence, exacerbating the chilling effect of the legislation. Thus, it may be the spectre of such vague legislation, not reflected in prosecution rates, which may prove to have the most damaging effect on freedom of expression, promoting self-censorship and inhibiting debate.<sup>168</sup>

### Free Speech Savings

The fourth amendment made by the Lords and described by its author, Lord Lester of Herne Hill, as 'a unique addition to UK criminal law'<sup>169</sup> introduces a free speech saving into the Act under s29J. The provision itself is extremely broad, specifically excluding behaviour aimed at expressing antipathy towards religion, lowering the protection of believers but also specifically providing a defence for evangelical activities, one of the key concerns of religious groups with the original legislation.<sup>170</sup> It also confines the new offence to words directed at religious adherents as opposed to their beliefs and practices. The result is an extremely narrow area of liability, which appears to reflect the Lord's view that the many other public order offences (discussed below) which already existed provided sufficient protection to religious believers, a central theme of the second reading of the bill in the Lords.<sup>171</sup>

The Victorian legislation also includes a free speech saving of sorts, according to section 11(1) of the VRRTA: '(1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith'. While this initially appears to establish a substantial saving, the protection offered by the clause is undermined by the fact that it operates as a defence. The defence requires the person engaging in the conduct to 'establish' good faith, rather than requiring the prosecution to prove the speech was not in good faith or, as the UK legislation does, excluding certain speech from the ambit of liability all together. Thus, the chilling effect on free speech is likely to continue unperturbed and many critics of the VRRTA have highlighted this fact.<sup>172</sup> When one combines this deficient saving with the low threshold set by the rest of the legislation, it becomes clear that the legislation is extremely poorly equipped to defend valuable and justifiable expression.

### Procedural and Human Rights Safeguards

Under the RRHA, a prosecution may only be brought with the consent of the Attorney General, who is bound by s6 of the Human Rights Act ('HRA') to consider the demands of Article 10, reducing the likelihood of frivolous prosecutions being brought. This safeguard is bolstered by the fact that the consent of the Attorney General has been offered relatively sparingly, 'in respect of race hatred.'<sup>173</sup>

Further safeguards against the potentially damaging impact on freedom of expression are, as Fenwick incisively argues, available to the courts under the HRA. Under s3 and s6 HRA, the courts may either declare incompatible or read into legislation provisos to make the Act consistent with the ECHR. Thus, it is open to the Courts to narrow aspects or introduce new elements to the legislation in order to keep it within the confines of Article 10.<sup>174</sup> Thus, any dangers which remain under the Act, such as the ambiguous definition

167 *ibid*, 962; Parkinson employs the case of *Judeh v Jewish National Fund of Australia INC* [2003] VCAT 1254 as an example of colonial and religious discrimination by the Victorian government.

169 Anthony Lester, 'Free speech and religion – The eternal conflict in the age of selective modernization', 10 < [www.odysseustrust.org/lectures/274\\_Hungarytalk.pdf](http://www.odysseustrust.org/lectures/274_Hungarytalk.pdf) > accessed on 08/4/2011

170 Andrew Clark, 'Evangelical alliance address Committee on Religious Hatred Bill', Christian Today Dec 15 2004 <http://www.christian-today.co.uk/article/evangelical.alliance.address.committee.on.religious.hatred.bill/1825.htm> accessed 04/4/2011

171 HL Deb 11 October 2005, Vol 674, Col 161-176

172 Garth Blake, 'Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK,' (2007) 81 Australian Law Journal 386, 156; see Peter Parkinson, 'Religious vilification anti-discrimination laws and religious minorities in Australia: The Freedom to be different' (2007) 81 Alternative LJ 954

173 Helen Fenwick, 'Civil Liberties and Human Rights' (Routledge-Cavendish 2007), 505

174 *ibid*, 506; As evidenced in the case of *Dehal v Crown Prosecution Service* [2005] EWHC 2154 (Admin)



of religion discussed above, are unlikely to play any significant role in broadening its scope. This mutes the threat of unmeritorious claims being brought by obscure groups, or of the Act being used to silence critics of cults which exploit their followers.<sup>175</sup> The only concern which remains is the potentially chilling effect of uncertainty in encouraging self-censorship, although as has become clear throughout this Part, the chilling effect of the Act is dampened by the narrow area of liability created by the other elements of the offence.

The VRRTA originally included no procedural safeguards. However, subsequent amendments to the Act have introduced a consent provision, similar to the one which exists under the RRHA.<sup>176</sup> The new s23A reserves the right to refuse to refer complaints to a tribunal if deemed 'frivolous, vexatious, misconceived or lacking in substance.' While undoubtedly a step in the right direction, this minor amendment alone is unlikely to prove a comprehensive solution to the problematic VRRTA. The primary reason is the lack of 'effective public education',<sup>177</sup> aimed at combating current public understanding of the Act, the effect of which is to diminish any potential effect on the chilling effect of the legislation.

Notwithstanding this criticism, a new facility has become available to the Victorian Courts under s32 and s36 of the recently enacted Charter of Human Rights and Responsibilities Act 2006 (Vic). These provisions import duties virtually identical to those under s3 and s6 HRA to interpret legislation in line with human rights obligations.<sup>178</sup> These provisions are, however, marginally less effective, as the interpretive provision also requires that the legislation be interpreted 'consistently with its purpose',<sup>179</sup> although, to reiterate, the declaration does not. Nevertheless, this difference in drafting may be overstated, as the UK courts' case law on s3 HRA adopts a similarly restrictive obligation: that words implied must 'go with the grain of the legislation'.<sup>180</sup> While it is beyond the bounds of this paper to conduct a full analysis of the potential implications of the Act, it is tentatively submitted that - with the relatively minor caveat relating to the interpretation provision in mind - Fenwick's analysis of the HRA may be applied by analogy.<sup>181</sup> Thus, it is at least arguable that the Victorian courts may read in, or declare inconsistent, all or some elements of the legislation deemed to be inconsistent with Australia's human rights obligations,<sup>182</sup> potentially mitigating the dangerous human rights implications of the legislation. However, as of yet there has been no case law on this point and, under the ICCPR (unlike the ECHR), contracting states are required to prohibit the advocacy of 'national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.<sup>183</sup> Therefore, for the time being at least, the foregoing criticisms of the VRRTA appear likely to persist.

Thus it is submitted that, under every element of the offence, the RRHA exhibits a more tightly drafted solution than the VRTTA, with significantly less potential to chill free expression or catch undeserving behaviour.

## Public Order Act

As discussed, the RRHA is undoubtedly preferable to the pernicious VRRTA. However, having considered the relative merits of the two Acts, the discussion will now move to consider the necessity of the RRHA

<sup>175</sup> Andrew Myers, 'A Crime to Tell the Truth' (2005) 155 NLJ 957

<sup>176</sup> Equal Opportunity and Tolerance Legislation (amendment) Act 2006 s11; see above 3.6

<sup>177</sup> Dermot Feenan, 'Religious Vilification Laws, Quelling the Fires of Hatred?' 31(3)Alternative LJ 153, 153

<sup>178</sup> The relevant obligations are Article19(expression) and Article18(Religion) ICCPR which are virtually identical provisions to those enacted under Article10 and Article9 ECHR

<sup>179</sup> S32(1) Victorian Charter of Rights; As argued by James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30(3) Melbourne University LRev 906

<sup>180</sup> Ghaidan v Mendoza [2004] UKHL 30, [2004] 2 AC 557, para33

<sup>181</sup> Helen Fenwick, 'Civil Liberties and Human Rights' (Routledge-Cavendish 2007), 505-507

<sup>182</sup> In this instance Article 19 ICCPR deals with expression and Article 18 deals with religion; both of which are virtually identical to Article 9 & 10 ECHR

<sup>183</sup> ICCPR Article 20; Although the UK is also a signatory to this instrument





against the background of existing speech offences under the Public Order Act 1986 ('POA'). While these offences are clearly problematic in and of themselves, the length of this paper does not allow for an extended discussion of these prohibitions. Rather, the purpose of this Section is to assess the gap in these existing offences which the RRHA supposedly fills.

The gap in liability filled by the RRHA is almost (if not completely) covered by existing offences under the POA, notably s5, s4 and s4A.<sup>184</sup> All of these can be charged as religiously aggravated, activating a penalty enhancement of up to a maximum of two years imprisonment,<sup>185</sup> as occurred in the case of *Norwood v DPP*.<sup>186</sup> The only small area of potential liability arguably now covered under the RRHA, as Goodall contends, are those circumstances in which religion has been used as a surrogate for race in an effort to circumvent existing racial hatred laws.<sup>187</sup> However, as Fenwick points out, s5 and possibly s4A POA would still be available in these types of cases.<sup>188</sup> Furthermore, it is submitted that public order legislation will continue to be used, given that it is more prosecutor friendly – with a lower standard of *mens rea* and a broader *actus reus* – and with police preferring other forms of control than prison sentences, such as ASBOs.<sup>189</sup> Therefore, it has been accurately argued that existing public order offences 'in conjunction with the other narrowing amendments considered... make it hard to envisage circumstances in which a prosecution could now be successfully brought'.<sup>190</sup> This position is reflected in prosecution rates, with only one case brought under the legislation since 1 October 2007 against Anthony Bamber who was subsequently acquitted on 21 June 2010.<sup>191</sup> Thus, while providing a relatively good example of hate speech legislation, particularly in comparison to the VRTTA, its ineffectiveness when placed within the existing legal structure forces one to ask why there was any 'need for further restrictions which are certain to make us less free and are likely to prove counterproductive'.<sup>192</sup> Ultimately, this leads the author to support Hare's characterisation of the RRHA as 'a cynical sop to a vocal, minority population who felt themselves to have been disproportionately the victims of recent Government initiatives on terrorism'.<sup>193</sup>

## Conclusion

The 'ostensible reasons for passing the incitement law were to remove the discrimination between different faiths which meant that only the established Church was protected by the law of blasphemy'<sup>194</sup> and to remove the discriminatory coverage of the Racial Hatred Provisions.<sup>195</sup> As such, it is contradictory that the Act has summarily failed to satisfy either of these motives, failing to repeal the law of blasphemy<sup>196</sup> and creating an area of protection for religious groups much narrower than that available under the Racial Hatred Provisions.

184 Helen Fenwick, 'Civil Liberties and Human Rights' (Routledge-Cavendish 2007), 508 & 780-787 for a full discussion of the offences; In some cases speech would also be covered by incitement to criminal offences

185 Crime and Disorder Act 1998, s31

186 *Norwood v UK*, (2004) 40 EHRR 11

187 Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 MLR 89, 94

188 Helen Fenwick, 'Civil Liberties and Human Rights' (Routledge-Cavendish 2007), 508

189 Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 307

190 Eric Barendt, 'Religious Hatred Laws: Protecting Groups or Beliefs?' (2011) 17(1) Res Publica 41, 42

191 HC Deb 14 Oct 2010, vol 516, col 404W

192 Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' (2006) PLJ 521, 538

193 Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 310; see also criticism of government for playing to disenchanted Muslim voters rather than addressing a genuine problem during the passage of the bill; HL Deb 25 October 2005, vol 438, col 1075; HC Deb 21 June 2005, vol 435, cols 718-745

194 Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 290

195 see, HL Deb 11 October 2005, vol 674, cols 161-176&189-280

196 Although this has since been subsequently repealed





While some commentators have seen the narrow ambit of the legislation as damaging to religious groups, 'minority faith leaders will see it as a betrayal'.<sup>197</sup> The narrow ambit of the offence may well be a blessing in disguise for religious groups. As Adhar and Leigh contend, 'we do not support the case for protection from religious offence as an aspect of religious liberty. Our concern is that to do so might merely be the pretext for loss of religious free speech'.<sup>198</sup> Considering then the RRHA, it appears possible that religious groups may in fact benefit from, not only its narrow drafting in relation to speech critical of other religions,<sup>199</sup> but also as a result of the free speech "vogue" created by the Act. One only has to look so far as the new offence of hatred on the grounds of sexual orientation,<sup>200</sup> which replicated the narrow model of legislation, restricting the offence to threatening behaviour, reproducing a requirement of intent and including a free speech saving (though not as broad) under s29JA,<sup>201</sup> the effect of which is to protect religiously motivated speech. Thus, religious believers - so often at the core of speech on matters of 'profound public controversy, including abortion, homosexuality, and the place of women in society'<sup>202</sup> - should perhaps see the act as a blessing, rather than a betrayal.

While this Part has offered a largely positive discussion of the RRHA may appear contrary to the overall tenor of this paper, which rejects prohibitions on religiously offensive speech, this is not the case. Legislation of this type, applying the democratic absolutist standard outlined at the outset,<sup>203</sup> is inevitably discriminatory. It creates two tiers of citizens: those protected from hatred; and those not protected from hatred of an equally hurtful or offensive character.<sup>204</sup> While it may be argued that certain beliefs are more worthy of protection, or that laws of this type are necessary to combat discrimination, this type of legislation does not genuinely pursue these aims and is in fact often counterproductive. In creating two tiers of citizens, the ban is immediately contradictory, purportedly combating discrimination, but in fact tacitly promoting it.<sup>205</sup> Moreover, even within the groups it protects, the Act creates a further layer of discrimination, distinguishing between those groups which may benefit from the stronger protections offered by the racial hatred provisions, and those that may not: namely, Muslims.<sup>206</sup> The RRHA, therefore, implies that Muslim groups are less worthy of protection than those other religious groups who may be afforded dual protection from hate speech.<sup>207</sup> The RRHA also presents further practical problems. The product of a 'reactionary policy designed to combat Islamophobia, [it] directs a disproportionate focus on one religion,' which 'creates an atmosphere of intolerance and fear and may even increase the chances of a backlash'.<sup>208</sup> Therefore, as a result of its tacit acceptance of discrimination, the RRHA appears likely to encourage discrimination rather than prevent it, damaging social cohesion and threatening the fair functioning of democracy. Perhaps the time has now come for the Government to abandon its reliance on counterproductive hate speech legislation, instead turning its attention to other strategies within *l'Etat Social*, such as community investment and education, which genuinely 'increase capacity within minority groups to respond to 'hate speech''.<sup>209</sup> This approach would obviate the need for reactionary and coercive hate speech legislation, which even in its narrowest form, has been shown to be counterproductive.

197 Kay Goodall, 'Incitement to Religious Hatred: All Talk and No Substance?' (2007) 70 MLR 89, 113

198 Rex Adhar & Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005), 395

199 The *Catch the Fires* case exhibits the propensity of hate speech legislation to curtail the ability of religious groups to criticise one another

200 Criminal Justice and Immigration Act 2008 s74

201 Criminal Justice and Immigration Act 2008 s74 Schedule 16

202 Ivan Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' (2006) PLJ 521, 527

203 See I

204 Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69(4) MLR 543, 565

205 *ibid*

206 Following the abolition of blasphemy Christians are also under the sole protection of the RRHA. However, at the time of the RRHA's enactment, they were still able to fall back on the very broad (if questionable) area of protection offered by the law on blasphemy

207 Jews and Sikhs for example

208 UNCHR 'Interim Report of the Special Rapporteur on freedom of religion or belief' (August 20, 2007) A/62/280, 77

209 Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17(1) Res Publica 21



## Conclusion

The dangers of hate speech prohibitions manifest themselves in different ways in both the VRRTA and the RRHA and through the jurisprudence of the ECtHRs. The fundamental problem with hate speech offences raised by viewpoint absolutists, such as Heinze,<sup>210</sup> is starkly evidenced by the RRHA. Notwithstanding its tight drafting, the inevitably discriminatory nature of such prohibitions persists, casting a dangerous and disproportionate focus on Muslim groups. Furthermore, the dangers of broader prohibitions, within Europe at least, are exacerbated by the failure of the ECtHR to provide any effective level of European supervision: the product of its malign free speech theory. The effect of which is to legitimise hate speech prohibitions which direct government strategy away from methods that may effectively promote minority access to public discourse, such as community investment and education. It is argued that these should be the preferred weapons in promoting minority access to public discourse.

It is also a peculiar consequence of this type of legislation that the people it is supposed to protect are in fact the groups most threatened by its counterproductive tendencies. Religious believers, so often at the core of controversial speech, are increasingly silenced by pernicious legislation that threatens to silence them on issues of central importance to their beliefs. Again, this point is exacerbated by the ECtHR's social utility approach to assigning value to speech, which gives *carte blanche* to member states to silence speech it does not deem to be socially useful. The result of this as Leigh convincingly argues 'may be the loss of protection for religious speech altogether',<sup>211</sup> as speech of this type is, by its very nature, assured of its own truth, making it 'uninterested in social progresses'.<sup>212</sup>

In conclusion, we return to the central normative question posed at the outset: should religious sensibilities be protected? If so, how far is such protection consistent with free speech? Having maintained a democratic absolutist critique of hate speech legislation throughout, this paper has sought to argue that religious sensibilities should not be specifically protected. It has asserted that, rather than fostering tolerance, such protection is often counterproductive, damaging social cohesion, reinforcing dominant social narratives and marginalising minority groups. The foregoing criticisms should dissuade law-makers from introducing new speech prohibitions aimed at protecting religious sensibilities, particularly when such legislation is part of a reactionary effort to appease religious minorities, who are perversely, the very individuals it disadvantages.

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211 Ian Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' 17(1) Res Publica 55

212 *ibid*



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# **The Relationship between European Union Law and International Law through the Prism of the Court of Justice's ETS Judgment: Revisiting Kadi I**

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## Abstract

*The EU, as an international actor with legal personality, is a subject of international law. It is thus bound by certain international treaties and principles of customary international law. This article attempts to analyse the relationship between EU law and international law in the light of the recent Court of Justice's decision relating to the EU Emissions Trading Scheme, using ETS to revisit Kadi I. It is argued that ETS explained the conditions under which the Court of Justice will assess the validity of EU law in the light of international treaties and principles of customary international law, advancing a dialogic approach to international law. This article suggests that this line of argument differs from the deferential approach to international law applied by the General Court in Kadi I, and that it also differs from the Court of Justice's dualist ruling in Kadi I, which seem to have lacked a much needed mutual engagement at the level of international fundamental rights.*

## Keywords

EU Law, International Law, International Treaties, Customary International Law, UN Charter

## 1. Introduction

According to Article 47 TEU,<sup>1</sup> the European Union (EU) has legal personality and is, therefore, subject of rights and obligations arising from international law. Article 216(2) TFEU<sup>2</sup> relates only to international treaties which have been concluded by the European Union, without alluding to other rules of international law. However, the Court of Justice of the European Union (Court of Justice) has admitted that other rules might bind the European Union, namely, certain rules stemming from customary international law and from international treaties which are binding on the Member States, but to which the EU is not a party.<sup>3</sup> Article 3(5) TEU states that the European Union shall contribute to 'the strict observance and the development of international law', including the respect for the principles of the Charter of the United Nations (UN Charter)<sup>4</sup>. However, besides international treaties, the Court of Justice has not resorted to rules or principles of international law in many cases.<sup>5</sup>

This article argues that the judicial decision in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change (ETS)*<sup>6</sup> explained the conditions under which the Court of Justice will assess the validity of EU law in the light of international treaties and principles of customary international law, advancing a dialogic approach to international law. This article suggests that this line of argument differs from the deferential approach to international law applied by the General Court in *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi I)*,<sup>7</sup> and that it also differs from the Court of Justice's dualist ruling in *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I)*.<sup>8</sup>

1 Consolidated Version of the Treaty on European Union [2010] OJ C83/01.

2 Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/01.

3 See, for example, Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019, para 9 (thereafter *Poulsen*); Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-03655, para 46 (thereafter *Racke*).

4 Charter of the United Nations [1945] 1 UNTS XVI.

5 Generally, Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (5th ed. Oxford University Press, Oxford 2011) 340-344.

6 Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] not yet reported.

7 Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649.

8 Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.





The *Kadi I* judgments seem to have lacked a much needed mutual engagement at the level of international fundamental rights, involving risks for both the EU and the international legal orders<sup>9</sup> and also for affected individuals. Firstly, the judgment of the General Court leaves affected individuals without an effective judicial protection of their fundamental rights. In addition, the contrasting decisions of the General Court and the Court of Justice bring uncertainty to those individuals. Secondly, whilst the General Court's judgment, in practice, confers an unfettered prevalence to UN Security Council resolutions, the Court of Justice's ruling could be perceived as a *carte blanche* for other courts and States not to comply with and enforce Security Council resolutions. Furthermore, the Court of Justice's decision could endanger the EU's position as a leading exemplar in the respect for international law.<sup>10</sup> Nonetheless, it is believed that, although *ETS* and *Kadi I* involve very different subject matters, i.e. aviation activities in the EU emissions trading scheme in contrast to asset-freezing measures that aim to combat terrorism, it took a situation where such a patent violation of fundamental human rights was not at stake for the Court of Justice to clarify and further develop the relationship between international law and European Union law. Accordingly, *ETS* will be the basis for reassessing *Kadi I* from a new prism.

## 2. The *ETS* judgment

### 2.1 General issue

The initial EU emissions trading scheme did not cover greenhouse emissions from air transport. However, Directive 2008/101/EC<sup>11</sup> changed this, as it included aviation activities in the EU emissions trading scheme from 1 January 2012. Therefore, all airlines have to acquire and surrender emission allowances for their flights that depart from and arrive at European airports.

Several airlines and airline associations, including the ones established outside the EU, contested the measures transposing Directive 2008/101 in the United Kingdom, alleging that the European Union had infringed various international treaties and principles of customary international law. The High Court of Justice of England and Wales referred the issue to the Court of Justice for a preliminary ruling. The Court of Justice examined whether Directive 2008/101 was compatible with international law, namely, with determined provisions of international treaties and principles of customary international law.

### 2.2 International treaties

In relation to international treaties, the Court of Justice referred to Article 216(2) TFEU,<sup>12</sup> according to which treaties concluded by the European Union are binding upon its institutions and, consequently, prevail over acts of the European Union.<sup>13</sup> The validity of an act of the EU might, therefore, be affected by the fact that it was incompatible with such rules of international law.

In order for the validity of the EU act to be assessed pursuant to those rules, a number of conditions must be fulfilled.<sup>14</sup> First, the European Union must be bound by those rules.<sup>15</sup> Second, the nature and the broader

9 This article agrees with Gráinne De Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51(1) *HarvInt'l LJ* 1, as regards the possible risks of the Court of Justice's decision in *Kadi I*. Thereafter Gráinne De Búrca 2010.

10 Referring that the Court of Justice's decision in *Kadi I* could undermine the EU's image of a 'virtuous international actor committed to the international rule of law', Gráinne De Búrca, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20(3) *EJIL* 853, 862. Thereafter Gráinne De Búrca 2009.

11 Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2008] OJ L8. Thereafter Directive 2008/101.

12 *ETS* (n 6) para 50.

13 See, for example, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, para 25; Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057, para 42 (thereafter *Intertanko*).

14 *Intertanko* (n 13) para 43 and *ETS* (n 6) para 51.

15 Joined Cases 21-24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219, para 7



logic of the international treaty must not preclude the Court of Justice from reviewing the validity of the EU act according to the treaty.<sup>16</sup> Third, the provisions of such treaty, which were relied upon for the purpose of examining the validity of the EU act, must appear, as regards their content, unconditional and sufficiently precise.<sup>17</sup> It seems that on its third condition the Court of Justice is analogically referring to the requirements for provisions of EU law to have direct effect.<sup>18</sup> In that sense, a provision of an international treaty would be unconditional where it set forth an obligation that was not qualified by any condition, or subject, in its implementation or effects, to the adoption of subsequent measures. Moreover, it would be sufficiently precise to be invoked by an individual and applied by a court where the obligation was set out in unequivocal terms.

As far as the first condition is concerned, if the European Union had concluded an international treaty or had had it concluded on its behalf, the provisions of that treaty formed an integral part of the EU legal order. Thus, the first condition being fulfilled, the EU was bound by the treaty. That was the case of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)<sup>19</sup> and of the Air Transport Agreement.<sup>20</sup>

In relation to the Convention on International Civil Aviation (Chicago Convention),<sup>21</sup> the European Union was not a party to it.<sup>22</sup> Nonetheless, if all of its Member States were contracting parties, the EU could still be considered bound by that international treaty under certain circumstances.<sup>23</sup> Although Article 351(1) TFEU implied a duty on the part of the EU institutions not to impede the performance of the obligations of the Member States of international treaties such as the Chicago Convention,<sup>24</sup> that duty was designed to permit the Member States to perform their obligations and did not bind the European Union as regards the third states party to that treaty.<sup>25</sup> Consequently, for the European Union to be bound by the provisions of the Chicago Convention, the EU must have had assumed the powers previously exercised by its Member States in the field to which that international treaty applied.<sup>26</sup> That implied that the EU must have had transferred *all* the powers previously exercised by the Member States within the ambit of the Chicago Convention.<sup>27</sup> Although the European Union had acquired certain exclusive powers to agree commitments with third states in the area, it did not have exclusive competence in the entire field of international civil aviation as covered by the Convention.<sup>28</sup> Therefore, the fact that some EU acts might have the object or effect of incorporating into EU law certain provisions that were set out in the Chicago Convention was not sufficient for it to be incumbent upon the Court of Justice to review the validity of Directive 2008/101 pursuant to the Convention.<sup>29</sup>

Regarding the Kyoto Protocol and the Air Transport Agreement, since they were binding on the EU, the second and third conditions had to be met for Directive 2008/101 to be reviewed in light of their provisions. In the case of the Kyoto Protocol, the Court of Justice confirmed that the Protocol allowed for a degree of flex-

(thereafter *International Fruit Company*). *Intertanko* (n 13) para 44 and *ETS* (n 6) para 52.

16 *ETS* (n 6) para 53.

17 *ETS* (n 6) paras 54-55 and *Intertanko* (n 13) para 45.

18 See, for example, Joined Cases C-246/94, C-247/94, C-248/94 and C-249/94 *Cooperativa Agricola Zootechnica S. Antonio and others v Amministrazione delle finanze dello Stato* [1996] ECR I-4373, paras 18-19; Case C-317/05 *G. Pohl-Boskamp GmbH & Co. KG v Gemeinsamer Bundesausschuss* [2006] ECR I-10611, para 41; Case C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-6281, para 45.

19 Kyoto Protocol to the United Nations Framework Convention on Climate Change [1997] 2303 UNTS. *ETS* (n 6) para 73.

20 Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand [2007] OJ L134/4. Mentioned as Open Skies Agreement in the *ETS* judgment (ibid para 16). See ibid para 79.

21 Convention on International Civil Aviation [1944] 15 UNTS 295.

22 *ETS* (n 6) para 60.

23 ibid paras 61-63.

24 Article 351(1) TFEU indicates that the provisions of the Treaties shall not affect the rights and obligations of the Member States arising from treaties which they concluded before 1 January 1958 or before the date of the Member States' accession.

25 *ETS* (n 6) para 61.

26 ibid para 62; *International Fruit Company* (n 15) para 18; Case C-301/08 *Irène Bogiatzi, married name Ventouras v Deutscher Luftpool and Others* [2009] ECR I-10185, para 25 (thereafter *Irène Bogiatzi*).

27 *Intertanko* (n 13) para 49, *ETS* (n 6) para 63 and *Irène Bogiatzi* (n 26) para 33.

28 *ETS* (n 6) para 69.

29 *Intertanko* (n 13) para 50 and *ETS* (n 6) paras 63, 71-72.



ibility as to the compliance with the obligations enshrined therein and the Conference of the Parties had the responsibility of approving the necessary measures to determine and address situations of non-compliance with the Protocol.<sup>30</sup> Hence, the nature and broad logic of the Protocol seemed to preclude the Court of Justice from reviewing the validity of Directive 2008/101 pursuant to the Protocol's provisions. Moreover, the Protocol's relevant provisions, such as Article 2(2), could not be considered, as regards their content, unconditional and sufficiently precise so as to confer on individuals the right to rely on them in legal proceedings.<sup>31</sup> Accordingly, the Court of Justice concluded that the Kyoto Protocol could not be relied upon to assess the validity of Directive 2008/101.<sup>32</sup>

In contrast, the Court of Justice was of the opinion that the Air Transport Agreement established certain rules designed to apply directly and immediately to airlines, conferring upon them rights and freedoms which were capable of being relied upon. Consequently, the nature and broader logic of the Air Transport Agreement did not preclude the Court of Justice from examining the validity of Directive 2008/101 and the second condition was fulfilled.<sup>33</sup> As regards the third condition, the Court of Justice individually analysed the relevant provisions of the Air Transport Agreement, concluding that they contained unconditional and sufficiently precise obligations.<sup>34</sup> Therefore, the validity of Directive 2008/101 could be assessed in the light of the provisions of the Air Transport Agreement, namely, Articles 7, 11(1) and (2c), and 15(3) read in conjunction with Articles 2 and 3(4).<sup>35</sup> The Court of Justice concluded that Directive 2008/101 did not infringe any of those provisions.<sup>36</sup>

### 2.3 Customary international law

In relation to customary international law, the European Union is to contribute to the strict observance and the development of international law (Article 3(5) TEU).<sup>37</sup> Advocate General Kokott proposed guidelines to assess when and to what extent a principle of customary international law could serve as a benchmark against which the validity of EU law could be reviewed.<sup>38</sup> The Advocate General affirmed that the same requirements that applied for provisions of international treaties to be relied on by individuals and applied by the Court of Justice should be satisfied in order for the lawfulness of EU law to be assessed in relation to principles of customary international law. Firstly, the principle of customary international law must be binding on the European Union. Secondly, the nature and broad logic of that particular principle must not preclude such a review of validity. Finally, the principle in question must also appear, as regards its content, unconditional and sufficiently precise.

However, the Court of Justice did not follow the Advocate General in this aspect and did not extend the conditions used for international treaties to principles of customary international law, denying an analogous direct effect-type analysis. Instead, the Court of Justice examined, in order to conclude whether Directive 2008/101 could be assessed in the light of such principles, whether the principles invoked were recognised as forming part of customary international law and, if so, whether and to what extent they might be relied upon by individuals.<sup>39</sup>

Regarding the first requirement, three of the principles invoked, i.e. the principle of State sovereignty over its airspace, the principle stating the prohibition of sovereign claims over the high seas and the principle of

30 *ETS* (n 6) paras 73-76.

31 *ibid* para 77.

32 *ibid* para 78.

33 *ibid* paras 79-84.

34 *ibid* paras 85-100.

35 *ibid* paras 131-156.

36 *ibid* para 157.

37 *Poulsen* (n 3) paras 9-10, *Racke* (n 3) paras 45-46 and *ETS* (n 6) para 101.

38 Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] not yet reported, Opinion of Advocate General Kokott, paras 108-113.

39 *ETS* (n 6) para 102.



freedom to fly over the high seas, were recognised as being part of customary international law.<sup>40</sup> However, there was insufficient evidence to establish that the principle of customary international law that a vessel on the high seas is in principle governed by the law of its flag would apply by analogy to aircrafts overflying the high seas.<sup>41</sup>

Pursuant to the second requirement, it involved verifying, first, whether those principles were capable of calling into question the competence of the European Union to adopt that act and, second, whether the act was liable to affect rights which the individual derived from EU law or to create obligations under EU law.<sup>42</sup> The Court of Justice considered that the claimants could rely on the first three principles.<sup>43</sup> However, given the lower level of precision of such principles of customary law when compared with norms of international treaties, the Court would only apply a marginal judicial review test.<sup>44</sup> The Court concluded that the EU institutions had not made manifest errors of assessment concerning the conditions for applying those principles, and that the EU had competence in the light of those principles to adopt Directive 2008/101.<sup>45</sup> Therefore, the Court of Justice held that Directive 2008/101 was not invalid.

## 2.4 Interim conclusion

In *ETS*, the Court of Justice expressly engaged in defining the requirements under which international law binds the European Union and the circumstances under which it will review EU acts in the light of international law, whether international treaties or principles of customary law. It thus appears that the Court of Justice assumed the existence of an international legal order, recognising the need to address conflicts between provisions of EU law and of international law by reference to set conditions. This suggests that the Court of Justice somehow adopted a soft constitutionalist approach, similar to Gráinne De Búrca's proposition,<sup>46</sup> as it sought to mediate the relationship between the norms of the different legal systems. This clearly differs from the absolute priority given by the General Court to the UN Charter in *Kadi I* and from the emphasised autonomy of the EU legal order present in the Court of Justice's decision in *Kadi I*. The next section aims to revisit *Kadi I* through the prism of *ETS*.

## 3. Revisiting *Kadi I* in the light of *ETS*

### 3.1 General issue

Mr Kadi had been listed by the United Nations (UN) Security Council's Sanctions Committee as a suspect of supporting terrorism and his assets were, therefore, to be frozen. *Kadi I* dealt with the issue of the lawfulness of the Council Regulation (EC) No 881/2002,<sup>47</sup> which implemented the freezing order in the European Union. The General Court and the Court of Justice were asked to analyse whether the European Community had competence to adopt that Council Regulation, and whether it had violated Mr Kadi's fundamental rights, namely, the right to respect for property, the right to be heard and the right to effective judicial review. In doing so, both courts delineated their understandings of the relationship between international law

40 *ibid* para 103-105.

41 *ibid* para 106.

42 *ibid* para 107.

43 *ibid* para 109.

44 *ETS* (n 6) para 110 and *Racke* (n 3) para 52.

45 *ETS* (n 6) paras 121-130.

46 Gráinne De Búrca 2010 (n 9) 4 and note 11. Criticising the Court of Justice's decision in *Kadi I* for being 'strongly pluralist', Gráinne De Búrca proposed a soft constitutionalist approach that could be generally used by the European courts to 'mediate the relationship between the norms of different legal orders'. In accordance, soft constitutional approaches would 'assume the existence of an international community, posit the need for common norms and principles for addressing conflict, and emphasize universalizability. They do not insist on a clear hierarchy of rules, but rather on commonly negotiated and shared principles for addressing conflict'.

47 Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L139. Thereafter Council Regulation 881/2002.





and EU law.

### 3.2 *Is the European Union bound by the UN Charter?*

#### 3.2.1 Impact of the Treaty of Lisbon

This subsection examines the impact of the Treaty of Lisbon,<sup>48</sup> questioning if it brought any clarifications to the issue of whether the European Union is bound by the UN Charter. Article 3(5) TEU, which mentions that the European Union shall contribute to the respect for the principles of the UN Charter, does not seem to be an express affirmation that the European Union is bound by it and should not be read in that sense. Its possible meaning is analysed below, but it seems to refer to the UN Charter as encompassing principles of customary international law.

The Declaration concerning the Common Foreign and Security Policy (Declaration 13)<sup>49</sup> could also be possibly relevant to the clarification of this issue, because it affirms that the European Union and its Member States remain bound by the provisions of the UN Charter. It adds that the EU and its Member states remain bound, in particular, by the primary responsibility of the Security Council and of its Member States for the maintenance of international peace and security. Although Declaration 13 could be interpreted as determining that the European Union is undoubtedly bound by the UN Charter, that does not seem to be the correct illation. While this might show a political intention to adhere to the UN Charter, it is argued that the fact that the Declaration refers to the European Union *remaining* bound indicates that a change to the previous status was not intended. Furthermore, the fact that it reserves the primary responsibility in the area of international peace and security to the Member States should be interpreted in the sense that this is still not an area in which all the powers have been assumed by the European Union.

Following the proposition that the Treaty of Lisbon did not clarify this issue, the subsequent subsections, highlighting some of the crucial points of the General Court's reasoning in *Kadi I*, enquire whether the UN Charter, namely, the resolutions adopted by the Security Council under Chapter VII of the UN Charter, binds the European Union.

#### 3.2.2 Criticising the General Court's findings

The General Court in *Kadi I*, after assessing the issue of the competence of the European Community to adopt Council Regulation 881/2002,<sup>50</sup> focused on the relationship between international law, i.e. the obligations stemming from the resolutions adopted by the Security Council under Chapter VII of the UN Charter, and European Union law.<sup>51</sup> The Court of Justice began by analysing the issue from the 'standpoint of international law', affirming that the obligations of the Member States under the UN Charter, to which they were all signatories, clearly prevailed over obligations of national law, EU law and other international treaties.<sup>52</sup> In accordance with Article 25 of the UN Charter, under which the members of the UN consented to accept and execute the decisions of the Security Council, that 'primacy' also included Security Council resolutions.<sup>53</sup> However, since the EU was not a signatory of the UN Charter, the Charter and the Security Council resolutions did not bind the EU by virtue of international law.<sup>54</sup> Nonetheless, the Court of Justice concluded that the European Union was bound by the UN Charter and 'was required to give effect to the Security Council resolutions' by virtue of EU law, namely, Articles 351 and 347 TFEU and in accordance

48 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306.

49 Declaration concerning the Common Foreign and Security Policy, as annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2010] OJ C83/01.

50 General Court's decision in *Kadi I* (n 7) paras 87-135.

51 *ibid* para 178.

52 *ibid* paras 181-183.

53 *ibid* para 184.

54 *ibid* para 192.





with *International Fruit Company*.<sup>55</sup> Hence, the Court found that the binding effect of the UN Charter prevented it from reviewing the validity of the contested Council Regulation 881/2002 on the basis of EU law, as that would imply that the Court considered indirectly the lawfulness of the Security Council resolutions.<sup>56</sup> Instead, the Court considered that it had competence to review the lawfulness of the Security Council resolutions indirectly with regard to *jus cogens*, concluding that the rights to respect for property, to be heard and to effective judicial review had not been breached.<sup>57</sup>

The General Court's reasoning and conclusion that the EU was bound by the UN Charter and by the obligations deriving from the resolutions adopted by the Security Council under Chapter VII of the UN Charter should be examined in the light of the requirements defined in *ETS*. In relation to the UN Charter as an international treaty, the General Court was right to concede that the European Union is not formally bound by the UN Charter.<sup>58</sup> Nonetheless, the UN Charter and more specifically the resolutions adopted by the Security Council under Chapter VII of the UN Charter are binding on all the Member States of the European Union. It should thus be considered whether the EU's practice of adopting measures, such as Council Regulation 881/2002, to give effect to Security Council resolutions entails that it is *de facto* bound by them.

The General Court considered that the European Union must be considered to be bound by the obligations under the UN Charter in the same way as its Member States by virtue of EU law.<sup>59</sup> However, Articles 351(1) and 347 TFEU solely imply a duty on the part of the EU institutions not to hinder the performance of the obligations of the Member States under international treaties like the UN Charter. The reasoning behind that duty is to allow Member States to perform their international obligations, but not to bind the European Union as regards the third states party to that treaty.<sup>60</sup>

Moreover, according to the General Court, insofar as the European Union assumed powers previously exercised by the Member States in the area governed by the UN Charter, its provisions had the effect of binding the European Union.<sup>61</sup> This assertion seems to be making an incorrect analogy with the considerations of *International Fruit Company*.<sup>62</sup> As clarified by *ETS*,<sup>63</sup> the fact that the European Union adopted measures which give effect to UN Security Council resolutions does not mean that it is bound by those Security Council resolutions. In fact, although the European Union has some powers in this area, the set up of the EU shows that it has not assumed such powers in their entirety.<sup>64</sup> Actually, significant powers in the area of international peace and security are reserved to the Member States, remaining their sole responsibility. Although all the Member States are signatories of the UN Charter, the Charter, especially its Chapter VII, does not fall

55 *ibid* paras 185-207. *International Fruit Company* (n 15) paras 11-18. For a classification of the theory developed by the Court of Justice in *International Fruit Company* as theory of substitution see Takis Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) *ELRev* 103, 110 and note 39: 'This theory posits that, where under the EC Treaties the Community assumes powers previously exercised by the Member States in an area governed by an international agreement, the provisions of that agreement become binding on the Community'. Thereafter Takis Tridimas. For its classification as doctrine of functional succession, Robert Schütze, 'The "Succession Doctrine" and the European Union' in Anthony Arnall and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, Oxford 2011), 475-481. Thereafter Robert Schütze.

56 General Court's decision in *Kadi I* (n 7) paras 215-225.

57 The Court of Justice defined *jus cogens* as 'a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible', *ibid* paras 226-292.

58 *ibid* para 192. Parallel with *ETS* (n 6) para 52.

59 General Court's decision in *Kadi I* (n 7) para 193.

60 Parallel with *ETS* (n 6) para 61.

61 General Court's decision in *Kadi I* (n 7) paras 196, 198, 200, 203.

62 *International Fruit Company* (n 15) paras 11-18. In contrast, Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit' (2007) 3 *EuConst* 183, 191, 197, considering that the arguments put forward by the General Court as regards the analogy with *International Fruit Company* are persuasive. However, the author criticises the proposed judicial review in the light of *jus cogens*. It is disputable that the Court of Justice had jurisdiction to review a Security Council resolution and it 'risks turning the UN Security Council into a supreme, unfettered legislature', containing the 'worst of both worlds'. Thereafter Piet Eeckhout.

63 *ETS* (n 6) para 63.

64 Similarly, Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: the Case of Individual Sanctions* (Oxford University Press, Oxford 2009) 231-232. Thereafter Christina Eckes.



within an area in which the European Union has assumed exclusive responsibility.<sup>65</sup>

Accordingly, the General Court's conclusions in *Kadi I*, which differed from the Court of Justice's reasoning in *ETS*, do not seem to be convincing. The European Union is not bound by the UN Charter, including Security Council resolutions deriving from Chapter VII, and it is not incumbent upon the Court of Justice to review the legality of EU acts in the light of that international treaty. Nevertheless, despite the fact that the General Court's deferential approach towards the UN Charter does not seem to be founded on acceptable premises, by paying 'its respects to international law',<sup>66</sup> the General Court revealed that it is generally receptive to a dialogic approach to international law.

### 3.2.3 UN Charter as customary international law

Continuing the analysis of the situation present in *Kadi I* in parallel with the requirements set forth in *ETS* under which an act of EU law would be reviewed in the light of international law, it is possible to enquire whether Chapter VII of the UN Charter could bind the EU as forming part of customary international law. The provision contained in Article 3(5) TEU broadly refers to the relations of the European Union with the international community. Its aim is not to define the conditions under which the European Union is bound by international law. Hence, one cannot conclude from it that the European Union is bound by the UN Charter. Article 3(5) TEU seems, instead, to be referring to the principles of the UN Charter as part of principles of customary international law.

According to Article 38(1b) of the Statute of the International Court of Justice, international customary law is defined 'as evidence of a general practice accepted as law'.<sup>67</sup> Hence, in order for a principle or norm to be part of international customary law two basic elements must be present, namely, the actual behaviour of States constituting the material facts and the 'subjective belief that such behaviour is "law"'.<sup>68</sup> Regarding the material fact, evidence of a general practice can be found by examining the practice of States, for instance, by observing the States' behaviours and interactions. Once a general practice has been established, it is then necessary to enquire the reasoning behind it, i.e. whether the States 'recognize an obligation to adopt a certain course'.<sup>69</sup> This 'belief that a state activity is legally obligatory' is the *opinio juris*.<sup>70</sup>

Although certain provisions of the UN Charter fulfil the criteria for the existence of customary international law, being 'to that extent universally binding',<sup>71</sup> its Chapter VII does not meet the two necessary conditions. For instance, there neither is sufficient evidence of a general practice nor *opinio juris*. Therefore, Chapter VII of the UN Charter cannot be binding on the European Union as customary international law. Applying the requisites defined by the Court of Justice in *ETS*, the first one, which requires that the principles invoked are recognised as forming part of customary international law, was not satisfied.<sup>72</sup> Accordingly, the validity of an act of EU law was not to be assessed in the light of Chapter VII of the UN Charter.

<sup>65</sup> These, i.e. all the Member States being part of an international treaty and that treaty falling within an area where the EU has assumed exclusive responsibility, are the two elements of the European doctrine of functional succession identified by Robert Schütze (n 55) 481.

<sup>66</sup> Piet Eeckhout (n 62) 190.

<sup>67</sup> The Statute of the International Court of Justice of 26 June 1945 forms an integral part of the UN Charter. See, generally, Antonio Cassese, *International Law* (2nd ed. Oxford University Press, New York 2005) 153-169; Malcolm Shaw, *International Law* (6th ed. Cambridge University Press, Cambridge 2008) 72-93 (thereafter Malcolm Shaw); Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed. Oxford University Press, Oxford 2012) 57-63 (thereafter Andrew Clapham); James Crawford, *Brownlie's Principles of Public International Law* (8th ed. Oxford University Press, Oxford 2012) 6-12. For an analysis of different approaches to the two elements of custom and of the difficulty to determine its existence, Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757.

<sup>68</sup> Malcolm Shaw (n 67) 74.

<sup>69</sup> Andrew Clapham (n 67) 57.

<sup>70</sup> Malcolm Shaw (n 67) 84.

<sup>71</sup> Christina Eckes (n 64) 229.

<sup>72</sup> *ETS* (n 6) para 102.



### 3.3 *Kadi I* v ETS: a different approach and scope for dialogue?

#### 3.3.1 Court of Justice's findings

After a detailed analysis of the issue of the legal basis of Council Regulation 881/2002<sup>73</sup> and before assessing the alleged infringements of the rights to respect for property, to be heard and to effective judicial review,<sup>74</sup> the Court of Justice held that the European Union was based on the rule of law<sup>75</sup> and that neither the Member States nor the EU institutions could prevent the Court of Justice from reviewing the compliance of their acts with EU law, which was the 'basic constitutional charter'.<sup>76</sup> Moreover, the Court of Justice stressed that fundamental rights formed an integral part of the general principles of EU law and that their respect was a condition of the lawfulness of acts of the EU.<sup>77</sup> Therefore, an international treaty could not affect the autonomy of the EU legal order and the obligations deriving from such a treaty could not prevent EU acts from being reviewed in the light of the constitutional principles of the European Union.<sup>78</sup>

#### 3.3.2 A different approach

Gráinne De Búrca has classified the Court of Justice's reasoning in *Kadi I* as 'robustly dualist',<sup>79</sup> due to its repeated emphasis on the separateness and autonomy of the EU from other legal systems and from the international legal order.<sup>80</sup> Gráinne De Búrca considered that the 'strong pluralist approach'<sup>81</sup> that supports the Court of Justice's decision contradicts the traditional embrace of international law by the European Union, that it carries risks for the EU and for the international legal order in the message it conveys, and that it risks damaging the image of the EU as a 'virtuous international actor'<sup>82</sup> which is committed to the observance and the development of international law. While certain aspects of Gráinne De Búrca's analysis are very convincing and will be considered, there are other possible interpretations of the Court of Justice's decision.

The Court of Justice's argument that it was not reviewing the validity of the underlying UN Security Council resolution, but merely the EU act in the light of EU law,<sup>83</sup> although legally accurate, cannot disguise the fact that it configured a *de facto* judgment about the listing procedure at the UN level.<sup>84</sup> The Court of Justice even asserted that the re-examination procedure before the Sanctions Committee does not offer guarantees of judicial protection,<sup>85</sup> so its declaration can be considered somewhat of a *façade*.

The Court of Justice should have engaged in the process of shaping customary international law.<sup>86</sup> It could have insisted on the respect for principles of due process and human rights protection under international law, even though these are neglected within the existing Security Council listing and de-listing procedures. The Court of Justice failed to address the issue of due process as being part of customary international law and also of which fundamental human rights are recognised as customary international law.

<sup>73</sup> Court of Justice's decision in *Kadi I* (n 8) paras 121-236.

<sup>74</sup> *ibid* paras 331-376.

<sup>75</sup> Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23.

<sup>76</sup> Court of Justice's decision in *Kadi I* (n 8) para 281.

<sup>77</sup> *ibid* paras 283-284.

<sup>78</sup> *ibid* paras 282, 285.

<sup>79</sup> Gráinne De Búrca 2010 (n 9) 23.

<sup>80</sup> For example, Takis Tridimas (n 55) 111 classified the Court of Justice's approach as 'firmly a sovereigntist one'.

<sup>81</sup> Gráinne De Búrca 2010 (n 9) 41.

<sup>82</sup> *ibid* 3.

<sup>83</sup> Court of Justice's decision in *Kadi I* (n 8) paras 286-287.

<sup>84</sup> Siiri Aulik, 'Judgment of the European Court of Justice in *Kadi*: Challenges to International Law, the United Nations Sanctions Regime and Fundamental Rights' (2009/2010) 4 *Acta Societatis Martensis* 25, 40. Thereafter Siiri Aulik. The author added that although from a legal point of view the annulment of the EU implementing measure of the Security Council resolutions would not affect the validity of the resolutions in international law, that would be of 'little practical value' if the Member States were not free to implement the Security Council resolutions on their own.

<sup>85</sup> Court of Justice's decision in *Kadi I* (n 8) para 322.

<sup>86</sup> As rightly pointed out by Gráinne De Búrca 2010 (n 9) 49.



It seems that in this aspect the Court of Justice's approach clearly differed from the one in *ETS*, and that in *Kadi I* it should have carried out an analysis of whether the principles invoked are recognised as forming part of customary international law and, if so, whether and to what extent they may be relied upon by individuals.<sup>87</sup> As proposed by Andrea Gattini,<sup>88</sup> the Court of Justice could have strengthened its conclusions by acknowledging customary international law with regard to the fundamental rights invoked, and there is no reason why the Court of Justice should not have recognised, at least in principle, a constitutional and fundamental status of those rights under international law, as well as under EU law.

It is true that the circumstances of *Kadi I* were very particular, 'dramatic'<sup>89</sup> and novel, involving violations of fundamental rights and the effectiveness of the fight against terrorism, which could explain to a certain extent the lack of a clear mutual engagement at the level of international fundamental rights.<sup>90</sup> Nevertheless, *ETS* shows that the significance of *Kadi I* has not gone beyond the context of UN targeted sanctions. Furthermore, the engaging approach taken in *ETS* could have been applied in *Kadi I* and should be used in future cases alike. It seems that Gráinne De Búrca's worries need not be confirmed.<sup>91</sup>

### 3.3.2 Scope for dialogue?

It is submitted that the Court of Justice's ruling need not be read as a strong pluralist approach, and that it did not necessarily close the door to a dialogue *à la Solange/Bosphorus*<sup>92</sup> in future cases. The passage in *Kadi I*, in which the Court of Justice affirmed that the existence of the re-examination procedure could not 'give rise to *generalised* immunity from jurisdiction within the internal legal order'<sup>93</sup> of the EU, could be read as leaving a possibility open for a future *partial* immunity of the United Nations, rather than as a rejection of even a theoretical possibility of a *Solange*-type deference.<sup>94</sup> As in *Solange I*, it could be said that for now, in cases relating to similar issues as in *Kadi I*, the Court of Justice will review every case *so long as* the listing and de-listing procedures do not provide a sufficient level of fundamental rights protection.

In *Kadi I*, in addition to opening the door to a future dialogue, the Court of Justice seems to have also defined its basic terms. The Court of Justice did so by identifying a set of principles which constitute the 'very foundations'<sup>95</sup> of the EU legal order, namely, the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Articles 2 and 6 TEU. This core is to be read as absolutely inviolable, and all EU acts are susceptible of having their lawfulness reviewed by the European Union judiciary as regards these principles, in particular, their consistency with fundamental rights.<sup>96</sup>

87 Gráinne De Búrca 2009 (n 10) 856, 860, added that *Kadi I* presented an 'opportunity to engage in the evolving legal debate over the accountability of the Security Council, and to participate in shaping the legal and political context in which the Security Council exercises its powers under the Charter'.

88 Andrea Gattini, 'Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of the Grand Chamber of 3 September 2008, nyr*' (2009) 46 *CMLRev* 213 (note), 231-232.

89 Gráinne De Búrca 2009 (n 10) 860.

90 Some authors have focused on the issue of the substantive values in question in *Kadi I*, aiming to go beyond the 'formal aspects of the lines of reasoning' regarding the question of the relationship between the EU and international legal orders. See Pasquale De Sena and Maria Chiara Vitucci, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values' (2009) 20(1) *EJIL* 193, 196, 227, where it is proposed that the 'need to assess the *substantive* values at stake can be deemed the *prevalent* need emerging from the *Kadi* judgment'. Gráinne De Búrca 2009 (n 10) 853, 856, *passim*, directly replied to these propositions, arguing that the formal and institutional reasoning in *Kadi I* regarding the 'relationship between different systems in the transnational legal domain' are also questions of substance, which are very important for several reasons, in particular, because the EU courts' attitude 'to the authority of international legal norms is a highly significant one as the EU develops its international identity and seeks a stronger global role'.

91 Gráinne De Búrca 2010 (n 9) *passim*.

92 BVerfGE 37, 271 2 BvL 52/71 *Solange I*-Beschluss (thereafter *Solange I*) and BVerfGE 73, 339 2 BvR 197/83 *Solange II*-Beschluss (thereafter *Solange II*); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* ECHR 2005-VI (*Bosphorus*).

93 Court of Justice's decision in *Kadi I* (n 8) paras 321-322 (emphasis added).

94 Such a rejection is argued by Daniel Halbertstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *CMLRev* 19, 60. It is also mentioned by Siiri Aulik (n 84) 49.

95 Court of Justice's decision in *Kadi I* (n 8) paras 303-304.

96 Robert Schütze (n 55) 472-473; Tarcisio Gazzini and Ester Herlin-Karnell, 'Restrictive Measures Adopted by the EU from the Standpoint of International and EU Law' (2011) 36 *ELRev* 798, 810-811 (thereafter Tarcisio Gazzini and Ester Herlin-Karnell); Christina Eckes, 'Protecting





Maybe, in the future, the re-examination procedure before the UN Sanctions Committee could benefit from a limited form of immunity from judicial review within the EU legal order if it offered adequate protection for fundamental rights.<sup>97</sup> This seems to have been Advocate General Maduro's intention when affirming that:

Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order.<sup>98</sup>

The Court of Justice could arguably adopt an analogous approach to the one taken in *Solange II* or in *Bosphorus*.<sup>99</sup> This would mean that the Court of Justice would refrain from reviewing every case, due to a finding of equivalent protection of fundamental rights. Such finding would not be final and would be susceptible of review. Namely, the presumption would be rebutted if the *very foundations* of the EU legal order were endangered.

This absolute core rightly identified by the Court of Justice in *Kadi I* should not be affected in any case, even in the case of international treaties which bind the European Union. In the case of customary international law, there should not be, in principle, a conflict of this nature. However, in the unlikely event that such a conflict is suggested, the European Union must still strive to protect its core values.<sup>100</sup> Therefore, the Court of Justice highlighted an ultimate exception to the respect due by the European Union to international law.

### 3.3.3 Interim conclusion

The Court of Justice followed different approaches in *Kadi I* and *ETS*. However, they need not be interpreted as irreconcilable. It is argued that the Court of Justice's decision in *Kadi I* left scope for dialogue between international law and EU law, although anticipating an ultimate protection of the core values of the EU legal system. The Court of Justice created its 'own somewhat modified *Solange* doctrine and added an important safeguard against the violation of fundamental human rights in the global context'.<sup>101</sup> Were the Court of Justice to rule on a case similar to *Kadi I* in the future, it might be advisable for it to take a more reasoned approach as in *ETS* and to put into practice such a dialogic model.

## 4. Conclusion

*ETS* set out, positively, the relationship between international law and EU law, acknowledging the need for principles for addressing conflict and emphasising 'universalizability'.<sup>102</sup> This judgment clarified and developed the requisites for the European Union to be bound by international treaties and customary international law and the conditions under which EU acts will be reviewed in the light of international law.

It is argued that *ETS* delineated suitable standards to revisit *Kadi I* in an attempt to help clarify the General Court's and the Court of Justice's findings. *Kadi I*, as far as the General Court's approach is concerned, seems to have adopted an erroneous interpretation of previous case law in this context. Reading it in the light of *ETS*, it is submitted that the European Union is not bound by the obligations derived from Chapter VII of the UN Charter. In relation to the Court of Justice's judgment in *Kadi I*, it missed the opportunity to shape the discussion of which fundamental rights may be considered to be part of customary international law.

Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' (2012) 18 *ELJ* 230, 241.

97 Bjørn Kunoy and Anthony Dawes, 'Plate Tectonics in Luxembourg: The *Ménage à Trois* between EC Law, International Law and the European Convention on Human Rights following the UN Sanctions Cases' (2009) 46 *CMLRev* 73, 81-82.

98 Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, Opinion of Advocate General Maduro, para 54.

99 *Bosphorus* (n 12) paras 155-156.

100 Values of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Articles 2 and 6 TEU.

101 Tarcisio Gazzini and Ester Herlin-Karnell (n 96) 811.

102 'Universalizability' as 'the Kantian notion of decision-making that seeks validity beyond the preferences of the decision-maker', Gráinne De Búrca 2010 (n 9) 39.





Nevertheless, as suggested, the Court of Justice did not totally reject a theoretical and future mutual engagement, but it should have been more explicit in that sense. Furthermore, *Kadi I* called attention to a desirable ultimate protection of the *very foundations* of the EU legal order in the relationship between international law and EU law. Thus, it seems that the door for a dialogic approach to international law remains open, which would confer certainty to individuals, strive for an adequate level of protection of fundamental rights, participate in the current debate over the accountability of the Security Council and reaffirm the European Union's clear commitment to the promotion of the international rule of law.



**Book Review:**  
**Punishment, Participatory, De-**  
**mocracy, and the Jury**  
**(Albert Dzur)**

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Jury trials are one of the basic pillars of the Common Law system. However, in England, the amount of jury trials has recently begun to decrease, especially in civil cases. In fact, criminal juries judge less than two percent of criminal cases. In the United States, although the extent of the decrease is different, the trend seems to be similar. Therefore, to improve the popularity of the jury system and demonstrate its value, the American Bar Association took unique measures.

The author, Professor Albert W. Dzur, focuses on democratic political theory, especially focusing on the value of citizen participation. He is quite skeptical about professionals and experts. Instead, he suggests "democratic professionalism" which urges citizens to share the role of legal experts and to engage in criminal procedures more actively. According to the author, one of the most effective ways of "democratic professionalism" is a restorative justice movement that attempts to involve the offender and victim in society after the trial. The movement also attempts to engage laypeople in community boards and sentencing circles. The book – *Punishment, Participatory, Democracy, & the Jury* – was based on this theory and the author discusses the controversial legal term 'jury system'. The purpose of this book is clearly defined by the author "to provoke court professionals, policy makers, and citizens to focus on punishment as a democratic problem demanding more careful attention to designing participatory institutions" (p. 20).

In this book, the author insists on expanding the role of the jury in the American criminal courts and promoting further use of jury trials in the country. The author is a strong supporter of the jury system and participatory democracy and his enthusiastic position on the American jury system is clearly and even emphatically expressed in the book.

The prime reason for the author to believe the jury system is an ideal and practical judicial system in the United States is because laypeople participation increases the legitimacy of institutions by expanding the base of actual consenting citizens. As mentioned above, the recent judicial trend in the United States is expanding the trial by specialists and experts instead of jury trials. However, according to the author, the specialists and experts are inferior to juries in terms of ability to decide fair and appropriate judgments. Such a "praising jury theory" reminds one of Tocqueville's famous piece *Democracy in America*, and it is frequently referred to by the author in this book.

In the middle of the nineteenth century, Alexis Tocqueville praised the American jury system enthusiastically, and he "saw the jury as so deeply rooted in American culture that its norms spread out of the courtroom and into the conflict resolution play of children in the street" (p. 11). Unlike today, 92 percent of all criminal cases went to jury in Tocqueville's age. Tocqueville respected democratic institutions engaged by ordinary people and not by the elite. This idea is shared by the author. The author insists current American society is less participatory and professionally managed in comparison to the previously. The decrease of jury trials is an example of this.

It should be pointed out that the author treats the current United States as a considerable "penal state." Therefore, for the author, the essential mode of recovery of democracy in the American criminal justice system is to strengthen civic engagement.

If the analysis of the author is correct, why has the situation of the American jury been changed towards the "penal state" so dramatically? The major reason of this decrease from the late nineteenth and early twentieth century is plea-bargaining. According to the author, plea-bargaining dominates the twentieth-century pattern of criminal adjudication. In fact, it settles about 90 percent of criminal cases. The author criticises plea-bargaining because it attempts to resolve crime and crime control in a bureaucratic manner, ignoring more democratic measures that need to be carried out.

As mentioned above, the author's position on the American jury system in the book is apparent, and unshakeable. However, because of his firm view on legitimating jury systems, the author is sometimes unfair



and even subjective in his analysis on the current trends of the jury system. For instance, the author eloquently describes the merits of the jury system rather than the demerits. The author refers to the various eminent scholars' and jurists' opinions in favour of the jury system. However, he does not deal with the views of the other side sufficiently. Therefore, it could be criticised that his one-sided support of his views decreases the quality of the persuasiveness of his argument. This is quite regrettable. Jury systems are not the only judicial system that involves laypeople. Therefore, the author could have examined the possibilities of improvements to the United States from the penal state in alternative manners. For example, one could consider introducing the continental style lay-judge system or trial by legally trained laypeople like the English Magistrates' Courts.

The author expresses the jury as an institution of self-governance. In fact, the original purpose of applying the jury system in the United States was for "check and monitoring" (p. 13) of the judicial power by the lay-citizen. The right to a jury is stipulated in the United States Constitution. In the United States, the jury system was "a cornerstone of democracy" (p. 6). However, is the jury still the "cornerstone of democracy" in the current America? The author could have considered more of the historical differences between Tocqueville's age and the current situation in the United States to answer this question.

Although there are many question marks on the author's theory in this book, it is highly recommended for legal specialists and ordinary people because of his detailed and clear analysis and great passion for the jury system.



# **Book Review: The Corporate Objective (Andrew Keay)**

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A company, as all rational activity, requires an objective to justify its behaviour. Meanwhile, a company's performance can be only measured and evaluated after establishing such criteria. If no goals or expectations exist, it will cause difficulties for judging whether or not the performance of a company is "good", or how well initial expectations have been met. Regardless the importance of corporate objective, no universally accepted corporate objective of the modern public company exists yet.

*The Corporate Objective* written by Professor Andrew Keay tackles this very important topic based on the previous research outcomes. After justifying the importance of having a clear corporate objective and setting the general backgrounds for the debate in Chapter 1, Keay examines the two most dominant theories — that is, shareholder primacy and stakeholder theory in the next two chapters.<sup>1</sup> Keay has provided a comparatively comprehensive introduction of the two theories including their positive and negative aspects respectively. Unsurprisingly, with the view that neither the shareholder model nor the stakeholder model is perfect, based on his earlier journal articles, Keay develops a new approach — Entity Maximisation and Sustainability (EMS) model to overcome the shortcomings of the above two models.

Under the EMS model, a company is a distinct entity and independent from all its investors, following the viewpoint of Professors Blair and Stout that a company "can lead a life of its own" (p. 178). A company could make contracts, own property in its own capacity, sue or be sued, and only the company is eligible for being regarded as a victim in derivative actions. But EMS goes much further and states a company could also have an objective, namely, maximising values of the entity *per se* on the one hand and ensuring its sustainability on the other (p. 175). That is to say neither shareholders nor other stakeholders are the end. None of the corporate constituents would be preferred under EMS, nor constituents as a whole would be seriously considered. In addition, issues other than economic ones would not only be taken into account, but account for a material position. Keay argues that the EMS model could bring more efficiency and fairness (p. 176).

Shareholder primacy and stakeholder theory in terms of Keay are of serious disadvantages. The new model is aimed to overcome ethical issues, externalities among others of shareholder model and irreconcilable conflicting interests and enforcement problems of stakeholder theory. This requires the new model substantially differentiating from previous ones. Although Keay tries to distinguish his model with the existing ones (pp. 228-230), it seems maximisation of the value of the company is not dissimilar with what the shareholder model pursues, in which maximising company wealth is normally the premise by virtue of the residual nature of the shareholders. The difference is that maximisation in EMS is an end, whereas maximisation in the shareholder model further indicates increasing residual cash flows to shareholders. Besides, in Keay's mind, maximisation of shareholder wealth is restrained in profit maximisation while his entity maximisation model encompasses issues such as reputation augmentation (p. 201). Such a narrow understanding of the shareholder model seems to be biased and limited. Solely pursuing short-term profit may ignore such things like reputation and R&D. Not only does the stakeholder model originate from and focus on these issues advocated by Keay, but the shareholder model does not necessarily exclude them, particularly from a long-term perspective where all above—which could be seen as the interests of non-shareholding stakeholders—are generally accepted as meaningful and helpful means for shareholder wealth maximisation.

<sup>1</sup> These parts are mainly based on Keay's several earlier journal articles: 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *Modern Law Review*; 'Stakeholder Theory in Corporate Law: Has it Got What it Takes?' (2010) 9 *Richmond Journal of Global Law and Business*; 'Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and All That: Much Ado About Little?' (2011) 22 *European Business Law Review*; 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' [2010] *European Company and Financial Law Review*.



Moreover, with the defects of the shareholder model in mind as well as the theoretical and practical difficulties of the stakeholder model, it seems that Keay tries to use the entity model to substitute the shareholder model whilst avoids the disadvantages of the stakeholder model at the same time. For example, an important reason for him to raise the EMS model is its superiority to avoid the problems such as balancing (p. 205). In accordance with Keay, the difficulty of defining the concept and scope of stakeholder and the issue of enforcement are, *inter alia*, two main defects of the stakeholder model (pp. 189-196). Consequently, EMS is deliberately described as having a clear goal to overcome troubles like defining the stakeholder groups and the never-ending task of balancing and/or integrating multiple interests by focusing solely on the entity wealth. With a simplification of the entity as an end, Keay holds a view that the fundamental defects of the stakeholder model are solved while simultaneously retaining superiority as compared to the shareholder model. Nevertheless, the shareholder model *as such* has a comparatively clearer goal to maximise the interests of a real group compared with that of an artificial entity which cannot be utilised as a guideline. The so-called benefits of EMS fall to be a facade. The simple advantage of being superior to the stakeholder model might not become a persuasive and sufficient reason for applying a new model.

Learning from the lessons of enforcement failures under stakeholder theory, Keay's other contribution is on the discussion of enforcement issue of EMS in Chapter 4. Keay brings forward eight enforcement options, including: 1) exit; 2) voice; 3) pressure; 4) board representation; 5) administration/liquidation; 6) government intervention; 7) oppression/ unfair prejudice provision; and 8) derivative claim. As most of these are ineffective and unintelligible both theoretically and practically (pp. 241-254), Keay's main argument relies on the last option, i.e., modifying the current derivative action system. In his mind, the refined derivative action should grant all of the so-called investors a right to initiate a suit. They can bring derivative actions when the board of a company does not comply with EMS.

However, this leads to another problem under EMS, namely what can be done and by whom in the event that the interests of companies are disregarded or damaged. Similar to the problem under the stakeholder model, enforceability remains a difficulty, if not insurmountable. First, EMS is not, or at least is not directly intended to protect the interests of all stakeholders. As reiterated, it seems not difficult to justify any decision on the basis of entity maximisation. Secondly, in terms of the artificial nature of the entity, it implies the company is only able to run through its organ since it could not generate its own mind. In addition, the foregoing discussions reveal that no direct relationship existed between the wealth of the entity and the constituents.

Chapters 6 and 7 address issues of investors and managers under the EMS. First, the so-called investors are indeed no different from stakeholders. Secondly, Keay is aware that no effective mechanism exists to ensure or facilitate the managerial accountability under the EMS model. He thereby tries to circumvent it by listing ten methods and mechanisms (pp. 305-318). He attempts to use a mixture of plural mechanisms to overcome the unaccountability while each mechanism has flaws (p. 318). These mechanisms have been already endeavoured by stakeholder theorists however. Except intentionally disregarding the issue of balancing, it is difficult to identify any distinction compared with the stakeholder theory. If such methods not unworkable, the stakeholder theory might also overcome its severe disadvantages.



Finally in Chapter 8, Keay uses a full but short chapter to discuss profit allocation. Unfortunately, however, the fundamental issue of allocation remains untouched. While any surplus and profits indeed should directly go into the company's account instead of shareholders' pockets in the first place, maximisation of the entity's wealth is far from being the end of the story. Even though the company has capacity to own and retain its profits, it can never consume or enjoy such profits. This is in line with the argument of Professor John Parkinson that companies with their artificial nature are not able to "experience well-being" and demanding a company to benefit itself is irrational. Without taking the human being behind the corporate form into account, it would be senseless to talk about the interest of the company. Considering that the ultimate goal is to maximise entity wealth, then what is the purpose of paying high bonuses to employees or the like? Is that still for achieving the goal of entity maximisation? As Keay argues, allocation of profits to benefit shareholders or other stakeholders should be done "in a way as to produce entity enhancement" (p. 326) and must be determined "on the basis of maximising the entity's wealth" (p. 207). Once more, it falls into an endless circle. Maximising entity wealth is for ultimate benefit of all its constituents, but when facing the distribution of the profits after its wealth has been increased or maximised, the guideline returns to maximising entity wealth again. The value of certainty has been demolished altogether. Besides, this would inexorably involve a judgment of which group or groups can most promote the success of company for deciding profit distribution as rewards. However, the EMS model fails to deal with this point.

In conclusion, Professor Andrew Keay addresses some of the most important and complex issues or at least provides a different way to consider the corporate objective. Furthermore, the structure of the book is easy to follow: Keay first discusses the importance of corporate objective and then the current two dominant theories; after demonstrating neither is perfect, he puts forward his EMS model in Chapter 4, then enforcement and other specific issues are dealt with in the following chapters in order to make up the deficiencies of the model. It is helpful for readers to obtain an overview of the scholarship upon corporate objective since this book is one of few books in recent years focusing exactly on this subject and clearly summaries the main arguments regarding the contemporary shareholder primacy and stakeholder theory. Whilst the discussion of the EMS model would certainly move the decade-long debate of for whose interests should the company serve well forward, the EMS model fails to materially differentiate itself from existing models and suffers from serious enforcement problems among others in practice. As a result, it is recommended to company lawyers and students involved in the corporate objective discussion who want to have a quick and clear understanding about the current development of this area, but in the meanwhile a critical view must be taken when reading the new model brought forward by Keay.