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The Manchester Review of Law Crime & Ethics

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Preface from the Head of the School of Law

When Michal Kniec first approached me with the idea of a student journal I was enthused by the project. However, it took us sometime to work out which was the best way forward. Should it be a student journal like the Harvard Law Review publishing work of professors or a newsletter or online journal? In the end we opted for a hard copy journal showcasing the scholarship of Manchester students and covering the breadth of work going on in the Law School – law criminology and ethics. Looking at the final product, I hope you agree we chose the right format.

At the heart of this project is the high quality product our teaching and learning environment produces. The work of students in Manchester Law School. I will be proud to send this to academics within the University and in other Law Schools and also our partner law firms. Those who have been published may feel the excitement of being able to help others gain new insights into the law that keeps academics going! Who knows for some this may be the first of many academic publications! However, producing this journal has involved developing organisational, managerial and technical skills that will be invaluable for all engaged in the enterprise. Those having fun producing the journal may not have realised it, but they were in fact developing those skills as well as demonstrating teamwork and leaderships skills. Educationalists talk about embedding employability skills into the student experience. This is a prime example of how these can be achieved whilst producing tangible benefits for the Law School. The product is a credit to you all.

I also want to say a few words about those who submitted papers that were not accepted for publication. This may have been dispiriting, but if it is any consolation most academics have faced rejection of their papers– and sometimes it has nothing to do with quality, merely the need to balance

content. However, your submission was an important sign of the value and commitment of the student body to this project.

My aim is to develop a Law School community where staff and students exchange ideas outside as well as inside the curriculum. The Public Lecture series is one way in which staff have showcased their work. This journal puts the focus on student thoughts and ideas. I look forward to discussing them with the authors and hope the papers will generate many debates around the Law School.

My heart felt thanks go to all who have contributed so much of their time and enthusiasm to realise this wonderful first volume of the Manchester Review of Law, Crime and Ethics.

Geraint Howells
Head of Law School

Preface from Norton Rose

We at Norton Rose are delighted to support The University of Manchester Review of Law, Crime & Ethics and are very pleased to commend the efforts of the undergraduate and postgraduate writers who have contributed to it, as well as to support the law faculty in helping to bring this journal to publication.

As Norton Rose has grown in recent years to become one of the leading international legal practices in the world, and as we continue to open new offices in different countries around the globe, we have frequent occasion to appreciate just how many opportunities there are to bring real value to our international clients through our ability to understand, interpret and advise on not just English law, but also the laws of each jurisdiction with which we work.

English law is, of course, one of this country's most successful export products - one of the leading legal systems chosen by parties around the world to govern their relations and their business dealings. However, the detailed and historical way in which we study the law itself, as well as our international outlook, helps us to understand the different - and sometimes conflicting - legal systems which apply to our colleagues and clients in other countries, and to enable us to advise on multi-jurisdictional issues, or create innovative solutions, in the most important of cases or the most high-profile of commercial transactions.

To do this requires us to have the brightest and the best people in our team, and we are always on the lookout for the top lawyers of the future. This publication evidences some of the depth of talent to be found in The University of Manchester. We are glad to lend the Norton Rose name to this journal, and congratulate all those who have contributed.

Duncan Batchelor
Partner

Preface from the Editor-in-Chief

As soon as I arrived at the University of Manchester School of Law I noticed that something was missing. Being a Canadian allotted me a certain perspective on how departments are organized and, as you can imagine, it did not take me long to notice that it did not have a journal. Quite literally as soon as I got off the plane I started contacting staff members and a few years later we finally transformed this idea into a reality.

I was truly excited when I got the approval to begin the process in September. I already had in idea of how a journal functions having worked on *The Mirror*, Canada's oldest undergraduate academic history journal, while I was completing a history at the University of Western Ontario. I knew how it functions and what it needed, yet actually getting it started was a lot more difficult than I thought it would be. While it may have been a struggle, when the journal finally started coming together I realized that I was part of something truly amazing.

I'd like to take this moment to thank everyone involved on this journey. Firstly, I'd like to thank the brilliant staff at the University of Manchester. Prof. Geraint Howells has been of tremendous assistance at each step, providing me with pragmatic input. Similarly, I would have been completely lost if not for Dinah Crystal's organization skills. Her knowledge, with the assistance of Maureen Barlow, was instrumental in getting this project off the ground. Lastly, all the academic advisors were there to answer any questions I may have had about running a journal. They were very eager to be a part of this academic venture, making my life a whole lot easier.

I would also like to thank Norton Rose for their interest and financial assistance. Ever since I met their representatives I knew that we would make an ideal match, create a perfect pairing of legal application and theory. Kept in constant contact, they've been very involved with the process and this journal and I owe them everything.

Of course this journal would not be here today if it were not for my amazing staff. More competent than I'll ever hope to be, they were all handpicked from a mountain of applicants, making them the very best academics at their level. I cannot express how grateful I am for their support and input. I owe them everything for making my little dream a reality.

While organizing a book of this magnitude was certainly not easy, it has been the most rewarding experience I've ever achieved. All the organizational difficulties, printing choices, even the essay selection have been a journey that few are allotted. This journal was not simply something to put on my curriculum vitae but rather a legacy to leave behind at the university. In many ways it is my *nostos*.

I fundamentally hope that the journal provides you with a truly enjoyable read. Each and every one of these works has been chosen based on a combination on extremely high academic merits, legal value, and uniqueness of character. While they are without a doubt perfect examples of first grade papers, they're all interesting reads that will hopefully inform you about the law. An expression of hard work on part of writers and editors, they are the prefect marriage of academic achievement. I hope they'll give you as much joy as they have given me.

Michal Kniec
Editor-in-Chief

Contents

The Public Interest Disclosure Act 1998: Nothing more than a "Cardboard Shield"[1]

Kelly Bouloy

Abstract

*Whistleblowers are workers who make disclosures about wrongdoing in the workplace. The purpose of this article is to assess the adequacy of the UK's Public Interest Disclosure Act 1998 (**PIDA**) in protecting whistleblowers. Whistleblowers play an essential role in the campaign against corruption, yet they are met with much resistance. The concern is that PIDAs provisions may be contributing to the deterrence of whistleblowers. This discussion is structured around the main areas of concern arising from the provisions. Although multiple limitations have become evident, this article focuses on the most strikingly problematic limitations. The author concedes to the areas of strength in PIDA, but believes that the limitations tip the scales in favour of reform. It is concluded that PIDAs limitations create unforgivable gaps in the protection offered by the provisions, thereby having the adverse effect of discouraging whistleblowing.*

I. Introduction

By exposing wrongdoing in the workplace, whistleblowers make important contributions to the campaign against corruption. Whistleblowers make disclosures in the public interest, but they do so at their own risk. In the past, they were at the mercy of the common law application of general employment principles. Now, PIDA has inserted Part IVA into the Employment Rights Act 1996 (**ERA**). Part IVA is comprised of sections 43A to 43L, which focus specifically on disclosures. These provisions form a guideline on how and to whom protected disclosures should be made. Guided by PIDA, whistleblowers can plan their disclosures, and the

[1] Council of Europe Parliamentary Assembly. Resolution 1729 (2010). Protection of "Whistleblowers".
<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm>. 11 December 2011.

judiciary can be guided in their judgments. The certainty created by the provisions increases the confidence of whistleblowers in the protection afforded by PIDA. A closer analysis, however, reveals that the comprehensiveness of the provisions is questionable.

The factors which will be discussed in this article are those believed to discourage whistleblowing the most. Firstly, many workers are faced with an anti-whistleblowing culture in the workplace, but PIDA only indirectly instigates a change of this negativity. Secondly, PIDAs provisions do provide a useful guideline on protected disclosures, but they are riddled with uncertainty as much is left open to interpretation. Thirdly, the benefits to society which accrue from whistleblowing must be reflected in the protections offered by PIDA. While providing some leeway for whistleblowers, the strict requirements tend to be too harsh on whistleblowers. Fourthly, the recourse offered by PIDA in the face of reprisals is inadequate. Whistleblowers are neither protected from reprisals before disclosures have been made nor after dismissal from discrimination during the job search process. Lastly, PIDA is silent on the burden of proof. This evasive stance leads to uncertainty and possibly formidable conditions.

All these concerns would be at the forefront of the mind of any potential whistleblower. Whistleblowers need to be assured that they will be protected for making disclosures in the public interest. If whistleblowers are discouraged, they are more likely to choose silence, the least risky route.[2] This article will discuss the adequacy of the protection that PIDA affords to whistleblowers in light of the aforementioned concerns.

II. Indirectly tackling the anti-whistleblowing culture

PIDA faces an anti-whistleblowing culture that has to be altered if corruption is to be effectively exposed and tackled.

[2] Guy Dehn, Director. Public Concern at Work. "Whistleblowing: The New Perspective". <www.pcaw.co.uk/policy/wbnewperspective.htm>. 9 December 2011.

It is a daunting task to oppose a culture which embraces "the unstated rule that dirty linen should not be washed in public".[3] It is a culture of "blind and unquestioning secrecy".[4] The opposing interests of fidelity of the employee to the employer and the public interest in the campaign against corruption must be balanced. The challenge is to ensure that the "duty of fidelity does not become an empty concept, but that a conspiracy of silence is not encouraged".[5] PIDA must provide workers with a "safe alternative to silence".[6] Workers often remain silent for fear of reprisals; with an alteration to the culture of whistleblowing, workers would be less fearful. Until this positive shift is achieved, the negative connotations held by colleagues and employers will continue to discourage workers from making disclosures. It is submitted that the implementation of internal disclosure procedures would lead to a more transparent and positive view of whistleblowing within the workplace.

PIDA has indirectly instigated a wider acceptance of internal disclosure procedures. PIDA highlights the potential for whistleblowing to be an internal check and balance system on the smooth operation of a company at all levels. It raises awareness of the benefits of whistleblowing by affording protection to whistleblowers for making specific external disclosures. In the case of *Bladon*, the whistleblower's external disclosure was protected because the internal disclosure procedures of the employer were lacking.[7] External disclosures, those made to sources outside the company, often tarnish the reputation of the employer. [8] Wishing to avoid the possibility of a disclosure affecting

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[3] James Gobert, Maurice Punch, "Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998". MLR 63:1, January, 27.
[4] Dehn (n2)
[5] Committee of Independent Experts. Second Report on Reform of the Commission. Volume 2. 10 September 1999. <www.europa.eu/experts/pdf/rep2-2en.pdf>.
[6] Parliamentary Assembly of the Council of Europe. Recommendation 1916. Paragraph 5. 29 April 2010.
[7] *ALM v Bladon*(2002) IRLR, 807.
[8] Terry Corbitt, "Employees' Family Rights and the Public Interest Disclosure Act 1998". Criminal Law and Justice Weekly. Issue 20, May 2003.

business, employers are encouraged to tackle disclosures internally. Thus, PIDA encourages employers to adopt internal whistleblowing procedures.

The Parliamentary Assembly of the Council of Europe rightly suggests that sections 43C (2) and 43G (3) (f) demonstrate that having internal disclosure procedures in place make it easier for employers to defend claims.[9] When judging the reasonableness of a disclosure, both provisions require the tribunal or court to have regard to the whistleblower's compliance with any procedure authorised by the employer. Thus, both the employer and employee benefit from compliance with an internal procedure. Furthermore, in the case of *Azmi*, the whistleblower was dismissed after making numerous internal disclosures.[10] The facts in *Azmi* reveal the uncertainty on the part of employees, the lack of transparency, and the dissatisfactory response to complaints, which arise when internal procedures are inadequate. Such situations are unfavourable for both the employer and employee. It is submitted that, by encouraging employers to implement internal disclosure procedures, PIDA enhances the overall protection afforded to employees and increases the transparency of the system.

There are, however, some limitations to PIDAs opposition of the anti-whistleblowing culture. PIDA does not make it mandatory for employers to introduce internal disclosure procedures in the workplace, and provides no outline of what an effective internal disclosure system should encompass. On reform, Lewis suggests making it mandatory for employers to implement internal disclosure procedures.[11] Such a reform would be a more direct approach in tackling the anti-whistleblowing culture. With effective provisions in place, PIDA could create a positive foundation for whistleblowers to feel more secure when making disclosures.

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[9] David Lewis, "European Developments: The Council of Europe Resolution and Recommendation on the Protection of Whistleblowers". IIJ, Vol 39, No. 4, December 2010, 434.

[10] *Azmi v. ORBIS Charitable Trust* ET 4 May 2000 (2200624/99)

[11] David Lewis, "Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?". JBE (2008) 82, 500.

Admittedly, an internal disclosure system would not be a panacea for all the issues facing whistleblowing, and could even be problematic. For instance, internal procedures could foster cover-ups of corruption by employers and reduce the information released in the public interest.[12] It is submitted, however, that the possible costs must be balanced with the definite benefits. The lack of internal disclosure procedures is likely to discourage workers from making disclosures due to uncertainty. On the other hand, having procedures in place is likely to increase transparency and accountability; thereby increasing certainty for whistleblowers. Thus, internal procedures would not come without drawbacks, but they offer advantages especially to whistleblowers. Implementing these procedures would mark a shift in the anti-whistleblowing culture towards an acknowledgement of the benefits of disclosure. With reform, PIDA can play a pivotal role in this shift.

III. A lack of statutory certainty

Unlike the ad hoc nature of common law developments, PIDA entrenches guidelines on protected disclosures. 'Protected disclosures'[13] are 'qualifying disclosures'[14] made in accordance with the requirements set out in sections 43B to 43H of PIDA. These requirements include: the type of information that can be disclosed and to whom the disclosure can be made; other requirements will be discussed later in this article. The entrenchment of the common law rules offers a level of assurance to workers. For instance, the provisions enable workers to plan their disclosures beforehand. Yet, the effectiveness of the provisions in protecting whistlebowers is questionable.

Uncertainty arises in the drafting of the provisions. Much is left open to interpretation.[15] For instance, PIDA protects

[12] Lewis (n11), 504.
[13] Employment Rights Act 1996. Section 43A.
[14] ibid section 43B-H.
[15] Lewis (n11), 498.

disclosures of 'exceptionally serious failures'.[16] It would be counterproductive to provide a specific list of disclosures of 'exceptionally serious failures'.[17] So, PIDA includes a "catch all" provision, which an employment tribunal or court is left to interpret and apply. What disclosures will be caught under this provision will be established retrospectively. Additionally, PIDA provides that protection is not afforded where a worker "commits an offence by making it".[18] For instance, a worker commits an offence if a disclosure is made in breach of the Official Secrets Act 1989.[19] A worker would not be aware that he has committed such an offence when making a disclosure as PIDA provides no guidance on this limitation. These shortcomings make workers less certain of the protection they will be afforded in the less clear cut circumstances. Potential whistleblowers would be more likely to remain silent.

Additionally, in both sections 43G and 43H, PIDA makes no indication as to whom protected disclosures should be made. Yet, it is required that "regard shall be had to the identity of the person to whom the disclosure is made".[20] The identity of the receiver of a disclosure can reduce the reasonableness of a disclosure. Effectively, justification is based on a condition about which the provisions give no direct guidance. This uncertainty leaves a gap in the protection afforded to whistleblowers, creating a risk workers would not be willing to take.

Lastly, where whistleblowers are denied the protection of PIDA, they are left vulnerable to litigation. Employers can bring civil and criminal claims, such as defamation charges, against unprotected whistleblowers.[21] The possibility of being burdened with liability for disclosures against an employer has a chilling effect on workers. Many would choose silence over the possibility of facing these repercussions.

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[16] Employment Rights Act 1996. section43H.
[17] Lewis (n11), 502.
[18] Employment Rights Act 1996. Section 43B(3).
[19] Lewis (n11), 499.
[20] Employment Rights Act 1996. Section 43G(3)(a).
[21] Lewis (n11), 504.

Entrenchment is undoubtedly a step forward for whistleblowers. Yet many gaps and uncertainties are clear from an analysis of the provisions. Without imminent reform, the fate of whistleblowers will remain to a large extent in the hands of the judiciary. A stronger, more comprehensive statute would provide greater protection to whistleblowers.

IV. The largely counteractive disclosure requirements

Protected disclosures are subject to additional requirements than those mentioned above. These requirements include: that a whistleblower has a reasonable belief in the content and truth of the disclosure[22], that the disclosure be made in good faith[23], that the disclosures not be made for personal gain,[24] and that the making of the disclosure be reasonable[25]. These requirements are repeated throughout the act. They clearly focus PIDAs protection on those instances of whistleblowing that are most reasonable and justifiable. PIDA targets its protection to instances where it will be most effective in impeding corruption.

Firstly, the test for reasonable belief was established by the Court of Appeal in the case of *Babula.*[26] Reasonable belief is "based on the workers understanding of the disclosed information and not on the actual facts".[27] This allows PIDAs protection to extend even to a whistleblower who has made an erroneous disclosure. This is important because workers are not protected under PIDA when subjected to detriments for investigating corruption. [28] In removing the fear of repercussions based on the validity of the assertion, a potential whistleblower would feel more at ease to make a disclosure where they have a reasonable belief in the

[22] Employment Rights Act 1996. Sections 43B, C, F, G and H.
[23] ibid sections 43C, and E - H.
[24] ibid sections 43G and H.
[25] ibid sections 43G and H.
[26] *Babula v Waltham Forest College* [2007] IRLR 346 (CA).
[27] Indira Carr, David Lewis, "Combating Corruption through Employment Law and Whistleblower Protection". ILJ Vol 39, No 1, March 2010, 73.
[28] *Bolton School v Evans* [2006] IRLR 500.

disclosure but are not completely certain of the validity. Workers would be less likely to be subjected to detriments or dismissal for investigating corruption because this test relieves the pressure to investigate. So the requirement of reasonable belief encourages disclosure. The remaining requirements of PIDA are less encouraging.

Secondly, the requirement of good faith was considered by the Court of Appeal in the case of *Street,* where it was established that PIDA does not protect malicious disclosures.[29] This would mean that a whistleblower with an unethical objective would not be protected. PIDA offers no guidance on unethical objectives; it is left to the discretion of the employment tribunal or court. This is not an easy task as it is difficult to discern an individual's true motives. Lewis rightly commented that a whistleblower normally has no second thoughts about their motives prior to disclosure, and would be taken aback by a finding that their objective was unethical.[30] Whistleblowers are often discouraged by even the possibility of having their motives questioned in this way.

Under the common law, an unethical disclosure is justifiable if it is in the public interest.[31] Both public interest and malice operate symbiotically under common law. Therefore, there is no absolute need for the 'good faith' requirement in PIDA; protection should be awarded regardless of motive.[32] This is a valid consideration. The removal of this requirement would enable more workers to fall under the scope of PIDA so long at their disclosure was in the public interest. The reasons for including the good faith requirement must be examined. If this requirement aims to sanction malicious disclosures, there are less burdensome alternatives to achieve the same aim. Lewis and Homewood suitably suggest entrenching a hefty sanction for

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[29] *Street v Derbyshire Unemployed Workers Centre* [2004] IRLR 687 (CA).
[30] Lewis (n9), 433.
[31] David Lewis, "Whistleblowers and the Law of Defamation: Time for Statutory Privilege?". [2005] 3 Web JCLI. http://webjcli.ncl.ac.uk/2005/issue3/lewis3.html. 11 October 2011, 6.
[32] Lewis (n11), 500.

the making of completely baseless allegations.[33] This would discourage workers from making malicious disclosures. The good faith requirement is a limitation that would discourage workers from making disclosures. The protection of workers would be better advanced if the inclusion of the good faith requirement was reconsidered.

Lastly, opposing disclosures which are made for 'personal gain' should also be reconsidered. Whistleblowers make disclosures at their own risk and, under PIDA, they are not to receive any compensation for taking this risk. The public has an interest in disclosures of corrupt practices, yet whistleblowers are offered no incentives or direct rewards by PIDA for making disclosures. Dehn rightly suggests that a useful analogy can be drawn in the comparison of a whistleblower to a criminal testifying against an accomplice.[34] Whistleblowers risk being faced with reprisals, but gain protection to a certain extent from PIDA and can get no personal gain from the disclosures. Conversely, the criminal often receives protection under the law plus a reward for the testimony to a crime in which he/she was involved. Criminals are rewarded because their testimony enables justice to be served. In the campaign against corruption, whistleblowing can be said to do the same thing. Offering rewards to whistleblowers would increase disclosures thereby allowing justice to be served.[35] As a precedent, the UK could follow the example set by the US Dodd-Frank Act.[36] This Act offers compensation to whistleblowers for disclosures made on corrupt practices in firms. Thus far, no rewards have been made, but it has sparked an influx of disclosures which have exposed acts of "fraud, bribery and other corporate crimes".[37] Such a reward system within the UK could also have a

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[33] David Lewis, Stephen Homewood, "Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected?". [2004] *5* Web JCLI, 4.
[34] Dehn (n2)
[35] Lewis (n31), 2.
[36] Dodd-Frank Wall Street Reform and Consumer Protection Act. <http://www.sec.gov/about/laws/wallstreet reform-cpa.pdf>. 13 March 2012.
[37] Kara Scannell. Whistleblowers drawn by tip-off payouts. Financial Times. 12 March 2012.

positive impact on tackling corruption. PIDAs disfavor of rewards can be argued to encourage silence. In this way, this requirement undermines the purpose of the legislation.

Although the requirement of reasonable belief allows some leeway in the protection of a whistleblower, much of the requirements of PIDA can be criticized for discouraging whistleblowers. If the objective of PIDA is mainly to protect whistleblowers, reform of these requirements would allow for more whistleblowers to fall under the scope of PIDA. Even if the objective is otherwise, reforms are still needed to increase the willingness of workers to make disclosures in the public interest.

V. Inadequate recourse for reprisals

PIDAs provisions on the recourse offered for reprisals can be interpreted to significantly limit the scope of PIDA. Dismissal [38] and redundancy [39] based on the making of a protected disclosure is automatically unfair. The protected disclosure must be the principal reason for dismissal; thus, if a protected disclosure was "important but not the principal reason, the dismissal would be fair", leaving the employee without recourse. [40] It may be difficult to prove what the principal reason was where there were numerous contributing factors. This very specific requirement increases the likelihood of a whistleblower losing a claim.

Also, PIDA provides for the right not to be subjected to any detriment, short of dismissal, by an employer on the ground that the worker has made a protected disclosure.[41] In *Knight,* the Employment Appeals Tribunal **(EAT)** held that it was not sufficient to show that 'but for' the disclosure the employer would not have subjected the worker to the

[38] Employment Rights Act 1996. Section 103A.
[39] ibid section 105(6A).
[40] Rad Kohanzad, "The Burden of Proof in Whistleblowing: *Fecitt and others v NHS Manchester* [2011] IRLR 111". Industrial Law Journal. Volume 40. June 2011: 218.
[41] Employment Rights Act 1996. Section 47B(1).

detriment[42]; instead, the requirement is the stricter test of demonstrating that the disclosure "has caused or influenced the employer to act in the way complained of".[43] This test makes it more difficult to prove the connection between the disclosure and the dismissal. Mr. Recorder Underhill QC notes that this test requires the court to have regard to the deliberations of the employer.[44] Employers often have a vested interest in not revealing their true motives when they are actually based on protected disclosures. As with judging the motives of a whistleblower, it is equally difficult to assess the true motivation of an employer. Knowledge of these difficulties would have discouraging effects on whistleblowers. It would be discouraging not only in choosing to make a disclosure, but also coming forward after suffering a reprisal.

Note also that protection does not extend to harassment of whistleblowers by colleagues.[45] Employers can, however, incur vicarious liability for their employees' actions towards the whistleblower.[46] It can be argued that securing personal liability against colleagues would be more effective. Holding colleagues personally liable for any harassment would reduce the negative treatment of whistleblowers; thus, this would also tackle the anti-whistleblowing culture in the workplace.

Lastly, PIDA does not protect workers that are attempting to make a disclosure.[47] If a worker suffers reprisals for investigating corrupt practices, PIDA does not protect that worker because no disclosure has been made at the time. Lewis befittingly suggests that the introduction of a victimization provision into PIDA would afford better protection from reprisals at this stage.[48] Furthermore, PIDA

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[42] Lewis (n11), 502.
[43] *London Borough of Harrow v Knight* [2003] IRLR 140, para 16.
[44] ibid para 15.
[45] Harden I, "Protecting the Whistleblowers – Asian and European Perspectives". 13th International Anti-Corruption Conference. Workshop Session II. 31 October 2008, 4.
[46] *Cumbria County Council v Carlisle-Morgan* [2007] IRLR, 314.
[47] *Bolton School v Evans* [2006] IRLR, 500.
[48] David Lewis, "Providing Rights for Whistleblowers: Would an Anti-Discrimination Model be More Effective?". ILJ, Vol. 34, No. 3, September 2005: 247.

does not protect whistleblowers from being blacklisted during the job search and hiring process following dismissal.[49] Here, Lewis suggests introducing an anti-discrimination provision to enhance protection in this respect.[50] Thus, PIDAs protection is narrowly focused on protecting workers who have already made protected disclosures from reprisals imposed only by current employers.[51] Reform is needed to protect whistleblowers at all stages of the disclosure process. Although viable, both Lewis's suggestions would take very careful drafting, so as not to extend PIDA beyond recognition. PIDA's focus must be maintained. If an act tries to do too much, it may end up doing nothing at all.

VI. An evasive stance on the burden of proof

Within PIDA, there are no express provisions on the burden of proof. Guidance has come from the general legal principle and the rest of ERA. The legal principle on the burden of proof provides that once the fact of dismissal has been demonstrated, the burden is on the employer to prove the reason for dismissal.[52] If the whistleblower disagrees with the reason proposed by the employer, the whistleblower must simply raise doubt and the onus returns to the employer to prove otherwise.[53] This was verified in *Maund*, where the Court of Appeal agreed that the burden of proof was on the employer, but clarified that, where the whistleblower disagrees, the 'evidential' burden and not the 'legal' burden would be on the whistleblower.[54] An 'evidential' burden is admittedly lighter than a 'legal' burden. Griffiths LJ rightly stated, however, that the weight of the 'evidential' burden is directly proportional to the seriousness of the allegation.[55]

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[49] Harry Templeton: Maxwell Pensions Scandal. Minutes of Evidence Taken before the Social Security Committee. 25 February 1992. p380-388.
[50] Lewis (n48)
[51] Ward LJ. *Woodward v Abbey National plc* [2006] EWCA Civ 822, Para 43.
[52] Employment Rights Act 1996. Section 98(1).
[53] Halsbury's Laws of England. Employment. Volume 40 (2009) 5th ed. Section 6(2)(ii), Para 726.
[54] Griffiths LJ. *Maund v Penwith District Council* [1984] IRLR 24, Para 12.
[55] ibid para 11.

Thus, even the evidential burden, the raising of doubt, could be a daunting task for whistleblowers.

Post-PIDA, in the case of *Kuzel,* Mummery LJ suggested, since section 103A makes no declaration on the burden of proof, it is left open to interpretation.[56] There was much uncertainty and discussion on the burden of proof in *Kuzel.* The Court of Appeal, in *Kuzel,* accepted the finding on the burden of proof in *Maund.*[57] This was decided not only based on the provisions of section 98(1), which says that it is for the employer to show the reason for dismissal, but also on the basis that the employer was in the best position to prove the reason for dismissal.[58] Mummery LJ befittingly noted that in cases of such uncertainty, "the sound exercise of common sense may be inhibited".[59] Lewis justifiably suggests that a more definite statutory provision on the burden of proof for whistleblowing claims would have helped to avoid the confusion in *Kuzel.*[60] Taking a more definite stance on the burden of proof would create a greater sense of certainty for whistleblowers.

On the other hand, where a whistleblower does not meet the qualifying period of one year's employment,[61] the position of the burden of proof is debatable. Halsbury's Laws of England states that, where a whistleblower, who does not meet the qualifying period, disagrees with the reason proposed by the employer, the burden of proof shifts to the employee.[62] Note that Halsbury's is suggesting not that the whistleblower must raise doubt as is noted above, but must prove the actual reason for the dismissal. PIDA is silent on the position of the burden of proof in relation to whistleblowers who do not meet the qualifying period. Where the employee did not meet the qualifying period in *Smith,* the burden was on the employee to prove the reason

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[56] Mummery LJ. *Kuzel v Roche Products Ltd* [2008] IRLR 530, Para 14.
[57] ibid.
[58] ibid para 61.
[59] ibid para 46.
[60] Lewis (n9), 435.
[61] Employment Rights Act 1996. Section 108(3)(ff).
[62] Halsbury's (n57), Para 726.

for dismissal.[63] *Smith* is pre-PIDA and does not involve whistleblowing, but serves as precedent for the positioning of the burden of proof in unfair dismissal claims where the qualifying period is not met. As such, the reasoning is likely to be applied if such a case were to arise since PIDA has left this area open to interpretation. There are several criticisms of this stance as it would place a heavy burden on whistleblowers.

This positioning of the burden would instigate a challenge of credibility between an organization and an individual.[64] Organizations are in a different weight class from individuals. The individual would experience great difficulty in establishing the true basis for dismissal.[65] It is very likely that whistleblowers would not have access to material evidence or to adequate legal representation to be able to satisfy this burden. On the other hand, Kohanzad argues, where an employer is allocated the burden of proof and fails to prove his allegation, this could open a can of worms since the employee could claim against the employer under the anti-victimization provisions.[66] The weight carried by this concern is questionable, however, when balanced with the effects of placing the burden on a whistleblower. Placing the burden of proof on whistleblowers engages them in a formidable situation. Potential whistleblowers would be discouraged to make any disclosures if they do not meet the qualifying period. As such, the release to the public of potential disclosures on corruption would be delayed or possibly completely frustrated. By remaining silent on the burden of proof, PIDA leaves an unforgiving gap in the protection offered to whistleblowers.

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[63] *Smith v Hayle Town Council* [1978] ICR 996.
[64] Gobert (n3)
[65] Corbitt (n8)
[66] Recorder Underhill QC. *London Borough of Harrow v Knight* [2003] IRLR 140. Rad Kohanzad, "The Burden of Proof in Whistleblowing: *Fecitt and others v NHS Manchester* [2011] IRLR 111". Industrial Law Journal. Volume 40. June 2011, 220.

VII. Conclusion

Although designed to encourage workers to break the silence against corruption, this article has argued that PIDA offers only wavering protection to whistleblowers. As we have seen, PIDA does not directly challenge the anti-whistleblowing culture. Much of the provisions are left open to interpretation, and the disclosure requirements are in dire need of reform. The protection from reprisals is inadequate to truly protect a whistleblower at every stage of the disclosure process. The lack of provision on the burden of proof creates much uncertainty. Due to the uncertainty and gaps in PIDA, the protection offered is nothing more than a "cardboard shield"[67]. Instead of quelling the fears of potential whistleblowers, the limitations discussed would discourage potential whistleblowers for fear of inadequate protection.

PIDA now has to cope with the large scale industries and the powerful employers which have developed in modern times. PIDA needs to be recalibrated to account for the caliber of risks taken by whistleblowers and the increasing inequality of the bargaining power between employers and employees. Fourteen years after the drafting of PIDA, the need for reform has become clearer than ever.

[67] Council of Europe Parliamentary Assembly (n1)

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The Right Answer? An assessment of the Charter of Fundamental Rights and its necessity in Europe

Caoimhe McElduff

Abstract

The Charter of Fundamental Rights of the European Union has not been universally welcomed to the human rights arena, with many rejecting it as a mere young pretender against the long reigning European Convention of Human Rights. This essay seeks to determine the role of the Charter and thus determine whether it is truly necessary in an already crowded marketplace of human rights models in Europe. This study approaches the question first by considering the historical prominence of rights in the EU, then discussing the functioning of the new Charter within the context of the current European human rights systems and finally, considering the value of the newly legal Charter. From this, it is evident that the Charter does have an importance within the EU's own laws and institutions, but is ultimately subservient to the ECHR.

I. Introduction

The Charter of Fundamental Rights of the European Union (herein known as "the Charter") has experienced an ascension from its inception as a guide of sorts detailing the aspirations of the EU's human rights policy to its current form; a binding document with the same legal status as all the treaties which preceded it. The Charter has fulfilled the original intentions of its creators by performing the role of a compilation of accepted rights and principles that already existed in Europe, albeit dispersed amongst different sources. However, the Charter has proved to be a contentious issue in European politics, with doubts being voiced about the

functionality of the European Union's own "Bill of Rights"[1], with questions regarding the necessity of the Charter lingering since it made its first appearance in December 2000. To effectively respond to these concerns the Charter must be evaluated, and thus it can be determined if this relatively new set of human rights regulations is a necessary and desirable development.

II. A history of rights and the EU

It is first important to set the Charter in context by examining the history and development of rights within the EU. The EU itself can trace roots back to a purely economic arrangement that emerged from the ashes of World War II, a conflict that ravaged Europe not just physically, but economically and diplomatically too. Therefore, a series of treaties and agreements led to closer co-operation between the European heavyweights who resolved to both rebuild Europe and tie previously warring nations closely together economically so that any future clashes would be prevented. Natural progression led to new aims of a common European market characterised by the free movement of goods and workers and, as first proposed by the Maastricht Treaty of 1992, a single European currency[2].

This vision of the EU as a purely economic organisation serves to provide an explanation as to why the EU had shied away from the difficult social issues, such as human rights. General feeling was that rights were issues for the individual member states (MS) to determine, and that the EU and its judiciary would rule on matters of mere economic significance. Thus, rights were developed by the European Court of Justice (ECJ) in a basic form, although not enshrined in any legally binding treaties the court made room for rights by stating that 'respect for fundamental rights forms

[1] Paul Craig and Grainne De Burca, *EU LAW Text, Cases and Materials* (OUP 2008), 412.
[2] Josephine Steiner, Lorna Woods and Christian Twigg-Flesner *EU Law* (OUP 2006), 7.

an integral part of the general principle of Community law'[3]. It is also interesting to note that the civil and political rights that did develop through case law may have emerged because they rarely threatened the economic principles on which the EU was built. For example, the prevention of discrimination with regards to nationality[4] bolsters the EU objective of maintaining a healthy internal market[5].

Move forward and the EU had become a different beast. Maastricht afforded Europe all the characteristics of a "superstate", as evidenced by Weiler; '[Maastricht] appropriates the deepest symbols of statehood: European citizenship, defence, foreign policy'[6]. This major political evolution in the 1990's led to a shift in attitudes as to what Europe had become. The new European Union had indicated that Europe was ready to integrate politically at a much greater level than previously known. Naturally, the issue of human rights within the EU came to the forefront, and as a result of much debate and a Convention, the Charter came into being as an adjunct to the Treaty of Nice. The Charter has, after 60 years of treaties, minor legislation and decisions of the ECJ, combined the rights and freedoms which were enshrined but scattered into one comprehensive document that gained legally binding status as a result of the ratification of the Treaty of Lisbon. Hence, given the disorganised condition of human rights within the EU and, arguably, their previous status as being the poor relatives of more important economic issues and policies, surely the Charter was well timed, if not overdue.

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[3] Case 11/70 *Internationale Handelsgesellachaft v Einfuhr- und Vorratstelle fur Gertreide und Futtermittel* [1970] ECR 1125.

[4] Treaty on the Functioning of the European Union, Article 18.

[5] Dorota Leczykiewicz '"Effective judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law?' E.L.Rev 2010, 35(3), 326-348.

[6] Alan Dashwood, Publication review on 'The Constitution of Europe: "do the clothes have a new emperor?" and other essays on European Integration' - Joseph H H Weiler, CLJ 2000, 59(2), 402-406.

III. The Charter in practice

One of the main initial aims of the Charter was to make the rights contained in the various treaties and judgements within the EU 'more visible and accessible'[7] for the everyman. With rights consolidated into one neat document one does not need to trawl through case law and legal provisions in order to establish what fundamental right the aggrieved party feels has been violated. This characteristic of the Charter has proven effective both before and after it's elevation to treaty status when ratified alongside the Treaty of Lisbon. Despite initially lacking legally binding standing, the institutions of the European Union were shown to be eager to adhere to the Charter, with the ECJ and European Parliament citing the Charter prominently in the case *EP v Council*[8]. Since the Charter's entry into legal force at Lisbon, its claim to provide legal certainty has solidified.

Ratification of the Charter has further provided for better access to legal institutions when asserting ones rights. Where a party feels wronged due to an action by a MS when implementing EU law, the case can now be heard in a national court instead of being directly referred to the ECJ, a course that is both expensive and inconvenient. Hence, more individuals will be encouraged to assert their rights. This clarification of rights must be considered a positive and desirable step proving the Charter to be worth its salt.

However, it would be a mistake to think that the rights afforded by the Charter are universal to all citizens in all circumstances outlined in the articles. Here, it is vital to take account of two factors. Firstly, the rights afforded by the Charter fall into different categories: freedoms and principles. Freedoms are straightforward; they are the classic civil and political rights that are completely justiciable, such as freedom from torture[9]. However, some of the rights outlined in the Charter are labelled principles. This has led

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[7] Official website of the EU Charter on Fundamental Rights – Introduction <http://www.eucharter.org/home.php?page_id=66?> Accessed 11/12/2010.
[8] Case C-540/03 *EP v Council* [2006] ECR I-5769.
[9] The Charter of Fundamental Rights of the European Union, Article 4.

to much confusion and debate over the definition of the term "principle". It is suggested under Article 52(5) of the Charter that principles are food-for-thought when MSs or the EU are drafting legislation, but they are not free standing, directly enforceable rights[10]. To confuse even more, there appears to be no clear and defining distinction between principles and freedoms, leaving some articles up in the air. The Revised Principles offer some explanation as to the nature of the contained rights; however, rights such as equality of the sexes offered under Article 23 can be interpreted as being both a right and a principle. It is these legal confusions that undermine the claims that the Charter is an easy guide to human rights in the EU.

Secondly, the Charter applies only horizontally in that the rights provided can only be utilised when it is an institution of the EU or a MS implementing EU law that strips the aggrieved party of their rights. The Charter has not provided an over arching human rights doctrine that must be adhered to both in the EU's own institutions but also domestically. On its face, this appears to promote the long standing principle of subsidiarity. Yet, it may serve to ultimately undermine the EU in its human rights functions, as MSs cannot be challenged on non-compliance with EU measures using the Charter[11]. Moreover, the adoption of Protocol 30 has emphasised the apparent weakness of the Charter, as the UK, Poland and the Czech Republic have all been granted protection against the ECJ finding practices within their state to be 'inconsistent with the fundamental rights'[12] that the Charter affords. Whilst Protocol 30 does not amount to an "opt out", it remains to be seen how the relationship between these three states and the ECJ develops. The pending *Saeedi*[13] case should serve to clarify some of the implications of Protocol 30 when it reached the ECJ. It could be the first

[10] Alina Kaczorowska *European Union Law* (Routledge 2011), 245.
[11] Ibid. 244
[12] Damien Chalmers, Gareth Davies and Giorgio Monti *European Union Law* (Cambridge University Press 2010), 257.
[13] Case C-411/10 *Saeedi* (pending reference to ECJ).

warning signal that the Charter will not be as successful as envisaged, and as such has potential become one of the EU's more undesirable brainchilds.

Nonetheless, to suggest this may be to wrongly write off the Charter. The Charter can be thought of as an instrument to seal the cracks with respect to human rights law in the EU. In many ways, the Charter does not need to extend past an outline of entrenched rights and principles that are only applicable to rulings originating from the EU. Most member states have their own constitutionally protected human rights legislation that adequately promotes the respect of rights in a way that is appropriate for the MS when considering questions of morality and locality. It is also important to note that all MSs of the EU are required to adhere to the European Convention of Human Rights (ECHR). Therefore human rights systems already exist which extensively govern the actions of individual states.

The Charter's strength lies in that it ensures that the EU measures up to, at least, the same standards as the MSs already follow. Indeed, it has routinely been boasted by the ECJ that the EU has built its rights law by adopting common standards of rights that already exist in MSs as a group[14]. Evidence of this commitment can be found in Article 6 of the Treaty of the European Union, where it is stated, 'the Union shall respect fundamental rights... as they result from the constitutional traditions common to the member states, as general principles of Community law'. Hence, the Charter can be regarded as complimentary to national rights legislation, and as such, it maintains an important balance whereby the EU has been brought up to the same legal standard as the member states.

Yet, this serves to puzzle one further when determining the reasoning behind EU's ascension to the ECHR. Surely if the Charter brings the EU into line with the MSs, then signing an external agreement on human rights makes little sense. Outside of considerations of the possible conflict with

[14] Chalmers, Davies and Monti (n12), 236.

the Charter, there are a number of good reasons why the EU should join the Convention system.

Importantly, it establishes an equal level of protection of human rights throughout all political institutions in Europe. The EU, with its relatively new invigoration for the promotion of human rights, has thus adopted the ECHR as a lowest common denominator for rights within its jurisdiction, providing a floor rather than a ceiling[15] for rights aspirations. It is also of significance that the EU has acceded to the ECHR whilst embarking on this drive to provide a more substantive human rights armoury. It is conceivable that the EU will look to the example of the old-hand of European human rights, the ECHR, as it tries to establish its own rights system. The ECHR can play the role of a check on the Charter in its early days of functioning[16]. This ties in with the current relationship between the two courts, as the ECJ has on many previous occasions referred to the ECHR and decisions made by the European Court of Human Rights[17].

Again, as mentioned previously, the ECJ has evolved from its initial role as a forum to settle economic disputes into a court with a much wider jurisdiction that now encompasses the promotion of rights in its work. One commentator has commended the ECJ's role in the radical expansion of rights in the EU, and suggests that the court should continue to deal with rights as within its competence[18]. However, an alternative school would suggest that the acceptance of the ECHR should see a change in the operation of the ECJ, with a return to operating primarily as a arbitrator on economic disputes whilst allowing rights questions to be dealt with in national courts or Strasbourg. As the EU now falls under the remit of the ECtHR, Strasbourg will now have the final say

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[15] Craig and De Burca (n1), 385.
[16] Chalmers, Davies and Monti (n12), 259.
[17] Aida Torres Perez *Conflicts of Rights in the European Union* (OUP 2009) 32. The ECJ has referred to decisions by the ECtHR on a number of occasions, a specific example being as case involving equal treatment to transsexuals, Case C-13/94 *P v S and Cornwall County Council* [1996] ECR 1-2145.
[18] Francis G Jacobs "Human Rights in the European Union: the Role of the Court of Justice" E.L.Rev. 2001 26(4), 331-341.

on the application of rights within the EU, although the ECJ should retain a role similar to that of national courts. Strasbourg has in the past shown itself willing to step in where no remedy can be found by the ECJ, as evidenced in the case of *Matthews v UK*[19].

IV. Europe's best option?

Following this, given that the EU now bows to the ECHR, as evident in the supremacy of the ECtHR, how then can the Charter claim to necessary and desirable?

The Charter can be confirmed as a major player in the field of European human rights as it goes above and beyond the rights laid out in the ECHR. The ECHR has been accused of concentrating too heavily on civil and political rights[20], despite protestations from Strasbourg insisting it is a "living document". The Charter aims to modernise rights in Europe and has expanded the scope of fundamental freedoms and principles to include social and economic rights, alongside provisions for "third generation rights"[21] relating to modern innovations such as biogenetics. With this radical rethinking of rights in Europe, the Charter has proven itself to be the foremost authority on modern day rights, having emulated the progression of attitudes to reflect the 21st Century. One authority suggests that 'it is up to date, in a way the Convention...cannot be[22]. This has led to an interesting paradox. The EU has surpassed the level of rights protection afforded by the ECHR, yet if any of the differing rights are found contrary to the interpretation of the ECHR at Strasbourg, the Charter's provisions should be technically struck down[23]. This is not to suggest that the Charter is rendered impotent, it still is of much benefit to the EU and its citizens as we have already discussed.

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[19] Appl. No 24833/94 *Matthews v UK* [1999] 28 EHRR 361
[20] Kaczorowska (n10), 242.
[21] Lammy Betten "European Community Law: human rights" I.C.L.Q. 2001, 50(3) 690-701
[22] Jacobs (n18)
[23] Kaczorowska (n10), 250.

Aside from critiques of the Charter itself, its necessity and desirability can be measured by considering other measures that, in place of the Charter, may have been more effective. Instead of compiling existing rights into one document, a complete reassessment of the EUs human rights policy may have been more appropriate. Indeed, Opinion 2/94 highlighted the EU's apathy to the furtherance of rights, stating that it not a main policy aim[24], suggesting that ascension to the ECHR would be a better option given its 'special significance' in EU law[25]. Weiler has proposed that reform to the system that existed before the Charter would have been the most effective route. These reforms would have encompassed a full rights policy facilitated by a budget, a Commissioner and a Directorate-General. However, these suggestions do not prove that the Charter is entirely undesirable, merely that alternatives may have had more effect.

V. Conclusion

The Charter has been introduced amongst much debate and controversy. Whilst providing a greater level of legal certainty as to rights in the EU it may be overshadowed by the EU's adoption of the ECHR, which will emerge the final arbiter of rights law in Europe, despite the more comprehensive rights protection offered by the Charter. Difficulties have been presented with respect to the distinction between freedoms and principles, with the current understanding of the terms remaining unclear and unsatisfactory. Moreover, the Protocol 30 opt-out has presented itself as a threat to the stability and future success of the EU's new human rights regime. All this evidence seems to suggest that the Charter is an entirely redundant instrument.

Regardless of this previous criticism, the Charter has filled the void of internal EU rights policy, a most important

[24] J H H Weiler "Editorial: Does the European Union Truly Need a Charter of Rights?" E.L.J. 2000, Vol.6 No.2, 95-97.
[25] Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759, para. 33.

development. It does not merely bow to the ECHR, but has provided an enhanced, modern doctrine of rights that should compliment and expand on the older Convention. Its flaws are easy to establish at this early stage, but ultimately the necessity of the Charter can only be measured by its future successes, or indeed, failures. Therefore, we should allow time to tell if it will be the most desirable course of action.

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An Evaluation of the Scope and Importance of Judicial Discretion from 1750-1850

Jodie Gittins

Abstract

This paper offers a journey back to the period 1750-1850 investigating the demise of judicial discretion resulting in the rise of the adversary trial and the role discretion played in the reforms at that time. Judicial discretion was far reaching in 1750, both during the trial itself and in post-trial proceedings. Much of what the jury heard was controlled by the judge and the use of the Royal Pardon was considered tyrannical and promoted a system of selective terror. The arrival of counsel and the discretion of the jury limited the discretion of the judge in the court room somewhat and the use of the Royal Pardon was restricted following the collapse of the 'bloody code'. This essay argues that the reformers of the time exaggerated the arbitrariness of discretionary power and used this to push through the reforms which removed the death penalty from many offenses. It is arguable that discretion was actually exercised in a more principled manner than was represented by the reformers and the core of the debate lay in the transforming notion of justice. Discretion was no longer viewed as an adequate vehicle for the administration of the reformers' enlightened idea of justice, showing the importance of judicial discretion to the changes in the law in this period. However, considerable judicial discretion remained in 1850 showing how the change in scope was in fact relatively slight and the move towards the adversary trial was gradual.

I. Introduction

The period 1750-1850 was arguably one of change with respect to trial and punishment of felonies in England; this is evident through the movement towards a more adversary trial and the collapse of the 'Bloody Code'. A fundamental factor contributing to this change was the differing opinions regarding the amount of discretion available to and exercised by the bench. According to McGowan, 'the judges were the

bedrock upon which the institution of justice rested'[1] but there was much controversy as to whether this was a satisfactory system of administering justice. This essay will investigate the scope of judicial discretion from 1750-1850 and examine its importance, in particular the role it played in the reforms of the 1830s and whether this really was the end of the 'golden age of discretion'[2].

II. Scope of Judicial Discretion from 1750-1850

i The Arrival of Counsel

During the second half of the 18th century, the scope of judicial discretion appears to be wide; this is evident through the clear dominance of the judge over the trial proceedings. Beattie attributes this dominance partly to the result of the role the judge played in the absence of counsel, giving him opportunity to comment on evidence to deduce testimonies from witnesses, acting as counsel for the accused[3]. At the start of the period in question, lawyers were used occasionally by the accuser, if they were wealthy, and very rarely by the defence. Langbein has termed the largely lawyer-free proceedings as the 'accused speaks' trial in which the accused conducted his own defence as a running bicker with the accusers[4]. The judge would ask questions in order to fill in gaps in the testimony that was volunteered to the court, providing the judge with some discretion over what the jury heard. This meant that each case was tried on its merits, as judicial discretion provided no reliable guidelines[5]. Moreover, the workload of the judiciary was very heavy so there was a desire to end the trial as quickly as possible, although by cutting the trial short the judge was potentially depriving the accused of a thorough examination of their

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[1] Randall McGowan, 'The Image of Justice and Reform in Early Nineteenth Century England' 32 Buffalo Law Review 89 (1983), 89-125.
[2] Peter King, *Crime, Justice and Discretion in England 1740-1820* (Oxford, 2000), 353-373.
[3] John Beattie, *Crime and the Courts in England 1660-1800* (Princeton, 1986), 406-436.
[4] John Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), 291-343.
[5] Beattie (n3)

case. At this time there was no right to appeal but the judge did possess discretion to reserve any point of law at his will, which was viewed as a sufficient safe-guard against potential injustice[6].

The increasing presence of counsel from the late 18th to the early 19th century began to impose some parameters on the discretion of the judge. At first, the bench placed severe restrictions on the scope of the counsel's activity; however this failed to contain the slow transformation into a more adversary procedure. Langbein points out that the reason that this occurred was down to the gradual nature of the process[7]. By 1836, defence counsel were even permitted to address the jury, resulting in a reduction in the judge's influence by breaking down the relationship with the jury. Lawyerisation also limited judicial discretion by establishing of rules of evidence, which had previously been at the will of the judge, as well as causing more recognition of judicial precedent as lawyers would ensure the judge exercised their discretionary power in a manner consistent with previous decisions.[8]

ii Discretion of the Jury

Prior to the arrival of counsel, an issue of debate had been how much influence the judge was able to exercise over the jury and influence their decision. For example, when 'summing up' the trial and directing the jury, the judge often expressed their own opinion on how the case should be decided. Hay articulated a rather radical view that 'all men of property knew that judges, justices and juries had to be chosen from their own ranks'[9] and argued that the propertied

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[6] Phil Handler, 'Judges and the Criminal Law in England 1808-1861' in P. Brand [et al] *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge, 2012)

[7] Langbein (n4)

[8] William Cornish, *Law and Society in England 1750-1950* (Sweet & Maxwell 1989), 567-587

[9] Douglas Hay, 'Property, Authority and the Criminal Law' in Hay [et al] *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Penguin, 1976), 17-63.

and elite judges used their discretion in the criminal law as a mechanism to enforce their 'ruling class conspiracy'[10]. He stated that the conspiracy was not necessarily discussed; it was more of a subconscious understanding between the aristocratic elite that they would use the criminal law to oppress the working class and protect their property. On the other hand, Langbein found Hay's account of jurors 'baffling' as they were not drawn from the ranks of the justices and judges but represented every segment of the community[11]. Furthermore, King tells us that juries were made up of mostly from the middling group or below[12]. It is hard to argue with Langbein's claim that 'if I were going to organise a ruling class conspiracy to use the criminal law to terrorise the lower orders, I would not interpose autonomous bodies of non-conspirators like the petty juries'[13]. It is possible to state that Hay did not sufficiently recognise the discretion of the jury in decision making which ultimately took away from that of the judge. Additionally, if the jurors thought that the judges were trying to use their discretion to serve interests of the aristocratic elite then the jurors would have been more disinclined to follow their direction[14].

The extensive use of partial verdicts by the jury to reduce the offence to one that was not capital or to make the offence clergyable reflects a desire to avoid committing what could be seen as judicial murder. Jury discretion goes hand in hand with limiting judicial discretion as even if the judge directed the jury to sentence to death, if they returned a partial verdict, the judge was compelled to enforce it. Thus the jury showed considerable independence from judicial influence by in exercising these powers[15]. This is also helpful in departing from Hay's theory as the jury often used their discretionary powers to be lenient towards woman and

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[10] Ibid
[11] John Langbein, 'Albion's Fatal Flaws' 98(1) Past and Present (1983), 98-120.
[12] Peter King, 'Decision Makers and Decision Making in the English Criminal Law 1750-1800' 27(1) The Historical Journal (1984), 25-58.
[13] Langbein (n11)
[14] Ibid
[15] King (n12)

younger defendants, imposing their own notions of justice[16], showing how judicial discretion may not have been as wide as appears at first glance. The relationship between the judge and jury was crucial as both had the discretionary power to manipulate the law with the view of achieving an appropriate outcome, which it seems they mostly agreed upon[17].

iii The Royal Pardon

The scope of judicial discretion in the second half of the 18th century is arguably more concentrated in the post-trial proceedings, Langbein claims this was to make up for the lack of direct judicial discretion in other areas[18]. If the accused was condemned to death, themselves or their friends and family would often petition the Crown for mercy and at the end of a session the judiciary would decide who was to be pardoned and who was to be hanged. The system came to be viewed as inhumane and potentially tyrannical as the amount of capital statutes was at its highest, yet so was the use of the royal pardon. Popular opinion among historians was that judges were choosing objects of terror rather than the occasional object of mercy and this process was dictated by prejudice and 'capricious whim', rather than by set principles or rules[19]. Hay classified this system as one of 'selective terror' and claimed that the raw material of authority coupled with the structure of the law and class interest made discretion an effective tool of power for the elite to serve their interests in property and oppression of the lower classes[20]. McGowan highlights how advocates of reform shared this view: 'Judicial discretion had grown ominously; Romilly feared that justice had come to seem the product of individual will'[21].

However, it is possible to state that Hay's thesis gives insufficient weight to the central issues considered by judges when distributing pardons as class interest was, in reality, only

[16] Ibid
[17] Beattie (n3)
[18] Langbein (n11)
[19] King (n2)
[20] Hay (n9)
[21] McGowan (n1)

a peripheral concern[22]. Empirical data analysed by King shows how youth was often a mitigating factor due to a belief in reformability. Also, softer sentences appear to have been given to those between the ages of 30 and 40 which can be explained by this age group being likely to have a family to support[23]. Petitions and reports compiled during the pardoning process show many references to good character and previous conduct of the accused[24]. Also, judges tended to lean towards the accused where they could claim poverty, the evidence in the trial was questionable, the prosecution seemed malicious or if the character of the offence did not warrant the death penalty. Despite the limitations of sources resulting in difficulty in coming to a clear conclusion, King's evidence portrays that, despite popular belief, most sentencing and pardoning decisions were in fact based on universal and widely agreed criteria rather than on class favouritism[25]. Thus, even though there was not a lot to go on, the approach was not wholly haphazard[26]. These principles acted as constraints on the scope of the discretion of judges in post-trial proceedings showing that it was perhaps exercised in a more ethical and less arbitrary manner than was believed, or represented by the reformers of the time.

iv Remaining Discretion in 1850

Judicial discretion retained some scope even after the collapse of the 'Bloody Code'. Judicial attitude to discretion remained the same; this is illustrated by their opposition to the establishment of the Court of Crown Cases Reserved (CCCR) in 1848. It was believed that this undermined the finality, certainty and authority of the trial judge's decision. The existing ability of the judges to choose whether to reserve points of law was viewed by the judges as sufficient in ensuring that no injustice occurred[27]. However, the CCCR

[22] Langbein (n11)
[23] King (n12)
[24] Ibid
[25] Ibid
[26] Cornish (n8)
[27] Handler (n6)

did reflect movement towards the reformer's image of justice as transparent and formal. Also, after the removal of the death penalty from most offences, the judiciary were left with wide powers of discretion in determining the mode and length of the less severe punishments of imprisonment and transportation. Additionally, despite the limits the arrival of counsel imposed on judicial discretion, they were still largely absent in 1850 as many victims and defendants could not afford representation, showing that the development of the adversary trial in 1850 was still a work in progress and some judicial dominance still remained.

Having investigated the scope of judicial discretion in the period of 1750-1850 it is possible to state that it was not as extensive as it would seem at first glance and was still present to some extent at the end of the period. The debate surrounding judicial discretion was instrumental to the collapse of the 'Bloody Code' in the 1830s which narrowed its remit. However, it is arguable that the abuse of the wide discretion possessed by the judges was exaggerated by advocates of reform and the core of the debate lies deeper, in different and transforming notions of justice[28].

III. Importance of Judicial Discretion to the Reforms of the 1830s

i Supporters of Discretionary Power

The judges were keen to retain their discretion as they believed that the power to grant mercy and discretion were what made the system humane as they could ensure that the law was applied in a moral manner and that only the most deserving suffered its full severity. Hay attributed this desire to the self-serving attitude of the propertied elite utilising the ideas of mercy, justice and majesty to create the law as an ideology to the lower classes, compelling them to adopt a positive image of the law. However, Langbein points out how Hay legitimates his argument by dismissing factors that go against his thesis as 'sub-plots', such as seemingly justified

[28] McGowan (n1)

acquittals or the granting of mercy, showing possible weakness to his thesis[29].

The oppositions to reform were not only the judges but the conservatives of the time. Although few defended the severity of the law, many took the standpoint that the discretion of the judiciary was of great importance as it incorporated wisdom, knowledge and experience into existing practice which was both desirable and necessary in the administration of justice. The judiciary were well educated and experienced in the law so it was argued that there was no better place to vest the discretionary power than with them, 'it was a system based on experience and history, not speculation' [30]. Reform would result in mechanical certainty as laws could never be perfect and account for every shade of circumstance in a case, but personal judgement and discretion could compensate for this imperfection [31]. Moreover, it was argued that taking away discretion within the trial would leave the accused without the 'protective benevolence' of the judge as well as lead to more inequality as only the wealthy would afford legal representation[32].

ii The View of the Reformers

On the contrary, advocates of reform argued that judicial discretion was not important to the administration of justice and was actually creating injustice. It was claimed that there was no certainty and equality in the law and therefore no real lesson of deference or discipline to the populace. Punishment was distributed in a 'lottery of justice'[33] meaning citizens could not make the link between an offence and a particular punishment. Furthermore, the fact that there had to be so much recourse to discretionary power to grant mercy was viewed as evidence of the disorganisation of the inhumanity and disorganisation of the system. According to

[29] Langbein (n11)
[30] McGowan (n1)
[31] Ibid
[32] Ibid
[33] Ibid

McGowan, the reformers were successful in their quest for change through the reinterpretation of aristocratic judicial practice in order to create the appearance of injustice[34]. The scope and nature of judicial discretion were arguably exaggerated and linked to 'discredited principles of aristocratic government' which assisted in pushing through the reforms of the 1830s[35].

It is clear that both sides of the debate agreed that judicial discretion was the operative principle of the administration of justice[36]. Additionally, both sides shared the aim of creating an image of justice which was satisfactory in the eyes of the populace; it was how to achieve this that was in disagreement[37]. According to McGowan judicial discretion was not rejected, it was more that claims about its nature were no longer understood due to a transforming image of justice; as King stated, 'Justice was not brilliant in this period but it does not mean that it was an empty word'[38].

IV. Conclusion

In conclusion, in the late 18th century the scope of the judges' powers of discretion were most prevalent in their dominance over the trial, post-trial proceedings and the punishment of offenders. However, King's research has illustrated that these powers were exercised in a more principled manner than the reformers believed and represented. The importance of judicial discretion to the collapse of the 'Bloody Code' is highlighted in the self-serving and arbitrary aims attached to the prerogative of mercy and discretion possessed by the aristocratic elite, utilised by the reformers to give an inhumane image which arguably did not completely reflect reality. Therefore, it is possible to state that this amplified image of discretion was used as a tool to push through reforms to remove the death penalty from many offences in

[34] Ibid
[35] Ibid
[36] Ibid
[37] Ibid
[38] King (n2)

the 1830s, in accordance with the transforming image of justice at the time. The judiciary and conservatives of the time believed the prerogative of mercy was what made the system humane and prevented mechanical justice. This attitude of the judiciary towards the retention of their discretion did not change and considerable discretionary power remained in 1850. Thus, in this period judicial discretion underwent some small reductions in scope but its importance in the changes to trial and punishment, albeit exaggerated, cannot be denied.

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Constitutional Conventions in the United Kingdom: Should they be codified?

Megan Caulfield

Abstract

This Article outlines whether constitutional conventions should be codified in the event that the United Kingdom were to adopt a codified constitution. Currently, the UK's constitution is un-codified. There has however, been much debate as to whether the UK should adopt a codified constitution. One of the overwhelming questions that faces those who propose the adoption of a written constitution is whether constitutional conventions should be codified and thus, whether the nature and purpose of conventions would allow for this radical change. Arguments for and against codification of conventions are considered in the context of four leading solutions: codify and legally enforce them, codify them and leave them as non-legal guidelines (as is the position in Australia), codify a selection or not codify them at all. This complex debate has been considered by Parliament, the courts and numerous academics; this article seeks to outline this complex debate and the many conflicting opinions. It is concluded in this article that to leave conventions as uncodified would be the best course of action for a newly codified constitution in the United Kingdom.

I. Introduction

A.V.Dicey separates legal rules from conventions whereas, Sir Ivor Jennings believes that the two can not be separated: 'without conventions legislation and case law are quite unintelligible.'[1] If law can not be separated from conventions as Jennings suggests, it would surely be difficult to create a codified constitution without including conventions. Marshall's argument however, is closer to that of Dicey's as he implies that constitutional conventions are unlike legal or

[1] Geoffrey Marshall, *Constitutional Theory,* (Clarendon Press, Oxford, 1980), 10.

moral rules because they are neither an outcome of legislative or judicial decisions and they rarely govern matters that are morally debatable.[2] It could be argued that it is unnecessary to codify conventions that do not have a direct moral impact upon the population. This debate regarding the distinction between legal rules and conventions is questionable because of their significance within the UK's legal system. Whichever theory is preferred it cannot be ignored that 'their constitutional importance in the United Kingdom is immense'[3]. As a result of their importance, it is a challenging task to decide whether or not conventions should be codified. In considering this debate it is also to consider the nature and impact of conventions themselves. This essay seeks to examine whether constitutional conventions should be codified if the United Kingdom were to adopt a codified constitution. There is the choice to codify and legally enforce them, codify them and leave them as non-legal guidelines, codify a selection or finally, not codify them at all; each potential outcome will be discussed in turn.

II. Should conventions be codified?

i. The easy way out? Not codifying conventions

The easiest approach would be not to codify conventions at all. [4] The United Kingdom has never had a codified constitution and the conventions within this uncodified constitution have never been the clearest set of rules to follow. In the United Kingdom's uncodified constitution, conventions do not have to be followed unconditionally[5] and it is possible for a Government to set aside a constitutional convention if by following it, justice will not be provided. In the Crossman diaries case[6] in 1976 the Attorney General was

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[2] Geoffrey Marshall, *Constitutional Conventions,* (OUP, 1984), 216.
[3] David Jenkins, 'Common law declarations of unconstitutionality', [2009] 7(2) IJCL, <http://icon.oxfordjournals.org/content/7/2/183.full.pdf+html>
[4] Rodney Brazier, *Constitutional Reform: Reshaping the British Political System,* (Oxford University Press, 2008), 164.
[5] Marshall (n 2), 216.
[6] *Attorney General v Jonathan Cape Ltd* [1976] QB 752 .

unsuccessful in enforcing the convention of collective cabinet responsibility. Lord Widgery noted that: "whatever the limits of the convention...there is no obligation enforceable at law to prevent the publication of Cabinet papers, except in extreme cases where national security is involved."[7] In this case a constitutional convention was applied but ignored; as a consequence we do not know how they will apply when put to the test[8] or whether they can be morally justified. To legally enforce or codify conventions that are impractical would be to inflict problems upon the Government and courts who would have no choice but to apply them.

Without codification, conventions can be 'applied to fresh political circumstances'[9], not ignored, but applied where necessary. Again, this argument is in support of not codifying constitutional conventions. Jenkins comments that '...without conventions, the Constitution loses its modern, democratic mechanisms and becomes no more than the bare frame of an old, still autocratically minded relic of the Glorious Revolution.'[10] He implies that constitutional conventions bring flexibility to what would be a rigid legal framework but also that the constitution can be kept up to date with the changing needs of Government.[11]In 2006, both the House of Lords and the House of Commons began to consider codifying certain conventions that affected the House of Lords and legislation.[12] The ideas were rejected on the grounds that to codify conventions would be a contradiction, considering that their purpose is to provide flexibility and have the capacity to evolve.[13] To codify conventions would be to reduce their adaptability as circumstances change and

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[7] *Attorney General* (n 6) (Lord Widgery)
[8] Institute for Public Policy Research, *A written constitution for the United Kingdom,* (Mansell, London, 1993), 214.
[9] Marshall, *Conventions,* (n 2), 217.
[10] Jenkins (n 3)
[11] Peter Leyland, *The Constitution of the United Kingdom,* (Hart Publishing, 2007) 25.
[12] A.W.Bradley, K.D.Ewing, *Constitutional and Administrative Law,* (Longman, 2010, 15th edition), 28.
[13] Joint Committee on Conventions, *Conventions of the UK Parliament,* HL Paper 265-1, HC 1212-1.

society progresses; they should not be legally enforced and they should not be codified to preserve this advantage that our constitution has.[14]

ii. The desire for certainty: codifying conventions

It could be argued that codifying conventions would bring certainty and make constitutional law more easily accessible. The *Ministerial Code* is an example of a set of codified conventions published by the Government that apply to Ministers in Parliament. It could be useful to bring together rules on a defined subject so that they are readily available for the public; this is one option open to Parliament.[15] In response however, it could be argued that although it may provide easier access, the majority of conventions, like those in the *Ministerial Code* do not directly affect citizens of the state. They 'do not affect individuals closely enough'[16] to justify the need of a single, accessible document being produced, especially when considering the difficulties that would accompany its drafting.

iii. The Australian example: Codifying a selection of conventions

If we decide not to codify the entirety of constitutional conventions, another option would be to codify a small selection: certain conventions that affect the public could be codified and those otherwise should not. A similar approach has been adopted in Australia, which has a statement of the main constitutional conventions that affect the federal Government.[17] This could be a course of action that the United Kingdom could take; to codify certain conventions but not legally enforce them.

The nature of conventions themselves obstruct this seemingly reasonable idea. Not only are they flexible but

[14] Brazier (n 4), 164.
[15] Bradley (n 12), 29.
[16] Bradley (n 12), 29.
[17] Brazier (n 4), 165.

their 'content and scope is at times unclear.'[18] Identifying conventions presents a difficult task and their uncertainty has caused a significant amount of debate in Parliament. In 1955, Sir Antony Eden wanted to appoint Lord Sailsbury as Foreign Secretary but was deterred from doing so according to the convention that the Foreign Secretary must be appointed from the House of Commons. Despite this, Lord Home was appointed as Foreign Secretary in 1960 by Harold Macmillan and Lord Carrington by Margaret Thatcher in 1979. That which was perceived to be a convention initially, eventually turned out to be a generalisation.[19] This clearly illustrates the uncertainty surrounding conventions and why it would be inconceivable to codify only a selection.

vi. Codifying and legally enforcing conventions

In considering the uncertainty of conventions it would not be plausible to either codify or legally enforce a set of regulations that are so vague and unclear. Conventions, by their very nature, are ambiguous but also flexible and thus, should not be codified or legally enforced in order to maintain this vital characteristic of the United Kingdom's constitution.

Despite their ambiguity conventions are observed because of the problems that arise if they are not.[20] Dicey argues that it is legal difficulties that arise whereas Jennings notes that 'conventions are observed because of the political difficulties which arise if they are not.'[21] In 1909 the House of Lords refused to pass a money Bill, which was a clear breach of convention and caused both legal and political outrage. As a result, in 1911 a statute[22] was introduced to enforce in law that which had previously been a convention. If certain conventions are found to have serious consequences when

[18] Vernon Bogdanor, Stefan Vogenauer, 'Enacting a British Constitution: some problems' [2008] PL Spr 38-57.
[19] Bogdanor (n 18.)
[20] Leyland (n 11), 27.
[21] W.I.Jennings, *The Law and the Constitution,* (University of London Press, 1938, 2nd edition), 128-9.
[22] Parliament Act 1911, s1(1).

breached, it would be reasonable to enforce a selection as law and codify them. Conventions are rarely ignored and thus, to begin a process of codifying and enforcing them could be seen to be unnecessary when considering the extremely challenging task in hand.

III. Conclusion

As has been illustrated in this article, deciding whether to codify constitutional conventions poses a complex question. To codify and enforce all conventions by law would arguably introduce certainty but completely restrict the flexibility that the United Kingdom's constitution holds. Instead a proportion of the most significant rules could be enforced and codified. This raises the issue of how to classify conventions and why those that are not classified as important are valuable as conventions at all. It has also been suggested that a 'non-legal statement'[23] could be made of conventions, as in Australia. However, the fact that they are not all agreed upon or followed raises concerns.

Considering the arguments and nature of conventions, it is clear that the easiest approach to take is to leave them as they are[24] and embrace the flexibility that they bring to our constitution. It is noted that conventions play a more significant role in countries with written constitutions because '...the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring.'[25] Thus, if the United Kingdom were to adopt a written constitution the informal, flexible and non-legal rules would continue to work as a fundamental part of the UK constitution, as they have for hundreds of years. To leave conventions as un-codified would be the best course of action for a newly codified constitution in the United Kingdom.

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[23] Brazier (n 4), 164.
[24] Brazier (n 4), 164.
[25] C.R. Munro, 'Laws and Conventions Distinguished' [1975] 91 LQR, 218-219.

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Economics and Jurisprudence: Is John Rawls' difference principle just another form of supply side economics and can it be applied effectively in modern society?

Darya Kraynaya

Abstract

The article discusses the possibility of supply side economics as an extension or recreation of John Rawls' difference principle. One of the key arguments of the difference principle is to permit economic disparity in a society as long as the least advantaged are benefitted in the best way possible. Through scrutinising the differences, similarities and results of applying each of these two theories, the author submits that the two cannot possibly be one and the same as on application vast disparity is revealed. The article makes this argument by highlighting examples of the application of a supply side economic theory in American history. Special attention is given to the United States as some economists have tried to use Rawls' reasoning behind the difference principle to justify the gap between the top 1% and the rest of the population.

I. Introduction

At first, it may appear that John Rawls' difference principle and the theory of economics are fairly similar, so much so that one could be said to be just one form of the other. Despite the fact that in recent years, particularly in the United States, some economists have tried to justify the growing gap between the rich and the poor by using the difference principle, on application, and once analysed in depth, these theories are rather different. To question whether these two ideas really have resemblance, this essay will take the reader on a journey, first addressing the basics of the difference principle and its criticisms, and then turning to the basic claims of supply-side economics and how they have been criticised. The essay will then consider these differences

and similarities respectively, with examples from US history. The goal of this essay is to make the argument that although it is possible to draw a parallel between these two theories, they are rather different when applied.

II. The Difference Principle

John Rawls' rejection of utilitarianism resulted in the development of his own theory of distributive justice which did not rely on the conceptions of the good. Rawls starts out with two justice principles which he claims will be selected by rational individuals once they place themselves in the original position. The original position is a state of complete ignorance. This is achieved when the decision-making process within a society is not tarnished by factors like gender or class prejudice. This can be employed by using the maximin principle, in which individuals assume they belong to the class of people who would be worst affected once the "veil of ignorance" is lifted. Once this position is assumed, Rawls posits that rational people will only consider two principles.

The first principle is the liberty principle which allows for all members of society to have the privilege of basic liberties. The second principle has two parts. First is the difference principle, allowing for inequalities in distribution of primary goods within society, so long as this benefits the least advantaged in the best possible way. Second is the equality of opportunity which requires institutions to make positions available to all based on equal opportunity.[1] These two parts of the second principle must be considered together because equality of opportunity on its own is "intellectually unstable."[2]

For Rawls, the difference principle solves the injustice of unequal natural distribution. Zoltan Miklosi suggests that Rawls is responding to "the unfairness of unrestrained economic returns on native talent."[3] Whilst the ultimate goal

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[1] J. Rawls, *A Theory of Justice* (Revised Edition, OUP 1999), 266.
[2] N. Simmonds, *Central Issues in Jurisprudence* (3rd ed, Sweet & Maxwell 2008), 71.
[3] Z. Miklosi, 'Does the Difference Principle make a Difference?' Res Publica (2010) 16(3), 267.

is not a society with equally distributed wealth, the difference principle aims to redistribute the primary materials so as to benefit the least advantaged. Miklosi suggests that the least advantaged will be a group of "the least effortful and the least endowed, or a combination of lack of effort and talent".[4] Rawls accepts inequalities in such a society as long as the least advantaged are better off than they would have been without inequalities. Even if the status of the least advantaged is enhanced by a very small number, Rawls allows inequalities. However, inequalities which cause no harm yet do not result in benefits for the least advantaged are not allowed.[5] Rawls does not place a limit on how much better the status of the least advantaged should be. Furthermore, institutions within the society that must reflect the guidelines of the difference principle are crucial, yet individual conduct does not play much of a role.[6]

III. Objections to the difference principle

The most prominent objections against the difference principle come from Robert Nozick and Will Kymlicka. Nozick submits two objections to the difference principle. Rawls overlooks the distinctness of persons when he suggests that natural talents of the most advantaged should be a shared asset within the society so as to balance the lack of benefits for the least endowed.

Nozick equated Rawls' proposition to stealing and slavery arguing that the better endowed persons have full rights to everything that they possess and any profit they may reap, because they were better endowed by natural distribution.[7] The difference principle is considerably unfair to the naturally talented because it demands that they share not only their talents but the revenue they acquired with the rest of society. Granted that Rawls' main concern is for the least advantaged, natural talents, arguably, are the property of

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[4] [n 3] 267.
[5] [n 3], 265.
[6] [n 2], 79.
[7] R. Nozick, *Anarchy, State, and Utopia* (Blackwell Publishing 2010), 185-187.

those who possess them. Therefore, turning their property into a communal asset is unfair. Rawls' proposition would require gathering all goods and wealth within society and redistributing it among everyone, which for a start is not economically viable. Someone would always end up on the losing end and this would continue as a vicious cycle.

Kymlicka argues that the difference principle does not give enough consideration to personal choice and concentrates too much on the importance of natural inequalities.[8] People should rely on their ambition to fulfil their destiny rather than hope that their natural and social endowment will pave the way for their economic and social welfare.

IV. Supply-Side Economics

Supply-side economists advocate corporate and income tax cuts for the wealthy along with less regulation and involvement by the government, as a way to improve the economy.[9] There is no special attention given to the standard of living of the least advantaged. This theory is primarily based on Say's Law, "supply creates its own demand". These economists argue that leaving workers with a higher portion of their salary provides an incentive to contribute more labour which would result in more products, therefore increasing supply of goods available on the market. Also known as Reaganomics or the trickledown theory, the idea is that the more wealth the upper class accrues, the 1% of the population, the more of it will flow into the general economic pool and ultimately result in helping the least advantaged. E. C. Pasour Jr. explains the essence of supply-side economics as "increased tax rates deter economic activity, drive it underground, or cause it to switch into legal but untaxable outlets."[10] Supporters of this theory claimed that it was advantageous to the people as well as the government,

[8] W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (OUP 1990), 70.
[9] J. Sloman and A. Wride, *Economics*, (7th ed, FT Prentice Hall 2009), 655.
[10] E. C. Pasour Jr., 'Supply-side Economics: A Return to Basic Principles?' Modern Age, (Winter 1982) 26(1), 58.

cautioning that higher tax rates motivated workers to find ways to conceal as much of their taxable income as possible. Quoting Gunnar Myrdal, Pasour listed Italy and Sweden as examples where higher tax rates resulted in a large portion of underground economic activity and emphasized that this was a growing problem in the USA as well.

V. Criticisms of Supply-Side Economics

The debate that supply-side economics is merely a rewording of elementary classic economic principles has been going on for several decades and its criticisms are copious. The majority of the opponents argue that cutting taxes is not the answer. Throughout American history, governments have turned to supply-side economics more than once to 'save the economy.' Has it worked and what were the consequences? During his first term, President George W. Bush's central proposal in 2000 was tax cuts. He vowed to decrease income taxes for every bracket. Four years later he claimed the tax cuts would help the economy by encouraging the public to spend money.[11]

According to Richard Kogan's analysis of underlying annual economic growth rates in the 1980s and part of the 1990s, the tax cuts had little effect. He demonstrates that the US economy goes through business cycle peaks and economic growth is the result of "more people working and more output per hour" rather than tax cuts.[12] Quoting a Republican analysis by the House Committee on Budget, Kogan stressed that the best tax incentive is "reduction of deficit"[13]. The tax cuts proposed by George W. Bush tended to benefit high income households and there was little, if any, benefit to middle class households, whilst the poorest saw no gain at all.

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[11] N. Gregory Mankiw, *Macroeconomics* (7th ed. Worth Palgrave Macmillan USA 2010), 296.

[12] R. Kogan, 'Does Cutting Tax Rates Increase Economic Growth?' (1996) http://www.cbpp.org/archiveSite/TXCT85.HTM accessed 27 February 2012

[13] Budget and Economic Analysis 1(3), House Committee on the Budget, U.S., House of Representatives, (1996)

VI. Differences

There are several differences between the two theories but there are only two glaring and crucial distinctions. At the onset of supply-side economics, beginning with Jean Baptiste Say and what became to be known as Say's Law, the main priority has always been to boost the economy and reduce the deficit. Even if the welfare of the least advantaged was mentioned, it was a secondary concern. In the US, supply-side economics saw a rise in popularity in the 1970s and its popularity continued growing in the 1980s. A majority of Wall Street economists were singing praises to the idea, even though many others, like E.C. Pasour were questioning whether this was really something new or merely "a return to basic principles."[14] Before George Bush Sr. came into the office as vice president, he called Reagan's proposals "voodoo economics."[15] Under the Reagan administration the gap between the rich and the poor grew continuously; many considered this the consequence of the tax cuts Reagan and his advisors so vehemently promoted.[16] The least advantaged, and under Reagan's administration these were unskilled workers, were affected the most and as a result of the new economic policies they lost their jobs. Those who were employed under the minimum wages saw a decrease in their salaries. Supply-side economics was endorsed as a safe policy that was going to benefit everyone in society. The result was less than satisfying.

According to the difference principle, the situation for all members of the society will improve and, both, the most advantaged and the least advantaged will be in the best possible position from where they started. Employing supply-side economics however, the upper class maintains their status while also retaining more of their income. At the same time, the lower class does not receive more benefits or higher

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[14] [n 10]
[15] BBC News, Reagonomics or voodoo economics?' (2004) http://news.bbc.co.uk/1/hi/world/americas/270292.stm accessed 27 February 27 2012
[16] [n 15]

wages; instead they are left hoping that the incentive provided for the wealthy will result in them investing more money in the economy, which in turn will result in higher productivity, which somehow will "trickle down" to the poor. Regardless of what any government has argued this does not work, and the recent economic crisis has made that even more obvious. Particularly in the US, the situation speaks for itself. Several Presidents, along with their advisors, beginning with Reagan, have been seduced by supply-side economics. President Reagan and President George W. Bush witnessed two of the worst economic recessions in American history. After tax relief has been provided for the wealthy, the lowest and middle class citizens have seen little benefit. Instead, unemployment has grown, and the standard of living has decreased with most average Americans left without health insurance coverage and many without jobs and without a home.

It appears that supply-side economists saw the difference principle as their panacea for making people believe in what they were selling. George DeMartino explains that the difference principle has been used as a "cover for unprecedented increases in global income inequality over the past three decades."[17] Accordingly, the two concepts cannot be the same nor could the difference principle be merely another form of supply-side economics. In his musings and explanations of the difference principle, Rawls sought a way to diminish the gap between the rich and the poor, even if it was only by a small amount. As long as the worst off were in a slightly better position than they would have been without the inequalities existing, for Rawls this was already a step in the right direction. DeMartino points out that "Rawls and other egalitarians would hardly approve" of the way the neoliberals have used the difference principle as a justification for allowing the upper class to become even more affluent.[18]

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[17] G. DeMartino, *Global Economy, Global Justice: Theoretical Objections and Policy: Alternatives to Neoliberalism* (Routledge 2000), 110.
[18] [n 17]

The second important difference is that under the supply-side economics theory, equality of opportunity is not guaranteed and not even considered. While the difference principle and the equality of opportunity form two parts of the second principle of distributive justice, they are more effective when considered together. If supply-side economists gave consideration to the idea of equality of opportunity, the economic theory might be more effective because then, it would account for the wellbeing of all members of a given society, rather than just focusing on improving the economy itself.

The difference principle is part of a hypothetical social contract that is meant to take place in a society unburdened by social prejudices and selfish motivations in decision making. Supply-side economics, even in a hypothetical situation, is unlikely to work in such a society. Moreover, supply-side economics has been applied throughout history by US and the UK, both largely capitalist societies. Application of the difference principle in a pure capitalist society is simply impossible.

VII. Similarities

Could it be possible to encounter any similarities between these two theories? Even at a first look, it is obvious that both allow for the wealthy to not only preserve their wealth, but also to acquire more income. While under the difference principle, Rawls outright allows for inequalities to exist within the society, as long as the least advantaged are benefitted even by a small measure, under supply-side economics inequalities are created and even justified by the government, and as a result the poor see no benefit whatsoever.

Overall the purpose of these theories is to improve society making everyone happier with their situation. However both these theories share the fact that in the long term, they inevitably fail in what they set out to achieve. Nozick highlights that despite the fact that the rich are continuing to grow their capital, they would soon realize that their wealth

could be just as great without the social contract with the least advantaged.

Rawls response to this is the following. He believes that without the difference principle, the least advantaged would be unhappy with their situation, but this leads back to the aforementioned criticism of enslaving the most advantaged to turn their natural talents into a communal commodity.[19] Certainly, Rawls does accept that in reality his social contract would not be agreed to as demonstrated by supply-side economics implementation. Members of the upper class accept lower taxes and enhance their personal wealth, but they do not give incentives to the lower class on an equal scale. This style of managing the economy is clearly short lived and in the end can result in society as a whole suffering.

Within the last paragraph, another similarity is apparent, that of unfair wages. Rawls' theory would imply as stated, that those who are less talented would be placed in the best possible position. According to Pegu, this could result in unfair wages or unjust enrichment because the theory does not require a person to earn his wealth.[20] That person is guaranteed allocation of the best possible portion of wealth that exists within the society. Similarly, supply-side economics allows for unfair wages since one's efficiency does not determine one's wages; although in this case it is the lower classes who are left disgruntled. Evidently, this does not result in a fair society, nor does it improve the society much.

Supply-side economists can argue until they are blue in the face, but the idea of decreasing tax burdens for the most wealthy has not and will not aid the middle and lower classes to enhance their economic status. This has been demonstrated numerous times in American, as well as European history, particularly with the recent economic crises. Therefore the careful consideration of the two theories and analysis of their application to actual society

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[19] [n 2], 88-90.

[20] A.C. Pegu, *The Economics of Welfare* (3rd ed., MacMillan and Co. Limited 1929), 553.

reveals that although fairly different, the Rawls' theory could help improve supply-side economics efficiency.

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Necessity or Nuisance? A Comparative Review of the Approach towards the Recovery of Pure Economic Loss in English Law with that of French Law

Rudi Roscetti

Abstract

English judges are reluctant to allow claims in damages for pure economic loss. This is primarily due to the "floodgates" argument or , in other words, the fear that by allowing such claims the courts would be inundated with an administratively unmanageable number of cases. The purpose of this essay is to assess whether such a cautious approach is necessary. In order to do so, the approach in England will be compared to that in France. This article will, firstly, determine whether the approach taken in France with regards to pure economic loss is, in style, as restrictive to that taken in England. Secondly, this article will analyse whether the potential difference in style leads to a difference in substance – is there a difference in the outcome of particular cases? It will conclude , on the basis of the comparison of the two legal systems, that the approach taken in England is indeed unnecessarily restrictive.

I. Introduction

In recent years, the English courts have been extremely reluctant to allow claims for negligently caused pure economic loss.[1] The reasons behind this are numerous, as are the tests which have been employed in an attempt to limit liability in this particular field of negligence. The aim of this paper is to assess the necessity of such a cautious approach. Kahn-Freund once said that comparative law "is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law; and especially for looking at

[1] Simon Deakin, Angus Johnston and Sir Basil Markesinis, *Tort Law* (6th edn, Oxford University Press 2008), 157.

one's own law."[2] Therefore, the best way to assess whether such strict limitations with respect to recovery of pure economic loss are justified and necessary would be to compare them to those imposed in another legal system.

This article will, firstly, determine whether the approach taken in France with regards to pure economic loss is, in style, as restrictive to that taken in England. Secondly, this article will analyse whether the potential difference in style leads to a difference in substance. For example, is there a difference in the outcome of particular cases? Or, more specifically, a difference in cases of *dommage par richocet* – that is when "when physical damage is done to the property or person of one party and that loss in turn causes the impairment of a claimant's right" [3] – and negligent misstatement. Finally, it will be assessed, based on the observations made during the analysis of the two legal systems, whether English law is indeed too cautious in restricting claims for purely economic loss.

II. Background

It is a long established legal maxim that *ubi jus ibi remedium*[4] (where there is a right, there is a remedy). Nevertheless, this seems to be no more than an optimistic theory which, in practice, has been unachievable in legal systems across Europe, particularly in the area of economic loss caused by negligent conduct.

It is probably worth highlighting before proceeding that the type of economic loss considered in this essay is not only negligent (non-intentional) but also pure. Whilst a common definition of pure economic loss does not exist, [5] The

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[2] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' [1966] 82 LQR 40, 41.

[3] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 11.

[4] Tracy A Thomas, '*Ubi Jus Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process' (2004) 41 San Diego L.Rev 1633, 1637.

[5] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 6 <http://www.ejcl.org/113/article113-9.pdf> accessed 10 February 2012.

European Centre of Tort and Insurance Law has described it as being "loss that is neither consequential upon death nor personal injury of the claiming victim nor upon the infringement of the victim's property."[6] This would, however, exclude recovery for loss caused *par ricochet*. It is therefore submitted that, as Gilead has stated, it is more precise to define it as "[loss] not consequent on bodily injury to the [claimant] or on physical damage to land or chattel in which the claimant has a proprietary interest."[7]

This distinction between different types of economic loss is of paramount importance as it is widely accepted that both loss intentionally caused and consequential economic loss are recoverable.[8] The reason for this is mainly one of policy, with the number of claimants being restricted to those who have suffered intentional or some direct harm to their person or property that results in consequential loss. The recoverability of purely economic loss on the other hand differs significantly between legal systems.

In English law there would seem to be no interdependency between different heads of tort: each head protects a particular interest through the use of particular rules. It could be argued that this type of system may be beneficial as each case may be dealt with in a more appropriate manner. However, the absence of a general principle of delictual liability (acts that harm or otherwise cause damage to another[9]) means that a claimant who fails to meet a particular set of circumstances will receive no compensation. This is because they either do not fall under one of the heads of tort because they fail to meet certain requirements such as the presence of a duty of care, a

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[6] European Centre of Tort and Insurance Law 'Pure Economic Loss' http://ectil.org/ectil/Projects/Completed-Projects/Pure-economic-loss.aspx accessed 22 February 2012.

[7] Israel Gilead 'Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both or In-Between?' (2006) Theoretical Inq L 511, 513.

[8] Simon Deakin, Angus Johnston and Sir Basil Markesinis, *Tort Law*, (6th edn, Oxford University Press 2008), 157.

[9] Robert Joseph Pothier, *Le Traité des Obligations* (1761): "...on appelle délit, le fait par lequel une personne, par dol ou malignité, cause du dommage ou quelque tort à un autre."

subsequent breach of duty and a causal link in the case of negligence or, alternatively, because they *do* meet a particular set of circumstances but are precluded from obtaining damages due to the existence of self-contained categories for which recovery is generally not allowed. Pure economic loss is an example of the latter.[10]

The courts' consistent reliance on whether it is 'fair, just and reasonable'[11] to impose a duty would suggest that it is on the basis of policy considerations, (such as the floodgate argument) that English law is in essence so reluctant to impose liability for pure economic loss.[12] Furthermore, the exceptions to the general rule of irrecoverability, such as the Fatal Accidents Act 1976 and the cases of negligent misstatement, seem to have the common element of excluding the risk of opening the "floodgates" to an indeterminate amount of claims. It is submitted for this reason that in the absence of such fears the English courts may be more willing to extend the recoverability of economic loss.

This 'exclusionary rule,'[13] whilst popular in England, is unknown in French Law. The civil legal system in France also distinguishes between various sub-categories of delict, but the basis of liability rests on a mere five articles contained in the Civil Code.[14] Upon reading article 1382[15] - which states that any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it,[16] it is clear that the French are unfamiliar with the existence of a separate category of pure economic loss

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[10] Giuseppe Dari-Mattiacci, 'Tort Law and Economics' (Utrecht University Working Paper, 2003)< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=347801> accessed on 22 February 2012, 2.

[11] *Caparo Industries plc v Dickman* [1990] UKHL 2

[12] See *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27.

[13] D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748.

[14] See Articles 1382, 1383, 1384, 138 and 1386, Code Civil.

[15] Article 1382, Code Civil: "tout fait quelconque de l'homme, qui cause a autrui un dommage oblige celui par la faute duquel il est arrive à le réparer"

[16] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 34.

and use the general principle of *faute* (fault) to determine when someone will be liable to pay damages. This is further qualified by article 1383[17] to include liability for harm caused to by negligent or careless conduct. However, it is not to be assumed purely on this basis that the French are more generous in allowing claims for pure economic loss. The absence of a distinction between types of harm merely means that it may be claimed *en principe* (in principle) but it must be remembered that the French courts have other 'tools' which aid them in limiting liability. For a claim to be successful, the damage concerned must usually infringe *un interet legitime juridiquement protégé* (a legitimate and legally protected interest) and the damage caused must be direct and certain consequence of the negligent act.[18]

Nonetheless, it is still evident that there is a significant difference in style between the two systems: pure economic loss caused by negligent conduct is, at least in theory, recoverable in French law whereas in England it is *prima facie* not, due to policy considerations.

III. Differences of substance

It is, as mentioned above, the purpose of this article to determine whether the 'floodgate fears' of the English courts justify the general exclusion of recoverability for pure economic loss. If the French courts are not inundated with an overwhelming amount of claims this may indicate that the application of the general principles are sufficient in limiting the number of potential claims. This would render the English approach unduly excessive. The functioning in practice of the two different approaches shall now be analysed with regards to (i) *dommage par ricochet* in the context of fatal accidents and personal injury and (ii) negligent misstatements.

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[17] Article 1383 Code Civil: "Chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa négligence ou son imprudence."

[18] Jean Carbonnier, *Droit Civil Volume 4: Les Obligations* (10th edn, PUF 2009).

Dommage par ricochet arises when damage is done to the person or property of the victim but causes loss of a purely economic type to a secondary victim. This includes the loss caused to a dependent (upon the death of a person the dependent financially relies upon).[19]

In England, an apparent exception is made to the general rule of irrecoverability under the Fatal Accidents Act 1976. As can be expected in the common law system, the scope of recoverability is limited by the requirement that the dependant fall within one of the categories of persons legally entitled to claim under an exhaustive list set out under s 1 of the 1976 Act. It is an important characteristic of this claim that the claimant's action for damages is accepted as being theoretically independent from the action of the primary victim, in the absence of death. A logical explanation for this is that to say otherwise would mean that this type of ricochet loss is not purely economic but consequential upon personal injury or, more specifically here, death.

However, this does not seem to be the case in practice in English law, where certain restrictions are imposed by considering the conduct of the deceased primary victim as demonstrated by the dismissal of a claim when the primary victim would not have had an action himself if he had not died. This is an example of the common law system attempting to reduce the number of potential claimants in such claims. However, this is not the only hurdle that need be overcome. Even if the claimant satisfies s 1 of the 1959 Act and can prove that the primary victim would have been able to sue in negligence if he had survived, he may not receive damages equivalent to his pure economic loss if the primary victim was contributory negligent. Furthermore, the policy consideration that such claims may result in the defendant being liable for unlimited amount of damages has been addressed under s 3(2) of the 1976 Act,[20] which states that the total damage to all dependants will be assessed as a

[19] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 22.
[20] Fatal Accidents Act 1976

lump sum and then subsequently divided between them. This mechanism ensures that the quantum of damages is independent of the number of dependants.

It is submitted that, based on these considerations, the Fatal Accidents Act 1976 is not a true exception to the irrecoverability of pure economic loss as the success of claimants seems to be dependant not only upon the conduct of the defendant with respect to the claimant, but also upon the conduct of the deceased victim, thus meaning that this type of ricochet loss is treated in English law as an extension of personal injury. This is an example, once again, of the English law's reluctance in allowing general recovery for pure economic loss due to policy arguments.[21]

It is a well-known fact that the English prefer to have particular rules for particular types of tort, which reflects the influences of Roman law, whereas the French prefer general rules of liability favoured by natural law.[22] This is reflected in the common law approach to ricochet loss due to fatal accidents and is also a true reflection of the approach taken in civil law.[23]

In France the liability of a defendant with respect to the dependent of someone he has killed is based upon the general application of article 1382. The only cases in France which seem to be made on the basis of policy considerations are with regards to concubines and claims for economic loss upon the birth of a healthy child.[24] However, these policy considerations are not made on the basis of the type of harm claimed being pure economic loss but upon the fact that it would be immoral to allow such claims. These cases excluded, it is at least *en principe*, possible for anyone to claim as long as they can prove they were dependent upon

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[21] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748.

[22] John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn, OUP 2008)

[23] FH Lawson and BS Markesinis, *Tortious Liability for Unintentional Harm Volume I* (CUP 1982)

[24] Jean Carbonnier, *Droit Civil Volume 4: Les Obligations* (10th edn, PUF 2009) 143-172.

the primary victim. In practice however, the application of the general principles does seem to limit the number of successful claims as it is difficult to prove that the loss suffered was caused by the defendant's negligence. Indeed, the requirement that the defendant's negligence be the direct and certain cause of the harm is a veritable limit to the recovery of compensation; something which is further limited by the onus of proof being placed upon the claimant. Furthermore, the courts require evidence of an actual undertaking of support on behalf of the deceased with regards to the claimant and, in those cases were the loss is merely one of chance, the chance must be real and substantial. Thus, it has been said that the practical consequences of this are that the number of possible claimants in French law is not much more extensive than that in England.[25]

One type of claim that is allowed in France, whilst being excluded in England, is recovery of loss suffered as a result of the injury of any employee. The nearest English law has come to accepting such a type of loss is in historically allowing *actio per quod seriatim amisit* (claims for loss of consortium). However, the basis for such an action was significantly different to that in France. The interest infringed was seen as proprietary in the primary victim, which would consequently mean that the basis of the claim was one of consequential harm and not one of pure economic loss, as in France. Furthermore, the *actio* was limited to loss of services of a domestic employee and then only when the latter was injured and not killed; thus it cannot in any way be deemed to be as extensive as the French approach.[26] Instead of extending liability for negligently caused economic loss, the English seem to have made it more restricted by abolishing

[25] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748.
[26] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748, 765.

this type of claim under the Administration of Justice Act 1982.[27]

The French, on the other hand, allow recovery for this type of claim on the basis of article 1382 but, as in the scenarios previously examined, limits the scope of liability through the use of general principles such as those mentioned earlier e.g. the requirement that the harm be direct and certain. So in the famous *Colmar* case[28] a football club lost one of its star players due to an accident was awarded damages in order to recover the loss with regards to a transfer fee as it was both a direct and certain result of his injury. However, no such damage was awarded for loss of profits made on people attending football matches on the basis that it was uncertain whether it was 'in fact' caused by the defendant's negligence. Loss of profits is evidently something that can be influenced by many factors and is therefore is by its very nature uncertain and irrecoverable. The requirement of uncertainty in particular has precluded the recoverability of the vast majority of claims for loss of profits whilst allowing claims in meritorious cases.[29]

For the reason above mentioned, it is submitted that also in claims of employers in respect of economic loss upon the death or injury of an employee, that the general principles in France used for limiting liability have been sufficient.

IV. Negligent Misstatements

In the 1964 case of *Hedley Byrne v Heller*,[30] where a bank negligently provided the claimant with incorrect information regarding a prospective client's credit history, the House of Lords seemed to extend the tort of negligence so as to permit claims for pure economic loss suffered by third parties. As mentioned earlier, the courts are usually reluctant in allowing

[27] Administration of Justic Act 1982, s 1 and 2.
[28] Colmar, Ch dét à Metz, 20 avril 1955; *Football Club de Metz v Wiroth,* JCP 1955.II.8741.
[29] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748, 771-772.
[30] [1964] AC 465.

claims for pure economic loss on the basis that it does not meet the three part-test set out in *Caparo v Dickman*. It is to be noted, however, that the recovery for such a loss is dealt with in French law under the law of contract. Furthermore, Lord Devlin stated that the categories of relationship which give rise to liability for economic loss in negligence include those which are equivalent to contract, namely, where there is "an assumption of responsibility in circumstances which, but for the absence of consideration, there would a contract."[31] Thus this is not a genuine example of the English courts permitting recoverability under pure economic loss, as it is only due to the excessive requirements in the formation of contracts or, more specifically, consideration, where it is allowed. This, together with the excessive restrictions upon the recovery under the Fatal Accidents Act, highlights the apparent absence of a true exception to the non-recoverability of pure economic loss in England.

IV. Conclusion

Based on the comparison of the two legal systems it can be concluded that there is a need for the exclusionary approach taken in England. The policy considerations which seem to be behind the irrecoverability of pure economic loss do not justify the excessive reaction of the English courts. Whilst it has been suggested by Marshall that the principles of general liability used in civil law are also actually policy considerations masquerading as legal principles [32] it is submitted that, regardless of their true nature, they are an efficient way to limit the scope of liability for economic loss whilst allowing such claims when it is fair to do so.

[31] Ibid, 529 (Lord Devlin).
[32] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748, 768-770.

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The Moral Justification Against Torture

Amber Edmondson

Abstract

This article aims to highlight the ways in which fear has coloured our usual moral objections to torture resulting in a dangerous rejection of the universal stance against torture and torture methods. The panic induced by the 'ticking bomb' scenario has allowed lawyers, politicians and military officials to undermine international treaties such as the Geneva Convention and has made a mockery of the protection it affords to prisoners of war. By examining the key arguments put forward in favour of torture, we can identify arguments that appear to be a moral justification of torture but on closer inspection reveals more of a side step to international treaty obligations rather than a moral justification. Using virtue, consequentialist and utilitarian moral theory, the pitfalls of the arguments in favour of torture become clear from both a moral and practical perspective. Most relevant here is consequentialist moral theory which is often used to justify torture. However, such reasoning fails to take into account the subsequent consequences flowing from this action including radicalisation of moderates and the moral corruption of those carrying out torture. This paper clearly sets out the modern arguments in favour of torture and enhanced interrogation tactics and highlights why and where they fail. While the current media presents the ticking bomb scenario as a unique threat requiring new and flexible laws, historical responses have been largely unequivocal drawing into question current practices and contemporary justification employed by government administrations and armed forces.

I. Introduction

The 1984 Convention on Torture provides "*no exceptional circumstances whatsoever... may be invoked as a justification for torture*".[1] Torture is also expressly prohibited under

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 165 UNTS 85 (CAT) art 2.

Third and Fourth Geneva Conventions as well as the UN Universal Declaration of Human Rights. Despite this general acceptance that torture is abhorrent, the consequentialist argument that torture may be justified in certain situations has gained alarming support. The attacks of September 11th and the current climate of fear has led to a shift in the moral stance against torture with the United States taking the lead. Yet the arguments justifying torture are weak, and it is important not to allow our usual moral objections to be silenced by panic. To demonstrate that torture is never morally justified, this paper will explore some of the most common arguments in favour of torture and discuss where and why they fail.

II. Torture as an Efficient Means of Eliciting Information

At present there is a lack of evidence that suggest that harsh interrogation techniques used by intelligence agencies produces reliable information. [2] Much of the current methodology and procedures employed by the CIA was reverse engineered from the U.S. Department of Defense's Survival, Evasion, Resistance and Escape (SERE) program by psychiatrists James Elmer Mitchell and Bruce Jessen. [3] Developed during the Korean War, the SERE program trained U.S. soldiers to endure captivity by enemies who didn't adhere to the Geneva Convention. Moreover, this came as direct result of captured American G.I.s forced to give false confessions on Korean Television.[4] However, the tactics and rationale employed by Korean captors were never designed to elicit information but rather to break the will of their victims.

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[2] Intelligence Science Board Phase 1 Report. *EDUCING INFORMATION Interrogation: Science and Art Foundations for the Future* (NDIC PRESS 2006)
[3] Jane Meyer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (Doubleday Publishing 2008)
[4] Frank Summers, 'Making Sense of the APA: A History of the Relationship Between Psychology and the Military' (2008) 18 Psychoanalytic Dialogues: The International Journal of Relational Perspectives, 614 – 637.

Academics such Mitchell and Jessen suggest such techniques can work to produce accurate and reliable intel although this is questionable.[5] Dubious anecdotal evidence has also been glamorized and promoted by popular TV shows such as 24 helping to proliferate the so-called "torture myth".[6] Psychologically, this has had an impact on interrogator mentality resulting in more aggressive and extreme techniques.[7]

In actuality there is very little empirical evidence that supports that effectiveness of these techniques. To the contrary, substantial evidence suggests that more conventional techniques are effective.[8] [9] Indeed, high-level American commanders now suggest that rapport building and treating prisoners with respect and dignity results in better intelligence gathering.[10] However it is extremely difficult to negate the perception of torture as an effective tool, and the discussion surrounding the moral/legal permissibility of this practice should be examined.

III. High Stakes Situations Warrant Torture

The consequentialist argument often utilizes the ticking bomb scenario in which torturing is permitted to save the lives of many. While this situation has never arisen through

[5] Jeannine Bell, 'Behind This Mortal Bone: The (In)Effectiveness of Torture' (2008) 83 ILJ, 339.

[6] Anne Applebaum, 'The Torture Myth' *The Washington Post* (Washington, D.C., 12 January 2005) <http://www.washingtonpost.com/wp-dyn/articles/A2302-2005Jan11.html> accessed 8 February 2012

[7] Philippe Sands, 'Torture Team: Deception, Cruelty and the Compromise of Law' *The Guardian* (London, 19 April 2008) <http://www.guardian.co.uk/world/2008/apr/19/humanrights.interrogationtechniques > accessed 5 February 2012.

[8] Summers (n 4), 614 – 637.

[9] Bell (n 5)

[10] Dexter Filkins, 'General Says Less Coercion of Captives Yields Better Data' *The New York Times* (New York, 7 September 2004) <http://www.nytimes.com/2004/09/07/international/middleeast/07detain.html?_r=1> accessed 5 February 2012.

the history of terrorism,[11] it serves as a counterpoint for discussion. In reality, it is often unclear whether or not a suspect really has valuable knowledge and the reliability of this evidence can prove to be equally problematic. A striking example was former U.S. Secretary of State Colin Powell's reliance on the confession taken from Ibn al-Sheikh al-Libi in which it was claimed that Iraq supplied both chemical and biological weapons to Al Qaeda.[12] Later al-Libi retracted his statement saying that he did so in order to make the torture stop. This testimony was subsequently used in the preceding month leading up to the invasion of Iraq.[13] A worrying feature of torture is that confessions produced under coercion or duress may be a result of victims telling their captors what they want to hear.[14]

A secondary consequentialist argument also suggests that the good consequences of torturing a suspect outweigh the bad consequences. Yet consequentialists often fail to consider the consequences flowing from the torture:

1. Torture can be seen as casting the torturer as a hypocrite in the eyes of the international community. As the U.S. Senate Foreign Relations Committee noted "*[America] cannot denounce torture and waterboarding in other countries and condone it at home*".[15] A secondary argument suggests that this also has a legitimizing effect of allowing other states to justify torture by pointing to ambiguous and

[11] Susan Opotow, 'Moral Exclusion and Torture: The Ticking Bomb Scenario and the Slippery Ethical Slope' (2007) 13(4) Peace and Conflict: Journal of Peace Psychology 457 – 461.
[12] Matt Smith, 'Al Qaeda figure who provided link to Iraq reportedly dead in Libya' *CNN International* (Washington, D.C., 1 May 2009) < http://edition.cnn.com/2009/WORLD/africa/05/12/libya.al.qaeda.prisoner/> accessed 3 February 2012
[13] Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (OUP 1985), 329.
[14] Henry Carey, *Reaping What You Sow: A Comparative Examination of Torture Reform in The United States, France, Argentina, and Israel* (Praeger 2012), 201.
[15] U.S. Congress Senate Committee on Foreign Relations, *Implementing Smart Power: Setting an Agenda for National Security Reform* (U.S. G.P.O 2008)

contradictory behaviour.[16] Speaking more politically, if the U.S. wants to remain a "soft power" and a moral role model it cannot be seen as engaging in abhorrent activities while simultaneously demonizing other states for similar crimes.

2. There is evidence that torture "*supports terrorist recruitment by radicalizing populations*".[17] Two of the most influential anti-west speakers of the 20th century Sayyid Qutb and Ayman al-Zawahiri were both tortured at the hands of the Egyptian authorities, early on in their political careers. The experiences of these men created a fierce ideological hatred for the west, which many believe fuelled the attacks of 9/11.[18] The desire for retribution and anti-west politics further became heightened and intensified leading to the radicalization of Islamic doctrine allowing for the creation of organisations such as Al Qaeda. Experiences from Northern Ireland also highlight consequences associated with heavy handed tactics. With regards to internment, Hamil notes; "*It has, in fact, increased terrorist activity, perhaps boosted IRA recruitment, polarised further the protestant and catholic communities and reduced the ranks of the much needed catholic moderates*"[19]

These are all vital considerations that must be considered unless one is also willing to kill suspects after they have been

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[16] Ian Munro, 'US a 'negative role model' for global torture' *The Age* (New York, 2007) <http://www.theage.com.au/news/world/us-a-negative-rolemodel-for-global-torture/2007/10/30/1193618884836.html accessed 31 January 2012

[17] James I. Walsh and James A. Piazza, 'Why Respecting Physical Integrity Rights Reduces Terrorism' (2010) 43(5) Comparative Political Studies, 551–57.

[18] Martin A. Lee 'The CIA and The Muslim Brotherhood: How the CIA set the stage for September 11th' *RAZOR Magazine* (2004) <http://ce399fascism.wordpress.com/2011/02/09/the-cia-and-the-muslim-brotherhood-how-the-cia-set-the-stage-for-september-11-martin-a-lee-razor-magazine-2004/> 4 February 2012

[19] Desmond Hamill, *Pig in the middle: The Army in Northern Ireland, 1969-84* (Methuen Publishing 1985)

tortured (and possibly their torturers too). Thus, even if the positive consequences of torture slightly outweigh the potentially grave consequences, this imbalance remains insufficient to overcome normal deontological objections to such inhumane activities. Therefore, the consequentialist argument justifying torture in some circumstances is weak. Further, the use of torture violates virtue theory as no honour or gallantry is involved in the infliction of pain on one with no means to defend themself.

IV. Torture vs. Enhanced Interrogation Techniques

The Convention Against Torture, defines torture as "*the intentional infliction of severe pain and suffering, whether physical or mental*".[20] Enhanced interrogation techniques however do not meet this definition and can possibly be morally justified.

Referring to the case of *Republic of Ireland v. United Kingdom,*[21] several points can be drawn:

1. It was argued that severe physical pain meant the pain level that was associated with death, major organ failure, or the serious and permanent impairment of a significant bodily function. The European Court of Human Rights said that techniques such as wall standing, hooding and sleep deprivation did amount to inhumane and degrading treatment but did not amount to torture.[22]
2. Severe mental pain meant prolonged mental harm and result from either (a) the intentional infliction of severe physical pain; (b) the administration or threatened administration of drugs or mind altering substances; (c) the threat of imminent death; or (d) the threat that some other person will be subjected to imminent death, severe physical pain, or mind-altering drugs.

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[20] 165 UNTS 85 (CAT) art 1.
[21] *Republic of Ireland v. United Kingdom* (1979-80) 2 EHRR 25.
[22] Ibid para, 167.

3. Although The Convention Against Torture along with the Geneva Convention and Additional Protocol 1 prohibits cruel, inhuman and degrading treatment which do not constitute torture, it was argued that the convention merely asked states to refrain from these techniques rather than prohibiting them.

V. U.S. Legal Defence to Torture

The so-called "Bybee Memos" (drafted by U.S. Deputy Assistant Attorney General John Yoo and endorsed by U.S. Deputy Attorney General Jay Bybee), also provided for a legal defence for torture and breach of fundamental rights. The rationale and justification has been described as "*a nice strategy for getting away with murder, torture, and treason*".[23] The tone of the memo is also particularly problematic as it does not give adequate regard to the U.S. moral obligation to international treaties. Furthermore, the memorandum claimed that even if such acts did constitute torture contravening U.S.C. §2340A (the applicable statue prohibiting torture in the U.S.), this would not be binding on the President while acting as Commander-in-Chief. The wide remit of this power subsequently allowed for the authorized torture of suspects regardless of U.S. law or its treaty obligation.

As a result of significant public outcry, the Bybee Memos was replaced by a revised opinion by Daniel Levin, Acting Assistant Attorney General. Although this subsequent memo retracted the claim that the President could not violate U.S. law and treaty obligations, it was argued that the federal prohibition did not apply as the acts themselves did not constitute torture.

[23] 'John Yoo's Torture Memos (*Freedom of Thought*) <http://freedomofthought.org/blog/?page_id=9> accessed 3 February 2012

i. Waterboarding

One particularly controversial technique is the use waterboarding which has been described as simulating the feeling of drowning.[24] Both its historical precedence and status has been well documented:

1. Invented during the Spanish inquisition, water boarding is classified as torture from many authorities such as human rights activists,[25] military judges,[26] intelligence officials.[27]
2. U.S. soldiers were court-martialled for using the technique on Filipino soldiers in the 1898 Spanish-American war[28] and Japanese soldiers were convicted of war crimes after water boarding U.S. soldiers after World War Two. [29]
3. Water boarding amounts to a mock execution which is prohibited under the Uniform Code of Military Justice[30]
4. The U.S. prosecuted this activity as a war crime in Norway in 1948[31]

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[24] Brian Ross & Richard Esposito, 'CIA's Harsh Interrogation Techniques Described' *ABC News* (New York 18 November 2005) <http://abcnews.go.com/WNT/Investigation/story?id=1322866> accessed 5 February 2012

[25] 'CIA Whitewashing Torture- Statements by Goss Contradict U.S. Law and Practice (*Human Rights Watch,* 21 November 2005) <http://www.hrw.org/en/news/2005/11/20/cia-whitewashing-torture> accessed 6 February 2012.

[26] Nicole Bell, 'Retired JAGs Send Letter To Leahy: 'Waterboarding is inhumane, it is torture, and it is illegal' (*Crooks and Liars* 2 November 2007) <http://www.crooksandliars.com/2007/11/03/retired-jags-send-letter-to-leahy-waterboarding-is-inhumane-it-is-torture-and-it-is-illegal/> accessed 6 February 2012

[27] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program* (St. Martin's Press 2006)

[28] McCain: Japanese Hanged For Waterboarding *CBS News* (New York 18 June 2009) <http://www.cbsnews.com/stories/2007/11/29/politics/main3554687.shtml> accessed 3 February 2012.

[29] Walter Pincus, 'Waterboarding Historically Controversial' *The Washington Post* (Washington, D.C., 5 October 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html> accessed February 6, 2012

[30] UCMJ, 64 Stat. 109, 10 U.S.C. Chapter 47.

[31] Andrew Sullivan, 'Verschärfte Vernehmung' *The Atlantic* (Washington, D.C., 29 May 2007) <http://www.theatlantic.com/daily-dish/archive/2007/05/-versch-auml-rfte-vernehmung/228158/> accessed 5 February 2012.

While these precedents were never referred to in the Bybee or Levin Memorandums, the current American Administration under Present Barack Obama has classed the current practice as constituting torture.[32]

The line between torture and interrogation is one that can be easily blurred. The use of linguistic terms "enhanced interrogation techniques" also draws similar comparisons toward the Nazi euphemism "*Verschärfte Vernehmung*" (which translates to "*enhanced or intensified interrogation*"[33]). Indeed, the high number of suicide attempts in Guantanamo Bay[34] and deaths such as Abdul Wali, and Dilawar[35] speak volumes about the seriousness of these techniques. Still, a clear definition is vital in ensuring states comply with the prohibition of torture and the claim that these acts do not technically constitute torture is insufficient.

VI. Extraordinary Rendition as an Alternative to Torture

In this situation, states transfer suspects to other countries that may employ torture or other illegal methods, thus avoiding moral blame. Such acts can be deemed to run afoul of certain international laws including Article 3 of the 1984

[32] Ewen MacAskill, 'Obama: 'I believe waterboarding was torture, and it was a mistake' *The Guardian* (London 30 April 2009) <http://www.guardian.co.uk/world/2009/apr/30/obama-waterboarding-mistake> accessed 4 February 2012.

[33] Andrew Sullivan, 'Bush Torturers Follow Where The Nazis Led' *The Times* (London, 10 July 2007) <http://www.timesonline.co.uk/tol/comment/columnists/andrew_sullivan/article2602564.ece> accessed 4 February 2012.

[34] Pauline Jelinek, 'Five more suicide attempts at Guantanamo' *The Guardian* (London, 7 February 2003) <http://www.guardian.co.uk/world/2003/feb/07/usa.guantanamo> accessed 5 February 2012.

[35] Steven H. Miles, *Oath Betrayed: America's Torture Doctors* (University of California Press 2006)

Convention Against Torture [36] and the Third Geneva Convention Art 12[37] (when concerning POWs).

Extraordinary rendition allows governments to publicly condemn torture whilst secretly making arrangements for terror suspects to be tortured elsewhere. One example is Canadian citizen Maher Arar who was deported to Syria and tortured for 10 months, before being released when the Syrian authorities became convinced he had no ties to Al Qaeda[38]. The UK has also allowed its territory to be used for these kinds of transfers,[39] raising significant questions on the ability of states to use extraordinary rendition as a form of "torture by proxy". Morally it can be seen there is little difference between the two acts.

VII. Torture vs. Capital Punishment

An additional argument follows that since death is more serious than torture, there should be some instances where torture is permissible in the same way as capital punishment. However, it is not instantly clear if death is more serious than torture.[40] However in this sense torture is not a punishment, but rather a method of interrogation. Torture merely treats the suspect as a mere means, unless the suspect deserves to be punished regardless of the information he possesses.

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[36] Which provides that "no state shall, expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[37] Which prohibits transfer of POWs to states that are not parties to the Convention or are unwilling or unable to comply with its provisions.

[38] Andrew Rosenthal, 'Rendition, Torture and Accountability (editorial)' *The New York Times* (New York, 19 November 2007) http://www.nytimes.com/2007/11/19/opinion/19mon3.html> accessed 6 February 2012

[39] Mark Seddon, 'Extraordinary rendition: just how much did David Miliband know?' *The Guardian* (London, 1 September 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/sep/01/extraordinary-rendition-david-miliband> 6 February 2012

[40] Andrew Buncombe, 'Guantanamo Bay prisoner 'tried to commit suicide a dozen times' *The Independent* (London, 27 April 2006) <http://www.independent.co.uk/news/world/americas/guantanamo-bay-prisoner-tried-to-commit-suicide-a-dozen-times-475757.html> accessed 6 February 2012

Torture in this regard cannot be seen as analogous to capital punishment.

VIII. Torture Warrants to Justify Torture

Another argument follows that torture may be justified if we require the application and issuance of a torture warrant. This ensures that torture is only used in the most extreme circumstances. Warrants in this situation would only be issued where the danger is serious and imminent and there is a very strong reason to believe a suspect has information that could avert a large disaster (similar to the ticking bomb scenario).

However this does not answer the question of whether torture can be morally justified, but would mean that torture *can* be morally justified in the most extreme cases, and used *only* in these cases. Nevertheless, some academics believe that the availability of a warrant for the use of non-lethal torture would actually decrease the illegitimate use of force against suspects.[41] If we look to the figures for wiretap warrants for suspected terrorists we can see that the requirement of a warrant may not necessarily limit torture. In 2008, the government made 2,082 applications for wiretap warrants of which 2,083 were approved.[42] In 2007, only 2 applications were denied and 86 modified.[43] Arguably while the consequences of wrongly granting a warrant to wiretap is less severe than wrongly granting a warrant for torture, the benefits being claimed are also more considerable. Here, there is a very real risk that those responsible for issuing such warrants would be pressurized in granting them for fear of public outrage in the event of catastrophe materializing.

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[41] Alan M Dershowitz, 'The case for torture warrants' (*Alan M. Dershowitz*, 2002) <http://www.alandershowitz.com/publications/docs/torturewarrants.html> accessed 6 February 2012

[42] *Federation for American Scientists* (Washington, D.C., 14 May 2009) http://www.fas.org/irp/agency/doj/fisa/2008rept.pdf <accessed 7 February 2012>

[43] *Federation for American Scientists* (Washington, D.C., 30 April 2008) http://www.fas.org/irp/agency/doj/fisa/2007rept.pdf <accessed 7 February 2012>

Deference to conservative judgment might cause warrant to be grant to ensure that such information isn't being withheld.

IX. Conclusion

In an age of terror, the once immovable and universal stance against torture finds itself on shaky grounds. It has become all too easy for academics, politicians and lawyers to justify torture by pointing to an unrealistic scenario which fails to comprehend all true consequences of engaging in torture. More dangerous is our willingness to turn a blind eye, extraditing suspects to be tortured in a bid to save our morality. The use of complex language and legal analysis to avoid the duty to comply with international law, has no place in a moral discussion of torture. Nevertheless, the fact remains that the intentional infliction of suffering in such a cruel and degrading manner is to be condemned worldwide and is to be treated as an international crime against humanity.[44] This exists notwithstanding any evidence that suggests that this will result in life saving information. Torture violates deontological, utilitarian and virtue theory and despite its common use, when properly considered, torture violates consequentialist theory. There is no situation where torture can be morally justified, ticking bomb or no ticking bomb.

[44] 147 of 192 UN member states are parties to the convention against torture.

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The Draft Defamation Bill - A Radical Change?

Molly Grace

Abstract

In 2010 Lord Lester introduced a draft defamation Bill to Parliament in order to address pre-existing problems with the current laws relating to defamation. This article will assess what these problems are, and whether the Bill adequately solves them. Through study of the current statutes, case law and commentaries from the field of defamation, it appears that the problems are less fundamental than they appear. Although there are issues which severely hinder freedom of expression, namely the reversed burden of proof (which considers the defendant guilty until proven innocent) and the cost of actions, these are not dealt with within the Bill. This article asserts that although Lord Lester's draft defamation bill may be an attempt at bringing clarity, it will not fundamentally change the current law of defamation if it is to be enacted.

I. Introduction

The law of defamation has sought to strike a balance between reputation and freedom of expression. In Britain, the current view is that the law is 'archaic, illiberal and unbalanced'[1] and leans towards safeguarding reputation, with only grudging merit given to free speech. Due to the Human Rights Act[2] the balance must now be found between the Article 8 right to respect for private and family life and the Article 10 which outlines the right to freedom of expression, both of which are given equal significance. Despite this, there is a worry that with these changes the law has 'gathered inconsistencies and become overly complex'.[3] Therefore moves for legislative reform have been made in the form of Lord Lester's Defamation Bill. Looking at sections of the Bill in turn, what

[1] Mullis and Scott, Lord Lester's Defamation Bill 2010: A distorted view of public interest? (Communications Law 2011).
[2] Human Rights Act 1998.
[3] Catherine Rhind, Reforming the Law of Defamation: An Honest Opinion (In House Lawyer 9th September 2010).

are the problems with the current law and will this Bill solve them?

II. 'Responsible publication on matters of public interest'

In Reynolds v Times Newspaper[4] a common law defence for quality investigative journalism was set out by the House of Lords, specifically through the ten criteria laid out by Lord Nicholls. This appeared to be a modernising move towards protection for the media and freedom of expression. However, Reynolds' privilege has not lived up to its reforming nature. Lord Nicholls' ten criteria have been employed as challenges which the media almost inevitably cannot pass all of, and because 'a reciprocal duty and interest for a statement to be made to the public at large arises only in exceptional circumstances'[5] trial judges are reluctant to find a story to be privileged. There have been attempts however to return to the original progressive spirit of Reynolds. In Jameel v Wall Street Journal[6] Lord Hoffman criticised the approach of the lower courts applying the Reynolds criteria as 'ten hurdles at any of which the defence may fail'[7] and said they should be applied in the liberalising spirit in which they were intended. So there is hope that this defence will become the protection for responsible journalism that it was designed to be.

The Defamation Bill builds on the Reynolds notion of 'responsible publishing' and codifies Lord Nicholls' criteria. However, the considerations of the source and status of the information, the tone of the article and whether the gist of the claimant's argument is included are conspicuously missing from the legislation. In Reynolds Lord Nicholls stated 'It is elementary fairness that... a serious charge should be accompanied by the gist of any explanation...given'. [8] Accordingly, it seems an extremely important factor to be

[4] [2001] 2 AC 127.
[5] Jacob Rowbottom, Libel and the Public Interest (Cambridge Law Journal 2007).
[6] Jameel v Wall Street Journal Europe SPRL (No. 3) [2006] UKHL 44.
[7] Ibid.
[8] Reynolds (n 4) at 206 per Lord Nicholls.

removed. Equally, the status of the information can be crucial as 'the blaring headline of accusation on page 1 becomes a tepid reference in the graveyard of page 2'.[9] The Bill suggests that only the collecting of information need be responsible, rather than the story itself. Another problem with the legislation is that Section 1(4)(g) mentions 'codes of conducts or other relevant guidelines'[10] which makes the section too media-specific and 'leaves hanging the question of whether bloggers and NGOs would be able to avail themselves of such a defence.'[11]

It is somewhat unclear as to whether this common law principle should be enforced through legislation at all. Arguably 'codification trades the flexibility of a common law approach for, in Desmond Browne QC's phrase, "the straightjacket of legislation"'.[12] Lord Nicholls himself has stated 'This solution has the merit of elasticity'[13] but immediately qualified his statement with: 'Hand in hand with this advantage goes the disadvantage of an element of unpredictability and uncertainty.'[14] For the media statutory intervention is certainly welcome, especially given the additional margin of error that the omitted criteria afford them. But does it promote freedom of expression too far at the cost of defence of reputation?

III. 'Honest Opinion'

The Bill renames the defence of 'fair comment' as 'honest opinion'. This is logical as fair comment doesn't require fairness, only an opinion which could honestly be held in the situation, based on true facts. It is difficult however to distinguish between fact and comment as facts require proof in order to be factual. This difficulty was highlighted by the

[9] Flood v Times Newspapers [2010] EWCA Civ 804 at [119].
[10] The Defamation Bill 2010.
[11] Siobhain Butterworth, Lord Lester's Defamation Bill should be more radical (The Guardian 23rd June 2010).
[12] Jenny Alia and Phil Hartley, Tipping the Balance (161 New Law Journal 376 2011).
[13] Reynolds (n 4).
[14] Ibid.

case of British Chiropractic Association v Singh[15] where the Court of Appeal concluded that 'if the communication is offered as a contribution to a debate on a matter of public interest that may be enough for the communication to be treated as comment'.[16] This is considered a widening of the defence and places 'an expansive gloss on the defence of fair comment'.[17] In The United States the position has long been that 'under the First Amendment there is no such thing as a false idea... we depend for its correction not on the conscience of judges and juries but on the competition of other ideas'.[18] This places admirable trust in the value of the marketplace of ideas rather than on correctional litigation.

Section 3(6) The Bill also changes the requirements of the defence, stating: 'no account is to be taken of – (b) whether the defendant first learned of the facts or material before or after publication'.[19] This contradicts all previous rules, as the test is whether a reasonably minded person could hold the opinion based on the facts before him, and as Lord Denning said 'No ordinary human person can look into the future and comment on facts which have not yet happened'. [20] In considering whether the same would apply if the facts had happened but were not known to the commentator Justice Eady said 'Logic would appear to suggest that one can hardly comment on matters of which one knows nothing, any more than one can comment on facts which have not yet happened'. [21] This broadens protection for freedom of expression significantly. But essentially 'the opinion delivered must still be one that is honest, so no matter how wide-reaching the facts included by the defendant are... [they] will

[15] [2010] EWCA Civ 350.
[16] You can't dust for comment: British Chiropractic Association v Singh (Communications Law 2010).
[17] Richard Mullender, Defamation, Fair Comment and Public Concerns (Cambridge Law Journal 2010).
[18] David Elder, Freedom of Expression and the Law of Defamation: The American approach to problems raised by the Lingens case (International and Comparative Law Quarterly 1986).
[19] The Defamation Bill 2010 s3(6)(b).
[20] Cohen v Daily Telegraph Ltd [1968] 1 WLR 916 .
[21] Lowe v Associated Newspapers Ltd [2007] Q.B. 580

not be able to strongly defend negative commentary with impunity.'.[22]

IV. Truth

The Bill renames the 'justification' defence as one of 'truth'. This again is logical as a statement does not have to be justified to comply with the defence; it simply has to be true. This defence is based on the basic assertion that 'the law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess'.[23]. Apart from this it does not substantially alter the defence. The burden of proof remains with the defendant, which is one of the main areas where the Bill lacks radicalism. Arguably this simple transfer of the burden of proof would offer much greater protection for freedom of expression as proving claims based on anonymous sources or those who have left the country or died can be impossible for journalists, whereas claimants are 'in the best position to say precisely what is true and what is false about defamatory statements'.[24] Mullis and Scott consider the current law to be preferable as it 'forces a publisher, when considering whether or not to publish, to focus particular attention on whether the statement can be justified.'[25]

V. Responsibility for Publication

Distributors and wholesalers can already use the defence of 'innocent dissemination' unless they ought to have known that a publication was likely to contain libelous material. The Defamation Act 1996 extended this to include live broadcasts, and internet providers and hosts are also protected[26], but this Bill gives them absolute privilege. This 'would appear to remove any incentive for an ISP to remove

[22] Catherine Rhind (n 3).
[23] M'Pherson v Daniels 109 E.R. 448 (1829).
[24] Siobhain Butterworth (n 11).
[25] Mullis and Scott (n 1).
[26] The EU Electronic Commerce Directive 2000/31/EC.

material even if that material is found to be defamatory.'[27] The Bill includes provisions for corrective measures, namely that defendants have 14 days from the complaint to remove the article. This is clear and precise and should help such matters be resolved without litigation. Under the 'had no reason to believe' [28] clause which currently applies, controversial publications can struggle with distribution as stockists fear being sued. One such example is the satirical magazine Private Eye which was 'once banned by W H Smith... [and is considered] the bane of the corrupt and super-rich'.[29] This can limit freedom of expression and if the Bill offers greater protection to third parties in the chain of distribution then this will be a success for public debate and freedom of expression.

VI. 'Multiple publications'

Under the current provisions claimants have to sue within a year of the last publication of the defamatory matter. This means that publishers are liable for however long the book is in circulation or article can be found in an internet database; something which is understandably unpopular due to the ease with which electronic material can be copied and shared. The Bill would change this to a year from which the publication was first made, but this could be unfair where the defamatory material was published on a relatively unknown website or similarly obscure forum but then brought to wider attention later on. 'In the online environment, the availability of past statements can continue to be horrendously damaging'[30], but the Bill appears to overlook this issue. This change will impact greatly on claimants wishing to protect their reputations, and could allow malicious publications to go unpunished.

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[27] Mullis and Scott (n 1).
[28] Defamation Act 1996 s1(1)(c).
[29] Mary Brodbin, Private Eye: The first 50 years (The Socialist Review November 2011).
[30] Mullis and Scott (n 1).

VII. 'Action for defamation brought by body corporate'

The Bill proposes that corporations would have to prove a likelihood of financial loss to bring an action in defamation. There have been calls to stop corporations being able to sue at all after the embarrassment of the so-called 'McLibel' case where a legal battle was fought between the might of the McDonalds Corporation and two protestors. However, the criticism from the European Court of Human Rights in that case was based on 'the absence of legal aid for the defendants [being] a breach of Art. 6 of the European Convention on Human Rights, and...the presumption of falsity and level of damages [breaching] Art. 10 of the Convention.'[31] Therefore, a proof of financial loss requirement wouldn't solve these issues, and could be economically problematic as businesses often rely heavily on reputation and good-will, the damage to which may not immediately present itself financially. Equally, a prompt action could curtail a statement before it has its potential financial impact, yet this in itself will make the statement un-actionable. This could prove to be damaging to small businesses, as the Bill affects all corporations regardless of size or wealth.

VIII. 'Harmful event in cases of publication outside the jurisdiction'

Due to the relatively sympathetic laws in the United Kingdom it is suggested that a problem of 'libel tourism' exists. For instance, foreign publications can be sued in Britain even if there has only been a single publication, due to a 160 year old rule.[32] However, an English court can refuse a case which would be more suitably tried elsewhere. This is known as the forum non conveniens doctrine, and will be applied:

> '...where the court is satisfied that there is some other available forum, having competent jurisdiction, which

[31] Eoin O'Dell, Defamation Reform in England and Ireland after McLibel (Law Quarterly Review 2005).
[32] Duke of Brunswick v Harmer 1849 14 QB 185.

> is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice'.[33]

As Lord Scott said 'it would be ridiculous and fundamentally wrong to have these... cases tried in this country, on a very small and technical publication'.[34] This has been effective in stopping American litigants. But any British action to remedy this perceived problem further would be limited by the Brussels Convention[35] which allows actions to be brought in any EEC country where publication occurs. Nonetheless, it appears that the issue of 'libel tourism' has been exaggerated. Afia and Hartley have stated that "In 2010, there were a grand total of three cases (out of 83) involving a foreign claimant and defendant".[36] The Bill handles this issue by leaving the courts to assess whether there has been significant damage to reputation in this jurisdiction with regards to the extent of publication outside of it. This is confusing as the claimants reputation can be significantly damaged in Britain even if the majority of publications did not occur here. This proposal will most likely lead to lengthier trial processes in the few foreign actions brought in Britain.

IX. Other Issues

The main issue not dealt with in the Defamation Bill is the cost of actions. This has been highly controversial with huge sums awarded to sympathetic claimants, a worrying lack of legal aid and no-win no-fee style legal firms charging extortionate rates. As Roderick Moore states: 'On one hand, rich crooks can use the law to cover up their crimes, while on the other hand, ordinary people who find themselves the victims of smear campaigns are left with no means of redress.'[37] The problem is no longer with juries awarding

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[33] Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460.
[34] Kroch v Rossell [1937] 1 All ER 725.
[35] 1968.
[36] Jenny Afia and Phil Hartley (n 12).
[37] Roderick Moore, The Case for Reforming the Libel Laws (Libertarian Alliance 2000).

ridiculous damages as 'in 1991 the Court of Appeal was empowered... to substitute its own award in place of excessive damages'.[38] The main concern has now become the fact that legal fees incurred in pursuing an action often outweigh damages recovered. Creating access for less wealthy claimants through conditional fee agreements has meant a doubling of costs for the losing party. With this in mind David Howarth conducted an in-depth statistical analysis on the issue and produced convincing evidence to support his claim that 'the vast majority of libel cases cost relatively little'[39] and therefore 'we do not know enough to justify a moral panic about libel costs.'[40] Any move to remedy this problem through legislation would be problematic; were the CFA firms' fees cut they would be more careful about the cases they took, limiting access to the justice system further. Relatively high costs also act as a deterrent to publishers and ensure that they don't irresponsibly publish unjustifiable stories.

X. Conclusion

Lord Lester has admitted that the proposed Defamation Bill is for the most part an attempt to codify the current law, and upon analysis this appears to be true. Greater media freedom has been granted through less stringent criteria for responsible publication and the extension of the fair comment defence. The most far reaching change is probably the multiple publication rule, as this could have severe adverse affects upon claimants. Equally a change in the requirements for corporate bodies would appear to cause more problems than it solves, but this is a minor issue. The Bill extends freedom of expression protection, and although some feel it does not go far enough, clarification is important in the law. Case-law can only do so much and as has been evidenced in the lower courts decisions in Jameel can actually be applied wrongly and against the spirit intended. The main

[38] Robertson and Nicol, Media Law (Penguin Books 2007).
[39] David Howarth, The Cost of Libel Actions: A Sceptical Note (Cambridge Law Journal 2011).
[40] Ibid.

criticism is that the burden of proof is not reversed but as politicians are often the subject of tabloid attacks it seems unlikely that this fundamental change will be granted swiftly. This Defamation Bill is not radical, but it doesn't need to be. The British defamation laws are not as flawed as they are perceived to be.

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Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?

Kourosh Majdzadeh Khandani

Abstract

Specific performance and the right to cure are often two main concepts in question when there is a breach in an international sale contract. This article, in a different approach, compares the–differences between provisions of English law and the United Nations Convention on Contracts for the International Sale of Goods (CISG), in order to analytically examine whether CISG overemphasises the performance of contract by the defaulting seller. Moreover, it explains the relationship between specific performance and the right to cure, using a new approach. While a considerable amount of existing studies mostly concern-restriction imposed by English law rules, this essay, illustratively indicates that there are advantages in adopting English law provisions rather than following the permissive attitude of CISG.

The article reveals the ambiguity made by some provisions of CISG in regards to application of its rules. While the main remedy granted by English courts is confined to damages, as they recognize specific performance as a discretionary order, the courts consider the test of inadequacy of damages and the uniqueness to avoid the unfair results. This essay is an attempt to change the picture shaped by existing literature by introducing a different perspective on the alleged restrictions of English law.

Introduction

Naturally, when a contract is made it is expected to be performed. Thus, parties to the contract are bound by its terms to do what they have promised to do. It may happen sometimes that one party breaches the contract either by refusing to perform his obligations, or by a defective performance. In such circumstances, one of the options available to the parties in order to remedy the breach by the other party is to enforce the performance of the terms of the contract. This is called 'specific performance' and it is

defined as a 'decree of the court which compels the contracting party to do what he promised to do.'[1] This is also true in the context of international sale of goods contracts.

Although the United Nations Convention on Contracts for the International Sale of Goods[2] was developed to establish a harmonisation among different systems of law in international sales,[3] in some aspects, its drafting process were influenced by civil law principles of contract law.[4]

It is submitted that, one of these aspects is the concept of specific performance. It is widely believed that specific performance is the primary remedy preferred by civil law jurisdictions. Thus CISG provisions on this class of remedy are likely to be interpreted in favour of civil law countries.

On one hand, English law tends not to follow this approach, since the principles of English law are based on common law rules. Moreover, English law rules on specific performance are more restrictive than CISG provisions. In other words, specific performance is limited to specified circumstances and it is suggested that the reluctance to make this remedy available in more situations, has its own advantages. Conversely, the Convention has established the remedy of specific performance as a right for the injured buyer, thus the scope of its application is broader than that – under English law.

Hence, it seems that there is a considerable difference between these two systems. This essay focuses on

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[1] Gareth Jones and William Goodhart, *Specific Performance* (2nd edn, Butterworths 1996) 1; Michael P Furmston, Geoffrey C Cheshire and Cecil H S Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (15th edn, Oxford University Press 2007), 797.

[2] The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 (hereinafter referred to as CISG or the Convention or the Vienna Convention).

[3] cf Troy Keily, 'Harmonisation and the UN Convention on Contracts for the International Sale of Goods' (2003) 1. Nordic Journal of Commercial Law of the University of Turku 18 <http://www.njcl.fi/1_2003/article3.pdf> accessed 22 February 2011: He concludes 'The real challenge for harmonisation and the ultimate success or failure of the CISG is dependent on its uniform application.'

[4] Max Wesiack, 'Is the CISG too much influenced by civil law principles of contract law rather than common law principles of contract law?' (2004) < http://www.cisg.law.pace.edu/cisg/biblio/wesiack.html> accessed 20 February 2011.

comparison between English law rules and the provisions of CISG, with respect to remedy of specific performance as well as the seller's right to cure. It should be noted that the seller's right to cure and specific performance have the same root but take different forms. Both rules are based on the buyer's demand of performance of the contract.

As far as specific performance is concerned, most of the existing studies on one hand, have concentrated on the limitations imposed by English law; and on the other hand, on the permissive attitude of CISG. However, the purpose of this essay is to indicate that this is not the whole picture. By means of comparison this research essay contends that CISG seems to place too much emphasis on promoting performance of the contract by the seller.

This essay is divided into two chapters. The first chapter (which is generally allotted to discussing English law rules) begins with a historical background for the term 'specific performance'. It then goes on to examine decided cases as well as statutory provisions which are required for the purpose of assessing remedy of specific performance. After that, the requirements provided by the provisions of English law are discussed.

In a similar way, the right to cure is also examined. Furthermore, the uncertainty concerning existence of right to cure is discussed by assessing the opponent and proponent views. In the end, the relationship between these two remedies is analysed.

Chapter two describes the contentious aspects under CISG rules. Like in chapter one specific performance and the right to cure is examined in regards to relevant articles of the Convention. The ambiguity surrounding some of its provisions is subsequently argued.

Finally, the essay concludes by comparing specific performance with the right to cure, as well as differences between the two legal systems.

Chapter 1: English Law

I. Specific Performance

A. Brief History

In his well-known treatise on specific performance[5] Edward Fry emphasised the fact that the only available remedy for a default in performance of a contract in Roman law, was a title to damages.[6] It seems that Roman law, by giving such a right, neither enforced specific performance directly nor indirectly. Likewise, the courts of common law did not enforce the remedy specifically, and the general rule was limited to granting damages; particularly to pay money. However, by virtue of the Mercantile Law Amendment Act 1866, the courts were given the power to order specific performance in actions concerning breach of delivery in the case of specific goods.[7]

In contrast, the Courts of Equity have been enforcing specific performance for some centuries.[8] These jurisdictions had a root in the past time. As indicated in Year Book 8 Edward IV, it was well-recognised and established since the time of Richard II.[9] Therefore, it would be appropriate to conclude that specific performance was an equitable remedy under English law – before the Sale of Goods Act 1979.[10]

B. Specific Performance under Sale of Goods Act[11]

Traditionally, the main application of the rules of specific performance was in land disputes.[12] And by virtue of section

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[5] Edward Fry, *A Treatise on the Specific Performance of Contracts* (William Donaldson Rawlins ed, 5th edn, Stevens and Sons 1911).
[6] Ibid, 4.
[7] Henry Storer Bowen, *Outlines of Specific Performance* (William Clowes 1886) 1.
[8] Ibid, 2.
[9] Jones and Goodhart (n 1), 6.
[10] A G Guest (ed), *Benjamin's Sale of Goods* (8th edn, Sweet & Maxwell 2011) para 17 – 096.
[11] The Sale of Goods Act 1979 c 54 as amended by the Sale of Goods Act (Amendment) Act 1995 (hereinafter referred to as the Act).

34 of the Judicature Act 1873, specific performance of contracts between vendors and purchasers of real estate was specifically assigned to the Chancery Division. However, English courts have extended the remedy to cases of sale of goods[13] and it is currently enshrined in section 52 of the Sale of Goods Act 1979. The basis for section 52 was an earlier legislation[14] which was enacted to extend the sphere of this remedy. There is an argument which considers the fact that the sphere of statutory jurisdiction is still open to question.[15]

Generally, section 52(1) of the Act[16] empowers courts to issue the decree of specific performance in circumstances where the promisor in the event of breach of contract of sale, will be ordered to do what he has promised to do. The relief is limited to actions brought with respect to delivery of 'specific' or 'ascertained goods'. The discretion provided for the courts, to award specific enforcement of the contract, would be available as a remedy to the aggrieved buyer only if the court thinks it is appropriate. Thus, the court is not simply bound to grant such an order – per se. For this reason, the remedy is generally granted based on the requirements, discussed below.

i. Conditions Provided by the Act

According to section 52, there are requirements to be fulfilled for an order to be issued against the vendor – to perform his obligations. The first condition is that the goods must be specific or ascertained. It means that under English

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[12] By virtue of section 34 of the Judicature Act 1873, specific performance of contracts between vendors and purchasers of real estate was specially assigned to the Chancery Division.

[13] Mirghasem Jafarzadeh, 'Buyer's Right to Specific Performance: A Comparative Study under English Law, the Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law' (2001) 20 < http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh.html> accessed 5 February 2011

[14] Section 2, Mercantile Law Amendment Act 1856.

[15] Jones and Goodhart (n 1) 146. This view is in terms of classifications of goods (specified in the provision) which will be discussed later in this .

[16] 'In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.'

law, specific performance is only applied in 'limited circumstances involving limited classes of goods.'[17] The mere fact that the goods consist of one of the required types, would not result in availability of the remedy. Additionally, there is a second condition as required by the provision and that is, that the court may order a seller to carry out his duties 'if it so deems fit'. Thus, under this discretionary approach, there is no guarantee for a plaintiff who is seeking specific performance of a contract to obtain the order sought, simply because the subject matter of the contract concerns specific or ascertained goods. It is clear that each of the factors mentioned above is needed to be explained in further details.

ii. Specific or Ascertained Goods

For the purpose of granting an order to compel a defaulting seller to perform his undertaking to deliver the goods, the very first requirement mandated by section 52(1) is that the subject matter of the contract of sale must be specific or ascertained. The question to be posed here would be: what is meant by the terms specific or ascertained goods? The definitions are explained below.

Section 61(1) of the Act defines specific goods as 'goods identified and agreed on at the time of contract of sale is made' which means that it is not acceptable for goods (for the purpose of this section) to be identified at a later stage. By the agreement of the parties, specific goods are allocated as the unique[18] goods which have to be delivered by the seller in discharging his obligations under the contract of sale. Therefore, their individuality is established and there is no room for further selection or substitution.[19] The goods are likely to become specific by means of express descriptions in the contract of sale.

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[17] Peter A Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?' (2000) 12(1) Pace International Law Review, 36.
[18] Uniqueness of the goods will be discussed later in this paper.
[19] AG Guest (ed) (n 10), para 1-114.

Moreover, a question may arise regarding the future or non-existent goods[20], as to whether these types of goods are presumed as specific goods, for the purpose of application of section 52. In other words, is it possible to suggest a wider meaning for specific goods? Some commentators have stated that the position is more or less unclear.[21] However, it is suggested that the wording of the definition of specific goods, as provided by section 61(1), does not necessarily stipulate that the goods in question must be in existence – at the time of the contract.

As far as ascertained goods are concerned, no statutory definition is provided. However, the expression 'ascertained goods' is defined by case law. In *In Re Wait*[22], Atkin LJ stated that 'ascertained probably means identified in accordance with the agreement after the time a contract of sale is made, and I shall assume that to be the meaning.'[23] Likewise, in some other cases such as *Wait and James v Midland Bank*[24] it was observed that ascertainment might be done in any way which is agreed upon as a satisfactory method by the parties to a contract. As a result, the expression of 'ascertainment' speaks of some process used by the seller, taken place after conclusion of the contract,[25] by which the goods are sufficiently identified or earmarked as contract goods.[26] In the case of goods forming part of a bulk, the ascertainment would not be done unless that part is actually separated from the bulk.

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[20] For instance: to be supplied by a manufacturer or procured by a seller after the contract has been made.

[21] cf *Howell v Coupland* [1876] 1 QBD 258 where there was a contract to sell potatoes from a specified crop to be grown by the seller. In that case, the contract was considered to be a sale of specific goods.

[22] [1927] 1 Ch 606.

[23] ibid 630; cf *Thames Sack and Bag Co Ltd v Knowles and Co Ltd* [1918] 119 LT 287 at 290 per Sankey J stated that ascertained goods are goods the individuality of which has in some way been found out at the time of contract.

[24] [1926] 31 Com Cas 172, 179.

[25] Michael Bridge, *The Sale of Goods* (1st edn, Oxford University Press 1998) 532. Alternatively, it is possible that ascertainment occurs as the same time as unconditional appropriation for the purpose of passing of property.

[26] Jafarzadeh (n 13) section 2.1.2.

By the clarification made by the Amendment Act[27] section 61(1) stipulates that goods 'includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid.'[28] Treitel provided a classification while describing the situation where goods form an undifferentiated part of an identified bulk.[29] He divided the cases into two types. Firstly, in cases where the part sold is expressed as a fraction or percentage of the bulk and the second one involves cases where the part sold is expressed as a specified quantity of unascertained goods to be taken from an identified bulk. He later discussed that in the first type of cases, by explaining that the court has discretion to order specific performance, provided that the bulk was identified and agreed upon in the conclusion of the contract. Moreover, in terms of the second type of cases, Treitel stated that the purchaser becomes co – owner of the goods, and in the case of vendor's insolvency, he would unlikely choose to seek specific performance. Finally, he concludes that cases concerning the first type are not covered in the wordings of section 52, and therefore the court may be unable to exercise the discretion to issue an order of specific performance.[30]

Furthermore, in the Law Commission report [31] after admitting the fact that there is an element of doubt as to whether an undivided share in goods counts as goods for the purposes of the Sale of Goods Act 1979, it has been suggested that the doubt should be removed and the definition in the Act should consist of an undivided share in goods.[32] Finally, for the purpose of applying section 52, it seems more logical that, the remedy of specific performance is likely to be available to some fraction or percentage of a

[27] The Sale of Goods (Amendment) Act 1995 section 2(d).
[28] In regard to the effect of adding to the wording of this provision, by s.2(d) of the Sale of Goods (Amendment) Act 1995, on the availability of specific performance, See Hugh Beale (ed), *Chitty on Contracts*, vol 2 (30th edn, Sweet & Maxwell 2008) para 27-016; AG Guest (ed) (n 10) paras 5-109 to 5-127.
[29] Guenter H Treitel, *The Law of Contract* (11th edn, Sweet & Maxwell 2003), 1024.
[30] Treitel (n 29), 1024.
[31] Law Commission, *Sale of Goods Forming Part of a Bulk* (Law Com No 215, 1993).
[32] ibid 30 para 5.3

bulk as identified and agreed upon in the conclusion of the contract.[33]

iii. Position of Unascertained Goods

The term 'unascertained goods' is not defined in the Act, however it can be described as goods which are not identified and agreed upon when the contract is made.[34] Since section 52 is only applied in the case of specific or ascertained goods, the buyer of unascertained goods, which are subject matter of most commercial contracts, cannot resort to the remedy to compel the seller to perform his obligations.

Some authors[35] have argued that the Act cannot be treated as a comprehensive code since section 52 does not cover cases of unascertained goods. Therefore, the remedy of specific performance is not available for a seller or a buyer of goods which are not yet ascertained. It is argued that[36] section 52 may be applied to the case of unascertained goods because the language of the section itself does not seem to exclude expressly its application to such cases. But an examination of related case[37] shows that the remedy is not available regarding unascertained goods. It is submitted that granting the remedy of specific performance should be considered with respect to circumstances of each case, and in questions concerning unascertained goods; particularly when the order of specific performance is the only appropriate and effective remedy.[38] In support of this view also, McKendrick[39] points out that 'a court should not be too ready to conclude

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[33] Guest (ed) (n 10) para 17-097.
[34] ibid para 1-117.
[35] Bridge (n 25), 532.
[36] Jafarzadeh (n 13) section 2.1.3; Treitel (n 29), 1024.
[37] *Re London Wine Co (Shippers)* [1986] PCC 121. In this case, the judge stated that the order of specific performance was not granted in a contract for unascertained goods.
[38] *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, where damages were found to be inadequate because of the oil crisis happening at that time, so the buyer could not obtain supplies of petrol from another vendor, and there was a serious danger that he would be forced out of business if the seller did not deliver.
[39] Ewan McKendrick, *Sale of Goods* (LLP 2000) para 10 – 042.

that it has no jurisdiction to make an order in circumstances falling outside the scope of section 52.'

iv. Discretionary Order

Another important aspect of specific performance under English law is the discretionary nature of the order. In addition to the equitable remedy of specific performance[40] this element is also provided in section 52 of the Act which uses the following formulation: if the court thinks fit. As indicated by commentators[41] and case law[42], the remedy of specific performance is not a right[43] for the aggrieved party to seek. In fact, it is an equitable discretion vested in courts when they enforce performance of a contract. It may be argued that the court has a wide[44] or broad[45] power, by virtue of the provisions of section 52, to grant such an order. It is submitted that, alternatively, this power is limited by the fact that the decision of the court is not 'left to the uncontrolled caprice of the individual judge.' [46] Indeed, specific performance will only be granted if it is just and equitable to do so.[47]

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[40] Edward Fry, *A Treatise on the Specific Performance of Contracts* in George Russell Northcote (ed) 6th edn, Stevens and Sons 1921, 36.
[41] Furmston, Cheshire and Fifoot (n 1), 798.
[42] Per Lord Watson in *Stewart v Kennedy* [1980] LR 15 App Cas 75, 102: [S]pecific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it; Per Lord Chelmsford in *Caesar Lamare v Thomas Dixon* [1873] LR 6 (HL) 414, 423: [T]he exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court.
[43] While in civil law jurisdictions it is an absolute right arising from the contract. For an analytic comparison between the approaches of Anglo-Amercian law and Civil law regarding specific performance, See Charles Szladits, 'The concept of Specific Performance in Civil Law' (1955) 4 American Journal of Comparative Law 208.
[44] Guest (ed) (n 10) para 17-100 and 43-473.
[45] Jafarzadeh (n 13) section 2.2.
[46] Furmston, Cheshire and Fifoot (n 1), 798.
[47] Per Lord Parker in *Stickney v Keeble* [1915] AC 386, 419.

C. Inadequacy of Damages and Uniqueness

Basically, it is established that damages are the most adequate remedy when there is a contract for sale of goods which are readily available in the market.[48] This precedence is based on a historical fact that the Courts of Equity would issue an order of specific performance only where the remedy available at common law was inadequate.[49] Similarly, review of cases suggests that the equitable discretion to order specific performance of a contract for sale of goods is exercised only if an award of damage would be an inadequate remedy.

Generally, there is no specific rule to identify what damages would be an adequate remedy.[50] However, some commentators[51] as well as the courts may have identified circumstances under which damages are inadequate. The case often cited as example is the case of the contract for sale of unique goods.[52]

Section 52 of the Act does not express the condition that the goods should be unique, but review of case law indicates that the courts have exercised the test of uniqueness for years. In this respect, as Swinfen Eady MR stated in *Whiteley Ltd v Hilt*,[53] the power granted to the courts to order the delivery of a particular chattel is discretionary, and should not be exercised 'when the chattel is an ordinary article of commerce and of no special value or interest.'

Another example is *Cohen v Roche*[54] where the court refused to enforce the seller to deliver a set of Hepplewhite chairs, since they were ordinary commercial articles with no special value. As in *Falcke v Gray*[55] which involved contract

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[48] Treitel (n 29), 1020.
[49] Laurence Kaffman and Elizabeth Macdonald, *The Law of Contract* (7th edn, Oxford University Press 2010), 21-110.
[50] Jones and Goodhart (n 1), 144.
[51] Treitel (n 29) 1020.
[52] Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2010) 932.
[53] [1918] 2 KB 808, 819.
[54] [1927] 1 KB, 169.
[55] [1859] 4 Drew 651. Although, the Vice Chancellor said that the jars had 'unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-delivery'.

for sale of two china jars, the court refused to order specific performance on the merits of the case. Thus, in terms of contract for sale of goods, the remedy would not be awarded where the goods are not unique. It means that the goods must be irreplaceable and not to be available on the market.[56] In this way, the chattels such as an Adam door,[57] a stone from Westminster Bridge[58], or a particular painting or an article are deemed to be unique. Additionally, in this case, Professor Kronman[59] classifies those objects which courts would have great difficulty identifying substitutes as unique.

Occasionally, there are cases in which the chattel is not an ordinary article of commerce, but the court refuses to order specific performance on the basis that the chattel can be obtained from another manufacturer, therefore it is not unique. As in *Societe des Industries Metallurgiques SA v The Bronx Engineering Co Ltd*,[60] the Court of Appeal held 'the fact that claimants have to wait between nine and twelve months for a replacement delivery did not itself establish that the goods were unique.'

To summarize, it should be stated that the availability of specific performance must depend on the appropriateness of that remedy in relation to circumstances of each case. As Treitel[61] has pointed out, 'the question is not whether damages are an adequate remedy, but whether specific performance will do more perfect and complete justice than an award of damage.' On one hand, the aggrieved party has to exercise his right to mitigate the loss, and on the other

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[56] Bridge (n 25) 534; Also, a dictum of Lord Westbury in *Holroyd v Marshall* [1862] 10 HL Cas 209, 210 is an old-fashioned illustration to explain the uniqueness of the goods. He pointed out that a contract for sale of 500 chests of tea is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular, but a contract for sale of 500 chests of the particular tea in my warehouse in Gloucester would be specifically performed.

[57] *Philips v Lambdin* [1949] 2 KB 33, 41.

[58] *Thorn v The Commissioners of Her Majesty's Works and Public Buildings* [1863] 32 Beav 490.

[59] Anthony Kronman, 'Specific Performance' (1978) 45 University of Chicago Law Review 351. He also gave an economic analysis of the law of specific performance beginning with a workable concept of uniqueness.

[60] [1975] 1 Lloyd's Rep 465.

[61]Treitel (n 29), 1026.

hand, he should be reasonably compensated by the most appropriate remedy, to be in the position in which he would be if the breaching party had performed his obligations.

D. Grounds for Refusing to Order Specific Performance

It may seem that once the requirements implied by section 52 are met, and damages would not be an adequate remedy, the courts will readily exercise discretion and order specific performance of a contract. However, this is not the whole story. There is a range of factors which a court will have to consider, in order to grant such a relief. And it should be noted that, its discretion to refuse the order on these grounds cannot be excluded by prior agreement of the parties.[62]

Generally the courts, in exercise of their discretion, consider several factors such as: circumstances of the case[63], conduct of the parties[64], the undue hardship that may be inflicted on the defendant[65], impossibility, unfairness, inadequacy of consideration and other elements.[66] English courts seem to be reluctant to grant the specific enforcement of a contract in cases where any of the mentioned factors are involved.

As Treitel[67] has stated, there are certain contracts which are not specifically enforceable, such as personal services

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[62] *Quadrant Visual Communications Ltd v Hutchison Telephone* [1993] BCLC 442 (CA).

[63] *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954. In this case the court applied the adequacy test and consequently, an interlocutory injunction was ordered. The test was applied as the circumstances of the case were such that an injunction would be equivalent to specific performance.

[64] The plaintiff in equity must approach the court with clean hands. The absence of clean hands is explained by presence of fraud, misrepresentations or illegality. See also I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (7th edn, Sweet & Maxwell 2007), 245.

[65] *Denne v Light* [1857] 44 ER 588. Here the court refused to order specific performance on the ground of severe hardship to the defendant. The case is related to sale of land. However, the rule can be used in terms of contract for sale of goods.

[66] All mentioned factors are discussed in details by Treitel (n 29) 1026-29. Considering the fact that this essay has focused on specific performance in terms of sale of goods, discussing the factors which are more related to the contracts for sale of land is outside the scope of the essay.

[67] Treitel (n 29), 1029-37.

contracts, contracts requiring constant supervision of the court, contracts which are too vague and promises made without consideration.

As far as contracts for sale of goods are concerned, the foremost element to be considered by judges is the inadequacy of damages, although, as already discussed, there is neither clear measure nor established rule to examine in regards to the fact about; what is exactly considered as adequacy of damages. The general rule is that the courts will refuse to grant specific performance when the claimant can, by any means, obtain the equivalent value of the remedy of damages. In all these cases, the remedy available to the claimant is subject to the duty of 'mitigation of loss'. This duty requires the buyer to substitute purchase in order to mitigate his loss[68], provided that the satisfactory equivalent of what he contracted for is available in the market.

II. Right to Cure

Generally, the right to cure can be formulated in different ways. When there is a breach of contract in the context of sale of goods, the main methods of cure can be categorized into two forms; firstly it can be performed by repairing the defective goods. The second way is to substitute the defective part of the goods, or the whole cargo.

As far as English law is concerned, the question of 'cure' creates considerable amount of uncertainty. While some authors[69] are of the view that common law may to some degree, offer applicants a right to cure defects; there are other differing views[70] which advocate a different opinion. For instance, Goode believes that if the buyer lawfully rejects the non-conforming goods, the seller has a general right to cure.[71] However, this is not the whole picture. In contrast, there are

[68] Treitel (n 29), 1020.
[69] Guest (ed) (n 10) para 12 – 032.
[70] Royston Miles Goode, *Commercial Law* (4th edn, Butterworths 2009) 370-73.
[71] ibid.

some other commentators[72] who believe that a defective delivery of the goods is regarded as a breach of condition of contract, and would definitely entitle the aggrieved buyer to reject the non-conforming goods. Thus, if the buyer does so, the contract will be terminated and the seller would not enjoy the right to cure his breach.

Additionally, in the Report of 1987,[73] the Law Commission provided a recommendation for consultation purposes stating that in the case of non-consumer sales,[74] cure should not be introduced because 'the circumstances of such sales were complex and cure would in many cases be impracticable.' [75] Nevertheless, the consequence of the decision was that it was taken to 'introduce some measure of control over abusive contractual termination.'[76]

With reference to the Sale of Goods Act it is indicated that there is no statutory recognition of the right to cure, neither can it be demanded by the buyer, nor may it be offered to the seller.[77]

Furthermore, a review of case law has also demonstrated the point that there is no general rule allowing cure of a defective delivery of goods or tender of documents. Though, the leading case which is cited by most of the authors, who support the existence of right to cure, is *Borrowman Philips & Co v Free & Hollis*[78] in which the offered cargo of maize were rejected by the buyer on the basis that complying

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[72] Robert Bradgate and Fidelma White, *Commercial Law* (11th edn, Oxford 2004) 128; Bridge (n 25), 201.

[73] Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987), para 4.16.

[74] As indicated in the report, the Law Commission stated that the reasons behind their decision as to entitling the seller, in the contract with a consumer buyer, to have the right to cure were particular positions of consumer buyers.

[75] Bridge (n 25), 197.

[76] Michael Bridge, 'A Law for International Sales' (2007) 37 Hong Kong Law Journal 17; This is provided by section 15a of the Act which prevents rejection of the goods and termination where a breach is so slight that it would be unreasonable to reject the goods.

[77] cf Goode (n 70) 372. He states that 'it is regrettable that opportunity has not been taken to modernise the Sale of Goods Act by including express provisions as to the right of cure, a right which mitigates the impact of an improperly motivated rejection by the buyer while at the same time tending to avoid economic waste.'

[78] [1878] 4 QBD, 500.

documents were not tendered. Although the seller offered another cargo coupled with proper shipping document, the buyer refused to accept seller's retender. It was held that the buyer was bound to take it.

This case is cited as authority by many cases, such as *The Kanchenjunga*,[79] in which the presence of right to cure is defended. The problem which arises here is that the authors who disagree with the existence of such a right, have stated that the *Borrowman*[80] cannot establish a general right to cure.[81] They argue that this can only become the case where the sellers have not effectively appropriated goods to the contract.[82] Thus, according to this approach the authorities on which the existence of right to cure is based are now undermined.

Due to this factor, it is indicated that the position of right to cure is relatively obscure under English law. On one hand, the Law Commission has stated [83] 'there is great uncertainty...as to the existence or extent of the seller's right to repair or replace defective goods'. On the other hand, there are leading academic writers[84] who argue in favour of the existence of right to cure. At least there seems to be a consensus among all commentators on the time limitation to the right to cure. In other words, the seller's right to cure, if it exists, is to be limited to the delivery period. The seller's offer to cure his breach would not be allowed after the time for delivery has passed.

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[79] *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corpn of India* [1990] 1 Lloyd's Rep 391.
[80] *Borrowman Philips v Free & Hollis* (n 78).
[81] Bridge (n 25), 199.
[82] Mirghasem Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law' (2001) <http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh1.html> accessed 5 March 2011
[83] Law Commission, *Sale and Supply of Goods* (Law Com No 85, 1983) para 2.38.
[84] Goode (n 70) 372; AG Guest (ed) (n 10) para 12-032.

III. Specific Performance and Right to Cure

The concepts of specific performance and right to cure are in fact two sides of the same coin, in the sense that English courts are likely to give priority to the remedy of damages. It often seems more practicable, in the case of non-delivery, that an aggrieved buyer be compensated by means of damages rather than requiring his seller to deliver the goods despite all the difficulties. Provided that the existence of right to cure is recognized, damages would be practically more helpful where the buyer demands that the seller substitutes or repairs the defective goods.

To clarify the matter, suppose that there is a contract for sale of certain brand of bread. The seller is a manufacturer of Bread-X and the buyer has a chain of supermarkets. One of the core ingredients of this type of bread is a spice called Corn-Y. This type of spice is produced by a third supplier in a foreign country. The time of delivery passed and the seller has not delivered the required Bread-X to the buyer's distribution centres. The buyer manages to obtain a claim against the seller by resorting to remedy of specific performance. The seller explains that his supplier of Corn-X has not performed his obligations due to a malfunction in the machinery. The machines are quite old, and it is impossible to repair the defecting part. It takes a while to replace them with new substitutes. Subsequently the seller could not procure Corn-X, since that supplier was the only supplier of Corn-X.

In the above case, the buyer may theoretically, demand that the seller performs his obligations under the contract. The reality is that, at this time, it is absolutely impossible for the seller to produce and deliver that type of bread. Thus, award of damages could be a better substitution than nothing. The seller has reasonable excuses, and the only immediate compensation to which he is bound, is to pay damages.

Accordingly, it is submitted that the reluctant attitude of English law as to either compel a seller to perform his duties, or entitle the seller to a right to cure, is more favourable to the injured party, rather than leaving him in an uncertain

situation of whether the breaching party will some day in the future perform his obligations, by delivering the goods, or not. By following this approach, he does not have to wait for the other party, and in our modern world of commerce it would save a substantial amount of money as well as time. Therefore, not only the aggrieved party will be fairly satisfied by the remedy of damages, but also he will have a chance to find alternative sources to supply himself with more suitable and conforming goods he requires in his own business.

Moreover, the seller who may have some justified excuses and convincing reasons for his failure to deliver the goods will not be forced to perform his duty under compelling circumstances in which the delivery of goods is very likely to be defective, since he has to supply the goods from the very first available sources as soon as possible in a very short time. However, he will be justly punished by paying damages. Finally, it is worthwhile to note that when there is a contract for sale of commercially unique goods[85], it seems reasonable for a buyer to demand the court to use its discretionary power[86] to order the seller to cure the defective delivery, since he may be the only supplier of those goods.

Nevertheless, as it is discussed in this chapter, the existence of right to cure is based on *uncertain* controversial authorities. It is submitted that, a prudent approach offered by English law in which it avoids to expressly recognize or exclude the right to cure, appears to be befitting and objective.

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[85] The term 'unique goods' has been discussed earlier in this essay under section 1.3.
[86] Their power is granted by section 52 of the Act to issue an order of specific performance.

Chapter 2: The United Nation Convention on Contracts for the International Sale of Goods 1980

I. Specific Performance

Initially, it is useful to state that the primary remedy for non – delivery, and in general non – performance, under CISG is not damages.[87] Of course, the Convention recognises the remedy of specific performance.[88] This is provided in article 46 of the Convention[89] where the buyer is allowed to 'require performance by the seller of his obligations.' Therefore, the buyer has a right to require the seller to perform his obligations regarding delivery of the goods or documents if the seller has not yet delivered them.

Unlike the Sale of Goods Act,[90] the Convention also provides a right in favour of the seller. Under article 62, the seller 'may require the buyer to pay the price, take delivery or perform his other obligations.' However, the practical aspect of presenting this provision is insignificant, since it is usually applied in exceptional circumstances.

Furthermore, specific performance under the Convention is an option available to the buyer to require a defaulting seller to perform his obligations. It is not, like under the

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[87] As Michael Bridge in James E S Fawcett, Michael Bridge and Jonathan Harris, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2004) para 16 – 142, stated 'this departs from the common law philosophy of damages as the primary remedy and specific performance as exceptional.' On another note, Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 Law Quarterly 201,219 has said that 'In systems outside the common law, specific performance is the logically prior remedy. Performance is what has been promised and it is performance therefore which the promisee is entitled to require. On this view damages are in principle only a substitute for actual performance. This way of looking at the matter is adopted by the Convention.'

[88] Shael Herman, 'Specific Performance: A Comparative Analysis' (2003) 7(2) Edinburg Law Review 194, 196. He has asserted that certain provisions of the CISG could militate against specific performance as primary remedy.

[89] Article 46 (1) 'The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.'

[90] Patrick S Atiyah, John N Adams and Hector MacQueen, *Atiyah's Sale of Goods* (12th edn Longman 2010) 557.

provisions of English law, a discretionary remedy granted by the courts. An aggrieved buyer thus, is not required to resort to a court to enforce performance of the contract by the other party.

The broad language of the provision seems to involve a wide range of circumstances in which the buyer is allowed to invoke such remedy. Article 46(1) refers to seller's non-performance of 'all obligations' which perhaps include delivery to wrong destination, wrong date, or even refusing to tender the proper documents.

In addition to the buyer's general right to specific performance of the seller's obligations, article 46 has two other subparts. Beforehand, it has to be noted that the nature of remedy in all these parts requires the defaulting seller to deliver complying goods. In other words, all the three subparts can be categorized as the buyer's rights to specific performance.[91]

In the case of non-conforming goods, article 46(2) gives the buyer the right to require delivery of substitute goods provided that 'the lack of conformity constitutes a fundamental breach of contract.'[92] And when there is no serious breach of contract, article 46(3) provides that the buyer may require the seller to remedy the lack of conformity by repair.[93]

Having considered remedies granted by the Convention to an injured buyer in the case of non-conformity or non-performance by the seller, it should be stated that there are some restrictions or requirements for resorting to such remedies. One may assert that this article entitles the buyer

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[91] However, there is a suggestion to recognize two last subparagraphs as separate remedies from specific performance. Jafarzadeh (n 13) at section 3 has submitted that these two remedies should be regarded as the buyer's rights to demand cure. Nonetheless, it is suggested that both specific performance and right to demand cure are remedies available for an aggrieved buyer to require his seller to perform his obligations. In fact, this seems to be a matter of language.

[92] And he made 'a request for substitute goods either in conjunction with notice given under article 39 or within a reasonable time thereafter.'

[93] Unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

to 'an apparently broad right to require performance.'[94] Therefore to clarify the subject these limitations need to be discussed.

A. Conditions Required by Article 46

As stated before, the text of article 46 may seem so broad that it hardly covers any remedy requested by the buyer. However, this is not true. There are express conditions required by the article in each subpart.

Firstly, article 46(1) makes the remedy available to the buyer unless he has resorted to a remedy which is inconsistent with this requirement. Clarifying the matter, there are several types of remedies which would be presumed as inconsistent with requiring specific performance, such as avoidance of the contract[95] or reduction of the price.[96] Under English law[97] however, the buyer is not prohibited from claiming damages[98] when he has already resorted to specific performance.[99]

Secondly, under article 46(2), there is an obvious limitation on the buyer's right to require re-delivery of substitute goods. There it is stated that the non-conformity must amount to a fundamental breach. For this purpose, article 25 defines the term 'fundamental breach' as a breach that 'results in such detriment to the other party as

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[94] John Fitzgerald, 'CISG, Specific Performance, and the Civil Law of Louisiana and Quebec' (1997) 16 Journal of Law and Commerce 291, 294.
[95] See article 26, 49 or 81 of CISG.
[96] Article 50 of CISG.
[97] Treitel (n 29) 1048.
[98] Article 45(2) of CISG.
[99] cf Jussi Koskinen, 'CISG, Specific Performance and Finnish Law' (1999) Publication of the Faculty of Law of the University of Turku, Private Law Publication Series B:47 <http://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html> accessed 6 Mach 2011. He argued that 'the buyer may lose his right to require performance if he has – without avoiding the contract, claimed damages for failure to perform or defective performance of some other obligation. Of the essence is the point of time when the buyer becomes bound by his claims for damages. Such point in time must be decided in conformity with general principles of good faith.'

substantially to deprive him of what he is entitled to expect under the contract.'[100]

The definition above consists of the term 'detriment' which is called a newcomer [101] word in the field of international sale. The Convention has not given an explanation of what this word means. But according to the statement of the Secretariat Commentary on article 23 of the 1978 Draft Convention, the word 'detriment' has an implicit meaning – synonymous with injury and harm. It can be so construed, depending on the circumstances of each case: such as the monetary value of the contract or the monetary harm caused by the breach.

Thirdly, the right to require repair under article 46(3) is limited to a request which would not be unreasonable, having regard to all the circumstances. In other words, it should not be unreasonable to the seller. Moreover, this does not depend on the character of the breach, but rather on the nature of the goods delivered and all the other circumstances.[102]

Finally, both provisions, for the purpose of repair or substitute goods, require that a notice of non-conformity must be made either in conjunction with notice required by article 39 or within a reasonable time thereafter.[103]

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[100] Unless the party in breach did not foresee the result and a reasonable person in the same circumstances would not have foreseen such a result.

[101] Michael Will, 'Article 25' in Cesare Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Fred B Rothman & Co 1987) 205, 210.

[102] Michael Will, 'Article 46' in Cesare Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Fred B Rothman & Co 1987) 333, 338; Koskinen (n 99) section 2.2.2.3: 'Of particular importance are the extra costs that the seller would have to suffer as a result of the repair. If such cost would be unreasonably high especially compared to a delivery of substitute goods, the precondition for article 46(3) is likely to be fulfilled.'

[103] Reasonable time is not defined in the Convention, however article 39(2) reads that 'In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.'

B. Compromise Made by Article 28

The restrictions imposed by article 46 on its rules as to the buyer's right to require specific performance has been set forth. Additionally, a further limitation is provided under article 28 of CISG. According to this provision, a court is not bound to enter a judgement for specific performance unless it would do so under its own law.

In civil law jurisdictions, the most natural remedy in the event of breach is the right to require performance by the defaulting party. This situation is different under the Common law system. As stated before, the primary remedy in the common law countries is presumed to be a claim for damages. Thus, specific performance is an exceptional remedy which may be solely granted in special circumstances.[104] For this reason, there is a compromise reflected in the context of article 28, in the sense that the courts under both civil and common law systems would nevertheless be able to carry on their routine proceedings. In fact, according to Gonzalez[105] article 28 provides 'an exception for countries whose legal systems differ from the specific performance bias of the Convention.'

In addition to the ambiguity[106] that concerns article 28, it has to be considered that while it seems as a useful approach to be applied by a common law party and to some extent, make the specific performance flexible. It also prepares the grounds for application of different rules depending on the law of the forum court, and may subsequently interfere with the aim of CISG to achieving unification.

All things considered, it seems reasonable to conclude that as Fitzgerald has asserted, 'CISG's specific performance provisions seem to raise more questions than they answer.'[107]

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[104] Steven Walt, 'For Specific Performance under the United Nations Sales Convention' (1991) 26 Texas International Law Journal 211, 218.
[105] Olga Gonzalez, 'Remedies Under the U.N. Convention for the International Sale of Goods' (1984) 2 International Tax & Business Law 79, 96.
[106] As Walt (n 104) 218 pointed out "The meaning of the statement 'its own law' is far from apparent. This phrase could refer to the substantive domestic law of the forum or to the forum's entire law, including its conflict of law rules."
[107] Fitzgerald (n 94), 300.

There is still the shadow of a non-uniform and national interpretation of CISG due to ambiguous nature of article 28.[108]

C. The Relevance of other Factors

As a matter of comparison, several issues such as availability of substitute goods, types of goods and duty of mitigation have to be examined in this section. While these factors were, to some extent, considered under English law, it may be asked what the answers would be if these questions arise in the case of specific performance under the CISG.

As far as the text of Convention is concerned, there are no imposed conditions, as such, to be met in the case of resorting to the remedy of specific performance. In other words, the Convention does not expressly provide such requirements. For the purpose of examining the presence of 'availability of substitute goods' test, a review of drafting history indicates that although article 25 of ULIS[109] precluded the buyer from requiring performance by the seller in cases where it was reasonably possible for the buyer to purchase goods as a replacement, this provision is not invoked anymore.[110] Thus, it can be concluded that there is no pre-requisite for availability of substitute goods in the market in order to claim the remedy under CISG.

Sometimes, it may seem necessary to examine whether the goods must fall into certain category in order for a party to

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[108] However, with respect to English law, Bridge has suggested that specific performance in article 28 should have the meaning assigned to it in English law. It should therefore be invoked only in respect of discretionary equitable remedies. Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, Oxford University Press 2007) 3.47.

[109] Uniform Law on the International Sale of Goods (1964)

[110] Report of the Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods (1977) YB VIII, paras 239-240. The UNCITRAL Committee considered a proposal that the buyer- has no right to require performance if 'it is reasonably possible for the buyer to purchase goods to replace those to which the contract relates'. The Committee rejected the proposal justifying the reason that 'the proposal, if accepted, would unjustifiably restrict the rights of the buyer to require performance of the contract... there was also the danger that the proposal, if adopted, might be abused by a seller anxious to avoid his contractual obligations.'

successfully resort to the remedy.[111] This question, as mentioned before, may arise when it comes to the application of CISG rules. The answer, as it is manifestly clear, would be that such an examination is not required by the provisions of the Convention. Thus, the CISG is silent about the types of goods which may meet legal requirements, for the purpose of granting specific performance.

From a practical perspective, it is suggested that the buyer should not be entitled to require delivery of replacement goods in cases involving specific goods, while this remedy should only be available in the case of contracts for the sale of unascertained goods.

As it is explained before, under English law, the remedy of specific performance is subject to the rule of mitigation.[112] It means that the injured party has to make reasonable efforts to mitigate his losses, example by making substitute purchase.[113] Similarly, by virtue of article 77 of CISG which concerns the case of breach of contract, an injured buyer 'must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit.'[114]

There are different views about the effect of this article. Some argue that[115] this cannot be regarded as a restriction on the buyer's right to specific performance, while others[116] are of the opinion that this provision limits the scope of the remedy.[117]

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[111] As it is considered under English law, the express provision of section 52 of the Sale of Goods Act requires that the goods must be specific of ascertained in order to be the subject of the remedy of specific performance.

[112] Treitel (n 29) 1020.

[113] Or the resale of the goods (in the case of an injured seller).

[114] Article 77 continues that 'If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.'

[115] Jafarzadeh (n 13) section 4.6.; Amy H Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 Washington Law Review 607, 624.

[116] Guenter H Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon 1988) 73.

[117] Herman (n 88) 196 pointed out that article 77 could constitute a brake on specific performance.

Finally, to make a balance between these arguments, a better suggestion was given by Koskinen. That is, that[118] article 77 'should not automatically restrict the right to require performance.' He submitted that 'in some situations such restricting effect should be allowed.'[119]

II. The Right to Cure

In a contract of sale, when a breach occurs, the buyer may demand the seller to remedy that breach.[120] In this manner, if the breach is fundamental then it is obvious that the seller may cure such a breach. This situation is made possible by the principle of right to cure.

In general there is an obvious difference between CISG and English law in recognition of right to cure. Unlike English law the Convention clearly allows the seller to cure any nonconformity in his performance related to the documents and goods.

It is argued that the purpose of giving such a right is to minimise the hardship that may be caused by the termination of the contract, and to save the contract from avoidance for fundamental breach.[121] It would also prevent economic loss and waste of time involved in international trade.

A. General Provisions

The principle of cure is laid down in article 34, 37 and 48. The right to cure any lack of conformity in the documents is conferred to the seller by article 34. Similarly, article 37 provides the possibility for the seller to cure his non-conforming performance[122] in relation to delivery of the

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[118] Koskinen (n 99) section 2.3.3.

[119] For this purpose, Koskinen gives examples such as 'where a party requires performance only to speculate on the market and where the party is acting against the good faith principle provided by article 7, some degree of an obligation to mitigate damages should be expected from the party requiring performance.'

[120] By means of specific performance, as discussed earlier.

[121] Bridge (n 108) para 12.35.

[122] Article 37 provides that: 'He may...deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of

goods. Both of these provisions permit 'cure' up to the time of delivery.

The time for right to cure is extended by article 48(1) under which it is provided that the seller may even after the date for delivery remedy (at his own expense) any failure to perform his obligations. Thus, the seller is entitled to cure a non-conforming tender and delivery even after the date set for performance. The application of these rules is stated subject to some limitations which are provided by the Convention.

It is necessary to state that in addition to the right to cure (like specific performance) the buyer 'retains any right to claim damages as provided for in the Convention.'[123]

B. Qualifications of Right to Cure

Although it may be asserted that under CISG the seller is granted a broad right to cure,[124] the fact is that the availability of such a right is qualified by some provisions of the Convention. As for the right to cure up to the delivery time,[125] it can be exercised only if its application does not 'cause the buyer unreasonable inconvenience or unreasonable expense.' [126] For the purpose of this condition, the unreasonableness must be decided with regards to all circumstances of the contracts.

One of the significant features of the right to cure under CISG is that the determination of relationship between the buyer's right to avoid the contract on the basis of fundamental breach with the seller's right to cure as regulated in articles 34 and 37, is not provided under its rules. The extension of right to cure under article 48(1) is manifestly

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any non-conforming goods delivered or remedy any lack of conformity in the goods delivered.'

[123] Articles 34, 37 and 48(1).

[124] Eric C. Schneider, 'The Seller's Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods' (1989-1990) 7 Arizona Journal of International and Comparative Law 69, 102.

[125] Granted by article 43 and 37.

[126] However, in the case of documents, Bridge (n 76) at 31 has stated that '[t]he real problem with this rule is the effect it might have on the clean documents rule.'

made subject to the buyer's right to avoidance.[127] This topic needs to be discussed in further details, thus it is examined under a separate heading below.

C. Right to Cure and Avoidance

It is quite obvious that the language used in article 48(1) makes its application subject to article 49; which deals with the buyer's right to avoid the contract. Article 49(1) states that the buyer may declare the contract avoided in one of these two situations. Firstly, if the failure by the seller to perform any of his contractual obligations amounts to a fundamental breach, or secondly in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer – in accordance with article 47(1).

In relation to the first subpart, it is meant that the exercise of seller's right to cure is subject to the buyer's right to avoid fundamental breach.[128] Perhaps, a question may arise here as to which one of the above rights takes precedence over the other. The answer to this question with respect to the buyer's claim for specific performance is almost clear, as both parties are looking for same result which is performing their respective contractual obligations.

The situation is entirely different in regards to the buyer's right of avoidance. In fact, it draws some controversial arguments. The main difficulty in resolving this controversy is: what is the position when the buyer exercises his right to avoid the contract before the seller has had a reasonable opportunity to attempt to cure? The probabilities are examined as follows.

One of the possibilities for response to the above difficulty, as Bridge has pointed out,[129] is to interpret the provisions of the Convention according to the good faith canon. He made another proposition in which the occurrence of fundamental breach is to be considered in relation to the seller's declared/possible willingness to cure, which would prevent

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[127] Article 49 of CISG.
[128] The concept of fundamental breach was examined earlier in this essay.
[129] Bridge (n 108) para 12.39.

unexpected action by the buyer. In the case where fundamental breach has not yet been committed, he believes the second approach 'has much to commend it.'[130]

There are other views which by some other authors; such as Professor Honnold. He maintained that the breach is not to be considered fundamental if a cure is possible, so that the buyer cannot avoid the contract. [131] Conversely, Ziegel [132] reached a different approach. In order to clarify his conclusion, he gave an example in which it was supposed that the delivered machine by the seller did not work at all, so this amounted to a fundamental breach. The buyer in such circumstances is entitled to avoidance of contract. However, he then presumed that the non-conformity could be fixed by some adjustments or the replacement of a minor part. Despite the ambiguity of the scope of CISG provisions, he finally concluded that to avoid economic waste, the seller 'should have an opportunity to cure.'[133]

Having considered these arguments, it is worthwhile to state that, the present view is that the consequences of the breach from the perspective of the buyer, the conduct of the seller and his willingness to exercise his right, and the possibility of cure must be taken into account in order to decide the fundamental nature of a breach.[134]

Conclusion

This essay has examined the remedy of specific performance as well as the right to cure, under both English law and CISG. The present research was designed to assess

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[130] ibid.

[131] John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer 1982) 214 as cited in Eric C Schneider (n 124) 88.

[132] Jacob S Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Bender 1984) 9 – 19.

[133] ibid 19-21; also M Bridge (n 76) 29 stated that the primary justification for the right to cure is that 'it reflects what merchants do in the real world of commerce.'

[134] Alison E Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom' (2000-2001) 9 Kluwer Law International 57.

overemphasis by CISG on compelling the breaching seller to perform the obligations he has promised to do in accordance with the contract. The positions in each of the concepts above, under both legal sources were examined. Moreover, cases and provisions related to each topic were also explained. It is indicated that the order of specific performance under English law is not an available routine remedy which the courts readily grant. While it is an established conduct under English law to recognise specific performance as a discretionary remedy, the provisions of CISG do not present such an approach. In this way, it was discussed that unlike English law, the rules of the Convention provide this remedy as a right for the buyer.

Furthermore, it was discussed that although the Sale of Goods Act lay down certain provisions regarding specific performance English courts are generally reluctant to grant such an order, especially in the light of rules which establish the fact that the primary remedy to compensate an injured party is: damages.[135] Subsequently, it was mentioned that there are several conditions required by the Sale of Goods Act in order to limit the scope of this remedy. Besides, in the case that these requirements are fulfilled by the claimant, there is a wide range of additional factors which English courts will consider.[136]

While under CISG, there is an uncertainty about exercising some measures for availability of goods in the market, it can be regarded as similar to the test of uniqueness in English law. The tests of adequacy of damages and the uniqueness of goods have been proved to be exclusively applied by English courts.[137] Subsequently, it is usually the case that this would likely result in refusing to order the specific performance.[138]

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[135] Walt (n 104) 218.

[136] As enumerated before, such as circumstances of the case , conduct of the parties , the undue hardship that may be inflicted on the defendant , impossibility, unfairness, inadequacy of consideration and other elements.

[137] Treitel (n 29) 1020.

[138] *Cohen v Roche* [1927] 1 KB 169.

In contrast, despite the ambiguity regarding the application of compromise made within article 28,[139] not only do the provisions of CISG present a broad chain of remedies available to the buyer to require specific performance of the seller's obligations,[140] there are also not enough restrictions imposed on the application of this remedy. The defaulting seller is not given a fair opportunity to explain his excuses for non-performance of his duties. Under English law, there are several reasonable escape routes for the seller to justify his breach, such as considerable undue hardship he might suffer.[141] Similarly, this is the case when the performance of the contract needs constant court supervision.[142]

At first sight CISG provisions seem more favourable by enabling the buyer to perform the contract in almost all circumstances. However, it is submitted that this is more likely to be counted as imperfection in the Convention rules governing specific performance, in the sense that there are circumstances in which the performance of the contract is practically impossible and where the seller is by no means able to deliver the contract goods.[143]

Given the explanations about the right to cure, although it is considered as a right for the seller to cure his breach, it is submitted that the approach of CISG is more favourable to buyers rather than sellers. In other words, the buyer (by avoiding the contract in the case of fundamental breach)[144] is enabled to deprive the seller of his right to cure. This could be regarded as another attempt by CISG to compel the seller to perform his obligations within the contract period.

According to article 47 of CISG, a buyer can claim damages in addition to requiring specific performance or

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[139] Walt (n 104) 218.
[140] See article 46.
[141] *Patel v Ali* [1984] 1 All ER 978.
[142] *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116.
[143] For example, in a case where the goods have been lost because the ship carrying them sank. The seller has to procure the goods from another supplier even though this maybe sometimes impossible. For instance, the producer has ceased to produce such goods.
[144] See article 49(1)(a) of CISG.

demanding seller's cure. Although there are limitations provided by the Convention on this matter, this permission can result in an unfair situation in which the seller would be obliged to expend unreasonable costs to cure his breach, or to perform delivery as well as paying a considerable amount of money for damages in addition to unexpected costs which might arise. In practice however, this is rarely the case. This is because the injured buyer usually can demand the goods he needs as soon as possible. For this reason, he is unlikely to wait for the seller to exercise his right and offer a cure. Thus, more often the buyer attempts to avoid the contract and consequently, he will try to resort to the remedy of damages instead of enforcing the contract on the first breaching seller.

Returning to the question posed at the beginning of this essay, it is now possible to state that CISG provisions overemphasise an approach towards compelling the defaulting seller to perform his contractual duties.

In short, it is true that a contract is made to be performed, it seems wrong to make this truth real regardless of whatever circumstance that is presented in such cases.

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Problems and Progress in the Protection of Videogames: A Legal and Sociological Perspective

Calum Darroch

Abstract

The videogame industry has reached a critical juncture in its efforts to prevent piracy: as publishers and developers adopt more stringent copyright enforcement technologies, consumers are becoming more and more vocal about the restrictions these technologies place on their use. Furthermore, there is a growing body of evidence to suggest that the heavy-handed rights management technologies used in videogames today may be counter-productive as they provide little incentive for consumers to purchase legitimate copies of games. If an effective method of regulating consumer behaviour is to be found, the motivations of pirates must be investigated.

This research could, however, have implications throughout the creative industries as a whole, as copyright protection technologies not only have a dramatic effect on consumer rights, but seek to expand the modern scope of copyright law beyond its traditional limits. It is therefore essential that the areas in which such technologies transcend these limits be identified and challenged if the balance of the law is not to be skewed too far in favour of copyright holders.

In this study, I have found that rights management programs employed by videogame companies not only disrespect traditional consumer rights, but are damaging the established doctrines of first distribution and of ownership in the physical property as separate to ownership of intellectual property. This has given these companies unprecedented power over the use and distribution of their works. If future rights management schemes are to be effective, balance the rights of users with those of the rights-holder, and not penalise honest consumers.

I. Introduction

The videogame industry is serious business. In the last two decades, what was once a niche hobby enjoyed by a minority

has exploded into the next entertainment media phenomenon. In 2006, it was predicted that by 2011, videogames would be outselling music.[1] In fact, in 2009, videogame sales overtook even the Hollywood film industry in terms of gross profits.[2]

With this increase in consumer interest, however, have come a number of rapid and sweeping changes to the way in which the industry conducts business. The transition from a relatively 'underground' hobby to mainstream pastime has been less than smooth, and the industry today is faced with the growing problems of software piracy and second-hand software markets. Both of these have made it more difficult for videogame developers and publishers to recoup their initial investments.

Furthermore, the aggressive steps videogame publishers have taken to protect those investments have serious consequences for the formulation of copyright law as a whole. The monopoly rights now conferred upon videogame companies are more extensive than in any other industry. Far from being an issue whose ramifications are solely confined to gaming markets, these extensions have the potential to rewrite the copyright map in an era of digital provision of content in a whole host of industries.

The purpose of this paper is to shed some light on the advantages and shortcomings of current copy-protection methods employed in videogames, the ways in which those methods challenge traditional copyright norms, and to put forward a number of observations as to how the industry may seek to evolve in the future. Due to the particularly highly-restrictive nature of protection measures applied to games for the personal computer (or PC), I will focus much of my

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[1] Nate Anderson, 'Video Gaming to be Twice as Big as Music by 2012' (*Ars Technica*, 30 August 2007) <http://arstechnica.com/gaming/news/2007/08/gaming-to-surge-50-percent-in-four-years-possibly.ars> accessed 21/09/11.

[2] Tom Chatfield, 'Videogames Now Outperform Hollywood Movies' (*The Guardian*, 27 September 2009) <http://www.guardian.co.uk/technology/gamesblog/2009/sep/27/videogames-hollywood> accessed 23/09/11.

attention on this market, particularly as its vast size[3] must make controlling it a very attractive prospect for publishers. As we shall see, the industry's efforts to do just that have resulted in a number of practical and legal problems that must be addressed.

II. DRM, TPMs and the Struggle for Control

Perhaps the biggest challenge facing the videogame industry today is that of piracy. In 2010, the UK gaming industry lost an estimated £1.45 billion in sales in the console markets alone.[4] The PC gaming market is likely to have been hit even harder, as research suggests that a staggering 90% of PC games in circulation in Europe are pirate copies.[5] These statistics suggest that the ability of copyright law to protect the interests of game developers is insufficient, as advancements made in file-sharing technologies and peer-to-peer networks (P2P) have facilitated the mass distribution of illegal copies of games.

The perceived failure of copyright law to tackle the issue of videogame piracy has resulted in a swift and decisive technological response from the industry. The last decade has seen a proliferation of technological protection measures (TPM) and digital rights management systems (DRM) applied to videogame software, as developers have sought to regain control over their copyrighted works. These technologies have one intended remit: whereas copyright law would seek to punish those who distribute and download pirate copies of videogames ex-post, technological measures

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[3] Estimates of the number of active PC gamers around the world range from under 100 million to over 300 million; Matt Ployhar, 'Just How Many PC Gamers Are There?' (*Intel*, 3 March 2009) <http://software.intel.com/en-us/blogs/2009/03/03/just-how-many-pc-gamers-are-there> last accessed18 March 2012.

[4] It is also believed to have cost the British economy up to 1,000 jobs in the last year; Dan Whitworth, 'Gaming Industry Lose "Billions" to Chipped Consoles' (*BBC Radio 1 Newsbeat*, 21 January 2011) <http://www.bbc.co.uk/newsbeat/12248010> last accessed 21/09/11.

[5] Tamsin Oxford, 'The Truth about PC Game Piracy' (*TechRadar*, 2 June 2010) <http://www.techradar.com/news/gaming/the-truth-about-pc-game-piracy-688864> last accessed 21/09/11.

act ex-ante to prevent illegal copying.[6] In effect, copyright protection technologies act as 'a substitute for legal standards',[7] and aim to prevent recourse to litigation or other legal channels by enforcing blanket rules regarding users' conduct. As I shall discuss, this could be seen as reducing the relevance of copyright law to videogames and other digital content.

However, these extra-legal instruments are now protected *in law*. The InfoSoc Directive,[8] which adopts the WIPO Copyright Treaty[9] into EU law, requires that member states provide 'adequate legal protection' against the circumvention of 'effective' technological protection measures. These provisions have been implemented in the UK by sections 296 to 296ZF of the Copyright Designs and Patents Act 1988 (CDPA).[10]

A. Defining DRM and TPM

Before we can discuss the issues surrounding DRM and TPMs, we must first define and distinguish these two terms. It is worth noting that sections 296 to 296ZF of the CDPA merely refer to 'technical devices', which are defined with regards to computer programs[11] as 'any device intended to prevent or restrict acts that are not authorised by the

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[6] My thanks to Paul Gibson for bringing this point to my attention.

[7] Dan L Burk, 'Legal and Technical Standards in Digital Rights Management Technology' (2005) 74 *Fordham Law Review* 537, 539.

[8] Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

[9] World Intellectual Property Organisation Copyright Treaty, adopted in Geneva on 20 December 1996. The United States implemented the Copyright Treaty through the Digital Millenium Copyright Act of 1998.

[10] Lionel Bentley and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 318

[11] Whether or not copyright subsists in a videogame as such, and to what extent it should be protected, is a fundamental debate. Indeed, there are no provisions in the CDPA that refer to 'videogames' per se. While I do not have time to address the complexities of this issue in this paper, for our purposes I have placed videogames in the general copyright category of software, governed by s.3(1)(b) of the Copyright Designs and Patents Act 1988. For a deeper discussion of this issue, see David Booton and Angus MacCulloch, 'Liability for the Circumvention of Technological protection Measures Applied to Videogames: Lessons from the UK's Experience' (2011) The University of Manchester and Lancaster University, accessed 4 July 2011

copyright owner of that computer program and are restricted by copyright.'[12] In this case, the legislation is a somewhat less-than-ideal starting point for our definitions.

A useful distinction is offered by Peter Yu,[13] who defines a technological protection measure as a solution that 'focuses narrowly on mechanisms used to protect copyrighted contents, such as passwords, encryption, digital watermarking and other protection techniques'.[14] In the context of videogames, the implementation of TPMs has been vast and relatively uncontroversial.[15] These kinds of measures have been in use since the early days of the videogame industry,[16] and have largely been accepted as necessary and relatively unobtrusive measures for protecting copyrights.[17]

DRM, however, is a much more modern and divisive technology. Yu conceptualises it as 'a larger set of technological tools that not only protect the content, but also monitor consumer behaviour'.[18] The standard notion of DRM in gaming culture is of rights management software applied to PC games. These programs are usually installed compulsorily as part of a videogame installation, and facilitate certain restrictions of user actions upon the game.[19]

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[12] s. 296(6) CDPA

[13] Peter K Yu, 'Anticircumvention and Anti-anticircumvention' (2006) 84 *Denv U L Rev* 13, 61.

[14] Yu (n13) 61.

[15] For example, PC games have long been issued with authorisation codes that must be input into a computer before a game may be installed.

[16] David Houghton, 'A Brief History of Video Game Piracy: From Tapes to Torrents, the Climb of Copyright Crime Laid Bare' (*GamesRadar*, 30 August 2010) <http://www.gamesradar.com/a-brief-history-of-video-game-piracy/?page=1> accessed 22 September 2011.

[17] Of course, this has not always been the case. Early technical protection measures, such as the 'Lenslok System', often came under public scrutiny because they were incompatible with users' television sets, leaving them unable to play legitimately purchased games. With the development of new storage media, however, TPMs became much less obtrusive, with the dominant forms from the mid-1990's onwards being authentication software on console games, and authorisation codes contained within PC game boxes; David Houghton, 'Gaming's Most Fiendish Anti-piracy Tricks' (*GamesRadar*, 26 February 2010) <http://www.gamesradar.com/gamings-most-fiendish-anti-piracy-tricks> last accessed 7 March 2012

[18] Yu (n 13) 61.

[19] A well-know example would be Sony DADC's copy protection program 'SecuROM'.

Videogame publishers are continually inventing new methods aimed at ensuring user compliance with copyright, and a number of these solutions have arisen through changes in the way many videogame companies distribute their products. Therefore, if there is to be any meaningful discussion of the implications of DRM, it is essential that we move beyond the public's common view of it and interpret the technology more widely.

B. The Shift in Emphasis to Consoles

Substantial opportunities to strengthen the copyright protection of videogames have been seen in the creation of the console market. Creating a proprietary console allows the manufacturer to exert a great degree of control over a videogame's operating environment, and dictate to the user what uses are and are not authorised. Early consoles, such as the Nintendo Entertainment System, featured crude but effective TPMs in the form of proprietary storage mediums.[20] Today, however, the sophistication of console TPMs has increased immensely. Almost all modern consoles contain programming known as 'firmware', which prevents the use of unauthorised software on the console,[21] and may also be updated over time to increase levels of protection.[22]

The PC, by comparison, is valued by consumers largely due to the *open* nature of its operating environment. Copy-protection is not generally built into PC operating systems as standard,[23] something which has benefited users by allowing

[20] The NES's games were published on shaped plastic cartridges that would only fit into a proprietary console. This not only acted as a piracy countermeasure, but allowed for the regional distribution of videogames via differently-shaped cartridges.
[21] The embedded firmware will only allow a game disc to run if it contains an authentication file which shows it has been licensed and distributed by the copyright owner; Booton and MacCulloch (n 11), 2.
[22] Charles Arthur, 'Microsoft cutting off up to 1m gamers with modified Xbox 360 consoles' (The Guardian, 11 November 2009) <http://www.guardian.co.uk/technology/2009/nov/11/xbox-modded-consoles-live-cut-microsoft> accessed 1 October 2011
[23] However, some copy protection has been built into the Microsoft Windows operating system since the 'Vista' version. This has generally been limited to the

for the development of a huge variety of third-party PC software. As such, any copy-protection must be included with a purchased game.

This additional protection provided by consoles has made the case for exclusive development for them very attractive to publishers. While PC piracy is often as simple as downloading a 'cracked' (DRM-free) copy of a game online,[24] console piracy usually relies on the availability of hardware-implemented methods – such as 'modchips' or other physical hardware solutions[25] – to circumvent the console's embedded firmware and allow the running of pirate software. The physical nature of many of these solutions has made copyrights much easier to enforce on consoles, as the distributors of these devices are much easier to track than faceless internet pirates. This has led to successful litigation against circumvention device distributors, such as in the recent case of *Nintendo v Playables*.[26]

If we consider that most consoles are sold at a loss,[27] and that they often contain outdated computing and graphics technology,[28] the only reasonable explanation for the current industry emphasis on them is as a method of copyright

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playback of certain media content, however (such as including region-encoding recognition software in Windows Media Player).

[24] Optical media emulation tools are often required in the absence of a disc. However, these tools are widely available at zero cost on the internet. An example would be the program 'Daemon Tools'.

[25] The security mechanisms preventing the playing of pirate games on Microsoft's Xbox console could be circumvented in a number of ways. A survey undertaken by Celine Schulz and Stefan Wagner indicates that by far the most common method of circumvention (at 78.6% of respondents) is the soldering of a modchip into the console. Other, less-popular methods include overwriting the console's firmware ROM-Chip with alternative software (a 'hardware hack'), and exploiting a buffer overflow through the use of specialised software (a 'software hack'); Celine Schulz and Stefan Wagner, 'Outlaw Community Innovations' (2008) Munich School of Management Discussion Paper 2008-08, 11 <http:// http://epub.ub.uni-muenchen.de/4678/1/ijim_schulz_wagner_bwl.pdf> accessed 18 March 2012.

[26] [2010] EWHC 1932.

[27] Lost revenues from console sales are generally reimbursed by the sale of software; N Daidj and T Isckia, 'Entering the Economic Models of Game Console Manufacturers' (2009) 73 *Communications and Strategies* 23, 37.

[28] Stuart Bishop, 'Rein: Consoles put a stranglehold on DX10' (*CVG*, 30 July 2007) <http://www.computerandvideogames.com/169116/rein-consoles-put-a-stranglehold-on-dx10/> last accessed 5 October 2011.

protection. One company that has embraced this console emphasis is Microsoft, as they have abandoned the development of PC versions of well-known titles – such as the Halo and Gears of War series' – in favour of exclusive development for the Xbox 360. The rationales for these decisions were subject to a great amount of speculation, until Cliff Bleszinski, design director of Epic Games, settled the matter in his now infamous interview with TVG:

> 'the person who is savvy enough to want to have a good PC to upgrade their video card, is a person who is savvy enough to know... all the elements so they can pirate software. Therefore, high-end videogames are suffering very much on the PC.'[29]

C. Digital Distribution

The past eight years[30] have witnessed the popularisation of digital distribution systems as a method for videogame delivery. These systems allow users to buy videogames online and download them directly to their PC or console. This can be advantageous to consumers for a number of reasons. First of all, downloading content is much more convenient for the consumer, as they do not have to travel to a high-street retailer, and the provision of the content is much faster than having a game delivered by an online retailer (download times notwithstanding). Secondly, because of the reduced reproduction and distribution costs associated with downloadable games, savings could be passed on to the consumer in the form of lower prices for content.[31] As publishers and developers are able to run their own digital distribution services, this will further reduce costs as profits

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[29] Chris Leyton, 'Gears of War 2 – Cliff Bleszinski Q&A Feature' (*TVG*, 29 September 2008) <http://www.totalvideogames.com/Gears-of-War-2/feature-13270.html> accessed 23 September 2011.

[30] Valve Software's digital distribution software, known as 'Steam', was launched on 12 September 2003, and is widely credited with popularising the digital distribution model.

[31] Eric Matthew Hinkes, 'Access Controls in the Digital Era and Fair Use/First Sale Doctrines' (2007) 23 *Santa Clara Computer & High Tech Law Journal* 685, 706.

from sales no longer have to be split between the publishers and independent retailers.[32]

However, it is also advantageous for publishers in that it facilitates the monitoring of consumer use. Most digital distribution services require users to connect to internet servers run by the publisher in order to authenticate the game each time it is played. In essence, digital distribution software has the potential to act as a form of *hidden DRM*, which can be beneficial to companies in a time where, as I shall discuss, public attitudes towards DRM are becoming increasingly hostile.

Digital distribution systems have, in fact, become *so* successful that many publishers now compulsorily link *retail* copies of the game to these systems to gain the advantages of use monitoring.[33] These practices are a source of growing controversy in the gaming community, and questions over the use and effectiveness of such DRM is the subject to which I will now turn.

III. Regulating Piracy

Current media and industry rhetoric[34] would have us believe that a *war* is currently being waged between the users and producers of videogames, and that DRM is a new weapon in the battle for copyright control. However, I believe that such a conception of DRM is inherently unhelpful, as it polarises the issue. If future rights management strategies are to be successful, the interests of content producers and consumers must align. If they do not, there is a risk that two groups will

[32] Oddly, however, this does not seem to have been the case thus far in practise. A great number of games sold via Valve Software's Steam and Electronic Arts' Origin services are available at lower prices from independent retailers. This would suggest that the market places a premium on the convenience of content provision over price.

[33] For example, all games published by Valve Software require registration with the Steam service.

[34] Andrew Wallenstein, 'How the War on Piracy Will Change in 2011' (*Mashable*, 19 January 2011) <http://mashable.com/2011/01/19/war-on-internet-piracy/> accessed 2 October 2011.

rail against one another and the problem of rights management will escalate.

I believe that a more useful conception of DRM can be found in the fact that the essence of any system of control is that it is *regulatory*. While classic theories of regulation have focussed on state control,[35] more modern interpretations have expanded to include 'all mechanisms affecting behaviour– whether these be state-derived or from other sources'.[36]

Furthermore, if we consider that economic incentive theories of copyright law have traditionally been justified in terms of upholding the public interest,[37] any conception of DRM as regulation must have the same aims. Baldwin and Cave suggest that this kind of '[r]egulation's purpose is to achieve certain publicly desired results in circumstances that where, for instance, the market would fail to yield these.'[38] In other words, DRM may further the public interest by regulating consumer behaviour in a way that further protects the rights of videogame publishers, and gives them economic incentives to create new games.

And incentives are indeed needed. Robert Walsh[39] estimates that the average cost of videogame development has 'probably doubled or tripled in the [last] console transition.'[40] In 2010, the average cost of videogame development was estimated at around US$28 million[41]

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[32] For example, Philip Selznik describes regulation as 'sustained and focussed control exercised by a public agency over activities which are valued by a community'; Philip Selznik, 'Focussing Organisational Research on Regulation' in Roger Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press, 1985), 363.

[36] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (OUP, 1999), 2.

[37] Bentley and Sherman (n 10), 37.

[38] Baldwin and Cave (n 36), 19.

[39] CEO of Australian developer Krome entertainment.

[40] 'Interview: Krome's Robert Walsh' (*Develop*, 26 May 2009) <http://www.develop-online.net/features/484/Interview-Kromes-Robert-Walsh> accessed 29 August 2011.

[41] These increased development costs are being driven by the increasing complexity of the underlying technology that powers videogames. The computer programs that are used to design and build videogames, known in the industry as 'engines', become increasingly complex and time-consuming to use as they gain greater potential for graphical fidelity and the programming of gameplay features (such as physics modelling, artificial intelligence etc.); Rob Crossley, 'Study: Average Dev

(approximately £17.3 million at the time[42]). In fact, the select group of videogames with the highest development budgets and highest projected returns, referred to in the industry as 'triple A games', can have development costs that are significantly higher.[43]

However, despite such exponential growth in costs, the interests of developers are not the only ones that should be considered. As noted by Richard Stallman, the public benefit justification of copyright law does not offer 'software companies... an unquestionable natural right to own software and thus have power over all its users.'[44] Users must be allowed a degree of control in the ways in which they use software for non-commercial purposes; if not, the degree of control gained by videogame publishers could reduce the value of their goods to the public. In other words, 'if we are to ensure that DRM systems truly reflect the historical bargain struck in the copyright system, we need to build into them not just holder rights, but also consumer rights.'[45] A balance must be struck[46] between the two that maximises the social utility of videogames.

A. Has the Balance Been Struck?

Costs as High as £28m' (*Develop*, 11 January 2010) <http://www.develop-online.net/news/33625/Study-Average-dev-cost-as-high-as-28m> accessed 29 August 2011.

[42] Calculated using XE's historical rate tables at <http://www.xe.com/ict/> accessed 30 August 2011.

[43] While the exact costs of development are not always a matter of public record, the most expensive game to date is believed to be Grand Theft Auto IV, with an estimated cost of US$100 million (£50.4 million) and a development staff of approximately 1,000 people; Gillian Bowditch, 'Grand Theft Auto Producer is Godfather of Gaming' (*The Sunday Times*, 27 April 2008) <http://www.timesonline.co.uk/tol/news/uk/scotland/article3821838.ece> accessed 29 August 2011. By comparison, id Software's game Wolfenstein 3-D, developed in1992 cost roughly $25,000 to make with a development team of 8 people; David Kushner, *Masters of Doom* (Judy Piatkus 2004), 113.

[44] Richard Stallman, 'The GNU Operating System and the Free Software Movement' in *Open Sources: Voices from the OpenSource Revolution* <http://oreilly.com/openbook/opensources/book/stallman.html> accessed 26 July 2011

[45] Yu (n 13), 62.

[46] Yu (n 13), 17.

If a fair balance is to be struck between protecting the rights of videogame developers and those of users, DRM and other copy-protection measures must be formulated in a way that 'not only protect[s] the copyrighted works from unauthorized access but also accommodate[s] important interests of users'.[47] Given that this will require videogame companies to relinquish a degree of control over their products, such a solution will likely fall short of stopping piracy completely. However, it is worth noting that a system of '*zero leakage* has never been a goal of copyright law,'[48] as the underlying justification for copyright is to allow a monopoly to the creator only to the extent that is necessary to incentivise content creation.[49]

Unfortunately, many of the measures employed by videogame publishers today are so restrictive that they risk doing harm to users' rights. One example would be so-called 'always on DRM', which requires users to maintain a constant connection with internet servers run by the publisher in order for the game to be authenticated and its use continually monitored.

French publishers Ubisoft have become somewhat notorious as pioneers of this kind of DRM, coming under stern criticism from consumers and the media alike for including it in PC versions of their recent games.[50] This is understandable, as its requirements place a serious burden upon consumer use. As noted by M. Scott Boone, the design of 'the personal computer... has had to assume that connection to a network is not always possible.'[51] This design restriction is no less relevant today than it was at the dawn of the internet. Even the best home internet connections can be

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[47] Yu (n 13), 61.

[48] Yu (n 13), 73, emphasis mine

[49] Jon M Garon, 'Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics' (2002) 88 *Cornell Law Review* 1278, 1307.

[50] Tom Senior, 'Ubisoft Server Switch to Render Always-online DRM Games Unplayable Next Week' (*PC Gamer*, 2 February 2012) <http://www.pcgamer.com/2012/02/02/ubisoft-server-switch-to-render-always-online-drm-games-unplayable-next-week> accessed 19 March 2012.

[51] M Scott Boone, 'The Past, Present and Future of Computing and its Impact on Digital Rights Management' (2008) *Michigan State Law Review* 413, 429.

subject to intermittent problems. If these problems interfere with the connection between the game and the publisher's authentication servers, then the game will be rendered unplayable.[52]

This has led a great number of consumers to assert that the purchasing of a legal copy of a videogame should entail the right to unlimited access to that *one copy*, as well as the freedom to use and abuse the copy of the work in any way they deem fit.[53] Any DRM measures that restrict these freedoms, they argue, are illegitimate.

This argument has been further strengthened by claims that overly-restrictive DRM amounts to an assault on users' privacy. As Julie Cohen argues, 'intellectual privacy resides partly in the ability to exert (a reasonable degree of) control over the physical and temporal circumstances of intellectual consumption within private spaces.'[54] Therefore, any copy-protection measures that interfere with a user's choice as to when and where he plays a videogame could be considered unreasonably invasive.

However, developments in monitoring controls perhaps pose a larger threat to privacy. While controls that merely authenticate the use of a game are only minimally invasive,[55] some videogame publishers have subtly expanded their monitoring to include the compilation of information about

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[52] Furthermore, in the case of Assassin's Creed II, a cyber-attack on Ubisoft's DRM servers in March 2010 caused the game to become unplayable for a number of paying customers. Tom Bramwell, 'Ubisoft DRM was "Attacked" at Weekend' (*Eurogamer*, 8 March 2010) <http://www.eurogamer.net/articles/ubisoft-drm-was-attacked-at-weekend> accessed 14 March 2012.

[53] Of course, such a right would in itself entail a number of neighbouring rights that are beyond the scope of my discussion here. Such rights could include the right to reverse-engineer videogames in order to create modifications (often known as "mods"), the right to make limited copies for personal use, and the right to lend the game to friends and family.

[54] Julie E Cohen, 'DRM and Privacy' (2003) 18 *Berkeley Technology Law Journal* 575, 582

[55] When contrasted with some invasions of privacy that are currently accepted by society (such as credit card companies keeping records of your shopping habits), the recording of when a game is accessed is only superficially invasive; Lionel S Sobel, 'DRMs as an Enabler of Business Models: ISPs as Digital Retailers' (2003) 15 *Berkley Technology Law Journal* 667, 691.

the user.[56] This was recently taken to new extremes in Electronic Arts' end-user license agreement (EULA) for their new download service, Origin, which requires users to accept a term that allows EA to monitor *any task* which a user may undertake on their computer.[57] The critical response to this measure has been vocal and scathing, as it arguably amounts to the complete annihilation of privacy in intellectual consumption online.

However, even such extreme measures as these may be justified if it can be shown that they are the only way of effectively regulating piracy and incentivising game creation. This is the question to which I shall now turn.

B. The Effectiveness of Current Measures

In order for current forms of DRM to be considered effective, they must fulfil two criteria: they must pose a sufficient technical barrier to illegal copying, and they must also work to induce copyright compliant behaviour in users. I believe that the majority of DRM methods currently in use fail to satisfy either of these standards. Many fall at the first hurdle as they are easily circumvented. This is apparent in the fact that huge numbers of games are now leaked online before they are even released.[58]

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[56] Until recently, any personal information taken from the user's computer was generally taken with express permission, such as under Valve Software's Steam system.

[57] The exact term in question is term 2 of the Electronic Arts Software End User License Agreement for Origin™ Application and Related Services, and states: 'You agree that EA may collect, use, store and transmit technical and related information that identifies your computer (including the Internet Protocol Address), operating system, Application usage (including but not limited to successful installation and/or removal), software, software usage and peripheral hardware, that may be gathered periodically to facilitate the provision of software updates, dynamically served content, product support and other services to you, including online services. EA may also use this information combined with personal information for marketing purposes and to improve our products and services. We may also share that data with our third party service providers in a form that does not personally identify you.' <http://tos.ea.com/legalapp/eula/US/en/ORIGIN/> accessed 3 October 2011.

[58] For example, recent EA release Mass Effect 3 was 'leaked' online a few days before its official release date; Gamesta Nick, 'Mass Effect 3 Leaked, Hacked, and Cracked Before Release' (Gamesta, 6 March 2012) <http://www.gamesta.com/mass-effect-3-leaked-hacked-and-cracked-before-release> accessed 12 March 2012.

However, it is worth asking just how difficult to circumvent DRM *needs* to be. Much like a Hollywood film's opening weekend, the majority of videogame sales are made within a very short window after release. The best-selling game of all time, Call of Duty: Black Ops, brought in over US$1 billion in its first six weeks of sales.[59] US$650 million of that was in the first five days.[60] If DRM is technically proficient enough to survive being cracked in this window, the publisher should suffer minimal financial harm.[61] Unfortunately, the fact that a large number of cracked games appear online before even their initial release suggests that this is not yet possible. Therefore, given the sheer technical ineffectiveness of most DRM, it is reasonable to suggest that many of its 'legions of critics must be reacting to the moral implications of rights management rather than the impact DRM has on the availability of works.'[62]

Moreover, there is a growing body of evidence to suggest that such restrictive measures may not be merely ineffective, but *counter-productive*. In 2008, Electronic Arts' game Spore became the most-pirated game of the year,[63] despite having some of the most restrictive DRM available at the time.[64] The reason this occurred is not difficult to ascertain: pirated copies of the game, in addition to being free, also had no restrictions on their use. In effect, Electronic Arts had

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[59] Dan Whitworth, 'Call of Duty: Black Ops is the Best Selling Game Ever' (*BBC Radio 1 Newsbeat*, 14 March 2011) <http://www.bbc.co.uk/newsbeat/12734749> accessed 25 September 2011.

[60] Fred Dutton, 'Black Ops Sales Top $1 Billion' (*Eurogamer*, 21 December 2010) <http://www.eurogamer.net/articles/2010-12-21-black-ops-sales-top-USD1-billion> accessed 25 September 2011.

[61] This can be seen in the practices of Polish developers CD Projekt, who removed the DRM tied to their game The Witcher 2 one week after its release. 'The Witcher 2 Becomes DRM Free: Patch 1.1 Released' <http://www.thewitcher.com/community/entry/35> accessed 16 March 2012.

[62] Jon M Garon, 'What if DRM Fails?: Seeking Patronage in the iWasteland and the Digital O' (2008) *Michigan State Law Review* 103, 124.

[63] 'Top 10 Most Pirated Games of 2008' (*TorrentFreak*, 4 December 2008) <http://torrentfreak.com/top-10-most-pirated-games-of-2008-081204> accessed 19 March 2012.

[64] The DRM program, called SecuROM, severely limited the number of times users could install the game on a computer.

penalised legitimate purchasers of the game and incentivised piracy.[65]

In fact, there has been a growing prevalence of reactionary user activity against DRM that is perceived as overly-restrictive. For example, when George Hotz circumvented the copy-protection on the PlayStation 3 in 2010,[66] Sony reacted by filing a lawsuit against him and removing a feature from the console (known as the 'Other OS' feature) which had facilitated his circumvention.

The Other OS feature, which allowed users to install third-party operating system software on the console (and thus made possible the installation and use of computer programs that were not licensed or sold by Sony, including 'homebrew software'), was removed by a firmware update to the console.[67] While the update was not compulsory, certain console features became locked until the firmware was downloaded.[68] The PlayStation Network[69] and online features of videogames (such as multiplayer modes) are only accessible if the most recent firmware is installed. In addition, any videogames released for the console after the update require the updated firmware in order to play. In effect, Sony mandated the removal of a selling-point feature by severely restricting the PlayStation 3's future capabilities unless users consented.

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[65] Erik Schonfeld, 'Spore and the Great DRM Backlash' (*The Washington Post*, 14 September 2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/14/AR2008091400885.html> accessed 2 October 2011

[66] Jonathan Fildes, 'Playstation 3 "Hacked" by iPhone Cracker' (*BBC News*, 25 January 2010) <http://news.bbc.co.uk/1/hi/technology/8478764.stm> accessed 19 March 2012.

[67] A full list of modifications made by the version 3.21 firmware can be found at: <http://us.playstation.com/support/systemupdates/ps3/history/index.htm#update321 > last accessed 21 August 2011.

[68] The limits placed on the console by refusing to download the firmware update are explained in a blog post by Sony's Senior Director of Corporate Communications & Social Media: Patrick Seybold, 'PS3 Firmware (v.3.21) Update' (*PlayStation.Blog*, 28 March 2010) <http://blog.us.playstation.com/2010/03/28/ps3-firmware-v3-21-update> accessed 21 August 2011.

[69] The PlayStation Network is an online service that allows users to purchase downloadable games, downloadable content (DLC) for games they own, cosmetic interface modifications and other content.

The backlash against this strategy cost Sony dearly. In April 2011, the PlayStation Network was hacked, and the personal data of 77 million Sony customers was stolen. Sony's response was to pull the plug on the network until new security features could be implemented. When the PlayStation Network finally came back online a month later, it was estimated that the total cost to Sony as a result of the hack was in excess of £106 million.[70]

If publishers wish to avoid such consumer backlashes in future, it is necessary that they place an emphasis on innovation in DRM that does not harm legitimate customers. For example, Rock Steady Software's DRM in the game Batman: Arkham Asylum, merely disabled an important game feature if the disc being played was an unauthorised copy, placing no restrictions on legitimate purchasers whatsoever.[71] The success of the game proves that DRM can be effective and non-restrictive upon consumers at the same time.

IV. Insidious Expansion

However, a perhaps even more serious issue than that of consumer rights is the relationship between DRM and copyright law itself. As Dan Burk observes, where technical standards are applied to control user behaviour, they 'effectively... become a type of law.'[72] The problem is that many DRM technologies offer publishers a degree of control over their works that goes far beyond what copyright law has traditionally allowed.

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[70] Greg [Watchful], 'Sony Cost PSN Hack' (*The Sixth Axis*, 23 May 2011) <http://www.thesixthaxis.com/2011/05/23/sony-cost-psn-hack/> accessed 19 March 2012

[71] The DRM disabled the player character's ability to glide, which made progression past the first five minutes of the game impossible. This feature only affected pirate copies of the game and placed no restrictions upon users of legitimate copies; John Funk, 'Arkham Asylum Pirates get a Gimpy Batman' (*The Escapist*, 8 September 2009) <http://www.escapistmagazine.com/news/view/94524-Arkham-Asylum-Pirates-Get-a-Gimpy-Batman> accessed 4 March 2012.

[72] Burk (n 7), 548.

This is a real cause for concern, particularly as courts in both the UK and USA have tended to interpret legal anti-circumvention provisions in a way that is highly sympathetic towards the interests of the gaming industry.[73] Because of this, overly-restrictive DRM could potentially undermine core principles of copyright law. If this is indeed the case, there is a serious need to reassess the ways in which anticircumvention legislation is applied, as 'the legal protection of TPMs is justified insofar as the technical measures do no more than preserve principles and guarantees already laid down in copyright law.'[74]

A. Challenging Ownership

A great deal of DRM shows disregard for the classical position that, as explained by Bill Cornish, '[c]opyright in a work gives rights that are distinct from ownership of the physical embodiment of the original work'.[75] This has arisen through the current industry practice of treating sales of games as *licenses* to access a work. When accessing a videogame, users are often asked to agree to the terms and conditions of a EULA (End-user License Agreement). This potentially allows publishers to displace copyright law with contract law, which is much more permissive in terms of how much control one party may exert over the other's conduct.[76]

This has led Eric Hinkes to observe that anti-circumvention laws have 'effectively created an additional exclusive right for content providers: controlling access to a work.'[77] Such a right is completely at odds with the average consumer's expectations, particularly where a game is bought at retail. A number of disc-distributed PC games today require registration with an online distribution and rights-

[73] Booton and MacCulloch (n 11), 5.
[74] Booton and MacCulloch (n 11), 2.
[75] W Cornish, D Llewelyn and T Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (7th edn, Sweet and Maxwell 2010) 478
[76] Hinkes (n 31), 690.
[77] Hinkes (n 31), 685.

management service in order to be played,[78] allowing the publisher to control access the software contained on the user's legally owned disc. However, there can be no meaningful ownership in an object of which your use is restricted in any way other than by law. The essence of such 'click-wrap' agreements[79] is that they tamper with society's fundamental concepts of property.

Therefore, the monopoly control provided to copyright owners by such agreements has no foundation in copyright norms. If we believe – and I do – that copy-protection should 'return the delivery of copyrighted works to an equilibrium comparable to that which existed prior to the advent of the Internet, but not to absolute control by the copyright owner',[80] then it is essential that our anti-circumvention laws do not provide protection to measures that extend further than this.

B. The Attack on the Second-hand Market

A further disregard for fundamental copyright principles can be seen in the gaming industry's sustained attack on the used game market. A number of prominent developers have argued that used game sales are harming the industry as they do not generate any revenue for creators.[81] However, the first distribution right[82] conferred by s.18 CDPA – which confers the right on a copyright owner to be the first distributor of *new* copies of a work – upholds the right of consumers to dispose of second-hand copies of works on an open market.

A number of game companies have sought to challenge second-hand markets in games by implementing so-called 'online' or 'content-licenses'. These licenses, which are required to access certain game content, are included in new

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[78] Games distributed by the Valve and Origin services require this.
[79] Burk (n 7), 547.
[80] Garon (n 49), 1341.
[81] Dan Pearson, 'On the Health of the Industry, the Developer/Publisher Relationship and why Games are Rated like Porn Movies' (Gamesindustry International, 12 September 2011) <http://www.gamesindustry.biz/articles/2011-09-09-guillaume-de-fondaumiere?page=3?> accessed 19 March 2012.
[82] Known as the 'doctrine of first sale' in the USA.

copies of games. However, if a used copy is purchased and the license has already been used by the original owner, a new license must be purchased from the game's publisher to allow access to the content.[83] Such licenses are conceptually the same as the right of *droit de suite* which offers royalties to artists upon the resale of their paintings.[84]

While the second-hand buyer is not required to pay for these licenses to enjoy the game, he is still subject to illegitimate influence from the publisher. By interfering with the resale value of games, copyright holders are claiming rights the conferral of which falls under the express authority of the state, and which should only be granted to avoid market failure. Considering the long history of second-hand markets in all other entertainment media, evidence of this market failure is weak.

Furthermore, some digital distribution services have eliminated the user's right to resell *entirely*. Applications such as Steam tie games permanently to a user's account. As noted above, these models often operate on a 'license' model, which seeks to restrict uses considered legitimate under copyright law. However, the mere fact that the game is conceived of as being licensed does not inherently restrict resale rights. Licenses may be bought and sold just like any other kind of commercial property.

And this is just the tip of the iceberg. Many videogame companies are continuing to find innovative new ways to limit the resale of games.[85] If second-hand markets are important

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[83] In id Software's new game Rage, part of the singleplayer campaign was omitted from second-hand copies:
Tom Bramwell, 'Tim Willits: Building Rage and Never Selling Out' (Eurogamer, 11 August 2011) <http://www.eurogamer.net/articles/2011-08-11-tim-willits-building-rage-and-never-selling-out-interview?page=2> accessed 19 March 2012.

[84] Lionel Bentley and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009), 54.

[85] For example, the non-rewriteable save file on Resident Evil: Mercenaries on the Nintendo DS will significantly harm its resale value, as purchasers of used game will not be able to experience the challenge of unlocking new content within the game; Stephen Johnson, 'Capcom Clarifies Stand on Resident Evil: Mercenaries Saved Games Controversy' (*G4*, 29 June 2011) <http://www.g4tv.com/thefeed/blog/post/714084/capcom-clarifies-stand-on-resident-evil-mercenaries-saved-games-controversy> accessed 19 March 2012

to our society,[86] and the large market for used videogames suggests that they are,[87] attempts to harm these markets must be curtailed.

V. Challenging Pirate Communities

Despite the illegitimacy of any copyright expansion through technical means, it is generally accepted that DRM will be necessary to any successful business model for the provision digital content.[88] If new copy-protection regimes are to be more effective, not only must there be a return to accepted copyright norms, but an analysis of the motivations behind videogame piracy is essential.

This analysis must necessarily take into consideration two categories of pirate: uploaders and downloaders. The motivations of downloaders are largely self-evident,[89] but are nevertheless worth some consideration. Research shows that most members of the public regard software copying as an issue of 'low moral intensity' that does 'not cause very much harm to anyone.'[90] Furthermore, there are a growing number of people who see the provision of free digital content as a right.[91] While consumer education may play an important role in challenging these viewpoints, such initiatives in other entertainment industries have been largely ineffective. Perhaps a more pragmatic approach is to tackle the root of the problem: uploaders.

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[86] Hinkes (n 31), 701-2.
[87] Nick Williams and Matthew Kumar, 'Analysis: 49 Million U.S. Gamers Buy Used Games' (*Gamasutra*, 9 April 2008) <http://www.gamasutra.com/php-bin/news_index.php?story=18163> accessed 19 March 2012
[88] Sobel (n 55), 669.
[89] i.e. the fact that pirate games are both conveniently available and free of charge.
[90] Jeanne M Logsdon, Judith Kenner Thompson and Richard A Reid, 'Software Piracy: Is it Related to Level of Moral Judgement?'(1994) 13 *Journal of Business Ethics* 849, 855.
[91] This belief is widely held by members of organisations such as The Pirate Bay and Anonymous. Also, Pirate Parties International operates political parties in a number of countries around the world, all of which share a common goal of reforming copyright law in a way that allows for much greater free public access to works and emphasises the development of 'open source' works.

The motivations for engaging in circumvention activity are becoming more widely understood. Studies show that the majority of 'hackers' circumvent copy-protection due in large part to intellectual stimulation such a task provides, and also to increase software functionality.[92] However it is reasonable for us to assume that pirate uploaders must have some other aim than simply the circumvention of overly-restrictive DRM. If they merely wanted to enable restricted but legitimate uses, they could simply post files or directions for circumvention online, allowing other legitimate purchasers of the game to also circumvent it. However, in the majority of cases, circumventers distribute pirated copies of the game online with the DRM disabled. Considering that circumvention will require a considerable investment from the uploader,[93] it is reasonable that we ask what benefits they gain from such activity.

In order to understand the motivations of the average pirate game uploader, it is necessary for us to form a notional paradigm of who such a person might be. Unfortunately, undertaking such an analysis is frustrated by the structure of today's pirate networks. The majority of P2P networks in current use by software pirates are anonymous and have no centralised network structure,[94] making the tracking of pirates much more difficult. [95] Therefore, any analysis that we undertake must be somewhat speculative.

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[92] Schulz and Wagner (n 25), 18.

[93] Nate Anderson, 'File-sharers are Content Industry's "Largest Customers"' (Ars Tehnica, 3 May 2010) <http://arstechnica.com/tech-policy/news/2010/05/file-sharers-are-content-industrys-largest-customers.ars> accessed 19 March 2012.

[94] Peter K Yu, 'P2P and the Future of Private Copying'(2004) Michigan State University College of Law Research Paper No. 02-08 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578568> accessed 29 August 2011, 18-19

[95] An example would be the notorious Pirate Bay, which instead of allowing users to download pirated works from centralised servers, allows the downloading of a 'torrent file'. This is a very small file that is interpreted by a program known as a 'client', and allows the downloader's computer to locate other computers in a network that have the file sought on them. The user's computer then downloads the file from all these computers separatelyThere are a range of different client programs that allow the downloading of torrent files. These programs are all based around the BitTorrent protocol, one of the most common digital message formats

However, there is a certain amount of information we can use in order to form a possible picture of the average uploader. Research undertaken by the Entertainment Software Association indicates that the average gamer is aged 37. [96] Also, the complexity of current DRM programs employed by videogame developers means that they require a great deal of programming skill to circumvent. As such skills may only be developed over time, I would estimate that the lower range for the average DRM hacker would be in their mid-twenties.[97]

A. The Origins of the Gaming Community

In the past, consumers of videogames have been referred to by the media and gamers themselves as forming a 'gaming community'. It is not until we view gamers in the context of consumers of entertainment as a whole that we begin to see how significant this terminology is. For instance, we do not refer to consumers of literature as the 'reading community'. This perception of gamers infers a social dynamic not apparent in other media.

From the early 1970's to the late 1990's, videogames were a largely underground form of entertainment, with a strong sense of 'scene' [98] which encouraged the development of social bonds based on mutual interests. While there is currently no unifying theory of community study,[99] this social

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used in P2P networking today. An example of a popular client using this protocol is the µTorrent client.

[96] '2011 Sales, Demographic and Usage Data: Essential Facts about the Computer and Video Game Industry' <http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf> accessed 20 March 2012

[97] Of course, this is not to suggest that hackers may not be younger than this. George Hotz was only 20 years old when he hacked the PlayStation 3. However, I feel that he is likely to be the exception rather than the norm.

[98] Garry Crawford, 'Forget the Magic Circle (or Towards a Sociology of Video Games)' (Under the Mask 2, University of Bedfordshire) <http://salford.academia.edu/GarryCrawford/Papers/104283/Crawford_G._2009_Forget_the_Magic_Circle_or_Towards_a_Sociology_of_Video_Games_keynote_presentation_to_the_Under_the_Mask_2_University_of_Bedfordshire> accessed 20 March 2012, 1.

[99] Ferdinand Tönnies, 'Gemeinschaft and Gesellschaft' in Colin Bell and Howard Newby (eds), *The Sociology of Community: A Selection of Readings* (Frank Cass and Co, 1974) 7, 12

structure could usefully be explained by Ferdinand Tönnies' concept of *Gemeinschaft*.[100] Tönnies defines Gemeinschaft loosely as 'community',[101] which can be found '[w]herever human beings are related through their wills in an organic manner and affirm each other'.[102] Furthermore, he explains that there is a sub-group of community known as 'Gemeinschaft of mind',[103] in which individuals are united by a common-interest or ideology, and whose sole purpose is 'co-operation and co-ordinated action for a common goal.'[104] I believe that this accurately describes the gaming community of the late 20th Century.[105]

The reason the age range of our notional hacker is important is that it puts him within the right age group to have been an active part of this community, particularly as there is also evidence to suggest that the original gaming community was also a *pirate community*. As Erin Hoffman observes, 'an awful lot of people back in 1988 were what we would call "software pirates" in 2003. The label and indeed the notion didn't exist then.'[106] File-sharing communities are not a recent phenomenon as many people believe: while relatively recent cases such as *A & M Records v Napster*[107] have drawn public attention towards the issue of illegal digital distribution of media, such activities occurred well before the internet could facilitate them.

In fact, this emphasis on file sharing was an ingrained part of gaming culture for decades,[108] and there is evidence to

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[100] Tönnies (n 99), 7.
[101] Tönnies (n 99), 7.
[102] Tönnies (n 99), 9.
[103] Tönnies (n 99), 8; At the time of writing, it is clear that Tönnies envisaged Gemeinschaft of mind in terms of religious and political affiliations. However, I feel that our situation is principally similar enough that it may be applied.
[104] Tönnies (n 99), 8.
[105] Note is that the kind of community we describe here is not the kind of community that Tönnies perhaps envisaged, writing as he was in 1887.
[106] Erin Hoffman, '1988: The Golden Age of Game Piracy' (*The Escapist*, 8 September 2011) <http://www.escapistmagazine.com/articles/view/features/9110-1988-The-Golden-Age-of-Game-Piracy> accessed 28 September 2011.
[107] 239 F.3d (9th Cir. 2001)
[108] David Houghton, 'A Brief History of Video Game Piracy: : From Tapes to Torrents, the Climb of Copyright Crime Laid Bare' (GamesRadar)

suggest that the practice, while not *encouraged*, was at least *tolerated* to some degree by software companies at the time.[109] As Microsoft business president Jeff Raikes explained, if users were pirating software, he wanted it to be *his* software as, in his view, Microsoft's most 'fundamental asset is the installed base of people who are using [their] products.' Once you have got people to use pirate copies, 'what you hope to do over time is convert them to licensing the software.'[110] In fact, a number of videogame developers based business models around the practice of file sharing, known as 'shareware'. [111]

However, the last decade has seen 'a rapid and extensive transition of the videogame market from niche to mainstream'.[112] I believe that this phenomenon has brought about the gaming *Gesellschaft,* or 'society',[113] which Tönnies describes as 'the mere co-existence of people independent from each other.'[114] This theory is given further support by Jessie Bernard's account of the creation of the *first*

<http://www.gamesradar.com/a-brief-history-of-video-game-piracy/?page=1> accessed 22 September 2011.

[109] Bill Gates argued that it was easier for Microsoft's products to compete with open-source alternatives 'when there's piracy than when there's not; 'Look for the Silver Lining' *The Economist* (New York, 19 July 2008), 23.

[110] Matt Mondok, 'Microsoft Executive: Pirating Software? Choose Microsoft!' <http://arstechnica.com/microsoft/news/2007/03/microsoft-executive-pirating-software-choose-microsoft.ars> accessed 21 September 2011.

[111] id Software's now-famous distribution model relied on the free distribution of large portions of videogames. People who enjoyed the game were then encouraged to copy it and pass it on to their friends. Once people were hooked, it was possible for them to buy extra missions and scenarios for the game, extending the amount of content; Steven L Kent, *The Ultimate History of Video Games* (Prima Publishing 2001), 459.

Interestingly, we may be seeing the creation of a similar business model in some areas of the PC gaming market. So-called 'free-to-play' 'microtransaction-funded' games allow users to play the base game free of charge, but allow them to purchase in-game features, items and other content through an in-game store. If developers continue to supplement these games with new content, they may generate a continuous stream of revenue from one product; Alec Meer, 'The Rise of Free-to-play Games' (*PC Advisor*, 30 June 2011) <http://www.pcadvisor.co.uk/opinion/game/3289004/the-rise-of-free-to-play-games> accessed 18 March 2012.

[112] Booton and MacCulloch (n 11), 3.

[113] Tönnies (n 99), 7.

[114] Tönnies (n 99), 8.

Gesellschaft. She argued that 'the psychological and sociological concomitants of the market essential for its operation came to be known as Gesellschaft and, as such, were viewed as the great destroyer of community in the Gemeinschaft sense.'[115]

The growing intolerance for copyright theft displayed by videogame companies threatens to destabilise the old gaming Gemeinschaft. Such a community shift has no doubt bred resentment, and many of its members (particularly those who align themselves with the so-called 'open-source' movement)[116] openly rail against the new corporate nature of the videogames industry. The survival of this community has been ensured (although fundamentally changed) by developments in internet file sharing, which have allowed hackers to bypass the copy-protection measures that threaten their old modus operandi.

B. The Digital Commons

To our notional uploader, software has always been, to some extent, free. It is therefore likely that he will view videogames as both non-rival[117] and non-excludable;[118] in other words, as public goods. As such, this creates an ideological rift between the uploader and the developer that cannot be easily reconciled, as any attempt on behalf of the industry to enforce copyrights could be seen as indicative of a 'second enclosure movement."[119] By working to prevent the free trade

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[115] Jessie Bernard, *The Sociology of Community* (Scott, Foresman 1973), 16.

[116] This is not to say that supporters of the open source movement cannot be sympathetic towards the needs of developers to recoup costs and make a profit. However, a core tenet of the open source philosophy is the right of users to copy and distribute programs that they own. Such a belief is entirely at odds with the position of most major videogame developers; Bruce Perens, 'The Open Source Definition' in *Open Sources: Voices from the OpenSource Revolution* <http://oreilly.com/openbook/opensources/book/perens.html> accessed 5 March 2012.

[117] Non-rival goods are goods that the consumption of which by one person does not affect the ability of others to consume them.

[118] Non-excludability means that it is impossible to exclude other people from using a good.

[119] James Boyle defines the second enclosure movement as the creation of property rights in intangible assets such as *ideas*, as opposed to the first enclosure movement

in copied games, developers have effectively disrupted a software 'commons', which is made up of all the software contributed by those active within it.

Such a situation could see the creation of a *digital* commons, in which videogames and other software are uploaded by pirates for the purposes of mutual benefit. The rationale behind such a project is that the more each individual adds to the growing commons, the greater the wealth of information to which he will have access to, as the non-rival nature of software would maximise the social benefit of such a system.

If videogame developers are to be successful in convincing uploaders of their position, they must justify the standpoint that a gaming common, if taken to its logical conclusion, would stifle the videogame market. As Jon Garon notes, 'The public good nature of the distribution model does not transform the underlying work's property attributes... Each additional copy does have some costs'. [120] Therefore, videogames cannot be considered as public goods, as the creation of excludability is required to recoup the game's development costs. Without this excludability, the vast development costs of triple-A games would likely make them unsustainable, and the tragedy of the digital commons would not occur due to its over-consumption, but through stagnation and lack of growth.[121]

The difficulty here is that this takes us full-circle to the problem of the pirate downloader: the piratical motivations of each may only be countered by strong arguments for the

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which conferred rights in physical property; James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law and Contemp Probs* 33, 37.

[120] Garon (n 49), 1328.

[121] I would suggest that the continued value of a digital commons is determinative upon its continued growth. In a fast-paced industry like that of videogames, consumers are constantly seeking new and improved content. If the need to experience new content is not satisfied by what is contained within the commons, its value to consumers will decrease until it falls into disuse. Note that this is quite different to the scenario depicted Garrett Hardin's famous hypothetical 'tragedy of the commons'; Garrett Hardin, 'The Tragedy of the Commons' (1968) 13 *Science* 1243.

need to exclude consumers of videogames. If these arguments are to be persuasive, developers must be able to show a failure in their current business model.[122] Considering the huge profits some games earn,[123] this may be very difficult indeed.

VI. Conclusion

The current model of mainstream videogame development will not be sustainable in an environment where copyrights are rejected outright. However, in their attempts to ensure compliance with copyright norms, developers have often gone too far. The monopolies sought by many videogame companies extend far and beyond any notion of a monopoly in intellectual property, and the overly restrictive nature of these rights is often at the expense of consumer freedoms.

I suspect that if developers are serious about regulating piracy, they will seek to reduce the restrictiveness of their copy-protection measures. After all, gamers, like most consumers, merely want to be treated equitably. A return to the classical balance between physical and copyright ownership will surely benefit both parties, as user's rights to engage in legal uses of software will be restored, and the consumer backlash against DRM will be diminished. In fact, the inherent value of videogames will also be improved, due to the reduced amount of 'cripple-ware'[124] on the market.

Nevertheless, as long as users are allowed to maintain some form of autonomy over their computing and online activities, pirate communities will likely always exist. The aim

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[122] Many arguments levied by the entertainment industries against piracy thus far have relied upon 'scare tactics', such as the threat of legal action against those who are caught engaging in piracy. Considering the scale of piracy today, such methods have clearly been ineffective. I believe that a better form of consumer education should involve engaging users in a discussion as to the nature of their contributions to the industry, and how the quality and quantity of that industry's output may be affected if they continue to resist financing it.

[123] Whitworth (n 59)

[124] 'Cripple-ware' is generally defined as software whose functionality is severely diminished, whether it be by the inclusion of DRM or otherwise; Hal Varian, 'Edited & Excerpted Transcript of the Symposium on the Law & Technology of Digital Rights Management' (2003) 18 *Berkeley Technology Law Journal* 697, 707.

of the videogame industry should not be to stamp out piracy completely, but to limit it to within acceptable levels. The scope of a copyright monopoly is necessarily limited to an extent that some illegal copying may occur. A completely secure form of copyright would undermine the distinction between intellectual property and property per se, and possibly risk undermining core tenets of copyright such as the idea-expression dichotomy.

Therefore, piracy limitation should be achieved primarily through consumer education, although DRM and alternative business models that discourage piratical activity will also have a large role to play. The fundamental message that must be conveyed is that if games matter to users (and the widespread sale and piracy of them suggests they do), they must be willing to contribute to the industry that provides them with their main source of entertainment.

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