Queen Mary Law Journal

Volume 7, Winter 2016

Queen Mary Law Journal

Volume 7, Winter 2016

The Queen Mary Law Journal seeks to publish innovative student legal scholarship.

Published by the Queen Mary Law Society in the United Kingdom.

Queen Mary Law Journal
c/o School of Law
Mile End Road
London E1 4NS

Email: *qmlawjournal@gmail.com*

All rights reserved. No part of this publication may be reproduced or transmitted, in any form or by any means, electronic, mechanical, recording or otherwise, or stored in any retrieval system of any nature, without the prior, express written permission of the Queen Mary Law Journal. Exceptions are permitted with regard to fair dealing for the purpose of research of private study, or criticism or review, as permitted under the Copyrights, Designs and Patents Act 1988. Enquiries concerning reproducing outside these terms should be sent to the Editor-in-Chief.

© 2016 Queen Mary Law Journal

EDITORIAL BOARD
VOLUME 7, WINTER 2016

Editors-in-Chief
Nicole Charles
Kevin Roche

Managing Editors
Anna Maria Deligkari
Kate Temple-Mabe

Lead Editors
Panagiotis Apostolou
Nikita Cowlagi
Sam Hodge
Gautam Lamba
Emma Randall
Sana Shafi
Malwina Anna Wojcik

General Editors
Will Banks
Andra Georgescu
Daniel Dong Hoon Lee
Areti Antonia Kostoula
Marissa Mah
Rebecca Neumann
Janet Nikova
Jiayen Ong
Konstantinos Saxionis
Mehdi Tayeb
Helena Tripp
Melina Tsangarides
Georgios Viopoulos
Krysta Amy Yan

Postgraduate Editors
Angelika Bialowas
Michael Gallagher
Giulia Gasparin
Samuel Grogan

Queen Mary Law Journal

Volume 7, Winter 2016

Contents

How far has the UK's intellectual property laws come in protecting copyrighted work on the Internet? Is reform necessary and in what ways might the law be reformed?

Yasmine El-Nazer
BPTC, Cardiff University

ABSTRACT

This article focuses on the impact of the Internet on copyright law in the UK. It also aims to determine whether the introduction of new legislation by the Government is enough to provide sufficient protection. Particular focus is placed on the Digital Economy Act 2010. This Act addresses media policy issues related to digital media, including copyright infringement, Internet domain names, Channel 4 media content, local radio and video games. The Act sought to impose new responsebilities on Ofcom and Internet Service Providers (ISPs) to tackle online copyright infringement. Unsurprisingly, it was heavily criticised by the ISPs, who argued users' civil rights were impeded and that it contradicted the whole essence of the copyright system, which strives to allow the public to utilise and enjoy authors' intellectual creations. Accordingly this article aims to analyse recent legislation and examine whether stringent reforms, such as the Digital Economy Act 2010, are necessary to realign the balance between authors' and users' rights, in order to tackle online copyright infringement.

I. INTRODUCTION

The Copyright Designs and Patent Act 1988 (CDPA 1988)[1] governs UK copyright law. It was developed after several technological innovations, dating back to the Statute of Anne in 1710.[2] Since its enactment, the CDPA 1988 has been subject to numerous amendments largely aiming at implementing the plethora of EU directives concerning copyright law.[3] Accordingly, it seeks to prevent the unauthorised reproduction of works by providing both exclusive rights for authors' and specific exceptions for users.

As a result of rapid Internet developments and online copyright infringement, stakeholders' rights have endured several challenges, with some academics even

[1] The Copyright Designs and Patent Act 1988 (CDPA 1988).
[2] Statute of Anne 1710.
[3] T Aplin and J Davis, *Intellectual Property Law - Text, Cases, and Materials* (OUP 2013) 62.

arguing that the Internet is the end of copyright law as we know it.[4] This view, alongside pressure from commercial lobbyists, contributed to the subsequent adoption of the Digital Economy Act (DEA 2010)[5] in 2010. It sought to impose new responsibilities on Ofcom[6] and ISPs in order to tackle online copyright infringement. Unsurprisingly, it was heavily criticised by the ISPs who argued that users' civil rights were impeded[7] and that it contradicted the whole essence of the copyright system. As it stands, certain provisions of the Act remain unenforced, with 2015 being the foreseeable implementation date, however this remains indefinite.

Accordingly, this article will demonstrate how UK copyright law endeavours to protect the authors' intellectual property (IP) rights on the Internet. Alternatively, it will argue how harsh reforms, such as the DEA 2010, are necessary to realign the balance between authors' and users' rights in order to tackle online copyright infringement.

II. THE INTERNET DEFINED

Since its inception, the Internet has advanced to a point unimaginable ten years ago. It comprises of a global network of computers that organise electronic transmission, mainly by cable, from the site where the material is held to a content provider on the server of an ISP. Therefore, the Internet may simultaneously undergo tasks involving storing, identifying and distributing various works fixed in digital format.[8] Such works can be literary, artistic, musical and audio-material; all of which attract copyright protection. Once accessed on an ISP, i.e., a mobile phone or a social networking site, material can be transmitted repeatedly, either on a temporary or long-lasting basis without losing its initial quality. This occurs all along the Internet chain.[9]

With users being able to casually access copyright material, opportunities for illegal copying are vast and thus, the Government's task of tracking ISPs for copyright infringement becomes extremely difficult and costly. Unceasing

[4] Eleonora Rosati, 'The End of Copyright as We Know It? Still on the Enterprise and Regulatory Reform Act (Still Unavailable)' <http://ipkitten.blogspot.co.uk/2013/04/the-end-of-copyright-as-we-know-it.html> accessed 19 February 2014.
[5] The Digital Economy Act 2010 (DEA 2010).
[6] Office of Communications, 'New measures to protect online copyright and inform consumers' <http://media.ofcom.org.uk/news/2012/new-measures-to-protect-online-copyright-and-inform-consumers/> accessed 7 December 2015.
[7] *R (on the application of British Telecom and TalkTalk Telecom Group) v the Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021.
[8] W Cornish, D Llewelyn and T Aplin, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (7th edn, Sweet & Maxwell 2010) 885.
[9] ibid.

advancements in communicative methods, such as peer-to-peer file sharing programmes like Ares and Limewire, which enable users to download files from another user's computer and share them with the public, have made this all the more complex. With technological developments like these, the courts will face major issues in the future and ultimately question the CDPA 1988's validity.

III. COPYRIGHT DESIGN AND PATENT ACT 1988

The CDPA 1988 came to effect on the 1st August 1989. Unlike other IP systems, copyright law is unique in that it arises automatically on the creation of the work, without the need for registration or other formalities. The UK in particular practices a 'closed-list' system, whereby only eight types of work are protected. These include: literary, dramatic, musical and artistic works; films; sound recordings; broadcasts; and typographical arrangements of published editions.[10] They are afforded protection for the lifetime of the author plus seventy years. Contrastingly, sound recordings receive a fifty-year protection; as do broadcasts and cable programmes. Copyright law affords much lengthier protection than other IP rights and therefore recognising where such protection lies is important.

Is material found on the Internet protected by UK copyright?

Once distributed online, an author's work acquires the same copyright protection as do works in other media forms under the CDPA 1988. For instance, copying, issuing copies and communicating the online work to the public[11] require the author's express or implied licence.[12] Additionally, there are no provisions in the CDPA 1988 that require licences to be in writing.[13] So, where an online photograph or music file does not expressly state that it has copyright protection, users may copy it, provided it falls within the CDPA 1988 exceptions and defences set out in sections 28 to 76.[14] Nevertheless, websites commonly state their users' copyright liabilities to ensure that material can be replicated without requesting the author's consent; otherwise, authors would have to give permission to every user out there. Furthermore, even when an author's online work satisfies section 1(1) CDPA 1988, it will still need to satisfy the qualification requirements, i.e., fall within the copyright protection timeframe,[15] be original[16] and be fixed in writing or otherwise.[17]

[10] CDPA 1988, s 1(1).
[11] ibid s 16(1).
[12] ibid s 16(2).
[13] ibid s 92.
[14] ibid ss 28-76.
[15] ibid ss 12-15
[16] ibid s 1(1)(a).
[17] ibid s 3(2).

Originality

To qualify for copyright protection, the work must be original; it must have been created through the author's own skill, judgment and individual effort, without replicating from other sources.[18] This originality threshold varies among States, with the UK commonly exercising a low level of originality.[19] The works that have been deemed to satisfy the threshold include: football coupons,[20] match fixtures[21] and television programme listings.[22] Alternatively, UK copyright law does not provide a definition of originality[23] nor does it practice a codified doctrine like the French and German Constitutions. This lack of definition, combined with a low originality threshold, makes the UK copyright system quite flexible, ensuring a broader scope for protection of works under section 1(1). Therefore, authors' online works may satisfy the test more easily under UK jurisdiction than abroad.

In contrast, database works like websites, have a higher threshold test for originality, as they receive a sui generis right.[24] This right is distinct from copyright, in that it provides protection for databases irrespective of whether the database in itself is innovative.[25] They must be original in that 'by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation.'[26] This criterion also applies to unoriginal photographic works that comprise the author's own intellectual creation.[27] Such standards may also apply to copyright holders where their photographs have been replicated on websites without their permission and the website owner claims that his use of the photograph has been rearranged in a way that constitutes his own intellectual creation. This area indicates a difficult area of law, especially as there are no specific definitions as to what constitutes originality. States also tend to apply the threshold inconsistently. If it was applied more uniformly, there would be a clearer indication of which copyright works acquired protection online, thus enabling online infringement to be dealt with more succinctly. Infringers could potentially seek out jurisdictions that knowingly practice a higher threshold in order to avoid infringement.

[18] *Ascot Jockey Club Ltd v Simons* [1968] 64 WWR 411 (BCSC).
[19] P Masiyakurima, 'The Futility of the Idea/Expression-Dichotomy in the UK Copyright Law' [2007] IIC 548, 549.
[20] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR (HL) 273.
[21] *Football Dataco Ltd v Stan James (Abingdon) Ltd* [2013] EWCA (Civ) 27.
[22] *Independent Television Publications Ltd v Time Out Ltd and Elliott* [1984] FSR 64.
[23] cf CDPA 1988, ss 1(1)(a), 3 and 4.
[24] CDPA 1988, s 3A; Implements Database Directive 96/9/EC.
[25] The EU Single Market, 'Protection of Databases' <http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm> accessed 19 April 2014.
[26] Article 3(1) of European Parliament and of the Council Directive (EC) 96/9 on the legal protection of databases [1996] OJ L77/20.
[27] Article 6 of Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L372/12.

Further qualification requirements

Additional qualification requirements must be met to gain copyright protection. The author must be British[28] or domicile in the UK or another country to which the Act extends when the work is created. For the publication of works, it is required that the country should be one in which the provisions of the 1988 Act extend or have been applied in recognition of that country's protection of works of UK origin. For broadcast works, the same qualifications are applicable too, but in place of the concept of publication is the making of a broadcast. Under section 6A CDPA 1988, there is no express provision regarding from where a wireless broadcast is deemed to be made. However, from Copinger[29] we can assume that, by analogy to section 6(4) CDPA 1988, the place from which the broadcast operator introduces the programme carrying signals into an uninterrupted chain of communication is where copyright will subsist.[30] Therefore, copyright protection for wireless broadcasts will arise from where the signal originates and not the place where it is receivable or its footprint falls.[31]

Initially, there was uncertainty as to whether a broadcaster could bring an action in the UK to stop an infringer from providing their content to UK viewers over the Internet using servers located in another country. This question arose in *Football Dataco v Sportradar*.[32] The European Court of Justice (ECJ) ruled that where an operator targets an audience in one EU State and provides them with material infringing sui generis database rights from a server located in another EU state, infringement occurs at least in the Member State of the recipients. However, the ECJ did not clarify whether any infringement occurs in the country of emission. Although the decision only concerned sui generis database rights, it is likely this judgement will also apply to situations where unauthorised copyright works are communicated to the public over the Internet without authorisation.

IV. WHAT AMOUNTS TO COPYRIGHT INFRINGEMENT IN RELATION TO INTERNET USE?

When a user intentionally places an author's unauthorised work online, this will amount to a primary infringement.[33] Also, where a user carried out their action in ignorance or by mistake, or where they unknowingly exceed a limited licence, this

[28] British Nationality Act 1981.
[29] K Garnett, G Davies, and G Harbottle, *Copinger & Skone James on Copyright* (16th edn, Sweet and Maxwell 2010), chapter 29.
[30] ibid.
[31] K Garnett (n 29) paras 7-128.
[32] [2013] EWCA Civ 27.
[33] CDPA 1988, ss 16-21.

too qualifies. In the UK, case law has determined what online activities amount to primary infringement. This shall be discussed in the later sections.

Copying from an original source

Under section 16(1) CDPA 1988, unauthorised copying from an original work, such as a book or music record, amounts to copyright infringement. This also applies to online works. In *Shetland Times Ltd v Wills*,[34] the copying of a newspaper headline from a rival's website was deemed to be an infringement; Lord Hamilton confirmed that the claimants had prima facie correctly argued infringement under sections 17 and 20 CDPA 1988. Equally in *Kabushiki Kaisha Sony Computer Entertainment Inc*,[35] Laddie J held that loading software or website content into a computer's RAM memory amounted to infringement, even when done transiently.

The above authorities highlight potential concerns for individuals making copies of lawfully purchased music to backup or play on another device. However, UK copyright law is not yet up to speed with these digital advancements. Moreover, these decisions create problems for Internet search engines like Google. Commonly, search engines extract copyright material to provide a detailed indication of contents on its own indexing system. As demonstrated above, this may now amount to an infringement.[36] In *Shetland Times*,[37] the court held that using a search engine to identify an author's original websites and pages does not lead to copyright infringement because it turned on the recognition of keywords and domains. However, as many ISPs and search engines store content of copyright works, in theory this could amount to a primary infringement, with the amount of potential claimants coming forward being enormous.

Notwithstanding the recent HM Government response to the European Commission Consultation on EU copyright rules,[38] which sought to clarify this, UK courts will now recognise a hyperlink to be a reference to authors' works and not a form of communication to the public. This coincides with the ECJ's verdict in *Svensson*[39] and will likely apply to cases where search engines act as references to

[34] [1997] SC 316.
[35] [2004] EWHC 1738 (Ch).
[36] W Cornish, D Llewelyn, T Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7th edn., Sweet & Maxwell, 2010) 889.
[37] *Shetland times* (n 31) 316.
[38] Computer and Communications Industry Association (CCIA), *Public Consultation on the Review of the EU Copyright Rules* (2014) <http://cdn.ccianet.org/wp-content/uploads/2014/03/CCIA-Contribution-to-the-EU-Copyright-Consultation-2014_FINAL.pdf> accessed 10 November 2015.
[39] Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76.

copyright works. This highlights the courts reluctance to restrict the free nature of the Internet, as the contrary could have a rather 'chilling' effect.[40]

Communicating a copyright work to the public

In accordance with section 20 CDPA 1988, communicating copyright work freely can amount to primary infringement. Certain activities may arise when communicating through an on-demand or interactive service.[41] Likewise, website operators may now infringe copyright too where they provide the technical means of assembling and downloading unauthorised content. This happened in *Twentieth Century Fox Film Corporation v Newzbin Ltd*[42] where a British Usenet indexing website, called NewzBin, facilitated access to copyright content through their technologies and search techniques. In his judgment, Kitchen J concluded that by enabling the public access to a portfolio of films from a place and time chosen personally by them, Newzbin had infringed section 28 CDPA 1988. The decision was a starting point in ensuring that ISPs have some responsibility in policing their websites and that the UK courts, in accordance with ECJ guidance, broadly interprets the concept of communication to the public. Therefore, section 20 CDPA 1988 can encompass an array of communicative forms.

Another case concerned with unauthorised communication to the public over the Internet was *(UAEF) v Briscomb*.[43] As a result of the Information Society Directive,[44] disseminating live broadcasts of Champions League Football matches through a website became copyright infringement. Similarly, in *ITV Broadcasting Ltd v TV Catchup Ltd*,[45] the High Court confirmed that live streaming of TV broadcasts over the Internet was also an infringement under section 20. In these circumstances, it will be the producer or distributor who acquires liability for the infringement. The end-user, however, will not be liable for watching broadcasted content, as copyright tradition tends not to impose liability on recipients. Also, where an ISP is not responsible for the content transmitted on their website and their role is mainly passive, the E-Commerce Directive[46] introduces an exception whereby pecuniary relief will not be imposed on the ISP.

[40] J Miller '*Clarity on hyperlink copyright clash*' 164 NLJ 7595.
[41] ibid.
[42] [2010] EWHC (Ch) 608.
[43] [2006] EWHC (Ch) 1268.
[44] Copyright Directive 2001/29/EC (n 27).
[45] [2011] EWHC (Pat) 1874.
[46] Electronic Commerce (EC Directive) Regulations implementing the EU's Electronic Commerce Directive 2000/31/E [2002], Art 17.

Authorising acts of infringement

UK copyright is territorial and the infringing act must occur in the UK. Where a person authorises the doing of a restricted act, it is possible for the deed of authorisation to arise outside the UK, provided the restricted act itself occurs within the UK.[47] Authorisation is interpreted narrowly by the UK courts and failure to act may be considered authorisation.[48] This provision has implications on ISPs, universities and other bodies where failure to inform its subscribers of copyright law may be regarded as authorising infringement.

In *CBS v Amstrad*,[49] the House of Lords established the UK's approach to authorisation of infringement; it was confirmed that creating and selling cassette players with a double tape deck did not amount to authorisation of illegal copying of recordings. The double tape deck could be used for both legal and illegal purposes and the supplier therefore had no control over this. This was distinguished in *Newzbin*,[50] where the defendants permitted subscribers of their website to locate and reassemble files for downloading films. By encouraging their editors to identify links to commercial films, they had demonstrated actual knowledge of the infringing activities and the courts will consider this when concluding liability.

However, the UK courts notably took a stance against peer-to-peer filing activities online in *Polydor Ltd v Brown*.[51] A father who installed file-sharing software onto his son's computer was held to have infringed copyright through the act of communicating music files to the public under section 20.[52] Similarly, he was also liable under section 16(2) CDPA 1988 for enabling others to make unauthorised music copies. With file-sharing costing the music industry £1.2 billion in 2010 alone,[53] this case will be significant in actions against peer-to-peer file sharing activities and will likely influence future court proceedings with regards to this type of infringement.

[47] *ABKCO Music and Records Inc v Music Collection International Ltd* [1995] RPC (CA) 657.
[48] D Brennan 'ISP Liability for Copyright Authorisation: The Trial Decision in Roadshow Films v iiNet Part One' [2010] 28 Communications Law Bulletin.
[49] [1988] EIPR 345.
[50] (n 42).
[51] [2005] EWHC (Ch) 3191.
[52] ibid.
[53] Intellectual Property Office, *Measuring Infringement of Intellectual Property Rights* (Crown Copyright 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325020/IP_Measuring_Infringement.pdf> accessed 10 November 2015.

Secondary infringement

Where a person facilitates primary infringing activities or deals in infringing copies of a work, this will amount to a secondary infringement. This requires an element of knowledge, since a person has to know or have reason to believe that they were facilitating an infringement or dealing with an infringing copy of work. Therefore, when an ISP knowingly exhibits or distributes unauthorised copyright material in the course of its business, they will be liable. For large commercial ISPs, such as BT, the claimant may have difficulty establishing the knowledge element in court, as global sites have a high number of end-users. This will make it difficult to track users of their site's contents and affords a higher threshold for claimants to overcome in court, as opposed to the strictly liable nature of primary infringement.

V. HOW DO THE DEFENCES TO COPYRIGHT INFRINGEMENT APPLY TO ALLEGED INFRINGEMENT ON THE INTERNET?

Commonly, ISPs will argue the traditional exceptions of fair dealing and consent.[54] Further defences are also available under the Electronic Commerce Regulations 2002.[55] However, while such defences are available to ISPs, they do not offer significant protection. Moreover, with the implementation of the Digital Economy Act in 2010 gaining prominence, the pressure on ISPs to police and remove unauthorised content is greater.

Digital Economy Act 2010

The Digital Economy Act 2010 received Royal Assent on the 8th of April 2010 and has undeniably been the largest proposed reform to date in the fight against online copyright infringement. Proposed measures include reducing users' connection quality and terminating their Internet connection after one year of unauthorised activity.[56] These provisions have been heavily criticised by the Open Rights Group and commercial ISPs, who maintain that the DEA 2010 is inflexible and wish to seek its repeal.[57]

[54] CDPA 1988, ss 29-30.
[55] Electronic Commerce Regulations which implemented the Electronic Commerce Directive 2000 into UK legislation [2002].
[56] DEA 2010, ss 3-16.
[57] Open Rights Group, 'Digital Economy Act' <https://www.openrightsgroup.org/issues/deact> accessed 11 November 2015.

Evaluation of the Digital Economy Act 2010

In addition to those mentioned in section 5.1, the DEA 2010 also imposes other regulations, these include: Internet domain name registration;[58] Secretary of State powers to obtain a court order to block an Internet location that is being used for copyright infringement[59] and powers of intervention in relation to Internet domain registries.[60] In *Media CAT Ltd v Adams & Ors*,[61] the court underlined identification and the removal of the presumption of innocence as a major problem with the DEA 2010. IP addresses can only identify a router, which can be used by numerous computers. Through these means, pirates can illegally 'piggy-back' on these routers and register at these IP addresses. Consequently, innocent people could be prosecuted for enabling infringement since a computer's IP address cannot identify particular infringers. This concern had huge implications on the commercial scale for institutes, such as hotels and educators, who argued that the Act could endanger their businesses because organisations providing public net access would be held liable for the actions of their customers.[62] Additionally, it revealed how right holders could abuse their power of alleging infringement. This problem emphasises the DEA 2010's failure to consider the needs of all stakeholders and demonstrates the lack of Parliamentary scrutiny on enforcement.

The Government recently presented the Deregulation Bill 2013-14 to Parliament. The Bill proposed the repeal of site-blocking powers contained in sections 17 and 18 after Ofcom concluded that these measures would not work in practice. Introducing sanctions would mean that zones providing public Wi-Fi access, like libraries and airports, would have to remove their service to avoid copyright infringement. The repeal was considered necessary to sustain a balance between stakeholders' rights. Arguably, this means that authors are right back to where they started before the DEA 2010. If these public Wi-Fi zones are subject to pirates utilising their routers, it is for the ISPs to police their networks. It seems unfair that ISPs should not take some form of liability because this is ultimately where the majority of infringing activities are taking place.

Nonetheless, after the initial publication by Ofcom in 2012 aiming at reinforcing initial obligations imposed on ISPs to reduce online copyright infringement by the

[58] DEA 2010, ss 1-2.
[59] DEA 2010, ss 17-18.
[60] DEA 2010, ss 19-21.
[61] [2011] EWPCC 6.
[62] Martin Couchman on behalf of the BHA, BPPA and BH&HPA, 'Response to 'Ofcom Consultation on: Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code'' <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/responses/british_hosp_assoc.pdf> accessed 11 November 2015.

DEA 2010, copyright infringement notification schemes shall be sent out in 2015. Naturally, this was met with resistance from ISPs, such as BT and TalkTalk, who sought judicial review.[63] However, the Court of Appeal rejected their application. Although such measures by the DEA 2010 are likely to ensue, the future of the Act concerning a new framework for copyright infringement online remains uncertain.

VI. REMEDIES FOR COPYRIGHT OWNERS

The main civil remedies available for online copyright infringement are set out under section 96(2) CDPA 1988. These include interlocutory relief, order for delivery up, forfeiture, injunctions, damages and an account of profits. Undoubtedly, authors will seek an injunction under section 97A CDPA 1988 to stop online infringement. However, the ECJ in *Scarlet Extended SA v SABAM*[64] highlighted the EU's attitude towards injunctions; it confirmed that national courts will not impose injunctions or general monitoring obligations on ISPs, in accordance with Article 15 of the Electronic Commerce Directive 2000/31/EC. The court stressed the need to strike a fair balance between copyright protection and the ISPs' fundamental rights to conduct business freely under Article 16 of the Charter of Fundamental Rights of the European Union, in addition to guarding their customers' personal data.

In contrast, the following UK decision in *Twentieth Century Fox v British Telecommunications plc*[65] surprisingly countered this judgement. Arnold J made an order under section 97A CDPA 1988 requiring BT to block their subscribers' access to the Newzbin2 website. He justified this on the grounds that the Court neither imposed a general monitoring obligation on BT nor required BT to scrutinise subscribers' activities; it only required BT to block access to Newzbin2 website. Even thought the case prima facie contradicts the SABAM[66] judgment, SABAM[67] in fact covered a variety of communications that the claimant wished to block and therefore the decision in *Newzbin2*[68] was upheld.

Both cases underline the fact that that where an author seeks to impose an injunction against an ISP, they will now be more likely to acquire it under UK jurisdiction as UK courts appear to take a more robust view than the ECJ on

[63] *R (on the application of (1) British Telecommunications Plc, (2) Talk Talk) v BPI Ltd and others* [2012] EWCA Civ 232.
[64] Case C-70/10 *Scarlet Extended SA v SABAM* [2011] ECLI:EU:C:2011:771.
[65] [2011] EWHC (Ch).
[66] *Sabam* (n 64).
[67] ibid.
[68] *Newzbin2* (n 42).

tackling online copyright infringement. Evidently this begs the question, why remove site-blocking powers from the DEA 2010 if the courts are now more likely to grant these remedies? As confirmed in *SABAM*[69] and *Newzbin2*[70], the selection process in blocking these sites is likely to be crucial, which the DEA measures would overlook. For instance, where obligations created on ISPs are too broad, they risk being viewed as imposing a general obligation on ISPs to monitor, which would be prohibited. Equally, if the mechanism leads to the outright blocking of sites comprising mostly legitimate content, such measures may seem disproportionate in the circumstances. Therefore, each case will be based on their own merit and no longer be subject to the harsher approach of the DEA 2010. However, this may change.

VII. OTHER POTENTIAL REFORMS

Due to the provisions inserted into the CDPA 1988, it is clear that the UK's copyright framework fails to adapt quickly enough to technological advancements. This was reaffirmed by Professor Ian Hargreaves in his independent report[71] following the initial review of IP. The Government's later report,[72] estimated that bringing the law into the 21st century could contribute around £500 million to the UK economy over ten years. A study on the Singaporean economy following changes to Singapore's copyright law highlighted that exceptions and limitations actually contribute to economic growth, without damaging the copyright industries.[73] Therefore, this should not be overlooked or diminished when considering a reform of copyright law.

In addition to the DEA 2010, another proposal put forward in Hargreaves's report, entailed a voluntary Digital Copyright Hub to register and identify licensing of works. This would enable users and right holders to stay connected whilst permitting more extensive and legitimate use of all kinds of digital content. This conflicts with Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works 1971, which expressly prohibits formalities as a condition for the exercise and protection of rights. However, the UK Consultation implies that this prohibition is not absolute. Furthermore, even though a register like this could potentially transform copyright protection on the Internet, the demand for such a register is unclear.

---

[69] *Sabam* (n 64).
[70] *Newzbin2* (n 42).
[71] Ian Hargreaves '*Digital opportunity: review of intellectual property and growth'* (2011) 11/968 Department for Business, Innovation & Skills.
[72] HM Government '*Modernising copyright - a modern, robust and flexible framework: Government Response to consultation on copyright exceptions and clarifying copyright law'* (2012).
[73] R Ghafele and B Gibert '*The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore'* (2012).

VIII. CONCLUSION

The Internet is continually evolving, with numerous members of the public actively distributing copyright work. The Department of Business, Innovation & Skills estimates that online copyright infringement costs the industries £400million per year.[74] It is therefore important that the Government takes action before these activities become a social norm. Although measures in the DEA 2010 have been held back due to their limitations on users' rights and protecting ISP information, harsher methods of policing and infringement information need to be implemented, even if there is initial public discontent. Accordingly, the Internet is not a copyright-free space and technological inconvenience is no reason for ignoring the rights of copyright owners online. Measures so far have only focussed on punishment, with minimal effort going into the development of a more effective business model. As such, a universally agreeable solution is yet to be found between the UK Government, right holders and ISPs. Nevertheless, the proposed enforcement of the DEA 2010 should bring to light the UK Government's determination in cracking down on copyright infringement. An instrument like the DEA 2010 can acknowledge the importance of copyright protection in society and eventually succeed as a deterrent.

[74] Robin Mansell and Edward Steinmeuller, *British Telecommunications Pls ("BT") and Talktalk Telecom Group Limited v Secretary of State for Business, Innovation and Skills ("BIS") in the matter of an Intended Claim* (LSE Enterprise, 2010) <http://eprints.lse.ac.uk/36152/1/British_Telecommunications_plc_(author_version).pdf > accessed 27 April 2014.

The appropriate balance between privacy and freedom of expression under UK law: just where does it lie when considering the actions of the press?

Richard Jordan
LLM Media Law, Policy and Practice, University of East Anglia

ABSTRACT

In the modern age of invasive technology, privacy issues arise in a number of areas of life: from online browsing, to the exposé of celebrities and beyond. Often privacy will come into direct conflict with other societal values, such as freedom of expression, leaving the correct balance to be applied, often one of subtle nuance. This article considers how the relatively fluid concept of privacy is balanced with the freedom of expression under UK law. It does so in the context of the actions of the press, and provides a model which this author suggests is of value in considering the appropriate balance between the positive elements of the press as an invaluable element of democratic society, and the harm that can be caused when privacy is brushed aside by freedom of expression not positively directed.

I. INTRODUCTION

This article examines whether when considering the actions of the press, the law of the United Kingdom provides the right balance between privacy and freedom of expression. Both *Kaye v Robertson*[1] and the phone hacking scandal[2] illustrate the harm that can be done by failing to provide the right balance between law and press. As 'the tension between the right to privacy and the right to freedom of expression arises most obviously in cases concerning the media',[3] the parameters of this article are well justified. The author's conception of the nature of privacy and the propounded model of the press (hereafter 'model of press duality') constitute the nexus upon which the consideration of the balancing act under UK law is anchored and upon which specific issues in the current state of the law are examined. Focus is on the machinery of the balancing exercise and the case law, which illustrates the operation of that machinery. This focus is often of more value than the analysis of the outcomes of particular cases because those outcomes inevitably derive to a great extent from the underlying machinery.

---

[1] [1991] FSR 62 (CA).
[2] Lord Leveson, *An inquiry into the culture, practices and ethics of the press: report* (The Stationary Office 2012).
[3] Jemima Stratford, 'Striking the Balance: Privacy v Freedom of Expression under the European Convention on Human Rights' in Madeleine Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing 2002) 13.

II. BRIEF DESCRIPTION OF THE AUTHOR'S CONCEPTION OF PRIVACY

As Collingwood recognised, privacy is an ill-defined societal value.[4] The respect for private and family life is enshrined in the Charter of Fundamental Rights of the European Union,[5] the European Convention on Human Rights (ECHR)[6] and the UK's Human Rights Act (HRA).[7] Modern case law too demonstrates that privacy rights have weight. However, the amorphous nature of privacy is a source of significant distress for those attempting succinct definition;[8] it is so intricately tied to the human condition, that its complex nature defies ease of explanation. On this basis, the author supports the work of Solove and Bernal, both of whom promote what may be considered 'open' conceptions of privacy. Solove argues that 'privacy is not reducible to a singular essence; it is a plurality of different things that do not share one element in common, but that nevertheless bear a resemblance to each other.'[9] Drawing on the work of Raz,[10] Bernal understands privacy as an element of individual autonomy[11] and of control over that autonomy.[12] As will be seen, open conceptions of privacy such as these have important ramifications for the quality of the balancing act under UK law.

III. MODEL OF PRESS DUALITY

The core element of this model, which will elucidate what the author sees as the right balance under UK law, is the separation between press outputs, which fulfil – or seek to fulfil – their duty of furthering democratic objectives, and outputs which do not. The former reflects the press as serving a democratic society, whereas the latter reflects the press as a commercial entity. This division is recognised regularly throughout academia and case law, with the former output consistently referred to as the 'duty' of the press, and the latter output tolerated as necessary for survival in the marketplace.[13] The 'intellectual aristocrat'[14] and esteemed press critic Godkin, writing in 1869, claimed inexpensive newspapers 'were failing in their duty to mould public opinion and cultivate society.'[15] He

[4] Lisa Collingwood, 'Privacy in Cyberworld: Why Lock the Gate After the Horse Has Bolted' (2012) 3 EJLT 1.
[5] Charter of Fundamental Rights of the European Union [2000] C 364/01, Art 7.
[6] European Convention on Human Rights [1950], Art 8.
[7] Human Rights Act 1998, ss 1-3.
[8] Jacques Velu, 'The European Convention on Human Rights and the right to respect for private life, the home and communications' in AH Robertson (ed), *Privacy and Human Rights* (Manchester University Press 1973) 31.
[9] Daniel Solove, '"I've Got Nothing to Hide" and Other Misunderstandings of Privacy' (2007) 44 SDLR 745, 756.
[10] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).
[11] Paul Bernal, *Internet privacy rights: rights to protect autonomy* (Cambridge University Press 2014) 24.
[12] ibid 35.
[13] See for an example of this economic necessity argument: *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 [143] (Baroness Hale).
[14] Erin Coyle, 'E L Godkin's Criticism of the Penny Press: Antecedents to a Legal Right to Privacy' (2014) 31 American Journalism 262, 266.
[15] ibid 262.

called for 'social, professional, and legal reforms that would halt the publication of gossip as news.'[16] This notion of press 'duty' continues to be seen in case law and academia. For example in the case of *Bladet Tromsø and Stensaas v Norway*,[17] particular emphasis was placed on the fact that freedom of expression under Article 10 of the ECHR 'carries with it duties and responsibilities'.[18] The model of press duality calls for this acknowledgement to be more vigorously reflected in an appropriate balancing exercise.

However, in order to do this, all expression must not be accepted as equal or as worthy of equal protection. Fortunately, this premise is given weight in law, with the justifications for freedom of expression limited, inter alia, where necessary for the health of a democratic society. According to Barendt, theoretical justifications stem primarily from four grounds:[19]

i) The discovery of truth;[20]
ii) As a necessary element of self-fulfilment;[21]
iii) To enable citizens to participate in democracy;[22] and
iv) Suspicion of government.[23]

The first justification is relatively weak as regards privacy because it would be absurd to hold that private information that is true is beyond protection.[24] Justification (ii) is not applicable to the press as commercial entities. However, justifications (iii) and (iv) are entrenched in the public interest duty promoted by the author's model of press duality, and where present, should elevate the weight of freedom of expression in an appropriate balancing act with privacy. As regards absolute freedom of expression for the press, Lord Leveson has firmly rejected the argument that the press are above the rule of law, stating that

> 'there are many forms of statute law which already restrict the activities of the press, whether in terms of their organisation, competition or activities up to and including in limited cases what it may or may not be lawful to publish (race hate, for example).'[25]

As freedom of expression is a societal good, and the press merely a tool for the protection of democracy, they must make use of it to fulfil their 'duty' to society.

[16] ibid.
[17] App no 21980/93 (ECtHR, 20 May 1999), para 65.
[18] European Convention on Human Rights [1950], Art 10(2).
[19] Eric Barendt, *Freedom of speech* (2nd edn, OUP 2005).
[20] ibid 7.
[21] ibid 13.
[22] ibid 18.
[23] ibid 21.
[24] Rebecca Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10 Balancing Exercise' (2014) 6 JML 234, 248.
[25] Lord Leveson (n 2) paras 5.12-5.13.

This duty is met through public interest investigative journalism (the watchdog role) and by informing the citizenry of matters relevant to a democratic society. Barendt states that 'the press has a duty to investigate and report stories of enormous public interest (or stories which the public finds extremely entertaining)'.[26] However, no trace of a 'duty to entertain' can be found in law. Perhaps Barendt means that the press have a duty to inform and just happen to entertain. Yet this is a means to an end and falls into the second form of outputs, those that are simply commercial in nature. Certainly the press must sell papers (or increasingly so, online subscriptions), and in entertaining their readers they have a higher chance of achieving this. However, the infringement of privacy rights should not be tolerated when the press is acting in a purely commercial role.

Phillipson explains that entertainment stories are still highly lucrative when private information is obtained by consent, as occurs regularly in magazines such as OK!.[27] *Douglas v Hello! Ltd (No 8)*[28] demonstrates that such exclusive agreements may still be infringed and offers a significant disincentive by way of damages. However, as Shiner opines regarding commercial expression generally, the parasitic attempt of corporations to manipulate fundamental human rights in order to ensure the protection of market dominance 'needs to be exposed as the conceptual and normative fraud that it is.'[29] The press duality model works towards this end; in serving democracy, freedom of expression must be protected to ensure that the press can adequately produce stories relating to real or legitimate public interest or concern across wide-ranging topics, and not relating simply to matters of gossip or curiosity.[30] The model of press duality imports a balance between freedom of expression and privacy, which protects and promotes the former. In relation to the latter, the law needs to show no mercy where the press deviate from merely entertaining to unjustified infringement of privacy rights.

IV. APPLICATION TO, AND CRITIQUE OF, THE BALANCE

It is apt to turn our attention now to the balancing test under UK law. The case of re *S (FC) (A Child)*[31] is frequently cited for its succinct illustration of the approach to be taken where Articles 8 and 10 are at odds. The approach, expounded by Lord

[26] Eric Barendt, 'Statutory Underpinning: A Threat to Press Freedom?' (2013) 5 JML 189, 192.
[27] Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom' (2013) 5 JML 220, 233.
[28] [2007] UKHL 21; [2008] 1 AC 1.
[29] Roger Shiner, *Freedom of Commercial Expression* (Oxford University Press 2003) 3.
[30] Alison Firth, '"Holding the line" – the Relationship between the Public Interest and Remedies Granted or Refused, be it for Breach of Confidence or Copyright' in Paul Torremans (ed), *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (Kluwer Law International 2004).
[31] [2004] UKHL 47, [2005] 1 AC 593.

Steyn and derived from the House of Lords' judgments in *Campbell v MGN Ltd*,[32] was agreed with by all four Lords comprising the Appellant Committee in *re S (FC) (A Child).* The approach stipulates:

i) First, neither article has as such precedence over the other
ii) Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary
iii) Thirdly, the justifications for interfering with or restricting each right must be taken into account
iv) Finally, the proportionality test must be applied to each.[33]

In order to determine whether Lord Steyn's 'ultimate balancing test'[34] provides for the right balance under UK law, its constituent steps need to be considered.

Element 1: First, neither article has as such precedence over the other.

The acknowledgement that neither Article 8 nor 10 has precedence ipso facto over the other is to be praised, and correctly reflects the intentions of the Council of Europe.[35] As regards to the appropriate balance under UK law, this starting point is paramount to giving effect to privacy rights, the existence of which have long been denied.[36] The alternative position, where privacy is subordinate to freedom of expression, creates a mockery of any 'balance' and the value of privacy. Canavan admits that 'the absolutist approach to freedom of speech and press has one great advantage: simplicity.'[37] However, critique of the recent Australian Law Reform Commission's (ALRC) report[38] on privacy invasion demonstrates this position is unfavourable. In the report, although the ALRC recommends either a statutory or tort law action of privacy, the required threshold is set to 'further ensure the new tort does not unduly burden competing interests such as freedom of speech.'[39] This wording is clearly inimical to adequate protection of privacy, where freedom of expression is the press' primary defence. It is precisely freedom of expression that privacy rights need to be placed on a level playing field with, in order to function as a viable cause of action in the modern sphere of highly intrusive journalism.[40]

[32] [2004] UKHL 22, [2004] 2 AC 457.
[33] *Re S* (n 31) [17].
[34] ibid (Lord Steyn).
[35] David Eady, 'Privacy: A Judicial Perspective' in James Lewis and Paul Crick (eds), *Media Law and Ethics in the 21st Century* (Palgrave Macmillan 2014) 9.
[36] See for example *Tapling v Jones* [1865] 11 HLC 290.
[37] Francis Canavan, *Freedom of Expression: Purpose as Limit* (Carolina Academic Press 1984) 25.
[38] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report 123, 2014).
[39] ibid para 8.15.
[40] See Lord Leveson (n 2) for a thorough description.

Bennett draws attention to the fallacy of the ALRC's recommendations: 'The ALRC's formulation invites the courts to overlook entirely the private interests in the plaintiff's claim and to accord it weight only insofar as it promotes some broader public interest.'[41] This is possible when the test itself frames privacy subordinate to freedom of speech and privacy actions are primarily brought to protect private interests is exceptional. As regards the starting point of the balancing test elucidated in *re S (FC) (A Child)*, UK law draws into the balance a privacy right of genuine weight, as opposed to the comparatively toothless conception contrived by the ALRC. This starting point also aligns with a functioning model of press duality, where privacy may be outweighed by legitimate public interest journalism, but invasions of privacy that do not promote democratic ends are seen as commercial expression. *Markt Intern v Germany*[42] illustrates that national courts may find the restriction of commercial expression legitimate in light of Article 10 at a lower threshold than is otherwise permissible for say, political expression.

Element 2: Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.

With all due respect to Lord Steyn, this element is not worded as well as it may have been; suggesting that an 'intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary' reads as redundant where neither article has precedence over the other, yet both are enshrined in the ECHR[43] and the UK's HRA[44] as fundamental human rights. Not only is their individual importance clear in the eyes of the law, but their comparative importance is prima facie equal. Despite this, element (ii) does hold considerable importance for the ultimate balancing test with 'specific rights being claimed' raising serious considerations of scope and nature. Where the correct scope and nature of the rights claimed is attributed, the ultimate balancing test is better able to deliver justified outcomes suited to the demands of specific cases. Particularly for privacy, which, as has been described, is amorphous and hard to define, appreciation of the subtleties of scope and nature is imperative to an appropriate balancing exercise.

[41] Thomas Bennett, 'Privacy, Free Speech and Ruthlessness: The Australian Law Reform Commission's Report, Serious Invasions of Privacy in the Digital Era' (2014) 6 JML 193, 2013.
[42] App no 10572/83 (ECtHR, 20 November 1989).
[43] European Convention on Human Rights [1950], arts 8 and 10.
[44] Human Rights Act 1998, ss 1- 3.

However, as a result of a lacking political will to tackle 'the thankless task of reigning in the UK's voracious tabloid press',[45] the privacy right to be balanced against freedom of expression under UK law is primarily of common law construction. According to Edwards, 'it might be charitable to say that the common law of privacy in the UK is currently in a transitional state, but perhaps more brutally accurate to say that it is a confused; an internally contradictory mess.'[46] The source of this pessimism can be attributed to the current UK privacy tort being born of an extended breach of confidence action. In *A v B plc*,[47] Lord Woolf CJ opined that the Court as a public authority was compelled by the HRA to not act 'in a way which is incompatible with a Convention right.'[48] In the same paragraph, he explained this obligation could be met by subsuming Article 8 of the ECHR 'into the long-established action for breach of confidence.'[49] It was said by Lord Nicholls in *Campbell v MGN Ltd* that 'the essence of the tort is better encapsulated now as misuse of private information'[50] (MPI tort).

This construction however, appears to possess inherent shortcomings for the appropriate balance. For one, it deviates from the conception of privacy currently implemented by the European Court of Human Rights (ECtHR), the dictum of which must be taken into account by UK courts in relevant cases.[51] As regards to the scope and nature, the MPI tort is also structurally restrictive. This becomes clear on comparison to the United States' formulation of the right to privacy, set out in the renowned categories of Prosser,[52] and illustrated in US law by cases such as *Peterson v Idaho First National Bank*.[53] Those categories are as follows:

i) Intrusion upon the plaintiff's seclusion or solitude
ii) Public disclosure of private facts about the plaintiff
iii) Publicity which places the plaintiff in a false light in the public eye
iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[54]

While Schwartz and Peifer criticise the subtle influence of a categorised approach under US law, as opposed to a 'right of personality' found under the German Basic Law,[55] it seems plain that although the MPI tort protects category (ii), and possibly

[45] Lilian Edwards, 'Switching Off the Surveillance Society?' in Sjaak Nouwt and others (eds), *Reasonable Expectations of Privacy? Eleven Country Reports on Camera Surveillance and Workplace Privacy* (TMC Asser Press 2005) 108.
[46] ibid 107.
[47] [2002] EWCA Civ 337, [2003] QB 195.
[48] Human Rights Act 1998, s 6.
[49] *A v B plc* (n 47) [4] (Lord Woolf).
[50] *Campbell* (n 32) [14].
[51] Human Rights Act 1998, s 2(1).
[52] William Prosser, 'Privacy' (1960) 48 California Law Review 383.
[53] 83 Idaho 578 (Idaho 1961).
[54] Prosser (n 52) 389.
[55] Paul Schwartz and Karl-Nikolaus Peifer, 'Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?' (2010) 98 California Law Review 1925.

(iii), it will naturally fall short in relation to categories (i) and (iv), which are open or personality-based aspects of privacy, or even attributable to torts such as passing off.[56] It appears, therefore, that a valid criticism of UK law as regards the ultimate balancing test is that the construction of the counterweight to freedom of expression is not fully represented. Bennett makes this criticism of UK law, arguing that whereas case law of other common law jurisdictions, including Canada and New Zealand, is illustrating thorough doctrines of privacy protection, the UK risks stagnation.[57]

Judicial acknowledgement of this stagnation can be seen in *Wainwright v Home Office*.[58] Although Lord Hoffmann pointed out that a number of common law torts and statutory remedies touch upon matters of privacy, ('trespass, nuisance, defamation and malicious falsehood…breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998'),[59] he stated that 'there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer.'[60] Lord Hoffmann then acknowledged that 'what the courts have so far refused to do is to formulate a general principle of "invasion of privacy"'.[61] Failure to adequately canvas the full capacity of the right to be weighed in the ultimate balancing test implies that the law of the UK is unable to provide the appropriate balance in all cases. For example, although the ECtHR in *Spencer v United Kingdom*[62] held that the applicants had not exhausted domestic remedies through a breach of confidence action before bringing their action in that Court, the medical nature of the case leaves questions unanswered for intrusion into seclusion cases not involving clearly private information. As the press commonly makes use of long-range telephoto lenses to intrude into the private sphere, such conduct should naturally fall under an intrusion into seclusion action, yet is unable to do so under UK law.

This clearly raises difficulties for the appropriate balance when considering the actions of the press. Especially as regards purely commercial outputs, the harm of privacy invasion may be real where it involves even mundane information. For example, the invasion of Kate Middleton's privacy while sunbathing by way of long-range telephoto lens is a testament to this conclusion. The harm in such cases can be caused as much by the intrusion itself eroding individual faith in the

[56] Thorsten Lauterbach, 'A celebrity fight-back "par excellence"' (2005) 21 Computer Law and Security Review 74, 77.
[57] Bennett (n 41) 204.
[58] [2003] UKHL 53, [2004] 2 AC 406.
[59] ibid [18].
[60] ibid.
[61] ibid [19].
[62] App no 28851/95 (ECtHR, 16 January 1998).

sanctity of established seclusion, as by the further misuse of that information. Referring to Bernal's understanding of privacy, this amounts to usurpation of the control over private autonomy that an individual should be able to protect. In the author's opinion, statutory intervention is the most satisfactory means for establishing a general privacy action beyond the structurally limited MPI tort and for achieving a better balance with freedom of expression in light of the conduct of the press. Although in *McKennitt v Ash*[63] it was said that the UK courts 'have to look to *Von Hannover*'[64] as 'the precedential rules of English domestic law apply to interpretations of Convention jurisprudence',[65] the result of this incremental evolution will likely be uncertainty, delay, and the UK courts' ongoing inability to apply the appropriate balance between privacy and freedom of expression when considering the actions of the press.

Element 3: Thirdly, the justifications for interfering with or restricting each right must be taken into account.

Clearly, freedom of expression is of undeniable importance in democratic society. In *Handyside v UK*, it was said that 'freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.'[66] Not only is freedom of expression inseparable from a democratic society, but its protection is an ongoing and hard-won victory. Nicoleta points out that:

> From the viewpoint of the evolution in time, the freedom of expression has a long history, which precedes the adoption of the main international legal instruments in the matter of human rights. The struggle to win the freedom of expression is as old as censorship.[67]

Yet even in the US, where 'Congress shall make no law… abridging the freedom of speech, or of the press',[68] what may be described as 'first amendment fundamentalism'[69] does not prevail. Justice Douglas, dissenting in the US case of *Branzburg v Hayes*,[70] argued that 'all of the balancing was done by those who wrote the Bill of Rights',[71] the absolute terms of which were intended to repudiate

[63] [2006] EWCA Civ 1714.
[64] [2008] QB 73 [64].
[65] ibid [62] (Buxton LJ).
[66] App no 5493/72 (ECtHR, 7 December 1976), para 49.
[67] Odina Nicoleta, 'On the Freedom of Expression and the Right to Private and Family life' (2011) 14(2) Juridical Current 19, 26.
[68] US Bill of Rights amendments 1971 <http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html> accessed 8 April 2015.
[69] Paul Jones, 'The moment of Leveson: Beyond "First Amendment fundamentalism" in news regulatory policies"' (2012) 18 (2) Pacific Journalism Review 51, 64.
[70] 408 US 665 (1972).
[71] ibid 714 (Douglas J).

any 'timid, watered-down, emasculated versions of the First Amendment.'[72] As Edward Snowden will attest, this line of argument is not strong. Certainly, this is not the case under UK law with interference and restriction apparent throughout various areas of the law, including defamation and even blasphemy until its recent abolition.[73] Appreciation both that freedom of expression serves a crucial role in democratic society and that it is not absolute allows the ultimate balancing test under UK law to promote a model of press duality for the benefit of the democracy it serves. Yet in a number of ways UK law has failed to do so.

One symptom remedied by the press duality model of failing to distinguish a public interest serving press from a tabloid press which entertains by infringement of privacy for commercial gain, is judicial acceptance of the latter as necessary for the former. Such can be seen where the UK courts have included market forces as balancing against privacy infringement. For example in *Campbell v MGN Ltd*, Baroness Hale (referring to tabloid newspapers), stated that:

> On the other hand is a newspaper which wants to keep its readers informed of the activities of celebrity figures, and to expose their weaknesses, lies, evasions and hypocrisies. This sort of story, especially if it has photographs attached, is just the sort of thing that fills, sells and enhances the reputation of the newspaper which gets it first.[74]

As *Campbell* was decided on a 3:2 majority, with the split primarily focused on the commercial needs of newspapers to include photographs to sell stories,[75] it is safe to suggest that the commercial element plays a significant role in the ultimate balancing test under UK law. Such weight would simply not be afforded under a model of press duality, as this 'economic survival argument'[76] is groundless and counterproductive in promoting the press as a respectable element of democratic society. Case law illustrates that Strasbourg jurisprudence has moved away from protecting purely commercial outputs of 'lurid news intended to titillate and entertain'.[77] Additionally, there is evidence that the ECtHR has also adopted the distinction of the model of press duality. For example, in *Bladet Tromsø and Stensaas v Norway*,[78] the ECtHR said that 'the margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern.'[79] This definition of the 'margin of appreciation' is detached from the purely commercial consideration in the Campbell case, and as Barnes argues,

[72] ibid.
[73] Criminal Justice and Immigration Act 2008, s 79.
[74] *Campbell* (n 32) [143].
[75] Edwards (n 45) 109.
[76] Phillipson (n 27) 232.
[77] *Mosley v The United Kingdom* App no 48009/08 (ECtHR, 10 May 2011), para 114.
[78] *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999).
[79] ibid para 59.

unless Campbell had led a 'just say no' campaign, the hypocrisy involved hardly justified 'putting the record straight' for the good of democratic society.[80]

Phillipson further disputes the economic survival argument which is weakening the balancing act under UK law, arguing that:

> While it is doubtless true that publishing celebrity gossip per se is very lucrative, I have never seen evidence to support the specific proposition that newspapers can only survive financially if they publish private information without the consent of the person concerned.[81]

Eady points out that 'since the Human Rights Act 1998 came into effect, no convincing example has ever been produced where [the right to privacy] has prevented the revelation of criminality or wrongdoing.'[82] Where commercial elements taint the balancing act of privacy and freedom of expression, the scales are not to be trusted. As Baker explains, market forces function well for commodities, but are susceptible to failure in relation to public goods, such as public interest investigative journalism, which requires significant investment although often not profitable.[83]

There are options to remedy this market failure, including a tax to support a public interest press,[84] philanthropic-based investigative journalism start-ups[85] and regulatory models that are better able to monitor and promote ethical journalism.[86] However, what seems clear is that it is not the role of the UK courts to protect the unacceptable elements of the press duality model out of pity for the failing business model of the traditional press. In order to give better effect to the model of press duality, the law of the UK could start by not allowing absurd threats of prosecution under terrorism legislation against legitimate investigative journalists,[87] or offer more respect to journalists' privilege.[88]

---

[80] Robin Barnes, *Outrageous Invasions: Celebrities' Private Lives, Media and the Law* (OUP 2010) 207.
[81] Phillipson (n 27) 233.
[82] Eady (n 35) 6.
[83] Edwin Baker, *Media concentration and democracy: why ownership matters* (Cambridge University Press 2002) 222.
[84] Phillipson (n 27) 234.
[85] Peter Griffin, 'Big news in a small country - developing independent public interest journalism in NZ' (2014) 20 (1) Pacific Journalism Review 11, 15.
[86] Lord Leveson (n 2).
[87] See Christa Elliot, 'Terror in the Press: How the U.K.'s Threatened Criminalization of The Guardian Under the Terrorism Act 2000 Would Violate Article 10 of the European Convention on Human Rights' [2015] American University International Law Review 101.
[88] ibid 116.

Element 4: Finally, the proportionality test must be applied to each.

The author will briefly conclude on this point without taking into regard the criteria of *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources, et al*.[89] Despite the criticisms that have been made so far, the UK Courts appear to have struck a more proportionate balance through *Campbell*,[90] than the Strasbourg jurisprudence did in *Von Hannover v Germany*,[91] in terms of public spaces. UK case law has illustrated that occurrences in public spaces are not ipso facto incapable of attracting a reasonable expectation of privacy, although additional factors such as treatment of a medical condition or vulnerability are required to induce that reasonable expectation.[92] This goes further to the fulfilment of the press duality model, than does the *Von Hannover* decision, which accepts freedom of expression for purely commercial motivations where privacy rights are not infringed. As regards to proportionality between these two rights, it appears Strasbourg jurisprudence overstepped the mark by holding that photographs of a prominent figure's mundane daily activity were deserving protection. It was stated that 'there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the ambit of her private life';[93] yet, even the most liberal conceptions of privacy would be artificially strained to reach that conclusion. Such an approach illustrates a shift of privacy protection to that of autonomy generally. This shift is a distortion of the privacy conception and highly adverse to the commercial conduct of the press, even where they are not infringing on the genuine private sphere. The UK law as applied in the *Campbell* case[94] and the *Elton John* case[95] appear to demonstrate a more rational balance to proportionality in public places, even if that balance is the result of judicial conservatism.

V. CONCLUSION

This article has attempted to adequately consider the balance that UK law strikes between privacy and freedom of expression when considering the actions of the press. In order to do so, a 'model of press duality' has been proposed, intended to separate the two outputs of the press: those serving democracy through the watchdog role as well as informing on matters of public interest and those outputs

[89] Case C-293/12 [2015] QB 127.
[90] *Campbell* (n 32).
[91] App no 59320/00 (ECtHR, 24 June 2004).
[92] See *Peck v The United Kingdom* App no 44647/98 (ECtHR, 28 January 2003).
[93] *Von Hannover* (n 91) para 53.
[94] *Campbell* (n 32).
[95] *John v Associated Newspapers Ltd* [2006] EWHC 1611 (QB); [2006] EMLR 772.

which entertain as commercial expression. Guided by the approach to the balancing exercise in *re S (FC) (A Child)*, it has been argued that although placing privacy and freedom of expression on an even playing field is an exemplary beginning, the machinery of the UK balancing act is worthy of criticism. In light of the developing case law in various other jurisdictions, reliance on the MPI tort holds inherent restrictions and shortcomings, which render it unsuitable for reliably providing the right balance.

However, the criticisms against the balancing exercise were not purely structural, with attention being drawn under the third element of the *re S (FC) (A Child)* approach to the tendency of the UK courts to include commercial factors in the balancing act. Such considerations were shown to be away from Strasbourg jurisprudence. It has been argued firmly that this tendency, which departs from the approach of the model of press duality, is theoretically weak and does not constitute a justification for protecting what is essentially commercial expression. Nevertheless, this article has argued that, following a brief consideration of proportionality, the conservative nature of the balancing act under UK law is actually desirable. Recent Strasbourg jurisprudence has a tendency of washing away the justifiable barriers between privacy and a general respect for autonomy, which is not currently recognised under UK law. It appears then that although the model of press duality provides a valuable guide to the appropriate balance between privacy and freedom of expression when considering the actions of the press, UK law is yet to strike the right balance in the manner that the author proposes.

Human Trafficking: The Sexual Exploitation of Women and Children

Yasmeen Joshi
LLB, Canterbury Christ Church University

ABSTRACT

This article examines the current legislation surrounding the issue of human trafficking, specifically for the purpose of sexual exploitation of women and children, in and around the UK. Research is broken down into chapters with sub-sections, using a multi-disciplinary approach. It includes an introduction, an analysis of current anti-trafficking legislation, the perception of trafficking in persons as either part of Transnational Organised Crime or contemporary slavery, followed by a discussion about the victims of trafficking. The conclusion proposes what actions may be taken in the future to provide greater support and protection for trafficking victims. In turn, this produces a comprehensive perspective of how well the UK deals with the protection of female and child trafficking victims, in particular, of trafficking for sexual exploitation.

I. INTRODUCTION

An introduction to human trafficking

Human trafficking has long been a global issue, which, despite recent changes in domestic legislation, continues to be an ever-present problem in the UK. This individual study considers the current UK legislation surrounding trafficking of persons and suggests ways in which gaps in the law may be improved so that there is a greater protection for the victims of human trafficking for sexual exploitation. It explains how the perception of human trafficking as either part of Transnational Organised Crime (TOC) or as contemporary slavery plays a vital role in how the UK legislates against human trafficking.

Before considering the UKs anti-trafficking measures, one needs to understand what human tracking is; trafficking can be defined as the illegal movement of persons typically for the purposes of forced labour or sexual exploitation; the latter suggested purpose is what this article focuses on. Article 3(a) of the United Nations Convention against Transnational Organised Crime (UNTOC) is the Protocol to prevent, suppress and punish trafficking in persons, especially women and children. UNTOC considers trafficking in persons to have three elements, the

first of which is the act or movement of the individual(s) either by recruitment, transportation, transfer, harbouring or receipt of persons. The second element is the means by which persons are trafficked; threats, the use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to gain the consent of a person having control over another. The third element, per Article 3(a) of the UNTOC, is the purpose for which persons are being trafficked, which is usually to exploit the victim by way of forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs and prostitution of others or other forms of sexual exploitation. Sexual exploitation occurs when a person receives material benefits, such as accommodation, food and money in exchange for performing sexual activities.

Statistics

Sexual exploitation is reportedly the most prominent reason for trafficking in the UK. Of the estimated 371 children who were trafficked into the UK between April 2009 and December 2010, almost a third was sexually exploited.[1] In 2012, of the 48 people reported as trafficking victims to the Blue Blindfold campaign, 39 were sexual exploited.[2] Those who are trafficked for sexual exploitation may be forced to work in brothels based in private rented houses or flats, in massage parlours or in other establishments that offer sexual services.[3] To date, such activities remain relatively undetected.[4] Anybody could be a potential victim of trafficking for the purpose of sexual exploitation. However, this study hereafter concern adult and underage female 'victims' because more data is available on them. Estimates by the International Labour Organisation (ILO) indicate that of the 43% of people who are trafficked for sexual exploitation, the overwhelming majority, 98%, are women and girls.[5] Additionally, in 2012, 786 potential female victims were referred to the National Referral Mechanism (NRM),[6] which is almost double the amount of men in that same year. So, whilst there is evidence that trafficking for the purpose of sexual exploitation does occur in men and boys, it is significantly

[1] HM Government, 'Human Trafficking: The Government's Strategy' (2011) 6 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97845/human-trafficking-strategy.pdf> accessed 11 November 2015.
[2] Blue Blindfold Campaign, 'Key Statistics' <http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/keystats-en> accessed 14 March 2015.
[3] Crown Prosecution Service, 'Links with Human trafficking' <http://www.cps.gov.uk/legal/p_to_r/prostitution_and_exploitation_of_prostitution/> accessed 11 November 2015.
[4] Sally Lipscombe and Jacqueline Beard, 'Human Trafficking: UK Responses' (HC Library SN/HA/43 24 2014) 4 < www.parliament.uk/briefing-papers/sn04324.pdf> accessed 11 November 2015.
[5] International Labour Organisation, 'Action against Trafficking in Human Beings' (2008) 3 <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf> accessed 23 January 2015.
[6] Secretary of State for the Home Department, *Second Report of the Inter-Departmental Ministerial Group on Human Trafficking* (Cm 8731, 2013) [7].

less than with women and girls.[7] It is important to add that victims of trafficking are not necessarily immigrants from other countries. It is possible for nationals of that country to be trafficked as well. In 2011, 42% of UK citizens who were trafficked for sexual exploitation were girls, further supporting the fact that anyone can become a victim of sex trafficking.

Due to the nature of the trafficking industry, it is impossible to obtain exact data as to the number of persons who are trafficked. However, estimates by the government and various NGOs can help to understand the full extent of trafficking in persons. Amnesty International and Eaves, a women's charity, have stated that many figures of trafficking victims are underestimates and that the UK's anti-trafficking measures are 'not fit for purpose'.[8] Recent government assessments provide that in 2014, 2,340 potential victims were referred to the NRM, a number which is 34% higher than the previous year.[9] This demonstrates that human trafficking is still a major issue that needs to be combated in the UK. Furthermore, if greater protection were available for victims of sex trafficking, then the more reliable available data could be because a greater number of victims would come forward.

II. CURRENT LEGISLATION

UK legislation

The legislation relating to human trafficking is complex largely due to the fact that not all of it is gathered into one statute.[10] Domestic, EU and international law all bind the UK on the matter. Domestic legislation includes the Sexual Offences Act 2003, the UK Borders Act 2007, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the Nationality, Immigration and Asylum Act 2002 and the Children Act 2004. The Sexual Offences Act 2003 is an important anti-trafficking legislation because it aims at preventing trafficking for sexual exploitation to, within and out of the UK.[11] The equivalent Scottish provisions are given by the Criminal Justice (Scotland) Act 2003.[12] This carries a prison sentence with a maximum of 14 years imprisonment, yet the average sentence for the offence of human trafficking is usually only 4.69 years.[13] Reduced sentencing for

[7] Joint Committee on Human Rights, *A Bill of Rights for the UK?* 2008 (HL 165, HC150) 33.
[8] BBC News, '600 Prostitutes were 'Trafficked into UK' (18 August 2010) <http://www.bbc.co.uk/news/uk-11012084> accessed 11 November 2015.
[9] National Crime Agency, 'National Referral Mechanism' <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/502-national-referral-mechanism-statistics-end-of-year-summary-2014/file> accessed 11 November 2015.
[10] Home Affairs Committee, *The Trade in Human Beings: Human Trafficking in the UK* (HC2008-09, 23-I).
[11] Sexual Offences Act 2003, ss 57-59.
[12] Criminal Justice (Scotland) Act 2003, s 22.
[13] HC Deb 14 Jan 2009, col800W.

trafficking can be seen in certain case law, such as in the case of *R v Makai (Atilla)*.[14] In this case, the appellant was successful in appealing against his 40-month imprisonment, following his conviction of conspiracy to traffic persons into the UK for the purpose of sexual exploitation. The basis of the plea was that the appellant's involvement was merely recruiting girls from Hungary to enter into the UK in order for them to work as prostitutes in brothels around the country. He then passed them on to contacts who were more closely involved in the trade. Due to his 'minor' involvement and the fact that the girls had all entered the UK of their own free will, being fully aware of the nature of the work they would be involved in and all being over the age of consent, the appellant's sentence was reduced to only 30 months. This highlights the serious gaps in legislation, which means that those involved in human trafficking serve unworthy sentences for their part. More importantly, however, it stresses the fact that victims of human trafficking are seen in the eyes of the law to be 'cooperative and compliant' in their trafficking. This can be because they entered the country illegally; therefore, they are not treated as the victims that they are, but are punished and treated like criminals.

Moreover, section 31 of the UK Borders Act 2007 has widened the extra territorial range of trafficking offences further by 'ensuring that facilitating the arrival or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator, are now caught by the offences'.[15] Similarly, Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 adds to the UK's guidelines on human trafficking that a person commits an offence if he arranges or facilitates the arrival into the UK of an individual intending to exploit that individual or if he believes that another person is likely to exploit that individual.[16] In addition, the Nationality section 143 of the Immigration and Asylum Act 2002 regulates the assistance of unlawful entry of a person into the UK, which is key when examining the legislation surrounding the issue of trafficking for sexual exploitation. What this demonstrates is that whilst there are provisions in place that set out to prohibit trafficking in persons in and around the UK, there is still a need for more stringent measures that focus on the protection of victims.

EU legislation

With respect to the protection of trafficking victims, the UK has signed the CoE Convention on Action against Trafficking in Human Beings,[17] which introduced a

[14] [2008] 1 Cr App R (S) 73.
[15] Explanatory Notes to the UK Borders Act 2007, para 101.
[16] ibid.
[17] Entered into force on 1 February 2008.

number of provisions to improve the ability to identify victims of human trafficking; this is in addition to giving them the necessary support and brings more cases to justice. The provisions include mechanisms for early identification of victims, national referral schemes, and the granting of recovery and reflection periods and renewable residence permits to victims.[18] Additionally, the Convention established the UK Human Trafficking Centre (UKHTC), which the Home Office described as 'the central repository of all data and intelligence on human trafficking'.[19] It forms closer links and combines the work of the Crown Prosecution Service, immigration services, the UK Border Agency and other law enforcement agencies, as well as Non-Governmental Organisations. The 2007 UK Action Plan on Tackling Human Trafficking too was created amidst government efforts to address the issue of human trafficking,[20] which works closely with the UKHTC.

International legislation

With regards to the trafficking of child victims, section 11 of the Children Act 2004, promotes the welfare of children in the UK and can be seen as relevant to the prohibition and prevention of trafficking of children for sexual exploitation. It is important to consider also international anti-trafficking measures, such as certain UN Conventions. The United Nations Convention for the Rights of the Child 1989[21] has been signed and ratified by the UK government. This convention recognises the needs of children as being different to those of an adult. Articles 34 and 35 of this Convention concern directly the offences of sexual exploitation, sexual abuse and the trafficking of children. Additionally, the Worst Forms of Child Labour Convention[22] considers the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour as the main priority for national and international action.[23] This is a legally binding agreement between ILO members, including the UK. Further, key international legislation by which the UK is bound includes the Convention on the Elimination of all forms of Discrimination against Women 1979. Article 6 provides that signatories shall take all appropriate measures, including legislation, to suppress all forms of trafficking, exploitation

[18] CPS, 'Human Trafficking, Smuggling and Slavery' <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a05> accessed 24 February 2015.
[19] Secretary of State for the Home Department, *Second Report of the Inter-Departmental Ministerial Group on Human Trafficking* (Cm 8731, 2013) para 6.
[20] Purpose of this Action Plan is to draw together work that is underway across government and other agencies on human trafficking; identify gaps in existing work increase transparency.
[21] Adopted on 20 November 1989 and entered into force on 2 September 1990.
[22] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 182 ILO.
[23] ibid Art 3.

and prostitution of women.[24] This reflects the idea that the trafficking of persons is an organised crime since it places emphasis on the need to eliminate all forms of trafficking. Therefore, the UK government should aim at apprehending and punishing traffickers, eventually abolishing the trafficking of persons once and for all. Yet, greater consideration needs to be given to the protection of victims of sexual exploitation.

III. HUMAN TRAFFICKING AS TRANSNATIONAL ORGANISED CRIME (TOC)

Criminalisation

The approach towards combating human trafficking for sexual exploitation largely focuses on the criminalisation of the traffickers. The way that most modern governments perceive human trafficking is as part of an immense TOC rink. 'Trafficking in women and children is not a new problem, it has occurred throughout history. What is new is the growing involvement of organised crime and increasing sophistication in methods'.[25] It is this view of human trafficking as a vast TOC that this chapter examines, as well as the impact that it has on the victims of human trafficking for sexual exploitation.

Human trafficking is the fastest growing crime in the world and the third largest source of income for organised crime, exceeded only arms and drug smuggling;[26] evidently, the issue of people trafficking is as prominent as ever and organised crime has a lot to do with it. 'The traditional image of British criminals is that of a smooth-talking "geezer" selling bootleg tobacco out the back of the van… or a tracksuit wearing kid with a crowbar and a torch shining up a drainpipe to nick someone's DVD player'.[27] However, in the present day, this image has changed dramatically. The UK is one of the world's organised crime capitals, with the low risk and high profit business[28] of trafficking in persons thriving all over the country. Trafficking networks include both economically and politically motivated criminals,[29] further inferring that the trafficking trade has grown due to it being associated with TOC networks.

---

[24] Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), Art 6.
[25] Stephen Warnath, Special Counsel and Senior Advisor on Trafficking, US President's interagency Council on Women; 'Trafficking of Women and Children: The Future Direction of United States Policy; Report of the U.S. – EU Trafficking in Women Seminar, L'Viv, Ukrain, 9-10 July 1998 as cited in Alexis A Aronowitz, *'Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drive it and The Organisations that Promote it'* [2001] European Journal on Criminal Policy and Research) 63.
[26] UNGA 'Heinous, Fast-Growing Crimes of Human, Drug Trafficking Will Continue to Ravage World's Economies without Coordinated Global Action, Third Committee Told' GA/SHC/403911, 11 October 2012) <http://www.un.org/ press/en/2012/gashc4039.doc.htm> accessed 19 March 2015.
[27] David Southwell, *Dirty Cash, Organised Crime in the 21st Century* (Virgin books Ltd 2002) 141.
[28] National Human Trafficking Resource Centre.
[29] Louise Shelley, *Human Trafficking, A Global Perspective* (Cambridge University Press 2010) 83.

The 'business' of trafficking

It is easy to consider human trafficking as a business when it is viewed on the scale in which it takes place. It has already been mentioned that trafficking for sexual exploitation is a TOC and the figures highlight that it is a flourishing industry. Each year, TOC generates an estimated $870 billion. It threatens peace and human security and leads to human rights violations. It also undermines the economic, cultural and political development of societies around the world.[30] Trafficking contributes billions of US dollars to TOC at the expense of the victims' basic human rights, highlighting how profitable the 'business' of trafficking is,[31] not only at a national level, but on an international one too.

> Organised crime, like all business, is focused on making a profit, ensuring supply and meeting demand. What sets an organised crime business apart is that violence and corruption are innate to its business operations… Human trafficking is very much part of organised crime because the criminals who traffic people rely on coercion, deception, corruption and force at every stage of the business.[32]

It is evident that the trafficking industry is fuelled by a supply of women and girls denied equal rights and opportunities for education and economic advancement.[33] Yet, their rights are not given as much attention as they should, with the States' focus on bringing those guilty of trafficking to justice, instead of helping the victim's overcome their ordeals.

Government responses

Taking into account the fact that the Protocol to Prevent, Suppress and Punish Trafficking in Persons is a criminal law mechanism designed first and foremost to punish the traffickers, the provisions dedicated to the protection of victims are vague and do not create strong obligations on signatories.[34] This supports the argument that there is a lack of prominence on the topic of protecting victims, as there are more provisions that focus on the criminalisation of trafficking. Consequently, the fate of the trafficked women and children is left rather unclear. The countries receiving trafficking victims can use the option of deportation for those trafficked, instead of offering them security, thereby discouraging these

[30] UNODC, 'Transnational Organised Crime' <http://www.unodc.org/toc/> accessed 13 March 2015.
[31] INTERPOL, 'Trafficking in Human Beings' <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Trafficking-in-human-beings> accessed 18 March 2015.
[32] United Nations Office on Drugs and Crime, 'Transnational Organised Crime' <http://www.unodc.org/toc/> accessed 13 March 2015, 112.
[33] Sankar Sen, *A Report on Trafficking in Women and Children in India* (2002-2003) 1 NHRC UNIFEM ISS Project 10 <http://nhrc.nic.in/Documents/ReportonTrafficking.pdf> accessed 11 November 2015.
[34] Silvia Scarpa, *Trafficking in Human Beings, Modern Slavery* (Oxford University Press 2008) 63.

victims from seeking protection.[35] This suggests that by ignoring the human rights aspect of human trafficking and only concentrating on its criminalisation, the victims of this gross human rights violation are deterred from coming forward to the authorities. Whilst prosecuting traffickers is clearly important, the needs of the victims should not be overlooked. The Organisation for Security and Co-Operation in Europe (OSCE) has commented that 'most States have not integrated human rights concerns of strategies into their laws or policies relating to trafficking'.[36] This connotes the governments' fear that the continued growth of the human trafficking industry is a greater concern than the basic human rights of the thousands of women and children who are trafficked for the purposes of sexual exploitation each year. Haynes summarises the focus of governments perfectly by stating that 'law enforcement is more concerned primarily with protecting borders, preventing unwanted migration and attacking organised crime'.[37] This further adds to the argument that more measures need to be taken to protect the victims.

The UK government has taken a multi-agency approach[38] in dealing with trafficking as organised crime. The creation of Serious Organised Crime Agency (SOCA) in 2006[39] exemplified this, it was 'an Executive and Non-Departmental Public Body sponsored by, but operationally independent from, the Home Office…an intelligence-led agency with law enforcement powers and harm reduction responsibilities'.[40] As important as it is to have agencies which are committed to the abolition of trafficking in persons specifically for the exploitation of women and children, it merely further stresses the governments' desire to criminalise, rather than deal with the protection and needs of the victims. It can be argued that the US Trafficking Victims Protection Act 2000 illustrates the direction in which UK legislation should follow; not only did it raise awareness of the issue of human trafficking, but it also addressed methods of prevention, facilitated prosecution of traffickers and provided resources to aid the numerous victims of trafficking.[41] This legislation combines a focus on victims' assistance with stiff

[35] Andrew Clapham, *Human Rights, A Very Short Introduction* (Oxford University Press 2007) 147.
[36] Jo Goodey, 'Recognising Organised Crime's Victims' in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2003) 146.
[37] Dina Francesca Haynes, 'Human Trafficking and Migration' in Alice Bullard (ed), *Human Rights in Crisis* (Ashgate Publishing Ltd 2008) 115.
[38] According to the Oxford English Dictionary, a multi-agency approach is the 'involving co-operation between several organisations, especially in crime prevention, social welfare programmes, or research'. Benefits of using a multi-agency approach can include gaining an increased understanding and trust between agencies which could lead to joint problem-solving and improved and more effective services.
[39] As of 2013 SOCA's operations merged with the NCA.
[40] Serious Organised Crime Agency, 'About Us' < http://www.nationalcrimeagency.gov.uk/about-us> accessed 29 October 2015. Now part of the NCA which leads UK law enforcement's fight to cut serious and organised crime. We have national and international reach and the mandate and powers to work in partnership with other law enforcement organisations to bring the full weight of the law to bear on serious and organised criminals.
[41] Barbara Ann Stolz, 'Interpreting the US Human Trafficking Debate Through the Lens of Symbolic Politics' [2007] 29, 311.

sanctions for traffickers.[42] As crucial as it is to punish traffickers and prevent human trafficking from continuing in the future, the protection of trafficking victims ought to be given more priority by the UK government; continuing to treat human trafficking as an organised crime, without much consideration of human rights, will fail to achieve this.

IV. HUMAN TRAFFICKING AS CONTEMPORARY SLAVERY

Slavery

Human trafficking so far has been understood as an organised crime; however it is also viewed from a human rights standpoint, as a form of contemporary slavery. Slavery in its traditional sense means the complete control of one person over another, subjecting the vulnerable to violence in order to gain some sort of profit. Whilst the definition is still relatively the same, it is the nature of the slavery that exists in the UK today that is different. Practises such as forced labour, domestic servitude, the worst forms of child labour and sexual exploitation is the reason why human trafficking can be categorised as contemporary slavery. President Obama has addressed the issue in 2012;

> It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name – modern slavery.[43]

This proves the platform of which human trafficking is on and the impact of the term 'slavery'. Slavery is one of the biggest human rights issues in the world, and therefore gives more focus on the victims' rights and protection. Schedule 1, article 4 of the Human Rights Act 1998[44] sets out that slavery encroaches upon an individual's fundamental human rights. It is important to bear this human rights aspect in mind when considering the issue of human trafficking for sexual exploitation because it ties in directly with the rights of the victims.

English speaking countries during the nineteenth and twentieth century coined the term 'White Slavery'. It refers to the sexual enslavement of white women, which is associated with the interpretation that human trafficking is a form of

[42] Anthony M. De Stefano, *The War on Human Trafficking: US Policy Assessed* (Rutgers University Press 2008) 229.
[43] Barak Obama 'President Obama to the Clinton Global Initiative at the Sheraton New York Hotel and Towers, New York' (2012) <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> accessed 17 March 2015.
[44] Human Rights Act 1998, schedule 1, Art 4 - Prohibition of slavery and forced labour (1) No one shall be held in slavery or servitude.

contemporary slavery. Nonetheless, historian Eileen Scully identifies factors that give rise to an 'international traffic of sex workers' by describing the movement of non-white and white sex workers to seek economic opportunities.[45] This highlights that this modern slavery practice is not inclusive of just one race; it can be anyone who is in vulnerable position, seeking financial promise and an overall better quality of life. This indicates how 'slavery' has changed, as the trans-Atlantic slave trade was the enslavement of the vulnerable from Africa. Today, anyone could be a victim no matter where they are from or the colour of their skin. Scully goes on to point out that later domination and degradation of white and non-white women develops as the trade was taken over by organized groups.[46] This eludes further to the previously discussed fact that the involvement of organised crime groups is what has largely progressed trafficking in persons. This demonstrates that there can be a link between these two perceptions of human trafficking, there just needs to be a balance in legislation so that the victims have better protection. A report published by the Joseph Rowntree Foundation[47] arrives at a similar conclusion, declaring that the UK's response to trafficking is biased towards law enforcement at the expense of victims.[48] It is of great importance that this is resolved in the near future.

The Modern Slavery Bill

Following a Home Office report of the NRM, the UK Modern Slavery Bill is currently awaiting consideration of the Lords' amendments at the House of Commons.[49] It consolidates the current offences relating to trafficking and slavery. Importantly, one of its key provisions concerns the protection of modern slavery victims. This signifies that the government has finally realised the need to take further action to protect the victims of trafficking. Home Secretary Theresa May says the Bill 'gives the best possible start to removing the scourge of slavery from contemporary Britain'.[50] Nevertheless, there are already criticisms of the draft Bill. Mr McQuade, head of Anti-Slavery International, said that 'the draft Modern Slavery Bill doesn't

[45] Eileen Scully, 'Pre-Cold War Traffic in Sexual Labour and Its Foes: Some Contemporary Lessons' in David Kyle and Rey Koslowski (eds), *Global Human Smuggling: A Comparative Perspective* 2nd edn, Johns Hopkins University Press 2001) 77.
[46] Karen E Bravo, 'Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade' (2007)247.
[47] The Joseph Rowntree Foundation is an independent organisation working to inspire social change through research, policy and practice.
[48] Suzanne Goldberg, 'Europe's Modern Slave Trade' [2009] European Lawyer 50.
[49] Home Office, 'Review of the National Referral Mechanism for Victims of Human Trafficking' (November 2014) <http://socialwelfare.bl.uk/subject-areas/services-activity/criminal-justice/homeoffice/170470Review_of_the_National_Referral_Mechanism_for_victims_of_human_trafficking.pdf> accessed 19 March 2015.
[50] This Week, 'Sex Abuse Trafficking: Number of UK Child Victims Doubles' (18 February 2015). <http://www.theweek.co.uk/uk-news/56523/sex-abuse-trafficking-number-uk-child-victims-doubles> accessed 17 March 2015.

seem to attend to any of the deficiencies which are identified in this report'.[51] It appears that it makes no practical involvements of the way that trafficking is policed or how its victims are supported. It remains to be seen whether this Bill will actually make a difference in protecting the victims of human trafficking. Thus, although slave trade (which included human trafficking) was abolished in the British Empire nearly 200 years ago,[52] contemporary slavery exists today and this should be a massive cause for concern. Moreover, it is the protection of the victims which needs to be greatly considered. Perhaps, perceiving human trafficking as contemporary slavery would cause the legislation to focus more on the victims.

V. THE VICTIMS OF TRAFFICKING FOR SEXUAL EXPLOITATION

The Government's focus

It can be argued that there is not enough emphasis on the protection of trafficking victims because of the government's primary focus on criminalising human trafficking. The UK authorities often focus on the immigration status of a trafficking person rather than on the fact that he/she is a victim crime. If victims are deported, then traffickers who are the real criminals escape justice.[53] This indicates that there needs to be a change in the way victims are perceived and the way in which human trafficking cases are handled.

Fear of the victims

Whilst there is a great necessity for there to be more legislative measures that consider the needs of trafficked women and children who have been sexually exploited, there is the issue that these victims are not entirely forthcoming. This can make it difficult for the authorities and various NGOs to offer support and protection. More often than not, victims of trafficking are people who set off in search of a better life. Either seeking an economic opportunity, an adventure or the ability to provide for their families back home, their dreams are destroyed by the traffickers who exploit their vulnerability. Victims are usually taken, kidnapped, sold or enslaved and soon realise that their search for a better life could not be further from their reality.[54]

---

[51] The Independent, 'Mps Warn - Home Office is Failing on Human Trafficking' (19 January 2014) <http://www.independent.co.uk/news/uk/crime/mps-warn-home-office-is-failing-on-human-trafficking-9069600.html> accessed 11 November 2015.

[52] The slave trade in the British Empire was abolished by the Slavery Abolition Act 1833.

[53] Anti-Slavery, 'Victim Protection Campaign', <http://www.antislavery.org/english/campaigns/victim_protection_campaign/default.aspx> accessed 15 March 2015.

[54] Dina Francesca Haynes, 'Human Trafficking and Migration' in Alice Bullard (ed), *Human Rights in Crisis* (Ashgate Publishing Ltd 2008) 113.

The main reason why trafficked women and children rarely give evidence against their traffickers is the fear of violence against themselves or their families. In addition, there is also the fear of being deported by the authorities back to their country of origin, from which they were trying to escape in the first place. This fear is genuine as traffickers often force their victims to evade immigration control and violate other criminal laws, resulting in States regularly treating trafficking victims as illegal immigrants and criminals.[55] It is irrelevant whether the individual knew that they were brought to the UK to work for the sex industry. If an individual is coerced or deceived, or subject to threats or controlled, then their 'consent' is void.[56] There is a great deal of case law which conveys the issue of victims being punished instead of being offered the protection and support which they long for, *M v the United Kingdom*[57] is a clear example of such a situation; the victim was forcibly transported from Uganda into the UK's sex industry. The basis of the appeal was that if she was returned to Uganda, there was a real risk that she would again fall into the hands of traffickers and be subjected to ill treatment and forced sexual labour. It is for this reason that the guaranteed protection of victims is important for their safety. The authorities need to change their view of victims, by treating them as the victims that they are, instead of condemning them.

Since the Government began attempts at recording information on cases of human trafficking, hundreds more children have been forced into this form of exploitation. This includes children from both the UK and abroad. The abuse is simple but brutal. Child victims of sexual exploitation are lured away from safety with the similar promises made to adults, such as opportunities of better education, employment, accommodation, attention and even love. In some cases, child victims have even been 'locked in a property and forced to have sex with strangers in exchange for money'.[58] This is a traumatic experience for any human being, let alone a child. The need for support and protection for these victims is evident. As a result, Elaine Pearson[59] suggests that witness protection should be put to greater use[60] so that these victims are given the sense of security in knowing that they can no longer be tracked down and harmed by their traffickers.[61] This would also increase the number of testimonies that the victims would give against

[55] Suzanne Goldberg, 'Europe's Modern Slave Trade' [2009] European Lawyer 50.
[56] Centre for Social Justice, 'It Happens Here: Equipping the United Kingdom to Fight Modern Slavery' A policy Report by the Slavery Working Group (March 2013) <http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB(5).pdf > accessed 19 March 2015.
[57] *M v United Kingdom* app no 16081/08 (ECtHR, 1 December 2009).
[58] 'Child Exploitation and Online Protection Centre: Child Trafficking Update' (October 2011) <http://ceop.police.uk/Documents/ceopdocs/child_trafficking_update_2011.pdf> accessed 17 March 2015.
[59] Elaine Pearson is the Australian director of Human Rights Watch.
[60] Elaine Pearson, 'Half-hearted Protection: What does Victim Protection Really Mean for Victims of Trafficking in Europe?' Anti-Slavery [2002].
[61] ibid.

their traffickers because they would have less fear that further harm would come to themselves or their families.

Role of NGOs

Various NGOs, such as Anti-Slavery International and Blue Blindfold, contribute significantly in raising awareness of human trafficking as it exists today. This is in addition to offering support and protection for those who have been trafficked for sexual exploitation. 'Anti-Slavery works to ensure that all victims of trafficking have their rights protected and are given access to non-conditional assistance'.[62] It has also been pushing for international action against slavery since what can sometimes be seen as at the beginning of the human rights movement.[63] It is interesting to discover that according to Anti-Slavery International:

> Currently only victims of trafficking, and not victims of other forms of modern day slavery, have access to a system of protection and support. And even that access is discretionary as protection for trafficked persons has no basis in law, meaning the welfare of potential victims is based on a 'lottery" where the support they receive is subject to the discretion and awareness of those dealing with them.[64]

The protection of victims should be widely available to every individual that needs it, so it is shocking that something that is so important is based on a 'lottery'. The Blue Blindfold campaign raises awareness of human trafficking in Ireland, and works with Crimestoppers UK to get victims or people who suspect someone is a victim to come forward.

Yet, as important as the role of NGOs is in offering support for trafficking victims who are sexually exploited, there are certain issues with using them as a wholly reliable source for data. The methods of research and findings of one NGO are often different to those of another. With no consistency as to the results, NGOs cannot solely be relied upon when gathering data on the number of victims trafficked for sexual exploitation. Moreover, NGOs only campaign for governments to take anti-trafficking measures, they themselves do not have the power to make or change legislation. At this point, it becomes imperative for governments to take part in the protection of trafficking victims.

---

[62] Anti-Slavery, 'Human trafficking Projects' <http://www.antislavery.org/english/what_we_do/trafficking/default.aspx> accessed 11 March 2015.
[63] Andrew Clapham, *Human Rights, A very Short Introduction* (Oxford University Press 2007) 27.
[64] Anti-Slavery, 'Victim Protection Campaign' <http://www.antislavery.org/english/campaigns/victim_protection_campaign/default.aspx> accessed 15 March 2015.

VI. CONCLUSION

Proposals and conclusions

It is evident that human trafficking, particularly for the sexual exploitation of women and children, is still a major issue throughout the UK and across the globe. As has been analysed throughout this study, it is apparent that whilst the UK domestic legislation attempts to provide sanctions for the prohibition of trafficking in the UK, there is clearly a lack of measures in place for the protection of trafficking victims. It can be argued that the UK government views trafficking in persons to be part of a major TOC, which may be why the legislation focuses more on criminalisation, rather than providing a human rights approach.

It is proposed that human trafficking for sexual exploitation should be seen more as contemporary slavery; classifying it as contemporary slavery would provide a guarantee of protection. This would result in many victims reporting the abuse that they have faced, without feeling that there could be dangerous repercussions for themselves and their families. This protection is from both the traffickers and the State, who often turn to deportation. In turn, it is believed that the number of convictions will be higher because of the testimonies the victims would give, without feeling there could be dangerous repercussions for themselves and their families.

It can be seen that the role of NGOs is quintessential in offering protection to the large number of women and children who have been trafficked for sexual exploitation. They turn to the NGOs for help rather than the authorities, who they feel will treat them as criminals rather than victims. Unfortunately, there are still many victims who are too frightened to come forward and seek help. This means that the full extent of sex trafficking will never be understood properly. Therefore, it is proposed that the government needs to follow the example of NGOs, such as Blue Blindfold and Anti-Slavery, who offer more protection to the victims of trafficking and sexual exploitation.

A Comparative Study of Cohabitation: UK, Scotland, France, and Australia

Mustafa El-Mumin
LLB, Queen Mary, University of London

ABSTRACT

Cohabitation is a widely popular social phenomenon throughout the western world. However, English law on cohabitation is in dire need of reform. Whilst divorcing couples have relatively straightforward legislation to determine the division of assets, English law utilises complex equity and trusts case law for separating cohabitants. As such, cohabitants usually suffer injustice at the hands of the common law. This has led many academics, politicians and the judiciary itself to call for legislative family law reform. Indeed, this discourse has been paralleled in various other countries but with more practical results. Scotland implemented the Family Law (Scotland) Act 2006, whereas France created a new form of legal relationship, called a Pacte Civil de Solidarité (PACS). Both Scotland and France based their reforms on the view of protecting relationships based on their 'form', providing overall greater protection for married couples. On the other hand, Australia advocates a marriage mirror-image reform, meaning that protection is provided on the basis of the 'function' of the relationship, as opposed to its 'form'. Certainly, Australia has been hailed as a world leader in curbing the injustices suffered by cohabitants, and therefore serves as a prime example for England's much needed reforms.

I. INTRODUCTION

Long have cohabitants been severely disadvantaged by the 'Common-Law Marriage' myth.[1] This legal fable encapsulates the belief wrongly held by a majority of cohabiting couples that they have rights similar to those of married couples.[2] The myth goes a long way to highlight injustices caused by the current common law. Due to their lack of a legal status, cohabiting couples are left severely

[1] The term exclusively represents unmarried cohabiting heterosexual couples; Rebecca Probert, 'Common-law marriage: Myths and Misunderstandings' (2008) 20 CFLQ 1.
[2] In response to the National British Social Attitudes survey carried out in 2000, 56% of the UK population – and 59% of current cohabitants – wrongly answered in the affirmative to the question, 'as far as you know do unmarried couples who live together for some time have a 'common law marriage' which gives them the same legal rights as married couples?' Anne Barlow, Simon Duncan, Grace James and Alison Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart 2005) 28-30.

disadvantaged when compared to their married counterparts.[3] This is because there is a distinct lack of financial ancillary relief, particularly with regard to the division of property on the breakdown of cohabiting arrangements. Academics have concluded that a range of options and solutions would be necessary 'to cater for the increasingly diverse nature of cohabitation in the 21st century'.[4] Calls for reforms of cohabitation law have also been prevalent in political circles.[5] Likewise, the judiciary, faced with financial disputes over the family home, welcomed the announcement that the Law Commission was to examine the property rights of cohabitants in 1996.[6] However, the Law Commission's highly anticipated project, Sharing Homes: A Discussion Paper,[7] 'illustrates the paralysis that may ensue when policy-makers try to devise solutions to fit a variety of different circumstances'.[8]

The Commission concurred that the current law was unsatisfactory and in need of reform, but conceded that no appropriate solution within property law was attainable, noting 'the infinitely variable circumstances affecting those who share homes'.[9] Ultimately, the Commission concluded that further deliberation was necessary for the legislative adoption of 'new legal approaches to personal relationships outside marriage, following the lead given by other jurisdictions'.[10] France and Australia will prove to be valuable in ascertaining which potential reform UK cohabitation law could adopt, whether it is a 'form-based' contractual civil union approach or 'function-based' marriage mirror-image legislation.[11] Scotland will also be looked at, alongside the two aforementioned international models.

Nonetheless, before assessing which system of reform is best to remedy the 'financial hardship suffered by cohabitants on the termination of the relationship',[12] a thorough examination of the historical and social background of cohabitation in Britain is necessary, alongside an evaluation of proposed domestic reforms.

---

[3] Cf. *Burns v Burns* [1984] FLR 216, as compared to the Canadian and New Zealand cases of *Peter v Beblow* [1993] 1 SCR 980, 101 DLR (4th) 621 and *Dickson v Dickson* [1996] NZFLR 539, respectively.
[4] Anne Barlow, Carole Burgoyne and Janet Smithson, *The Living Together Campaign - An investigation of its impact on legally aware cohabitants* (Ministry of Justice Research Series 5/07, 2007) 50.
[5] Labour MP Jane Griffiths tried to introduce a Civil Registration Bill under the ten-minute rule. The bill proposed to grant both same- and opposite-sex cohabitants equal rights and responsibilities as spouses. HC Deb 24 October 2001 vol 373 col 321-5.
[6] Per Waite LJ in *Midland Bank Plc. v Cooke* [1996] 1 FCR 442, 443.
[7] Law Commission, *Sharing Homes: A Discussion Paper* (Consultation Paper No 179, 2002).
[8] Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP 2012) 267.
[9] Law Commission (n 7).
[10] ibid pt IV, para 7.
[11] Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67 MLR 143.
[12] Law Commission, *Ninth Programme of Law Reform* (Law Com No 293, 2005) [3.6].

II. UK COHABITATION LAW IN CONTEXT

Cohabitation's historical and social origin

In the English early modern period, marriage was a loose ideal without a stable definition, an arrangement that could be entered in 'a bewildering variety of ways'.[13] Marriage was not subjected to the Canon Law of the Church of England until the thirteenth century, when the modern concept of marriage as monogamous and eternal was established.[14] Additionally, there were numerous steps to enter into marriage.[15] All this changed when Lord Hardwicke's Marriage Act of 1753 codified marriage law by requiring an Anglican clergyman to celebrate the marriage. As such, only church weddings - not verbal espousals - were legally binding.[16] The Church's monopoly on matrimonial matters lasted until the Marriage Act of 1836, whereby purely civil marriage was finally recognised in England.[17]

A reduction in religious pressures to marry over centuries also coincided with a notable change in the social climate regarding marriage. Relationships less than marriage were stigmatised as contracts 'akin to prostitution' at the beginning of the twentieth century.[18] However, there was a notable decline in the popularity of marriage as the century progressed. Freeman and Lyon[19] have attributed the decline of marriage to several factors, such as: an increase in divorce rates,[20] the women's rights movement[21] and high expectations of marriage. Thus, the structures that had supported marriage for centuries were steadily being eroded. People in modern times were obviously becoming disillusioned with marriage. However, what feasible means were there for companionship, which did not entail the formality of matrimony? The answer was, and still is, cohabitation. Although cohabitation had been present to differing degrees throughout British history,[22] it was predominately in the 1970s that the 'classless phenomenon' took hold.[23] Extra-marital sexual intercourse and children born out of wedlock were becoming

---

[13] Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (Weidenfeld and Nicolson 1977) 30.
[14] Richard Henry Helmholz, *Marriage Litigation in Medieval England* (Harvard University Press 1974).
[15] Stone (n 13) 31-32. For example, lawyers believed that espousals (the formal exchange of oral promises before witnesses) were sufficient to constitute a valid marriage.
[16] John Bossy, 'The Counter-Reformation and the People of Catholic Europe' (1970) 47(1) Past and Present 51.
[17] Michael Freeman and Christina Lyon, *Cohabitation Without Marriage: An Essay in Law and Social Policy* (Ashgate 1983) 8.
[18] Michael Freeman, 'Family Values and Family Justice' (1997) 50 CLP 315.
[19] Freeman and Lyon (n 17) 46-50.
[20] Divorce in England was made easier through the Divorce Reform Act 1969.
[21] Feminist encouragement to achieve social, sexual and financial independence resulted in women of marriageable age no longer viewing marriage and family as their primary goal in life. See Joseph Epstein, *Divorced in America: Marriage in an Age of Possibility* (Penguin 1974).
[22] Probert (n 8) 220.
[23] Fran Wasoff, Jo Miles and Enid Mordaunt, *Legal Practitioners Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Centre for Research on Families and Relationships 2010) 10.

more commonplace. Likewise, it was in this period that the term 'common-law marriage' originated to produce the dangerous myth of the same name.[24] The term has been attributed to American common-law marriages, which could be described as cohabiting relationships that became marriages.[25] Nevertheless, the myth encompasses the commonplace belief that cohabitants obtain corresponding marital rights to 'their partners' assets and to financial support in the event of relationship breakdown or death'.[26]

Nevertheless, due to the changing nature of marriage, the progression of women's social position and increased public acceptance of premarital relationships, cohabitation has skyrocketed across the Western world. This has been mainly at the cost of marriage as an institution.[27] Yet, the public confusion about cohabitants' rights is worrying because, as Baroness Hale succinctly summarised, intimate domestic relationships frequently bring with them inequalities, especially if children are involved. Inherent detriments, such as compromised economic positions and domestic abuse, cannot be predicted in advance. Therefore there should be remedies that serve the needs of these circumstances as they arise.[28]

Equal treatment versus different treatment

The debate regarding the extension of the law to match public perceptions pivots around the degree of such an extension. The 'differential treatment' camp argues that cohabitants should not have the same rights as their married counterparts. On the other hand, the 'equal treatment' camp believes that cohabitants should be afforded legal rights and responsibilities equivalent to those possessed by married couples. This is on the basis that family law should protect the partner in a weaker economic position due to relationship-generated disadvantages.[29]

Autonomy or protection?

Barlow has suggested that legal scholars should welcome the extension of family law's protection towards the weaker partners.[30] Deech disagrees; arguing that

[24] Probert argues that any 'use of the term Common-Law Marriage before this period was too negative to convey the impression that such living arrangements attracted legal rights', Probert (n 1) 21–22.
[25] ibid.
[26] Pascoe Pleasence and Nigel J Balmer, 'Ignorance in Bliss: Modelling Knowledge of Rights in Marriage and Cohabitation' (2012) 46 L & Soc Rev 297.
[27] Kathleen Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe' (2004) 26 Law & Pol 33.
[28] Baroness Hale of Richmond 'Unmarried Couples in Family Law' (2004) 34 Fam LJ 391.
[29] Such as foregoing wages and savings in order to raise children or be a homemaker: see Dawn Oliver, 'The Mistress in Law' (1978) 31(1) CLP 81.
[30] Anne Barlow, 'Cohabitation Law Reform: Messages from Research' (2006) 14 Fem LS 167.

there ought to be a 'corner of freedom' where couples can escape family law.[31] Hence, it is clear that an argument of autonomous choice is presented against the equal treatment of cohabitation. According to Deech, preservation of this freedom is paramount, particularly for women, to preserve their independence and career mobility. Therefore, she maintains that the fear is that this autonomy will be diminished by the imposition of family law's patriarchal principles, 'converting the relationship into marriage ex post facto'.[32]

Hence, the arguments for differential treatment pose an interesting question: why should the law care about those couples that do not bother to place themselves within a relationship status? The simple answer is that the applicable property law does not currently regard the duration of cohabiting relationships or the time invested with one another. Additionally, children need protection regardless of their parents' relationship status. Mrs Burns is the archetypal embodiment of Deech's so-called myth.[33] In fact, the Law Society used her misfortune to highlight the shortcomings of the current law, especially towards female cohabitants.[34] She was left with no interest in the family home although, as a cohabitant of nineteen years, she raised minor children and spent her earnings on household expenses. The Court of Appeal 'firmly reasserted the strict legal principles applicable to determining property rights between cohabitants';[35] that is, a cohabitant without legal title must prove that they have a beneficial interest under a constructive trust to retain any share of the home. This is different from cases involving spouses, in which family assets can be distributed during divorce, regardless of the presence of intentions to share.

Thus, the case law on cohabiting couples poses another interesting question: why does injustice occur? Douglas, Pearce and Woodward have cited the complexity of the law as the main reason.[36] Yet, providing better and more frequent information is unlikely to remedy this problem because people, not just cohabitants, are generally unaware of their legal position.[37] As Barlow and James intensely argue, cohabitants should gain the same protection and privileges accorded to married couples on relationship breakdown and death in order better to protect cohabiting families.[38]

---

[31] Ruth Deech, 'The Case against Legal Recognition of Cohabitation' in John Eekelaar and Sanford Katz (eds) *Marriage and Cohabitation in Contemporary Societies* (Butterworths 1980), 302.
[32] ibid 302.
[33] *Burns v Burns* [1984] Ch 317.
[34] Law Society, *Cohabitation: The Case for Clear Law: Proposals for Refom* (2002) 1.
[35] Nigel Lowe and Andrew Smith, 'The Cohabitant's Fate' (1984) 47 MLR 341, 344.
[36] This refers to the opacity of legal language and cohabitants' lack of understandings of their legal entitlements; Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 MLR 24.
[37] Carol Smart and Pippa Stevens, 'Cohabitation Breakdown' (Family Policy Studies Centre, 2000) 41.
[38] Barlow and James (n 11) 174.

Yet, the protective function of family law that is invoked rests not only on the proposition of protecting cohabitants so as to defend the weaker parties in the relationship, but also extends to cohabiting relationships as fulfilling the exact same roles as married life.[39] Certainly, the similarities between cohabitation and married life are present when the function of raising children is taken into consideration. Judicially and legislatively, procedures to solve cohabitation disputes have become increasingly aligned with those of divorce cases, such as the provision of child maintenance.[40] This is due to the occurrence of cohabiting arrangements as 'a social development of considerable importance'.[41]

Hence, it is evident that the counter-argument against autonomy's persistent support of differential treatment is that of protection for the weaker parties in cohabiting relationships, including children. Indeed, Deech concedes this as the strongest argument put forward to 'justify the legal embrace of cohabitation'.[42]

Proposed reforms

Albeit credible, it is maintained that the aforementioned reservations about extending financial relief on separation to cohabiting couples have little hold. However, the main issue is how to implement pragmatic reform.

The current law

An examination of the law applicable to cohabitants is necessary to understand what aspect of the law should be corrected through reform. While it might seem as if cohabitants have no succour with regard to issues on breakdown, this is not entirely the case; cohabiting couples do have some form of redress through the courts for issues that are also prevalent in marriages. For example, the court has the power to order a parent to provide payment or transfer property, whether to the child directly or to the applicant on behalf of the child, under Schedule 1 of the Children Act 1989, regardless of the marital status of the parents.

However, when property disputes over the family home arise, there are stark differences between the powers that courts have in regard to married couples and those regarding unmarried ones. For married couples, the court can redistribute the assets of the couple on divorce by virtue of the Matrimonial Causes Act 1973.

[39] For a further analysis of cases and legislation, see Freeman and Lyon (n 17) 161-162.
[40] See *Tanner v Tanner* [1975] 3 All ER 776.
[41] Per Ormrod LJ, *Re Ever's Trust* [1980] 3 ALL ER 399, 403.
[42] Deech in Eekelaar and Katz (n 31) 307.

Through the Act, the courts' overriding aim for the division of assets is fairness.[43] Furthermore, there are 'three strands' concerning the power to grant relief under the 1973 Act;[44] the needs created during the relationship, compensation for relationship-generated disadvantages[45] and equal sharing.

Despite its aim to seek equality on marital breakdown provided through the Matrimonial Causes Act 1973 and the complementary case law, the current divorce law faces great criticism. The presence of judicial discretion is a predominant problem, often cited as the producer of inherent uncertainty with regard to a case's outcome. [46] However, it must be acknowledged that the reason for this discretion, and consequent unpredictability, is to produce fairness in divorce cases. Hence, it could be reasonably argued that a degree of uncertainty should be tolerated if the overall objective is the endorsement of fairness.

Nevertheless, it is submitted that this 'confusing' divorce law is still relatively more straightforward when contrasted with the law governing the separation of cohabiting couples. The former, albeit unpredictable at times, undoubtedly aims to achieve equality and fairness. This is a process predominately brought about through a single piece of legislation. On the other hand, in the cohabitation context, the court can only declare ownership of assets. This is done through reliance on the complex rules of property and trusts law.

If the parties are not joint legal owners and no formal declaration of trust has been made,[47] the court will consider whether a constructive trust has been developed. For a court to find a constructive trust there are two prerequisites; a common intention to share and detrimental reliance upon that common intention. In addition, it is necessary for the court to quantify the beneficial interest.[48] The House of Lords case of *Stack v Dowden*,[49] as reaffirmed by the Supreme Court in *Jones v Kernott*,[50] held that 'common intent' could be proved by express discussions, regardless how vague.

---

[43] This is done by taking into consideration all of the parties' assets and applying a 'yardstick of equality' approach whereby judges exercise discretion to ensure fair distribution between the parties, per *White v White* [2001] AC 596.
[44] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
[45] For example, the wife may be compensated for her loss of earnings, per *Miller; McFarlane*. Additionally, the wife can earn a share of the husband's future earnings per *Parlour v Parlour* [2004] EWCA (Civ) 872.
[46] The Law Commission criticised the law as being confusing and misleading; Law Commission, *Family Law: The Ground for Divorce* (Law Com No 192, 1990). Furthermore, the Law Commission recently argued that the judiciary has no explicit guidelines on the division of a divorcing couple's assets, particularly regarding what 'needs' precisely means; Law Commission, *Matrimonial Property, Needs and Arrangements* (Law Com No 208, 2012).
[47] *Pettitt v Pettitt* [1970] AC 777. A declaration must be in writing to be enforceable, per s 51(1)(b) of the Law of Property Act 1925.
[48] *Lloyds Bank v Rosset* [1990] UKHL 14.
[49] [2007] UKHL 17.
[50] [2011] UKSC 53.

The main issues of complexity arise with regard to the relevant case law. Loans[51] and gifts[52] negate any common intention whilst, per *Eves v Eves*,[53] arduous labour does not suffice. However, dicta in *Stack* also seem to suggest that indirect contributions to the purchase price may suffice to generate an interest in the property. Nevertheless, in *James v Thomas*,[54] Ms James lived and worked unpaid for 17 years, but the courts declined to find a common intention to share the property. The court cited Mr Thomas' elusive response to proposals of transferring the property into joint names as an indicator negating any common intention to share the beneficial interest. As such, it is obvious that there is dire inconsistency and uncertainty in the case law.[55]

Additionally, even if a common intention has been found, the quantification of the interest will also need to be established. This is determined holistically with regard to the 'whole dealings in relation to the property'.[56] As such, *Stack* has been heavily criticised. In property law spheres, Glover and Todd have cited the quest to identify a common intention as a myth.[57] Even more sympathetic commentators, such as Etherton (who states the results are positive in terms of social justice), argue that the decision was nevertheless intellectually dishonest by pretending to be in line with previous authorities.[58]

Nevertheless, *Stack* is the prime example of the courts' rebellion against the lack of formal ancillary relief for cohabitants. They are deploying equitable doctrines, such as the constructive trust, in order to provide some remedy for cohabitants. However, the issue with this is its aforementioned complexity. This route is overtly convoluted and requires extensive litigation as compared to the relatively straightforward process enjoyed by most divorcing spouses. Thus, it is evident that cohabitants are left in an awkward legal position because of the current common law. Hence, it is unsurprising that such a myriad of legal rules has led commentators to call for reform.[59]

'Cohabitation: The Financial Consequences of Relationship Breakdown'

[51] *Re Sharpe* [1980] 1 WLR 219.
[52] *Mehra v Shah* [2004] ALL ER (D) 283 (May).
[53] [1975] EWCA Civ 3.
[54] [2007] EWCA Civ 1212.
[55] Sarah Greer, 'Back to the Bad Old Days*?*' [2008] NLJ 174.
[56] *Stack* (n 49). *Fowler v Barron* [2008] EWCA Civ 377 applied *Stack* in a restrictive way, stating that only 'exceptional' cases can rebut the presumption of an equal beneficial joint tenancy where the property is in joint names.
[57] Nicola Glover and Paul Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325.
[58] Terence Etherton, 'Constructive Trusts: A New Model For Equity And Unjust Enrichment' (2008) 67 CLJ 265.
[59] See John Eekelaar, 'The Place of Divorce in Family Law's New Role' (1975) 38 MLR 241.

The main beacon of hope of reform for cohabitation law was embodied in the Law Commission's 2007 recommendations.[60] The Law Commission acknowledged the prevalence of cohabiting relationships and the current law's faults. Its conclusion was that reform is a necessity. The proposed reforms never intended to confer the exact same rights on cohabitants as married couples or civil partners, but rather to strengthen the position of cohabitants as opposed to their current position in the law.

The recommendations proposed that cohabitants be entitled to apply for financial relief upon separation 'to ensure that the pluses and minuses of the relationship [are] fairly shared between the couple'.[61] The ability to apply for such financial relief should depend on certain suggested eligibility requirements, achieved if the couple had either lived together for a minimum number of years or had a child together.[62] What the specific period of time should be was left for the Government to decide although the Commission suggested a period between two and five years.[63]

The Law Commission's scheme's first ground for relief was that the respondent had a retained benefit because of 'qualifying contributions' the applicant had made.[64] Yet, after closer examination of the proposal, the types of contributions connected to a retained benefit are relatively constricted. For example, routine maintenance would not give rise to a claim. Additionally, physical improvements to the property only give rise to a claim if they increased the property's value.[65] The court would also have the power to provide financial relief for any 'economic disadvantage' that arose. This would require courts to assess any loss that a claimant suffered as a result of contributions made throughout the relationship. Such economic disadvantage could have entailed the loss of future earnings, an incapability to secure future pension provisions, or a failure to make savings and investments.[66]

The Commission proposed that quantification of such awards would be left to the court's discretion. The Commission directed them to reverse any retained benefit and distribute any economic disadvantage. However, this was only possible when

[60] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).
[61] ibid 4.
[62] ibid para 3.63.
[63] As such, couples 'living apart together' and in brief relationships were disqualified from the scheme. See further John Haskey, 'Living Arrangements in Contemporary Britain: Having a Partner Who Usually Lives Elsewhere and Living Apart Together (LAT)' (2005) 122 Popular Trends 35.
[64] Law Commission (n 60) para 4.33.
[65] ibid para 4.45.
[66] ibid para 4.60.

'reasonably practicable', a notion ascertained through discretionary factors.[67] The primary consideration was to be the welfare of any children of both parties under the age of eighteen. Financial needs, obligations, resources and the conduct of the parties would have also been taken into account. For claims based on economic disadvantage, there was an 'economic equality ceiling'. All of these proposals were distinctively opposed to divorce law, whereby the carer of minor children is likely to receive more than half of the assets in lower-income cases.[68] However, it must be noted that these financial remedies were based on the assumption that the cohabiting couple had not chosen to opt out of the scheme.[69] As such, it is clear that this approach strives to strike a balance between protecting cohabitants and infringing on autonomy, maintaining a noticeable division between the choice of people to enter into a formal public commitment and those who do not. Therefore, the aim of the recommendations was to reverse unequal 'economic advantage or disadvantage resulting from cohabitation, rather than to create an entitlement to equal division or to specifically address the parties' needs'.[70]

Nonetheless, in March 2008, the government announced that it would not undertake the reforms. It wanted to examine a similar scheme implemented into Scottish Law[71] to assess 'the likely costs and benefits to English Law of enacting the Law Commission's recommendations'.[72]

Obstacles to pragmatic reform

There are a number of issues that hinder the achievement of reforms. Probert has cited the distinct lack of a uniform definition of 'cohabitant' in English law as one such obstacle.[73] This claim has some merit; judicially, a definition was espoused in *Crake v Supplementary Benefits Commission*,[74] whereby a checklist was provided, including a heterosexual couple with a stable and sexual relationship of some duration. Legislators, on the other hand, have defined cohabitation along different

[67] ibid para 4.37.
[68] Rebecca Probert, 'A Review of *Cohabitation: The Financial Consequences of Relationship Breakdown,* Law Com No 307 (HMSO, 2007)' (2007) 41 Fam LQ 521.
[69] This is only if enforcement of the agreement would not result in manifest unfairness: Law Commission (n 60) paras 5.30, 5.51. An opt-out scheme has been hailed as the only system that can both protect cohabitants' autonomy and 'provide them with a mechanism which ensures appropriate protection for weaker parties'; see Sabine Aeshlimann, 'Financial Compensation Upon the Ending of Informal Relationships: A Comparison of Different Approaches to Ensure the Protection of the Weaker Party' in Katharina Boele-Woelki, Bente Braat and Ian Curry-Summer, *European Family Law in Action, Vol III Parental Responsibilities* (Intersentia 2005) 255.
[70] Pleasence and Balmer (n 26) 327-328.
[71] Family Law (Scotland) Act 2006, s 28.
[72] Per Parliamentary Under-Secretary of State in the Ministry of Justice, Bridget Prentice MP. HC Deb 6 March 2008, vol 472 col 122WS.
[73] Probert (n 68) 526.
[74] [1982] 1 All ER 498.

lines.[75] However, this argument is easily refutable as long as the definitions purported are workable and purposeful. This is certainly the present case as these varying definitions have the same effect in practice.

Moreover, it could be argued that the political considerations surrounding cohabitation are a greater and more significant obstacle to pragmatic reform.[76] This argument revolves around the notion that Governments tend to not want to appear as supporting a form of relationship other than marriage. Indeed, any desire to reform the law is always followed by a fear of being lampooned in the media for appearing to undermine marriage, making parliament and the Government reluctant to enact much-needed reforms.[77] Certainly, the Conservative administration during the 1990s asserted the need for 'traditional family values'.[78] The succeeding 'New Labour' government was susceptible to public opinion,[79] citing marriage as the form of the archetypal family. Their 1998 Supporting Families[80] paper focused on strengthening marriage and failed 'to acknowledge, let alone address, the need for better family-law based regulation of cohabiting relationships'.[81] Additionally, the Treasury were wary of providing further legal rights to cohabitants if it would become costly to the State.[82]

This political opposition to the reform of cohabitation law is also present in the recent Coalition Government. It was made clear in 2011 that the administration would not support reform of the cohabitation law. [83] In response, the Law Commission expressed hope that implementation would not be delayed 'beyond the early days of the next Parliament, in view of the hardship and injustice caused by the current law'.[84] However, this can be regarded as wishful thinking on the Commission's part. The Cohabitation Bill 2013, introduced by Lord Marks of Henley-on-Thames in the House of Lords, with an aim to implement the Law Commission's 2007 recommendations, only received a first reading. A distinct lack of attention and time afforded to the Bill caused it to be abandoned at the end

[75] See The Adoption and Children Act 2002, s 144(4)(b) and The Family Law Act 1996, s 62(1)(a), as amended by the Domestic Violence, Crime and Victims Act 2004.
[76] See Martin Durham, 'The Conservative Party, New Labour and the Politics of the Family' (2001) 54 Parl Aff 459.
[77] Probert (n 8) 267.
[78] Lorraine Fox Harding, *Family, State and Social Policy* (Palgrave Macmillan 1996).
[79] Andrew Rawnsley, *Servants of the People: The Inside Story of New Labour* (Penguin 2001).
[80] Government's Green Paper, *Supporting Families: A Consultative Document* (Home Office 1998) paras 4.3-4.4.
[81] Anne Barlow, Simon Duncan and Grace James, 'New Labour, the Rationality Mistake and Family Policy in Britain' in Alan Carling, Simon Duncan and Rosalind Edwards, *Analysing Families: Morality and Rationality in Policy and Practice* (Routledge 2010) 118.
[82] Such as an increased strain on judicial resources and further funding in legal aid. For more on the Treasury's influence in shaping policies, see Trine P. Larsen, Peter Taylor-Gooby and Johannes Kananen, 'New Labour's Policy Style: a mix of policy approaches' (2006) 35 *Journal of Social Policy* 629.
[83] Elizabeth Cooke, 'Cohabitation: Current Project status' <http://www.lawcom.gov.uk/project/cohabitation/> accessed 8 January 2016.
[84] ibid.

of the 2013-14 parliamentary session.[85] This is not at all surprising and follows the unfortunate trend of private members' bills.[86]

III. SCOTLAND

Scotland is another nation experiencing the rising social phenomenon of cohabitation. Scottish cohabitants enjoy a 'tailor-made statutory jurisdiction for the grant of financial relief following separation'.[87] This structured law - in contrast to the convoluted equity and trust law in English and Welsh jurisprudence - is encapsulated in the Family Law (Scotland) Act 2006. It stems from the Scottish Law Commission's 1992 recommendations that the law should strike a balance between not undermining the institution of marriage and protecting the autonomy of those who do not wish to be caught by the trappings of married life.[88] The main aim of the legislative reform was to secure legal clarity and alleviate harsh circumstances after cohabitation separation.

Eligibility

To ensure a flexible statute, Scottish cohabitants are legally defined as two people, whether of heterosexual or homosexual orientation, living as husband and wife or civil partners respectively.[89] Yet, there are further requirements to be eligible for financial relief under the statute. Cohabitants with children receive automatic eligibility. This notion is also evidenced in the recommendations made by the Law Commission for reforms in England and Wales, a concept that emphasises the well-being of the child regarding relief on the breakdown of cohabitation.[90] Furthermore, similar to the proposals in the English Law Commission's 2007 report, if the cohabitating relationship bears no offspring, eligibility can be established by assessing the relationship's length. However, unlike the recommendations by the English Law Commission that suggested a period of two to five years, there is no minimum duration requirement in the Scottish statute. Rather, the length of time, nature and extent of financial arrangements of the relationship will be evaluated by the judiciary.[91]

Once a cohabitant is eligible, they can seek a limited number of orders as opposed

[85] 'Cohabitation Rights Bill [HL] 2013-14' <http://services.parliament.uk/bills/2013-14/cohabitationrights.html> accessed 8 January 2016.
[86] See further Hansard (n 5). Additionally, Lord Lester introduced a similar bill in the House of Lords. HL Deb 25 January 2002 vol 630 col 1746.
[87] Jo Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71(3) CLR 492, 492.
[88] Scottish Law Commission, *Report on Family Law* (Scot. Law Com. No. 135, 1992), para 16.1; Scottish Executive, *The Family Law (Scotland) Bill: Policy Memorandum* (2005), paras 64-65.
[89] Family Law (Scotland) Act 2006, s 25(1).
[90] Law Commission (n 60), 13.
[91] Family Law (Scotland) Act 2006, s 25(2).

to their divorcing counterparts.[92] These financial remedies only include orders for payment of a capital sum, as compared to the Family Law (Scotland) Act 1985, the 2006 Act's statutory predecessor.[93]

Scottish divorce law and cohabitants' relief

The provisions of the 2006 Act that pertain to cohabitants are found in sections 25 to 29. The basis of financial relief on separation is premised on certain principles derived from Scottish divorce law's five principles, set out in the aforementioned 1985 Act.[94] Out of the five principles, only two apply to cohabitants: consideration of economic advantage and disadvantage received by either cohabitant[95] or any economic burden of childcare.[96] These aspects are encapsulated in section 28 of the 2006 Act, which requires the judiciary to ascertain whether the respondent received an economic advantage from contributions and the burden of childcare arising out of the relationship. This is balanced by any economic disadvantage suffered in the applicant's interest. However, this requirement produces a significant onus on evidence, and is prone to complexity as it is not clear 'what the main focus of the assessment of a claim should be'.[97] Such fears are compounded when the ambiguous extent of the court's discretion is taken into account, resulting in notable judicial inconsistency and legal uncertainty.[98]

There is also a notable lack of clarity when determining the economic burden of childcare.[99] As Guthrie and Hiram ask, should it be 'restricted to actual costs or account for broader economic disadvantages of childcare such as present and future impact on earning capacity?'[100] Indeed, one major and notable difference between the 2006 Act and the proposed English law reforms is that there is no explicit reference to future loss of earnings in the former.[101] In any case, the exclusion of future loss quantification would yield wildly unjust results for the applicant. It would contribute to, rather than alleviate, their hardship by

[92] ibid s 8.
[93] The Family Law (Scotland) Act 1985 was the principle statute regarding family law matters in Scotland, presiding over the financial consequences of divorce, which include periodical payment and transfer of relevant properties, ss 8, 12, 14.
[94] Family Law (Scotland) Act 2006, s 9.
[95] ibid s 9(b).
[96] ibid s 9(c). Divorcing couples, unlike separating cohabitants, gain account of equal share of matrimonial property, substantial dependence and financial hardship, the Scottish legislative counterpart to the English judicial three strands, per ibid s 9(a), (d), (e) (See further n 84 - 86).
[97] Tom Guthrie and Hilary Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006' (2007) 11 Edin LR 208, 219.
[98] Lord Matthews stated that the burden of cohabitation should be borne fairly but was mistaken as to the distinction between economic advantage and disadvantage in *CM v STS* [2008] CSOH 125 para 260.
[99] Family Law (Scotland) Act 2006, s 28(2)(b).
[100] Guthrie and Hiram (n 97) 216.
[101] However, it is assumed that it is impliedly included, evidenced in *CM v STS* (n 98) whereby Lord Matthews assessed the loss of future earning capacity.

decreasing their awarded relief, particularly if the relationship's offspring live with the applicant.

Further reservations?

Hence, it is clear that the Scottish legislation has its limits. Although section 28 has been singled out for its lack of clarity, the legislation has generally received a critical response.

One criticism regards the aforementioned lack of a duration requirement. A two-year minimum incorporated in an early draft of the Bill was ignored, meaning that a very short relationship could be eligible for statutory protection, if the court uses its inherently wide discretion.[102] This critique against the statutory eligibility of short cohabiting relationships is premised on the argument that not all cohabiting relationships should qualify for financial relief on dissolution as, in the words of the English Law Commission, 'casual short term relations, without inter-dependence (social, financial and emotional) may not need nor justify protection'.[103] A floodgate of cases - whereby numerous unmeritorious claims of insignificant periods of time are lodged to spite their cohabiting partners - would stretch the judiciary's already limited resources, hindering justice for cohabitants with meritorious and more pressing cases.

However, a no-minimum duration period evades arbitrary injustice to applicants who may have meritorious claims but narrowly miss the qualifying period. Baroness Hale asserted that, although reform is urgently needed for England and Wales, there is no specific need for a minimum duration period in order to be eligible to apply for remedies.[104] She refers to Scottish research that indicates the lack of such a requirement is not an obstacle, due to a distinct lack of cases during the Act's first three years. This suggests that the inclusion of a similar provision (or rather, its exclusion) would not produce burdens on the judiciary and legal aid resources.

Lessons learned from north of the border?

This Scottish research mentioned by Baroness Hale, conducted by Wasoff, Miles and Mordaunt, provided the exact sustained research that the British government waited for before potentially implementing the English Law Commission's 2007

[102] Guthrie and Hiram (n 97) 213.
[103] Law Commission (n 61) 258.
[104] *Gow v Grant* [2012] UKSC 29.

recommended reform.[105] The Scottish research concluded that the 2006 Act reflects the opinion in Scotland that cohabitants should be provided with financial remedies on the dissolution of their relationships whilst not to the full extent as received by married couples. However, as illustrated, the Act is not without faults. It is not the solution that the English law requires as it 'leads to a loss of coherence in the law, judicial division and public confusion, creating a false security among the ill-informed'.[106] Certainly, these are very credible reservations. The 2006 Act affords imprecise discretion to the judiciary, allowing judges to decide differently as to which contributions are relevant to assessment, leading to legal uncertainty. Such a result is made possible by a distinct absence of criteria.[107]

However, the shortcomings of the 2006 Act may be reconcilable. The legislation is new and has not been excessively utilised, even with the perceived somewhat lenient eligibility criteria. The issues of poor drafting could be offset through an increase in cases and judicial guidance. Nevertheless, when considering legal transplantation to England and Wales, it would be wiser to refer to a more structured and legally certain cohabitation framework, with a proven history of social success.

IV. FRANCE

French cohabitants were widely ignored by the law due to an old Napoleonic adage: 'they don't want law; law pays no regard to them'.[108] However, due to changes in the law, France has introduced a unique form of legislative reform in the international cohabitation domain. This is evidenced in its extensive and influential history.

A brief history of French cohabitation

French commentators in the latter half of the 20th century noted a significant change in the constitution of French relationships.[109] Such liberation from conventional marriage was spurred on through family law reforms during this period, which resulted in a notable decline in marriage alongside a simultaneous increase in cohabitation.[110]

[105] Wasoff *et al* (n 24). The research focused on the views and experiences of 97 family law practitioners on the provisions pertaining to cohabitants in the 2006 Act during its first three years. It also included a review of reported cases that applied these provisions.
[106] Elaine Sutherland, 'From 'Bidie-in' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise' (2013) 27(2) IJLPF 143, 144.
[107] Frankie McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) CFLQ 277.
[108] Claude Martin and Irene Thèry, 'The PACS and Marriage and Cohabitation in France' (2001) 15(1) IJLPF 135, 142.
[109] Louis Roussel, 'La cohabitation juvènile en France' (1978) 33(1) Population 15.
[110] Martin and Thèry (n 108) 136.

Legislation proposals for extra-marital relationships were originally introduced in 1990, intended to aid with the lack of legal recognition afforded to same-sex cohabitants. [111] After nearly a decade, several government-commissioned reports and more than 1,000 amendments, the Pacte Civil de Solidarité (PACS) was eventually introduced into French legislation.[112] Legislators made it clear that it was to be a status fundamentally different to marriage.[113]

Pacte Civil de Solidarité: Formalities

Whilst a PACS is available to both same- and different-sex couples, only partners involved in a 'stable, adult, unrelated, monogamous' relationship may register a PACS.[114] It is entered by concluding a completely customisable contract, one that allows the partners to set out their mutual preferences for the arrangement of property, financial support and other concerns.[115] When it comes to terminating the PACS, it may be dissolved immediately through mutual consent,[116] a far cry from the tedious and 'onerous' French divorce provisions.[117] Simply, the PACS is essentially a cohabitation contract that can be easily entered and terminated with minimal formalities.

Pacte Civil de Solidarité: Provisions

Although the PACS requires that partners support each other and provide mutual aid, the manner in which this is achieved is to be ascertained solely through the pact.[118] A presumption of joint ownership is evoked if there are no agreements made regarding the shares of property.[119] The PACS also has a notable lack of reference to guiding principles with regard to children. Nevertheless, French law maintains a principle of shared authority over children that include an obligation of financial support, regardless of their parents' relationship status.[120] Property division upon separation is also to be determined by the parties, only having the option for judicial help when their intentions are not ascertainable.[121]
Nevertheless, just as a PACS does not create fidelity obligations, post-dissolution

[111] Irene Thèry, 'Le Contrat d'union Sociale en Question' (1997) 10 Revue Esprit 159.
[112] Act no. 99-944 of 14 November 1999 amending the French Civil Code.
[113] Eva Steiner, 'The Spirit of the New French Registered Partnership Law' (2000) 12 CFLQ 1.
[114] Rebecca Probert, 'From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarité' (2001) 23 (3) JSWFL 257; French Civil Code Art 515–2.
[115] French Civil Code, Art 515–3. A relevant official must also be notified of any changes to the rights encompassed in the pact.
[116] ibid Art 515–7.
[117] Nicole Guimezanes, 'Family law in France' in Carolyn Hamilton and Kate Standley (eds) *Family Law in Europe* (Butterworths, 1995) 141-4.
[118] French Civil Code, Art 515-4.
[119] This is regulated by French property and succession law titled *l'indivision*, ibid Art 515–5.
[120] *Loi* no. 83–22, Art 38.
[121] French Civil Code, Art 515-7.

maintenance obligations are omitted.[122] On the other hand, divorcing in French law has significant economic consequences which 'often amount to a perpetuation of marriage under another name',[123] such as 'compensatory payment' for financial disparities after separation.[124]

Nevertheless, although the PACS are fully customisable, nearly all are signed with a single line that simply states the partners enter into a pact.[125] Yet, due to the aforementioned presumptions of joint ownership and shared authority of children, this is not a particularly disadvantageous thing. Indeed, cohabitation law under the PACS is more streamlined and it actively aims to protect cohabitants, a notion that stands opposed to the 'very indirect and limited' preceding French jurisprudence applied in resolving cohabiting property disputes.[126]

The French experience

Hence, the PACS avoided the legal complexity that previously prevailed and its propensity to produce inadequate results.[127] Furthermore, the PACS legal framework not only allowed enforceable agreements whilst providing family-law resolutions on breakdown, but it also gave cohabitants a tangible freedom to structure their relationship in a way that they saw fit. Hence, in a way, the PACS has somewhat found a balance between protecting the interests of cohabitants whilst not interfering with their autonomy. This overall newfound clarity and simplicity in the French cohabitation law helps to explain the minimal amount of legal disputes arising from terminations of PACS and their increasing popularity.[128] The popularity of PACS can also be attributed to the provision of marriage-like benefits, such as tax breaks.[129] Therefore, since its introduction, the PACS has quickly assimilated itself into French society as a positive characteristic

---

[122] Joëlle Godard 'Pacs Seven Years On: Is It Moving Towards Marriage?' (2007) 21(3) *International Journal of Law, Policy and the Family* 310.
[123] Harry Willekens, 'Long Term Developments in Family Law in Western Europe: an Explenation' in John Eekelaar and Thandabantu Nhlapo (eds) *The Changing Family* (Hart Publishing 1998) 69.
[124] Revised article a 'compensatory payment' to the other to make up for the disparity, which the divorce creates in the conditions of their respective lives, French Civil Code, Art 270.
[125] Xavier Tracol, 'The Pacte Civil de Solidaritè' in Katharina Boele-Woelki & Angelika Fuchs (eds) *Legal Recognition of Same-Sex couples in Europe* (Intersentia 2003) 79.
[126] The French courts utilised *'société de fait'* or *'enrichissement sans cause'* principles. Under the former, where there is a lack of a written agreement, a de facto partnership must be demonstrated by establishing contributions and an intention to share the property, a notion that resembles the convoluted trust law premise utilised in England and Wales. The latter principle, more commonly known as Unjust Enrichment in the English speaking world, requires that one party confers a benefit upon the other that it was unjust to allow the second party to retain. In either legal route, minimal significance is attached to domestic contributions. See further Jean Carbonnier, *Droit Civil Vol. II: Les Biens, Les Obligations* (Presses Universitaires de France 1999); Roger Nerson, '*Les Couples Non-mariés en France'* in John Eekelaar and Sanford Katz (eds) '*Marriage and Cohabitation in Contemporary Societies* 198, 205.
[127] Caroline Mecary and Flora Leroy-Forgeot, *Que Sais-Je?: Le PACS* (Presses Universaties de France, 2000) 95-96.
[128] Cynthia Bowman, *Unmarried Couples, Law, and Public Policy* (OUP 2010) 214.
[129] Probert, 'From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarité' (n 113) 258-259, 263.

of cohabitation reform.[130]

Nonetheless, the PACS is not without flaws, as evidenced by the French Ministry of Justice's recommended reforms.[131] Certainly, many commentators expressed issues regarding the dissolution of a pact, which created potential confusion and issues arising out of the division of property because of the 'co-owner regime'.[132] This is an issue as there is little to fully explain what occurs to property entered under a PACS if the cohabitants opt to marry one another.[133] Furthermore, regardless of the reforms to correct the deficiencies, it has been noted that the PACS – by virtue of it being a contractual agreement – is premised on unfounded presumptions as Barlow argues. Firstly, the approach assumes that people think about the legal consequences stemming from relationships, a position that stands opposed to reality.[134] Additionally, it also assumes that both parties are equals when in fact they have asymmetric bargaining powers.[135] Indeed, a contractual cohabitation position seems to provide little succour in preventing exploitation, a notion exacerbated by the fact that PACS are private and unverified by either an authority or lawyer.[136]

However, although credible, it is possible to refute these apprehensions as exaggerated and overlooking key facts. Even if a partner entered into an exploitative PACS agreement, French courts have the judicial power to find void contracts entered through mistake, deception or coercion.[137] Thus, although it is undeniably premised on the assumptions that individuals have both symmetric bargaining powers and regard to the legal consequences of their relationship, the PACS nevertheless accommodates the needs of the French society and its cohabitants, if not through the agreement itself then through legal presumptions and judicial intervention.

A feasible transference across the Channel?

Hence, it clear to see that overall PACS is a generally well received legislative

---

[130] Daniell Borrillo and Eric Fassin, 'The Pacs, Four Years Later: A Beginning or an End?' in Marie Digoix and Patrick Festys *Same-Sex couples, Same Sex Partnerships, and Homosexual Marriages: A Focus on Cross-national Differentials* (Ined 2004) 19.
[131] Ministry of Justice (France), *Le Pacte Civil de Solidaritè: Reflexions et Propositions de Reforme* (2004) available online at
<http://www.ladocumentationfrancaise.fr/rapportspublics/044000598/index.shtml.> Accessed 8 January 2016.
[132] Pierre Murat, *Le pacs, analyse juridique, in Actes du colloque 'Pacs; mode d'emploi* (Barreau de Grenoble, 2000).
[133] Martin and Thèry (n 108) 152.
[134] Anne Barlow, 'Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain Within Europe (2004) 26 Law and Policy 57.
[135] David McLellan, 'Contract marriage – The Way Forward or Dead End?' (1996) 23(2) *Journal of Law and Society* 234.
[136] Martin and Thèry (n 108) 152
[137] French Civil Code, Arts. 1110, 1112, 1116.

reform in the French cohabitation context. Nevertheless, there are several obstacles as to the degree to which such a legislative initiative can be effectively transplanted to England and Wales.

The first, as Probert argues, is the UK's lack of a notarial tradition.[138] Thus, as Barlow and James have noted, imposing a PACS-style legislative reform in England and Wales would mean assuming cohabitants will actually register their agreements.[139]

The second, and more significant, obstacle to transplantation regards the domestic desirability of contractual relationships, regardless as to whether they pertain to marriage or cohabitation.[140] Such a notion is generally regarded as unworkable in England and Wales as they are not legally enforceable. This is because, as noted above, the English courts already have wide discretionary powers to fairly distribute the divorcing parties' assets.

A final hindrance to direct transplantation of the PACS into English law follows from both of the aforementioned points: such a legal transfer would involve introducing a concept that is not naturally developed from England's legal culture.[141] Indeed, early research has found that the British public deems contractual relationships as unfriendly and inflexible.[142] Furthermore, the England and Wales Law Society regarded it as 'illogical to allow cohabitants to make enforceable cohabitation contracts when married couples cannot make enforceable pre-nuptial contracts'.[143] Admittedly, this is likely to change, with more emphasis being given to the pre-nuptial question in recent times.[144] However, until pre-nuptial agreements are unequivocally enforceable in the English law, it is still maintained that there is little support for a wholly transplanted contract-based property solution for separating UK cohabitants. Additionally, there is also a key difference in the property regime utilised by both countries. England utilises a separate property regime for married couples whilst

[138] Probert, 'From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarité' (n 113) 266. Indeed, there is a very small practical need for notaries regarding legal matters in England and Wales as UK qualified solicitors can also exercise commissioners for oaths powers and certify signatures.
[139] This is a belief that runs contrary to the fact that cohabitating partners do not even register their own wills. See Barlow and James (n 11) 171.
[140] McLellan (n 138).
[141] David Bradley, 'Convergence in Family Law: Mirrors, Transplants and Political Economy' (1999) 6(2) Maastricht Journal of European and Comparative Law 127.
[142] Jane Lewis, *Marriage, Cohabitation and the Law: Individualism and Obligation* (Lord Chancellor's Department, Research Programme 1999).
[143] Law Society (n 34) 80.
[144] Courts may now take a pre-nuptial contract into account, giving effect to it if it was freely entered into by both parties with full appreciation of its implications, unless upholding such a contract would be unjust, per Lord Phillips, *Radmacher v Granatino* [2010] UKSC 42. Furthermore, the Law Commission introduced a 'qualifying nuptial agreements' recommendation in 2014, see Law Commission, *Matrimonial Property, Needs and Arrangements* (Law Com No 343 2014).

France employs a community-based property regime. Therefore, any default position of equally shared property makes sense in the French context but is wholly displaced in an English setting.

Thus, although the PACS has served France relatively well, English law requires legislative reform that is more aligned with its social and legal history.

V. AUSTRALIA

England's former territory, Australia, unlike France, is a country that would be most beneficial to learn from. Not only is it part of the Commonwealth; its laws and customs are also premised on a common-law tradition, as opposed to France's civil legal system. The significance of Australia's approach to cohabitation - particularly in regards to remedies for property disputes - is that it is remarkably different from anything envisaged worldwide, let alone in England and Wales.

Cohabitation down under: the Australian attitude towards cohabitation

The Australian Royal Commission on Human Relationships, a formal government-sanctioned public inquiry between 1974 and 1978, held a similar line to the old French Napoleonic maxim.[145] As such, much like present day England, the Australia of old offered no legislative redress but opted to utilise the complex mechanism of trust law to establish beneficial interests in cohabitation property disputes.

Nevertheless, Australian academics – much like their English counterparts – denounced the use of trust law in cohabitation cases as an expensive, ambiguous, inconvenient and unnecessarily complex legal process.[146] However, unlike England, Australia responded earlier to these legal issues. The response was one of predominately legislative reform.[147] Yet, unlike France and Scotland, which opted for national legislation, Australian cohabitation legislation was enacted on a state-by-state basis. This is because jurisdiction over non-marital couples is held by its states, by virtue of the Australian constitution.[148]

[145] 'If parties refrain from marrying because they do not want to incur the legal and financial obligations of marriage, then the law should be slow to impose those obligations on them', Australian Royal Commission on Human Relationships, *Final Report Vol IV* (Australian Government Publishing Service 1977) 73.
[146] Ian Kennedy, 'The Legal Position of Cohabitees in Australia and New Zealand' [2004] IFLJ 238.
[147] Reg Graycer and Jenni Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 Washington University Journal of Law and Policy121.
[148] Lindy Willmott, Benjamin P. Matthews and Greg Shoebridge, 'De Facto Relationships Property Adjustment Law – A National Direction?' (2003) 17(1) Australian Journal of Family Law 37.

De facto relationships

Unlike the reforms proposed by the England and Wales Law Commission, which recommended that a relationship is an eligible cohabitating relationship if it exceeds a prescribed duration or produces children, Australian law determines eligibility through several factors - albeit duration being one such factor.[149] In essence, a mini-trial is required to determine the relationship's nature before remedies in the legislation may be made available.[150] By 2006, all of Australia's states had enacted legislation regarding de facto relationships.

The pioneering New South Wales

The first state to legislate such reform was New South Wales, which instigated a 1983 report that recommended a change in the law regarding the division of heterosexual de facto relationship property.[151] The result was the New South Wales De Facto Relationships Act 1984, later amended to the Property (Relationships) Act 1984 (NSW). It defines cohabitants as two persons who live together as a couple, a definition that encompasses homosexuals.[152]

Although a pioneering proposal for reform, the legislation was equally controversial. Politically, equating de facto couples with married couples was seen as a hazard to the legislation's Parliamentary success.[153] Hence, under the enacted provisions, duration and circumstance requirements had to be met before the parties had access to property adjustment provisions.[154] Furthermore, the judiciary could only consider financial, non-financial and in-kind contributions.[155] Future needs were not assessed. These factors ensured the Act's passage as de facto relationships became distinguishable from marriage: under the latter, the courts had a wide discretion as to the allocation of proprietary interests[156] as well as the ability to not only assess financial and non-financial contributions, but also to take into consideration any present and future needs of the divorcing couple.[157]

In this sense, the judiciary was unable to seek guidance from precedents set down by family law cases. Consequently, courts produced property orders which

[149] Kennedy (n 146) 241.
[150] Bowman (n 128) 194.
[151] Graycer and Millbank (n 147) 125-27.
[152] Property (Relationships) Act 1984, s 4(1).
[153] Willmott, Matthews and Shoebridge (n 148).
[154] Property (Relationships) Act 1984 (NSW) s 17.
[155] ibid s 20(1)(a)-(b).
[156] Family Law Act 1975 (Cth), s 79.
[157] ibid s 79(4).

drastically differed from similar cases dealt with under the Family Law Act 1975 (Cth),[158] the federal statute governing family law in Australia, a position that could be compared to the relationship between Scotland's earlier mentioned Family Law (Scotland) Act 2006 and the Family Law (Scotland) Act 1985.[159]

The Tasmanian revolutionists

Whilst the New South Wales legislation was relatively tame due to fears regarding its legislative success, it paved the way for the remaining states to enact their own cohabitation-focused legislation.

Tasmania premised its reforms, attributing marriage-like properties to cohabitants, on the Family Law Act 1975 (Cth), allowing its judges to take into account the de facto parties' contributions and needs, whether present or future.[160] Queensland and Western Australia also followed this approach.[161] Hence, the property adjustment remedies that de facto relationships received in these states resembled those that their married counterparts enjoyed under Australian law.

However, one difference from marriage that these states held is that (like with New South Wales) the de facto relationship eligibility was premised on the satisfaction of a two-year minimum duration period or the birth of a child.[162] Yet, Tasmania also opted for a registration scheme alongside its legislation. This registration initiative enabled de facto partners to formalise their relationship through a deed, allowing them to have immediate access to the law (much like their divorcing counterparts and the French PACS) rather than to wait the requisite period.[163]

Therefore, Tasmania was arguably the most progressive state with its revolutionary remedies for de facto relationships that mirror the Australian marriage law.

[158] Willmott, Matthews and Shoebridge (n 148).
[159] Victoria and the Northern Territory also adopted this relatively restrictive approach.
[160] Willmott, Matthews and Shoebridge (n 147) 39-40; De Facto Relationship Act 1999 (Tas), s 16(1)(a) and (c).
[161] Property Law Act 1974 (Qld) ss 291-292, ss 297-309; Family Law Amendment Bill 2001 (WA), s 205ZG, respectively. Western Australia is the only state to have wholly transplanted the Family Law Act 1975; see the Family Court Act 1997 (WA).
[162] Property Law Act 1974 (Qld), s 287; De Facto Relationship Act 1999 (Tas), s13; Family Court Amendment Bill 2001 (WA), s 205Z(1).
[163] Relationships Act 2003, s 11.

A united approach

Hence it is obvious that – because of Australia's federal constitution – the cohabitation reform legislation varied in scope and remedies. This was until the passing of the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, a statute that allowed de facto couples the ability to access the federally-uniform family law regime, dealing with financial and children matters in one court and in a single proceeding.

This legislative consistency was achieved through the introduction of provisions to amend the Family Law Act 1975 (Cth). The amendments extend the 1975 Act from providing a financial settlement scheme for married relationships to de facto couples.[164] To do this, the couple must be in a de facto relationship, ascertained by the court through various factors, which satisfies one of the four 'gateway' criteria,[165] as well as complies with the relevant time limits for a successful application. Indeed, if a de facto relationship falls within the legislation, Australian courts are granted discretionary, distributive powers over the whole of the relationship's assets.[166] To determine what orders to make, courts go through several stages, such as considering the parties' contributions, consideration of section 75(2) factors[167] and whether the proposed order is just and equitable.

In any regard, Australia's reforms on the whole circumvent the injustice and inconsistency that arise out of trust law in cohabitation cases, such as unfair property division or the sacrifice of careers to care for children or the property. Furthermore, as with the French PACS, Australian de facto couples receive various marital benefits through these legislative reforms making them very popular.[168] Indeed, de facto relationships recently comprised 15 per cent of the Australian population.[169]

From Tasmania and New South Wales to England and Wales?

Although clearly the trailblazer in the global cohabitation-reform context, it has been argued that Australia's reforms do have substantial limitations. For one, courts are faced with the onus of categorizing whether a relationship is eligible for

[164] Part VIII AB.
[165] ibid s 90SB (1)-(4). These 'gateway criteria' require that either the de facto relationship lasted for at least 2 years, there is a child of the relationship, substantial contributions have been made in which a failure to make an order would result in serious injustice for the applicant, or the relationship was registered under a prescribed law of an Australian State or Territory.
[166] Family Law Act 1975 (Cth), Part VII AB, s 90SS.
[167] These factors are similar to the England and Wales' Matrimonial Causes Act 1973, s 25(2).
[168] Kennedy (n 146) 243.
[169] Australian Bureau of Statistics, *1301.0 Year Book Australia* (Australian Bureau of Statistics 2012).

legal relief through a list of factors.[170] While admittedly the UK judiciary is no stranger to using factors to determine the division of property,[171] to decide whether a couple qualifies or not by reference to a list of factors is not only onerous and tedious, but can also result in inconsistent outcomes.[172] The Law Commission's recommendations are surely more favourable in this scenario, saving the court effort, cohabitants money, and both parties time.

Whilst the Law Commission's proposal may be favourable in regards to classifying cohabitants, it can surely take heed of several positive aspects of the Australian response to the same issues it faces.

The marriage and autonomy debates revisited: the Australian answer

A more significant issue that might be viewed as an obstacle to transplantation in England and Wales is that the Australian reforms possess a distinct marriage mirror-image quality. This is a major issue because, as noted in the earlier sub-chapter, English politics regards marriage as an indispensable family structure, which should not be equated with 'inferior' relationship statuses. Certainly, the England and Wales Law Commission's rejection of the Matrimonial Clauses Act 1973's expansion to encompass cohabitants was due to the fact that a scheme which equated cohabitation with marriage in this way would be 'politically unattainable'. [173] Indeed, the aforementioned 1983 New South Wales Law Commission echoed this very view.[174] However, Australia has been able to enact ground-breaking reform as they have radically structured their cohabitation law to reflect the reality of economic and individual situations, rather than to uphold traditional values.[175]

Undeniably, many commentators concur with this view that marriage is an institution that is losing its traditional influence. Willmott, Matthews and Shoebridge argue that the strength of a relationship is a result of the individuals' personal qualities and effort, rather than 'whether their commitment has been solemnized in a marriage ceremony'.[176]

[170] Family Law Act 1975 (Cth), Part VIII AB, s 90RD.
[171] See e.g. Baroness Hale's 'holistic factors' in *Stack v Dowden* (n 49).
[172] Bowman (n 128) 200-1.
[173] Law Commission (n 60) paras 4.5-4.10.
[174] New South Wales Law Reform Commission, *Report 36: De Facto Relationships* (New South Wales Law Com 1983) paras 5.49-5.50.
[175] ibid paras 5.45-5.47.
[176] Willmott, Matthews and Shoebridge (n 148). This notion is also held by a majority of the Australian public, See David De Vaus, 'Family Values in the Nineties' (1997) 48 Family Matters 5, 7.

In conducting their reform proposals to extend legal recognition to de facto relationships, the New South Wales Law Commission also noted that imposing a legislative scheme on de facto relationships meant that their autonomy would be compromised.[177] However, it must be noted that the Australian reforms do not automatically apply to de facto relationships. They provide a legislative route that can be utilised by separating partners suffering unjust outcomes during the distribution of property.[178] Hence, the de facto couples' autonomy is not only wholly protected but they also enjoy the additional benefit of seeking legal succour when their economic interests have been unfairly marginalized.

Despite facing the same debates and issues as England, Australia acknowledged that - due to their lack of marital status - cohabiting couples suffered injustice because of their legal position.[179] Such discrimination was corrected by disregarding the use of trust law and extending legal rights to cohabitants based on economic realities as opposed to tradition.[180] Of course, the main issue with this approach is that it overrides the status quo of marriage in favour of an 'inferior' relationship. However, for all intents and purposes, the legal distinction between marriage and cohabitation should be abandoned in favour of an approach that provides legal remedies based on what families do, as opposed to what they are.

VI. CONCLUSION

Whilst it is evident that countries around the world have enacted legislative reforms to soften the injustice felt by cohabitants, English law 'remains schizophrenic'.[181]

This confusion is attributable to the changes throughout the history of marriage as an institution. People responded imaginatively to daily life's challenges in contexts where 'older cultural and institutional constraints have lost their bite'.[182] Yet, such a rise in cohabitation has not been without criticism, as witnessed through the discussions on the perceived perversion of marriage and autonomy. Moreover, the current case law remains convoluted with a propensity for injustice.[183] This is compared to the relatively straightforward provisions set out in legislation for married couples on the breakdown of their relationships. Furthermore, most

[177] New South Wales Law Reform Commission (n 173) paras 5.51-5.55.
[178] Willmott, Matthews and Shoebridge (n 148).
[179] ibid.
[180] Rebecca Bailey-Harris 'Dividing the Assets of the Unmarried Family: Recent Lessons from Australia' [2000] IFL 90, 90–92.
[181] Barlow (n 134).
[182] Alan Carling, 'Family Policy, Social Theory and the State' in Alan Carling, Simon Duncan and Rosalind Edwards (eds) *Analysing Families: Morality and Rationality in Policy and Practice* (Routledge 2002) 4.
[183] See further Simon Gardner, 'Rethinking Family Property' (1993) 109 LQR 263.

cohabiting couples have received injustice at the hand of the law, not because they actively seek to evade it, but because they believe they are subjected to it, such is the prevalent common law marriage myth.

Hence, there is a clear difference in the way a cohabiting couple and a married couple are treated in England and Wales, which is based on the form of their relationships. By categorising relationships, policy makers assume that the law can help steer couples towards marriage - a more desirable family 'form' - by providing them with greater legal protection as compared to their cohabiting counterparts. Therefore, as the argument goes, British society will benefit through a restoration of social stability derived from the increase in marrying couples.[184] If England opted to follow this approach, it need not look any further than Scotland or France for guidance in reform. Nevertheless, whilst they both have enacted legislation based on the form of relationships, the way in which they have enacted it is significantly different.

Unlike the England and Wales Law Commission, Scotland opted not to bar cohabitants from legal redress through a minimum requirement, providing relief on economic disadvantage and the economic burden of childcare grounds. However, this approach is not feasible for England for several reasons. First of all, the Family Law (Scotland) Act 2006 is poorly drafted. Secondly, and more damaging, is that the legislation is ambiguous, providing the judiciary with wide discretionary powers. When combined, these factors become the antithesis of any reform; ambiguity will result in more confusion as opposed to alleviating the already complex common law.

On the other hand, France chose an opt-in registration-scheme through its PACS. The registration scheme is beneficial as it allows French cohabitants to order their property and concerns through an enforceable agreement. As such, it is a much simpler alternative to a complex body of case law. Furthermore, staying true to the fundamental tenet of the form approach, it maintains the distinction between cohabitating and marital relationships.

Yet, when transplanted to England and Wales, this approach may not have the intended effect of remedying the injustices suffered. The formalisation of relationships will merely create another set of jurisprudence when these agreements are eventually exploited. Additionally, the cohabitation contract approach does not follow from England's legal culture. Finally, even if cohabitants

[184] Barlow and James (n 11) 167.

did register their relationship, non-formal cohabitation will still exist, leaving these individuals without recourse to legal relief.

It would perhaps be better for England to follow its Commonwealth compatriot Australia. Australia clearly extends marriage-like rights to its cohabitants through a legislative scheme. The extent of this mirror-image response represents a view of attributing equal legal rights relying on the function of a family unit as opposed to its status, a position that is surely more preferable for England than the aforementioned reforms. Undoubtedly, the current relationship status quo is in need of revision, whereby both cohabitants and married couples – regardless of sexuality – should be entitled to legal relief when faced with the same family-based concerns.

In conclusion, English property law has undeniably failed cohabitants.[185] It is maintained that, in the interest of justice, reform must be enacted to fulfil family law's aims of protecting individuals. This will entail providing equality between functionally alike relations and protecting the weaker parties in disputes, as opposed to the promotion of a particular form of relationship. Indeed, England's northern neighbours, ancient rivals and a former colony all enacted some form of reform to protect its cohabitants, whilst England itself clings to ancient traditions.

[185] Gardner and Davidson argue that where a relationship is materially shared, it becomes a 'normative identical with marriage' and should be treated so. See Simon Gardner and K Davidson 'The future of *Stack v Dowden*' (2011) 127 LQR 13.

Spending Less Time with the Family: Are Dual-Class Shares A Necessary Evil?

Amy Yu-Tsu Chen
PhD Candidate, Lancaster University

ABSTRACT

Family firms are valued for their altruism, innovation and kinship; this distinguishes family firms from non-family firms. It is argued that the standard structure of public companies may jeopardise the independence of family firms as well as their ability to innovate and retain their distinctive characteristics. It is hoped that the UK regulators will not blind investors to the benefits of the family organisational form, because in the appropriate institutional context, a dual-class capital structure can offer economic opportunities as well as risks.

I. INTRODUCTION

According to data published by the Institute for Family Business, more than 3 million companies in the United Kingdom are family controlled firms. This represents 66% of all private sector firms in the UK.[1] However, 'UK family firms are concentrated in industries that have low investment opportunities, low need for external financing, and low M&A, while in France, Germany, and Italy, these factors have no effect on the family control'.[2] Subsequently, families in the UK, control only 8% of listed companies, while the proportion of family-controlled listed companies is much higher in other jurisdictions: 34% in Germany, 49% in France, 60% in the United States, and 66% in Italy.[3]

The fundamental question posed in this research deals with the appropriate balance between shareholder interests and the ability of family-investors to oversee the company's long-term interests. The method for answering this question is to examine the correlation between investor protection and the continuity of the family organisational form in public listed companies, and whether control mechanisms such as a dual-class capital structure is necessary for

[1] Institute for Family Business, 'The UK Family Business Sector Working to grow the UK economy' (Oxford Economics 2011).
[2] Julian Franks, Colin Mayer, Paolo Volpin, and Hannes Wagner, 'The Life Cycle of Family ownership: International Evidence' (2012) 25 Review of Financial Studies 1675.
[3] Gil Hiduke and JD Ryan, '*Small Business: An Entrepreneur's Business Plan*' (9th edn, Cengage Learning 2013) 283; Family Firm Institute, 'Global Data Points' (*Family Firm Institute*, 2014) <www.ffi.org/?page=globaldatapoints> accessed 8 January 2016.

the survival of the family firm. On one hand, if the promised returns are diminished due to the extraction of private benefits by family-investors, underinvestment and suboptimal allocations of capital may occur. In other words, dual-class shares may become a barrier to economic growth. On the other hand, with too few incentives for entrepreneurs in the forms of control and private benefits, investment and innovation may subsequently suffer.[4] This premise implies that family-investors are reluctant to access public equity markets, if the perceived costs of capital overrides incentives.[5]

Nevertheless, the strategic rationale for family involvement and control that characterises family firms depends on the jurisdiction the firm chooses when releasing its IPO (Initial Public Offering).[6] The founder-entrepreneur must decide between employing professional managers, or leaving management to their heir. Additionally, they must also decide which, if any, of the shares should float on the stock exchange.[7] If the legal protection against exploitation of minority shareholders is good, widely held and professionally managed firms emerge as the 'equilibrium' outcome.[8] Alternatively, if the protection of minority shareholders is less secure, it is optimal for founder-entrepreneurs to remain involved, and subsequently, designate their heir to manage and control the firm.[9]

However, when family-investors want to retain control, they use a variety of mechanisms to ensure that their control is not diluted. According to Hall's historical analysis of family firms in the United States, companies commonly used '[c]ousin-marriage, sibling exchange, the marriage of widows to their husband's brothers, and delaying or preventing marriage as estate-preserving strategies'.[10] However, in more recent years, the controlling minority uses alternative mechanisms to retain control, as seen through the use of several mechanisms. The first are pyramid structures, where the family controls the firm by a chain of ownership relations. For instance, if a family owns 51% of Firm X and Firm X owns 51% of Firm Y, then the family controls Firm Y even though it only owns 25% of its equity shares.[11] However, such structures are not common in the UK or in the

[4] Allaire Yvan, '*Dual-Class Share Structures in Canada: Review and Recommendations*' (Policy Paper 1, The Institute for Governance of Public and Private Organisations, 2006).
[5] Renée Adams and Daniel Ferreira, 'One Share-One Vote: The Empirical Evidence' (2008) 12 Review of Finance 51, 53.
[6] Mike Burkart, Fausto Panunzi and Andrei Shleifer, 'Family Firms' (2002) 58 J Fin 2167.
[7] ibid.
[8] ibid.
[9] ibid.
[10] Peter Hall, 'A Historical Overview of Family Firms in the United States' (1988) 1 Family Business Review 54.
[11] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer 'Corporate Ownership Around the World' (1999) 54 The Journal of Finance 471.

US because regulators require controllers to own significant threshold of shares to bid for the other shares of the company.[12]

Cross-holdings are also common among family firms.[13] An example of cross-holdings is where Firm X and Firm Y owns e percent of each other's shares, and the founder and/or family owns s percent of shares of each firm. The founder and/or the family will control companies X and Y, if e + s exceeds 50 percent.[14] Finally, families can issue dual-class shares, where shares sold to outside investors tend to have inferior voting rights.[15] In a dual-class capital structure, there are different classes of securities known as superior and inferior voting shares.[16] The number of votes that each share carries differs in accordance to the class, pursuant to the company's articles of incorporation. For instance, in some dual-class share structures, superior shares carry multiple votes while inferior shares carry only one.[17] In other cases, superior shares carry one vote while inferior shares are non-voting.[18]

A dual-class capital structure seeks to achieve the best of both the private and public corporate worlds: to provide family-managers access to the increased financing opportunities associated with a public listing, whilst enjoying control rights typically found in private companies. Unfortunately, these structures can create a gap between control rights and cash flow rights, and this allows family-investors to retain control even when they are minority shareholders.[19] An immediate implication of this structure is that the expropriation of outside investors can be particularly acute in family-controlled firms, especially if the family retain absolute control over a public listed company. However, more than 30% of Fortune 500 companies feature concentrated ownership,[20] and 50% use

[12] Julian Franks, Colin Mayer, and Stefano Rossi, 'Spending Less Time with the Family: The Decline of Family Ownership in the United Kingdom' in R Morck (ed), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (University of Chicago Press 2005).
[13] Lucian Bebchuk, Reinier Kraakman and George Triantis, 'Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanism and Agency Costs of Separating Control from Cash Flow Rights' in R Morck (ed), *Concentrated Corporate Ownership* (University of Chicago Press 2000).
[14] ibid.
[15] Harry DeAngelo and Linda DeAngelo, 'Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock' (1985) 14 Journal of Financial Economics 33.
[16] Paul Halpern, 'Systemic Perspective on Corporate Governance Systems' in Stephen Cohen and Gavin Boyd (eds), *Corporate Governance and Globalisation: Long Range Planning Issues* (Northampton: Edward Elgar Publishing 2000) 46.
[17] Daniel Cipollone, 'Risky Business: A Review of Dual Class Share Structures in Canada and a Proposal for Reform' (2012) 21 Dalhousie Journal of Legal Studies 42.
[18] ibid.
[19] ibid.
[20] Deborah DeMott, 'Guests at the Table? Independent Directors in Family-Influenced Public Companies' (2007) 165 Duke Public Law & Legal Theory Research Paper Series <http://ssrn.com/abstract=1010732> accessed 8 January 2016.

some control-enhancing mechanism that entitles them to more votes than their share ownership stake.[21]

It is believed that in countries with strong investor protection, family ownership declines overtime; and in countries with weaker investor protection, family ownership can span multiple generations.[22] The World Bank Group produces an index measuring the strength of minority shareholder protection. The index ranks Hong Kong 2nd for protecting minority investors, the UK is ranked 4th, Canada is ranked 7th, the US is ranked 25th, and Germany is ranked 51st in the world.[23]

This research will explore the relationship between investor protection and the continuity of the family organisational form in public listed companies, and whether such assertions have prima facie support. Subsequently, this article examines: (1) the arguments for and against dual-class capital structure; (2) the UK versus the US legal framework analysis; and (3) a comparative case study of UK and US companies.

II. WHY DUAL-CLASS CAPITAL STRUCTURES?

Despite the orthodox conditions of one-share-one-vote cemented by Grossman and Hart as being imperative for the maximisation of shareholder benefits,[24] a large number of companies recapitalise their common equity into different classes of shares based on unequal voting rights. Corporate governance scholars who have focused on one-share-one-vote and dual-class structures, are divided between two conflicting views: (1) the opponents who contend dual-class shares are an undemocratic device that seizes shareholder rights, and diminishes firm value.[25] In contrast, (2) there are the proponents who regard dual-class shares as a purposeful device having valuable utility as an anti-takeover mechanism.[26] These two fundamental approaches underline the two conflicting paradigms found in value-based versus institutional-based critiques.

The modern literature on dual-class shares underlines the desire of entrepreneurs to retain control without having to bear excessive cash flow risks. This assertion was confirmed in a study by DeAngelo and DeAngelo, which examined efficiency-

[21] Belen Villalonga and Raphael Amit, 'How do Family Ownership and Management Affect Firm Value?' (2006) 80 Journal of Financial Economics 385, 396.
[22] Franks et al (n 2) 1677.
[23] World Bank Group, 'Protecting Minority Investors' (*Doing Business*, 1 June 2014) <www.doingbusiness.org/data/exploretopics/protecting-minority-investors> accessed 8 January 2016.
[24] DeAngelo and DeAngelo (n 15) 35; Sanford Grossman and Oliver Hart, 'One Share/One Vote and the Market for Corporate Control' (1988) 20 Journal of Financial Economics 175.
[25] ibid.
[26] Villalonga and Amit (n 21) 396.

based reasons as to why founders choose dual-class structures.[27] The study demonstrated how controlling shareholders want to avoid interference from uninformed outside stockholders; and more importantly, it viewed disproportional ownership, coupled with the consumption of private benefits, as an efficient arrangement between controlling shareholders and outside investors.[28]

The main justifications for a dual-class capital structure are: (1) protection against shareholder misjudgement because of inferior information coupled with the 'managers know best' thesis,[29] (2) protection against takeovers, and (3) greater compensation for risks.[30]

Firstly, the 'managers know best' thesis stems from the assumption that insiders are experts who have better knowledge of the firm than its relatively uninformed shareholder body.[31] In this respect, managers as well as other insiders worry that the uninformed shareholders' personal interests may conflict with that of the firm during hostile takeover bids. More specifically, they fear the tendency of the uninformed shareholders to sell control to hostile bidders because of misinformation or mistaken beliefs about the firm's performance, and/or to be opportunistic in realising excess profits.[32]

Indeed, 'managers may not make investments that, although profit-maximising, are difficult to explain to a relatively uninformed shareholder body; that require substantial secrecy for competitive reasons; or that are expected to show a profit only in the long term'.[33] Consequently, proponents of dual-class share structures believe that such structures may also maximise shareholder wealth by minimising misguided shareholder opportunism.[34]

The premise of this approach is fundamentally at odds with the notion of open capital markets, coupled with laws and rules based on the concept that all investors, whether institutional investors or private individuals, should have access to financial information. The ability to access information will enable accurate analysis of a company's performance and potential.[35] However, Easley, Hvidkjaer, and O'Hara (2002) disagree with this assertion, asserting that

[27] Grossman and Hart (n 24).
[28] ibid.
[29] Cipollone (n 17) 78.
[30] Jeffrey Gordon, 'Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice' (1998) 76 CLR 1.
[31] ibid.
[32] ibid.
[33] ibid.
[34] ibid.
[35] ibid 2.

asymmetric information exists and it impedes investment, increasing the costs of capital.[36] Easley et al. effectively argue that an uninformed outsider is always at a disadvantage relative to traders with better information.[37] However, there is no conclusive evidence that uninformed shareholders make systematic mistakes when selling to third party bidders.[38]

Secondly, proponents of dual-class structures argue that during hostile takeovers these can serve as effective mechanisms for protecting companies' interests, and can promote long-termism.[39] In effect this allows managers to concentrate on long-term goals, while protecting themselves from corporate raiders and hostile takeovers.[40] Lastly, proponents argue that shareholders receive greater compensation for their risks when investing in dual-class companies.[41] Dual-share companies provide the controlling shareholders with an entrenched protection against hostile takeovers, which allows them to focus on firm building. This in turn allows non-controlling shareholders to 'benefit from the long term value of the founder's vision and entrepreneurial spirit' as well as profit.[42] However, a dilemma emerges under this scheme when one realises that such structures enhance agency costs as well as financial risks for non-controlling shareholders.

In 2004, this dilemma was realised when the Toronto Stock Exchange (TSX) was urged to adopt a one share, one vote requirement following complaints by non-voting shareholders at Chum Ltd., an iconic Canadian media empire, over the controlling family - the Waters' - refusal of an attractive takeover bid.[43] According to the Financial Post, the Waters family owned 88.6% of Chum Ltd.'s voting shares and 13.2% of its non-voting shares.[44] Thus, the Waters family had unhindered control over Chum Ltd.'s operations as well as its transactions. Two years later, another bidder, Bell Globemedia Inc, acquired Chum Ltd. for $1.4 billion. At that time, this transaction rang alarm bells for corporate governance scholars.[45]

Since Chum Ltd. was listed before TSX's 1987 'coattail' provision, the non-voting shareholders were not offered the same premium consideration as the other

[36] David Easley, Soeren Hvidkjaer and Maureen O'Hara, 'Is Information Risk a Determinant of Asset Returns?' (2002) 5 The Journal of Finance 2185, 2218.
[37] ibid.
[38] Gordon (n 30) 2.
[39] ibid.
[40] ibid.
[41] As seen in examples such as Berkshire Hathaway Inc, Google Inc, Facebook, MasterCard, Rogers Corp., and the Blackstone Group.
[42] Gordon (n 30) 2.
[43] Robert Monks and Nell Minow, *Corporate Governance* (5th edn, John Wiley & Sons Ltd, 2011) 138.
[44] Theresa Tedesco, 'A Media Family's Tough Decision' *National Post* (Toronto, 30 January 2007).
[45] Kirsten McMahon, 'Bell Globemedia Counsel Sores Top Newsmaker' *Canadian Lawyer InHouse* (5 October 2006) <http://www.canadianlawyermag.com/47/Bell-Globemedia-counsel-scores-top-newsmaker.html> accessed 8 January 2016.

class(es) of shareholders.[46] This issue garnered much attention, which subsequently led to the unsuccessful intervention and lobbying of the Canadian securities regulators. It is alleged that the founders chose dual-class shares over private equity, because it produced better growth prospects. These prospects are measured by company profits, the ratio of research and development to sales, and the number of employees.[47] Consequently, a dual-class capital structure can be perceived as a tool to reduce the cost of capital. Conversely, if such structures were not possible, some firms may stay private to consolidate control, which increases the costs of capital.[48]

Others, such as Taylor et al. contend that the main goal of dual-class shares is to maintain the 'founder-human-capital'; and in effect, the protection of firm-specific human capital is a rationale for the control mechanism.[49] Dual-class firms were relatively small companies, known as 'start-ups', prior to their IPO.[50] Therefore, the firm value is highly dependent on the human capital of the founding shareholders,[51] and there is little evidence to suggest that dual-class stock sustained inferior performance.

It is often maintained that firms implementing a dual-class capital structure and/or other anti-takeover provisions are of higher quality than those without anti-takeover provisions.[52] Professor Field supports this assertion by showing dual-class firms earned higher operating revenues in the year before going public, are more established, and are less likely to be in the developmental stage, than companies without such provisions.[53] It can be alleged that dual-class companies are more sophisticated, and their offerings are also underwritten by higher quality underwriters.[54]

Conversely, it is often assumed that controlling shareholders use dual-class structures to unduly entrench themselves within the company without having to bear the proportional economic risk.[55] However, Amoako-Adu and Smith (2001) observe that up to 10 years after an IPO, more than 67% of the firms experience

[46] TSX Venture Exchange: Policy 3.5 Restricted Shares.
[47] Kenneth Lehn, Jeffry Netter and Annette Poulsen, 'Consolidating Corporate Control: Dual-class Recapitalization versus Leveraged Buyouts' (1990) 27 Journal of Financial Economics 557.
[48] ibid.
[49] Stephen Taylor and Greg Whittred, 'Security Design and the Allocation of Voting Rights: Evidence from the Australian IPO Market' (1998) 4 Journal of Corporate Finance 107.
[50] ibid.
[51] ibid.
[52] Laura Field, 'Control Considerations of Newly Public Firms: The Implementation of Antitakeover Provisions and Dual Class Shares Before the IPO' (1999) 2 SSRN Electronic Journal <http://ssrn.com/abstract=150488> accessed 11 January 2015.
[53] ibid.
[54] ibid.
[55] Adams and Ferreira (n 5) 60.

control changes, which the authors suggest may be inconsistent with the aforementioned premise.[56] In a related work, Smart, Thirumalai, and Zutter (2006), found that control changes in dual-class firms are less sensitive to performance, and occur less frequently than single class firms.[57] Smart et al. found that dual-class companies trade at a lower price than single-class firms at an IPO, and that this effect carries over for at least five more years.[58] This trend correlates with corporate governance issues associated with dual-class shares, which influence the pricing of dual-class firms.[59]

III. THE UNITED KINGDOM v THE UNITED STATES OF AMERICA

In both the UK and the US, there is an active market for corporate control, and as a result, families have a greater incentive to sell out to other firms or investors. Therefore, in contexts where there is an effective market for corporate control, widely held firms are the norm. The UK and the US have been chosen as comparative subjects because they have key similarities (i.e. active markets for corporate control) as well as differences in their approach to founder/family-controlled firms (i.e. pro-shareholder versus pro-management). Leading this comparative discussion is the question, what happens when families want to retain control?

Although La Porta et al.'s thesis connecting law and finance has since been criticised,[60] most commentators acknowledge that 'law matters' in shaping the economic and financial development of a given jurisdiction.[61]

Corporate Governance

After major corporate scandals such as Enron and News Corp., the 2002 Sarbanes-Oxley Act (SOX) was enacted as a reactive measure to increase corporate governance, including '...mandated increased disclosure, new board oversight provisions, and improved internal controls', thus enhancing corporate transparency.[62]

---

[56] ibid.
[57] Scott Smart, Ramabhadran Thirumalai and Chad Zutter, 'What's in a Vote? The Short- and Long-Run Impact of Dual-Class Equity on IPO Firm Values' (2008) 45 Journal of Accounting and Economics 94.
[58] ibid.
[59] ibid.
[60] It was alleged that the quality of laws protecting minority shareholders rest in legal origins (Common law vs Civil law), see Rafael La Porta et al, 'Law and Finance' (1998) 106 J Pol Econ 1113.
[61] Brian Cheffins, 'Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies' (2003) 23 OJLS 1.
[62] ibid.

By contrast, the UK's system of business regulation, which is principles-based rather than rules-based, follows the form of 'comply or disclose' where companies are required to publicly disclose the extent of their compliance and alignment to suggested 'best practices' prescribed by the securities commissions.[63] For instance, in the UK, listed companies must disclose whether their directors are related (i.e. family and close associates), and they must describe their relationship with the company in their annual reports.[64]

Table 1: UK v US Corporate Framework

	United Kingdom	United States
Corporate Governance	'Comply or disclose'	'Rules-based approach'
Duty of Care	Yes	Yes
Executive Compensation	'Say on pay'	'Say on pay'
Independent Directors	50% Independent Directors	50% Independent Directors
Takeover Rules	Neutrality Rule	'Dominate Motive Analysis'
'Blockholder' Dual-Class Shares	Discouraged	Allowed

It is often maintained that a principles – rather than rules-based approach reduces administrative costs, whilst providing a flexible corporate governance environment for businesses.[65] Nevertheless, companies must take the Corporate Governance Code seriously, because the market for corporate control enables shareholders to 'punish' non-compliance if shareholders are dissatisfied with the company's annual report or with their explanation for non-compliance (i.e. company downgrade or share price falls).

On the other hand, the US follows the 'rules-based' approach of mandatory compliance. Under the SOX, listed companies must have an audit committee hired by independent directors,[66] and financial statements must be signed off by the Chief Executive and Chief Financial Officers.[67] One of the main criticisms of the rules-based approach is that it assumes a 'one size fits all' approach to corporate

[63] ibid.
[64] Financial Conduct Authority, 'Response to CP 13/5: Enhancing the Effectiveness of the Listing Regime' (Policy Statement 14/8, FCA 2014).
[65] Tara Gry, *Dual-Class Share Structures and Best Practices in Corporate Governance* (Library of Parliament No. PRB 05-26E, Parliamentary Information and Research Service 2005).
[66] Sarbanes-OxleyAct 2002 (SOX 2002) s 301.
[67] SOX 2002, s 302.

governance. For instance, section 404 of Sarbanes-Oxley Act is applicable to small and medium-sized (SMEs), as well as large public companies.[68] Under section 404, companies are required to produce an annual report assessing the effectiveness of their internal controls over financial reporting (ICFR).[69] Accordingly, the ICFR has been criticised as being an unnecessary burden on small businesses,[70] and one that disproportionately penalises SMEs because of the fixed costs associated with the setting up of ICFR systems.[71]

Duty of Care

In the UK, the duty of care was based on very low standard of care as it is stipulated by 'subjective' standard of competence, as seen in the ruling of *Re City Equitable Fire Insurance Co*.[72] However, given the developments of the common law[73] as well as other external factors, the subjective standard of competence was re-examined in *Re D'Jan of London Ltd*.[74] The Court applied both the 'subjective' as well as 'objective' reviews, and held Mr D'Jan accountable for a lack of diligence, as well as for the breach of the duty of care. This case cemented the judicial framework for directorial conduct in insolvent firms, but more importantly, it created a subjective and objective standard for the duty of care as well as a statutory standard for conducts of wrongful trading.[75] This approach formed the basis for director's duties, codified under the Companies Act 2006 sections 171 to 177.

In the US, the business judgment rule was dominantly applied.[76] As seen in *Shlensky v Wrigley*,[77] which affirmed a dismissal of this case due to the business judgment rule, which allowed the director of the professional baseball team to hold matches during the day. The business judgment rule sanctioned director immunity from losses incurred in corporate transactions that are within their authority and power to make - thereby in good faith.[78] Then in 1985, the Delaware Supreme Court issued the *Smith v Van Gorkom* ruling, which was the first Delaware case to hold directors liable for breach of the duty of care as a result of a business decision.[79] Thereafter, the concept that directors can be held accountable for breach of the duty of care was then adjudicated, as seen in *Cede & Co v*

[68] Deloitte, 'Sarbanes-Oxley Section 404: 10 Threats to Compliance' (Deloitte Development LLC, 2004) <www.deloitte.com/us/tenthreats> accessed 12 January 2016.
[69] ibid.
[70] ibid.
[71] Gry (n 65) 4.
[72] [1925] Ch 407, 427.
[73] Insolvency Act (IA 1986), s 214(4).
[74] [1994] 1 BCLC 561.
[75] IA 1986, s 214(4).
[76] *Dodge v Ford Motor Company*, 170 NW 668 (1919).
[77] 237 NE2d 776, 780 (Ill. App. Ct. 1968).
[78] *West's Encyclopedia of American Law* (2nd edn, 2005) vol 10, 190-192.
[79] 488 A2d 858 (Del 1985).

Technicolor Inc.[80] This approach formed the basis for the NYSE Code of Business Conduct and Ethics, which requires listed companies to outline their commitments to shareholders, i.e. to act in good faith, with due care.[81]

Executive Compensation

In 2002 the Directors' Remuneration Report Regulations,[82] introduced provisions that required every listed company to hold an annual non-binding shareholder vote on executive pay.[83] This concept is more formally known as the 'say on pay' scheme. This regulatory strategy aims to mitigate the often damaging effects of remuneration packages through the means of advisory boards and/or shareholder votes on executive compensation packages. In theory, the 'say on pay' scheme is a residual loss-minimising mechanism that helps shareholders ensure that the remuneration packages will not be used to increase agency costs,[84] and improves the 'accountability, transparency, and performance linkage of executive pay'.[85]

The UK Corporate Governance Code requires listed companies on the London Stock Exchange to disclose whether they have complied with the code, and subsequently, explain the areas in which they have not complied; in other words, the 'comply or explain' scheme.[86] The Code aimed to increase the level of disclosure to shareholders. However, it must be noted that the aforementioned Code is adopted on a principles-based approach, which in turn, highlights best practices in which public listed companies must 'comply or explain'. This contrasts the US rules-based approach (Sarbanes–Oxley Act of 2002). Subsequently, in 2010 the US government enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act 2011, which mandates a non-binding vote on the 'say on pay'.[87]

The objective of a well-designed remuneration package is to attract and retain the right talent at the lowest costs, as well as to motivate those executives to create long-term shareholder value and avoid decisions that destroy value.[88] Jensen and Meckling believe that the alignment of the agents' incentives with that of the principal's incentives can be best achieved by aligning their risks through stock

[80] 634 A2d 345 (Del 1993).
[81] NYSE Listed Company Manual 2006, sub-s 303A.10
[82] The Directors' Remuneration Report Regulations 2002, SI 2002/1986
[83] Companies Act 2006 (CA 2006), ss 420-422.
[84] Pavlos Masouros, '*Corporate law and economic stagnation: How shareholder value and short-termism contribute to the decline of the western economies*.' (Eleven International Publishing 2013) 197.
[85] Fabrizio Ferri and David Maber, 'Say on Pay Votes and CEO Compensation: Evidence from the UK' (2013) 17 Review of Finance 527, 563.
[86] UK Financial Services Authority (FCA) sub-s 9.8.6 R.
[87] Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, s 951.
[88] Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 308.

options.[89] This notion prompted the adoption of equity based remuneration packages, which entailed some variation of stock options. A stock option is a right granted to the agent to buy company stock in the future at a negotiated price, which is usually determined at the time the remuneration package are considered.[90] It is alleged that stock options can align the incentives of the agent with that of the principal because it provides the agent with equity incentives as well as compensation if the agent actions yield higher returns. However, it must be noted that stock option plans are by their nature asymmetrical because they reward success, but fails to punish failure.

Therefore, the dominant approach views executive compensation packages as a remedy to the agency problem.[91] This approach is labelled as the 'optimal contracting approach'.[92] Under this theory, the boards are assumed to have the ability to design compensation schemes to provide agents with effective, as well as efficient, incentives to maximise shareholder value. The main hindrance in the optimal contracting model rests in the political limitations: more specifically, in the tendency to be generous to executives. This results in compensation schemes that are insufficiently high-powered. However, the fundamental flaw in the contractarian approach lies in the notion that contracts are incomplete and are thereby not comprehensive due to various contingencies that may arise, proliferated with asymmetrical information, as well as bounded rationality.

Another approach to the study of executive compensation focuses on the link between the agency problem and remuneration packages, called the 'managerial power approach'.[93] In accordance with this approach, executive compensation is viewed not as a remedy to the agency problem, but also as part of the agency problem itself. As Bebchuk and Fried have recognised, some features of compensation packages seem to increase rent-seeking, and in turn to promote tunnelling practices, rather than the provision of efficient incentives.[94]

Overall, executive compensation is multifaceted. On one hand, it can minimise residual loss when the remuneration packages are designed properly; on the other hand, there is also the potential of increasing residual loss, as seen in corporate scandals such as Enron.

[89] ibid.
[90] Masouros (n 84) 196.
[91] Lucian Bebchuk, and Jesse Fried. 'Executive Compensation as an Agency Problem.' (2003) 17 Journal of Economic Perspectives 71, 71-72.
[92] ibid.
[93] ibid.
[94] ibid.

Independent Directors

In 2003, the Combined Corporate Governance Code recommended that at least half of the board members must be independent directors.[95] Similarly, in the US, the NYSE listing rules require at least half of the board to be independent.[96]

Independent directors are thought to be 'free' from conflicts of interests, which minimise the residual loss produced by the insufficient separation of management and control. They are viewed as guardians of shareholder value. However, almost half of the independent directors in the UK were recruited through personal contacts or friendships, and only 4% had had a formal interview.[97]

The empirical evidence linking independent directors and firm performance is unclear. On one hand, it is alleged that there is a direct link between independent directors and shareholder value.[98] The adoption of takeover defences or rejecting bids by companies that have independent boards is welcomed by the markets with a rise in share price rather than a drop.[99] On the other hand, there appears to be no direct correlation between board composition and firm performance.[100] Fogel et al. propose a third explanation, which views the effectiveness of an independent director as dependent on whether she is viewed as 'powerful' or not by her social network.[101] It is believed that 'powerful' independent directors are better at detecting and countering managerial missteps because they have better access to information, coupled with greater credibility in challenging the status quo.[102]

Takeover Rules

The board neutrality rule is of British origin and cemented in the City Code on Takeovers and Mergers of the Panel on Takeovers and Mergers since 1968.[103] This instrument is often referred as the 'non-frustration principle', a general rule that prohibits the target board from taking measures that would impede the bid, for instance, the issue of shares or options, the sale of assets, and etc as a takeover defence. Traditionally, this 'non-frustration principle' was an instrument of self-

[95] The Combined Code on Corporate Governance 2003, s A.3.2.
[96] NYSE Listed Company Manual 2006, sub-s 303.A.01.
[97] Kathy Fogel, Liping Ma and Randall Morck, 'Powerful Independent Directors' (Finance Working Paper No 404/2014, European Corporate Governance Institute (ECGI) 2015) <http://ssrn.com/abstract=2377106> accessed 12 January 2016.
[98] ibid.
[99] Masouros (n 84) 205.
[100] ibid.
[101] Fogel and Morck (n 97) 19.
[102] ibid.
[103] The City Code on Takeovers and Mergers 2008, Principle 7 and Rule 21.

regulation, which was subsequently, codified in CA 2006 section 943 of the UK regulatory framework.[104]

In the United States, the 'dominant motive analysis' as affirmed in *Cheff v Mathes*,[105] granted the board's unlimited power to defeat hostile takeover bids. However, in 1985 the Delaware Supreme Court developed concrete limits to the board's ability to adopt defensive measures during takeover bids. In *Unocal v Mesa Petroleum Co*.[106] a two-prong test was introduced: (1) the reasonableness tests states that the target board must demonstrate that it had reasonable grounds to believe that the bidder's action is a danger to corporate policy; and (2) the proportionality test states that the defensive measure must be proportional to the threat posed.[107] This test was applied in *Moran v Household International Inc*, and it was held that the adoption of the defensive plan was within the directors' authority.[108] The court believed that the defensive measure implemented was necessary as a means to protect the firm from coercive acquisition techniques.

In 1990, the Time Inc 'just say no' defence was heard in court.[109] Time Inc was concerned that the other parties would consider the merger as a sale of the company. As a result, the board enacted several defensive tactics against the more generous bidder because they were concerned that the company's journalistic integrity would be diminished under Paramount's ownership. In consequence the board believed that the shareholders would not understand their reasoning as the shareholders' interests lie in shareholder value maximisation. The Delaware Supreme Court acknowledged that the shareholders might have been ignorant about the long-term strategic benefit of management's preference for the less generous bidder (Warner). As a result, the court ruled in favour of the takeover defences adopted by Time, against Paramount as the more generous bidder.

It can be alleged that the Delaware court moved further away from the pro-shareholder model and towards the direction of greater deference to defensive actions, as seen in *Unitrin Inc v American General Corp*.[110] This is the leading case on a target director's ability to use defensive measures, such as share buybacks and/or poison pills to prevent a hostile takeover.

---

[104] Carsten Gerner-Beuerle, David Kershaw and Matteo Solinas, *Is the board neutrality rule trivial? Amnesia about corporate law in European takeover regulation.* (LSE Legal Studies Working Paper No. 3/2011), Law Society Economy 2011) <http://ssrn.com/abstract=1799291> 1-2.
[105] 199 A.2d 548 (Del 1964).
[106] 493 A.2d 946 (Del 1985).
[107] 'The Enhanced Scrutiny Test', Wex (2013) <https://www.law.cornell.edu/wex/enhanced_scrutiny_test> accessed 13 January 2016.
[108] 500 A 2d 1346 (Del 1985).
[109] *Paramount Communications Inc v Time Inc.*, 571 A 2d 1140 (Del 1989).
[110] 651 A 2d 1361 (Del 1995).

However, according to agency theorists, defensive mechanisms adopted by agents in the face of impending takeover bids are subsequently considered to have negative aggregated wealth effects for the shareholders.[111] In this effect, it is perceived that defensive measures deprive shareholders from the premium offered by the highest bidder, whilst shielding the agent from the disciplinary effects of the market for corporate control.[112]

It is contended that agents of the target firm have the tendency to use defensive measures as a means to extract better personal deals at the expense of the shareholders as well as higher premiums.[113] This assumption is supported by studies that suggest that after a bid is defeated the firm shares drop significantly, and trade at an average discount of 18% to the post-takeover bid price.[114] For instance, in the US the use of the poison pill has been found to be associated with significant stock price declines.[115]

IV. DUAL-CLASS CAPITAL STRUCTURE: THE UNITED STATES

The rules of the NYSE and NASDAQ allow for the issuance of super-voting stock at the IPO stage, but not after the company goes public.[116] Companies with existing dual-class capital structures are permitted to issue additional shares of the existing super-voting stock without conflict with this policy.[117] The NYSE Listing rules do not provide further safeguards for minority shareholders in dual-class listed companies,[118] except that they prohibit non-voting shares from being further differentiated in terms of entitlement compared to voting shares.[119] However, prior to IPO, the company requires shareholder approval to introduce the structure, and traditionally, institutional shareholders voted against proposals to create a dual-class capital structure.[120]

The Institutional Shareholder Services Inc (ISS), is a proxy advisory firm paid by large institutional investors, such as hedge funds, pension funds, mutual funds, and similar organisations to advise (and often vote their shares at shareholder meetings) on issues pertaining to shareholder votes.[121] Until 2011, it has been

[111] Masouros (n 84) 208.
[112] ibid.
[113] ibid.
[114] ibid.
[115] ibid.
[116] NYSE Listed Company Manual 2006, sub-s 313.10.
[117] ibid.
[118] NYSE Listed Company Manual 2006, sub-s 303A.10.
[119] ibid sub-s 313(B).
[120] ibid.
[121] Institutional Shareholder Services Inc, 'About: The Global Leader in Corporate Governance' (*ISS Governance*, 2014) < www.issgovernance.com/about/about-iss/> accessed 13 January 2016.

ISS's policy to recommend against dual-class shares regardless of voting rights or compelling reasons for the structure. However, pursuant to the revised policy in 2011, ISS will vote against any proposals to create dual-class capital structures, except in limited circumstances, such as (1) the company's auditors raise substantial doubt about the company's future prospects; (2) the new class of shares will be temporary, and there is a clear deadline; (3) the new class is not designed to increase the voting power of an insider; or (4) 'the new class is intended for financing purposes with minimal or no dilution to current shareholders in both the short-term and long-term'.[122]

It can be inferred that institutional investors will support the creation of a dual-class capital structure, if the company meets the above criteria. More importantly, this acknowledges the 'possible' positive potential of dual-class capital structures.

V. DUAL-CLASS CAPITAL STRUCTURE: THE UNITED KINGDOM

The Takeover Panel was established in 1968 as a regulatory response that strengthened the market for corporate control. The market for control, coupled with the rise of institutional investors, and financial institutions, dismantled the use of dual-class shares.[123] In effect, anti-director provisions were introduced,[124] disclosure provisions were enhanced,[125] which furthered the separation of ownership from control.[126] The elimination of dual-class shares and pyramids in the UK was therefore the consequence of well-planned government policies, which gave rise to a new era of shareholder democracy, also known as the principle of one-share-one-vote.

The UK Corporate Governance code does not recommend one-share-one-vote; it only suggests shareholders should have the ability to vote at an annual general meeting (AGM).[127] Therefore, the UK does not ban dual-class companies. However, interestingly, in 2012, the Manchester United IPO was deemed 'impossible' on the London Stock Exchange (LSE), because of the football club's decision to implement a dual-class share structure.[128]

---

[122] Institutional Shareholder Services Inc, 'United States: Summary Proxy Voting Guidelines' (*ISS Governance*, 4 March 2015) <https://www.issgovernance.com/file/policy/1_2015-us-summary-voting-guidelines-updated.pdf> accessed 13 January 2016.
[123] ibid.
[124] Company Directors Disqualification Act 1986; CA2006, s 168; The Companies (Model Articles) Regulations 2008, Art 18.
[125] UK Corporate Governance Code 2010.
[126] Franks Mayer and Rossi (n 12) 584.
[127] Financial Reporting Council, *The UK Approach to Corporate Governance* (Financial Reporting Council 2010).
[128] Michael de la Merced, 'Manchester United Sets Price Range for I.P.O. at $16 to $20 a Share' *The New York Times* (New York, 30 July 2012).

The Council of Institutional Investors, states the LSE 'essentially prohibits' the listing of dual-class companies.[129] However, this does not mean an outright ban. After a close evaluation of the LSE rules, one cannot find a provision that disallowed dual-class listed companies. In spite of this, it can be alleged that the UK Listing Authority,[130] 'indirectly' prohibits the listing of new dual-class companies. Although the majority shareholder rule is widely seen as a legitimate premise for the exercise of power, 'the tyranny of the majority' is a potential concern for UK regulators.[131]

'Premium Listed Companies' with Controlling Shareholders

The UK government has systematically discouraged the IPO of new dual-class listed companies, but existing 'Premium Listed Companies' with controlling shareholder(s) can provide an interesting insight to our analysis.

Listings on the LSE are divided into 'standard listing',[132] where listed companies must comply with minimum standards as outlined by the European Union. By contrast, 'premium listing',[133] must comply with enhanced listing requirements as outlined by the Financial Conduct Authority (FCA).[134] Requirements for listing in the UK are laid down by UK regulators, not the LSE.

Secondary listing on the LSE is not held to the same standard as 'premium listing'. For instance, the Daily Mail General Trust plc (DMGT) have majority blockholders with 'A' Ordinary Non-Voting shares, which are excluded from the Financial Times Stock Exchange's (FTSE) index series.[135] Effectively, 'under the new listing rules, DMGT's 'A' share will be classified as having a 'Standard' rather than a 'Premium' listing because they do not confer voting rights'.[136] In other words, DMGT sought to downgrade its premium listing to a standard listing to avoid new UK rules aimed at reducing the influence of controlling shareholders.[137]

---

[129] Joe Mont, 'Dual-Class Shares Gets Double Teamed by Critics' (*Compliance Week*, 2 October 2012) <www.complianceweek.com/blogs/the-filing-cabinet/dual-class-shares-get-double-teamed-by-critics#.VlsmXd_hCRs> accessed 13 January 2016.
[130] FCA (n 64).
[131] Roger Barker and Iris Chiu, 'Protecting Minority Shareholder in Blockholder Controlled Companies: Evaluating the UK's Enhanced Listing Regime in Comparison with Investor Protection Regimes in New York and Hong Kong' (2014) 10 CMLJ 98, 100.
[132] Listing Rules 2010 (LR 2010), 1.5.1G(1)(2)(4).
[133] LR 2010, 1.5.1G(1)(3).
[134] FCA (n 130).
[135] Daily Mail and General Trust plc (DMGT), 'DMGT Shares to Leave the FTSE's UK Index Series' (DMGT Shareholder Statement, 20 April 2012).
[136] ibid.
[137] Paul Murphy, 'Degraded! Finance Directors Reveals Sorry Truth Behind Index Exit for Publication Immortalised by Dead Beatle' *FT Alphaville* (20 April 2012) < http://ftalphaville.ft.com/2012/04/20/967991/degraded-finance-director-reveals-sorry-truth-behind-index-exit-for-publication-immortalised-by-dead-beatle/> accessed 13 January 2016.

Therefore, 'Standard Listing' could be an option for established companies seeking to reduce the government's scrutiny of its corporate governance practices. Nevertheless, premium listed companies benefit from: (1) an increased profile, (2) enhanced analyst coverage, (3) inclusion on the FTSE 100 (the 100 largest, most actively traded companies on the LSE) and thus (4) an increased liquidity in their shares.[138]

The UK Listing Authority introduced new corporate governance standards as part of its 'Revised Rules' for companies with controlling shareholders (hereafter 'new Listing Rules').[139] In the light of the 2008 financial crisis, the UK listing authority and the FCA felt compelled to introduce a new set of listing rules,[140] to enhance minority shareholder protection in blockholder-controlled companies.[141] The new Listing Rules seek to protect minority shareholders by 'ensuring the voice of the minority shareholders is heard when the behaviour of a controlling shareholder is not appropriate'.[142]

The key component of the new Listing Rules is to protect minority shareholders by: (1) imposing a relationship agreement whereby shareholders with at least 30% of the voting shares must enter into a mandatory agreement with the company; (2) providing additional voting powers to minority shareholders when electing independent directors and (3) enhancing the voting power of minority shareholders when the company wants to cancel its listing.[143]

(1) The first key component of the new Listing Rules is that controlling shareholder(s) must enter into a mandatory 'relationship' agreement with the company.[144] The aim is to limit the extraction of private benefits by controlling shareholders, and to mitigate the lack of transparency, as well as accountability, to minority shareholders. In other words, the neutrality rule is intended to regulate the controlling shareholder's influence over the company, whilst safeguarding the 'independence' of the business, and to ensure that the company's constitution does not undermine the position of minority shareholders.[145]

The independence of controlling shareholders highlights the idea that key shareholders must be at arm's length with 'day to day' business activities. In effect,

[138] Anne Kirkwood, 'New UK Premium and Standard Listing Regime' (Insights, Linklaters LLP 2010).
[139] FCA (n 64).
[140] FCA, 'Feedback on CP12/25: Enhancing the Effectiveness of the Listing Regime and Further Consultation (Consultation Paper 13/15, FCA 2013).
[141] FCA (n 64) 11.
[142] FCA (n 140) para 2.6.1.
[143] FCA (n 64) 10.
[144] LR 2010, 6.1.4ff.
[145] Barker and Chiu (n 131) 107.

the company must have strategic control over all its commercial transactions; and the controlling shareholders must also agree not to circumvent the new Listing Rules.[146] Additionally, to be eligible for a Premium Listing, the company must have at least 25% free float,[147] and must comply with the UK Corporate Governance Code.[148] However, companies incorporated outside the UK are subject to a 50% free float requirement.[149]

(2) If the above requirements were not met, or if an independent director believes the terms outlined in the Listing Rules are not complied with, then minority shareholders are given the power to veto all related-party transactions.[150] The FCA, states that 'when a controlling shareholder risks damaging the interest of minority shareholders, the new rules provide for specific sanctions to allow minority shareholders the means to veto all transactions between the company and the controlling shareholder'.[151] This gives independent directors and minority shareholders extra monitoring powers.

(3) The key aspect of the Premium Listing Regime aims to re-order voting rights of minority shareholders under certain circumstances, which gives them more 'voice' than would Standard Listed companies at General Meetings.[152] In particular, minority shareholders are granted additional influence when appointing independent directors or when a company seeks to cancel its Premium listing.

VI. DISCUSSION

The objective of the above analysis was to illustrate the substantive similarities as well as differences between the UK and the US. In relation to the shareholder analysis, both jurisdictions provide adequate protection for shareholders to an extent that agents can be held liable for their conducts. Shareholder-enhancing provisions, such as 'independent directors' and the 'say on pay' initiative, were all directly aimed at minimising the residual costs for shareholders.

However, with regards to takeover regulations, we have seen that the most divergence lies in this area. In accordance with agency theory, defensive mechanisms adopted in the face of impending takeover bids are considered to

[146] ibid.
[147] An issuer must ensure that at least 25% of its shares are at all times in 'public hands'. The minimum free float of 25% is also implemented at the NYSE.
[148] Tim Dempsey, 'A Guide to Listing on the London Stock Exchange' (LSE, White Page Ltd 2010).
[149] ibid.
[150] FCA (n 140) para 3.4.
[151] ibid.
[152] Barker and Chiu (n 131) 107.

have negative aggregated wealth effects. It is perceived that defensive measures deprive shareholders of the premium offered, while shielding management from the disciplinary effects of the market for corporate control. The board of neutrality rule as adopted in the UK, is indeed shareholder enhancing, but it is at times done at the demise of the company's long-term value creation. In *Paramount v Time*[153] the judge identified the innate complexities that exist; he subsequently ruled in favour of the company's defensive tactics against the higher bidder.

It can therefore be asserted that some shareholder enhancing provisions may in fact diminish the overall value creation of the company. In this way, agency theory paired with shareholders' advocacy for board neutrality and a preference for the most generous bidder may in fact increase the so-called agency costs, when its intentions are the opposite. Therefore, opponents in the context of takeover regulations offer empirical findings that suggest that anti-takeover provisions are not universally harmful for shareholders[154] and at times they can actually increase the portion of total gains received by target shareholders.[155]

Overall, the weaknesses of Delaware company law, from a minority shareholder perspective, have been compensated for by US securities regulations. This notion is strengthened by the viability of civil enforcement, which allows shareholders to seek compensation for director misconduct such as insider dealing and disclosure failings.[156] By contrast, UK shareholder remedies such as Derivative Action,[157] and Unfair Prejudice Action,[158] are framed in such a way that can rarely be used by aggrieved investors, due to the high threshold claimants must overcome in order get damages.[159]

However, the NYSE Listing Rules do not provide many safeguards for minority shareholders in companies with controlling shareholders.[160] As outlined in our previous analysis, the US institutional framework is fundamentally pro-management, due to the traditional US context of corporate resistance towards shareholder rights.

[153] *Paramount Communications Inc v Time Inc* 571 A 2d 1140 (Del 1989).
[154] Miroslava Stráska and Gregory Waller, 'Do antitakeover provisions harm shareholders?' (2010) 16 Journal of Corporate Finance 487, 488.
[155] Masouros (n 84) 210.
[156] Barker and Chiu (n 131) 118
[157] CA 2006 s 263.
[158] CA 2006 s 994.
[159] *O'Neill v Phillips* [1999] UKHL 24; *Gardner v Parker* [2004] EWCA Civ 781.
[160] Barker and Chiu (n 131) 107.

The above is evidenced, in *Business Roundtable v SEC*,[161] where the Business Roundtable lobbied on behalf of the management sector; and as a result of their efforts, the DC Circuit struck down the SEC's rule to adopt the one-share-one-vote rule. More recently, an action was brought against Rule 14a-11 of Dodd–Frank Wall Street Reform and Consumer Protection Act,[162] which gave shareholders the ability to nominate their down directors at an AGM as well as the right to propose rules regarding director nomination procedures. It was alleged that the SEC acted arbitrarily, and failed to consider the economic consequences of this rule. The court of appeals ruled in favour of the Business Roundtable, and invalidated the SEC's proxy access rule because they failed to conduct an adequate cost-benefit analysis.

VII. RIP THE FAMILY FIRM PLC?

A series of high profile scandals at Eurasian Natural Resources Corporation ENRC (now de-listed) prompted a review of UK corporate governance standards for companies with controlling shareholders.[163] The UK listing authority and the FCA, felt compelled to introduce the new listing rules,[164] to enhance minority shareholder protection in family-controlled companies.[165] The new Listing Rules seek to protect minority shareholders by 'ensuring the voice of the minority shareholders is heard when the behaviour of a controlling shareholder is not appropriate'.[166]

It is viewed that where family-controlled firms exist, 'the private benefits of control are generally achieved at the expense of the net wealth of minority shareholders'.[167] Therefore, the 'Mandatory Relationship Agreement' (MRA) is intended to regulate a controlling family's influence over the company,[168] and to ensure that the controlling-family does not undermine the position of minority shareholders. Therefore, the controlling family must agree that all business transactions as well as arrangements will be conducted at arm's length.[169]

---

[161] 905 F 2d 406 (DC 1990).
[162] *Business Roundtable v. SEC* No 10-1305 (DC Cir 2011).
[163] James Wilson, Jonathan Guthrie and David Oakley, 'ENRC "should have set off alarm bells"' (*Financial Times,* 22 November 2013) <www.ft.com/cms/s/0/1995e548-5368-11e3-b425-00144feabdc0.html#axzz3svNsJLLI> accessed 13 January 2016.
[164] Financial Conduct Authority, *Enhancing the Effectiveness of the Listing Regime and Further Consultation* (FCA CP13/15, 2013).
[165] FCA (n 64).
[166] FCA (n 140) para 2.6.1.
[167] Barker and Chiu (n 131) 100.
[168] LR 2010, 6.1.2AR states that a 'controlling shareholder' is viewed as someone who, together with persons acting in concert with them, exercises or controls 30 per cent or more of the votes.
[169] FCA (n 64).

However, the new UK Listing Rules aimed at strengthening minority shareholder protection can be viewed as 'a defensive measure to protect the reputational brand of the UK-listing regime as perceived by institutional investors'.[170] These new measures ultimately limit the benefits that a controlling-family brings to the company. The influence of a controlling-family over a company is fundamentally different from that of a top manager. The controlling-family's stake in a firm is generally greater than that of a professional manager; these factors play a role in aligning the controlling-family's interests with the long-term success of the company.[171]

Professional managers are generally more short-term, this notion was supported by Oliver Hart (1995), who uncovered an essential flaw in Jensen et al.'s executive compensation model.[172] It was held that it is difficult to design executive remuneration to motivate long-term performance, because contracts are not comprehensive safeguards to good corporate governance, since they need to be revised and renegotiated at all times.[173] It is viewed that contracts are inevitably incomplete; and at times, inflexible to address complex social issues - from up/downs in the business cycle to unpredictable personalities of CEOs.

It can be alleged that the new Listing Rules may introduce disincentives for family firms to IPO on the London Stock Exchange. The argument is two sided. On one hand, minority expropriation,[174] and lack of external accountability as well as transparency,[175] are held to be side-effects associated with family-controlled firms. On the other hand, many commentators have convincingly argued that family-controlled firms may, in the right institutional context,[176] promote good governance by shielding the company from external pressures,[177] which allows companies to focus on the long-term growth and sustainability of the company.[178] This will be further explored in the next section.

VIII. CASE STUDIES: UK AND US COMPANIES

This case study aims to consider how companies within the UK and US have used the one-share-one-vote principle versus dual-class capital structures. Twelve

[170] Barker and Chiu (n 131) 106.
[171] ibid.
[172] Oliver Hart, *Firms Contracts and Financial Structure* (Clarendon Press 1995) 23.
[173] ibid.
[174] *Brown v British Abrasive Wheel Co* [1919] 1 Ch 290.
[175] *Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd* [1920] 2 Ch 124.
[176] Alex Edmans, 'Blockholders Trading, Market Efficiency, and Managerial Myopia' (2009) 64 The Journal of Finance 2481, 2481-2483.
[177] Marc Moore and Edward Walker-Arnott, 'A Fresh Look at Stock Market Short-Termism' (2014) 41 Journal of Law and Society 416, 416-419.
[178] Barker and Chiu (n 131) 105.

firms were carefully reviewed and analysed against domestic corporate governance standards. The case studies show that a firm does not need to have dual-class shares to have disproportionate voting rights. In Royal Dutch Shell, the company's A and B shares have identical voting rights.[179]

However, a single class voting structure can yield disproportionate voting rights amongst shareholders. For instance, British Petroleum provides one vote for every ordinary share and two votes for every £5, in nominal amount, of BP preference shares.[180] My case studies also show a divergence in the frequency of elections for the Board of Directors, between US and UK companies. As you can see from the Table 2, the UK prefers to use board elections as a method for maintaining control and to secure some power within the company. However, in 2011, most UK firms have chosen to adopt the UK Corporate Governance Code (June 2010) requirement that all directors should stand for annual re-elections.[181] However, as seen from the table above, British Sky Broadcasting chose to use longer terms, while BP placed no term limit on their directors.[182] Some scholars suggest that annual elections may have an adverse impact on the interests of agents to plan for long-term value creation.[183] Whether or not this is true is up for debate. On the other hand, the above trends also show the effectiveness of 'soft' laws, as evidenced through the response of companies engaging with the Code.

Overall, companies featuring dual-class shares have sought to compensate for their structure by following good governance practices, such as increased independent board representation as well as annual board elections to assuage minority shareholder concerns. On average,[184] US firms feature more independent directors than UK firms. However, 21st Century Fox (Fox), Berkshire Hathaway, and Google have combined the role of CEO and Chairman, but elect their directors on an annual basis. However, both Google (68%) and Berkshire Hathaway (66%) have high ratios of independent directors, while less than half of the board is independent at Fox (41%). Interestingly, of all companies using a dual-class structure, Central Garden & Pet Company is the most classic example of concentrated ownership where a founder/family has voting control of the company through super-voting shares. However even Central Garden & Pet

[179] Royal Dutch Shell plc, 'Annual Report and Form-20F for the Year Ended December 31, 2014' (Shell 2015) < http://reports.shell.com/annual-report/2014/servicepages/downloads/files/entire_shell_ar14.pdf> 180.
[180] British Petroleum plc (BP), 'Annual Report and Form 20-F 2014' (BP, 2015) <www.bp.com/content/dam/bp/pdf/investors/bp-annual-report-and-form-20f-2014.pdf> 248.
[181] UK Corporate Governance Code 2010, s B.7.
[182] BP (n 180) 62. Great power is given to the nomination committee to recommend and appoint candidates for re-election, also known as Staggered Board.
[183] Jack Jacobs, '"Patient Capital": Can Delaware Corporate Law Help Revive It?' (2011) 68 Washington and Lee Law Review 1645, 1660.
[184] See Appendix A.

Company establishes a Board with annual elections, 55% independent directors, and a separate CEO and Chairman despite their controlling power over the firm.

Table 2: Frequency of Elections for Board of Directors UK v US

	2014	2013	2012	2011	2010	2009	2008	2007	2006
British Petroleum	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Royal Dutch Shell	Annual	Annual	Annual	Annual	Annual	3+ years	3+ years	3+ years	3+ years
Schroders	Annual	Annual	3+ years	3+ years	3+ years	3+ years	3+ years	3+ years	3+ years
British Sky Broadcasting	3+ years	3+ years	3+ years	3+ years	3+ years	3+ years	3+ years	3+ years	3+ years
Daily Mail General Trust	Annual	Annual	Annual	Annual	3+ years	3+ years	3+ years	3+ years	3+ years
Jardine Lloyd Thompson Group	Annual	Annual	Annual	Annual	3+ years	3+ years	3+ years	3+ years	3+ years
Apple	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual
Google	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual
Time Warner	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual
IBM	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual
Berkshire Hathaway	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual
Central Garden & Pet Company	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual	Annual

Google, on the other hand, is a relatively young company and has been trading on the NASDAQ since 2004. Class A shares carry one-vote-per-share, whilst its Class B shares carry 10 votes per share, and its Class C shares carry no votes. Interestingly, 92.5% of Class B shares are held by the founders, Larry Page and Sergey Brin, and its original employees. The founders are very much involved in the management of the firm, and since 2006, its Board independence has stayed above 68%. According to empirical findings, shareholders often approve the amendment to the Charter to adopt a dual-class capital structure, and '…that firms that undergo dual-class recapitalisation enjoy abnormal positive results in the stock market and in operation results'.[185]

Although the above analysis is descriptive in nature, this information provides an interesting insight into how dual-class capital structures are created. It was found that dual-class shares are not necessarily focused on minority expropriation, but instead, they are used to create long-term incentives focused on value creation. Dual-class shares are not indicative of bad corporate governance practices, but there were a few, namely Fox,[186] that had some questionable corporate

[185] Lynn Stout, 'Do Antitakeover Defenses Decrease Shareholder Wealth? The Ex Post/ Ex Ante Valuation Problem' (2002) 55 Stanford Law Review 845, 859.
[186] Revenue of $31.867 billion.

governance structure as well as compensation practices.[187] For instance, Fox's dual-class structure gives the Murdoch family 39.4% of voting power, even though it has only 13% economic ownership; and Rupert Murdoch (Chairman and CEO), Lachlan Murdoch (Co-Chairman), and James Murdoch (Co-Chief Operating Officer), as well as their associates are on the board.[188]

Interestingly, Sky plc with a revenue of £7.632 billion, is controlled by Fox (39.14%), which is indirectly owned by the Murdoch Family.[189] However, in 2005, Sky and Fox entered into an agreement, which caps Fox's voting rights to 37.19% at any general meeting.[190] Sky issues only one class of shares, and since 2006 Board independence stayed above 50%, and similar to BP, Sky has a staggered board structure. Many commentators view staggered boards as having a 'negative wealth effect' on overall returns to the company.[191] However, Stout (2002) viewed control mechanisms such as staggered boards, dual-class shares and other anti-takeover mechanisms as having significant benefit to a company, especially at the beginning of its business life cycle.[192]

New UK Listing Rules

Schroders plc is a multinational asset company,[193] developed under stable ownership for more than 200 years. The firm has disproportionate voting rights and carries with it a dual-class capital structure comprised of ordinary voting shares and non-voting ordinary shares, both listed on the LSE.[194] The Schroder family interests are held, directly and indirectly, by the family trust and these interests amount to 47.93% of the Company's ordinary voting shares.[195]

Following the new Listing Rules, the Schroder family entered into a 'Mandatory Relationship Agreement' (MRA) with the Company. The independence provisions mean that all commercial transactions and arrangements conducted with the controlling-family are done at 'arm's length'. The controlling-family must also agree that they will not take any steps to circumvent the new Listing Rules. (This was my observation?) This is concerning because this may generate the

[187] Amol Sharma, 'ISS Recommends Shareholders Not Re-elect 21st Century Fox Chairman Murdoch' (*Wall Street Journal,* 9 October 2013) <www.wsj.com/articles/SB10001424052702303382004579125601027171922> accessed 13 January 2016.
[188] ibid.
[189] Sky, 'Annual Report 2014' (Sky 2015) <https://corporate.sky.com/documents/annual-report-2014/annual-report-2014.pdf> 79.
[190] ibid.
[191] Stout (n 185) 846.
[192] ibid.
[193] Revenue of £1,531.2 million.
[194] Schroders, 'Annual Report and Accounts 2014' (Schroders 2014) <www.schroders.com/annualreport2014/servicepages/downloads/files/entire_schroders_ara14.pdf> 64.
[195] ibid.

perception that family-controlled firms are viewed negatively in the UK and this could make the LSE less attractive to family-investors as well as international issuers.

Both Daily Mail General Trust (DMGT) and Jardine Lloyd Thompson Group (JLT) sought permission from the Listing Authority to downgrade from Premium to Standard listing. DMGT has disproportionate voting rights and a dual-class capital structure with ordinary voting and non-voting shares. The Viscount Rothermere family controls 100% of the voting rights, and it has 29% economic ownership of DMGT (this is significantly more than Fox).[196]

On the other hand, JLT issues only one class of shares, but it is block-held by Jardine Matheson Group (40.16%), which is owned and controlled by the Jardine family based in Hong Kong.[197] JLT has a long history of insider control and resisting compliance with the Corporate Governance Code, as seen from my sample, JLT has the lowest ratio of independent directors (33%). However, JLT is well known for its long-termist views and it delivers consistent returns to shareholders.[198] Interestingly, after JLT's announcement of its downgrade, shares in all five companies owned and controlled by the Jardine family rose significantly.[199]

IX. FINAL OBSERVATIONS

After the review of two major listing regimes, it is derived that minority shareholder protection is evolving, but company law seems less relevant to family-controlled firms than securities regulations. The UK company law framework is well regarded for its anti-director provisions as well as for its shareholder rights, but it lacks civil enforcement. Conversely, minority shareholder protection is comparatively weak in the US, and can be viewed as pro-management, especially in Delaware. A key finding in this study underlines the increased importance of securities regulations and corporate governance standards that merge into a framework of Listing Rules.

It is contended that the decline of family ownership of UK corporations is the direct result of the equity market and its Listing Rules. The board neutrality rule governing takeovers, subsequently led to a high volume of equity-financed

[196] Daily Mail General Trust, 'Annual Report 2014' (DMGT 2015) <http://resource.ancreative.co.uk/ 3zhg1g3nc2ioog o8k8w0cooww4wcg0g0/100-43543> 40.
[197] Jardine Lloyd Thompson Group, 'Annual Report 2014' (JLT 2014) <www.jlt.com/~/media/files/sites/group/reports/jlt-annual-report-2014.pdf?la=en-gb> 68.
[198] Jennifer Hughes and Ben Bland, 'Jardines Still Marches to its own Beat' (*Financial Times,* 11 March 2014) <www. ft.com/cms/s/0/225d1bd4-a8da-11e3-bf0c-00144feab7de.html#axzz3svNsJLLI> accessed 13 January 2016.
[199] ibid.

acquisitions, which led to the dilution of family holdings.[200] As a result, family firms are often reluctant to access public equity markets via IPO due to the perceived costs of capital overriding its incentives.[201] In this effect, the use of a dual-class capital structure can protect against hostile takeovers and deter short-term investors whose portfolios are highly diversified, such as institutional investors and activist investors. This can be a valuable trade-off between a family-investor's desire to gain capital and to enjoy control rights typically found in private companies.

Research suggests that family-controlled firms are associated with higher firm valuation in jurisdictions with high shareholder protection.[202] This premise implies that family-control can lower the agency problem between owners and managers if there is adequate protection mitigating agency conflicts between the family and its shareholders. A corollary to this line of argument is that control-enhancing mechanism such as a dual-class capital structure can be detrimental to firm performance in weak shareholder jurisdictions. This means, in the right institutional context, as in the UK with its strong shareholder protection, dual-class shares can promote good governance by shielding the company from external market pressures whilst increasing firm valuation.

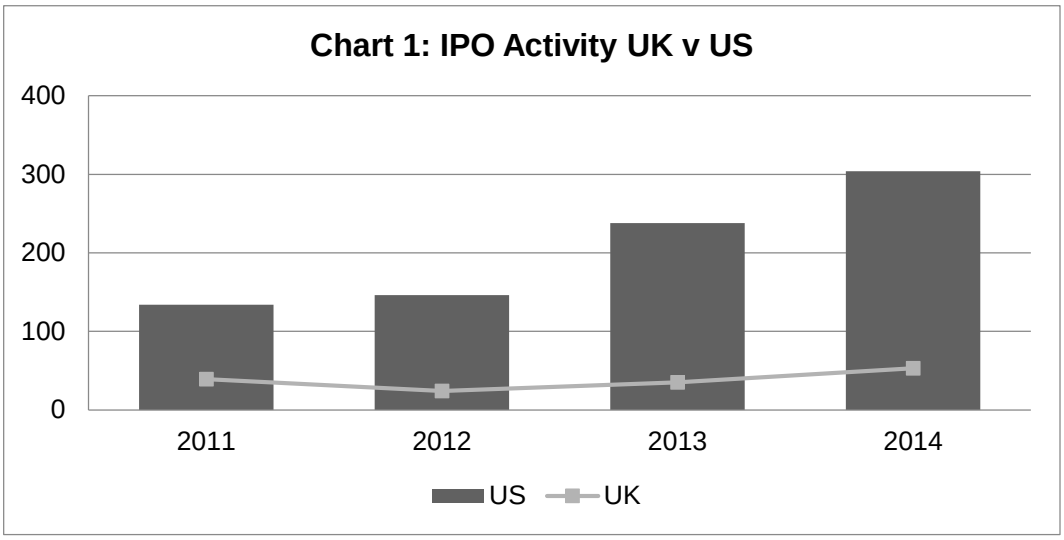
However, it is believed that the new Listing Rules generate the perception that the UK views family-controlled firms negatively, and this could lead to fewer IPOs on the LSE. Conversely, this negative perception of family-controlled firms has not emerged to the same extent in the US.[203] As seen from the Chart 1, entrepreneurs prefer to take their companies public in the US rather than the UK because it has the most attractive framework for new companies as well as for founders that want to retain control.

At the beginning of the business cycle, control mechanisms such as dual-class shares (like at Manchester United),[204] entrenchment provisions (like at Alibaba),[205] and other anti-takeover mechanisms (like at JLT) may have direct beneficial effects against hostile takeovers, whilst contributing to the company's long-term growth and increasing shareholder value.[206] It can be alleged that the

[200] Franks, Mayer and Rossi (n 12) 605.
[201] Adams and Ferreira (n 5).
[202] Stout (n 185) 846; Yvan (n 4) 3.
[203] Barker and Chiu (n 131) 132.
[204] de la Merced (n 128) 1.
[205] David Milstead, 'Google, Magna, Alibaba: Unequal Voting is Here to Stay' (The Globe and Mail 16 May 2014) <www.theglobeandmail.com/globe-investor/investment-ideas/google-magna-alibaba-unequal-voting-is-here-to-stay/article18734492/> accessed 13 January 2016.
[206] Stout (n 185) 859.

new Listing Rules may introduce more disincentives for family firms to IPO on the LSE.

Nonetheless, takeover defences and control mechanisms, such as the dual-class capital structure, cannot withstand the wrath of institutional investors or UK regulators. Many commentators believe the manifestation of new Listing Rules and governance standards are driven by institutional investors' preferences for an increased liquidity in their shares.[207] In spite of this, recognisable companies such as Schroder, Facebook, Berkshire Hathaway, and Google continue to issue dual-shares and investors continue to buy-in despite their corporate structure. This suggests that dual-class shares are still a matter of debate.



Data Collected from the 2014 PricewaterhouseCoopers Listing Reports.[208]

Overall, family firms are valued for their altruism, innovation and kinship, this distinguishes family firms from non-family firms. It is contended that the standard structure of public companies may jeopardise the independence of a family firm as well as its ability to innovate and retain its distinctive characteristics. It is hoped that the UK regulators will not blind investors to the benefits of the family organisational form, because in the appropriate institutional context, a dual-class capital structure can offer economic opportunities as well as risks.

[207] Franks et al (n 12) 605; Adams and Ferreira (n 5) 53; Barker and Chiu (n 131) 130; Stout (n 185) 846.
[208] Pricewaterhouse Cooper (PwC)'s Deals Practice, '2014 US Capital Markets Watch: Analysis and Trends' (PwC 2015) 8; PwC, 'IPO Watch Europe 2014 Annual Review' (PwC 2015) 16.

Comparative Analysis of Injunctive Relief Available under English and Kazakh law: Practitioner's Perspective

Rupert D'Cruz and Bakhyt Tukulov

Rupert D'Cruz is a Barrister at Littleton Chambers (London, UK) and Secretary of the British-Kazakh Law Association. Bakhyt Tukulov is Partner at Grata Law Firm (Almaty, Kazakhstan)

ABSTRACT

This article compares legal regimes applicable to injunctive relief available under English law and the law of Kazakhstan. Injunctive relief powers of English courts have traditionally been broad and comprehensive, in terms of geographical reach and types of available relief. The Kazakh legal system, on the contrary, is evolving from Soviet traditions of civil procedure; it is not yet sufficiently flexible and effective. Both systems have advantages and disadvantages in terms of length and costs. The advantages of the English legal system could serve as a good example in the transformation of Kazakhstan's civil procedure law. The authors will conclude that despite broadly similar regulation of injunctive relief and powers available to English and Kazakh courts, significant differences exist in how such powers are applied in practice.

I. INTRODUCTION

We often read about the large number of substantial disputes that are brought before the English courts. Cases considered by the English Commercial Courts often involve foreign parties whose business interests are located outside the country; issues in dispute in such cases have no connection to England. Why, then, do so many wealthy businessmen strive to have their disputes resolved by the English courts?

There are many reasons for this phenomenon. One reason often cited is the independence and quality of English judges and legal practitioners. However, this cannot be the only reason. The courts and legal professionals of many European Union (EU) Member States and the United States (US) can boast the same qualities. The additional ingredient is that England is seen as being able to offer more than other jurisdictions as a legal system that is best able to respond promptly, flexibly and effectively to the needs of businesses.

In this article, an English barrister and a practising Kazakh lawyer will aim to explain the main differences between the legal regimes governing judicial

processes in England and Kazakhstan. Given the breadth of the subject matter, the focus of this article will be a comparative analysis of injunctive relief under English and Kazakhstan law as the authors believe that this is one of the key elements of any judicial process, and a key attraction of the English legal system. If readers find this article interesting, its authors would be pleased to undertake a comparative analysis of other aspects of the judicial process in England and Kazakhstan in future articles.

II. INJUNCTIVE RELIEF UNDER KAZAKHSTAN LAW

Types of available injunctive relief

Article 156 (1) of the Civil Procedure Code 1994 (CPC 1994) of the Republic of Kazakhstan identifies the following types of injunctive relief that may be granted by the civil courts in Kazakhstan:

(i) freezing of respondent's assets;
(ii) prohibiting the respondent from undertaking certain actions;
(iii) prohibiting other parties from transferring assets to the respondent or performing obligations to the respondent;
(iv) suspending the sale of assets;
(v) suspending the legal effect of an act of a state authority; and
(vi) suspending collection under a collection order.

In addition to the above, parties are free to request other types of relief provided the relief meets the objective of Article 155 of the CPC, which provides that:

> [a] court may order injunctive relief at the request of either of the parties to dispute at any time in the course of the proceeding, if the failure to take such measure would make enforcement of the judgment impossible or difficult.

Article 156 (2) of the CPC expressly allows for several types of injunctive relief to be granted simultaneously, although we have not encountered this in practice.

The standard

It is apparent from the wording of Article 155 that in order to obtain injunctive relief the applicant must be able to show that the failure to take such measures would make enforcement of the judgment 'impossible or difficult'.

The Republic of Kazakhstan's (RoK) Supreme Court has explained that the 'impossibility or difficulty' of enforcing a judgment should be understood as referring to situations where the respondent may: 'conceal or dispose of all or part of its property, or prepare to leave the Republic of Kazakhstan, etc.'[1]

The CPC sets an additional condition to the granting of injunctive relief: the requested relief must be commensurate to the claim filed in court. An order of injunctive relief must not lead to the debtor's insolvency, interfere with the normal conduct of its business, violate the rights and legitimate interests of other parties, or facilitate the illegal appropriation of the respondent's property. These requirements are stipulated by the Normative Resolution of the Supreme Court of the Republic of Kazakhstan regarding Interim Measures in Civil Cases dated 12.01.2009 No.2 (the NRSC). In practice unfortunately, this rule is rarely observed.

A party to a dispute may seek injunctive relief only if, and once, judicial or arbitral proceedings are initiated under Article 155 of the CPC. Thus, before ordering injunctive relief, the court has to be satisfied that the claim meets all formal requirements for a valid statement of claim as set forth in Article 148 or 501 of the CPC (e.g. court has jurisdiction over the respondent; the claim has been properly drafted, etc.) or that there is an ongoing arbitration proceeding.

Security for losses caused by injunctive relief

According to the first sentence of Article 162 of the CPC, when ordering injunctive relief, a judge may require the applicant to provide security of losses which the respondent may incur as a result of the granting of the injunction. In practice, this requirement is seldom imposed: no source may be provided as it stems from a court practice. The second sentence of Article 162 provides that, if the court rejects the claim, upon the entry of the judgment into effect, the respondent also has the statutory right to bring a claim against the claimant for compensation in relation to any damage caused by the injunctive relief granted.

Restrictions

Injunctive relief is not available against 'financial organisations', as defined by Kazakh law. 'Financial organisations' are defined in the Law of the RoK On the State Regulation, Control and Supervision of Financial Market and Financial

[1]Normative Resolution of the Supreme Court of Kazakhstan No 2 dated 1 January 2009 "*On the Taking of Injunctive Relief in Civil Cases*", s 9.

Organisations dated 04 July 2003 No. 474-II, as including banks, insurance companies, securities brokers and dealers, pension funds, and others.

It is worth mentioning that the types of injunctive relief referred to above are not available with respect to all claims. For example, according to the NRSC, injunctive relief such as freezing of assets would only be possible if the claimant pursues a monetary claim. This measure would be unavailable if the claimant pursues a non-monetary claim, for example, a claim seeking invalidity of a transaction or recognition of a right, and other such reasons.

In respect of state institutions financed from the state budget and certain state corporations (under so-called 'operative management'), freezing of assets belonging to the respondent is not available except in relation to money held in the accounts of these entities. This is because under the Civil Code of the Republic of Kazakhstan, certain categories of state institutions and state corporations holding assets on the basis of operative management do not 'own' the property they hold. This property belongs to the state. For example, a public library manages, but does not own the building of the library.

Injunctive relief in aid of arbitration

Under Article 155 of the CPC, parties to arbitration proceedings, including arbitration proceedings outside of the RoK, may also seek injunctive relief from RoK courts having jurisdiction over the respondent (this conclusion comes from court practice[2], it does not expressly follow from the wording of Article 155 of the CPC). In principle, the courts of the RoK are able to order injunctive relief in aid of foreign arbitrations. However, complications may arise in practice when the relief is sought in remote regions of Kazakhstan where judges are less familiar (and less comfortable) with the concept of injunctive relief in aid of arbitration.

If the injunctive relief is sought in aid of foreign arbitration, courts of the area where the respondent or their assets are located would have jurisdiction to grant appropriate relief. In domestic arbitrations, courts of the area where the arbitral tribunal is seated would have this jurisdiction.

In order to file an order seeking injunctive relief in aid of arbitration, the applicant must demonstrate that arbitral proceedings have been initiated. The CPC does not specify the documents required to prove existence of ongoing arbitration. In practice, judges require that the applicant provide a copy of the ruling issued by

[2] This court practice is based on personal experience of the author.

an arbitral institution to show that arbitral proceedings have been initiated. Sometimes, a copy of the request for arbitration and related documents may be requested.

Procedure

Parties may seek injunctive relief simultaneously with the filing of a statement of claim during judicial proceedings, or after the proceedings have been concluded, but before enforcement of the judgment.

Issuing an order for injunctive relief does not involve a court hearing when the request for injunctive relief is filed simultaneously with the statement of claim (before a court hearing on the merits), or before enforcement of the judgment (after the hearing on the merits is closed). In either of these cases the judge would decide on the request upon receipt of the written petition without notifying or hearing oral arguments from the parties.[3] In practice, it takes three to five days from the date of receipt of the application to determine the application and, if granted, to issue an order. The order becomes enforceable and binding immediately after it is issued.

If a request for injunctive relief is submitted during the course of a court hearing on merits, the judge will read the request to the parties and request that the respondent make any opposing arguments if they wish. Generally, applicants request injunctive relief before the beginning of hearings on merits to avoid objections of the respondent. However, if the order for injunctive relief has been issued without sufficient grounds, the respondent could always seek removal thereof in the course of the hearing.

If the request for injunctive relief is rejected, this does not prevent the applicant from filing another request, provided that the new grounds for the order of injunctive relief are indicated.

Under the CPC, the order for injunctive relief is not enforceable by itself. On the basis of the court's order, the judge issuing the order must issue a separate document named 'enforcement writ' (*ispolnitel'nyi list*). The court must simultaneously issue an enforcement writ with the order or on the next day and send these documents either directly to an enforcement officer, or to the applicant to have them transferred to the enforcement officer. Then, the enforcement officer

[3] Normative Resolution of the Supreme Court of Kazakhstan No 2 dated 1 January 2009 *On the Taking of Injunctive Relief in Civil Cases*, section 6.

will initiate an enforcement proceeding and take the relevant actions stated in the order.

Cancellation

The judge may later cancel the ruling if the respondent demonstrates that the injunctive relief granted is no longer necessary or the order was excessive. Alternatively, the respondent may appeal the order granting injunctive relief to the Appellate Court. Apart from the respondent, third parties affected by the injunctive relief may also appeal the order.[4]

The Appellate Court will then review the appeal over the course of one or two hearings and issue a resolution to either reject the appeal, revise the ruling, cancel the ruling and issue a new one, cancel the ruling and terminate the proceedings, or to leave the claim without consideration. Submitting an appeal against the granting of injunctive relief does not have the effect of suspending the operation of that relief while the appeal proceeds. However, submitting an appeal against the order cancelling injunctive relief suspends enforcement of the cancellation order.

Sanctions for breach of a court injunction

Kazakh law provides for monetary and criminal liability for the failure to enforce an injunction order. According to Article 669 of the Republic of Kazakhstan Code on Administrative Violations, the size of the fine varies between approximately $123 USD and $246 USD. As an alternative to the fine, the respondent may be imprisoned for up to 10 days.

The threshold for criminal liability for failure to enforce an injunction order is somewhat high. According to Article 430 of the Republic of Kazakhstan Criminal Code, there is criminal liability for deliberate contempt or obstruction of enforcement of the court's orders for the period of six months. Deliberate contempt includes the respondent's concealment of income or other property which may be subject to the court's order, their failure to provide information to an enforcement officer on the sources of income, their entry into transactions to transfer property with an aim to avoid enforcement of the court's order, and so forth. Obstruction of enforcement of the court's order refers to any action of the respondent aimed to avoid enforcement of the court's order, for example, the respondent's refusal to provide access to property. [5]

[4] ibid s 10.
[5] Normative Resolution of the Supreme Court of Kazakhstan No 12 dated 12 December 2003 *On the Liability for Contempt of Judicial Acts*, section 12.

The criminal liability for deliberate contempt of a court's order or obstruction of enforcement of a court's order includes a fine of up to approximately USD 2,470, community service for a term ranging from 120 to 180 hours, or restriction of freedom for a term of one year (not to be confused with imprisonment).[6] Similar actions committed by state officials and employees of commercial organisations would be subject to higher sanctions, such as a fine ranging from approximately USD 2,470 to USD 4,940, restrictions to engage in certain types of activities or to hold certain positions for a term of up to five years, community service for a term ranging from 180 to 240 hours, restriction of freedom for a term of up to two years, or imprisonment for a term of up to two years.

III. INJUNCTIVE RELIEF UNDER ENGLISH LAW

Types of Available Injunctive Relief

Section 37 of the Senior Courts Act 1981 provides that:

> (1) The High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court to be just and convenient to do so.
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

The power that the English High Court has under section 37(1) to grant an injunction whenever it considers it just and convenient to do so is self-evidently wide and flexible. Part 25 of the English Civil Procedure Rules identifies specific examples of the injunctive relief that it may grant. These include:

> (i) An order requiring the detention, custody or preservation of relevant property (rule 25.1(c)(i)).
> (ii) An order requiring the delivery up of goods (rule 25.1(e)).
> (iii) An order restraining a party from removing from the jurisdiction assets located there from dealing with any assets whether located within the jurisdiction or not (commonly referred to as a 'freezing injunction') (rule 25.1(f)).[7]

[6] Restriction of freedom refers to a type of sanction envisaging restrictions on the ability of the criminal to travel outside of the area where the criminal resides. Restriction of freedom includes supervision of the criminal by law enforcement agencies.

[7] A freezing injunction may apply to assets of the respondent located outside the jurisdiction *and* to assets held in the names of nominees of the respondent (for example, holding companies, agents and trustees) - as well as to assets that are registered in the respondent's name. In these respects an English freezing order has wider scope than freezing orders available in many other countries, including Kazakhstan. It will apply to the respondent's assets only to the

(iv) An order directing a party to provide information about the location of relevant property or assets (rule 25.1(g)).[8]
(v) An order (referred to as a 'search order') requiring a party to admit another party to premises for the purpose of preserving evidence (rule 25.1(h)).[9]
(vi) An order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund (rule 25.1(l)).

The standard

The issues that an applicant must establish in order to obtain injunctive relief depend on the nature of the relief being claimed. For 'an ordinary injunction' it will be necessary to establish that:

(i) the substantive claim is one that involves a serious issue to be tried';[10]
(ii) the balance of convenience justifies granting the injunction, i.e. the applicant is likely to suffer more harm if the injunction was not granted than the respondent would if it were.[11]

For a freezing injunction it will be necessary to establish that:

(i) the applicant has a good arguable case;[12]
(ii) there are assets belonging to the respondent; and
(iii) there a real risk that the respondent of dispose or hide those assets in order to avoid satisfaction of a judgment in the applicant's favour.[13]

For a search order it will be necessary to:

(i) establish a strong prima facie case against the respondent;[14]
(ii) establish a serious risk that damage will be caused to the applicant's interests if the injunction is not granted; and

---

extent of the amount being claimed by the applicant. Therefore, a freezing injunction will allow the respondent to deal with particular assets as they wish if the value of all *remaining* assets is in excess of a particular amount stated in the court order, this being the sum claimed by the applicant. A freezing injunction may be granted against a foreign defendant with no assets within the jurisdiction. In this regard the scope of an English freezing order is wider than that of a Kazakh court.
There are few jurisdictions outside the European Union where an English worldwide freezing order is *directly* enforceable. Therefore, it may be necessary (or prudent) to obtain 'a parallel order' in the jurisdiction(s) where the respondent or its assets are located to increase the effectiveness of the freezing order.
[8] It is standard practice to include such an order in a freezing injunction. Disclosure by the respondent of his assets is recognised as essential to the effective 'policing'of a freezing injunction (ie, monitoring that the respondent is complying with its terms).
[9] This is most commonly granted where there is a real risk that the respondent may destroy important evidence.
[10]The applicant need only demonstrate that their claim has a real prospect of success, which is a low threshold and in reality means that the claim is not frivolous.
[11] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
[12] The applicant is required to demonstrate that their claim is more than barely arguable, but nevertheless, it does not have to demonstrate that it has more than a 50% chance of success. Therefore, the threshold is higher than that which applies to an ordinary injunction, but still relatively low.
[13] *Derby & Co v Weldon* [1990] Ch 48.
[14] The available evidence indicates that the applicant is likely to succeed at trial.

(iii) provide clear evidence that the respondent has incriminating evidence in his possession which there is a serious possibility it will destroy if it becomes aware of the claimant's claim.[15]

An undertaking to compensate the respondent

As a condition of granting injunctive relief the court will almost always require that the applicant provide 'an undertaking in damages'. This is 'a promise' to the court that the applicant will compensate the respondent for any losses caused to the latter by the injunction if it turns out that it should not have been granted (ie if the applicant's claim is unsuccessful). The provision of an undertaking in damages is not a statutory or procedural requirement, but rather a matter of established case law.[16] An applicant will be expected to provide evidence that they have the financial means to satisfy a future compensation claim by the defendant.[17]

The court may also require the applicant to 'fortify' that undertaking by making a payment to court or providing a bank guarantee in an amount that reflects a reasonable assessment of the loss that may be caused to the respondent by the injunction. The requirement to fortify an undertaking in damages is most commonly required of foreign applicants with no substantial assets in the jurisdiction. The purpose is to ensure that the respondent has a quick and easy method of enforcing a compensation claim against the applicant in the event that the latter's claim fails.

If the applicant's claim is unsuccessful the respondent will be entitled to apply for 'an inquiry' into the damages caused to it by the injunction and claim compensation for such damage. This 'inquiry' will take the form of a separate hearing involving oral and documentary evidence produced by both parties, which the court will determine what (if any) losses were suffered by the respondent as a result of the injunction.

Restrictions

An injunction may not be granted against the crown[18] or against a sovereign state unless written consent is provided, or the injunction relates to property used for commercial purposes.[19] Apart from that, there is no restriction on the types of parties against whom an injunction may be granted. Specifically (any by contrast

[15] *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.
[16] see e.g. *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
[17] For example, details of all assets and their values and/or copies of the latest financial accounts.
[18] Crown Proceedings Act 1947, ss 21(1)(a).
[19] State Immunity Act 1978, ss 13(2)(a), 13(3), 13(4).

to the position in Kazakhstan), an injunction may be granted against financial institutions such as banks, insurance company, security brokers and dealers and pension funds. This is another example of the scope of flexibility of the English court's injunctive relief powers.

Injunctive relief in aid of arbitration

Section 44 of the Arbitration Act 1996 (AA 1996) provides the English High Court with the power to grant a range of interim relief in support of arbitral proceedings. This includes the power to make orders relating to the preservation, custody or detention of property, authorising any person to enter any premises in the possession or control of a party to the arbitration (e.g. for the purpose of seizing and preserving evidence). If the case is one of urgency the court will make such orders as it thinks necessary for the purpose of preserving evidence or assets (e.g. a freezing order). However, the court is only able to grant such relief where the arbitral tribunal does not have the power to do so or is unable to do so effectively.[20] The English High Court is frequently asked to make such orders[21] and is comfortable doing so where the relevant pre-conditions are met.

Section 2 of the AA 1996 also entitles the English High Court to grant the interim relief specified in section 44 in support of foreign arbitral proceedings. However, the court may refuse to do so 'if…the fact that the seat of the arbitration is outside England…makes it inappropriate to do so'. In practical terms, the court will need to be satisfied that the court of the seat of arbitration cannot make the appropriate order or at least an effective one.[22] A situation where this might be the case is if the respondent is a resident, and/or (in the case of a freezing injunction) the respondent has significant assets in the jurisdiction of the English court.

Procedure

An applicant may seek injunctive relief at the same time as court or arbitral proceedings commence, or even beforehand in cases of extreme emergency.[23] Applications for injunctive relief are considered at an oral hearing and must be

[20]See Arbitration Act 1996, ss 44(5). Common examples of the tribunal being unable to act effectively are: where the injunction is required to prevent some imminent harm that would be caused by a proposed action of the respondent and the tribunal has not yet been constituted; or if the order needs to be obtained without the knowledge of the respondent to be effective (eg, a freezing injunction or search, where respectively, it is feared that the respondent would take immediate steps to dissipate or hide their assets if given notice of the application to freeze them or to destroy important evidence (see the section below on *Procedure* for further discussion of this).

[21] Particularly freezing injunction and search orders, where it is easier to demonstrate that the tribunal is not able to grant an effective order.

[22] *Tate & Lyle v Cia Usina Bulhoes and Cargill Inc* [1997] 1 Lloyd's Rep 355.

[23] Although where relief is sought prior to the commencement of a claim, the court will almost invariably require an undertaking that such proceedings will be commenced within a short (and specified) period of time.

supported by an application, affidavit(s), documentary evidence, skeleton arguments[24] and a draft order explaining the evidential and legal bases for the application, as well as the terms of the relief sought.

In the case of an ordinary injunction the hearing will usually be attended by both parties. The judge will normally have had time to read the papers filed by the parties, including any affidavit(s), documentary evidence and skeleton arguments in opposition to the application. At the hearing, the judge will hear oral arguments from both parties and will make his decision (usually immediately afterward) based on those documents and arguments. In a complex case, this may take a full day or more.

On the other hand, within applications involving freezing injunctions or search orders, the basis of the applications is usually a fear that, if notified, the respondent will take immediate action dissipating, hiding assets or destroying relevant evidence. Therefore, to make these orders as effective as possible, such applications may in the first instance be made at an oral hearing without the respondent being notified.[25] There are two safeguards employed to protect the position of the unrepresented respondent in such situations. Firstly, the applicant is under a strict duty[26] to bring to the court's attention any legal or factual matters of which they are aware and upon which the respondent may have relied in opposition to the application had they been in attendance.[27] Secondly, if the injunction is granted, it will only last for a short period until the application can be relisted for a second hearing,[28] which is usually up to 14 days later, and then the respondent will be notified. At the second hearing, the court will consider whether to extend the operation of the injunction, taking into account the written evidence and oral arguments presented by both parties.

Unless stated to the contrary by the court, any injunctive relief granted will come into effect as soon as the court order is served on the party against which it is made.

[24] A document prepared by a party's advocate summarising the factual and legal bases of that party's case.
[25] Known as 'a without notice application'. A without notice application may be made on very short notice (eg, within one or two days of notifying the court and in cases of extreme urgency even on the same day). The availability of a without notice hearing is another example of the flexibility within the English procedural rules that attracts many businesses and businessmen.
[26] Commonly referred to as 'the duty of full and frank disclosure'.
[27] If the applicant breaches this duty the court can, and often will, discharge the injunction as a punishment, even if the injunction was justified on the standard grounds.
[28] Known as 'the return date hearing': between the dates of the without notice and return date hearings the injunction will be in force and therefore, the applicant will in theory (and to the extent that the injunction is not breached by the respondent), be protected against the risk that the injunction was designed to avert.

Cancellation

In the case of an injunction granted at a without notice hearing, the court may as mentioned, decide not to renew it, thus effectively cancelling it at the return date hearing on the basis of representations made by the respondent.

The court may also subsequently terminate the injunction if it is no longer necessary or of practical benefit to the applicant (as in the case of a freezing injunction). This would also occur if the respondent provides security to cover the entirety of the sum claimed by the applicant in the relevant proceedings or the respondent discovers that the applicant failed to discharge their duty of full and frank disclosure at a without notice application.

Alternatively, the respondent is entitled to apply for permission to appeal the order granting injunctive relief[29] and if granted such permission, may appeal to the Court of Appeal Civil Division. The Court of Appeal will consider the appeal at an oral hearing having considered the written arguments of both parties. The Court of Appeal has the power to uphold, overturn, or vary the decision of the English High Court in relation to injunction relief.

Unless stated to the contrary by the judge who granted the injunction or the Court of Appeal itself, submitting an appeal against the granting of injunctive relief does not have the effect of suspending the operation of that injunction while the appeal proceeds.

Sanctions for breach of a court injunction

A commonly recognised advantage of an English court injunction is the robust array of sanctions that may be imposed on a respondent who breaches it. These include:

1) imprisonment of up to 2 years;[30] and/or
2) an unlimited fine;[31] and/or
3) sequestration of a company's assets;[32] and/or

[29] The application for permission to appeal should be made in the first instance to the judge who made the order being appealed. If that application is refused the respondent may apply to the Court of Appeal for permission to appeal.
[30] Contempt of Court Act 1981 s 14.
[31] *Deputy Chief Legal Ombudsman v Young* [2011] EWHC 2923, [2012] 1 WLR 3227; and Arlidge, Eady & Smith on *Contempt of Court,* para.14-108
[32] Rule 81.20(1) of the Civil Procedure Rules

4) debarring a respondent from defending the claim in respect of which the injunction was granted.[33]

All of these sanctions may be imposed by the English High Court that granted the injunction in question. It is not necessary, for example, for separate criminal proceedings to be commenced in order for a term of imprisonment to be imposed. The most recent example of the High Court imposing a substantial term of imprisonment of 22 months on a defendant (and an order debarring him from defending the claimant's claim) for refusal to disclose assets in the context of a freezing injunction is the high profile Kazakhstan case of *JSC BTA Bank v Ablyazov*.[34]

IV. CONCLUSION

On brief consideration, it may appear that the injunctive relief powers available to the Kazakh and English courts are broadly similar. However, significant differences exist in: (i) the geographical reach of injunctive relief powers in relation to extra-territorial applications of injunctive relief under the English legal system to foreign assets; (ii) the duration of injunctive relief (limited duration under the English system allowing the respondent greater opportunities to remove the order and prevent applicant's abuses); (iii) security required of the applicant (this is rarely applied by Kazakh courts, although introducing this practice widely would substantially decrease the number of injunctive relief applications in Kazakh courts and prevent abuse of this procedural tool); (iv) significant penalties for the failure to enforce the court's order; (v) the procedural standards that give rise to injunctive relief applications.

This is something that can be said when comparing the interim relief powers of the English court against those of many other countries as well. This should not be a surprise if one takes into account the extended period of stability the English legal system has had to adapt to the needs of businesses and business people, particularly in relation to procedural rules.

Judicial systems are evolving institutions. It is to be hoped, indeed expected, that over time the Kazakhstan legal system will also develop greater flexibility – particularly in the context of injunctive relief – as the courts gain increasing exposure to international disputes. However, for the moment, the experience of the English legal system may prove more advantageous for an applicant seeking urgent, robust and flexible injunctive relief.

---

[33] It is settled case law that such a court may debar a defendant from defending court proceedings (*JSC BTA Bank v Ablyazov*, [2012] EWCA Civ 1411; [2013] 1 WLR 1331). However, there remains doubt as to whether it may do the same in support of arbitral proceedings.

[34] [2012] EWHC 237 (Comm).

Leaving the European Union: The Impact on Migration and Consequent Effects on the UK Economy

Rajah Rab-Nawaz
LLB, Manchester Metropolitan University

ABSTRACT

The focus of this article is to examine the possible economic effects of the restriction of migration if the United Kingdom withdraws from the European Union. In order to achieve this, this article evaluates the current and past actual economic impact that migrants have had and determines whether this mirrors their perceived impact. Extensive research has produced findings that contradict the popular consensus that migrants are damaging the economy; they are net contributors to the economy in more instances than natives are. As well as contributions to GDP, this article evaluates migrants' contribution to aspects of the economy such as employment, wages, housing, fertility rates and age dependency ratios. Findings highlight that migration has a positive impact on all aforementioned aspects and in occasions where the impact was negative, such as downward pressure at the bottom of wage distribution, it was insignificant. Building on the premise that migrants have an overall positive impact on the economy, the article then considers the alternative options the UK has to EU membership and after careful consideration of primary and secondary sources, concludes that none of the options would be as beneficial to the UK as direct EU membership. If the UK withdraws from the EU, but retains a similar membership such as the EEA and join EFTA, it will retain the right to free movement of persons. This, coupled with a reduction in its political power in Europe, can prove to be detrimental; the UK will be bound by any possible future legislation removing all the requirements of free movement. In this case, the UK will truly have zero control over its borders.

I. INTRODUCTION

This article evaluates the possible impact of the UK's exit from the European Union on its migration and economy. Firstly, it analyses the current law on migration and the differing rules for European Union (EU) and non-EU migrants. As regards the law surrounding EU migrants, the focus is on the Treaty on the Functioning of the European Union (TFEU) and case law relevant to the free movement of persons. It then considers the UK immigration system for non-EU migrants focusing on the

five-tier points based system (PBS). This eventually contributes to the comparative evaluation of the two sets of rules, especially in relation to their benefit to the UK economy.

The second section evaluates research studies on the impact of migration on the following aspects of the UK economy: it's GDP, employment, dependency ratio, wages and social housing. This in-depth evaluation contributes to this article by making suggestions regarding the nature of the potential economic impact that leaving the EU can have on the UK.

The final section addresses the options the UK will have if it withdraws from the EU. It attempts to evaluate the economic impact of migration in each of these cases and therefore, to suggest which of these options, if any, would be most appropriate for the UK.

II. CURRENT LAW

EU Law

Article 3(2)[1] of the Treaty on European Union 1992[2] (TEU) outlines that the fundamental objective of the Community is the creation of a common market by way of free movement of goods, workers, services and capital, which would ensure economic prosperity and economic rejuvenation to what was a devastated European community following the Second World War. This objective is reiterated in Article 26(2) TFEU.[3] Free movement of persons –previously workers– within the European Union is, therefore, one of the four fundamental freedoms of the Single European Market. This freedom was originally granted to economic actors, i.e., those who were employed or self-employed, who were able to move around and positively contribute to Member States' economies. However, by way of Article 7(1) Directive 2004/38 (a consolidating legislation), those with sufficient resources and comprehensive health insurance as well as those enrolled on a course of study are now also able to enjoy the right of residence –for more than 3 months– in another Member State. Therefore, in theory, the individuals who fulfil the conditions to move freely within the Union should not become a burden on the social welfare system of the Member State. This article considers what the implications of leaving the EU might have on the UK and whether the freedom would bring with it any benefits and considers whether this freedom benefits the UK and what the implications of leaving the EU might be.

[1] Previously Article 2 of the European Economic Community (EC) Treaty 1957, also known as the Treaty of Rome.
[2] Also known as The Maastricht Treaty.
[3] Previously Article 14 of the EC Treaty 1957.

Article 21(1) TFEU states that every citizen of the European Union shall have the right to move and reside freely within the territory of Member States subject to limitations mentioned in the Treaty. Article 45(1) TFEU[4] highlights this right as it specifically applies to workers. EU citizens are defined in Article 20(1) TFEU[5] as 'every person holding the nationality of a Member State.' Therefore, if one is a national of a Member State he automatically acquires EU citizenship that enables one to exercise the right of free movement.[6]

As mentioned before, Article 7(1) Directive 2004/38 outlines the conditions for exercising this right. The first condition is the requirement of being either a worker or self-employed. The European Court of Justice (ECJ) highlighted in *Unger*[7] that the definition of the term 'worker' must be uniform; a Union-wide concept, for relying on the Member States' own definitions of the term would result in inconsistencies.[8] *Lawrie-Blum*[9] describes the three criteria one needs to meet to classify as a 'worker': firstly, the individual must be performing a service of economic value; secondly, this performance must be under the direction of another; and thirdly, this service must be performed in return for remuneration.[10] Furthermore, the ECJ stated in *Levin*[11] that the worker must take part in 'genuine and effective economic activity' and not merely in a 'marginal and purely ancillary'[12] activity. Based on the evidence, the European Union Law on migration seems to be effectively achieving its purpose as it filters out the unemployed, the inactive, and the arguably burdensome citizens. Thus, it enables positive contributions to the Member States' economies from those that qualify to move freely.

However, the ECJ in *Raulin*[13] concluded that it is the nature of work that is to be considered, as opposed to the regularity. Therefore, an individual on a zero-hours contract would not be 'precluded by reason of his conditions of employment from being regarded as a worker.'[14] This gives rise to the argument that a 'worker' on a zero-hours contract is not guaranteed to constantly perform 'effective economic activity', thus not making a positive contribution to the Member State. In addition

[4] Previously Article 39 of the EC Treaty 1957.
[5] Previously Article 7 (1) of the EC Treaty 1957.
[6] Subject to limitations outlined in Directive 2004/38 (2004) OJ L 158/77.
[7] Case C-75/63 *M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECR 177.
[8] Ibid [1].
[9] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121.
[10] ibid para 1.
[11] Case C–53/81 *DM Levin v Staatssecretaris van Justitie* [1982] ECR 1035.
[12] ibid para 17.
[13] Case C–357/89 *V J M Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.
[14] ibid para 11.

to this, *Royer*[15] implies by way of denying expulsion, that EU citizens have a right under Article 45 TFEU to seek employment in another Member State.[16] Furthermore, the ECJ in *Antonissen*[17] suggested that the time limit for individuals residing in Member States to find work should be six months unless 'the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged.'[18] Consequently, he may not be expelled for as long as this can be proven, which is further consolidated in Article 14(4)(b) Directive 2004/38. The aforementioned cases and secondary legislation conflict with previous authorities, such as *Lawrie-Blum*,[19] where an individual seeking employment would not be deemed to have performed a service of economic value and would therefore not be classed as a worker able to rely on Article 45 TFEU. If an individual does not constitute a 'worker', he does not fulfil the first condition of Article 7(1) Directive 2004/38 and thus cannot exercise a right of residence in another Member State. To add to these drawbacks, Article 7(3)(b) Directive 2004/38 expresses that a 'worker' can retain his status if he becomes involuntarily unemployed after having been employed for more than one year, provided he has registered as a job seeker. Laws such as these are no doubt costly to Member States as unemployed individuals are allowed to reside in a Member State for an indefinite period.

The second condition of the right to reside in another Member State is to have sufficient resources and sickness insurance.[20] However, *Kempf*[21] points out that if the worker is performing genuine and effective economic activity, but is earning below the minimum subsistence level, he is entitled to financial assistance without this affecting his right to freedom of movement. While this liberal approach of the ECJ is aiming at increasing the number of people who are able to exercise the right to free movement of persons, it is potentially costly to the Member States. Moreover, Regulation 492/2011[22] expressly states that migrant workers 'shall enjoy the same social tax advantages as national workers.'[23] Although this seems beneficial because it promotes equality between citizens and prevents discrimination, in reality it gives rise to certain issues. If one were to retain their status as a 'worker' under Article 7(3), they would qualify to benefit from Article

[15] Case C–48/75 *Jean Noël Royer (preliminary ruling requested by the Tribunal de première instance Liège)* [1976] ECR 497.
[16] ibid para 3.
[17] Case C–292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745.
[18] ibid para 22.
[19] ibid para 7.
[20] Article 7(1)(b)of Directive 2004/38 (2004) OJ L58/77.
[21] Case C–139/85 *R H Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, 1752.
[22] Previously Regulation 1612/68.
[23] Article 7(2) of Regulation 492/2011 (2011) OJ L 141/1.

7(2) Regulation 492/2011 albeit not in employment. However, *Collins*[24] highlights that EU citizens who move in search for employment do qualify for equal treatment under Article 7(2), but only in respect to access to employment.[25] Although this clarifies the law surrounding social benefits for those seeking employment, it potentially contradicts Article 24(2) Directive 2004/38, which states that 'the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence.'

Overall, the authorities and legislation contradict Article 7(1) Regulation 492/2011; individuals wishing to exercise rights of residence in another Member State can do so whilst becoming a net cost to the state. EU Law clearly has the potential to promote economic wealth in its Member States because the right to free movement is based on the pre-requisite that any qualifying individual must have sufficient resources, so as not to become dependent on the Member State. If the law had been rigidly applied, not implemented or interpreted in ways contradicting the very purpose of the article, then perhaps leaving the EU would not have been a leading issue in today's national affairs and instead have been a reason for economic growth within our state.

UK law

The UK immigration system for non-EU migrants is far more complex than that of EU migrants. The Immigration Act 1971 (IA 1971) sets out the framework for immigration law at first instance and the Nationality, Immigration and Asylum Act 2002 sets the framework for appeals. Section 3 of the IA 1971 states that a person who is not a British Citizen shall not enter the UK unless given leave to do so in accordance to the provisions made under the Act. The UK currently has a five-tier points system; however, Tier 3 has never been activated. Consequently, in effect, there are only four tiers; therefore, in order for an individual to obtain leave to enter the UK, he/she must fall within one of these tiers.

Tier 1 is aimed at highly skilled individuals.[26] The presumption is that those with this level of qualification are an asset to the country and as a result, no sponsor or specific job is required. There are three categories of Tier 1: migrants; exceptional talent; entrepreneurs and investors. Tier 2 is aimed at less skilled migrants and has four sub-categories: skilled workers; intra-company transfers; sports people; and ministers of religion. In order for an individual to enter under this tier, he/she must have a certificate of sponsorship, enough points for the relevant category,

[24] Case C–138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.
[25] ibid 2704.
[26] Immigration Rules part 6A < https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-6a-the-points-based-system> accessed 25 March 2015.

entry clearance and a biometric ID card. Tier 4 covers international students. Students require 40 points in order to be granted clearance under this category. These points are awarded for a valid confirmation of acceptance of studies and maintenance that satisfies the minimum requirement. Tier 5 has two categories of workers: temporary workers and the youth mobility scheme. The former includes those involved in theatre, charity and religious work and has strict limitations, for example, that one must not work outside the relevant sector. Anyone who falls under Tiers 2, 4 or 5 must have a sponsor. A sponsor is an employer/education provider who keeps track of migrants and participates actively in enforcing immigration law in line with the Home Office's regulations. In order to become a sponsor, the employer/education provider must obtain a licence from the Home Office, which lasts for four years.[27] To do this, they must demonstrate good human resources systems, which will enable them to monitor contact details and attendance. The employer must appoint a 'level one user' who will be registered with the Border Agency (BA). This role is extremely onerous because the appointee is legally and personally responsible for ensuring that all migrants keep within their conditions, thus they will be held accountable for any failures. Due to the complex computer systems used and the requirement of a salary for the level one user, smaller companies tend not to obtain a sponsorship licence. Though this may seem unfair, this restriction has positive effects on the system as a whole because those who are sponsoring are more likely to take their job seriously, as their performance affects their business and personal reputations.

The various categories under which migrants must fall, coupled with the sponsorship requirement, clearly suggests there are differences between entry of EU and non-EU migrants. On one hand, law regarding EU migrants is relatively flexible and contains many loopholes, which enable individuals to enter the UK even if some requirements are not fully satisfied. On the other hand, the PBS for non-EU migrants is aimed at selecting needed skills therefore; individuals must satisfy extensive requirements in order to be granted entry clearance. Furthermore, by way of the 'Resident Labour Market Test', employers are restricted from recruiting non-EU migrants without advertising the same job in the UK for a minimum of 28 days – continuously or in two stages – at least six months before the date the sponsor assigns the certificate of sponsorship to the applicant.[28] This advertisement must include aspects such as job title, description, location, salary and skills required.[29] This test ensures that there are no suitable workers already residing in the UK before entry is granted to an applicant. An

[27] ibid.
[28] Immigration Rules Appendix A: attributes [78B] < https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-a-attributes> accessed 25 March 2015.
[29] Immigration Rules Appendix J: codes of practice for skilled work, para 2 < https://www.gov.uk/guidance/ immigration-rules/immigration-rules-appendix-j-codes-of-practice-for-skilled-work> accessed 25 March 2015 .

employer is exempt from satisfying this test if the job available is on the 'Shortage Occupation List'.[30] This list comprises of the occupations for which there are insufficient resident workers, such as production managers, secondary school teachers, engineers and medical practitioners.[31] The rigid laws surrounding non-EU migrants suggests that those migrants that manage to satisfy the requirements and move to the UK are more beneficial to the economy than EU migrants; the latter are able to migrate without guaranteed employment whereas the former must satisfy extensive conditions to prove they will be an asset to the UK economy.

II. ECONOMIC IMPACT

Migrants play a huge role in the UK economy; their skills and international connections make them invaluable sources of labour market growth. Therefore, it is vital to examine the true economic effects of both EU and non-EU migrants in this sector. The evidence and evaluation presented in this chapter establish the fiscal and social effects of migrants and show which of the two sets of migrants benefit the economy more. This chapter will assess the impact that the UK's departure from the EU would have on migration and the UK economy.

Public perception

There is a common consensus influenced by views portrayed in the media that immigrants are draining British resources and damaging the economy. The native population, particularly those without specialist knowledge, are encouraged to believe immigrants cause high levels of unemployment amongst the natives and are becoming increasingly burdensome on public services, such as the NHS. This is supported by the study undertaken by Ipsos MORI in December 2014,[32] which highlights that 42% of the British public believe the leading issue facing the UK is immigration. Although this figure was reduced to 34% in February 2015,[33] becoming the second leading issue after the NHS, it nonetheless highlights the overall perception of the public concerning immigration. One should not generalise the outcomes of these studies; the former study involved a sample of a mere 970 adults and the latter 965. Is immigration genuinely a leading issue or is

[30] Tier 2 and 5 of the Points Based System Guidance for Sponsors, para 28.7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/371099/Tier_25_Sponsor_Guidance_11-14.pdf > accessed 25 March 2015.
[31] Immigration Rules Appendix K: shortage occupation list < https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-k-shortage-occupation-list> accessed 27 October 2015.
[32] Ipsos MORI, 'The NHS Remains the Most Important Issue Facing' <https://www.ipsos-mori.com/researchpublications/researcharchive/3496/EconomistIpsos-MORI-December-2014-Issues-Index.aspx> accessed 1 March 2015.
[33] Ipsos MORI <https://www.ipsos-mori.com/researchpublications/researcharchive/3535/The-NHS-remains-the-most-important-issue-facing-Britain.aspx> accessed 1 March 2015.

it a false ideology created by the UK and the media to avoid the embarrassment of publicly accepting that the native population and, crucially itself, caused most of the economic damage?

The resident population commences their working life with a negative fiscal contribution as a result of their expenditure on schools and infant healthcare. Therefore, they remain a burden on the economy until, if at all, they generate enough revenue to balance their net fiscal contribution. If this is balanced, they must then contribute sufficiently to prevent themselves from becoming a burden once again from retirement age onwards. This cycle of revenue and expenditure is in stark contrast to that of migrants. First generation migrants tend to arrive at working age, having completed their studies in their resident countries, thus the UK does not incur the burden of education costs as they do with the majority of their native population. Migrants start their working life in the UK with a balanced net fiscal contribution making them immediately more beneficial to the economy than the natives. Dustmann and Frattini also argue that 'many of these immigrants return migrate, thus spending their later and less productive years in their home countries.'[34] In fact, they contend that the median length of immigrant stay in the UK has 'decreased…from 24 years to 12 years between 1995 and 2011'[35] and that the proportion of those staying for less than five years has increased from 16% to 24%.[36] They simply migrate to the UK without any cumulative costs to the economy, generate revenue throughout their working life and return to their home countries in their later years. This would suggest that the net fiscal impact of immigration, which is defined by Vargas-Silva as the 'difference between the taxes and other contributions migrants make to public finances and the costs of the public benefits and services they receive',[37] should be positive. However, not all migrants return migrate and those that do, may have been an overall burden on the economy during their stay. This could be due to lack of generated revenue or their expenditure exceeding their revenue. The latter is a realistic outcome if the migrants have children below the age of 16 in full-time education, as the costs of these children are assigned to the parents, which increases their overall expenditure. This concept damages the credibility of most reports on the fiscal contributions of immigrants in comparison with natives because the costs of educating the natives are rarely taken into account. Nonetheless, they are worth taking into consideration for the sake of comparison and the overall view of the impact of migrants.

[34] Christian Dustmann and Thomas Frattini, 'The Fiscal Effects of Immigration to the UK' [2013] Centre for Research and Analysis of Migration (CReAM) 28.
[35] ibid 18.
[36] ibid.
[37] Carlos Vargas-Silva, 'The Fiscal Impact of Immigration in the UK' [2013] The Migration Observatory.

Static and dynamic approaches

Before analysing reports on the economic impacts of immigration, it is crucial to grasp the two approaches applied in such reports: static and dynamic. The two approaches are dealt with succinctly by Vargas-Silva.[38] The static approach is based on specific years and compares the contributions with benefits made and received by migrants. The dynamic approach calculates the contributions and costs over the entire lifetime of the migrants; this may also include the cost of their children. The advantage of the former is its simplicity as it enables an easier application and evaluation of historical data. On the other hand, the main drawback is that it focuses on a specific point in time, thus one cannot make assumptions about the future based on the past findings. The dynamic approach makes it easier to explore potential future changes, but this requires strong future assumptions, such as changes in productivity, fertility and return migration rates. As both approaches are far from flawless, it is vital to consider studies that use both static and dynamic approaches to reach a reasoned conclusion on the impact of migrants.

Contributions to GDP

Gott and Johnston conclude in their static approach study that in the fiscal year 1999-2000 migrants contributed £31.2bn in taxes and used £28.8bn in benefits, thus making a net fiscal contribution of approximately £2.5bn.[39] Whilst this clearly indicates that migrants have a positive effect on the economy, the drawbacks of the study are evident; it is based on a single fiscal year, one ought not to generalise the outcome and suggest migrants as a whole have a positive effect. Furthermore, this report was based on the year ending June 2000, when the government budget was in surplus. This highlights yet another disadvantage of the static approach, findings regarding the impact of migrants in a year in which the country was in surplus does not suggest what the outcome would be when in a deficit, in turn making it impossible to make long-term assumptions.

Sriskandarajah et al[40] provide a report based at a more financially unstable period and conclude that the expenditure in 2004 associated with immigrants outweighed the contribution, thus resulting in a £0.4bn deficit.[41] This suggests that when the UK is in a budget deficit, the contribution by migrants is also a deficit and

[38] Carlos Vargas-Silva, 'The Fiscal Impact of Immigration in the UK' [2014] The Migration Observatory.
[39] Ceri Gott and Karl Johnston, 'Migration Population in the U.K: Fiscal Effects' [2002] Development and Statistics Directorate Occasional Paper 77, Home Office, London, 11.
[40] Dhananjayan Sriskandarajah et al, 'Paying their way: The Fiscal Contribution of Immigrants in the UK' [2005] Institute for Public Policy Research (IPPR).
[41] ibid Appendix 1, 13.

therefore, clearly detrimental to the economy. However, they also illustrate that between the fiscal years 1999-2000 and 2003-2004, it is estimated that revenue from migrants grew by 22% in real terms as opposed to 6% for natives. This in turn suggests migrants contributed more than natives, but their expenditure exceeded this contribution. Therefore, this highlights that migrants do contribute and, in fact, more than natives, but also that their expenditure is estimated to be higher. Though this report highlights this, it is still limited in scope as the evidence is based on five years and it would be unreasonable to generalise the impact of migrants based on this evidence. It is clear that a more dynamic approach is needed.

Rowthorn[42] estimates what the migrant contribution would be with a balanced budget, concluding that in 2003-2004 the net contribution of migrants would be approximately £0.6bn. This clearly contradicts the findings of the aforementioned study and draws attention to the possible opposing outcomes that depend simply on which approach is used. It is clear from the evidence that assessing the accurate impact of migrants is extremely difficult as equally credible reports contradict one another, thus making it difficult to reach a reliable, reasoned conclusion.

Dustmann and Frattini's study[43] might be the most credible study to date since the evidence is based on a 17-year assessment. The approach adopted is static; focusing on specific years, as well as dynamic, with the assessment based over a 17-year period can give a forward-looking perspective. They assigned to immigrants the average cost of public goods and argued that this will result in an overestimation of fiscal costs.[44] This is because the cost of certain public goods, such as defence, does not depend on the size of the population, these goods are known as 'pure' public goods. Whereas 'congestible' public goods are those that are dependent on the size of the population, e.g. water supply. Overall, they conclude that between 1995 and 2011 European Economic Area (EEA) migrants made a net fiscal contribution of £8.8bn, whereas natives made an overall negative net fiscal contribution of £604.5bn. Furthermore, between 2001 and 2011, EEA migrants made a net fiscal contribution of £22.1bn and non-EEA migrants made a contribution of £2.9bn. This clearly highlights the economic benefit of migrants as the natives made a negative contribution of £624.1bn in the same period. Based on this evidence, migrants have made a £25bn contribution over a period in which the UK ran an overall budget deficit. Furthermore, of the 17 assessed fiscal years, expenditure exceeded revenue on twelve occasions for natives and only on seven

[42] Robert Rowthorn, 'The Fiscal Impact of Immigration on the Advanced Economies' [2008] Oxford Review of Economic Policy 24 (3) 560 - 580, 560.
[43] Dustmann and Frattini (n 34).
[44] ibid 8.

occasions for EEA migrants.[45] This once again clearly highlights the benefits that EEA migrants bring to the UK economy. The study also considers the impact of assessing the fiscal contributions with marginal cost as opposed to average cost, ie assigning all the costs of the 'pure' public goods to the natives, as they would have had to pay the same amount had there been zero migration. This resulted in EEA migrants making a net fiscal contribution every single year from 1995 to 2011 and non-EEA migrants making a positive contribution between 1997 and 2007. However, as immigration results in the sharing of these fixed public costs, they reduce the burden on the natives and thus, they are able to substantially save. In 2011, the natives saved £15.8bn as a direct result of immigration.[46] In addition to all the above, immigration has, contrary to public belief, created approximately one million jobs for natives despite their population being unchanged since 1995.[47] The fiscal benefits which migrants, in particular EEA ones, bring to the UK economy are clear. Based on these figures, it would be reasonable to suggest that if the UK were to leave the EU (which would affect the right to free movement and thus the number of EEA migrants would be reduced), the UK economy would suffer. This is further supported by Vargas-Silva's assumption that zero net-migration will result in public sector net debt equivalent to 180% of GDP in 2060, whereas high net-migration will result in debt equivalent to 50% of GDP.[48] This is due substantially to age dependency ratios, which are discussed below.

Overall, the study clearly illustrates the difficulty in accurately assessing the fiscal impact of immigration because contributions fluctuate depending on the period that is being assessed. Despite the fluctuation that the study highlights, the consistent positive contributions made by EEA migrants over the years contributed to the reduction of UK's fiscal deficit. The study equally highlights the overall negative contributions made by non-EEA migrants and suggests that it is partly explained by the ration of children to adults – 0.38.[49] This has proven to be costly for non-EEA migrants because the costs of their children have been assigned to them. Because they might have more children than natives or because EEA migrants' expenditure is higher than theirs. Although Dustmann and Frattini have evidently researched and analysed the data in depth and have reached reasoned conclusions, the fatal defect of their study is its primary source of data. As mentioned in the report, the Labour Force Survey is a survey of 60,000 households, which equates to 0.2% of the population;[50] it is unreasonable to suggest that reliable generalisations can be made from such a small sample of

[45] ibid 24.
[46] ibid 26.
[47] ibid 18.
[48] Vargas-Silva 'The Fiscal Impact of Immigration in the UK' (n 37) 4.
[49] ibid 20.
[50] ibid 17.

households. Although they identify the issues surrounding the cost of education and UK-born children of migrants,[51] they fail to illustrate if and how this had such dramatic effects on the net fiscal contributions. In addition to this, they also fail to consider the costs of children born to one native parent and one migrant parent. A report by MigrationWatch UK[52] suggests that the costs of such children should be split between the native and migrant groups and not allocated solely to the native one,[53] as was the case in previous reports. Considering this, the report concludes that migrants made a negative net fiscal impact of £5bn in the 2003-2004 year. This is in stark contrast to Rowthorn's figure for the same year, which was a positive contribution of £0.6bn. This demonstrates the complexity of such reports and the differing outcomes each report has dependent on the assumptions made. In order to accurately assess the impact of migrants it is crucial to analyse other aspects, such as dependency ratios, social housing and employment.

Age dependency ratio

The proportion of older people to working-age people is growing because of an increase in life expectancy and a decrease in fertility rates as the post-war 'baby-boom generation retires'.[54] There are currently approximately 10 million people residing in the UK that are over the age of 65.[55] Cracknell's projection highlights an increase to 19 million by 2050.[56] Furthermore, the European Commission's 2012 Ageing Report estimates the old-age dependency ratio to increase from 28% in 2010 to 47% in 2060, which equates to a reduction from four working age people for every person over the age of 65 to two working age people.[57] The increase in life expectancy will have a direct impact on age-related spending; Silcock and Sinclair estimate a rise from an annual cost of 21.3% to 26.3% of GDP between 2016/17 and 2061/62, which equates to £79bn in today's money.[58]

Having previously established the economic impact that migrants have on the UK economy comparative to natives it would be reasonable to argue that migration should be encouraged in order to generate revenue to reduce the fiscal burden of an increase in age-related spending. An increase in migration will also contribute to a reduction in age dependency, as the UK's immigrant population has been

[51] ibid 5-6.
[52] MigrationWatch UK, 'The Fiscal Contribution of Migrants' [2006] Economic Briefing Papers 1.9, Migration-Watch UK.
[53] ibid 5.
[54] European Commission, *The 2012 Ageing Report, Economic and Budgetary Projections for the 27 Member States (2010-2060),* (2012) 23.
[55] House of Commons, 'Key Issues for the New Parliament' (2010) 44.
[56] ibid.
[57] European Commission (n 54) 27.
[58] Daniela Silcock and David Sinclair, 'The Cost of our Ageing Society' [2012] ILC-UK December 3.

consistently younger than the native population.[59] Furthermore, in 2011, less than 1 in 20 of the population that were born abroad arrived after the age of 45.[60] Therefore, the majority of migrants arriving to the UK at working age contribute to the economy, which in turn reduces the burden of age-related spending as well as reducing the age dependency ratio. In addition, the inward migration of women of childbearing age contributes to the UK's fertility rate given that the fertility of immigrants is higher than that of natives.[61] Immigration not only reduces the current dependency ratio because of their age structure, but it also reduces the ratio in the long-term because they have more children than the natives and so contribute more to the fertility rate. Although the current fertility rate of 1.8[62] children per woman is below the natural replacement level of 2.1 consistent with immigration, it will result in an increased rate in the long-term thus further reducing the dependency ratio.

Based on these arguments, it is clear that if the UK was to withdraw from the EU and was to place heavier restrictions on migration, the age dependency ratio would increase and as a direct result so would the age-related spending; this would further burden the UK economy. Moreover, if the UK was to withdraw, it may experience a sharp increase in the dependency ratio not only as a result of a reduction in migration, but because of the return of UK citizens over the age of 65 who were residing in other Member States. Whether they would be legally obliged to return to the UK would depend on any agreements between the UK and EU, but it would further burden the UK economy. Finch et al[63] conclude that in 2009, 9.2% of UK pensioners were living abroad; this is equivalent to approximately 912,000 individuals. This addition to the population coupled with a mass expulsion of the working-age migrant population will no doubt cause a catastrophic impact on the age dependency ratio, thus making it far more likely for government expenditure to outweigh revenue in the short and long term.

Social housing

As social housing is a public resource, EU citizens who have exercised their right to free movement are entitled to it. As mentioned in the first section, 'workers' from other Member States enjoy the same social and tax advantages as UK nationals. It is therefore crucial to analyse the impact that migrants have on social

[59] Dustmann and Frattini (n 34) 19.
[60] ESRC Centre on Dynamics of Ethnicity (CoDE), 'Dynamics of Diversity: Evidence from the 2011 Census' [2013] JRF 3.
[61] Dustmann and Frattini (n 34) 6.
[62] European Commission (n 54) 45.
[63] Tim Finch and others, 'Shall We Stay or Shall We Go? Re-migration T0rends Among Britain's Immigrants' [2009] IPPR.

housing and whether the public perception that 'the government looks after them and not us'[64] is true. Dustmann and Frattini illustrate that over the period 1995-2011 EEA migrants were '3 percentage points less likely' to live in social housing than natives and non-EEA migrants were '3 percentage points more likely'[65] than natives. These figures suggest migrants as a whole are more likely to live in social housing in comparison to natives. However, they proceed to justify these figures by arguing that social housing is far more widespread in urban areas, such as London, than in the rest of the country. Therefore, as London is home to 42% of the immigrant population,[66] in comparison to 9.5% of the working-age native population,[67] generalising these figures will result in unjust conclusions; the majority of the social houses occupied by migrants are in a city, which has a higher density of social houses in comparison to the rest of the country. An alternative report by the IPPR in 2009 took into consideration the high density of social houses in London and illustrated that from 2004-2009 migrants made up less than 2% of the total of those in social housing across the country and over 90% of social house occupiers are UK born.[68] This evidence suggests that although migrants occupy the majority of social housing in London, this is so because London is home to the majority of the migrants and has a higher density of social housing. Therefore, although it may seem as though migrants occupy the majority of social housing, this is not the case when looking at social housing nationwide.

Overall, if the UK was to withdraw from the EU and the right of free movement of persons was terminated, it would be possible to restrict migrants applying for social housing. As the evidence above suggests, the impact of such a restriction will be minimal because natives, and not migrants, occupy the majority of social houses. The impact will be however, more evident in London given the high percentage of immigrant occupiers.

Employment

As previously mentioned, migration also assists natives with employment because an increase in immigration results in an increase in jobs created. Since 1995, one million jobs have gone to natives despite their population being unchanged. Despite this, the Migration Advisory Committee found that in the period between 1995 and 2010 for every 100 working-age non-EU migrants, there would be a

[64] Jill Rutter and Maria Latorre, *Social Housing Allocation and Immigrant Communities* [2009] IPPR, 39.
[65] Dustmann and Frattini (n 34) 22.
[66] ibid 21.
[67] Christian Dustmann, Tommaso Frattini, and Ian Preston, 'A Study of Migrant Workers and the National Minimum Wage and Enforcement Issues that Arise' [2007] CReAM, 4.
[68] J Rutter and M Latorre, Social Housing Allocation and Immigrant Communities [2009] IPPR, viii.

subsequent reduction in native employment of 23[69], thus highlighting a direct correlation between migrants and the displacement of jobs for natives. However, the report also stressed that this is only the case where the output gap (a measure of difference between the actual output and potential output) is zero or negative; if it is positive this association is 'statistically insignificant'.[70] However, this correlation only exists between non-EU migrants and natives as EU migrants did not have a 'significant association with native employment.'[71] Once again, EU migrants have proven to be more beneficial than their non-EU counterparts; the former do not affect employment for the UK-born, whereas the latter do, in economic downturns. Additionally, recent EU migrants (since 2000) have also enjoyed higher employment rates than non-EEA migrants, as the former have an 80% employment rate and the latter, 60%.[72] Although Dustmann argues that the lower employment rate for non-EEA migrants could be due to higher parental responsibilities, it is nonetheless burdensome to the economy and damages the credibility of the previous argument that most migrants are of working age and can therefore, contribute to the economy and reduce the dependency ratio. This is only possible if the migrants are in employment; if, as is the case with non-EEA migrants, over 40% are unemployed, this will clearly cause further damage to the economy. However, if Dustmann's argument is correct, i.e., that non-EEA migrants have greater parental responsibility, then although those that are unemployed are currently burdensome on the economy, they could arguably be an 'investment' for the UK; the higher fertility rates would, eventually, reduce the dependency ratio. Nevertheless, this 'investment' would only be beneficial if the benefits that the children of the non-EEA migrants bring to the economy in the future outweigh the current detriment to the economy.

It could, however, be argued that restrictions on free movement are partly responsible for the high employment rates for EU migrants and low rates for their non-EU counterparts. EU citizens are able to move and reside freely in any Member State, subject to conditions; if they cannot find employment in the UK, they are free to return to their host Member State without restrictions or potential difficulties with future migration back to the UK. On the other hand, non-EU migrants must satisfy extensive conditions to gain entry into the UK; return migrating would often be a last resort. Consequently, EU migrants who move back to their host Member States because they cannot find employment do not fall under the unemployment statistics, whereas the non-EU migrants who cannot find employment, yet nonetheless stay in the UK to continue searching are classed as

[69] Migration Advisory Committee, 'Analysis of the Impacts of Migration' [2012] 63.
[70] ibid.
[71] Migration Advisory Committee (n 69).
[72] Dustmann and Frattini (n 34) 20.

unemployed individuals in the UK. The statistics highlight that approximately 80% of EU migrants are employed and contributing to the economy. Based on this alone, withdrawing from the EU and subsequently restricting EEA migration would be detrimental to the UK economy, as the effects on employment will mirror the current effects non-EU migrants have.

Wages

The effects that migrants have on wages are another crucial aspect to examine when establishing the true effects that they have on the economy. Dustmann et al's widely cited 2007 report[73] outlines the positive impact migration has on average wages, but at the cost of downward pressure at the lower end of the wage distribution.[74] They conclude that an increase of 1% in the ratio of immigrants to natives in the working age population resulted in a 0.5% decrease in wages at the first decile, 0.6% increase at the median and a 0.4% increase in wages at the ninth decile.[75] This effect leads to an overall increase of 0.3% in average wages.[76] It is clear from the statistics that although immigration has a positive impact on wages as a whole, it has quite the opposite on wages at the lower end of the distribution and the reasons for such an impact are dealt with by the report. In 2005 it was found that 45% of recent migrants, i.e., those that arrived within the last two years, left education after the age of 21 in comparison to 34.5% of migrants who have been residing in the UK for more than two years and to 16.5% of natives.[77] Despite the considerable differences in education levels between natives and recent immigrants, the latter group has the highest percentage of individuals below the tenth percentile of the wage distribution.[78] In addition to this, they also have a higher propensity to work in manual labour than the natives, which suggests that recent migrants struggle to 'make use of their educational background to its full potential, as they may lack complimentary skills like language.'[79] The lack of relevant skills explains the reason why some recent migrants occupy the lower end of the labour market despite being highly educated. As a result of this increase in available labour, they subsequently put downward pressure on wages at the bottom end of the distribution. However, Dustmann et al argue that recent migrants improve their position in the labour market over time as they acquire and develop the skills they lacked upon arrival, thus gradually moving to better

[73] Dustmann, Frattini and Preston, 'A Study of Migrant Workers and the National Minimum Wage and Enforcement Issues that Arise' [2007].
[74] ibid 53.
[75] ibid 5.
[76] ibid 45.
[77] ibid 18.
[78] ibid 23.
[79] ibid 18.

jobs.[80] It could be argued, however, that many recent migrants working at the lower end of the labour market are doing so as part of a transitional phase in order to acquire the relevant skills to progress higher in the market. This would suggest that the current 'recent' migrants should not be occupying the lower end of the labour market for many more years. It is worth remembering, however, that as the current recent migrants progress higher into the labour market, future migrants could be expected to go through a similar phase of occupying the lower end. Therefore, for as long as the lack of complimentary skills in recent migrants exists, the UK should expect downward pressure on wages in the lower end of the distribution.

Although the aforementioned arguments draw out the negative effects migration has on wages, the overall impact is nonetheless beneficial to the economy. This has been a very modest benefit; estimates suggest that migration has contributed approximately 0.01 pence to the 0.29 pence wage growth between 1997 and 2005.[81] Furthermore, the study report outlines that all the assumptions made are based on immigrants staying in the UK permanently. As mentioned above, the median length of stay for immigrants has decreased from 24 to 12 and the number of those that return migrate within five years has also increased. On these statistics, it is reasonable to suggest that migrants have less of an impact on wages than suggested by the study. The evidence suggests that migrants do not tend to reside in the UK permanently.

To conclude, the increase in available labour puts downward pressure on wages at the lower end of the distribution. This in turn leads to an increase in the number of people in work, which subsequently increases the proportion of working people to nil. This tackles the age dependency ratio and improves the economy, as there is an increase in wealth. As wealth increases, there is more money available to give to those on benefits. Although immigration has a negative impact on the poorest working people because it slows the increase of the minimum wage, it is beneficial to the economy and those receiving benefits. Whilst immigration has negative effects on the poor employed, it is suggested that this could be resolved by taxing those who are making money out of immigration, i.e., those who are higher up the wage distribution, and by giving money back to those on low wages by way of benefits. If this were to take effect, losses experienced by workers at the low end of the wage distribution would be 'more than compensated by wage increases of workers further up the wage distribution.'[82]

[80] ibid 25.
[81] ibid 45-46.
[82] ibid 59.

Conclusion

It is argued based on the aforementioned studies, that EEA migrants benefit the UK economy. In doing so, they reduce the fiscal burden for the natives. It is harder, however, to argue that the same is true for non-EEA migrants; although they do contribute to the economy, the uncertainty surrounding the costs of their children results in complex studies that have yielded inconsistent data. The main uncertainty is pertaining to UK-born children of migrants; migrants are defined, for the purpose of impact studies, as those who are born outside of the UK, therefore, children born in the UK, regardless of the country of origin of the parents, should be classed as natives. One could equally argue, that these children would not have been born in the UK had it not been for their migrant parents, in turn they should be classed as part of the migrant group. As the effect that immigrants have on wages is extremely modest, the UK leaving the EU will have little impact on the wage pressure.

Furthermore, the higher fertility rates of migrants would prove to be highly beneficial for the UK in reducing the age dependency ratio, thus reducing the fiscal burdens associated with it. This provides a strong argument against the UK's withdrawal from the EU as the age dependency ratio is an evident problem for the UK and the best solution for this is to encourage migration from countries with high fertility rates. If leaving the EU is likely to result in a mass expulsion of migrants and their children (and a corresponding return of UK emigrants), then the UK would experience a sharp rise in the age dependency ratio that in turn would immediately strain the economy. The contention that withdrawal from the EU will be detrimental for the UK is also supported by the employment rates of EEA migrants. They have enjoyed, on average, a higher employment rate since 2000 than the natives and non-EEA migrants. This clearly demonstrates the benefits that EU migrants offer the UK economy as well as the void that will be left subsequent to any UK withdrawal from the Union.

III. LEAVING THE EU

Having established the fiscal benefits that EU migrants have on the UK economy, this article shall now analyse the options that the UK will have if they leave the EU and whether or not these options will result in an increase or a decrease in benefit for the UK economy.

Article 50

Article 50 of the TEU expresses that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.'[83] The Member State must notify the European Commission of intention to withdraw[84] and once notification is given, the Member State can either negotiate an agreement with the Union about the terms of their withdrawal or it can automatically withdraw two years after notification.[85] The withdrawal, however, is not as straightforward as the article implies; the President of the European Council, Herman van Rompuy, states that leaving the EU would be 'legally and politically a most complicated and unpractical affair.'[86] He compares the UK's EU membership with a 40-year marriage and emphasises the complexities of a potential 'divorce'. Additionally, Sir David Edwards states that a 'withdrawal from the Union would involve the unravelling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations';[87] withdrawing from the EU is no walk in the park.

The EFTA

An alternative to EU membership is to join the European Free Trade Area (EFTA) alongside Switzerland, Norway, Iceland and Liechtenstein. This agreement was reached in 1960 between countries that sought the benefits of trade without full EU membership. Although the UK was a founding member of the EFTA, Dr Johanna Jonsdottir argues that the UK is now a 'larger and more assertive country.'[88] Therefore, the UK would inevitably find paying to administer and police the single market difficult, especially without being able to make any material decisions; such a situation 'could feel like a very un-splendid isolation.'[89]

Although contributions might reduce by 60% for the UK, based on the same as Switzerland,[90] it could be argued the loss of political power will outweigh the benefit of a reduction in costs, as relations with third countries will be detrimentally affected. One may not appreciate the existence or the extent of interest that third countries have in UK EU membership; Barack Obama has emphasised that this membership is 'hugely important to our [United States'] interests as well as the world.' Furthermore, the EFTA does not deal with free movement of persons. Therefore, the UK would need to negotiate bilateral agreements on a case-by-case basis, much like Switzerland in order to tackle issues

[83] Article 50(1) TEU.
[84] Article 50(2) TEU.
[85] Article 50(3) TEU.
[86] House of Commons, 'Leaving the EU' [2013] Research Paper 13/42, 5.
[87] ibid 10.
[88] ibid 18.
[89] ibid.
[90] ibid 23.

that involve such rights. Nonetheless, it is admitted that by joining the EFTA, the UK can become/remain a party to the EEA agreement, which includes the right to free movement.

The EEA

The EEA is another alternative to EU membership; this agreement is currently assented to by all the EU Member States as well as Norway, Liechtenstein and Iceland. The EEA extends the EU single market and free movement of persons, capital, goods and services; this entails that non-EU countries can enjoy such rights if they are party to the EEA. If the UK were to leave the EU, it would be required to re-join the EFTA in order to remain in the EEA. The EEA ensures that the four fundamental freedoms apply equally to the non-EU countries just as they do to the EU countries. Therefore, it might be argued that withdrawing from the EU, whilst remaining in the EEA, would not affect migration as the rights of free movement would still apply. However, the UK would have less input into Regulations, therefore, if in the future all the conditions on the free movement of workers were lifted, the UK would have to bear the consequences of a possible sharp rise of EU migrants.

Nevertheless, the aforementioned alternatives may not be suitable for the UK. The 2013 FAC report[91] illustrates that in both cases, the EEA and the EFTA, the non-EU country 'is obliged to adopt some or all of the body of EU Single Market law with no effective power to shape it.' The report then suggests that if the UK were to remain in the Single Market, it should remain in the EU or 'launch an effort for radical institutional change in Europe to give decision-making rights in the Single Market to all its participating states.' As the UK has powerful economic influence within the EU and is therefore accustomed to having its voice heard,[92] it will find it difficult to adjust to a more back-seat approach. The implications of this may be detrimental in the future if rules and regulations are introduced that will prove costly to the UK.

Complete withdrawal

Alternatively, the UK may withdraw from the Union without making any agreements. In this case, Directives will still have effect because they have been implemented through Acts of Parliament, thus falling under national law. The

[91] Foreign Affairs Committee First Report, *The Future of the European Union: UK Government Policy* (HC 2013-14 87-I).
[92] ibid.

Factortame[93] compromise might mean, however, that such legislation went into abeyance. Nonetheless, Treaties and Regulations would cease to apply; seeing as they are directly applicable, they do not require further implementation by the UK and so would lose their binding force. This would directly impact upon the free movement of persons as these rights derive from the Treaties. Citizens of Member States therefore, will not be able to rely on these Treaty-rights to move to and/or reside in the UK. This also gives rise to questions surrounding the status of UK workers in other Member States as well as future rights to emigrate due to the potential requirement of visas to visit the EU. A withdrawal without an agreement will no doubt result in a daunting task of filling the gaps left by the Treaties and Regulations as 80% of the current law is derived from the EU.[94] These arguments illustrate that it is difficult to predict the full impact of a UK withdrawal. Nonetheless, this article proceeds with an analysis of the potential effects these options of withdrawal may have on immigration and the labour market.

Impact of withdrawal on immigration and labour market

UK-EU negotiations will determine whether the UK can exercise the right of free movement after withdrawing from the EU. If the agreement states that the right to free movement of persons no longer applies, then the UK would be free to impose its own controls on EU migration. The impact of the new laws would depend on the terms of the rules; it is therefore currently difficult to assess. One option would be for the UK to simply expand the current points based system it has in place for non-EU migrants to include EU migrants. This seems to be a restrictive approach as it would effectively limit migration to highly skilled migrants. Although this may sound effective as it filters out the low-skilled migrants, the London Chamber of Commerce and Industry (LCCI) warned that 'such an approach could lead to a shortage of low-skilled workers that a lot of businesses are dependent on.'[95] This is supported by a report in 2011[96], which concluded that migrants were more flexible in meeting employer demands, as they are more likely than natives to work for longer and at unsociable hours, as well as undertake temporary jobs. In addition, data from the Office for National Statistics illustrates that the sector that employs the highest share of EU migrants is accommodation and food services with approximately 139,000 employees in 2012.[97] All this information shows the difficulty that the UK would face if it were to limit EU migration to highly skilled

[93] *R v Secretary of State for Transport Ex p Factortame (No.2)* [1991] HL 1 AC 603.
[94] Laura Bolado, 'If the UK left the EU then…' <http://www.accountancyage.com/aa/feature/2141274/uk-left-eu> accessed 10 April 2015.
[95] London Chamber of Commerce and Industry, 'Help or Hindrance? The Value of EU membership to London Business' [2012] 23.
[96] UK Commission for Employment and Skills, 'The Impact of Student and Migrant Employment on Opportunities for Low Skilled' [2011].
[97] Office for National Statistics, Labour Market Statistics Data Tables, June 2013.

migrants. The majority of the employees in the accommodation and food sector are actually low skilled migrants. Therefore, a limit on migration would leave a gap in such sectors, as the migration of low skilled individuals will decrease over time. Furthermore, a universal PBS will restrict the ability of migrants to bring their family members to the UK because they would have to prove that they have considerable finances to support such family members. In order to bring a spouse and 3 children, the applicant must prove he is able to take care of them by meeting the financial requirement of a gross annual income of £27,200; this breaks down to £18,600 for the spouse, £3,800 for the first child and £2,400 per child for any further children.[98] This would clearly hinder the migrants' ability to bring over family members resulting in fewer children in the economy, which would increase the age dependency ratio in the long run.

Another aspect that would need to be taken into account is the status of the current EU citizens in the UK and vice versa; it has been argued that certain rights can be protected under general international law. Lord McNair suggests that although certain rights owe their existence to Treaties, those that have already been executed before withdrawal 'have acquired an existence independent of it' and '…the termination cannot touch them'.[99] Based on this, the individuals who have exercised their right to free movement will retain these rights after withdrawal from the Union, thus preventing the possibility of UK workers in other Member States, and vice versa, from becoming illegal immigrants. Alternatively, in the worst case scenario, there may be a UK-EU agreement that individuals should return to their host Member States following withdrawal from the Union irrespective of whether free movement has been exercised or not. If such an agreement were to be reached, there would be a transitional period mirroring the terms outlined in Article 2 of the Protocol attached to the Greenland Treaty following their withdrawal in February of 1985. This transitional period allowed nationals, non-national residents and businesses with acquired rights under EU law to retain these rights. Even with the transitional period in place, it would be extremely difficult to ensure that all individuals who have exercised their right to free movement to return to the UK, given that the number of UK nationals residing in other EU Member States is significant. The Home Office estimated in 2010 that approximately 1.4 million UK nationals resided in other Member States.[100] As a significant proportion of these migrants are of post-retirement age, their return would instantly increase the UK's age dependency ratio.

[98] Home Office, 'Immigration Directorate Instructions Family immigration', Annex FM 1.7: Financial Requirement, 5.
[99] Lord McNair, *The Law of Treaties* (2nd edn OUP 1961) 531-532.
[100] Home Office, 'Emigration from the UK' Research Report 68 (2nd Edn, November 2012).

Following the decision of the Commission that 'Greenland should retain "the substance" of free movement rights,'[101] the UK may also be able to withdraw from the EU whilst retaining right to free movement. However, the decision was made as the amount of people affected by this, given Greenland's relatively small population, was an 'extremely small number.'[102] This is not the case with the UK, since the population is much larger and so is the influx and outflow of migrants. Furthermore, although the Commission made it clear that Community workers in Greenland should retain rights of free movement, it failed to mention whether the same would apply for Greenlanders moving to the EU. Based on this seemingly unequal retention of rights and the stark differences between the UK and Greenland, it is highly unlikely that the UK-EU agreement would resemble the decisions taken concerning Greenland's withdrawal.

Since the UK currently provides access to all Member States via the single market, it is an attractive economy for businesses to invest. In 2011, the UK was the receiver of £770bn, thus constituting the second largest Foreign Direct Investment (FDI) in the world, behind the US.[103] This investment will be affected if the UK withdraws from the EU, and even more so if it subsequently withdraws from the EEA, seeing as it will lose access to the single market and become less attractive to business investment. A reduction in investment would directly impact jobs, as the substantial investments that have been made whilst the UK has enjoyed EU membership have created jobs both for natives and migrants.

Moreover, changes to the immigration system are extremely unpopular amongst businesses; keeping up to date with new developments creates an administrative burden. The British Chambers of Commerce (BCC) expressed that 'business now needs the government to leave both the cap and the system alone.'[104] Constant changes to the immigration system may eventually cause firms to relocate to other economies with a more stable system, as businesses need certainty in order to plan for the future. The withdrawal process itself will cause disruption to businesses, notwithstanding that the agreement might result in the UK enjoying the same rights in the future, as it does currently. The negotiation process may take years, which could result in a lack of stability and certainty within that period.

Since the impact of withdrawal from the EU is difficult to assess, one thing is certain; due to the complexities of EU membership, a 'comprehensive set of

[101] House of Commons (n 88) 15.
[102] European Commission, *Status of Greenland* (COM (83) 66 Final, 1983) 12.
[103] ONS, Foreign Direct Investment, 2011 (MA4) Inward Reference Table 4 to 6.
[104] British Chambers of Commerce, 'Migration Policy Must Prove That Britain is Open for Business' <http://www.britishchambers.org.uk/press-office/press-releases/migration-policy-must-prove-that-britain-is-open-for-business,-says-bcc.html > accessed 15 April 2015.

institutional and substantive provisions would be required to turn the political desire to leave the EU into a legal reality.'[105] Furthermore, it is likely that withdrawing from the EU would not actually lead to a reduction in migration, as it is unlikely that stricter restrictions on free movement would be negotiable. Even if it were possible to restrict migration, the consequences of this would be disastrous for the standard of living for the people in the UK over the next 50-60 years, until the age dependency ratios begin to right themselves.

IV. CONCLUSION

The first chapter has illustrated that while EU Law should be filtering out burdensome citizens, it in fact fails to do so; one can be unemployed and still migrate to the UK to search for work. Based on this, it might be argued that EU migrants are detrimental to the UK seeing as they are able to migrate without fulfilling conditions, such as having sufficient resources. Notably, though, the various studies on the economic impact of EU migrants suggest otherwise. Conversely, the rigid immigration system for non-EU migrants is designed to filter out the inactive individuals with the aim that those who satisfy the extensive conditions should be positive contributors to the economy. Although non-EU migrants do contribute to the economy overall, they do so much less than EU migrants, thus it is concluded that EU migrants are the most beneficial migrant type to the UK.

The above studies have proven that the impact of migration is beneficial to the economy in terms of revenue generated; it increases GDP and, in some cases, migrants are the only group that are net contributors. The studies have shown that natives' expenditure has outweighed their revenue many times. Nevertheless, the difficulty of accurately assessing the impact of migration is evident; their revenue generated cannot solely determine the effect of migration on the economy. Fertility rates, return migration, and average age are all contributing factors, and draw attention to the impossibility of making perfect assumptions of the future based on information of the past. Furthermore, the studies have highlighted that EU workers do not affect native employment rates and that their employment rates are higher than that of non-EU migrants. Once again, this demonstrates the detriment that would be caused to the UK if it were to withdraw from the EU and terminate the right of free movement. Employment rates would fall and, as a result, income generated through taxes would decrease, further burdening the UK.

[105] Adam Lazowksi, 'How to Withdraw from the European Union? Confronting Hard Reality' (2013) CEPS Commentary, 2.

Migrants have an overall positive impact on wages at the cost of downward pressure at the lower end of the distribution. This issue can be tackled, however, by redistributing wealth to compensate for the loss suffered by the poorest employed. Recent migrants are the group with the highest percentage of individuals below the tenth percentile of the wage distribution. Therefore, a reduction of migrants may ease the pressure on wages at the bottom, but at the cost of a much slower increase at the top. If the UK were to withdraw from the EU and restrict migration, it is likely that the overall impact on wages will be a slower increase than that which is currently enjoyed.

The effects on the economy by leaving the EU depend on the kind of agreement reached between the UK and EU. It is therefore impossible to determine the precise impacts. If the UK was to opt for any of the alternatives to EU membership, the evidence suggests that the impact on the economy would actually be detrimental. Joining EFTA and remaining in the EEA would not affect migration, but it would reduce the UK's political power in Europe. A complete withdrawal could result in a restriction on EU migrants, but as determined throughout this article, they are the biggest contributors to the UK economy. It is abundantly clear that migration generally is beneficial to the UK economy both short-term, as migrants contribute to GDP, and long-term, as they reduce the age dependency ratio. Leaving the EU and restricting migration will cause catastrophic consequences on the UK economy that will take countless generations to rectify. Withdrawing from the EU on the basis that migration is damaging the economy would be a calamitous mistake; the evidence clearly indicates that the public perception is far from the truth. The migrants are not the problem. The natives are.