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Welcome to the inaugural issue of the Aston Student Law Review. This publication features the works of students from Aston Law School (ALS), and is designed to both showcase the work of the students within ALS and also provide interesting and thought-provoking reading for students. I, as the Editor-in-Chief, and everyone else who is part of the ASLR team, are incredibly proud of the work contained within this publication and would encourage other students to submit their pieces for consideration by the team; this really is a fantastic ‘showcase’ for talent.

The pieces contained within this publication demonstrate not only an in-depth analysis of the legal sphere, but also its importance to the commercial sector. In addition to this, there are pieces contained within that offer stimulating and challenging analyses of a number of different aspects that are currently affecting the area, with analyses focusing upon the relationship between Member States and the European Union, and also the development of emerging technologies and the legal ramifications, providing for excellent examinations of important legal issues that are currently affecting society.

We are grateful to all of those who have submitted their work to the ASLR, and as we are in the fortunate position of being over-subscribed in our very first issue, we look forward to an equally insightful and stimulating second edition in the Summer. If you would like your work to be considered for that second issue, then please do get in touch with a member of the ASLR team or, in addition, if you would like to register your interest for a formal role within the ASLR team for the next academic year (2018/19), then your interest would be very welcome indeed.

We are also exceptionally honoured to present an interview that has taken place between our Deputy Editor and Mary Prior QC; Mary offers us a unique insight into the profession and we are certain her insights will be of great benefit to our readership; we sincerely hope you all enjoy her intriguing responses.

The Editorial Board
Aston Student Law Review
April 2018
FOREWORD FROM THE DEAN OF LAW

This Review’s overriding purpose is to provide a platform to showcase the outstanding work of students studying within Aston Law School and to provide thought-provoking pieces to inspire the next generation of legal scholars. I am confident that you will agree that this first issue successfully achieves and exceeds that purpose.

The papers contained within this issue illustrate the broad-based and interesting curriculum that faces the modern law student and I sincerely hope that it inspires and enlightens you as a reader. The Review also reveals the challenging diversity of legal scholarship from the minutiae of technical, black letter topics to the more theoretical and contentious conceptions of the very notion of ‘Law’. It is the diverse combination of subject matter and approach that typifies the study of Law and which makes it, in equal measure, fascinating and frustrating!

Law is often perceived to be an antiquated and outmoded system of rules that is out of step with, and incapable of, furthering the interest of modern society. This Review dispels that myth and shines a different light on our legal system. It is a light that shows a more positive and progressive role for law in meeting the challenges of society. The papers contained within reveal a vibrant and changing legal landscape - both in terms of substantive rules and the underlying legal system - and the quality of written analysis gives me confidence that the next generation of scholars, lawyers and citizens will be well-equipped and best placed to meet these challenges.

This Review predominantly takes the assessed work of students – normally seen only by individual student and tutor – and exposes that work to a much broader audience. This will, it is hoped, be an enriching experience for the author and the reader. Additionally, the interview with Mary Prior QC offers the Law School a fantastic insight into the profession, and I am particularly grateful to Mary for sharing with us her fascinating views on the profession.

It is a pleasure and privilege to be in the position of writing the Foreword to this inaugural issue. I very much enjoyed reading the papers and look forward to sharing with you the next issue in the summer.

Dr Ryan Murphy
Commercial Law

Should courts stick to interpreting contracts rather than rewriting them?

Simranpreet Pannu

Introduction

The interpretation of contracts refers to a process by which meaning is ascertained from the language used by the parties in commercial contracts.\(^1\) Despite, the principles of contractual interpretation being well established it continues to take up more judicial time than other areas of law combined.\(^2\) This can be attributed to the inconsistency in approach to contractual interpretation. With the prevailing modern contextual approach to contractual interpretation there is a real danger of the courts using this to depart too greatly from the natural meaning of the contract to the extent of rewriting the parties’ contracts for them.\(^3\) Therefore to some degree the decision in *Arnold v Britton*\(^4\) is to be welcomed to act as a cautionary warning to the courts.

A general notion of good faith was first suggested by Lord Mansfield in *Carter v Boeham*\(^5\) and then later put forward in subsequent cases.\(^6\) However, case law shows that English law refuses to recognise any such general obligations for an array of reasons.\(^7\)

This article suggests that the courts are interfering unnecessarily with commercial contracting to the extent of rewriting the contracts of parties

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\(^3\) Adam Shaw-Mellors and Laura Stockin, ‘Contractual interpretation and commercial common sense: setting the limits’ (2015) 5 PCB 268.


\(^5\) *Carter v Boeham* (1766) 3 Burrow 1905, 97 ER 1162.

\(^6\) *Walford v Miles* [1992] 2 AC 128 (HL).

\(^7\) The idea of having no general doctrine of GF was confirmed by Bingham LJ in *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] 1 QB 433 (CA) 439; *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* (Court of Appeal, 8 April 1998); *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All ER (Comm) 483 [45] (Moore-Bick LJ).
and that they should refrain from such by giving effect to the written content of the contract. This article also suggests that the courts have failed to provide a consistent approach to contractual interpretation and good faith, resulting in vast commercial uncertainty. The article develops, first, with a discussion of the competing approaches to contractual interpretation and the extent these approaches can be regarded as rewriting the contracts of parties. Secondly, it will be suggested that even today there remains, to some degree, inconsistency in regard to the approach to contractual interpretation. Finally, it will be explained that in keeping with the ideas of certainty, the general hostility to an implied good faith obligation is to be welcomed and that otherwise the courts are in danger of rewriting the contract for the parties; with, however, the exception of the circumstances in which the parties have expressly contracted as such.

**The competing approaches**

The underlying theme of contractual interpretation is the inherent tension between the need for certainty and accuracy when interpreting contracts. Advocates of certainty argue that the courts should only consider the written words in the contract and construe them on their ordinary and natural meaning, the textual literal approach. Whereas advocates of accuracy suggest that words should be considered in accordance with the background, the factual matrix, this is known as the contextual approach.

Historically English courts have implemented a textual approach to the interpretation of contracts. However, gradually the courts have begun to favour accuracy and this has signalled the shift in approach to contextualism. This shift was based on two concepts; the first concept was surrounding circumstances and the second commercial common sense. The idea of surrounding circumstances being relevant to interpretation was developed in two notable judgments, namely *Prenn v Simmonds*\(^{11}\) and *Reardon Smith Line*\(^{12}\). Arguably, however, Lord Wilberforce’s statements are a step too far, in that he suggests that surrounding circumstances could be

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\(^{8}\) *Lovell and Christmas v Wall* (1911) 104 LT 85, 88.


\(^{10}\) ibid.

\(^{11}\) *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1381-84 ‘to be understood the agreement must be placed in its context. The time has long passed when agreements were isolated from the matrix of facts’.

\(^{12}\) *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL) 995-96 ‘No contracts are made in a vacuum: there is always a setting’.
used as an alternative way of interpreting contracts.\(^{13}\) It is arguable, however, that surrounding circumstances are merely a tool that enable the courts to prefer between plausible meanings.\(^{14}\) Therefore this suggests that where the courts are using surrounding circumstances they may ignore the words of the contract to give effect to an interpretation that is consistent with the context, which could then be argued to be rewriting the parties’ contract for them. The idea of commercial common sense was developed in the case of *Antaios*\(^ {15}\) in which Lord Diplock stated ‘if analysis of the words is going to lead to a conclusion that flouts business common sense then it must be made to yield business common sense’. This suggests that Lord Diplock was not just commending the use of commercial common sense to understand the meaning of a contract but as a way of ignoring the words.\(^ {16}\) This, again, could be argued to be a step too far for the courts to the extent of them rewriting contracts for parties.\(^ {17}\)

Despite reservations about this approach\(^ {18}\), perhaps the most significant development was in 1998 in *Investors Compensation Scheme v West Bromwich Building Society*\(^ {19}\) in which Lord Hoffmann famously restated the principles of contractual interpretation; this became the modern prevailing approach to contractual interpretation. In his speech, Lord Hoffmann stated five principles that he suggested replaced the ‘old intellectual baggage of legal interpretation’.\(^ {20}\) The first three of the principles were concerned with increasing the amount of context that could be regarded as surrounding circumstances to include ‘absolutely anything’.\(^ {21}\) The fourth and fifth principles concerned the difference between language and meaning, suggesting that language was simply the matter of dictionaries but meaning was what the document conveyed to a reasonable person.\(^ {22}\) While Lord Hoffmann’s approach enables the pursuit of accuracy, it has often been criticised for being too broad. This is because by considering absolutely anything within the surrounding circumstances the length of court trials will

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\(^ {13}\) Lord Sumption (n 9).

\(^ {14}\) ibid.

\(^ {15}\) *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 (HL) 201.

\(^ {16}\) Lord Sumption (n 9).

\(^ {17}\) The shift to a contextual approach was further developed in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL) 767.

\(^ {18}\) Lord Mustill in *Charter Reinsurance Co v Fagan* [1997] AC 313 ‘most expressions do have a natural meaning’.

\(^ {19}\) *Investors Compensation Scheme Ltd v West Bromwich Building Society* (No.1) [1998] 1 WLR 896 (HL) 912.

\(^ {20}\) ibid.

\(^ {21}\) *Investors Compensation Scheme Ltd v West Bromwich Building Society* (No.1) [1998] 1 WLR 896 (HL) 912.

\(^ {22}\) Lord Sumption (n 9).
undoubtedly increase and therefore further increase the cost of commercial litigation.\textsuperscript{23}

The restatement by Lord Hoffmann has been regarded by some to have changed the mood within the judiciary in relation to commercial contracts\textsuperscript{24}, and has remained the prevailing approach to contractual interpretation for a number of years. However, the recent Supreme Court case of \textit{Arnold v Britton}\textsuperscript{25} suggests that the courts have begun to withdraw from contextualism and reconfirmed a more restrictive literal interpretation. The clauses in dispute, in \textit{Arnold}, were themselves relatively clear but produced an absurd outcome. However, the Supreme Court held with a majority of 4-1 that despite the harshness the clause required a fixed annual payment by the lessees rather than setting an upper limit. \textit{Arnold v Britton} suggests that the Supreme Court is in favour of a more hands-off approach, in comparison to \textit{Investors Compensation}, that gives paramount importance to the words of a contracts rather than allowing surrounding issues to distract from this. \textit{Arnold} clearly serves as a caution from the highest court to give effect to the written content of the parties and to refrain from making the contract for the parties by allowing other factors to distort the meaning of the contract.

However, a more context-sensitive approach, such as that developed in \textit{Investors Compensation Scheme}, may have avoided such a harsh and absurd result. Therefore, this begs the question to what extent is it permissible for the courts to effectively rewrite the contract for the parties to ensure a fairer outcome?

Advocates of contextualism would argue that the true purpose of contractual interpretation is to find the contextual meaning of the language used.\textsuperscript{26} Therefore, words can only be understood in relation to the circumstances in which the contract was drawn up, and it is therefore necessary to read the words used in a contract in relation to the matrix of fact to ensure that what the parties actually intended is given effect,\textsuperscript{27} even if this is regarded as rewriting parties contracts for them by literalists. Furthermore, even though clarity is essential in commercial contracting, absolute clarity is often unattainable as neither parties nor their legal advisors can envisage all the issues that may arise in the future, especially under the great pressures that

\textsuperscript{23} \textit{Scottish Power Plc v Britoil (Exploration) Ltd} [1997] EWCA Civ 2752 per Staughton LJ: ‘I have to say that such a wide definition of surrounding circumstances, background or matrix seems likely to increase the cost, to no very obvious advantage’.

\textsuperscript{24} Lord Sumption (n 9).

\textsuperscript{25} \textit{Arnold v Britton} [2015] UKSC 36, [2015] AC 1619 which concerned different versions of a clause requiring lessees to pay an annual fee for the maintenance of a chalet leisure park. See also Lord Neuberger’s principles.


\textsuperscript{27} ibid.
deals are often made. Therefore it is essential that courts are willing and able to give effect to the actual intended meaning of the contract.

Yet, on the other end of the spectrum, advocates of certainty would argue that the overriding aim of the courts in relation to contractual interpretation is to give effect to the intention of the parties objectively. Therefore, what better direct admissible evidence is there that portrays the intention of the parties than the actual words used in their agreement? In addition it is unrealistic to argue that language is only meaningful in relation to the background, as language, especially properly drafted language, has an autonomous meaning. By abandoning the words of a contract we are simply allowing the judges to rewrite the contract in a way that may be fairer but the parties did not intend.

It has often been regarded that businesspeople from other countries around the world choose English law because they hold parties to their bargain. Therefore, if the courts adopt contextualism and refuse to hold parties to the bargains they have agreed and instead rewrite their contracts to include what they think should have been agreed, businesspeople may simply avoid conducting business in England, resulting in economic loss. Therefore, Arnold v Britton is to be welcomed as it promotes certainty and party autonomy, even if it is at the expense of absolute accuracy.

**Continued inconsistency in approach**

Recent case law suggests that the courts have somewhat drifted away from the contextual background approach. While Lord Hoffmann’s principles remain binding and applicable, it appears that the circumstances in which the contextual approach is applied has been reduced in scope. Lord Hoffmann restated that the contextual background could be considered regardless of any ambiguities being present or not. However, in the recent case of, ING bank v Ros Roca it was suggested that ‘judges should not see

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29 Beale (n 1).
30 Lord Sumption (n 9).
31 ibid.
32 ibid.
34 Roy Goode, ‘The Concept of Good Faith in English Law’ (Rome March 1992) ‘the pursuit of certainty is necessary even at the expense of absolute accuracy’.
**Chartbrook** as an open sesame for reconstructing the parties’ contract, but an opportunity to remedy by construction a clear error of language which could not have been intended.\(^{37}\) Therefore, this suggest that courts are now warning against the implementation of too much context,\(^{38}\) which could be argued to be a preferable position as the idea of the courts not departing too much from the contract is in line with the general rule of not accepting an implied obligation of good faith. This is because in doing otherwise the courts could be said to be rewriting the parties’ contracts\(^{39}\) rather than interpreting them, in addition to the practical difficulties that may arise; this also suggests that there is some inconsistency with the approach preferred by Lord Hoffmann and recent cases.

In *Rainy Sky*\(^{40}\) it was stated that ‘if there are two possible constructions the court is entitled to prefer the construction that is consistent with commercial common sense and reject the other. This was also confirmed in *Wood v Capita*.\(^{41}\) However, in *Skanska v Somerfield Stores*\(^{42}\) Lord Neuberger argued ‘judges are not always the most commercially-minded or commercially experienced’ and therefore should ‘avoid the role of arbiter of commercial reasonableness or likelihood.’\(^{43}\) This again indicates some inconsistency within the judiciary as to the best arbiter of commercial common sense; it could be argued that it is the parties themselves, who are in a position to understand the market and are best positioned to decide commercial common sense. This suggests that, perhaps, the courts should simply trust what the parties have said in the wording of the contract and refrain from finding absurdities\(^{44}\) in an attempt to rewrite their contract. In addition, the fact that the courts are still attempting to resolve commercial common sense, and ultimately the contextual approach, suggests that this may not be the most suitable approach to contractual interpretation.

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\(^{37}\) ibid.

\(^{38}\) ibid ‘Construction cannot be pushed beyond its proper limits in pursuit of remedying what is perceived to be a flaw in the working of a contract’.

\(^{39}\) *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321 [123].


\(^{42}\) *Skanska Rasleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 [22].


\(^{44}\) Similarly Firm PI 1 Ltd v Zurich Australian Insurance [2014] NZSC 147 [90], Arnold J noting ‘commercial absurdity tends to lie in the eye of the beholder’.
Yet, the recent case of *Wood* argues reinstates the importance of the contextual approach. This is because the Supreme Court stated that ‘it does not matter whether the detailed analysis commences with the factual background or a close examination of the relevant language in the contract’. In *Arnold* it was stated that contractual interpretation should start with the ordinary meaning of the language and, therefore, *Wood* appears to be inconsistent with the approach of *Arnold* to some extent. This is especially true as both *Arnold* and *Wood* are both Supreme Court judgments that are very recent and have both been cited as authority many times this year. This therefore shows that even today the courts are not providing a clear consistent approach to contractual interpretation, but rather altering their position on the correct approach with every case decided and, as a result, are arguably creating further inconsistencies. However, it could also be argued that *Wood*, to some extent, clarifies the law by reconciling with *Arnold* by suggesting that ‘textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation’.

At present the case of *National Health Service Commissioning Board v Silovsky* suggests that this approach appears to be prevailing, as it affirmed *Wood* but also strongly warned against ‘courts seeking to reformulate a contract with the benefit of hindsight as this was not the parties intention at the time the contract’. However, it is yet to be seen whether the courts, in the future, will follow the approach of *Wood* and refrain from making the contract for the parties, or whether there will continue to be inconsistency in approach. It remains to be seen whether a consistent approach to contractual interpretation will result.

The implementation of an implied good faith obligation

English law does not recognise implied obligations of good faith in commercial contracting. However, attempts have been made to recognise such a requirement, namely by Leggatt J. In *Yam Seng* Leggatt J found that

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46 ibid.
48 *National Health Service Commissioning Board v Silovsky* [2017] EWCA Civ 1389.
49 ibid. Gross LJ ‘the purpose and limits of contractual interpretation must be underlined. The task of the court is to identify and give effect to the agreement of the parties: it is not for the court to make some different bargain because it thinks that the parties or a party would have been wiser to do so’.
50 Beale (n 1).
in addition to being in breach of a repudiatory term, ITC had also breached an implied duty of good faith. Therefore, it could be argued that by Leggatt J trying to imply such obligations into contracts to make them yield commercial common sense he is rewriting the parties’ contracts for them, and therefore should refrain from such. However, this position is not consistent. In the case of *Mid Essex* the court refused to find an implied obligation of good faith as ‘any such obligation must be intrinsic to the contract’ as otherwise by implying such ‘they invite courts to go well beyond the proper function of judicial law-making’. Therefore, it appears that by implying an obligation of good faith the courts are again in danger of rewriting parties’ contracts for them. English law’s hostility to an implied good faith obligation is to be welcomed for this reason. In addition to this, good faith ought also to be resisted for the practical reasons. This is because the implementation of good faith will cause inherent uncertainty from unpredictable judicial decisions, and this then poses many practical difficulties for businesspeople; this is because they will not know where they stand in commercial contexts and this then, potentially, means that they will not know how to plan their business affairs and will become overly risk avert or else risk legal action for non-compliance with this obligation. This view was also supported by Roy Goode who argued that ‘predictability of the legal outcome of a case is more important than absolute justice’.

**Conclusion**

This article suggests that there is a real danger of the courts attempting to rewrite parties’ contracts for them in order to make them yield to commercial common sense and be consistent with the matrix of fact. Therefore, it appears that *Arnold v Britton* was decided to act as a strong warning against this. However, it appears that despite such attempts there still remains, to some extent, elements of inconsistency; for example, there is no obvious preferred approach that the courts will implement, neither one

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52 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265 can be distinguished from *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 as where one party has the ability to exercise discretion as part of the contract English law does recognise an obligation of good faith. Similar cases include: *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685 and *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

53 Roy Goode, ‘the concept of good faith in English law’ (Rome March 1992).

54 ibid.

55 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *National Health Service Commissioning Board v Silovsky & Anr* [2017] EWCA Civ 1389 in which Gross LJ gave a very strong judgment regarding the proper role of the courts being to interpret contracts.
that favours accuracy or certainty. This position is unsatisfactory. In commercial contracting businesspeople would prefer an approach that enables words to mean what they say in ordinary English rather than one that allows the contract to mean what the members of the judiciary think it ought to be mean.\textsuperscript{56} However, one thing is undeniable and that is that the proper function of the courts is to interpret the contract, not to rewrite contracts. If the contract suggests that a clause is unambiguous it should be applied without the need to refer to any background issues.\textsuperscript{57} The exception to this should be where the contract suggests that the clause is unambiguous in which case a more iterative approach should be adopted.\textsuperscript{58} It is also suggested in such cases that it is permissible for the court to look to a limited number of background factors, so long as they do not go beyond the functions of the court or depart too greatly from the words used.

\textsuperscript{56} Christopher Staughton, ‘How do the courts interpret commercial contracts?’ (1999) 58 CLJ 303.


\textsuperscript{58} Cases in which this approach was used include: \textit{Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-rata CLO 2 BV} [2014] EWCA Civ 984 [32]; \textit{Deutsche Trustee Co Ltd v Cheyne Capital (Management) UK (LLP)} [2015] EWHC 2282 (Ch) [38]; \textit{125 Obs (Nominees1) v Lend Lease Construction (Europe) Ltd} [2017] EWHC 25 (TCC) [98]; \textit{MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd} [2017] UKSC 59, [2017] Bus LR 1610 [37] \textit{Flanagan v Liontrust Investment Partners LLP} [2015] EWHC 2171 (Ch), [2015] Bus LR 1172 [136]-[137]; \textit{Flanagan v Liontrust Investment Partners LLP} [2015] EWHC 2171 (Ch), [2015] Bus LR 1172 [136]-[137]; \textit{Persimmon Homes Ltd v Ove Arup and Partners Ltd} [2017] EWCA Civ 373, [2017] BLR 417 - These cases are relatively recent; it may be that this is the future approach of contractual interpretation.
A critical assessment of the options available to parties for dispute resolution

Mollie White

Introduction

This article will explore the area of dispute resolution. It will first draw on the issues surrounding litigation and attempts commercial parties have made to avoid this, namely drawing on the principle of good faith. The article will then go on to discuss *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd*¹ and the impact this case has had on parties specifying how to resolve legal issues, should they arise. Subsequently, it will explore other alternative dispute resolution (ADR) methods available to parties, focusing on the courts’ encouragement of mediation and ADR generally. The article will conclude by examining whether the courts should be able to compel parties to use other means of resolution (particularly mediation) before engaging in litigation.

Litigation: a last resort?

Litigation can be problematic for parties; its unpredictability can mean even a ‘water-tight case’ can take an unexpected turn at the hands of the court.² The adversarial (winner and loser situation)³ nature of litigation can create ill-feeling as well as causing the loser substantial, often disproportionate costs. For example, in *Egan v Motor Services*⁴ the parties were described as ‘completely cuckoo’⁵ to engage in a dispute over £6,000 which incurred legal costs of over £100,000. The lack of privacy created by the open-door nature of a Commercial Court (indeed most courts) means that anyone is free to watch proceedings and judgments are routinely reported⁶, potentially compromising commercial sensitivity, along with reputation, as a result.

To avoid litigation and its disadvantages parties might opt, by contract, to specify how they will resolve issues should they arise. This is usually via

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² *Hurst v Leeming* [2002] EWHC 1051 (Ch).
⁵ *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, [2008] 1 WLR 1589 [53].
⁶ cf. ADR.
express terms to act or negotiating in good faith. The general position in English law is that there is not an overarching good faith requirement, although other jurisdictions have been more willing to incorporate good faith requirements into their legal system. For example, France, Germany, and the USA, have included good faith requirements in their legislation whilst Canada has done so via judicial precedent.

The significance of Emirates Trading

Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd breaks new ground in this area. This case involved an express contractual promise to negotiate in good faith before going to arbitration to resolve a dispute. Initially party one (ETA) failed to fulfil their contractual obligations (namely lift the appropriate amount of iron ore under the agreement) thus the other party (PMEPL) threatened to refer the dispute to arbitration if a sum was not paid as a result of the alleged breach. The contract between these parties stated that they should ‘first seek to resolve a claim/dispute by friendly discussion’ and ‘if no solution is reached between the parties for a

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7 Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch) [97] cf Gold Group Properties Ltd v BDW Trading Ltd (formerly Barratt Homes Ltd) [2010] EWHC 1632 (TCC) [91] and Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200 [109].
10 French Civil Code.
11 German Civil Code s 242.
12 Restatement (second) of Contracts s 205.
13 Bhasin v Hrynew [2014] SCC 71, [2014] 3 SCR 495 (Canada) [33].
continuous period of four weeks\textsuperscript{16} then the party who was not at fault (PMEPL) could invoke the arbitration clause.

PMEPL took the dispute to arbitration, as they believed clause 11.1 was not enforceable as it was only an agreement to negotiate and, even if it was enforceable, they had complied with the friendly discussion requirement anyway; hence the arbitrators had the authority to decide the dispute.\textsuperscript{17} ETA argued against this, as they believed no such friendly discussion had taken place initially, so the dispute should not have been referred to arbitration. In the judgment, a series of meetings had been highlighted which were aimed at resolving the claims made in PMEPL’s letter of termination\textsuperscript{18}; Teare J stated that the discussions did not need to be continuous and it was enough that four weeks had passed from the beginning of the discussion before the referral to arbitration\textsuperscript{19}. Thus, Teare J concluded that friendly discussions had taken place\textsuperscript{20} (clause 11) and so PMEPL were within their right to refer the matter to arbitration.

Within this case, a dispute resolution clause made ‘obvious commercial sense’\textsuperscript{21} because, as arbitration is costly in terms of time and money, it is far better to be avoided by friendly discussions to resolve a claim. Illustrating that where the parties provide a contractual mechanism to settle a particular matter the courts will seek to uphold that term.

\textit{Emirates Trading in context}

In the earlier case of \textit{Walford v Miles}\textsuperscript{22}, the owner of a business undertook to terminate negotiations to sell the business to a third party, in return for the plaintiff’s promise (made in pre-contractual negotiations) to continue negotiations to buy the business. In this case, Lord Ackner held that a bare agreement to negotiate was unworkable in practice as it lacked the necessary certainty and, thus, ruled that it was unenforceable. In \textit{Emirates Trading}, counsel for ETA cited Lord Ackner’s comments in support, in submitting that the obligation to seek to resolve a claim friendly discussion was a mere agreement to negotiate, rendering it unenforceable.\textsuperscript{23}

\begin{flushright}
\textsuperscript{16} ibid. \\
\textsuperscript{17} ibid [5]-[6]. \\
\textsuperscript{18} ibid [14], [8]-[15]. \\
\textsuperscript{19} ibid [26]. \\
\textsuperscript{20} ibid [70]-[71]. \\
\textsuperscript{21} ibid [27]. \\
\textsuperscript{22} [1992] 2 AC 128 (HL). \\
\textsuperscript{23} \textit{Emirates} (n 15) [28].
\end{flushright}
However, ‘where commercial parties have entered into obligations they reasonably expect the courts to uphold these obligations’\(^\text{24}\); this expectation was not met in *Walford*\(^\text{25}\). Nevertheless, it was reinforced in the case of *Petromec Inc v Petroleo Brasileiro SA*,\(^\text{26}\) where the Court of Appeal stated that where the promise to negotiate in good faith was an express term of a contract, it could be enforceable - this enabled Teare J to feel able to reach that conclusion in *Emirates Trading*\(^\text{27}\).

*Emirates Trading* is counterintuitive as the parties had been to arbitration and the arbitrator accepted jurisdiction. However, more litigation resulted to interpret the clause in question because what amounts to good faith (or friendly discussions in this case) is difficult to quantify. This highlights that such terms can be commercially problematic due to drafting. Here, the clause’s purpose - to avoid litigation - was completely defeated and, as a result, although *Emirates Trading* breaks new grounds in regard to party autonomy it has also left a mess of litigation in its path.

Nonetheless, it is submitted that the courts should now be encouraging parties to use the *Emirates Trading* approach as the case, in a sense, addressed its own issues; these issues should now be eliminated, setting precedent as a result, and preventing satellite litigation of this kind reoccurring. *Emirates Trading* refocused the importance of party autonomy, allowing the parties to respect what they originally agreed at the outset. This approach has since been followed, for instance, in *Astor Management AG v Atalaya Mining Plc*\(^\text{28}\), within which a term requiring a party to use ‘reasonable endeavours’ was held to be enforceable, with Leggatt J finding support from *Emirates Trading*\(^\text{29}\) and *Petromec*\(^\text{30}\).

### Alternative options

Other than express contractual commitments to negotiate in good faith, what options are available to parties? Generally, the courts have expressed a clear preference for party attempts to resolve disputes through ADR (particularly mediation) as a dispute resolution mechanism as opposed to

\(^{24}\) ibid [40].
\(^{25}\) *Walford v Miles* [1992] 2 AC 128 (HL).
\(^{26}\) *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)* [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep 121.
\(^{27}\) *Emirates* (n 15).
\(^{29}\) *Emirates* (n 15).
\(^{30}\) *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)* [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep 121. Leggatt J also distinguished *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), [2014] 2 All ER (Comm) 403 [64].
Yet, there are alternative methods. For example, arbitration is a form of ADR, a voluntary process whereby disputes are settled in a manner other than by litigation. There are two types of ADR available to parties: Adjudicative methods of ADR (including arbitration\(^32\), adjudication\(^33\), and expert determination\(^34\)) which may involve a binding impartial decision being made by a third party. Non-adjudicative ADR (encompassing negotiation\(^35\), mediation\(^36\), expert evaluation, and conciliation) is where the process and outcome is governed by the parties themselves, giving them more control. Given the courts’ preference for mediation,\(^37\) it is convenient to focus analysis there.

### Mediation: the courts’ preference

Mediation is a very common way of resolving disputes; it utilises a neutral third party ‘mediator’ to oversee and try to guide the negotiation process towards a settlement. Mediation makes commercial sense as the experienced mediator provides a more objective view, perhaps helping the parties, who are often at loggerheads, move away from an entrenched position. A mediator can also provide a sense of reality, thus making offers look more acceptable and allowing the parties time to reflect and consider them, possibly salvaging their future commercial relationship. An agreement to mediate often includes a confidentiality clause, which protects business integrity and commercial reputation as communications between the parties and the mediator cannot be disclosed in court and neither can any settlement. This is linked to the ‘without prejudice principle’\(^38\) as oral or written communication between the parties made in a genuine attempt to settle cannot be disclosed during subsequent litigation.

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\(^{32}\) Arbitration Act 1996.

\(^{33}\) CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd [2015] EWHC 667 (TCC) 15.

\(^{34}\) Channel Tunnel Group LTD v Balfour Beatty Construction Ltd [1993] AC 334 (HL).


Practically compelling ADR

Although mediation\(^{39}\), and ADR in general are encouraged, a court cannot compel parties to go to mediation\(^{40}\), or another form of ADR, as it is regarded as an unacceptable constraint on their right to access the court and therefore represents a violation of their right to a fair trial\(^{41}\). Nevertheless, from a practical perspective the position seems very different. In *Halsey v Milton Keynes General NHS Trust*\(^{42}\) Dyson LJ held that, where a party unreasonably refuses to engage in ADR, but then goes on to win at trial, that party can be penalised by an adverse costs order. As a principle of civil litigation, the loser usually pays the winner’s costs; however the court can make a different award at its discretion\(^{43}\) i.e. an adverse costs order meaning the winning party may not be able to recover (all, or some of) their costs. Additionally, where a party does not take ADR seriously\(^{44}\), (e.g. ignores the others request to mediate) the court is likely to regard this as unreasonable and penalise the uncooperative party (The grounds for what the courts consider to be unreasonable was laid out in *Halsey*\(^{45}\)).

Essentially, as examined above the courts are already compelling parties to use other practical avenues of resolution and revert to litigation only as a last resort\(^{46}\). It is submitted that a judge should have the discretion to refer parties to mandatory mediation if the case is deemed suitable. This makes more commercial sense than litigation and enables parties to reap the true benefits of mediation, namely keeping costs down by avoiding the courts imposing an adverse costs order on the winning party for not exploring it as a resolution mechanism. Parties would not be prompted to appeal against the referral to mediation, as this again would be deemed ‘unreasonable’\(^{47}\) by the courts and result in them being adversely penalised,\(^{48}\) deterring satellite litigation.

Conclusion

The better view is that the *Emirates Trading* approach should be adopted so that the parties can clearly highlight their intentions from the outset,
supporting commercial integrity and party autonomy. If a dispute arises, the courts should be able to compel mediation, as this does not infringe the parties’ right to a fair trial. Ultimately, if parties still needed to go to litigation after mediation they could, as compulsory mediation is not an order to settle, only an order to attend a scene of potential settlement. Further, several signatories to the Human Rights Convention, namely Belgium and Greece, have submitted mandatory ADR schemes without successful Article 6 challenges⁴⁹, hence the UK could too. Mandatory ADR makes commercial sense, as it not only minimises costs but protects reputation as well as future business relationships.

⁴⁹ See Article 214 of the Greek Civil Code.
A critical analysis of the extent to which the law's approach to the classification of terms creates certainty

Yasmin Kalani

Introduction

Breach of contract occurs when a party without lawful excuse (such as the doctrine of frustration) fails to perform an obligation under the terms of the contract or, does perform, but does so in a defective manner (i.e. where there is a failure to meet the standard of performance requirement contracted for). Lord Diplock in *Photo Productions Ltd v Securicor Transport Ltd*,¹ outlined that ‘breaches of primary obligations give rise to secondary obligations on the part of the party in default and in some cases may entitle the other party to be relieved from future performance of his own primary obligations.’² However, a separate question arises whether breach of primary obligations also entitles the innocent party to repudiate the contract. The innocent party will have such a right where the breach equates to a breach of condition, or else where the breach is of an innominate term and the effects of that breach are sufficiently serious.³

This article will argue that the classification of conditions and innominate terms is unsatisfactory. It will do so, first, by reference to statute and then by reference to the language of the contract and time stipulations. The article will also highlight elements of repudiatory breach which fail to achieve commercial certainty, a fundamental requirement in commercial law.

Statutory classification of terms

The law concerning the statutory classification of terms is satisfactory because it achieves commercial certainty. Where there is a business-to-business context, sections 13-15 of *Sales of Goods Act 1979* imply certain terms as conditions by default. As such, parties are aware of their legal position prior to contracting and so this provides certainty. Section 15(A) provides that where a breach of sections 13-15 is so slight it would be unreasonable for the buyer to reject, it is not repudiatory (no option to terminate). This provides a balance because it stops the innocent party escaping the contract where a minor breach such as a breach of warranty occurs, in turn precluding the possibility of escaping a bad bargain via a technicality. The approach strikes the right balance between certainty and flexibility.

**Classification based on the language of the contract or the importance of the term in question**

The courts’ approach in *Poussard v Spiers*¹ and *Couchman v Hill*² was, arguably, satisfactory. According to these cases, terms so fundamentally important to the point where parties would not have contracted without that term ought to be conditions. This is beneficial to contracting parties because it promotes certainty by reference to the ‘importance attached’ test which places importance on terms going to the root of the contract; therefore parties are aware of the scope of their obligation.

A similar approach can be seen in *Lombard North Central Plc v Butterworth*.⁶ There, the court placed emphasis on the use of the phrase ‘of the essence’ in the contract. This is more beneficial to the innocent party whereas the

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¹ (1876) 1 QBD 410.
² [1947] KB 554.
breaching party faces harsher consequences. Alternatively, if the courts applied a more hands-on approach and in doing so, did not give effect to the language of the contract, it could undermine freedom of contract. Furthermore, this may lead to a marginalisation of words, so the potential effect would be that the courts are rewriting contracts and, therefore, potentially undermining party autonomy since parties get involved in pursuit of competitive cooperation. Lord Sumption stated that it would be a ‘fallacy to say language is meaningful in relation to a particular background’. Even badly drafted language chosen by parties has an autonomous meaning since the draftsman may regard, or disregard, a situation more than a judge.

Yet, many would argue Lord Reid’s point that a ‘condition is an indication-even a strong indication of intention but by no means is it conclusive’. This approach was developed in *Schuler AG v Wickman Machine Tool Sales Ltd* where the courts emphasised that just because a party says something is a condition, it does not automatically mean it is a condition. To some extent, this is sensible because it is a question of fact, not form. If the parties have expressly attempted to classify an obligation as a condition, why should the courts not give effect to this? Nonetheless, in *Arnold v Britton*, the Supreme Court signalled a retreat to an approach that seeks to undermine, or depart from, the parties’ expressed contract. There is an argument to say that this approach is to be welcomed, because it gives primary importance to the wording of the contract. In that light, it is questionable whether the approach taken in Schuler would stand today.

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8 See *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 23, (Lord Reid).
Problems with the innominate term

Diplock LJ in *The Hongkong Fir*\(^1\) altered the legal landscape of this area of contract law by departing from the traditionally accepted approach that it is the innocent party’s right to elect to terminate for the breach of contract. An obligation was held not be a condition and, instead, an innominate term claiming the effects of the breach was not serious. It followed that the charterers did not have the right to repudiate and had wrongfully repudiated. Nevertheless, his Lordship never expressly used the term ‘innominate’, and the alteration shifted focus to the consequences resulting from breach. Arguably, the law fails to strike consistency and certainty in this area because the concept of innominate terms fails to provide adequate protection and hinders the operation of contract law regarding planned exchanges. This is further supported by Adams and Brownsword who stated that ‘market-individualism centres on the notion that the purpose of contract law is to facilitate competitive exchange’.\(^2\) The test of substantial deprivation introduced by *Hongkong Fir*\(^3\) harmonised the protection afforded by conditions and innominate terms to the intended beneficiary of the right to terminate the contract. However, substantial deprivation is ambiguous and far from certain and this contradicts market ideology which requires clear grounds rules. Adams and Brownsword also criticised this by asking ‘how can an innocent party ever be confident that a court will treat the consequences as being serious enough to justify withdrawal?’\(^4\)

Through contractual flexibility the issue of practicality was raised, since breach of contract is constantly occurring in English Law. It is not ideal to place parties in a ‘wait and see’ position, predominantly in the context of the innocent party, when detriment arises because they are exposed to additional

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\(^1\) [1962] 2 QB 26.  
\(^3\) [1962] 2 QB 26.  
\(^4\) Adams and Brownsword (n 12) 205, 210.
risk that may be construed as affirmation of the contract. In doing so, it is time consuming and practically problematic because parties would waste legal resources to be aware of their legal position. The consequences of innominate terms were further illustrated in Aerial Advertising v Batchelor Peas.

The uncertainty, unpredictability because of the ‘wait and see approach’, and inconsistency created by innominate terms, weakens the protection afforded to the intended beneficiary who has the right to terminate the contract. This is unsatisfactory because by concealing the legality of the cause of action and discouraging the beneficiary from exercising such rights, it is overshadowed by the time consuming judicial scrutiny. Comparing innominate terms with conditions, there are increasingly compelling arguments for the latter because of the certain and predictable nature of conditions which protect the beneficiary’s right to terminate, and this would also enable parties to be commercially competitive by planning and managing the risk without wasting resources resolving the dispute.

Going to the root of the contract deprives the defendant of substantially the whole benefit originally intended under the contract. This was emphasised by Lewison J in Urban 1 Blonk Street v Ayres and it is apparent that, from Lewison J’s analysis and Arden LJ’s remarks in Valilas v Januzaj, there is increasing confusion amongst courts regarding the ‘going to the root of the contract’ as an idea of serious calibration of seriousness equivalent to the ‘substantial deprivation of the whole benefit’ test. However, it is arguable that such a test imposed by Diplock LJ places a high threshold burden on the innocent party. This was supported by Males J in C&S Associates UK Ltd v Enterprise Insurance Company claiming termination will be justified if there

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15 Oliver Williams, ‘A preference for Innominate Terms: The Good, the Bad Bargain and the Ugly’ (2012) 2 SLJ 155, 166.
16 [1938] 2 All ER 788.
18 Carter (n 3) 48.
is high level of default. Trietel also commented on the link between substantial deprivation and the similar legal metaphor of going to the root of the contract noting that ‘it is not particularly helpful in analysing the law or in predicting the course of future decisions’.\textsuperscript{23} As well as this, expressing important terminology in English law in metaphorical terms such as ‘goes to the root of the contract’ is unsatisfactory because it creates a degree of uncertainty.\textsuperscript{24} This is supported by Lewison LJ in \textit{The Nanfri},\textsuperscript{25} and the Australian High Court in \textit{Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd},\textsuperscript{26} where it was stated it that it would be ‘difficult to be sure what they mean.’\textsuperscript{27} The question whether breach of an innominate term justified termination requires assessment of the consequences of breach.\textsuperscript{28} The aim of the flexibility approach is to work in favour of the guilty party because, unlike conditions, innominate terms shield the guilty party from innocent party’s punctilious demands for precise performance; therefore, the innocent party terminates as a result of trivial breaches.\textsuperscript{29} Debatably, this is not sensible because it introduces considerable uncertainty in the application of contractual terms at the stage where it must be determined whether a term is innominate or not, and the subsequent stage where the courts assert paternalism in assessing the seriousness of the breach to justify the innocent party’s decision. The outcome will require protracted and expensive litigation\textsuperscript{30}, which is not ideal for commercial parties entering into contracts in pursuit of competitive cooperation. Furthermore, another problem arises when the recognition of innominate terms induces sloppiness in performance of commercial contexts because the guilty party is aware that termination cannot occur unless the breach is deemed serious enough; therefore, the innocent party is confined to

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{23}] John N. Adams and Roger Brownsword, \textit{Understanding Contract Law} (5th edn Sweet and Maxwell 2007) 171
\item[\textsuperscript{24}] [1979] AC 757, 50 (Lewison LJ)
\item[\textsuperscript{25}] [1979] AC 757.
\item[\textsuperscript{26}] [2007] HCA 61.
\item[\textsuperscript{27}] [1979] AC 757, 50 (Lewison LJ)
\item[\textsuperscript{29}] ibid.
\item[\textsuperscript{30}] ibid 12-023-24.
\end{itemize}
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a less dramatic remedy if seeking compensatory damages.\textsuperscript{31} Rowan suggested that contracting parties should be permitted to agree upon remedies resulting from a breach.\textsuperscript{32} This is sensible to an extent, because by reference to freedom of contract, agreed remedies ‘have the advantage of not necessitating any fundamental overhaul of English Law remedies for breach of contract’.\textsuperscript{33} Despite its apparent attractiveness, the view seems at odds with \textit{Communications Ltd v Hutchison Telephone (UK) Ltd}\textsuperscript{34} regarding the enforcement of specific performance clauses. However, Rowan’s analysis that agreed remedies will not interfere with the discretion of the courts seems uncompelling.\textsuperscript{35}

Arguably, innominate terms can be beneficial since it stops innocent parties escaping a contract where a minor breach has occurred, or when parties entered a poorly advised bargain. This can be supported by reference to \textit{Reardon Smith Line v Hansen-Tangen},\textsuperscript{36} illustrating the attempted escape. \textit{Ocean Economics}\textsuperscript{37} raised the point that where there is financial hardship it will not be ideal for a party to leave the contract and, therefore, it would be sensible for the parties to carry on with the contract. Wier made a compelling argument regarding how problematic wrongful repudiation can be by reference to \textit{The Hansa Nord}\textsuperscript{38}, where parties themselves must decide whether a breach is repudiatory.\textsuperscript{39} This is potentially problematic because it has potential for further litigation, which may commercially frustrating the contract. As a result of the consequences of innominate terms, commercial parties valuing certainty must take extra reasonable steps to ensure the drafting of contract clearly illustrates the consequences of breach to remove the possibility of courts using a paternalistic approach and recognising the term to be innominate. This is unsatisfactory because it is time consuming

\textsuperscript{31} ibid 12-023-24.
\textsuperscript{33} ibid.
\textsuperscript{34} [1993] BCLC 307.
\textsuperscript{35} Rowan (n 32) 265, 230.
\textsuperscript{36} [1976] 1 WLR 989.
\textsuperscript{37} [2012] EWHC 3104 (Comm), [2013] 1 All ER (Comm) 1277.
\textsuperscript{38} [1976] QB 44.
\textsuperscript{39} Tony Weir, ‘Contract- The Buyer’s Right to Reject Defective Goods’ (1976) 35 CLJ 33, 34.
and parties waste valuable resources to ensure effective classification and contractual certainty.

**Time Stipulations**

Time stipulations are terms relating to time in shipping contacts. They are recognised as conditions, without the burden of showing that the term went to the root of the contract. Here, the law’s approach is satisfactory because general classification is a condition and thus promotes certainty since parties are aware of their legal position prior the breach. This can be advantageous since contracts regarding shipping are fast paced; it is vital to provide certainty because the ‘wait and see’ approach is time consuming. This point is supported by Megaw J in *The Angelos*, an example of how certainty should be the underlying principle of time stipulations, which was an example also highlighted in *Bunge Corp v Tradax Export SA* where Lord Lowry asserted ‘there are enormous practical advantages in certainty’. As well as this, certainty was advocated by Lord Wilberforce who noted certainty as ‘the most indispensable quality of mercantile contracts’, echoing Megaw LJ who also praised the advantages of certainty as ‘a firm and definite rule for a particular class of legal relationship’.

Contrary to this, the approach in *The Gregos* was unsatisfactory because it failed to promote certainty and illustrated that the law concerning this area is inconsistent i.e. some breaches will be conditions, some will be innominate. It was perhaps problematic that Lord Mustil advocated flexibility and the court’s reluctance to extent the list for condition. Arguably, to some extent, his Lordship made a compelling point that often parties rely on conditions to

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42 [1981] 1 WLR 711, 113 (Lord Lowry)
43 [1981] 1 WLR 711, 715 (Lord Wilberforce)
44 [1971] 1 QB 164, 205 (Megaw LJ)
45 [1944] 1 WLR 1465.
escape bad bargains, as mentioned previously.\textsuperscript{46} Lord Templeman focused on certainty and this was supported by Flaux J who said the courts should not be reluctant to extend list of conditions; this argument is perhaps sensible because it places commercial certainty at the heart of the law of contract.

The court’s approach in \textit{Spar Shipping}\textsuperscript{47} fails to achieve commercial certainty by recognising charter-payments as innominate terms. The decision in \textit{The Aforos}\textsuperscript{48} has influenced the tone of this article in favouring certainty, as no doubt it also influenced Flaux J to emphasise the point that commercial certainty is significantly important in commercial transactions.\textsuperscript{49} However, the Court of Appeal’s decision was welcomed and Popplewell J’s argument that innominate terms best reflect ‘general market’s view’\textsuperscript{50} is helpful because adopting that flexible approach would be advantageous when conducting commercial transactions. Nevertheless, the effect on the market is generally mixed and this was further supported by Todd, who made a compelling point that the market, or rates, do not tell us anything about legal decisions.\textsuperscript{51} Adams and Brownsword argued the ‘virtues of certainty, which are dear to market individualism’,\textsuperscript{52} although this may not be wholly accurate because, as the Law Commission identified, the rigidity of the conditions may not be advantageous to commercial parties in circumstances where the courts hold that there was no breach if the outcome seems unjust.\textsuperscript{53} This is exemplified by Lord Denning in \textit{The Hansa Nord},\textsuperscript{54} resulting in further unpredictability. The uncertain nature of this area has been reflected in undesirable statutory recognition in the context of the \textit{Sale of Good Act 1979};\textsuperscript{55} the statute entails ambiguity because of terms such as ‘slight’ and ‘reasonable’. This is

\textsuperscript{46} See \textit{Reardon Smith Line v Hansen-Tangen} [1976] 1 WLR 989.
\textsuperscript{47} [2016] EWCA Civ 982, [2017] 4 All ER 124.
\textsuperscript{48} [1983] 1 WLR 195.
\textsuperscript{49} Paul Todd, ’Punctual Payment of Hire: Condition or Innominate Term?’ [2017] Lloyd’s Martime and Commercial Law Quarterly 18, 22.
\textsuperscript{50} Ibid 18, 24.
\textsuperscript{51} Ibid 24-25.
\textsuperscript{52} Adams and Brownsword (n 12).
\textsuperscript{54} [1976] QB 44.
\textsuperscript{55} Williams (n 15).
supported by Peel who accurately spotted the irony in which the law is injecting uncertainty into terms, designed to avoid uncertainty.\textsuperscript{56}

Conditions facilitate commerce by supporting commercial practise. This is supported by Lord Lowry who identified that prolonged litigation is avoided, and disputes can be resolved quickly therefore minimising legal fees and time lost maximising commercial resources available to commercial parties for future transactions.\textsuperscript{57} Recognising terms as innominate encourages litigation, the beneficiary’s right of termination may be subjected to financial burden and disruption regarding the legality of the termination.\textsuperscript{58} As well as this, it is adversial for the operation of the markets generally and causes inconvenience for both commercial parties diverting legal resources away from the course of the business.

\textbf{Conclusion}

The narrow line dividing conditions from innominate (despite the uncertainties), obtains practical importance. By falling within the former, termination is justified for any breach regardless of consequences but falling within the latter, termination is contingent on substantial deprivation.\textsuperscript{59} Lord Justice Kerr raised the difficulty in classifying terms because judges are confronted with a value judgment regarding commercial significance and, therefore, the judiciary confer inevitable discretion.\textsuperscript{60} The court’s preference for innominate terms is unsuitable because it encourages uncertainty and is injurious to the framework of commercial contract law.\textsuperscript{61} English law fails to recognise the inherent unfairness caused when the seller deliberately breaching the contract to be at a financial advantage. This is unsatisfactory

\begin{thebibliography}{9}
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\bibitem{57} Williams (n 15).
\bibitem{58} Adams and Brownsword (n 12).
\bibitem{59} Williams (n 15).
\bibitem{60} State Trading Corporation of India Ltd v M Golodetz Ltd [1989] 2 Lloyd's Rep 277, 282 (Lord Justice Kerr).
\bibitem{61} Williams (n 15).
\end{thebibliography}
because, by reference to consumer-welfarism, where fairness is perceived to be hardship suffered by the innocent party there is a gap in the relationship between fault and detriment. Having discussed both sides of the arguments, certainty should prevail. Breach of contract cases are often shipping cases; therefore, due to the fast-paced environment within which business is conducted, it would not be sensible to place parties in a ‘wait and see’ position. Arguably, certainty is not a ‘trump card’ which defeats other principles in contract law, but it can be affirmed that certainty is a fundamental requirement in commercial law because, as Lord Scott stated, ‘certainty is a desideratum and a very important one’. 

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English Law’s Relationship with Good Faith: A Critical Analysis

Simran Ubhi

Introduction

English law recognises no general requirement for contracting parties to act in good faith.\(^1\) Instead, it is said to have ‘developed piecemeal solutions in response to demonstrated problems of unfairness’.\(^2\) Contrastingly, there are components of good faith in other legal jurisdictions.\(^3\) However recently, English law has attempted to recognise the idea of a more general principle of good faith.\(^4\)

This article will argue that English law should not accept a broad obligation of good faith as it will lead to commercial uncertainty. It will do so with reference as to why the existing approach works, why good faith brings uncertainty, and good faith in other legal jurisdictions.

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\(^2\) *Interfoto* (n 1) [439].


Why the Existing Approach Works

The general position of English law is that there is no overarching good faith principle; this works as commercial context is often taken into account. Granger explains how English law exhibits elements of good faith and has developed incrementally.\(^5\) In *Carter v Boehm*,\(^6\) Lord Mansfield proposed that the notion of good faith should apply to all contracts and dealings.\(^7\) However, this case was in the context of insurance where there is already a good faith aspect.

*Interfoto Picture Library v Stilleteo Visual Programmes*\(^8\) provides a better view of English law’s true position, although it still does not give a definition. There is an underlying sense of good faith at times (in certain exceptions like promissory estoppel) but this is not explicitly defined.\(^9\) This is the best approach as parties will have commercial certainty when contracting, which is necessary for businesses to make decisions quickly and effectively. Good faith promotes co-operation and transparency, but this is not sufficient to override the importance of self-interest in a commercial setting. Parties must be able to act in their own interests as there is a risk of being too cautious if they are uncertain of what exactly good faith is.

Party autonomy is paramount to English law. By disregarding a general principle of good faith, this can be upheld as parties can fulfil their own interests freely. There are other cases that convey the same point of no general principle,\(^10\) ensuring that parties can be confident the law will not become involved unless the contract has been breached. As Goode rightly points out, 'It is necessary in a commercial setting that businessmen at least should know where they stand'.\(^11\) Always giving effect to party autonomy

\(^6\) *Carter v Boehm* (1766) 3 Burrow 1905, 97 ER 1162.
\(^7\) ibid [1910].
\(^8\) *Interfoto* (n 1).
\(^9\) ibid 439 (Bingham LJ).
\(^10\) *James Spencer* (n 1); *MSC Mediterranean Shipping Company SA* (n 1).
may be unfair as one party may be more powerful, so it is therefore imperative to examine the context behind the good faith obligation.

*Yam Seng Pte Ltd v International Trade Corp Ltd*\(^1\) identifies why English law acquires the approach it does,\(^1\) but yet again fails to recognise the meaning of good faith. A significant point is made by Leggatt J where he discusses how English Law prides itself on its ‘ethos of individualism’.\(^4\) The reputation of the English legal system would arguably decline if there was a general principle of good faith, and furthermore parties from across the world choose to be governed by English law as it is premised on the idea of certainty; therefore, courts must stay focussed on this and seek to produce a solid definition.

*Walford v Miles*\(^5\) is fundamental as it establishes how agreements to agree are not enforceable due to the vague nature and uncertainty created by such actions. Hoskins criticises this as he states that this position is ‘inapt and ambiguous’.\(^6\) Despite this, if parties have agreed to negotiate in good faith then it can be said that the courts should give effect to this as it is commercially unfair to deny it.\(^7\) There is a danger, however, of courts becoming too paternalistic if judges start re-writing contracts. Lord Ackner accurately points out that negotiating in good faith is ‘inherently repugnant to the adversarial position of the parties when involved in negotiations’.\(^8\) This demonstrates that negotiating in good faith is too uncertain as we cannot anticipate what amounts to good faith. To have parties negotiating in good faith would undermine the commercial certainty of contracts before they even start, subsequently frustrating the commercial decision-making process as a conflict of interest may arise. *Courtney & Fairbairn v Tolaini*
Brothers\textsuperscript{19} further shows this as it displays how difficult it is to measure when good faith becomes bad faith, thus reinforcing the need to persist with the current approach.

The current position of good faith in English law is summarised through \textit{ING Bank NV v Ros Roca SA}\textsuperscript{20} where Rix LJ acknowledges that ‘…silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune’,\textsuperscript{21} supporting how \textit{caveat emptor} represents the fundamental features of English commercial law.

Ultimately, a refined definition for good faith is needed because parties suffer to understand what it truly means, resulting in litigation and uncertainty of English law. Commercial certainty is essential from a business standpoint in terms of decision making, which is why it can be argued that the current approach is suitable.

\textbf{Why Good Faith Brings Uncertainty}

Yet, it is evident that English courts struggle to define what good faith actually means; studying case law perhaps proves that a good faith obligation would be a poor concept, as no case specifies its meaning.

Certain types of contractual relationships do, however, give rise to a good faith obligation, with partnerships representing a good example.\textsuperscript{22} However, this does not augment commercial uncertainty as it is in the nature of these contracts to act in good faith.

Although, where there are express terms concerning good faith, parties may be uncertain as to how to act. Express terms can be either to negotiate, or to act in good faith; it is clear that an express term to act in good faith is far

\textsuperscript{19} \textit{Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd} [1975] 1 WLR 297 (CA).
\textsuperscript{20} \textit{ING Bank NV} (n 1).
\textsuperscript{21} ibid [92].
\textsuperscript{22} \textit{O'Neill v Phillips} [1999] 1 WLR 1092 (HL) 1098.
more certain than to negotiate in good faith, as these are often upheld by
the courts.23 The House of Lords established that a promise to negotiate in
good faith before a contract starts is unenforceable.24 This is because such
promises are merely ‘agreements to agree’ and lack the necessary certainty
to be enforceable. Barbudev v Eurocom Cable Management Bulgaria EOOD25
also illustrates the same principle but this is, arguably, not absolute.

Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)26 was a landmark
turning point where Longmore LJ considered whether an express term
requiring good faith negotiation could be enforceable.27 He discussed how
describing such a term as too uncertain to be enforceable carries little
weight, because the good faith negotiation term in Petromec was an express
agreement whereas in Walford,28 it was simply a pre-contractual negotiation;
there is an element here of commercial certainty as it shows courts giving
effect to part autonomy. Nonetheless, uncertainty outweighs certainty as his
other criticism, on measuring good faith, does not surpass the fact that
nobody knows what amounts to good faith.29 Albeit, whilst Petromec narrows
the scope of Walford significantly, as it highlights the need to understand
the commercial context and background before assessing whether an
express term to negotiate in good faith is enforceable, such promises are no
longer seen as unenforceable ‘agreements to agree’ per se, showing
development in the law. It is important though for the courts to remain
aware of the uncertainty and litigation that may come with enforcing such
terms, supporting the need for consistency with the existing approach.

Butters v BBC Worldwide30 shows an element of this, although only in the
obiter comments, which subsequently reduces its value in the grand scheme.

23 Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch).
24 Walford (n 15).
ER (Comm) [963].
26 Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3) [2005] EWCA Civ 891, [2006] 1
Lloyd’s Rep [121].
27 ibid [116].
28 Walford (n 15).
29 Petromec Inc (n 26) [119].
30 Butters v BBC Worldwide Ltd [2009] EWHC 1954 (Ch) [151].
Longmore LJ expressed that such obligations are enforceable if the court can clearly see what it means in practice and the intention of it.31 This does give effect to party autonomy, allowing parties to be certain that their interests will be upheld but may be unfair when they have to act contrary to their own commercial interests.32 Lewison LJ warned against courts rewriting contracts,33 as this is one of the fundamental problems with good faith express terms; we often find courts becoming too involved. Various other cases portray how such terms can be uncertain as promises appear to be abstract, so they cannot automatically be enforced.34 It must be noted that this does, unfortunately, limit party autonomy.

It seems that courts are trying to respect party autonomy but instead grow too involved; the result is the creation of a paradox where more uncertainty is built than certainty. Express good faith terms to negotiate are so vague that, by implementing them, they actually provide a basis for more litigation to resolve good faith disputes than offer parties certainty. Leggatt J proves this in Novus Aviation Ltd v Alubaf Arab International Bank BSC(c).35

Leggatt J seems to focus too much on the implied good faith term in Yam Seng v International Trade Corp,36 even though the judgment was in relation to a repudiatory breach of contract. He articulates how English law is not yet ready to imply a duty of good faith in every contract, but the courts should be more ready to imply a term in fact based on presumed intentions.37 This is still too broad of an explanation and should, instead, stay consistent with the current approach to ensure certainty.38 The term ‘relational contract’39

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31 Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417, [2012] 2 All ER (Comm) 1053 [69].
32 ibid [32], [70].
33 ibid [60].
34 Dhanani v Crasnianski [2011] EWHC 926 (Comm), [2011] 2 All ER (Comm) 799; Shaker v Vistajet [2012] EWHC 1329 (Comm); Dany Lions Ltd v Bristol Cars Ltd [2014] EWHC 817 (QB), [2014] 2 All ER (Comm) [403].
35 Novus Aviation Ltd v Alubaf Arab International Bank BSC(c) [2016] EWHC 1575 (Comm), [2017] 1 BCLC 414 [60].
36 Yam Seng Pte Ltd (n 4) [124].
37 ibid [131].
39 Yam Seng Pte Ltd (n 4) [142].
was also discussed which hints at uncertainty too, as this has not been defined by the courts. It appears that the courts mention terms like this (and similarly, good faith) but struggle to define them, showing a serious flaw in the way that precedent is set. In order for there to be complete certainty, a clear definition must, debatably, be formed. With a relational contract, it may not even be possible to define it as when does a contract become long term, and thus relational? The term also seems to have lost meaning because it is so ambiguous that parties argue it in court without even knowing the real meaning behind it.

Leggatt J argued again for the need of a good faith element but was undermined by the Court of Appeal as the recognition of such a broad concept would have ‘potentially far-reaching consequences’.\(^{40}\) The decision of the higher court should be respected, proving the current approach is suitable. Good faith is clearly too uncertain.

Some may challenge this by arguing we ought to accept a broad principle\(^ {41}\) due to the existing elements of good faith in English law. It is submitted here that this is a weak argument as it ‘does more to cause uncertainty than it does to help’,\(^ {42}\) it is evident that the current progressive steps of good faith are sufficient as commercial certainty is maintained, allowing businesses to interact with each other whist pursuing their own interests.

**Good Faith in Other Jurisdictions**

There are components of good faith in other legal jurisdictions, but these also generate uncertainty. The Principles of European Contract Law 1998 attempts to introduce a harmonised contract law across jurisdictions to regulate commercial contracts.\(^ {43}\) This has not yet been adopted by English

\(^{40}\) *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* (n 1).

\(^{41}\) Leggatt J, ‘Contractual duties of good faith’ (n 3) accessed 9 November 2017.

\(^{42}\) Granger (n 5).

law as application is at the parties’ discretion. It is useful having the option to deal in good faith rather than an overarching principle, because in terms of commercial contracts this is better; otherwise, parties become too cautious and do not pursue their own commercial interests. There is little information on the meaning of good faith in this legislation, proving that it is still an uncertain concept.

Contrary to English law, other common law jurisdictions incorporate good faith requirements in their legal system. English law’s hostility towards the idea may be misplaced as other jurisdictions have adopted it, such as in Canada where it is now recognised as a general organising principle:44 this principle is seen as necessary for protecting reasonable expectations.45 However, it is still too ambiguous as it does not suggest a free-standing rule of good faith but rather in the contractual background, leaving matters to subjective opinions.

Some may argue that if a good faith principle works in other legal jurisdictions, then it can work in English law too. It seems that English law is, perhaps, too attached to the idea of certainty, which would have the effect of imagining good faith to facilitate uncertainty. There is no evidence to suggest that this has happened within other jurisdictions but similarly, there is no indication as to whether it promotes certainty. Whilst being a plausible argument, the better view is that it is paramount for English law to maintain certainty with the existing approach as it is its unique selling point. If this is lost, it is feared that the popularity of English law will deteriorate. Every jurisdiction works differently and English law already possesses aspects of good faith that take into account the commercial context.

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44 Bhasin (n 3).
45 Waitzer and Sarro (n 3).
Conclusion

There is a clear need for a definition of good faith and, as such, one that includes components of fairness and honesty. The main issue that comes with a general principle is commercial certainty as that it restricts self-interest, resulting in parties having to act in respect to others more than they should need to. Indeed, parties should be transparent but the fundamental root of English law depicts that as long as the contract terms are adhered to, parties are free to do as they please. This should be upheld as it is an established principle that works for English law. Parties can include an express term if they want a good faith obligation\textsuperscript{46}, so introducing something different would not suit every commercial contract. Some contracts may be complex and unsuitable to negotiate or act in good faith. A general principle of good faith is a recipe for litigation, a process that is all too expensive and time consuming, especially for large commercial parties. The current approach on the role of good faith in commercial contracting seeks to deliver commercial certainty and endorse sanctity of contract, which is at the heart of English law.

\textsuperscript{46} Mid Essex Hospital Services NHS Trust (n 1).
A critical analysis of the approach the Supreme Court has taken to Contractual Interpretation

Parminder Dyal

Introduction

When interpreting contracts, the courts have a choice from two main approaches: the literal approach, or the purposive approach. The literal approach aims to achieve certainty by ensuring that the courts only consider the written wording of the contract, thereby minimising the courts’ interference and upholding sanctity of contract. The purposive approach favours accuracy, with the courts considering the wording of the contract according to the wider context and background of the contract. The issue as to which approach should be favoured has arisen in three Supreme Court cases: Rainy Sky SA v Kookmin Bank, Arnold v Britton, and Wood v Capita.

This article will argue that the courts have, due to prioritising different factors at different points in time, failed to take a consistent approach towards deciding whether to intervene in parties’ contracts, with the effect being that this has led to a lack of clarity surrounding the law on contractual interpretation. The article develops, first, by analysing three key decisions that the Supreme Court has made, with regard to contractual interpretation, and assesses whether the courts have achieved consistency in their approach. Secondly, it brings clarity to the current approach being taken by the courts when interpreting contracts. Finally, it will be suggested that,

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1 For authorities in favour of the literal approach, see: Lovell and Christmas v Wall (1911) 104 LT 85, Arnold v Britton [2015] UKSC 36, [2015] AC 1619.
despite the adaptability of the law to different situations, the approach of the courts is inconsistent, due to the courts considering each case individually, and, due to the nature of each case being different, a unique approach is used in many cases.

The Three Supreme Court cases

In *Rainy Sky*, the Supreme Court held that 'If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.' The case concerned the interpretation of a clause in a contract for the construction of ships, where Kookmin Bank had agreed to guarantee the repayment, to Rainy Sky, of ‘all such sums due…under the contract.’ However, when the ship manufacturer became insolvent, Kookmin argued that they were not under an obligation to make the payments as the agreement only covered ‘rejection of the vessel’ and ‘termination, cancellation or rescission’ of the ship-building contract. In his judgment, Lord Clarke stated that ‘where the parties have used unambiguous language, the court must apply it.’ It has been put forward that this represents a quiet ‘drifting away from the application of the ‘factual matrix’ in the case of unambiguous clauses.’ This, arguably, shows a lack of consistency with earlier decisions that had been made with regard to contractual interpretation, with the Supreme Court choosing to focus on the specific wording of the clause rather than prioritising the background of the agreement.

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6 ibid [21].
7 ibid [23].
9 *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)* [1998] 1 WLR 896 (HL) 912.
As stated by Sir Geoffrey Vos, Rainy Sky advocates a two-step approach; this is different to many of the other decisions made by the Supreme Court, which have primarily focused on one factor, namely either the background of the agreement or upholding the sanctity of contract. The first step is identifying the potential constructions of a clause, and the second step is identifying which of these potential constructions is the most commercially sensible.

In Arnold v Britton, the parties disputed the interpretation of a clause regarding service charge payments for the lease of chalets. The lessor argued that each lessee was under an obligation to pay a service charge of £90 for the first year and this would then increase by 10%, either annually or triennially. However, the lessees argued that this would lead to an ‘absurdly high annual service charge’ and put forward that the use of the word ‘proportionate’, in the clause, meant that the quantified amount in the lease was an upper limit and that the lessees were merely under an obligation to pay a ‘proportionate amount’ within that limit. In Arnold, the courts focused on the importance of the words; they did not get distracted by their consequences. The Supreme Court took this approach, despite it leading to the service charge payments being at extremely high levels, in some instances over £1,000,000, at the end of the lease. In this instance, the Supreme Court focused on upholding sanctity of contract, refusing to get the lessees out of a bad bargain. Lord Neuberger, particularly in the third and fourth factors he explained in his judgment, emphasised that the clarity of the contract meant that there was no reason to depart from the language in the contract, despite the commercially absurd outcome. This is due to his

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10 Sir Geoffrey Vos, ‘Contractual Interpretation: Do judges sometimes say one thing and do another?’ (Canterbury University, Christchurch, 18th October 2017).
12 ibid [19].
13 ibid [20].
belief that ‘Judges are not always the most commercially minded, let alone the most commercially experienced of people.’

Although the decision in *Arnold* helps with certainty, this comes at the expense of commercial common sense. If the courts interpret contracts according to commercial common sense, this prevents harsh or unfair consequences from occurring. Often, both parties put forward arguments which could both be used, for ambiguous clauses, so the court must make their decision based on which interpretation would be commercially sensible, as they did in *Pink Floyd Music v EMI Records*.

However, the lack of consistency in the approach taken by the courts can be seen in *Jackson v Dear* where, just two years after *Pink Floyd*, the Court of Appeal said that courts should ‘not elevate commercial common sense into an overriding criterion.’

Conversely, if the courts did decide to focus on commercial common sense, there is a risk that they will not just interpret the contract but will end up re-writing it; this is not their job. Parties are likely to be better at judging what is commercially sensible more than the courts, and it is clear to see what the parties thought was commercially sensible by looking at the contract itself. Commercial common sense is a subjective matter and different judges may have different views, which will lead to uncertainty; this is why there are often appeals to the higher courts in contractual interpretation cases. Judges are likely to help the weaker party to try to make the outcome fairer, simply because the other party negotiated a good bargain. This view has been echoed by Lord Sumption, who said that ‘Parties enter into [contracts] in a spirit of competitive interest, with a view to serving their own interest’.

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14 *Skanska Rasleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 [22]. Lord Neuberger repeated his opinion on this matter in a lecture he gave in New Zealand: Lord Neuberger, ‘The impact of pre- and post-contractual conduct on contractual interpretation’ (Banking Services and Finance Law Association Conference, Queenstown, 11 August 2014).


16 [2013] EWCA Civ 89.

17 ibid [15].
is a contrast to Leggatt LJ’s view, who said that ‘the essence of contracting is that the parties bind themselves ... to co-operate to their mutual benefit.’\(^{18}\)

The decision in *Arnold* is a complete contrast to the approach that had previously been taken by the House of Lords in *Investors Compensation Scheme v West Bromwich Building Society* (ICS).\(^{19}\) In *ICS*, Lord Hoffmann set out five principles of contractual interpretation, and although these principles recognised the importance of the wording of the contract, they primarily favoured the contextual approach. The second, third, fourth, and fifth principles, in particular, demonstrate the courts’ willingness to interfere with the wording of contracts that parties have freely agreed to. This is due to the principles’ breadth and because they allow the courts to ‘depart from the natural and ordinary meaning of the words used by the parties’,\(^{20}\) which goes against the principles of party autonomy and sanctity of contract. An example of the extensiveness of these principles can be seen in the second principle, which says that the courts can include ‘absolutely anything’ from the matrix of fact when considering the background of an agreement. The vastness of this rule led to Sir Christopher Staughton describing it as being ‘hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation.’\(^{21}\) He, instead, advocates that the background should include facts that ‘the parties must have had in mind’.\(^{22}\) The second principle also encourages parties to write contracts in a more complicated manner, as there is more room for debate over any clauses, should a dispute arise.\(^{23}\)

In addition to principle two, principles four and five have also been subject to disapproval from members of the judiciary, particularly from Lord Sumption. He criticises Lord Hoffmann’s ignorance of the language and his eagerness to consider the background of the agreement, rather than focusing on the meaning of the actual language used. The language of the

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\(^{18}\) *Ford v Beech* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 148.

\(^{19}\) [1998] 1 WLR 896 (HL).


\(^{21}\) Sir Christopher Staughton, ‘How do the courts interpret commercial contracts?’ [1999] 58 CLJ 303, 306.

\(^{22}\) ibid 308.

contract is the primary evidence to consider when interpreting a contract, as it has been agreed to by both parties and is, therefore, likely to be reflective of their intentions. Moreover, following Lord Hoffmann’s approach would lead to a lack of clarity in the law as parties will be unable to make an informed decision as to which way their case may be decided, due to the case-sensitive nature of the principles.

Most recently, in Wood v Capita,\textsuperscript{24} the Supreme Court, once again, reinstated the importance of context. The case involved the interpretation of an indemnity clause in an agreement regarding shares in an insurance company. It was suggested that the language of agreements should be looked at using either ‘textualism’ or ‘contextualism’. Textualism prioritises the specific wording of the agreement, when interpreting it, whereas contextualism prioritises the context of the agreement. The inconsistency of the courts can be seen by how, in Arnold, the court said that the starting point for interpretation was the language, whereas Wood says they can consider the context first and then look at the language. However, having considered the context, their view of the language may be tainted.

Wood demonstrates a clear departure from the approach of prioritising sanctity of contract and upholding the exact wording of an agreement, and is further evidence of a lack of consistency in the approach taken by the Supreme Court. Wood allowed the court to revive the iterative approach to interpretation, which originated in Ford v Beech.\textsuperscript{25} This process involves checking the potential meanings of a clause, against the contractual document as a whole, and then considering the commercial consequences of each interpretation. It is suggested that this should happen even if the wording of the disputed term is, in the abstract, clear.\textsuperscript{26} Although using this approach may lead to the correct decision in individual cases, it will provide less certainty in the law, for contracting parties, as they cannot be certain whether the court will give effect to the specific wording of the contract.

\textsuperscript{24} [2017] UKSC 24, [2017] 2 WLR 1095.
\textsuperscript{25} (1848) 11 QB 852.
\textsuperscript{26} Wood v Capita [2017] UKSC 24, [2017] 2 WLR 1095.
Where are we now?

The current approach taken by the courts, towards contractual interpretation, appears to be an amalgamation of a number of factors from each of the above cases. If a clause is ambiguous, the courts will consider the factual matrix when ascertaining its meaning. If there is still ambiguity, the court may decide to use the more commercially sensible interpretation. This approach can be seen in ICS and Wood v Capita.

If a clause is unambiguous, the courts will give effect to the clause; they will not consider the factual matrix.\(^{27}\) Not only does this uphold sanctity of contract, it also ensures that the courts do not have to unnecessarily waste time having to consider the background of the agreement to try to find the meaning of a clause. If a clause is unambiguous, but produces a commercially absurd outcome, the courts will consider the factual matrix when interpreting the clause. However, they will be slow to depart from the clear meaning and will not substitute what it believes to be the proper interpretation for an interpretation which is commercially sensible. This is the approach taken by the Supreme Court in Arnold v Britton.

Conclusion

Having considered these cases, it is evident that, with regard to contractual interpretation, there is a lack of clarity and consistency. The court has changed their approach from Arnold to Wood, and they had previously changed their approach from ICS to Rainy Sky and then to Arnold. Indeed, the only thing that does appear to be clear is that ‘no word or group of

words has a fixed meaning.\textsuperscript{28} In \textit{Wood}, it appears as if the courts have tried to find a mid-point between \textit{Arnold} and \textit{ICS}, by not favouring the language over the context, and vice versa.

As Lord Carnwarth’s dissenting judgment\textsuperscript{29} in \textit{Arnold} makes clear, it is key for the judiciary to perform a balancing act between commercial common sense and certainty; although both are important, a judgment should not be such that it completely ignores one of these in favour of the other. It was said that it is important to look at what happened when the matter got to the courts, rather than looking at it from the context of when it was made. This disagrees with Lord Neuberger’s view, that the issue should be looked at from the perspective of when the agreement was made.

The issues are, effectively, being dealt with on a case-by-case basis, as is evident with the constant changes in which factors will be prioritised, and this is leading to a lack of consistency. It appears that the courts have taken the correct decision in \textit{Wood}, regarding using textualism and contextualism. It is not as black and white an issue as the courts appeared to believe it was with their decisions in \textit{ICS} and \textit{Arnold}. It is contested here that they should develop a consistent approach, which considers the language of the contract, but whilst not forgetting the wider context of the agreement, in order to ‘ascertain the objective meaning of the language’\textsuperscript{30} and ensure that that a commercially absurd outcome is not reached.

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\textsuperscript{29} [2015] UKSC 36, [2015] AC 1619 1640.
\textsuperscript{30} \textit{Wood v Capita} [2017] UKSC 24, [2017] 2 WLR 1095 [13].
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European Union Law

Supremacy of EU Law: Member States as the Master of the Treaties

Thomas Duggan

Introduction

Maduro claims that the constitution of the European Union has been developed without sufficient constitutional theory.¹ The conflicting claims of supremacy between national constitutional courts and the Court of Justice of the European Union (CJEU) gives rise to a normative conflict at the highest level, where two distinct, yet interacting systems of law, claim ultimate supremacy. Beck argues that this is unreconcilable, because each of the systems' Grundnorm is particular to itself, yet is not acknowledged by the other.² This article will argue that the appropriate forum for deciding the constitutional relationship is the constitutional courts of the Member States themselves. If the Grundnorm of the constitutional relationship is deemed to be ratification of Union Treaties by Member States, then it flows that it is the Member States who should be empowered to adjudicate on normative conflicts. The article will continue by analysing the claim of the CJEU first, before considering the constitutional courts protestation that the rule of recognition flows from the Member States, making them the ‘master of the Treaties’.³

The Position of the CJEU

The CJEU in Van Gend en Loos confirmed that EU law had created a new legal order whereby, within limited spheres, Member States limit their sovereign rights.⁴ The hierarchy dictates that even the most minor piece of technical EU legislation ranks above the most cherished domestic constitutional norm.⁵ De Witte suggests that the absolute nature of EU primacy is the institution’s most

⁴ Case 26/62 Van Gend en Loos [1963].
striking characteristic. The absolute nature of EU supremacy has been confirmed by the jurisprudence of the Court of Justice; namely in the case of Costa and Internationale Handelgesellschaft. Here, according to the CJEU, the validity of the special and absolute nature of Union law can only be judged in the light of Union law. The rule of recognition, or meta-rule, underpinning EU law is therefore this new legal order. EU primacy is a product of this, transcending all domestic claims of sovereignty within the areas of competency conferred upon the European Union. The United Kingdoms' Parliament, when passing legislation to join the Union, was aware of the jurisprudence of the CJEU and therefore seemingly accepted the absolute supremacy of Union law upon its membership, as per the House of Lords decision in Factortame.

Constitutional pluralists argue that the question of supremacy need not be answered. However, Baquero Cruz blames pluralism, in part, for helping to give the national courts a justification for digressing away from clear and precise requirements of European law. National courts arguing that the European Union's hierarchical supremacy is non-existent, or is at least equal to their own, are therefore potentially guilty of trying to turn the real world into a fable. The German Constitutional Court, whose jurisprudence will be considered in more detail below, has been the most vocal critic of the new legal order's absolute supremacy. Despite some academics likening the German Constitutional Court to a 'dog that barks but does not bite', Beck argues that the deference shown by the German court comes from a pragmatic Euro-friendly approach adopted by the court. He suggests that German public opinion, outside Bavaria, remains broadly sympathetic towards the European integration project, a factor which the court must consider, as to not disrupt the integration process too extensively.

Pliakos suggests that Union supremacy assists with the functionality of EU law, allowing for the aims of the Treaties to be realised. In the 2008 case of Kadi, ultimate authority was again confirmed by the court of justice, citing functional grounds, principles of freedom, and democracy, as a justification

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7 Case 6/64 Flaminio Costa v ENEL [1964] ECR 585.
9 Factortame v Secretary of State for Transport (No 2) [1991] 1 AC 603, 659.
10 Matej Avbelj and Jan Komárek, Constitutional Pluralism in the European Union and Beyond (Hart 2012).
for EU primacy.\textsuperscript{15} However, the fluid reasoning of the court does not distinguish EU law as particularly unique or special, which was the original justification for its claims of supremacy. The reasons cited in \textit{Kadi} are not unique in terms of protection for human rights nor of democracy when compared to other international legal bodies, namely the United Nations or European Convention of Human Rights who, despite not claiming primacy, offer sufficient legal protection in these areas.

Whilst Costa suggested that the new legal order was so special that it was entitled to claim supremacy, De Witte now claims that since principles of freedom, democracy and the protection of human rights have been adopted elsewhere by other international institutions, the EU is no longer that special.\textsuperscript{16} Therefore the direction of the argument is now reversed. EU law is, arguably, now only unique because of its unconvincing claim that it is intrinsically endowed with direct effect and primacy. As a result, causality cannot be established convincingly, weakening the claim that normative constitutional conflicts ought to be decided by the CJEU by virtue of the unique and absolute nature of the new legal order. It is therefore submitted that the constitutional courts of the Member States are more legitimately positioned to answer normative constitutional questions.

**The Position of Member State Constitutional Courts**

The constitutional courts of Member States, both in new and old Europe, have been significantly influenced by German Jurisprudence with regard to their position of supremacy.\textsuperscript{17} Member States who confer power to the EU by means of a euro article within their constitution, or by an enabling act of parliament, i.e., the European Communities Act 1972, do so by limiting their constitutional powers within specified arenas. Therefore, if the Grundnorm of European law is the amended domestic constitutions of Member States, which now include a ‘euro article,’ it flows that as the guardians of those constitutions the national courts are intrinsically empowered to review the legitimacy of European law as to whether it remains within the powers conferred upon it. To illustrate this the jurisprudence of three separate Member States – the U.K., Germany, and the Czech Republic - will now be discussed.

**Supreme Court of The United Kingdom**

The Supreme Court of United Kingdom in \textit{Pham} agreed that the UK’s Membership of the EU is an expression of Parliamentary will, as enacted by the 1972 Act.\textsuperscript{18} The constitutional arrangement in the United Kingdom means

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\textsuperscript{15} Case 402/05 Kadi v. Council of the European Union and Commission of the European Communities [2008].
\textsuperscript{16} De Witte (n 6) 361.
\textsuperscript{17} Michal Bobek, ‘The Effects of EU Law in the National Legal Systems’ in Catherine Bernard and Steve Peers (2nd edn), \textit{European Union Law} (OUP 2017).
\textsuperscript{18} Secretary of State for the Home Department v Pham [2015] UKSC 19 [80].
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that the rule of recognition regards EU law as a source of UK domestic law, rather than an independent legal order.\textsuperscript{19} The United Kingdom therefore must have the last word in regard to potential normative conflicts. This principle was developed in the 2014 HS2 case\textsuperscript{20} whereby, in an obiter judicial comment, the court made its view clear that certain national principles may limit the supremacy of EU law.

Whilst only an obiter comment, the Supreme Court has been consistent in voicing their concern regarding absolute institutional supremacy. In Jackson, Baroness Hale made an obiter comment which suggests the possibility that, in exceptional circumstances, the courts may be willing to question and reject an Act of Parliament.\textsuperscript{21} If the courts are even willing to entertain the idea of defying longstanding domestic constitutional norms, then it follows that they would be willing to claim the ultimate kompetenz-kompetenz in regard to conflicts of EU law. In light of this, Member States constitutional courts would be considered the correct forum for deciding on normative conflicts.

**Federal Constitutional Court of Germany**

Germany maintains a strict hierarchical relationship between the German Basic law and the EU’s legal order,\textsuperscript{22} whereby the Union may, according to Doukas, claim primacy over conflicting national legislation, by virtue and within the limits of the former.\textsuperscript{23} Recent German jurisprudence, namely the Lisbon case,\textsuperscript{24} has maintained an EU friendliness for reasons of pragmatism and application of Treaty provisions, whilst reserving powers of ultimate kompetenz-kompetenz in regard to areas such as constitutional identity review. The reasoning behind this can only be appreciated in the context of the post-war German constitutional landscape. Habermas suggests that post-war sovereignty stems from a focus on constitutional patriotism as entrenched by the German Basic Law.\textsuperscript{25} As such, the Constitutional court, acting as the guardian of the German Basic Law, maintains the right to review the legality of European law. This is because the Grundnorm of Union law is the conferred powers given to it by the Member States amended constitution.

Therefore, the relationship between the German Constitutional Court and the CJEU is defined through the particular arrangement of the three different review functions of the Court, namely ultra vires, fundamental right, and constitutional identity review. It has been suggested that the reluctance to

\textsuperscript{19} R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [2017] 2 WLR 583, paras 60-61.

\textsuperscript{20} R (HS2) v Secretary of State for Transport [2014] UKSC 3.

\textsuperscript{21} R (Jackson) v Attorney General [2005] UKHL 56 [159] ‘The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny’.

\textsuperscript{22} Internationale Handelsgesellschaft [1974] CMLR 540.


\textsuperscript{24} BvE 2/08 Gauweiler v Treaty of Lisbon (2009).

\textsuperscript{25} Jurgen Habermas, *The Inclusion of the other* (MIT Press 1998).
exercise these powers weakens the courts’ ability to implement them. However, Payandeh claims that the function of the powers lies not in the actual application, but rather in the imminent and latent threat which disciplines and influences EU law making. The existence of the courts latent power was confirmed in *Honeywell*. However, the court accepted the need to adopt judicial pragmatism and European openness, which has therefore created a restrictive modality, whereby a ruling against the CJEU remains only a last resort.

In the eyes of constitutional pluralism the judicial restraint demonstrated by the German Constitutional Court is existential of the pluralistic legal theory. The German Constitutional Court does not exercise the powers it claims to possess. Constitutional pluralists argue that the German Constitutional Court demonstrates that the legal systems of Member States and the legal system of the EU are overlapping and interacting, without superiority of one legal system over the other. However, the existence of constitutional pluralism has not been acknowledged by the CJEU, with the CJEU consistent in its position that the new legal order is intrinsically endowed with sovereign rights. Davis argues that pluralism is an empty idea, futile when called upon to answer questions of supremacy when genuine conflicts arise. Law is only meaningful when it can be applied. While pluralism helps to define the relationship between the CJEU and the constitutional courts of Member States, it fails to offer any practical application. Here, according to Davis, the theory crumbles due to its inability to address the question of kompetenz-kompetenz.

For the Treaty provisions to be effective, constitutional courts must adopt an EU tolerance. However, it is submitted here that the German Constitutional Court’s tolerance does not flow from a pluralistic ideology, but rather from a willingness to allow for the effective operation of the Treaties, which have been ratified with the consent of the German government. Democratically elected representatives from Member States chose to adopt greater legal flexibility and cooperation, and expressed this willingness through the ratification of the Treaty of Amsterdam and further Treaties thereafter. The German Court

27 *Honeywell* [2010] 2 BvR 2661/06.
30 Case 26/62 *Van Gend en Loos* [1963].
fulfils its constitutional duty to protect the German Basic Law by voicing its concerns regarding supremacy, but exercises ‘legal maturity’ in accepting the will of the democratically elected German legislature who incorporated EU law into the German Basic Law. The German Constitutional Court is therefore appeasing the German legislature rather than appeasing the CJEU. If elected Parliaments are willing to adopt EU flexibility and greater cooperation, then so must the constitutional courts. If the position is accepted, that sovereignty ‘is he who decides on the exception’, it is the Member States’ constitutional courts who maintain kompetenz-kompetenz as it is the constitutional courts who are exercising judicial restraint for the effective operation of European Treaties.

**Constitutional Court of the Czech Republic**

The Czech Constitutional Court became the first member state court to declare a ruling of the CJEU as ultra vires. While this does seem to offer jurisprudential support for the German Constitutional Courts position that domestic courts maintain the prerogative of review powers, the decision is shrouded in domestic political squabbles which ultimately detract from the legitimacy of the Czech court’s ruling. According to Kuhn, despite being based on German case law, in its application of euro-friendliness the Czech Constitutional Court is not in keeping with the German jurisprudence. Due to the political uncertainty, Komárek submits that this case may be anomalous, generating little or no reaction from the European Union.

**Conclusion**

Despite scepticism regarding the Czech decision, it is the Member States constitutional courts who have the last word regarding ultimate kompetenz-kompetenz. European Union law, according to De Witte, is only a branch of international law, not entirely unique, despite its unusual, quasi federal nuances; domestic constitutions remain the apex of hierarchical norms. Most states consider their constitution the origin of all law applicable on the national territory. Recognition of this as the ultimate Grundnorm means that, despite a willingness to maintain judicial restraint in the interest of EU functionality, it is the national constitutional courts who are best placed,

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34 Davis (n 31) 272.
36 Case C-399/09 *Landtova* [2012].
offering the most legitimate forum, to adjudicate in the event of a conflict of constitutional norms.
Legal Theory

Is Law Fair?

Olatunji Braimoh

Introduction

This article will analyse the best method for understanding law in the modern world and highlight Ronald Dworkins flaws, primarily by examining the conflicting and various theories within sociological jurisprudence. We live in a world where there are laws to be followed and, arguably, the majority of our lives are governed by laws. But, the question is, what is law? Dworkin implies that law should be moving towards ‘an improved coherent with our well-established goals and visions of a just society’¹ and emphasises that law is ‘a statement of principle we are charged to interpret/determine according to the situation at hand’.² Thus, Dworkin argues that the law is a gapless system which conflicts with Hart’s theory and the field of Critical Legal Studies (CLS), with the latter claiming that law is actually a ‘system of domination’³ due to oppression within society; the argument goes that law is a ‘fundamental contradiction or paradox’⁴ by saying that individuals need to be free of others - however this freedom cannot do without other individuals. It will be discussed in this article whether, despite Dworkin’s theories being considered as forward thinking, those theories represent an unrealistic theory.

Who was Richard Dworkin?

Richard Dworkin (1931-2013) was an American Philosopher and jurist who has been regarded as ‘the most original and powerful philosopher of law in the English-speaking world.’⁵ Dworkin earned degrees (B.A.,1953; L.L.B., 1957) from Harvard University and studied as a Rhodes scholar at Magdelen

² Ibid 165.
³ Suri Ratnapala, Jurisprudence (2nd edn, Cambridge University Press 2012) 244.
⁴ Ibid 218.
College, Oxford, which in 1955 awarded him a B.A. degree. Having been known as an incredible intellect among his peers and Professors, Dworkin was seen to be ‘the very model of an Oxford philosopher’. After completing his final year’s exams at Oxford, the examiners were so overwhelmed with his work that the Chair of Jurisprudence (then H.L.A Hart) was summoned to read it. In 1969, at the age of 37, Dworkin became the Professor of Jurisprudence at Oxford, which represented one of the youngest appointments ever made by that institution. Despite having been recommended by Hart, Dworkin criticised Hart’s concept of law during his student years, which caused Hart to ‘express considerable anxiety about this student’s views for the arguments of The Concept of Law.’ During his life, Dworkin would serve as a law clerk with Judge Hand, Dworkin’s mentor, who stated that he was the ‘law clerk to beat all law clerks.’

Dworkin’s Philosophy of Law

Dworkin’s theory was conceived in the post-World War II era, evolving from the Positivist theory. The foundation of Dworkin’s view is that judges do not make law, but rather interpret the legal material which is presented to them. Furthermore, Dworkin’s first sense of the law is that it is a “distinct and complex type of social institution” that may be one of society's greatest achievements or tools of oppression. As well as that, Dworkin has argued that there is a right answer for almost every legal problem and is, arguably, right in the sense that it fits best with the institutional and constitutional history of his society and is morally justified. Also, Dworkin believes that law and morality are intertwined with each other. Another essential point is that Dworkin believes that the law ‘of a community is a set of special rules used to determine what kind of behaviour will be punished or coerced by the state’. Contrary to Hart, Dworkin argues that law does not need a rule of recognition to exist in a given society. Therefore, according to Dworkin a community may, by its practice, accept the rule as a standard for its conduct, which makes the rule binding.

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Dworkin's flaw: Judge Hercules

Dworkin draws on the metaphorical example of Judge Hercules by implying that judges must ‘rely on his own judgement in answering questions about interpreting statues’. In theory, this means that Dworkin would like judges to not think that the constitution ‘is what the best theory of abstract justice and fairness would produce by way of theory’, which insinuates that judges should always interpret the law in a moral manner. This is due to Dworkin believing that the law can provide the right answer to every legal problem to which the judge is responsible for finding. However, there is an argument that this is incorrect because by Dworkin creating this fictional character in Hercules, Dworkin is creating unreasonable expectations for judges to be like Hercules and, who would therefore, be ‘endowed with unmatched knowledge of the law and unlimited time to trace the implications of principle’. Furthermore, Dworkin arguably contradicts himself in the sense that law can provide the right answer because although Dworkin ‘accepts that integrity permits disagreement about the law, he clings tenaciously to the view that it nonetheless yields right answers’. However, if integrity yields different answers and since different judges will have ‘different answers to the same question of law’, this means that, as Fellas implied, all the answers cannot possibly be right.

Another essential point is that by Dworkin encouraging judges to use their morality to find the ‘right answer’, judges are unintentionally ruining democracy. This can be applied to judges in the USA, who arguably ‘are able to impose their ideological commitments over an enormous range of public policy issues—health care, gun control, criminal punishment, sexual

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11 ibid 397.
14 ibid 738.
freedom, religious liberty, and public schooling’. It is worth noting that Posner is an American judge himself, so it is natural for someone in his position to disagree with Dworkin, perhaps. Due to Supreme Court judges being chosen by the President of the USA, it is plausible to argue that the judges chosen would reflect the President’s political ambitions, most of the time. Therefore, in cases such as these, Dworkin is potentially wrong in stating that judges should find 'the right answer' because the ruling made would not satisfy everyone in society. It is plausible to argue that judges can make decisions like this due to their position in society, which as an ideal agrees with the position taken within the Critical Legal Studies movement, that law is politics. Additionally, the position taken by Dworkin, that there is always a correct answer in every case, is potentially problematic because Dworkin can be said to be underestimating the complexity of law itself. For instance, the decisions made in cases cannot, and will not satisfy everyone. Therefore, those who disagree with the decisions will not see the decision made as the 'right answer' in controversial cases, such as gun control laws. This leads one to the understanding that there may be flaws in Dworkin’s argument, which means that the law cannot be understood as an overarching goal aiming to meet all of society’s needs because it is not possible to do that.

Dworkin’s flaw: Morality

The key aspect discussed is that Dworkin is arguing that laws and morality are intertwined. Such a view ultimately disagrees with legal positivism, which can be encapsulated by Hart who states that there is a ‘duty to honour our responsibilities under social practices that define groups and attach special

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responsibilities to membership". This is because people must act as the state’s ‘moral agent’. Yet, critics may argue that by Dworkin encouraging judges to make decisions ‘based on moral principles’, he is wrong in saying that law and morality are intertwined because it is unreasonable to make illegal everything that society presently views as immoral. Although it is clear to see how Dworkin’s views on law and morality transpire, because as Dworkin stated every ‘human life in all its forms is sacred’, the implication is that we as humans should look out for each other and it would be morally correct to help those in need. To elaborate, Dworkin states that one has ‘a prima facie duty to help a stranger when he is in danger of losing his life’. In the fictional example presented by Simons, there appears to be a moral duty to act and, as such, he applies Dworkin’s assessment to the situation to suggest that there appears not to be a moral duty because the victim’s injury is only a broken leg. In the very hypothetical situation that the victim died due to complications from the broken leg, the actor should not be held liable for the victim’s death because the actor could not have foreseen the victim’s death. Similarly, Lord Nicholls in Stovin v Wise states that ‘there must be some additional reason why it is fair and reasonable that one person should be regarded as his brother’s keeper and have legal obligations in that regard’, meaning that one does not have to act if there is no required legal duty imposed. It would be unfair and unjust to punish those who do not act like Good Samaritans because the Good Samaritan law pressurises people to go out of their way to help people in need. Furthermore, the Good Samaritan Law arguably constrains individualism.

16 Dworkin (n 10) 198.
20 Ronald Dworkin, Justice for Hedgehogs (Harvard University Press 2011) 177.
23 ibid.
What is Critical Legal Studies?

Critical Legal Studies is a movement which emerged ‘in response to the moral intensity of the broader social movements of the 1960s.’ CLS also proposes that power structures exist within society and that the law assists those power structures, by making them look fair and just. The main theme of this theory is that law is not fair. Those that subscribe to the CLS movement view the law as being impacted upon by external factors, in that ‘lawyers, judges, and scholars make highly controversial political choices, but the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.’

Pioneers of the CLS movement includes Duncan Kennedy and Roberto Unger, and Unger argues that principles and authorities are contradictory and there can never really be a clear answer as law is, essentially, indeterminate.

CLS: The Theory of Truth

One of the fundamental differences between the views of Dworkin and the views of those that subscribe to Critical Legal Studies is that Dworkin claims that ‘Law is not politics’, whereas proponents of CLS would strongly disagree with Dworkin. CLS scholars would argue that ‘political critique espouses the view that our society and its institutions fall dramatically short of our democratic and egalitarian ideals’, which strongly contradict the views of Dworkin, who advances that the law is coherent. Proponents of CLS

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propose that the law and politics effectively need each other as ‘law needs politics to be enforced, while the former is based on ways and limitations generated by the latter’.

Although Dworkin stated that morality and law are intertwined, he arguably fails to recognise the fundamental contradictions between ‘moral laws’ and the lack of freedom it provides to society. The CLS view that ‘liberalism’s curious position that freedom is possible though its negotiation’ is supported by cases such as *S.A.S. v. France*, within which the decision favoured the State, as France was able to apply the margin of appreciation which effectively takes away an individual’s rights. However, it is hard to see how the banning of the Burqa and Niqab in public places is ‘necessary to a democratic society’, as the court argued that ‘the ban imposed was proportionate to the aim of preserving the conditions of living together as an element of the protection of the rights and freedoms’. The former President of France, prior to the ruling, justified this by stating that the Burqa is ‘a sign of women’s “subservience” and declared that the full veil was “not welcome” in France’. On the contrary, it is plausible to argue that the European Court of Human Rights is essentially allowing France to discriminate against women who wear such religious garments because of stereotypes portrayed in the French media. Furthermore, the denial of wearing the Burqa clearly oppresses Muslim women from expressing their religious beliefs which, evidently, shows that ‘racism and oppression can be camouflaged in the name of respect for the law’ with cases such as *Plessy v. Ferguson* further illustrating this view. Although critics would say that this ruling (*Plessy v. Ferguson*) enabled African Americans to be ‘separate but equal’, CLS highlights that this enables racism to thrive under the façade of law. As well

31 ibid.
33 Litowitz (n 1).
as that, the continuous social injustice suffered still in America, which has only intensified during Donald Trump's presidency, appears to add weight to this claim.

Furthermore, CLS scholars correctly highlight that law can be ‘seen as a significant constituent in the complex set of processes which reproduces the experience and reality of human subordination and domination’. Thus, CLS scholars would therefore argue that the decisions made within the parameters of the law become a tool of the powerful and subject citizens to oppression, which is perhaps demonstrated by the actions of the powerful in relation to uprisings within one of Paris’ banlieus recently. This was done by the police redefining the meaning of rape despite the video footage which clearly showed their liability for the crime, which further goes against Dworkin’s belief that law is fair and coherent to a large extent. Proponents of Critical Legal Studies ‘believe that law is not a political and objective [system] and judges make highly controversial political choices’, implying that the law is not neutral and the legal reasoning behind their decisions appear neutral, but they are anything but. CLS scholars highlight that the law can be ‘seen as a significant constituent in the complex set of processes which reproduces the experience and reality of human subordination and domination’. This is implying that law and society are, therefore, evidently bounded together, arguably more than law and morality as Dworkin claims. Although critics argue that CLS fails ‘to move beyond criticism to the construction of new conceptions of law which show law to be capable of both effecting and regulating social change’, CLS has developed into a

34 Controversial issues include the ban on entry for people in various countries, and the NFL controversy, for more information see ‘Trump resumes attack on ‘out of control’ NFL as ratings slump continues’ [2017] The Guardian (28 Nov) https://www.theguardian.com/sport/2017/nov/28/donald-trump-nfl-tv-ratings-anthem-protests.
38 Hunt (n 35).
more focused form in response to a number of sectors within society, with
the studies of feminism providing a good example.

Conclusion

Dworkin attempts to evaluate law as a fair and coherent system which cares
for every citizen in society. However, Dworkin's theory is arguably too
optimistic in the sense that the law will always provide the ‘right answer’ to
every case; this arguably implies that Dworkin oversimplifies the law because
Dworkin's theory cannot translate to controversial cases such as abortion-
related cases, because people will have different moral principles upon which
there cannot be a ‘right answer’. Critical Legal Studies, however, give a more
realistic view in that law can be understood as a complex system which gives
the façade of fairness; CLS scholars are able identify the principle of
indeterminacy, which develops into the understanding that law has the basis
to oppress society in order to maintain the existence of power structures. It
is contested here that while Dworkin’s views represent somewhat of a
utopian vision for the law, the proponents of CLS present the ‘reality’ of the
situation.
For us by us, or an instrument of the elite? A brief introduction into law in the eyes of society

Samira Ali

Introduction

Marxist writer Alan Hunt likens the study of society and philosophy as being like a river which self-evidently exists and moves.¹ This article with this simile, as it accurately exemplifies the nature of the study of society; but to what extent does this river course into the realm of the law? How far do society, sociology, and philosophy relate to the law? Certainly, it is reductionist to argue that the law exist in a vacuum; this article assumes that the law is not ‘a windowless, airless building’² isolated from the society and this article will argue, amongst other things, that this informs its content. Put simply, the study of the relationship between law and society is rooted in the belief that legal rules and decisions must be understood in context.³ This scarcely controversial assumption represents a vast volume of discourse this article aims to simplify. The scope of the debate is too vast to tackle in its entirety here, so this article serves merely as an introduction to the nature of this relationship; it does not claim to be an exhaustive analysis. The aim is to address three main categories of social and sociological perceptions of the nature, origins, and purpose of this legal framework. To this end, the content of the multifaceted discourse emanating from various sociological and philosophical theories have been grouped together and fall into two distinct categories; these are a) law as a social organiser, and b) law as an oppressive instrument. The inverse position taken by those who believe that the legal framework is dictated by society will also receive brief consideration. The article will use succinct case studies and examples from history to bring the volume of theoretical debate and discourse to life, as borne out in litigation, reform, and instances where society and the content of law come to a head. This intends to show that the law is acted on social,

sociological and philosophical forces, or at the very least, that such forces consider the law through their particular lens.

**Law as a Social Organiser: The Sovereign and Their Subjects**

The central charge levelled by this particular sociological interpretation of the law pays lip service to a ‘top-down approach’, in which the law acts as an unequivocal manifestation of the will of an identified ‘sovereign’. The sovereign in this situation refers to the source of such law in any given society; the Monarchy or Parliament, for example. The expression of this will is contested to feed the law’s legitimacy by virtue of the sovereign’s rank in society which, argues Blumrosen, ‘is prepared to put the various agencies of law... to work in resolving problems’\(^4\) in society. This conforms to a wholly Liberalist view of the law as the originator and organiser of society. This notion, as should be clear, is scarcely controversial; all developed societies have a clearly identifiable sovereign to which law-making power is unique, and whose power is used to effect social change. This was discussed much earlier in legal writing. 17th century English philosopher Thomas Hobbes, writing in his seminal work *Leviathan*\(^5\), also attests to the importance of such a notion. He asserts that the state is justified in the protection and regulation of all aspects of society, such as life and property.\(^6\) He makes the argument in favour of the state, and of the subject’s absolute obligation to obey the law\(^7\), succumbing to the will of the sovereign.\(^8\) It is easy to see how *Leviathan* remains, argues Ratnapala, the strongest justification of absolute power and the strongest proclamation of the state’s mandate in policing and regulating society.\(^9\)

On a similar note, Jeremy Bentham propounds a very similar positivist sentiment. He too argues unequivocally for a legal system founded on the concepts of sovereignty and power, placing particular emphasis on how this works procedurally. His source-subject dichotomy (in which the source is the sovereign as the source of law, and the subjects are those who are bound by it) has been discussed very widely, and attributes law as coming from the top


\(^6\) ibid.


\(^9\) ibid.
and trickling down into society, who are then bound by it\textsuperscript{10}. The doctrine of contract law will be used as an example so as to illustrate how this occurs.

i) **Case study: the regulation of contracts**

Contract law is made up of uniform principles that apply to all contracts everywhere. This promotes a sense of certainty and predictability that positivists would argue forms that backbone of society. Importantly, the element of fairness as imposed by the sovereign is best exemplified here, as the same rules apply equally to all. Luhmann writes that the aforementioned predictability works to 'stabilise social expectations by applying general pre-developed and predictable norms to actual cases and maintaining the unity in the system'.\textsuperscript{11}

This interpretation of the role of the law and its impact on society as part of a top-down approach is clear, and one must also look to the way the law has been used in history to organise society to fully assert its importance. This is with consideration to President Lyndon B. Johnson’s attempt to use law to create a ‘Great Society’ for all American citizens.

ii) **Case study: President Johnson’s ‘Great Society’**

Actualising the utopian ideals of President Johnson’s Great Society were, argues Orrick, indeed ‘concerned primarily with an end goal’\textsuperscript{12} for society. Efforts involved the use of law and executive law-making power to organise society in a way necessary to achieve the ideals underlined in the Great Society.\textsuperscript{13} Closer to home, the law’s top-down impact on society is discussed by Patricia Allatt - with regards to the 1942 Beveridge Report – as being influential in the creation of the welfare state of the United Kingdom.\textsuperscript{14} It is

\begin{itemize}
  \item \textsuperscript{10} This is discussed very generally in Xiabo Zhai and Michael Quinn, *Bentham’s Theory of Law and Public Opinion* (Cambridge University Press 2014).
  \item \textsuperscript{11} Niklas Luhmann, *Law As A Social System* (OUP 2004) 159.
  \item \textsuperscript{12} William Orrick Jr, ‘Antitrust in the Great Society Symposium – Seventy-Five Years of the Sherman Act’ (1965) 27 ABA Antitrust Section 26.
\end{itemize}
easy to see how the nature of the report as originating from the ‘sovereign’ (the Legislature) was ‘intimately related to its social context’.  

Critique

This particular perception, however, is reductionist; it only deals with social organisation and State intervention at a fairly benign level explained with Liberalist sociological theory in mind; that the law and the State work together for the better of society. It seems to imply that through regulation by the ‘Sovereign’, conflict would cease and civilisation could function. The function of law as an exclusive precursor to civilisation is arguably over-exaggerated, and describes efforts, argues Boyle, to shore up the power of a centralised state.  

It is therefore apt that, given this reductionism, we discuss the discourse on social perception of the law as neither neutral nor Liberalistic, but that its appearance of neutrality is exploited to oppress certain categories of people.

Marx: Politics as the Bone and Law as the Flesh

Where positivists would argue that the law rules all fairly and equally, the central charge of the Marxist school of thought is that law is inherently political; infused with values which mirror the interests of the ruling elite. Marx would counter Hobbes’ sentiment, arguing that the Sovereign makes and unmakes law according to its own agenda. This making and unmaking is determined, Marxist theorists would argue, by the relations of production. The relations of production is a social dynamic whose law facilitates its subjects closely identifying with who they labour for and their productivity, taking account of neither individuality nor personhood. This results in a system of alienation, which confines identity to the way the working class (the ‘proletariat’) relate to their surroundings. Such social relations’ elevation

15 Patricia Allatt, ‘Stereotyping: Familism In The Law’ in Bob Fryer, Alan Hunt, Doreen McBarret and Bert Moorhouse (eds), Law, State and Society (Croom Helm Ltd 1981) 181; see more generally Jose Harris, William Beveridge: A Biography (OUP 1977).
17 Hugh Collins, Marxism and Law (OUP 1982) 19.
18 Karl Marx, A Contribution to the Critique of Political Economy (Progress Publishers 1859).
to ‘basic constituents of any society,’ \(^{19}\) is therefore an oppressive dynamic ‘arbitrarily established in law’. \(^{20}\) Indeed, both theories level that there is a great degree of abstraction between what the law is, and what it is that the law purports to be. Both take a staunch anti-formalist stance in their construction of what law is, and dispute ‘that there is an autonomous and neutral mode of legal reasoning’. \(^{21}\)

For Marxist theorists, the law is part of a legally constructed\(^ {22}\) super-structural network used to justify the actions of the ruling class. Politics’ true nature is disguised as ‘the decisions of a range of legally identifiable roles’, \(^ {23}\) whose appearance of neutrality hides the value choices present in politics. Critical Legal Studies (CLS, which takes much from the study of Marxism) has coined a term for the legitimation of this alienation: reification.

To reify is to make concrete. Reification describes the process by which abstract legal rules are given a transcendental existence from human intervention, when it is in fact ‘made and unmade according to criteria that seem patently open to ideological manipulation’ by humans; \(^ {24}\) this is the source of the law’s power, and promulgates a value-neutral form, masked beneath the law’s appearance of neutrality. \(^ {25}\) This results in what Gabel calls a ‘collective denial’\(^ {26}\) on behalf of all of society due to the success of the law’s prima facie neutrality. Duncan Kennedy argues that Marx’s goal was ‘as it always [was] with this dereifying enterprise’\(^ {27}\) of CLS, to illustrate that ‘people ought consciously to choose [their own reality], rather than merely submit to the status quo.’\(^ {28}\) Marxist Russian legal writer Pashukanis writes that reification presents an ideological smokescreen advantageous to the ruling class, \(^ {29}\) as the relations of production (the status quo) is maintained and legitimated in law. Pashukanis has also shaped CLS thinking, by way of arguing that in such a repressive social dynamic, ‘every legal relation is a

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\(^{19}\) Collins (n 17) 18.
\(^{21}\) Roberto Unger, Law in Modern Society Toward a Criticism of Social Theory (London, Collier Macmillan 1977).
\(^{23}\) Ibid.
\(^{25}\) Hunt (n 22).
\(^{28}\) Ibid.
relation between subjects’30 of the law, under which ‘the products of labour are related to each other as values’.31 CLS corroborates Pashukanis, fundamentally believing that law deprives people of individuality, as it ascribes them constantly as the property of somebody else. This describes the phenomenon of alienation, of which CLS has arguably borrowed much from Marxism. Gabel argues that under law as it exists in the status quo, ‘one is never, or almost never, a person; instead one is successively a “husband” or “bus passenger [etc.]”32, with such abandon for personhood being attributed by Kennedy simply as ‘the price of what freedom we experience in society’.33 Such categories contribute to the destruction of individual personhood, a phenomenon endemic to both Marxism and CLS.

Both Marxism and CLS launch an unabated attack and mutual critique of Liberalism. Liberalist’s ideal society of the ‘rights-bearing citizen’34 is criticised on similar proportions by both Marxist and CLS thinkers in its incorrect assumption that rights are ‘out there’,35 existing independently of any manipulative forces from humans. Contrary to Liberalism, CLS scholars argue that the law and its standards are predicated on purely subjective qualities which do not favour individual freedom, instead acting in service of a political agenda.36 Liberalist subscription to the idea ‘that subjective values choices are the only arbiter of good’37 relate to both CLS and Marxist theories, from which Liberalism is used ‘as a point of departure’38 and Marxism and CLS theories offer a critical mirror. Marxist theorist Alan Hunt argues that legal rules are predicated on a ‘purposive enterprise’,39 and its codification of the status quo serves to ‘render it amenable’.40 To Marxists, the law would serve a decidedly bourgeoisie agenda, safeguarding the interests of the ruling class.41 Marx himself argues strongly that through such an enterprise, ‘a dogma is made to appear as a law of universal truth’,42 making the notion of legal autonomy, argues CLS scholar Schlegel, a bare-

30 ibid 109.
31 ibid 111.
32 Gabel (n 26).
39 Hunt (n 22) 53.
40 ibid.
41 Lawrence Friedman, Law and Society: An Introduction (Prentice-Hall 1977) 97.
faced lie. Crucially, it is Liberalism’s denial of the value choices infused in the application of legal rules which is of much contention for CLS scholars; a source undeniably borrowed from Marxist legal theory.

On a very similar strand, it is important to discuss the feminist adaptation of the Marxist stance on law: that law’s value-laden nature exists at the expense of women who are subject to it.

**Feminism: For Men by Men?**

‘[The civil law] as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman... The natural and proper timidity and delicacy which belongs to the female sex, evidently unfit it for many of the occupations of civil life’

In the 1873 American case of *Bradwell v Illinois*, the law’s expression of biological differences between men and women to stop a woman pursuing the Illinois Bar, is a founding pillar of feminist legal theory; that the law legitimates sexist social values, and uses them as an instrument of oppression against women is a central theme. This case is often used as the starting point for much feminist discourse, in that law is a powerful conduit for the transmission and reproduction of the dominant ideology of the day. Feminist sociologists are concerned with the female experience of engagement with the law on an institutional level. Feminist legal scholars have taken on the feminist slogan ‘The Personal Is Political’, an adaptation of the Marxist sentiment which operates on very similar lines to argue that the law is not value-neutral, and is in fact, sexist.

Feminist sociologist Martha Fineman argues that the failure to accommodate women into the legal sphere is systemic; the institutions of the law’s historically conservative nature has not and still accurately does not represent the interests of women on an institutional level. For example, writes Fineman, access to voting, jury service, and the Bar have only been realised *de jure* relatively recently, and have not been widely realised on a *de...
Ilze Olcker in ‘A Feminist Critique of Law’, takes Fineman’s sentiment further and uses it to propound, like Marxism, a scathing critique of Liberalism and the value neutrality of law. She argues that the law is inherently patriarchal, that ‘the systematic masculinity rooted in law [is one] as derived from a positivistic tradition’. This may be true; after all, Hobbes’ Sovereign, for example, would have inevitably been a man or a Parliament comprised of male figureheads. Margaret Thornton further consolidates this Liberalist critique, in her submission that feminist discourse has shown that liberal thought is rooted in ‘a sense on sexualised, hierarchised dualisms’, and the law itself is only concerned with this dualism on its male facet. Feminist jurist Carol Smart counters this view that sexism in law is systemic, arguing that the legal institution and its components are fundamentally ‘congruous' with the male experience; that it is something created for men and by men, and an institution in which women are ostracised.

i) Case study: the female experience studying law

Indeed, case studies here further illuminate this. Olcker makes sense of her experiences studying Law as a woman in South Africa, recalling the ‘thrill of being a woman in a male-dominated world’ as something ‘forbidden and accessible only to a few brave women’.

Radical feminist sociologist Catharine MacKinnon asserts that the law’s conservative character has unequivocally hindered the progress of women in the legal field. The patriarchal teaching of law has seen women ‘emerge from law school, blinded and disoriented, like a rat in a maze', with their male counterparts ‘glowing in the dark’ as they leave adapted to a legal system adapted specifically for them. Such alienation women experience when engaging with the law in different capacities is, it is argued, a product of

51 See generally Carol Smart, Feminism and the Power of Law (Routledge 1989).
52 Olcker (n 49).
existing in a legal climate not made for them; a product of which Subotnik terms the ‘unremitting and wide-scale war [of law] against women’.54

The content of the law is also argued to be oppressive to women. Ann Mumford writes that the system of tax and benefits in the UK do not value the individual choices of women, reinforcing the view that they simply ‘can’t have it all’55. Such a system, submits Mumford, restricts the female experience to the reductionist housewife-working woman dichotomy, with few or no options for women beyond this. This is argued to be abjectly oppressive, and the feminist critique of law as not adequately catering to the female experience is certainly an evidence-based one. Indeed, feminist legal theory, argues Ruth Fletcher, has been bolstered exclusively through litigation, campaigns for reform, and education, which has seen feminist engage explicitly with the law.56 The next case study therefore seeks to illuminate the extent to which the law protects and represents the interests of women; the seminal US case of *Roe v Wade*57.

ii) Case study: *Roe v Wade* (1973)

*Roe v Wade*58 was the product of a challenge to Texan anti-abortion laws, in its declaration that laws outlawing abortion were unduly constitutional. Such laws were arguably unfair against women, as they were often interpreted very strictly within narrow parameters by the judiciary to decide whether a woman was an exception to the anti-abortion laws.59 *Roe v Wade*60 therefore became of great interest to feminists, and saw the issue embark on an unprecedented trajectory which made abortion a key feminist issue,61 as intertwining both law and society. For the first time, feminists understood the importance of the law; its ability to oppress, and, simultaneously, its

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58 ibid.  
59 Marian Faux, *Roe v Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* (Cooper Square Press 2000) 76.  
potential to reinforce positive social change as in *Roe v Wade*. As Maleiha Malik puts it, the goal of feminist legal theory is ‘to render problematic the ‘objective’, the ‘neutral’ and the ‘normal’ values that law emphasises and legitimates at the expense of certain cross-sections of society.

iii) The Civil Rights Movement

The Civil Rights Movement first called into question the supposed value-neutrality of the law. It did so insofar as the Jim Crow laws which informed the unabated racism of deprived African-Americans in the South of the United States of opportunities freely available to their white counterparts. For example, black people were frequently barred from voting by expensive poll taxes they could not afford and extremely difficult literacy tests; a racist dynamic which impeded the way that African-Americans could engage in society. In this way, the Civil Rights Movement is termed as a ‘legal attack’ on injustice; recognising the law as being problematic is, in its crudest form, a critique on Bentham and Hobbes’ perception of the law. Here, the link between law and society is clearest; regressive social values had been unequivocally fuelled and legitimatised by the law.

Conclusion

This article began by stating that sociology and philosophy are like rivers in the way that they are constantly evolving. The way they meander specifically into the realm of law has been explored, and the inextricable link between law and society has been broken down. As different as all of the theoretical and sociological principles discussed are, they all agree that the force of society in informing the content of the law is certainly a potent one. Whether the outcome of such force makes the law benign or laden with regressive

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62 *Roe v. Wade*, 410 U.S. 113 (1973). However, see Dan Subotnik’s critique in ‘The Cult of Hostile Gender Climate: A Male Voice Preaches Diversity to the Choir’ [2001] 8 The University of Chicago Law School Roundtable 38, 39, in which he submits in a somewhat controversial statement that *Roe* was actually a bigger triumph for men than women. Catherine McKinnon in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 205 actually argues that access to abortion means that women have no recourse to refusing sex.


values, the value of social theories in law is clear. Case studies have taken such theories out of the abstract, placing them in a real-world context. This article, in summary, has elucidated the extent to which history and legal rules have embodied the notions propounded in such theories. With consideration of the 21st Century’s age of information, as well as the rise in forces such as social media activism and globalisation, it remains to be seen what else society can do to inform laws it perceives to be unfair, simultaneously quelling the view that the law need only be the will of a sovereign.
The Boom of Autonomous Transportation

Jake Richardson

Introduction

The idea of autonomous transportation has a while until it gains momentum within the United Kingdom as well as the rest of the world. It will be demonstrated that before the success of autonomous transportation is fully recognised, both social and legal issues need to be examined. Therefore, this article will first present the success of autonomous transportation, whilst highlighting the future developments indicating the potential of this technology.\(^1\) Secondly, it will acknowledge that such technology has a long way to go before it can be fully accepted by the general public. Finally, this article will conclude that the current laws governing road users will need to be significantly reviewed to accommodate this new technology.

Social Struggles

From a purely social perspective, autonomous vehicles have the capacity to reduce death and injury caused by driver error. The World Health Organisation published statistics indicating that 1.25 million people die from car related incidents every year, and 90% of that figure occur in low to middle-income countries.\(^2\) If cars were to be autonomous, then perhaps driver error, which would encapsulate drink-driving, fatigue, speeding, careless and reckless driving, would be eliminated. However, are we ready

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for this technological change? Even if we are not ready on a global basis, the facts given by the Eno Centre for Transportation in the United States tells us that if all cars were autonomous, then incidents would fall by 80%.³

However, in light of recent events with Joshua Brown, who was killed when the autopilot system in a Tesla S failed to notice a truck blocking its path, there will certainly be some doubt in many minds.⁴ Indeed, this was the first incident to occur with a driverless vehicle in 130 million miles of autonomous driving, and such technology is still within the testing phase.⁵ In turn, autonomous transportation will significantly reduce the number of car-related incidents because it is removes driver human error completely, although it will not eradicate incidents completely because faults do exist within technology and mistakes still do occur either if they are foreseen or unforeseen. However, news recently that an autonomous vehicle has claimed the life of a pedestrian for the first time⁶ has sought to add further scrutiny to the area, with many negative connotations foreseen.

Yet, with 3.7 million commuters in the United Kingdom spending on average 2 hours a day to travel to work,⁷ and with those who cannot travel or find it difficult to do so because of a disability, autonomous transportation yields strong support as it increases the quality of life and work for many. But, with many commuters paying high fares to get to work as rail fares account for 14% of salary earnings,⁸ autonomous transportation is not a cost effective alternative either. With Google releasing its own autonomous car at a starting price of $75,000 and cars manufactured by Tesla starting at

$101,500,\textsuperscript{9} it seems to be that affordability is still a long way off in the future. However, Tesla may sway buyers with its new model - the Tesla 3 - as prices start at $35,000 and therefore act as a game changer in the autonomous transportation industry.\textsuperscript{10}

**Legal Ramifications**

There are, of course, many legal issues to be resolved. Current civil law requires a driver to be competent and demonstrate the same care of a reasonable person; yet, how can this law apply when there is no driver to be assessed? Additionally, a person can also be criminally liable if driving a car dangerously under Section 2 of the Road Traffic Act 1988.\textsuperscript{11} In turn, the United Kingdom, as with many other jurisdictions, will have to revise their current laws; perhaps the burden of responsibility should be shifted onto the manufacturers themselves, with the law stating that reasonable care should be imposed on companies who do not comply with new Health and Safety laws. If this were to happen, then our understanding of cars would change, and we would view cars as technological items that have similar characteristics of say, an Apple iPad, in the sense that manufacturers have liability for defective products. This would, where an accident is a result of a fault or defect in the car, result in car owners potentially seeking compensation from the manufacturers. Such reasoning already exists within European Union member states, because strict liability is imposed on the producers of defective products that cause harm to consumers.\textsuperscript{12} By way of analogy, if a car were to be classed as a day-to-day product, then perhaps the strict liability position could be extended here as well. Additionally, the driving license could effectively be replaced with a competent training certificate which would, therefore, allow everyone to understand how autonomous technology works so that they are better equipped in dealing with problems that may arise.

\textsuperscript{11} Road Traffic Act 1998, s 2.
Alternatively, manufacturers of autonomous transportation may hold an increased amount of commercial information that could be susceptible to hacking. Indeed, if the heavily researched information relating to product developments, which allows for a commercial edge, were ever leaked then this would be damaging against competitors. Yet, the nature of the automotive industry is in the sights of further development. Currently, automotive manufactures are required to collect and retain significant amounts of data\textsuperscript{13}, and with autonomous transportation appearing to further capitate the internet with its own operational use, the cars themselves could be the target of cyber-attacks. Recently, a pair of ‘white-hat’ hackers demonstrated the ease of controlling the air conditioning, audio system and other components of a Jeep.\textsuperscript{14} This raises not only concerns of how consumer information is protected, but the potential for physical harm caused by more sinister motives. However, this again raises the concern of how much responsibility or liability should be vested with the manufacturers to limit or avoid these situations from occurring. Importantly, this raises the issue of how far a state will intervene in securing the safety of consumers. It is encouraging to witness that the United Kingdom has pledged that cybersecurity will be a part of the United Kingdom’s overall regulatory framework for autonomous transportation.\textsuperscript{15} Although, it is submitted that cyber-attacks are not usually committed by independent parties; instead, employees are more likely to cause harm via security breaches, especially if the manufacturer has trade secrets, personal data relating to consumers, or if a disgruntled member of staff wishes to cause deliberate damage to the manufacturer and their business.\textsuperscript{16} In turn, a balance would need to be struck between those who demonstrate a malicious intent to cause harm, and those that are careless to the policies and legislation designed to protect data, companies and consumers. By way of analogy, autonomous transportation and the technology used within these cars would be protected by the Network and Information Systems Directive.\textsuperscript{17} Whilst this directive does not

\textsuperscript{13} Data Retention and Investigatory Powers Act 2014.


explicitly state that autonomous transportation will be protected, perhaps it could be extended to include it, because traffic management control operators and other intelligent transport systems fall within this Directive.

**Conclusion**

Autonomous driving does bring many advantages, but this also equally brings disadvantages both from a social and legal perspective. If autonomous transportation is to become a commercial success, then companies will have to start taking responsibility for the quality of technology that will inevitably safeguard a human being. If this were to happen, then governments would be able to legislate accordingly and set new Health and Safety laws that regulate companies and protect the consumer. Yet, the biggest challenge facing manufacturers will be the social acceptance of this new technology. As an example, technology is used to regulate the operational use of gated level-crossings on British railways. However, when Network Rail wanted to upgrade a level crossing next to Plumpton station, which is on a branch line off the main London to Brighton route, fierce opposition was established because residents were not confident in a system which monitored the level crossing remotely 20 miles away. Therefore, acceptance of technology comes with time. We, as a population, need to consider when we have allowed other human beings to safeguard our lives when using transportation. When pondering that thought, we do it when we hail for a taxi, catch the bus, commute on a train, and fly for our holiday. We all take the risk of entrusting and relying on these individuals to drive or fly safely, sober, and with a level of reasonable care - can this be the same for autonomous transportation? It is submitted that not one manufacturer will have a monopoly right in the autonomous transportation sector. However, each manufacturer will have to overcome the social issues of acceptance, and the legal issues including security, data protection, product standards and liability questions.

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Questions and Answers

The Aston Student Law Review is absolutely honoured to present to you an interview that took place between the ASLR’s Deputy Editor – Matt Hopkins – and Mary Prior QC, a Criminal Barrister. The ASLR is indebted to Mary for her kindness in agreeing to conduct this interview with us.

Alright, let’s get started then. Why would you say it is important for students to get their work recognised?

Mary:

Getting into the legal profession is extremely difficult, and it is not enough nowadays to have a first class degree and a vocational qualification, such as the bar vocational course and the usually mini pupillages that everyone does, as you will be competing with a large number of students who have all done that. In order to make a difference in your application you need to show that you’re actually really interested in an aspect of law. The best way you can do that is by demonstrating it through some form of voluntary work, paid employment or alternatively writing articles, essays and taking part in competitions. Because if it’s something independent you can show it makes you stand out and shows you’re passionate. It’s very easy for someone to say they are utterly committed to a career in law, but what are you committed to and what is it that you’ve demonstrated other than the fact you’ve done it as a degree [is really important]. If you’re able to say I have published 3 articles or received commendation within a competition then those are things you can show, and the sooner you start showing them the better.

Matt:

Okay. That leads me onto my second question, what made you pursue a career in law?

Mary:

When I started my law degree, I thought it would be interesting but I didn’t expect to be pursuing a career in law as I come from a very ordinary working class background, and careers in law were not seen as a possibility for someone like me. I thought it might have got me a job in industry or in civil service, and in fact I had a long convoluted journey into law. In fact when I finished my degree, I was a graduate trainee for a company that sold Volvo cars. Then after that I got a job as a magistrates court Clark, and I did that
for a few years. The typical route wasn’t open for me as I couldn’t have borrowed the money for the bar vocational scheme. I couldn’t have done a pupillage either as at that time pupillages were unpaid, and you would have had to have worked for 6-9 months for no money at all and pay accommodation; it was completely out of my reach. When I was a magistrates court clerk I was sent on the bar vocational course, and I was surprised that when I was on it I was not only keeping up with other people on the course, but I was excelling. I then managed to secure a sponsored pupillage with the crown prosecution service and I worked there for 6 years and then went to the independent bar. In that sense it was a particularly untraditional route.

Matt:
That leads me onto my next question, as I know you come from a working class background which a lot of people studying law now do. Would you say this has made it harder for you to pursue a career in law or in some ways do you believe this may have been advantageous?

Mary:
It wasn’t advantageous back then, no. At the time that I was studying, almost everyone who was studying with me was no brighter than I was, and they were not intellectually superior to me; but, they had social skills and connections which I simply did not have. They are things you can’t look up and learn. Even at university for me, people who I was at university with were, for the most part, had a far more privileged upbringing then I had. They had less debt to worry about. I had to work every year at university and all through the summer, were as they didn’t. I wouldn’t go abroad for holidays in the summer or do unpaid internships as I didn’t have the money to do it. I actually think that what’s ironic about it all is that I actually now realise that all of those things actually stood me in really good stead when seeking employment and pupillage. It does make you a stronger candidate but you don’t know it. You think ‘oh lord I have not gone off to death row to do the death row project’ and the reason you haven’t gone to do the project is that you can’t afford it. You think well all these other people have gone off and done that and I have been working in Sainsbury’s, a factory, more bars than you can ever imagine; I did all manner of awful jobs. But actually, they were far better for me in my career than anything that I was jealous of other people doing, and I was jealous, because I couldn’t afford to do it. This made me feel less than them, and I think this is the tragedy of coming from a working class background. As your automatic reaction is that this makes me of less worth in terms of pupillage, where as in fact it’s the exact opposite. It makes you of more value and more worth but you can have to know it and believe it. As I genuinely think that all this form social skills which are subtle things that are difficult to learn, the only real difference between intellect and ability from those from a privileged background and those from a working class background is confidence. That is the one thing that often
work class people don’t have, and it shows. Actually, if you can find confidence and understand that you are just as much capable and learn that confidence you stand for more chance of success.

Matt:
I know a lot of people may appreciate that insight, as I often have discussions with my friends and it is definitely something that puts people off the profession.

Mary:
A very small example would be that I’ve always felt very welcome at the bar, and it is a very welcoming environment; it doesn’t matter who you are, where you are form, or what race or colour you are. If you are good at what you do you will succeed. But, along the way if you come from a working class background, it is to some extent like coming from another country. For example, I was invited to someone’s house for supper, and I wasn’t quite sure what supper was! Fortunately, before I went I learnt a new social skill that I didn’t know before, and that is if someone says help yourself and puts a dish of food in front of you, what that means is have some but do not go for anymore until everyone else at the table has finished what they have taken. Now I didn’t know that, and my friend who didn’t know I didn’t know that due to how ordinary it was for her, had said to me ‘oh god don’t you hate it when people take all the food when you say help yourself’. Of course I said “oh yeah I do” but I had no idea. It’s a whole different world but it is learnable. Another example would be a few years into practice a judge said to me ‘Mrs Prior you’re being Delphic’. I had learnt by that stage to be proud of who I was, and I said to him “I’m terribly sorry I didn’t have a private education so could you tell me what Delphic means”. He told me, but of course he assumed that I knew. I didn't do Greek mythology or classics of any description, not any more than I went on skiing holidays or anything of that nature. But that is the only real danger; there is an inherent understanding that we know these things but we don’t; but none of them are a barrier, except in your head. The barrier is there, but it’s just something you have to learn. It’s like joining a new school, you learn eventually. It doesn’t have to define you and it doesn’t make you less then.

Matt:
These barriers seem to be have been a challenge to yourself, but what would you say has been the biggest challenge you’ve faced as a barrister?

Mary:
That’s a really good question. Overcoming my own value set I think probably is a clumsy way of putting it. What I mean is when you are a barrister there is
a camaraderie that is there is help and friendship, but when you're in court you are on your own. It's not a thing you particularly do when you're from an ordinary background. You know to debate, and have all manner of principled discussions which can result in you succeeding or failing. The biggest thing I had to learn was when a judge challenged me or disagreed with me, it was not personal.

Matt:

I can imagine that is a particular problem at the criminal bar, as it can be quite easy to get emotion and attached to certain things

Mary:

Yes, but also it's a difference in teaching styles. In a public school you may debate and have principled chats then go out afterwards. That didn’t happen in my upbringing. So when a judge would say to me something that could be seen as confrontational, I had to learn not to become emotionally involved in it. It can feel like a judge is dismantling and verbally attacking your argument which can be hard to deal with. You have to learn to have more confidence than I did when I started, you have to learn to be comfortable with who you are and what you bring to the profession, and understand everyone is different within it and you just have to learn that it is okay. Whether a judge agrees or disagrees with that is irrelevant; what matters is that you are able to put your own worries and fears and inevitable self-doubt to one side and concentrate on the quality of your arguments.

Matt:

So what would you say is the best and worst aspects of life at the criminal bar?

Mary:

Where do you start? The worst aspect of life at the criminal bar is that it is relentless. It isn’t a nine-to-five job and there are many times where you are working far too many hours later into the night and early in the morning.

Matt:

Does that significant affect your work life balance? Has it been difficult for you?

Mary:

Yes it has been very difficult for me. It is easier to start with good habits. So I would urge anyone who is stating off in the profession to ensure that they are disciplined enough to ensure they make time for their family. I think almost everyone I know in this job works far more hours than they probably ought to. This will put their job before their own health and leisure time, and that is not is not a good thing and I'm not a good example by any means. It
is not a profession to go into to work nine-to-five and not work evenings and weekends. There is relentless pressure during any trial. It’s not only the time in court, but thinking time, preparation, devising tactics, and it can be all consuming. It is also difficult when the public don’t receive the best press about what we do. They will get headlines saying this particular council has received a lot of money in legal aid. However, members of the criminal bar do not do the work for the money. There are many other less challenging and more financially rewarding paths to take to earn a living, so that can be disappointing at times.

Also you are trying to work in a system that is more and more being stripped to the bones. There is less time and resources all round due to budgetary requirements, so that can also be quite difficult. So I don’t think anyone should go into criminal law if they are not prepared to work really hard and be flexible. It’s not for the faint hearted. It is difficult when you have a family and young children to balance everything in order to give sufficient attention to everyone.

The benefits, goodness me… there are so many it’s difficult to know where to start. It is, intellectually, a wonderful job. You have the ability to pit your wits against others. Every day is different even if you’re doing the same offence. The law is changing and you have to keep up to date. You’ve got advocacy, client skills, people skills, you can make a real difference in people’s lives. It doesn’t matter how older you are, particularly for a woman. It’s one of the few jobs where the older you are the higher thought of you are. Fortunately, I have never had to rely on my looks for work, but one does feel for people who do. As you age you get better and better as you know more and your experience develops. The people in this profession for the most part are supportive, interesting and funny people.

**Matt:**

*What would you say is your biggest achievement to date as a barrister?*

**Mary:**

*Well last year I was made Queen’s Counsel, and this year I have been made a recorder. Those I think are my professional greatest achievements. I have to say my greatest achievement I believe was to go to university and finish my degree. From my background that was a remarkable achievement, the things that have flown from that came from that leap of faith. My father was a coal miner and my mother packed tiles in a factory, so for me it was not easy or straightforward as it was not something I was expected to do, and I did have to work during my degree. However achievements are easier as you get older as you have more ability to achieve them. At 18 if you’ve been sufficiently determined to give yourself a large amount of debt and go into a profession with a lot of competition and study hard with no outside help, I think that’s an achievement that is worth celebrating.*
Matt:
If you take a moment to reflect back on your whole career as a barrister, what would be the one thing you would do differently and why?

Mary:
That’s a good question. If I could go back and talk to my 18-21 year old self, I would have understood how amazing and great it was to do what I was doing, and have the confidence it was going to be okay. What I brought to the table was just as much as someone from a privileged background. I put up personal barriers when I started in the profession. It took me a long time to realise my background has assisted me in my career. I always thought I was lucky and at some stage I would be caught out. I look back on my young self now and think you were intelligent, young and fascinated by this subject, I should have enjoyed it more and been proud of what I have done, and made the most of the time, instead of worrying that after my three year degree I would be jobless and homeless. I wish I could go back and say to myself enjoy being who you are. I would also change the fact that I always like to please, as I am a bit of a people pleaser. The one thing I’ve learnt as I’ve progressed in this career is not everyone is nice. Not everyone wants to help you and you can’t win them over. People might not like me for a variety of reasons, but I just have to accept that and move on. Being a people pleaser is not easy in this line of work.

Matt:
Could you briefly talk me through the process of how you prepare for a case?

Mary:
Yes. The first thing I do is draw up a grid, which is what I call a fact management grid which you will learn on the bar course. I will read over it and learn it thoroughly, and work out what the fundamental facts are, and what the prosecution and defence cases are, and identify any gaps. Secondly, I then look at the charges and work out what they’ve decided to charge; I never look at the charges first or any briefs or summaries as they subconsciously influence you. I then look at the law and determine whether the prosecution can prove each element of the offence in question. Then I look at the more complex details of which side I’m representing, then draft an advice letter stating the pros and cons of the case, and meet who I’m representing. Then I will prepare for cross-examination and go back to the grid of facts that I started with. It is important to figure out what I need to ask but more importantly what I don’t need to ask, and see if I can improve the evidence in any way by providing CCTV footage or any other evidence.
Matt:
Do you believe anything is being done to improve access to the bar from low income families and what else could be done to improve this?

Mary:
Pupillage is now paid, and all of the inns are now providing scholarships to aid people who are studying the bar course or to have assistance in their first year of practice. But the difficulty is making everyone aware of them and getting them to the stage of applying, and know that they can apply; people think they can’t apply. I am in Gray’s Inn, and they have specific scholarships for people who might struggle financially. The requirements are that you have to be doing a law degree, and going to do the bar course. The main issue is whether you need financial assistance; academic excellence is not necessarily required. It is difficult for someone from a working class background to get through this whole process, however it is not impossible. What I would suggest is having the law degree and the bar course combined to effectively make a 5 year course, with a year of pupillage at the end of the course. This would ensure everyone would have an equal opportunity to showcase their talents. The tragedy of the current system is there are hugely talented people who aren’t getting pupillage, and the reason for this is that chambers now have to pay for pupillage. To some extent the fact that our profession has been trying to include people from other backgrounds has in fact had the opposite effect, and there are much fewer pupillages. I couldn’t have done an unfunded pupillage, especially considering that students will have to pay off years of debt. Vets and Doctors have a 5 year degree, so I don’t see why law students shouldn’t have a 5 year degree with a passport to a pupillage at the end. What you do with it after the course however is up to you. I don’t feel that it’s fair to permit people to go through the bar course and a law degree, and then not permit them the opportunity of pupillage. I expect it is not possible for all manner of reasons, but in an ideal world that’s what I would say.

Matt:
That now leads me onto my final question. Despite Lady Hale recently being appointed as the first female president of the UK Supreme Court, women are still very much underrepresented throughout the English courts. Do you think enough is being done to promote and encourage gender diversity within the legal system? How could more be done?

Mary:
Do you know what year it was that women were allowed to wear trousers in a crown court? Have a guess. 1995. So for my first 5 year of practice I had to wear a skirt whatever the weather. When I first practiced robing rooms were mixed, and men were taking their shirts off constantly, and you had to work
around it. However, we have come a long way since then, and if one looks at the intake at universities there are more women than men studying law, and the about of women and men gaining pupillage is about the same. The problem is the attrition rate, which is the amount of women leaving the profession. This is very high due to obvious reasons, such as that if you have a small family at work at the criminal bar it is very difficult. This is not helped by giving numerous deadlines which have to be done overnight or over a lunch break. When we are talking about women, I think exhaustion causes the attrition rate. Women in this profession are achieving heroically to remain in it. It needs a change, and digital case working has helped this significantly and made life a lot easier. You can also have telephone appointments with court to deal with directions. I think the bar council and the inns are doing huge amounts to achieve this, but I needs to also be done by judges and chambers.

The judicial appointments committee have been doing a sterling job of promoting equality. We have now fortunately got an accurate reflection of society in terms of black and ethnic minorities being represented at the bar. The BSB have stated that silks may achieve a 50/50 balance in gender within 50 years, however for normal barristers an equal split in gender is not going to be achievable in my life time, which is saddening and disappointing. What women need are good role models and mentors to make sure they can be heard in the profession. We have a system of mentoring in order to provide some support. And it is possible, I have 5 children and I’m still alive and I have got through it. Having said that, there are men in similar positions who have the same deadlines who would like to spend more time with their family. The deadlines come at a huge cost to women in the profession. We mustn’t lose mums or dads in this profession. This profession works because if you’re good enough you will succeed, as long as you have had the opportunity in the first place. People from a working class background need to understand that they will be in a far better position to understand the struggles and stresses of ordinary people who can’t make their wages last, or have grown up in unpleasantness. I would genuinely say that having a working class background, once I had gotten over my lack of confidence, has really helped me in this profession. But you have to make a strong support network. If you put yourself out there the very worst thing someone can say is no, so try, you never know what the answer could be.