ASTON UNIVERSITY
STUDENT LAW REVIEW

ISSUE 2
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EDITORIAL

In this second issue of the Aston Student Law Review, there are a small number of pieces that aim to examine important issues ranging from the development of Trust Law, to the constitutional environment in the UK post-Brexit. In addition, there is an insightful piece on how theory influences Law reform, and on the importance of good corporate governance, which are particularly pertinent subjects to cover. Finally, there is a review of a recent conference held in Aston University entitled Reflecting on 15 Years of the Enterprise Act 2002 Insolvency Reforms.

It is worth mentioning here that there is a reason for the limited scope of this issue. In the near future, the ASLR will be publishing a Special Edition that focuses upon Commercial Law in particular, and we are excited to bring that to you in due course.

Everybody involved with the ASLR would like to thank those who contributed to this issue. As we are a bi-annual publication, there are some important issues to advertise before the next year’s issues are formed. The editorial board is populated on an annual rolling basis, and therefore there will be advertisements soon regarding applications for the roles of Associate Editor, General Secretary, and Social Media Secretary. The Editor-in-Chief would like to take this opportunity to thank Matthew Hopkins, Amirah Asghar, Ciara Attenborrow, and Jake Richardson for their efforts and support in this first year of the ASLR.

The Editorial Board
Aston Student Law Review
December 2018
Introduction

The judgment in *Barclays Bank v Quistclose*¹ has received a remarkable amount of attention. The Quistclose principle as recognised in the case has been subject to plethora of dialogue.² A Quistclose trust arises where funds have been lent to the borrower for a specific purpose and the borrower is required to use the money for that specific purpose and will hold it on trust for the transferor if the purpose fails.³ This article argues that although the Quistclose trust serves a useful purpose in the commercial context, it is an unfair anomaly and the trust device lacks adequate explanation, therefore should be abolished. The first section of this article will consider how various scholars like William Swadling, Lord Millet, and Robert Chambers have critically analysed the application of the Quistclose trust and identified ambiguities in the trust device. The second section will consider how the Quistclose Trust plays a significant role in commercial context. The final section will consider the argument of unfairness in relation to the Quistclose trust.

The institution of the Quistclose trust has attracted legal and academic analysis. Brandon Dominic Chan argues that the existence of the Quistclose trust is enigmatic, which has led some critics to argue that the trust device is

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¹ *Barclays Bank Ltd v Quistclose Investment Limited* [1968] UKHL 4.
an inconvenient form of judicial law-making doctrine because of its lack of precise identification. Also, some scholars have argued that it is an incoherent doctrine and a legal anomaly, which aims to obtain only short-term justice on the facts of various cases.⁴

Some scholars have questioned whether the Quistclose trust is indeed a trust and queried how this form of 'trust' should be conceptualised amongst the existing group of trusts.⁵ As a result of this, scholars have questioned whether Quistclose trust is an express, resulting or constructive trust.⁶ In *Barclays bank v Quistclose*, Lord Wilberforce introduced a two-layered trust structure, a primary trust and a secondary trust. However, Lord Millett argued that the two-trust analysis should be abandoned as it had “formidable difficulties.”⁸ Viewing the Quistclose trust as a form of express trust has also been subject to criticism as it has been argued that an express trust analysis cannot be applied in a Quistclose situation because there is no intention on the lender’s part to retain a beneficial interest in the loan money.⁹

Peter Gibson J regarded the Quistclose trust as a constructive trust.¹⁰ The argument is that the requirement of unconsciousness can be met by the borrower using the money for a purpose other than the intended one. However, in this sense a constructive trust cannot be created until there is

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⁵ Timon Hughes-Davies, ‘Redefining the Quistclose trust’ (2015) 1 The Conveyancer and Property Lawyer.
⁷ *Barclays Bank Ltd* (n 1).
⁸ *Twinsectra v Yardley* [2002] UKHL 12.
¹⁰ *Carrers Rothmans Ltd v Freeman Mathew Treasure Ltd* [1985] Ch 207.
‘misuse of the funds’ by which stage it has been pointed out that it might be too late for an effective remedy. ¹¹

Chambers states that the Quistclose trust is puzzling and that there is confusion about the nature of the relationships created under the Quistclose trust, the property interests created by a loan to be used for a specific purpose and the classification of the trust for the lender upon the failure of the purpose. ¹² Chambers argues that Quistclose trusts are not trusts at all, rather merely a contractual obligation for the borrower to use the money for a specific purpose with the lender holding an equitable right to restrain the borrower from misuse of funds. ¹³

In *Twinsectra v Yardley*¹⁴, Lord Millett established that the Quistclose trust is a form of resulting trust. However, various scholars have criticised Lord Millett’s approach for discouraging the investigation of the true intentions of the parties. ¹⁵ The criticism of Lord Millett’s approach has resulted in the development of different arguments about the existence of the Quistclose trust. For this purpose, it can be argued that there is a lack of adequate explanation about the precise nature of the Quistclose arrangement and it does not appear as though the nature is “necessarily mutually exclusive and there is no single right answer.”¹⁶

Chambers criticises the classification of automatic and presumed resulting trusts as classified in *Re Vandervell*¹⁷. Chambers argues that these categories should be abandoned, as there is no real distinction between them. This is

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¹⁴ Twinsectra (n 8).
¹⁶ Glister (n 13).
¹⁷ *Re Vandervell Trustees Ltd* (No 2) 1974 EWCA Civ 7.
because in both instances resulting trusts arise because the provider of the property did not intend to benefit the recipient.\textsuperscript{18} Swadling also criticises this and argues that any of form of presumed trust is inappropriate as there is no room for such a presumption as the courts know what the transferor intended.\textsuperscript{19}

Additionally, Professor Birks argues that virtually all cases of direct transfer of wealth from plaintiff to defendant will give rise to a claim in equity under a resulting trust. This theory has been criticised by Swadling who argues that the resulting trust has little or no part to play in law of restitution.\textsuperscript{20} Swadling argues that the House of Lords were wrong in the decision in \textit{Barclays v Quistclose}\textsuperscript{21} to have found a trust. Swadling argues that to give the lender having beneficiary powers could result in difficulties, one of which is that the lender could recover twice, firstly as a beneficiary of the trust and secondly as an obligee under the contract of loan.\textsuperscript{22} Some have argued that the justification for finding that the borrower holds on resulting trust for the lender is to prevent the borrower from being unjustly enriched. This has been criticised by Swadling who argues that the argument of unjust enrichment cannot apply as a reason for justifying a resulting trust arising under the Quistclose scenario as the borrower is in any case under a liability to repay the money he has received from lender.\textsuperscript{23}

Furthermore, the Quistclose trust has been criticised for serving no useful purpose, however this view has been opposed by scholars who argue that the Quistclose trust stands as an invaluable device for lenders in a commercial context and that this trust device is too advantageous in

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\textsuperscript{18} Robert Chambers, \textit{Resulting trusts} (Oxford University press) 4.
\textsuperscript{20} ibid.
\textsuperscript{21} ibid.
\textsuperscript{22} Swadling (n 15).
\textsuperscript{23} ibid.
\end{flushleft}
commercial practice to be abandoned.\textsuperscript{24} Lord Millet stated that Quistclose trust “probably represents the single most important application of equitable principles in commercial life”\textsuperscript{25}. The argument remains that the Quistclose trust has infiltrated and become an important part of commercial law, it can be argued that this is evident, as the doctrine of Quistclose trust has been invoked in several commercial contexts like insolvency and many others.\textsuperscript{26}

On the other hand, the Quistclose principle has been targeted and there are doubts about the legal certainty of the trust device. Nevertheless, some other scholars have identified the fact that the Quistclose trust assists in corporate rescue. The argument is that Lord Millett’s reasoning, which states that the beneficial interest would always be left with the lender, fits with commercial reality. It can be argued that this is accurate to some extent, because by the lender always having a beneficial interest, it means that the lender would always be protected almost like a secured creditor in an ordinary commercial dealing.\textsuperscript{27}

Lord Millet stated that the borrowed money was not at the borrower’s ‘free disposal’.\textsuperscript{28} Lionel Smith have pointed out that the borrower is constrained and has very limited use of the money as the borrower is obliged to use the money for the specific purpose or return it.\textsuperscript{29} Lord Millet explains that the ultimate trust in favour of the lender should not give rise to any issues, as it is a classic example of a resulting trust in favour of the party who provided the money.\textsuperscript{30} This principle of overpowering the lender has been gravely criticised. The argument is that providing the lender with “superior powers”

\textsuperscript{24} Chan (n 4).
\textsuperscript{25} Swadling (n 15).
\textsuperscript{26} Man Yip, ‘The commercial context in trust law’ [2016] 5 The Conveyancer and Property Lawyer.
\textsuperscript{28} Twinsectra (n 8).
does not appear to be a commercially sound arrangement. This is because it does not appear as though it is the arrangement intended by the borrower and the lender, as it seems rather difficult to picture the borrower entering into an agreement that the lender may be able to collapse and revoke at any time.\(^{31}\)

It has been argued that the practical implications of Quistclose trusts are problematic and unfair. This is because under this trust device, the argument is that the lender acquires “super-priority” over the other creditors by having equitable proprietary interest over the loan money. Scholars have questioned this principle as they are puzzled by the fact that the lender, and not the creditors who were to be paid a declared dividend with the loaned money, have the beneficial interest. The argument of unfair treatment rests on the approach established by Lord Millet, which has been criticised for giving the lender too much and leaving the creditors with too little.\(^{32}\) Michael Smolyansky, a key critic of Lord Millett’s approach, argues that the Quistclose principle is in error and in direct conflict with orthodox insolvency law principles. He argues that Quistclose trust violates the pari passu distribution principle whereby the courts place the lender in a vastly superior position by satisfying the lender at the expense of both unsecured creditors and secured creditors who have taken a floating charge.\(^{33}\)

In conclusion, although the courts have tried to place the Quistclose trust within the parameters of conventional trust law rules, it is clear that the existence of the Quistclose trust is more complex than whether the borrower is restricted concerning the disposal of the funds.\(^{34}\) It can be argued that the

\(^{31}\) Arthur Chan, ‘The Tree That was Not Meant to Be – The Quistclose Trust Moving on from the Twinsectra Model and Why it May Never Be An Established Transactional Arrangement’ (2015) 9 Hong Kong Journal of Legal Studies.


\(^{33}\) Smolyansky (n 9).

‘authoritative’ judgment by Lord Millett lacks adequate explanation and for that reason, there is a need for clarification and coherent answers by the court as scholars still continue to debate the nature of the interest created before and after the failure of the purpose.\textsuperscript{35} Despite the fact that Quistclose trust has been considered to play a useful role in commercial contexts, the notion of the Quistclose trust is still in essence, incoherent, unfair and problematic and therefore should be abolished.

Legal Theory

The Critical Legal Studies Movement: A Worthwhile Catalyst for Law Reform?

Venandah Madanhi

Introduction

This essay explores how and to what extent the areas of Critical Race Theory, Feminist Legal Theory, Fundamental Contradiction Theory and Queer Theory have influenced our understanding of law’s role and operation in society. The Critical Legal Studies Movement materialised in the United States during the 1970s however, the intellectual basis can be traced back to the American Legal Realist Movement in the 1930s\(^1\). The movement emerged in the height of various influential periods in history including, the Civil Rights, Women’s Rights and Gay Rights movements. In light of this, Critical Legal Studies is an umbrella term that governs a wide range of critiques from varying subject areas and scholars investigating the supposed neutrality of the law.

A brief overview of the history of the Critical Legal Studies Movement

Tushnet describes Critical Legal Studies (CLS) succinctly as ‘... a developing body of thought, and it would be unsound to attempt to freeze it with an absolutely precise description’\(^2\). This developing nature allows CLS to adapt

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and question legal doctrines within society at any given period. The CLS movement assists us in our understanding of the role of law in society by exposing us to radical literature that changed established traditions within society. The Critical Race Theory illustrates this. Professor Derick Bell and Alan Freeman sowed the first seeds of the Critical Race Theory in the 1970s in response to the seemingly slowing pace of the Civil Rights movement.\(^3\) Professor Derick Bell was an African American lawyer and legal scholar. He spent the formative years of his career constructing legal strategies dedicated to reforming the laws that governed racial segregation in schools.

**Critical Race Theory**

As a sole entity, Critical Race Theory (CRT) was formally established in 1989 in Madison Wisconsin. The theory is fundamentally concerned with the operation of race in law, increasing 'race consciousness' and exposing the law's pervasive racism. CRT argues that the law is far from neutral and can be discriminatory to ethnic minorities. CLS scholars help us to understand the operation of law in society by bringing to light the way the law falls short. CRT scholar Delgado is of the opinion that the CRT is founded upon the insight that 'racism is [a] normal ... ingrained feature of our landscape'.\(^4\) This suggests that the law is not neutral due to the legal system being predominantly shaped by the white elite. Nunn supports this as he explores how in America, whites are not only a simple majority but 'whites on the whole have more money, higher social status and greater access to power than do Blacks'.\(^5\) Considering this CRT adherents question whether formal equality is sufficient enough to combat the way the law marginalises ethnic groups. In order to tackle this problem, CRT scholars campaign in favour of affirmative action that has the

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\(^4\) ibid.

power to produce not just equality on paper but equality in outcomes. This is because the role of the law in society is to provide rules and equally apply sanctions when rules are broken. The way CRT scholars question the neutrality of law, is helpful in assisting us to understand the role of law in society. However, it is fair to question whether going beyond the law (in the form of affirmative action) is an effective solution. This is because solely focusing on blacks and other ethnic minorities could result in discrimination towards whites; creating a quagmire of legal uncertainty.

Matsuda proposes that the Critical Race Theory can provide the legal system with 'distinct normative insights'. She expands on this by claiming that 'those who are oppressed in the present world can speak most eloquently of a better one'. It can be argued that individuals like Crenshaw who have experienced first-hand prejudices are at times the wisest advisors in regards to how the law can be reformed to improve society. The CLS movement helps us to understand the operation of law in society by employing narrative to expose the law for what it really is. Matsuda voices her thoughts impeccably when she states that theorist ‘concerned with the process of change should ... [use the] critical eye, of student rather than teacher’. From a psychoanalytical perspective, the critique of legal literature that CLS provides is significant. Trubek applies a Freudian analysis when he acknowledges CLS scholars as having the ability to 'bring to consciousness' the 'perceived contradictions that are too painful for us to hold in consciousness'. Similar to their Marxist and AR predecessors, Ratnapala is of the view that CLS challenges 'prevailing comfortable assumptions about the law ... [by compelling] liberal legal

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7 Like Patricia Williams, Kimberlé Crenshaw’s narrative (in Kimberlé Williams Crenshaw, ‘First Decade: Critical Reflections, or A Foot in the Closing Door’ (2002) 49 UCLA Law Review 1343) offers insightful reflections from ‘multiple positions’.
theorists to re-examine, revise and refine their views’. Nevertheless, it is important to acknowledge the criticism that has been directed towards CLS scholars. For instance, Randall Kennedy argues that the way CRT scholars such as Delgado and Matsuda favour race-consciousness is bad for legal academia; because a scholar’s ‘social position’ does not determine ‘the intellectual quality of scholarly productions’. It would seem that the focus on providing critique rather than solutions casts doubt on the extent to which CLS is helpful, as the school of thought can sometimes raise more questions than answers.

**Feminist Legal Theory**

The Feminist Legal Theory (FLT) school of thought has a range of branches that employ varying opinions and critiques such as, radical, difference and liberal feminism. According to Lacey there are three main areas in feminist jurisprudence, namely ‘liberal feminism, cultural feminism and radical feminism’. In the 1960s the FLT allowed female legal scholars to campaign for women’s rights and raise the claim that the law was (to an extent) responsible for the subordination of women throughout history. Menkel-Meadow claims that ‘[i]n the beginning, law was male ... (and) made by men, though it was enforced against women’. Scales argues that the law must focus on the ‘injustice of sexism ... (and this) cannot be achieved through a formal lens’. This radical position held female legal scholars led to them being labelled by sceptics as ‘Fem-Crits’. One of these fem-crits is MacKinnon who strongly denies the neutrality of the law and seeks to expose and change

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the system. FLT exemplifies how critiquing the law can result in tangible changes.\textsuperscript{17} Unger holds the notion that our greatest ‘obstacle to transforming the world is that we lack the clarity and imagination to conceive that it could be different’.\textsuperscript{18} The notion that the Critical Legal Studies movement assists our understanding of the law by opening up our imagination to what society could be like if the law was reformed.

**Fundamental Contradiction and Queer Theory**

The Critical Legal Studies movement introducing us to new perspectives such as the Fundamental Contradiction Theory. This theory is based on the notion that as individuals we need to be free from others yet cannot live without them. The paradox is that society depends on both our autonomy and the support from 'the collective' in order to function.\textsuperscript{19} The fundamental contradiction identified by CLS scholars is evident in Queer Theory. For example, the way English law operated discriminated against homosexuals.\textsuperscript{20} For instance, during the 1950s (despite the legality) if a man embraced his autonomy and lived as a publically gay man he would have faced discrimination due to the limited support that came from the collective at the time. This led to the Gay Rights Movement because the law left some members of society feeling marginalised and tormented. Valdes argues that scholars of a sexual minority should ‘go beyond sexual orientation in the search for social and legal equality’.\textsuperscript{21} From a jurisprudential perspective, history shows us that the role of law is to shape what society deems acceptable; influencing how the law operates and how we behave. Duncan Kennedy holds the view that although 'it forms and protects us, the universe

\textsuperscript{17} Scholarly works and activism by Fem-Crits heavily contributed to the change in the law meaning husbands could no longer rape their wives. See the Sexual Offences Act 2003.

\textsuperscript{18} Lee Smolin, 'The Life of the Cosmos' (Oxford University Press 1999) 258.

\textsuperscript{19} This collective comes in the form of family, community, friends and the state.

\textsuperscript{20} Criminal Law Amendment Act 1885 commonly known as the Labouchere Amendment.

of others (family, friendship, bureaucracy, culture and the state) threatens us with annihilation...numberless conformities ...[and] small abandonments of self to others.’

Van Blerk seconds this sentiment as he argues that liberal legalism ‘falsely persuades society that prevailing social arrangements are necessary and neutral’. In light of this, Critical Legal Studies scholars are of the view that society can be transformed if the belief structures that govern over legal and social consciousness are removed. Alternatively, liberal legal theorists are of the view that neglecting our relationships with others can be problematic for the law. This is not a new sentiment. Donne historically stated that 'no man is an island ...every man is a piece of the continent'. It is important to appreciate the way in which the CLS movement provides a worthwhile alternative perspective to the arguably two-dimensional legal system. However, this is to a limited extent. There is a clear fundamental contradiction, which needs to be addressed yet Fundamental Contradiction Theory scholars fail to provide a well-reasoned alternative or solution to improve the problems they see present.

In conclusion, it is evident that the Critical Legal Studies movement has produced and continues to produce a wide array of literature that not only critiques the law but affects its operation in society. Critical Race Theory scholars assist us in our understanding of the law by introducing the world of legal academia to the use of narrative, in order to illustrate the way in which the law falls short. The Fundamental Contradiction Theory and Queer Theory scholars such as Valdes, help us to understand that in order to administer

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24 Jacques Derrida (a deconstructionist) would argue that it is impossible to reach a truth even if such belief structures are removed because there are multiple ways in which texts (including scholarly works) can be interpreted. Lucie Guillemette and Josiane Cossette, ‘Deconstruction and Differance’ (Signo) <http://www.signosemio.com/derrida/deconstruction-and-differance.asp> accessed 01 April 2016.
justice, the role of the law is to consider the views of all members of society. Meanwhile, Feminist Legal Theory scholarship demonstrates that actively scrutinizing the law can result in tangible changes to how the law operates. Critical legal theory demonstrates how one cannot truly understand the operation of the law by simply taking it at face value. This is because in order to appreciate the law one must look at what its critics have to say. The Critical Legal Studies movement satisfies the latter. Nonetheless, the extent to which the Critical Legal Studies movement assists law reform is limited. The reason for this is that the Critical Legal Studies movement fails to produce practical solutions or alternatives to remedy the law's pitfalls by focusing mainly on critiquing the law. However, scholars raise useful points such as how Matsuda stresses the importance of using 'a critical eye'. This is because listening to the perspectives of those most marginalised by the law allows for progression. Ultimately, the Critical Legal Studies movement is a valuable catalyst for law reform. This is because an important role of the law is to make changes for society and what better way to do so than to take advice from those who seek a better tomorrow.
Comment

Has Brexit Reignited the Need for a Codified Constitution?

Blessing Ngorima

Introduction

Britain voted to exit the European Union on June 23rd 2016 by a 51.9% majority.¹ This is an unprecedented result, because it is the first time that a member of the union has voted to leave. The EU became a fundamental part of the British constitution as a result of s.2 of the European Communities Act 1972². This section meant that the EU became a source of law to the British constitution, provided that Parliament implements European legislation.

A constitution is a body of fundamental principles or established precedents according to which a state or other organisation is acknowledged to be governed.³ Unlike our French and American counterparts, the United Kingdom has no written constitution, but we have a number of constitutional instruments⁴, which range from constitutional conventions (traditional customs) to statutes (Acts of Parliament). However, since Britain voted to leave the European Union it can be argued that even though our uncodified constitution provides guidance on many issues, we nonetheless lack clear ground rules for how decisions of the highest national importance must be

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¹ BBC ‘EU Referendum results’ <https://www.bbc.co.uk/news/politics/eu_referendum/results> last accessed 01/08/18.
² European Communities Act 1972, s.2.
This article will bring to light fundamental issues such as the use of referendums, prerogative powers and lack of a decisive government that have reignited the debate for having a codified constitution as a result of Brexit.

The use of Referendums

The June referendum left the British constitution in a crisis. The first issue to note is that referendums themselves are not legally binding, but have been regarded as such as a result of an unwritten convention. The legal uncertainty brought about by referendums is one of a number of reasons why a codified constitution should be in place when it comes to matters of constitutional importance. As of recently there was a shift in public opinion according to a Sky news data poll that called for a second referendum. This level of uncertainty harms the economy because it leaves businesses in confusion with regards to the future between Britain and Europe. This is profoundly unsustainable as it does not help small businesses prepare for life after Brexit. Furthermore, doubt has been cast on Theresa May’s leadership and whether she will meet her Brexit deadline. Only a clear constitution could have circumvented these issues and, because a

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mechanism for constitutional change is unclear, we are thrust into a zone of constitutional uncertainty. Where a referendum has now entered the constitutional order as the final means for deciding matters of seminal importance, if this is so then the principle of popular sovereignty trumps parliamentary Supremacy.

Gina Miller case

Another issue that raises the need for a written constitution involves and use and extent of prerogative powers. In her application for a judicial review, Gina Miller and Dos Santos both submitted that the ECA 1972 Act had created statutory rights based on EU treaties that could not be removed by the exercise of the prerogative alone. The government was defeated both in the High Court and on appeal in the Supreme Court by a majority of 8-3. This case highlights the issue that the executive was unclear on matters of constitutional importance and were unaware that they had to seek parliamentary approval if they wanted to extinguish statutory rights that citizens enjoyed because of the ECA. Only a codified constitution can explicitly solidify the doctrine of Separation of powers. It appears the lack of a written constitution is making the government’s negotiating position appear weak in the EU, because not only is Theresa May having to battle it out in Brussels but also facing humiliation in London at the Supreme Court. The issue with prerogative power is there are no written guidelines as to the extent of the power. Thus the ‘elusive nature of minister’s prerogative powers and the absence of agreed rules means that the government of day can decide the constitutional and political rules under which it operates to

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9 This argument gains support from the Scottish Independence referendum, held in 2014 and the Alternative vote referendum following the 2010 Lib Dems manifesto pledge.
12 European Communities Act 1972.
13 European Communities Act 1972.
suit itself, or as Sir Robin Butler (former cabinet secretary) puts it “something we make up as we go along”.\textsuperscript{14} It can be conceded that our unwritten constitution is effective because of its ability to change in order to suit the status quo, however this is dangerous because if there are no written guidelines to assist law makers with important decisions, then we allow powerful media moguls to attack our judiciary\textsuperscript{15}, whilst we also allow scare tactics and exaggerated research\textsuperscript{16} to determine the future of our country in a non-binding referendum.

**Safeguarding Rights**

The European Union (Withdrawal) Act 2018\textsuperscript{17} converts EU law into our domestic law after the prescribed exit date. There is, however, one notable exception to the proposed conversion of EU law into domestic law\textsuperscript{18}: s.5(4)\textsuperscript{19} proposes that the Charter of Fundamental Rights is not part of domestic law on or after exit day, and this causes great concern to the safeguarding of citizen’s rights.

In America, their constitution provides citizens with positive rights. For example, the 1\textsuperscript{st} amendment allows Americans to have freedom over religion.\textsuperscript{20} This is a constitutional right that is entrenched in the constitution which, if one wanted to repeal such an amendment, would require two thirds

\textsuperscript{14} Stuart Weir and David Beetham, Political Power and Democratic Control In Britain (Routledge 1999) 291.
\textsuperscript{17} European Union (Withdrawal) Act 2018.
\textsuperscript{18} Scott Vesel and Nicola Peart, ‘Will the fundamental rights enshrined in the EU Charter survive Brexit?’ [2018] EHRLR 134.
\textsuperscript{19} European Union (Withdrawal) Act 2018.
\textsuperscript{20} U.S. Constitutional Amendments <https://constitution.findlaw.com/amendments.html> last accessed 02/08/18.
of both houses to repeal.\textsuperscript{21} UK citizens do not have the same courtesy as the positive rights we enjoy came under the UN Charter\textsuperscript{22} and the Human Rights Act 1998\textsuperscript{23}, of which can both be easily be repealed by an Act of Parliament. Even though Human rights protection did not form part of the original intentions behind the creation of what is now the EU, over time the CJEU has found ways to guarantee, and later develop the legal effectiveness of human rights in the EU’s legal order.\textsuperscript{24} However, with Brexit, British Citizens are in a vulnerable position because we do not have our rights entrenched in our constitution as they can be repealed by any government. Prior to Brexit this was not an issue as the UN charter was in place and, following the Factortame case\textsuperscript{25}, EU legislation is binding. This meant that we had a UN charter in support of the Human Rights Act to further entrench and protect citizen’s rights. Only a written constitution can now guarantee citizens’ rights and without any radical change our rights will be at the mercy of Westminster.\textsuperscript{26}

**Conclusion**

Brexit exposes the fact that we have, almost uniquely in the democratic world, an unprotected constitution.\textsuperscript{27} The persistent changes within the cabinet weakens Britain’s position on a global scale. There is no constitution to guide us over how Brexit should be conducted. We appear to be a ship

\textsuperscript{21} National Archives, ‘Federal Register’ < https://www.archives.gov/federal-register/constitution/article-v.html> last accessed 02/08/18.
\textsuperscript{23} Human Rights Act 1998.
\textsuperscript{24} Adrienne Yong, ‘Forgetting human rights - the Brexit debate’ [2017] EHRLR 469-79.
\textsuperscript{25} R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1990] UKHL 13.
\textsuperscript{27} ibid.
without a captain. Our unique method has served us well thus far, however a radical change is needed for us to keep up with the current political sphere.

Our current ‘if it’s not broke don’t fix it’ approach is outdated. Brexit will leave a gap in our constitution in terms of the protection of human rights. This gap could well be filled by the judges. If that happens, Brexit will increase the danger of a clash between the judges and Parliament\(^\text{28}\). A referendum cannot be how we decide constitutional decisions; it leaves the country divided\(^\text{29}\). Maybe with time our legislators may come to that very realisation.

\(^{28}\) ibid.

\(^{29}\) Rafael Behr, ‘Divided Britain, where the Brexit alarm is sounded but no one wants to hear’ The Guardian (London, 28\(^{\text{th}}\) Nov 2017) <https://www.theguardian.com/commentisfree/2017/nov/28/divided-britain-brexit-alarm> last accessed 02/08/18.
The Significance of the Board of Directors to Good Corporate Governance

Oluwarotimi Adeniyi-Akintola

Thanks in no small part to the 2007/8 economic crisis and the plethora of corporate scandals witnessed since, corporate governance continues to occupy a position of great importance in the contemplation of stakeholders. The silver lining is that when these corporate scandals occur, they present an opportunity to examine how failures in the governance culture of a company can result in disastrous consequences, and in time we have come to distil certain key components of good corporate governance from them. Some of these essential issues of governance relate to the treatment of shareholders and stakeholders, the discharge of the board of directors' functions, risk and strategy oversight, appropriate executive compensation, amongst many others.

Of these elements, the consideration of the board of directors is perhaps the most significant, because the board is entrusted with major decisions which affect the business activities of a company. Lapses at the board level are therefore dangerous to the health of any company. As a result, there are several rules and recommendations regarding the composition, diversity, independence, remuneration, responsibilities, terms and qualifications of board members. One only has to examine the ongoing scandal at Nissan to gain an insight into how lapses at the board level can be detrimental to the reputation and success of a company.

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On 19 November 2018, the chairman and former CEO of Nissan, Carlos Ghosn, was arrested by Japanese authorities on the basis of allegations of financial improprieties and falsification of annual reports\(^2\). The details of the reported allegations\(^3\) are as follows: Ghosn collaborated with another board member, Greg Kelly, whom he instructed to under-report Ghosn’s income in annual reports by about 5 billion yen ($44 million) over a five-year period; Ghosn misappropriated money allocated for other Nissan executives; using Nissan’s funds, Ghosn purchased properties in Rio De Janeiro, Beirut, Paris and Amsterdam which were rent-free and undeclared; Nissan paid Ghosn’s sister $1.7 million for advisory work which was never delivered; and Ghosn directly instructed a close aide by email to make a $1.5 million payment to remodel his home in Lebanon. It is important to note that these are only allegations, and that Carlos Ghosn has neither been charged nor convicted of any offences at this point in time.

The burning question for most observers is how these extraordinary abuses could have occurred without detection for such an extensive period. One plausible explanation was provided by Hiroto Saikawa, Ghosn’s successor as CEO of Nissan, who stated that ‘the lesson we need to learn from the negative part of Ghosn’s rule is that too much power was concentrated in one person.’\(^4\) Saikawa added that Ghosn routinely made decisions without seeking the input of relevant board members, resulting in a weakened state of governance at Nissan\(^5\).

Indeed, Nissan’s governance structure was appalling. Ghosn, who once told investors that no CEO should exceed a term of five years, was allowed to spend nearly two decades at the helm of Nissan. Further, in a review of governance in Japan’s largest companies, Nissan was one of very few who did not have at least two independent directors and was also found to have no board committees. Without these structures, there were no checks and balances, particularly with regard to auditing, appointments, compliance, executive remuneration and other sensitive issues. When further consideration is given to Ghosn’s cult hero status in Japan and France earned for his turnaround of both Nissan and Renault from the brink of collapse, it is impossible to imagine how anyone could have possibly challenged his will and direction in the boardroom. Saikawa’s frank assessment of the situation at Nissan is therefore unsurprising against the backdrop of Nissan’s governance structure.

It might be tempting to dismiss Nissan’s board failures as improbable within the UK’s corporate governance system, in view of the perceived saturation of governance principles within this jurisdiction. Indeed, for many years the UK’s code of corporate governance has recommended the division of responsibilities within the board of directors, independence of the chair and non-executive directors, limitation of the chair’s term to nine years, and separation of the roles of the chief executive and that of the chair. Levels of compliance with the code’s provisions continue to improve, with full compliance by the FTSE 350 at 61.2% and 93.5% complying with all but a couple of provisions in 2015. Nevertheless, Nissan’s failures are a useful reminder of the reasoning behind the extensive principles of good corporate governance, and serve as a warning for companies who might consider departing from the substantive application of these principles. The lapses at

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7 Financial Reporting Council (n 1) 3-9.
Nissan are also instructive for other jurisdictions where some of these principles are yet to be embraced.
Conference Review

Reflecting on 15 Years of the Enterprise Act 2002 Insolvency Reforms:
15th November 2018 – Aston University

Klaudia Skubera

The conference, co-hosted with the University of Wolverhampton, marked fifteen years since the Enterprise Act 2002 introduced far-reaching changes to the UK’s insolvency system, with the aim to promote enterprise and provide a second chance for business. Throughout the day the speakers considered the reforms, whether these remain fit for purpose, and whether further reforms are needed. In light of the Government’s recent proposals for the most far-reaching reforms to corporate insolvency proceedings since 2003, the conference was perfectly timed. A total of eleven papers were presented and discussed over four sessions through the day.

Session One

Dr John Tribe from Liverpool University opened the Conference with his paper entitled ‘I have a cunning (insolvency policy) plan! Scuppering Insolvency Baldricks During the Legislative Process.’ John critiqued the last-minute interference in the House of Lords during the passage of Insolvency Act 1986, arguing that it transmuted the proposal of the Cork Committee to such extent even Sir Kenneth Cork (who led the committee) expressed dissatisfaction. John continued to evaluate how insolvency policy continued to be subverted in the Enterprise Act 2002.

Dr Kayode Akintola from Lancaster University followed with ‘Parable of the Prescribed Part: Much ado about nothing?’ Kayode reviewed the sustainability of the prescribed part fund as a realisation tonic for unsecured creditors in contemporary insolvency proceedings in the UK. This paper was especially
relevant considering recent proposals to increase to both increase the prescribed part and reintroduce some of the Crown preference.

The first session concluded with Dennis Cardinaels, of University of Leeds, with an examination of the ‘Differentiation Between Groups of Unsecured Creditors: A Solution to Reduce Vulnerability?’ Dennis analysed the effects of the Enterprise Act 2002 had on the position of unsecured creditors during insolvency procedures. He set out why it would be better to recognise the existence of the different groups of unsecured creditors instead of continuing to view all the unsecured creditors as a homogenous group.

Session Two

Part Two began with Professor Andrew Keay from the University of Leeds, who considered ‘Financially Distressed Companies, Restructuring and Creditors’ Interests: What is a Director to Do?’ Andrew examined two key questions: firstly if concerns of breaching s.172(3) of the Companies Act 2006 lead directors to be risk averse when attempting a restructuring to protect against liability are realistic; and secondly, if they are, what directors should be doing to ensure they do not breach the obligation. Andrew noted there has been little consideration to the issue of liability of directors for breach of duty in the wake of a restructuring.

Professor Keay was followed by Dr Bolanle Adebola, University of Reading, who proposed ‘Re-examining the Role of the Pre-Pack Pool.’ Bolanle argued that making applications to the pre-packed pool mandatory for previously-connected persons is not the solution to the issues posed by sales to connected parties in a pre-pack. Rather, she argued it would impose an additional burden without corresponding benefit, and better attention should be instead paid to core criticism of connected party pre-packs.

Andrew Tate, insolvency practitioner and partner at Kreston Reeves LLP, considered ‘In Practice – Have the Changes Over The Last Fifteen Years Benefited The Insolvency and Restructuring World? Andrew focused on
business rescue in practice. He considered whether the incremental developments of insolvency in the UK leave practitioners with more tools in their toolkit, or whether the UK now has a mixed and ineffective system in need of wholesale review.

Session Three

We reconvened after lunch with Professor David Milman from Lancaster University discussing ‘The Changing Face of the Formal Institutional Structures for the Resolution of Personal Insolvency in English Law’. David reviewed the changing nature of personal insolvency regimes in wake of the Enterprise Act 2002. He examined the pre-2004 position, explaining the evolution of related regimes in the past 15 years. There was a particular focus on the decline in the dominance of bankruptcy, with a number of alternatives introduced. With a raft of subsequent legislative reform, professional developments and policy initiatives, David explained that the Enterprise Act 2002 was not a major reform in personal insolvency, but part of a continuum of liberation related to bankruptcy.

Nicola Howell from Queensland University of Technology continued the discussion on consumer bankruptcy in her paper on ‘Reducing the Duration of Bankruptcy: Arguing for Consumer Bankruptcy Reform Through An Innovation and Entrepreneurship Lens’. Nicola examined the effect the Enterprise Act 2002 had on bankruptcy in the UK, followed by an analysis on its influence on personal bankruptcy reform in Australia. She compared approaches in the two countries considering the effects it has on encouraging entrepreneurship and innovation. It was suggested that whilst a decrease in the length of bankruptcy would have positive impact, focusing on the entrepreneurial lens does not do justice to the complexity of personal insolvency and should not be the only justification for such a proposal.

Concluding Session Three, Matthew Stubbins from Canterbury Christ Church University considered ‘What Kind of World Are We Living In? Creditor Wealth Maximisation, Contractarianism or Multiple Values in the Post-Enterprise Act
2002 Insolvency Regime?’ In his paper, Matthew provided a theoretical analysis of the impacts of the Enterprise Act 2002 reforms on the current insolvency infrastructure. In doing so, he sought to establish which theoretical insolvency model, if any, is best embodied in the present system.

Session Four

Associate Professor David Brown of Adelaide University and Visiting Scholar at Aston University, began Session Four with a paper on ‘Australia’s Corporate Rescue Laws: Boldly Going Abroad the Enterprise Mission?’ David examined the Australian position on corporate rescue procedures, in particular voluntary administration, and the link to enterprise. Specific focus was paid to recent reforms aimed at increasing entrepreneurship and reducing the stigma of failure. The paper considered several reforms, including the restriction of ‘ipso facto’ clauses, the reduction in the general bankruptcy discharge period, and ‘safe harbour’ carve-out for directors from personal liability for insolvent trading where they take bona fide steps to consider restructuring.

The final paper was delivered by Marc Brown, Barrister, of St Philips Chambers. Marc discussed ‘The Response to the Consultation on Insolvency and Corporate Governance – The Evolution of the Enterprise Act 2002?’ In his paper, Marc examined the Government’s recently proposed reforms, including the introduction of a pre-insolvency moratorium and a new restructuring tool, with a view of assessing the extent to which they represent an extension and evolution of the Enterprise Act 2002.

Concluding thoughts

The conference was informative, thought-provoking, and filled with humorous one-liners. The topics discussed were diverse. As such, it allowed for an in-depth evaluation of the Enterprise Act 2002 from different angles. The continuous debate on future reform proposals and practical implementations were the highlight of the conference. I was struck by the process of enacting legislation, and the disparity between the finely tuned
legislation proposals and their final form. It provokes one to re-consider the extent of dilution that occurs in the legislation making process.