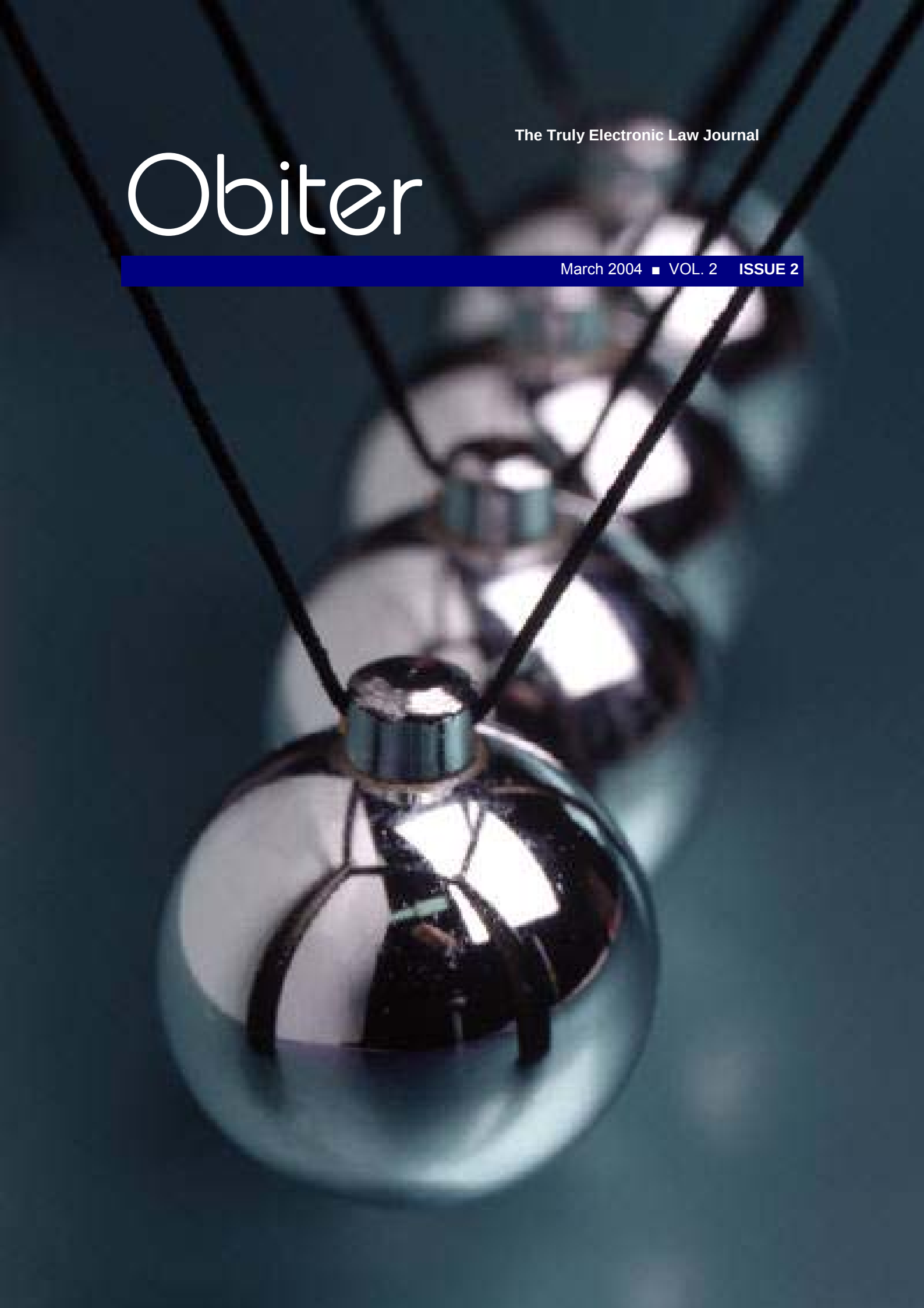

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As you will see from the pages of this issue we have been hard at work to provide you with a quality publication and we only hope to build on this and better ourselves in the future. If you therefore have any comments about this issue then please do not hesitate to contact us at the address at the bottom of the next page.

We sincerely hope that you will enjoy reading this second issue of Obiter and that you find something useful within these pages. If you have any ideas for future development of obiter then again we would very much like to hear from you.

Lawfile

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Published by
Lawfile
195 Firs Lane
Leigh
Lancashire
WN7 4TJ
United Kingdom

Tel. +44 (0) 1942 678705
Fax. +44 (0) 1942 607580
e-mail: administrator@lawfile.org.uk

The Editor

Alan Lowe

Dear Reader,

Since the last issue of Obiter I have been involved in my new full time job within the National health Service and so have been unable to dedicate all of my time to the regular monthly publication. Thus you will not have received a copy of Obiter for February 2004. I hope that that problem is now one in the past as I am currently assessing numerous applications from individuals around the world for the posts of Editor.

With this issue of Obiter I would like to welcome Dr. Penelope Richards from the Republic of South Africa as the first member of the new look Editorial Board for Obiter and I hope that this will be the makings of a long and prosperous relationship between Dr. Richards and Obiter. I hope that by the next issue of Obiter we will have a fully constituted board of Editors from various countries around the world at which point I will introduce you to them and publish a full story about the New Look board and it's members.

You will notice as you read this issue of Obiter and if you visit our website http://www.lawfile.org.uk we have just been awarded the prestigious Golden Web Award 2003 - 2004. This is seen by us as an achievement by any standards and we hope that by winning this award we are not allowed to sit and rest on our Laurels but continue to strive for excellence in all that we do to bring legal knowledge, news and information to our readers and viewers.

As I have stated before if you have any thoughts on how we may improve our publication or website for your continued enjoyment I would personally like to hear from you and you may contact me directly at the e-mail address below.

We are slowly working towards introducing new writers to Obiter each month and hope that you continue to enjoy the articles that they write for Obiter. If you have any comments about the articles or would like to see a readers letter page in future issued then again, please let us know.

Yours sincerely,
Alan Lowe

ajjlow@lawfile.org.uk


Insolvency and Football: Sports Law's Latest "Signings"!

By Gregory Ioannidis, LLB, LLM, Barrister, Lecturer in Law & Research Associate in Sport Law University of Buckingham (UK) and Sheila Byrne, BA, LLM, ILTM, Senior Lecturer in Law, Tutor for Admissions,

Football clubs in the U.K. are being crippled by the perilous state of their finances and are constantly standing in the shadow of debt. Combinations of different factors, which are explained below, have created a murky picture for a healthy financial future of many football clubs. As Table 1 illustrates, this is a major problem for the footballing industry and this article considers the options available to such clubs that find themselves suffering from a cash crisis.

Southampton F.C.	***£20.2 million***
Liverpool F.C.	£20.5 million
Everton F.C.	£27.5 million
Bolton Wanderers	£33.9 million
Newcastle F.C.	£43,0 million
Arsenal F.C.	£45.8 million
Manchester City	£50.0 million
Middlesbrough	£53.6 million
Leeds F.C.	£78.0 million

TABLE 1

The business of football and financial reality

UK LISTED FOOTBALL CLUBS
Aston Villa
Celtic
Leeds United
Manchester United
Southampton
Sunderland
Tottenham Hotspur
Heart of Midlothian

TABLE 2

It is an undisputed fact that football clubs today are being run as business and from an investor's point of view; a return on every investment is the required and desired target. Since the early 1990s a number of football clubs have become Public Limited companies listed on the Stock Exchange [Table 2] and media companies such as BSkyB, NTL, Granada and Carlton, have purchased shares in top clubs.

The dynamics of UK and European football have also changed with the decision of the European Court of Justice in ***Bosman***. The changes of this decision became visible and had an immediate impact in the world of football. The changes to the transfer system "opened" the market, with an immediate impact on contracts of employment too. These changes in British football had as a result to increase the gap between rich clubs and the smaller clubs in the lower professional leagues. It has been argued that the transfer system has acted in the past as "a powerful mechanism for redistributing wealth." According to Sir John Hall: "the trickle down effect is a bit of a myth…the really big money has circulated in the last five years…in the Premier League or the top of the First Division." What is clear, however, is the fact that new money has also entered the football arena, from the sale of television rights and other marketing and sponsorship opportunities. Only the elite clubs appear to enjoy healthy profits, whereas clubs in lower divisions [and a few from the Premier League] are going fast into a financial crisis.

One of the major factors that contributed to this financial crisis was the collapse of ITV Digital in April 2002. Although Table 1 above includes mainly premiership clubs, it was the clubs from the lower divisions that felt the blow in an unprecedented degree. When ITV Digital pulled out of their £315 million sponsorship deal, Nationwide League clubs were left with a huge hole in their finances. ITV Digital had entered into a contract with the Football League in June 2000 to broadcast live games for three seasons. Unfortunately, ITV Digital went into administration one year into a three-year contract, owing the Football League some £178 million.

Other factors that have contributed to clubs financial problems include high wages, relegation, the costs of building new stadia and the depressed state of the transfer market, but, overwhelmingly, it is the wages bill which is responsible for the continued escalation of debts, with about 2/3rds of football clubs income being spent on salaries. In the last five years, the football market has experienced an increase in players' salaries, mainly because of an increase in the money available from television rights. The

professional leagues in England have attracted the best players from all over the world and they have lured them into signing lucrative contracts in return for their services. When ITV Digital pulled out of the deal, however, this left many clubs with huge bills, creating, at the same time, an unprecedented financial crisis. The loss of the television money was and continues to be hugely damaging to the football clubs, particularly for those in the first division who had expected to receive something like £2.7 million each.

MOST PROFITABLE ENGLISH CLUBS
MANCHESTER UNITED £33.9m
NEWCASTLE UNITED £14.8m
LIVERPOOL £14.5m
TOTTENHAM HOTSPUR £9.2m
CHELSEA £8.1m

Source: ***Deloitte & Touche Sport, operating profit for season 2001/02***

TABLE 3

The situation appears to be better in the Premier League, however, but only for a few clubs [Table 3]. Last year's annual study by consultants Deloitte & Touche found that some of the clubs showed signs of dealing with their financial problems [Table 4]. According to Dan Jones and Gerry Boon "In our view, the player transfer market has clearly peaked (in terms of overall values, but not perhaps in terms of values for the true stars). The inexorably rising graphs of annual transfer spending – that we have steadily plotted over the years – will fall in 2002/03 and may never again climb back past the 2000/01 level – although, of course, the emergence of a few more new billionaire owners may change that. If, however, the market does fall, as we expect, the overall value of players on the balance sheet and the amortisation charge against such player values will also fall – bad for clubs' net asset values but also a lowering of the annual hit to club profits."

with the shake up in media rights values, created a financial hole in many clubs, particularly those in the lower professional leagues. It is predicted that as a result the negotiating power will shift from the players back to the clubs, but this argument goes beyond of the scope of this article.

The Law of Insolvency – A New Subject for Sports Law?

It is questionable whether the form of a public limited company is appropriate for a football club, but since 1984, when Tottenham Hotspurs became the first football club to go public this seems to be the norm for many of the Premiership clubs. It is suggested that this type of business organisation is not a suitable vehicle from which to operate a football club because of the potential conflict between the fans and the shareholders. From an investors point of view they want a return on their investment in the way of dividends but fans would rather see profits ploughed back into the club. Moreover, the clubs main asset, the players, is quite different from other business assets in that even though they may be injured and unable to play they still need to be paid. Recently we have seen Leicester F. C. giving up their p.l.c. status and Chelsea F.C. has now become private after the biggest take-over bid in the history of football by the Russian billionaire Roman Abramovich.

It is submitted that the limited liability company is not suitable for a football club and the traditional argument used in favour of limited liability, namely, the promotion of commerce, is not applicable to a football club. The limited liability company was originally introduced to enable capitalists to embark upon risky ventures without shouldering the burden of personal liability but a football club can hardly be described as a form of entrepreneurship, in the traditional sense. Football is about grass roots and is, primarily, funded by supporters through matches,

SURVEY FINDINGS	
Premiership clubs' total turnover	**£1.132bn**
Premiership clubs' total pre-tax loss	**£137m**
Average premiership club turnover	**£56.6m**
Premiership clubs' total wages and salaries grew by 26% to	**£706m**
Promotion to the Premier League is worth	**£34m**

Source: Deloitte & Touche – 2001-2002 season

Table 4

The study also found that in the Premier League the ration of wages to turnover rose to 62% in the 2001/02 season, which is an increase up from 60% the previous year. This, in conjunction

television subscriptions and merchandise.

WHAT IS THE SOLUTION?

WHEN A FOOTBALL CLUB FINDS ITSELF IN FINANCIAL DIFFICULTIES IT GENERALLY HAS FOUR OPTIONS:

(i) Immediate winding up
(ii) Enter into an arrangement with its creditors whereby they agree to accept a smaller amount than is due to them, rather than risk the company going into liquidation and receiving even less. This may be a formal arrangement, such as a company voluntary arrangement under section 1 Insolvency Act 1986 or a scheme of arrangement under section 425 Companies Act 1985. Alternatively an informal agreement can be negotiated which is governed by the general law of contract and is outside the insolvency statutory framework.
(iii) Bring in an administrative receiver, if the club has a debenture secured by a floating charge
(iv) Bring in an administrator as an external manager to consider if a viable rescue package can be put together

WINDING UP

In general terms, winding up, or liquidation is a process leading to the termination of the company's existence. The main function of the liquidator is to collect in and realise the assets of the company and then to distribute the net proceeds in the form of a dividend to creditors in accordance with the priority rules contained in the Insolvency Act 1985. Companies may be put into liquidation either voluntarily, as a result of a resolution of the members, or compulsorily by order of the court. In the case of a voluntary liquidation it may be either a members' voluntary liquidation or a creditors' voluntary liquidation, but if the company is insolvent the liquidation will have to proceed as a creditors' voluntary liquidation, which gives the creditors control over the conduct of the liquidation.

Liquidation will result in the termination of the existence of the company and, clearly, a rescue is no longer possible. In the case of an insolvent football club liquidation is not ideal as this will result in the demise of the club, which could have devastating consequences for the club, players, supporters and the local community. If a club is liquidated it will lose its league status, cutting off its main source of income, hence liquidation should be avoided. What is required is a procedure that will enable a club to restructure its finances and turn itself around and, in accordance with Cork philosophy, recognise that interests of those other than the debtor and creditors are affected by insolvency and that there should be a means for preserving clubs capable of making a useful contribution to the community.

Informal Rescue Plan

The use of a formal rescue procedure clearly involves considerable expense; hence if an informal arrangement can be entered into this will be cost effective. An informal rescue plan is based on the contractual agreement of the creditors, rather than on any formal arrangement under the Insolvency Act or Companies Act. This approach has the advantage of avoiding harmful publicity and being flexible. Terms can be altered and renegotiated in a way that formal rescue procedures do not allow. Informal arrangements provide a cheap, flexible, efficient and relatively quick method of rescuing a company. There is no limit to the type of arrangement that can be entered into and as they are contract based any arrangement can be agreed by those involved. This may involve a change of management, a reorganisation or restructuring of the company. As can be observed in the case of Leeds United, a popular strategy is to change top management in order to give the company a change of direction and to restore public confidence.

However the major weakness of an informal rescue strategy is that dissenting creditors can halt the informal rescue by invoking a formal rescue procedure.

Company Voluntary Arrangement

This avoids the problem with an informal rescue procedure of a creditor enforcing his debt and sabotaging the rescue plan. This was a new procedure introduced on the recommendation of The Cork Committee under the Insolvency Act 1986. It is basically an agreement between a company and its shareholders and creditors, with little court involvement. Cork recognised that there was a need for a simple procedure whereby the company could enter into a legally binding arrangement with its creditors, which

would be binding on all creditors. Unfortunately, prior to the passing of the Insolvency Act 2000, this was not particularly useful as a rescue procedure because there was no automatic moratorium and hence it had to be used in conjunction with an administration order thus making the procedure more expensive and complex. The Insolvency Act 2000 has now introduced a procedure for small companies to obtain a short moratorium in order to put together a CVA without first having to put the company into administration.

Under section 1 of the Act the CVA may take one of two forms (or a combination of both)

1. A composition of debts, whereby the company agrees to pay a certain percentage of the debt or
2. A scheme of arrangement whereby the company agrees to pay its debts in full but not immediately or it may involve a debt-equity swap whereby the creditor exchanges his debt for an equity shareholding in the company.

It remains to be seen how often this new CVA procedure will be used given the new administration regime introduced under the Enterprise Act 2000, which should make it much easier for a company to opt for administration.

Administrative Receivership

An administrative receiver is appointed under a debenture secured by a floating charge covering the whole or substantially the whole of the company's assets. His duties are owed to his charge holder and not to the general body of creditors or other interested parties, such as football clubs supporters. The Enterprise Act 2002 has introduced radical changes in relation to administrative receivership. Under the new legislation holders of a floating charge will have to appoint an administrator rather than a receiver.

Administration

The most favoured option for the football clubs facing insolvency is to go into administration. Administration is a legal procedure that allows a business, which is in financial trouble to keep operating without being forced to sell off assets to pay its debts. The aim is to give a company a moratorium, i.e. a breathing space from the pressures of its creditors during which it can restructure its finances and, hopefully, restore the business back to profitability or, alternatively, allow a more effective realisation of the assets than would be available in a liquidation.

Administration Orders were the brainchild of Sir Kenneth Cork whose aim was to preserve viable businesses capable of making a useful contribution to the economic life of the community. The Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (the Cork Report) laid the foundations for a rescue culture:

> "*We believe that a concern for the livelihood and well being of those dependent upon an enterprise which may be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked."*

Football clubs are an integral part of the community and, as such, need to be preserved, but it is submitted, not for the benefit of the investors and businessmen but for the benefit of the fans who have loyally supported their teams and who have seen their clubs resources being diminished instead of being ploughed back into the club.

ADMINISTRATION LAST SEASON
Leicester
Ipswich
Notts County
Port Vale
Barnsley
Huddersfield
York

TABLE 5

The Cork Committee specifically recognised the wider implications of insolvency and stated that modern insolvency law must have regard for the implications of insolvency not only on debtors and creditors but also on employees and the whole community. This is in stark contrast with the views of Professor Thomas Jackson who put forward the 'creditors bargain theory.' According to Jackson, the goal of insolvency law is to maximise the amount that creditors receive. He views insolvency law as a superior debt collection system and argues that the insolvency system should reflect the bargain that creditors would have made (*ex ante*) if they had the opportunity to do so prior to entering into transactions with the debtor. He argues that insolvency law should follow a mandatory, collective regime as this will result in administrative and economic efficiencies and will increase the

pool of assets available for creditors. This theory is creditor focused and fails to take into account non- economic values such as moral, political, social and personal considerations. As such, this theory is open to criticism. It assumes equal knowledge and bargaining power of creditors and fails to take into account that some creditors are in a much stronger bargaining position than others.

In marked contrast to the creditors' bargain theory is the communitarian theory, which takes into account the interests of a wide range of constituent interests such as the interests of employees, suppliers, government and the wider community. The Cork Report seems to implicitly endorse this approach and the Committees aims explicitly provide that the insolvency process should provide the means for preserving viable commercial enterprises capable of contributing to the economic life of the country and the community. Clearly, the demise of a football club is a community problem and it is in the community's best interests that the club should be restructured and enabled to regain its pivotal role within the community, which, as Gary Lineker and his Consortium has demonstrated in the case of Leicester FC, is a real possibility. Insolvency law should embrace the interests of a broad range of different constituents, including the community at large and although it is recognised that it may be difficult to balance a variety of interests and, inevitably, such a multi-pronged approach to insolvency law will necessitate trade offs, it is essential that the interests of all those affected, or potentially affected by insolvency are taken on board.

Cork identified a lacuna in the range of available rescue procedures and wanted to redress this. He recommended the administration procedure, which he modelled on receivership and Chapter 11 of the United States Bankruptcy Code. The existing receivership procedure was defective in that the sole function of the receiver was to enforce the security for the benefit of his appointer and he did not have to consider the interests of anyone else. Moreover, receivership did not provide for a moratorium, hence it was open to any creditor to sabotage a rescue plan by enforcing his own claim. Accordingly, Cork recommended the introduction of the Administration Order, which would provide for a moratorium and ensure that the interests of all creditors would be taken into consideration.

The philosophy underpinning Administration is threefold:

1. Rescue operations should be invoked earlier rather than later if they are to stand a chance of success.
2. Companies should be given a breathing space from the pressure of creditors.
3. Consideration should be given to the interests, not only of creditors and shareholders but also to the interests of the community generally. (In the case of football clubs, although the administrator is not required to consider the wishes of supporters, frequently where the fans have formed a pressure group the administrator has met with them to discuss his proposals)

WHEN CAN AN ADMINISTRATION ORDER BE MADE?

Under the original provisions of the Insolvency Act 1986 a court order was required before an administrator could be appointed and the administrator would only be appointed if the court considered that his appointment would be likely to achieve one or more of four statutory purposes:

(i) The survival of the company, and the whole or any part of its undertaking, as a going concern
(ii) The approval of a voluntary arrangement under Part 1 of the Insolvency Act
(iii) The sanctioning of a creditors scheme of arrangement under section 425 Companies Act 1985
(iv) A more advantageous realisation of the assets than would be affected on a winding up.

Unfortunately the administration procedure proved not to have been as successful as it was hoped and the Enterprise Act 2002 was enacted, which makes radical changes to both administrative receivership and administration. One of the purposes behind these amendments was to streamline administration, making it quicker, more flexible, easier to access and fairer.

It provides for 3 routes to administration:

1. By the court
2. By the holder of a floating charge
3. By the company or its directors.

The primary purpose of the administration order is to rescue the company as a going concern, the secondary purpose is to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up

and the third purpose is to realise property in order to make a distribution to one or more secured or preferential creditors. Only if the primary objective of rescuing the company cannot be achieved will the second and third objectives become available to the administrator. There is a general duty on the administrator to perform his functions in the interests of the company's creditors as a whole and to perform his functions as quickly and efficiently as is reasonably practicable.

The effect of the administration order is to impose a moratorium on actions against the company and to give the company a breathing space from harassment by creditors. The moratorium is designed to protect the company for a short period whereby it can sort out its financial problems without creditors trying to enforce judgement or repossessing goods. All creditors are bound by the moratorium, unless the court gives permission for them to enforce their claim. Clearly, the whole purpose of the administration would be frustrated if the moratorium only began when the administrator was appointed, for creditors who became aware of an intention to put the company into administration may act quickly to execute judgement over the company or suppliers might decide to repossess goods supplied under a reservation of title clause or on hire purchase. In order to prevent this there is provision for an interim moratorium to be in place until the appointment of an administrator.

As a result of the Enterprise Act 2002 administration orders will now replace administrative receivership in most cases. Where a floating charge is created after the Act, the power of the floating charge holder to appoint an administrative receiver is replaced with the power to appoint an administrator.

Conclusion

From the perspective of a football club facing a financial crisis it is suggested that calling in an administrator is probably the best solution, especially if the only holder of a floating charge is a bank which would not want the adverse publicity which would accompany the calling in of an administrative receiver to take over the running of a much loved football club. However, it should be noted that administration cannot be used other than by a company formed under the Companies Act 1985 (or earlier legislation.) Hence, if a football club was formed as a Friendly Society or charitable trust then administration is not an option.

Administration is a temporary measure during which the club can obtain a breathing space from the pressures of its creditors and, hopefully, a means can be found of affecting a rescue. The administrator has full management powers and can trade freely and dispose of the business or its assets (football players) and can enter into an arrangement with creditors. He is not required to distribute assets or dividends among creditors (unlike a liquidator) therefore the principle of *pari passu* distribution has no role to play in administration. It is for this reason that 'super creditor' status, which is given to football players, has not been challenged. If football clubs are to survive such super creditor status has to be abandoned. Under current Football League rules, clubs in administration have to pay off players, manager, other football clubs, the Professional Footballers Association and the League even before the banks. It is submitted that it is vital that the current Football League Rules whereby clubs in administration have to pay off football super creditors first should be abolished. Whilst such rules remain in place it is virtually impossible to restructure the club and negotiate with other creditors if they are going to be the last to be repaid. A change in the current rules could allow clubs to reduce the pay of poorly performing players and the long term injured rather than continue to pay them at their full contractual rate. Moreover, such a move could lead to greater stability in the future by encouraging clubs to negotiate realistic wage bills which correspond with the income that the club is able to generate. Moreover, 'super creditor' status is contrary to the principle of *pari passu*, which is regarded as the most fundamental principle of insolvency law. This principle provides for the equality of division among unsecured creditors and is based on the maxim 'equality is equity.' The principle is designed to ensure fairness between the unsecured creditors as it prevents a 'free for all' whereby the race will be won by the strongest and swiftest but also, it reduces costs and delays as the courts do not have to differentiate between competing claims.

Although it is accepted, in principle, that insolvency should not be used to alter pre-insolvency rights that have been bargained for, it is submitted that prior private bargains should be readjusted if it is in the public interest to do so. It is suggested, that a change in the 'super creditor' rules for football players is in the public interest and that their contracts should not be allowed to circumvent the principle of *pari passu* distribution. Only by allowing clubs to renegotiate players' contracts and cut the wages of expensive players will they be able to survive the current economic climate.

However, if administration is to be effective then the rule, which is to be introduced for the 2004/05 season, namely, that clubs that go into administration will be, docked 10 points, needs to be reconsidered. Clubs, such as Leicester City, have been criticised for going into administration and gaining what is perceived to be an unfair advantage. They filed for administration, paid a substantially reduced rate to creditors, retained their best players and won promotion to the Premier League after the club was re-launched under a new consortium. If insolvent football clubs do face the prospect of having points docked then, clearly, they will be reluctant to bring in an administrator. It is suggested that administration is the best way forward for an insolvent club and the implementation of a rule, which penalises clubs for opting for administration, ignores the realities of running a business.

FOOTNOTES

1. See "Football Club Dealings", Sports Law bulletin, 6, 1999, 2(6).

2. Case C-415/93 ***Union Belge des Soceities de Football ASBL v Bosman [1995] ECR I-4921.***

3. Lee, M, "A game of two halves: putting the boot in", (1995) New Statesman and Society 27.

4. He was reported as having sold his shares in Newcastle United for around £100m – his initial investment had been around £2.4m. "Sports Law", Cavendish, p. 47.

5. Director and Partner, Deloitte & Touche Sport

6. For an interesting account of the suitability of the limited liability company for all types of business organisations see Freedman, Limited Liability: Large Company Theory and Small Firms, (2000) 63 MLR 317

7. See Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd 8558 otherwise known as the Cork Report.

8. Peter Risdale was appointed as chief executive in 1997. He advocated a 'Business Model' for the club, which proved to be disastrous. He was replaced by Terry Venebles, who was also subsequently dismissed, at a cost of £2million

9. A somewhat surprising omission given that in the almost identical procedure for individuals, the Individual Voluntary Arrangement, there is provision for a short moratorium.

10. The requirements for being a small company are specified in section 247(3) of the Companies Act 1985 as a company which satisfies two or more of the following requirements: a turnover of not more than £2.8 million, has a balance sheet total of not more than £1.4 million and employs not more than 50 people.

11. 28 days.

12. A company cannot take advantage of this procedure if there has been a previous moratorium within the past 12 months or if the company is in administration, liquidation administrative receivership or is already subject to a CVA, Para 4 of schedule A1 Insolvency Act 1986 (inserted by Insolvency Act 2000)

13. Para 204 Cork Report

14. See *The Logic and Limits of Bankruptcy,* Harvard Pres (1986) and 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors Bargain' (1982) 91 Yale L.J.857

15. See D.R. Korobkin,'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum.L.Rev 717,762

16. See para 204

17. See paras 191-8, 203-4, 232, 235, 238-9

18. It is not possible to provide a detailed exposition of all the theories of insolvency law here but see: Carlson, 'Philosophy in Bankruptcy (Book Review) (1987) 85 Mich.L. Rev. 1341, Finch.' The Measures of Insolvency Law' (1997) 17 OJLS 227, Flessner, 'Philosophies of Business Bankruptcy Law: an International Overview inJ.S. Ziegel (ed), *Current Developments in International and Comparative Insolvency Law* (Clarendon Press, Oxford, 1994) p.19, Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Washington University Law Quarterll 1031, Jukka Kipli, *The Ethics of Bankruptcy,* London: Rouledge (1998), Shuchman, 'An Attempt at a Philosophy of Bankruptcy' (1973) 21 UCLA L Rev 403, Warren, 'Bankruptcy Policy making in an Imperfect World' (1993) 92 Mich. L. Rev. 336

19. Receivership is the process by which assets are realised to pay off a particular creditor and is essentially a method of enforcing security for the benefit of his appointer. (Since 1986 known as administrative receivership) The Enterprise Act 2002 brings about radical changes in relation to administrative receivership.

20. Insolvency Act 1986, s. 8(3)

21. Para 3(1)(a) Enterprise Act 2002

22. Para 3(1)(b) Enterprise Act 2002

23. Para 3(1)(c) Enterprise Act 2002

24. It is acknowledged that the principle of *pari passu* is rarely achieved in practice because of the numbers of exceptions to the principle

IN JUDGMENT: Comments on Law & Culture

"Is Denial the Tenth Muse in Law?"

By Michael Sweig, J.D., President of Sweig Family Venture, LLC, and Adjunct Professor of Legal Studies, Roosevelt University, Chicago, (US)

A salient issue emerging in the current American presidential race looks to me like essentially the same issue I've earlier identified as a key obstacle to the health of the legal profession: denial of its most serious problems. Lawyers' ostrich-like attitudes when it comes to making the profession truly honorable look like a sad barometer for the way the less educated masses address society's biggest problems. We ignore them. But lawyers have no excuse, because unlike in life, in law lawyers should not allow Denial to become the Tenth Muse.

Consider the Pentagon has concluded that global warming is by far a more serious security threat than terrorism. President Bush is ignoring this report and the Democrats are letting him do it. Similarly, the world's most precious commodity is fresh water; the commodity for which serious worldwide shortages are now occurring and will get worse to the point that those who control water resources will control far too much power, and will haggle over it while people die. But we don't harvest our rainwater in any meaningful way.

There are mandatory conscription bills afoot in Congress, and no one is talking about them, either. Senate Bill S.89 calls for an end to the all-volunteer military and the establishment of a compulsory two-year military term. A companion bill, HR 163, has been introduced in the House. Bush needn't say a thing about this, and Kerry is leveraging off of his military career too heavily to risk calling attention to it. No one wants to appear too soft on Al Qaeda, including most of the press.

Right wing Theocrats in Congress are about to introduce legislation in both houses intended to divest the U.S. Supreme Court of jurisdiction to resolve legal disputes that arise from any lower court determination that God or Jesus Christ are the supreme sources of law. As if we have no more pressing problems, the FCC is pressuring uptight bandwagon media titans to can the likes of Howard Stern shock jocks, and Bush wants to amend the Constitution to outlaw same sex marriage.

Censorship and divesting the US Supreme Court of two-plus centuries of jurisdiction are as sinister solutions to free speech as trading privacy for security has been in response to terrorism, like we've done with the US Patriot Act. America is fast becoming a theocratic police state, and no one of moment is willing to say so.
I recite these current American woes for their starkness, and for perspective. When lumped together and exposed in litany, they so clearly scream out for action that one can hardly imagine these problems are functionally ignored by those in power.

The same repugnant denial inheres in the legal profession. The most frequent cause worldwide for attorney disbarment is attorney theft of client funds. I've said here (November 03) and else-

where that the legal profession owes it to the public and itself to be accountable for this, especially because the solution is simple: make it impossible for attorneys to handle client funds; make them entrust this function to banks and title companies. Lawyers like to think they are usually the smartest people in a room (just ask them). But what are smart lawyers worldwide doing to stop this problem - their worst problem? Disciplining the lawyers who are caught, that's all. And that's no solution; rather, it's an employment bill for lawyers who work at disciplinary agencies.

Since I last wrote on this subject I can report more of the same awful spate of lawyer-theft horror stories. Here are three from the last month alone: The South Carolina Supreme Court has disbarred a Columbia real estate lawyer who admitted he misused more than $400,000 in clients' money.

In Pennsylvania, a court-appointed official expects to raise about $1 million on behalf of the clients of a disbarred lawyer who admitted he embezzled inheritances and other financial accounts entrusted to him. The lawyer pleaded guilty last August to stealing $2.5 million from 37 clients. The court-appointed official plans to put 11 properties up for sale, but the $1 million to be realized from those sales won't cover even half of what was stolen.

In Georgia, a disbarred attorney will spend a year in jail for stealing clients' money that was supposed to pay for medical bills. The lawyer stole money from people he successfully represented in personal injury cases, and then avoided his clients when they tried to contact him about outstanding bills.

Like some of the problems we have in America now, these lawyer theft tales when lumped together scream out for action. But lawyers worldwide are in denial because giving up management of client trust accounts strikes at a collective self-interest that continues to yield only more egregious denial. Lawyers, give up your trust accounts. Let a bank or title company handle it. Don't let Denial become the Tenth Muse in law, as it has in life

LAWFILE wins Golden Web Award 2003 - 2004

We are delighted to announce that this month we received notification from The International Association of Web Masters & Designers that our website Lawfile (http://www.lawfile.org.uk) had been awarded the prestigious Golden Web Award for 2003—2004. We feel that this is an award well worth winning and hope that this will set us on a path to future positive development of both our website and the information contained on the website for our readers and viewers.

If you have any suggestion as to how we may better serve the legal community worldwide by using our website then we would be pleased to hear from you. Your suggestions should be sent to us at the following e-mail address: administrator@lawfile.org.uk

We look forward to hearing from you!

Theological and Ethical Reflections on the Law on Human Fertilisation and Embryology in England and Wales

Robert Stevens, LL B, ADPTD, MA (Theology), Barrister, Lecturer in Family Law

An Introductory Overview of the Problem

Some people want to have children and yet struggle to conceive their own. According to Margaret Brazier in *Medicine, Patients and The Law* it has been estimated that 'as many as one in ten couples and maybe more have difficulty conceiving naturally'.[1]

Also, some may want a child with particular characteristics. What help should properly be sought from the involvement of others and what assistance should legitimately be sought from science? The determination of what is proper or correct depends upon theological, ethical and legal judgments and rules. The Warnock Committee, which led to the current legislation, the Human Fertilisation and Embryology Act 1990, was established to (inter alia) 'consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications' of the developments in medicine and science relating to human fertilisation and embryology. The objective can be more easily stated than achieved. Tom Beauchamp & James Childress in *Principles of Biomedical Ethics[2]* wrote,
' contemporary biomedical ethics incorporates theoretical conflicts of considerable complexity, and the diverse theories explored…help us to see why. Competition exists among the various normative theories…' and ' in moral reasoning we often blend appeals to principles, rules, rights, virtues, passions, analogies, paradigms, parables…'

This paper considers the current English law in the light of the above perspectives.[3] Its theological stance seeks to be Christian and biblical, without any deliberate denominational bias. This critical approach is important because would-be parents, their potential future children, doctors and nurses involved in treatment processes, judicial and parliamentary decision-makers will all have to face the question of whether what they are proposing to do or are already doing is 'proper'.

A Theological Perspective on Assistance with Having a Child

The issue of assisted conception is not new. In Genesis 16 Sarai (as she was then named) , the wife of Abram (as he was then named) had born Abram no children. The solution was found to lie in Sarai's Egyptian slave-girl whose name was Hagar. Sarai took the initiative and said to Abram[4], "You see that the LORD has prevented me from bearing children; go into my slave-girl; it may be that *I* shall obtain children *by her*. (writer's italics)" The words used are significant in terms of this narrative theology. *Sarai* is to *obtain* children by her. This is surrogacy. Note also, it is with the wife's consent, a factor in the English law relating to surrogacy and commissioning couples which will be covered in more detail below. The story proceeds with Abram actually having sexual intercourse with Hagar and the latter gave birth to Ishmael. The narrative theology continues to be significant.

Genesis does not omit the emotional realities, which can occur in surrogacy arrangements. When Hagar saw that she had conceived, she looked with contempt on her mistress, Sarai. 5 It will be recalled that Sarai instigated the surrogacy arrangement and yet she said to her husband, "May the wrong done to me be on you![5] To the writer this seems hardly fair, yet it is an understandable emotional reaction and so a factor to take into account when counselling those considering some forms of assisted conception. Abram's reply is interesting too, 'Your slave-girl is in your power; do to her as you please.' Sarai dealt harshly with her, but God's response was otherwise, for through an angel (Greek for messenger) He states, 'I will so greatly multiply your offspring that they cannot be counted for multitude… 'Now you have conceived and shall bear a son; you shall call him Ishmael, for the LORD has given heed to your affliction'. 'Ishmael' means 'God has heard'. There is an element of blessing in those words. The allegory that Paul draws between Hagar (law) and Sarai (grace) in Gal. 4:21 et seq. does not really detract from that; the law is still good and Paul is not an antinomist as his letters, when read as a whole, illustrate. From this the writer argues that surrogacy and forms of conception using the gametes (eggs, sperm) of others is not, of itself, improper in biblical terms. The writer cannot find anything else in either Testaments to either support or condemn surrogacy. (General references to 'sexual immorality'

or 'fornication' are vague and do not cover the specific issues considered in this paper.)

The English Law on Parenthood and Its Procurement

It now falls to consider the English law on parenthood and the procurement of parenthood. In other words *how* does the law determine the relationship of parent and child and *what framework* does the law provide for enabling persons to lawfully become a parent? It will be observed that policy decisions have been made which do not necessarily derive from biological causal links between an adult and child.

General Points about the Approach of the Law

The starting point is ordinary conception through sexual intercourse. The Family Law Reform Act 1987 established the general rule that the male progenitor is, in law, the father and the female progenitrix, the mother. (The issues about who has rights and duties in the relation to the child – known as parental responsibility – is covered by the Children Act 1989 as amended by the Adoption and Children Act 2002.[6]) The rules relating to the adoption of children is covered by the Adoption Act 1976, subordinate legislation and case-law. Changes to adoption law will be brought about by the Adoption and Children Act 2002.

Assisted conception through in vitro fertilisation (IVF) etc is regulated by the Human Fertilisation and Embryology Authority (HFEA), an agency established by the Human Fertilisation and Embryology Act 1990 (HFEA 1990), the principal piece of legislation in this field. The rules determining parenthood in the 1990 Act apply only where the treatment has been licensed by the HFEA. Unlicensed practice leads to a quagmire of uncertainty about the status of the child in relation to those biologically *or* emotionally involved in his conception. When the treatment has been licensed, the Act legally prescribes who are a child's parents and who are not *or* provides a legal framework and procedures for authorized courts to make decisions about relationships between a child and other persons. A consequence of this is that some people are declared to be strangers to the child, either automatically or by virtue of a court order. This will have affective emotional impacts as well as legal consequences on the people concerned, not only the child, but also his family.

Behind the rules in the HFEA 1990 and the decisions of the courts which interpret the 1990 Act are human value judgments, open to challenge by different outlooks and, subject to change in the light of changing outlooks. (This potential for change can be illustrated by the law on adoption where there has been a sea-change between not disclosing the identity of birth parents and discouraging contact with such persons and now permitting and facilitating the opposite. This change in outlook was promoted by the advent in 2000 into English law of the European Convention on Human Rights and Fundamental Freedoms which gave a marked emphasis to the right of a person to know his identity and where he comes from as this is part of the right to private life under art 8 of the Convention. The writer will indicate below how this aspect of identity has already had an impact on the law relating to assisted conception.)

From the General to the Particular: How the Law Has Addressed Specific Issues

It now falls to look at some particular scenarios and how the HFEA 1990 has been applied to them. After legislation has been passed and put into force, English law develops on a case-by-case basis. Precedents are established which are then followed and applied in later cases.

A man is physically unable to fertilise one of his wife's eggs. The couple are advised to use sperm from another man. Who are the parents?

Theologically, this might be seen as an application of the Genesis 16 story, save that here another male is the helper who is external to the spousal relationship. The law makes it explicit that *where* provision is made for a woman to be regarded in law as the child's mother or for a man to be regarded as the father, they are the parents for all purposes. [7] The provisions of the law that deem parenthood fall to be considered.

Section 27(1) of the HFEA 1990 establishes that the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, *and no other woman*, is to be treated as the mother of the child. [8] It will be immediately observed that a policy decision has been made, motherhood is accorded to the carrier or bearer of the child, not to the biological progenitrix, the egg supplier. The egg is the female equivalent gamete of the sperm[9] or seed, through which genealogical tables are traced in both testaments. However, it is noteworthy that in Orthodox theology, the Virgin Mary is designated the 'mother of God' for she is the theotokos, the 'God-carrier'.

Who is the father? Section 28 of the HFEA 1990 answers this questions by covering dif-

ferent situations.

The first situation occurs where the child concerned is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination. If at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was married, but the creation of the embryo was not brought about with the sperm of her husband, then, there is a general legal rule that her husband is the father of the child. However, this rule does not apply if it is shown that the husband did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination. Consent, something that occurred in Genesis 16, is a vital ingredient to paternity.

The second situation applies where the couple is not married. From a theological perspective, should the civil law facilitate the procreation of children to unmarried couples? Is that really the correct question, for should a secular civil law decide what is and what is not marriage or, for that matter, sexual immorality, in biblical terms? In other words, a couple might be treated as married biblically and yet the civil law of a later secular jurisdiction might not considered them married. Be that as it may, the law provides that a man shall be treated as the father of the child where the embryo, sperm or eggs were placed in the woman, or she was artificially inseminated provided this happened in the course of treatment services provided for her and a man together even though the creation of the embryo carried by her was not brought about with the sperm of that man. The necessity for the couple to be 'treated together' has given rise to real life issues. Does treatment continue to be *together* if the couple separate?

In ***Re R (IVF:Paternity of Child)*** **[2003] EWCA Civ 182 (CA) [2003] 1 FLR 1183; (2003), *The Times*, 20th February a woman and her unmarried partner commenced IVF treatment together. The man was infertile. Two embryos were implanted into the woman, but a successful pregnancy did not result. The woman and the man then separated.**

The hospital was not informed of the separation. After the separation, more embryos were implanted, she became pregnant and a child was born. The question for the court was whether the man was, in law, the child's father by virtue of the 1990 Act? The court decided that he was not the father because it was crucial that they both had treatment together. The court's reasoning was that the time at which legal paternity was determined was the time when the embryo or sperm or eggs (which resulted in the birth) were placed in the woman. That time occurred *after* the man and the woman were separated and so they were not 'treated together'.

Consent is a crucial factor in the determination of parenthood. Lady Justice Hale said in *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565[10], ' the whole scheme of the 1990 Act lays great emphasis upon consent. The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties'.

Great trauma was experienced when a hospital accidentally mixed up sperm. In *Leeds Teaching Hospital NHS Trust v A and others* [2003] EWHC 259; [2003] 1 FCR 599; [2003] 1 FLR 1091 (QBD) two couples were involved in infertility treatment, Mr and Mrs A and Mr and Mrs B. The consent forms indicated that the As and the Bs *only* consented to IVF treatment using the gametes of their own spouses. AID was *not* consented to. The sperm of Mr B was mixed with the eggs of Mrs A. The essential issue was who was the father of the twin children born as a result of this mix-up. The court decided that Mr A was not in law the father of the child. Mr B was the father although no formal declaration to that effect was made by the court. If the rules in

s 28 (above) had applied, Mr A would have been the legal father; if not, Mr B, as the biological father, would be the legal father. The court stated that the error was so fundamental that the provisions of the 1990 Act did not apply so as to make Mr A the legal father. Consent was a fundamental issue. This gives the 1990 Act a strong ethical undertone.

What should happen if following the creation of embryos, the relationship breaks up and consent is withdrawn? Again, it is left to the law to make an ethical and moral decision. In *Evans v Amicus Healthcare Ltd and others; Hadley v Midland Fertility Services Ltd and others* [2003] EWHC 2161 (Fam);(2003), *The Times,* 2nd Oct; [2004] 1 FLR 67. Two women

had undergone IVF treatment with their former partners. Embryos had been created and were being frozen and stored by the respondent clinics. Following the break-up of the relationships, the two men concerned withdrew their consent both to the IVF treatment and to the continuing storage of the embryos.

Following the break-up of the relationships, the two men concerned withdrew their consent both to the IVF treatment and to the continuing storage of the embryos.

In these cases both couples had specified that the embryos were to be used in providing treatment services for themselves and their partners *together.* Schedule 3, para 4 gave each party to IVF treatment an unconditional right to vary or withdraw consent to treatment and to the continued storage of any embryos at any time up to the point at which the embryos were used in the treatment. This was to be interpreted as *until the embryos were transferred into the women.* Schedule 3, para 6(3) provided that an embryo must not be used for any purpose unless there was an effective consent by each gamete provider for such use.

Since the couples were no longer together and had no continuing relationship, the clinics would be in breach of their licence if they treated the women. The consents to treatment which were given at the outset were no longer effective.

It was also stated that embryos, like foetuses, were not considered persons in English law and accordingly did not have a right to life. In *The Times* (2nd October, 2003) Baroness Warnock, who chaired the inquiry which led to the enactment of the 1990 Act, wrote, ' …the law is clear. At the moment there has to be consent of both parties to use the embryos. If they do not both agree, then the decision falls to whoever is controlling the embryos at that point'.

Theologically and ethically, the intrinsic value accorded to embryos is surely a debateable issue.

To sum up, where the 1990 Act is complied with, a man is *deemed* to be the child's father.

What about the other male who contributed to the child's birth? The law responds by making the other man a stranger, for it provides that where someone is to be treated as the father by virtue of the above rules, no other person is to be treated as the father of the child.[11]

Should The Identities of Donors of Eggs or Sperm (Not Legal Parents but Biological Progenitors) Be Disclosed to Their Biological Offspring?

There is an explicit provision covering the status of sperm donors. Providing the Act is complied with, they are not fathers.[12] However, there are plans for a change in the law to remove the anonymity which is currently given to sperm and egg donors, but the law will continue not consider them to be parents.

Already two persons, born as a result of assisted conception involving anonymously donated sperm have sought to learn about their biological backgrounds. This occurred in *R (Rose and another) v Secretary of State for Health and another* [2002] EWHC 1593; [2002] 3 FCR 731. One was born in 1972 before the Human Fertilisation and Embryology Act 1990 and the other, still a child, was born in 1996 after the 1990 Act had come into force. The woman who was born in 1972 indicated in detail how important it was to her to know her genetic connections, stating it was important 'socially, emotionally, medically and even spiritually'. She felt 'intense grief and loss, for the fact that I do not know my genetic father and his family'. She was concerned about 'dangerous mis-information [being] enforced by birth certificates which did not reflect someone's true genetic identity.[13] She concluded that she had 'a strong need to discover what most people take for granted. While I was conceived to heal the pain of others (ie my parents' inability to conceive children naturally),
I do not feel that these are sufficient attempts to heal my pain'.

The second person, the child, stated that she would like to meet the man who donated his sperm and constantly asked her mother questions about him. Her mother found it very difficult to answer all her questions. Indeed, even if she had wanted to do so, she could tell her very little about the donor.

Both people *in this joined case* were content to seek information which would not actually identify the donors, but this was qualified somewhat by the younger person wanting a contact register. (The court was of the view that it was not necessarily easy to draw a line between information which would, and which would not, identify the donor.)

The court acknowledged that the donors gave their sperm[14] on the clear understanding, if not promise, that their identity would remain undisclosed forever and that any failure now to honour that long-standing understanding would be manifestly unfair to the donors and would 'drive a coach and horses through the AID system'. The question of ethical issues for the nursing and medical professions arises at this juncture. What advice should they give? What should they disclose? In any event, s 31(5) of the 1990 Act provides that regulations cannot be made to require the Human Fertilisation and Embryology Authority to disclose information which would identify a donor if the information concerned was provided at a licensed clinic and at a time when the Authority could not have been required to give information of that kind. The question arose as to whether either or both persons had a human right under the European Convention (by virtue of the Human Rights Act 1998) to know of their origins. Human rights are retrospective and so both cases were considered together.

The High Court in the *Rose and another* case considered *Mikulic v Croatia* [2002] 1 FCR 720 to be'an important recent European authority', a description which the writer finds encouraging because he has advocated its importance in terms of supporting applications for DNA testing with a view to establish parentage. That case explained what was meant by the right to private life in art 8 of the Convention. 'Private life... includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity. Respect for private life must also comprise, to a certain degree, the right to establish relationships with other human beings.' The court continued to quote from *Mikulic* : ' there appears...to be no reason of principle why the notion of private life should be taken to exclude the determination of the legal relationship between a child born out of wedlock and her natural father... respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because---and note the following words---of its formative implications for his or her personality'. The writer would suggest that these words not only are potentially strong submissions in a court-room, but ought to be borne in mind in a clinic. Should counselling explicitly address such issues, including the law as it stands at the time of counselling, together with any possible developments?

So far the issue has been considered from the perspective of the child who has been conceived. What about some of the others involved? *M v The Netherlands* (1993) 74 D & R 120 was referred to in the *Rose and Another* case. A sperm donor and his wife met a lesbian couple that wanted a child. The man agreed to donate his sperm and, following an AID procedure, one of the lesbians had a child. He visited the mother during pregnancy and babysat after the birth. Later he was refused further contact with the child. The European Commission decided that the donation of sperm only to enable a woman to become pregnant did not by itself give the donor a right to family life in relation to the child conceived. Furthermore his contact with the child did not help him. The writer wonders whether the European Court might now make a different decision in the light of *Mikulic.* In any event, the High Court in the *Rose and Another* case decided that the *Netherlands* decision did not assist because it was looking at 'family life' rather than 'private life' and that it was looking at the problem 'through the other end of the telescope'. The court decided that at the stage of a case when a decision had to be made about whether there was a human right to private life it was unreal to draw a distinction between information which would and which would not, identify a donor. The court concluded that as the donor provided half of the child's genetic identity, that created the interest in seeking information, subject to one cautionary note: ' it will not be in every case where a woman has given birth following AID treatment that the AID donor is the father of the child'.

What does all this mean in practice – for the clinic and the court? Obligations rested with organs of the state. Drawing on *Marckx v Belgium* (1979) 2 EHHR 330, the court decided that the obligation of the state in relation to family life might require positive legal safeguards to render family life possible. The court extended this thinking to the rights to private life-the issues in this case. The court decided that there were some principles, namely that respect for private and family life could place positive obligations of the state---and here the writer would suggest on the NHS and those bodies regulating private clinics-- and that respect for private and family life required that *everyone* should be able to establish details of their identity, including their origins and the opportunity to understand them. It covered physical and social identity and psychological integrity. ' A human being is a human being whatever the circumstances of his conception and an AID

child is entitled to establish a picture of his identity as much as anyone else.' It also comprised to a certain degree---not defined or explained---the right to establish and develop relationships with other persons. The fact that there was no existing relationship did not mean that there was not a human right under art 8 of the Convention. Although the two individuals had rights under the Convention, the issue of whether their rights had been breached was not decided because the factors arising under art 8(2) remained to be considered. At that later stage—which had not yet arisen-- the issue of whether to disclose identity was likely to become very relevant because other people's rights under the Convention had to be weighed in the balance.

The case does not seem to tackle the concerns of those who have donated eggs and sperm believing that they would not have a relationship with the child. Do hospitals and clinics have records which could be used for tracing purposes? Is there legislation that protects against the disclosure of such records? Did Scott Baker explain what he meant by ' to a certain degree'? The writer considers that the ethics and practical implications of disclosure of the biological background remain very much open to debate.

Should A Deceased Man 'Father' A Child?

In unassisted conceptions, a child can obviously only be conceived following the fertilisation of the woman by a living father. However, a recent development in the law[15] means that it is now possible for a woman to conceive through the sperm of a dead man. By virtue of the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, a man can now be recorded as the father of a child born as a result of fertility treatment that took place after his death.[16] However, registration of the man as the father does not give the child any legal rights such as inheritance or nationality. Psychologically, mankind is entering unchartered territory. How will the child feel when he learns of his origins?

A woman is physically unable to carry a child to term. She seeks the help of another woman.

The other woman may be a relative or a stranger to the woman who wishes to conceive. The law is to be found mainly in s 30 of the 1990 Act. When the child is actually born, the law automatically treats the surrogate as his mother. If the surrogate mother has had placed in her an embryo, sperm or eggs of one or both of the commissioning couple (who must be married to each other), then, following the birth, the couple may apply to a court[17] for what is known as a 'parental order' which transfers parenthood to the commissioning couple . There are a number of conditions to be satisfied, the principal ones are that the child must have been handed over to the couple. The surrogate must consent to the proposed court order no earlier than 6 weeks after the birth. She has the right to change her mind and keep the baby and, if she does this, a parental order cannot be made. The court cannot overrule her veto and make a parental order.[18]

The application must be made within 6 months of the child's birth. The court has to make its decision in the light of the following criterion: it must have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood and, rather surprisingly in the light of his age, so far as reasonably practicable, ascertain his wishes and feelings, and give due consideration to them, having regard to his age and understanding.[19] The court will be guided in its decision-making by an independent professional with a social work background known as the Parental Order Reporter. A parental order has to contain a clause in it directing the Registrar General to make in the Parental Order Register an entry relating to the child, and a direction to endorse any existing Register of Births with an endorsement that the child has been re-registered.

Sadly relationships break up. The man who is not the biological father has formed a bond with the child and wants an order for him to having continuing contact with the child.

The law has decided that it is not genetic ties but legal bonding which is determinative of contact issues. In Re CH (Contact)(FD)[1996] 1 FCR 768 a child was born to a wife by A.I.D. with her husband`s consent. After their relationship had broken down, the mother effectively denied her husband the status of fatherhood and sought to deny him contact on the ground that he did not have a biological link with the child. She argued that there was no presumption in favour of contact. The court rejected her argument. An analogy could not be drawn with stepfathers for although it was held in Re H [1994] 2

FCR 419 that there was no presumption that a step-father should continue a relationship with a step-child, in this case,by virtue of s 28 of the 1990 Act the husband was deemed to be the child`s father and, to quote the judgment,"there [was] clearly a right in the father to see this child by way of contact unless the welfare checklist [in section 1(3) of the Children Act 1989] [made] it undesirable for the father to do so." The mother submitted that the child would be confused because she now had a new husband whom the child regarded as his father, but this submission was rejected on the basis that this flowed from her remarriage, not from the conception of the child.

Conclusion

The individual or the couple who seeks medico-scientific assistance in the procreation of a child will face legal, ethical and theological issues. So will anyone providing medical, nursing or pastoral support. Those professionals will likewise have their oen legal, ethical and theological considerations. The writer suggests that they are not clear-cut. Any contributions to these reflections, for that is all that they can be, that might provide further guidance are to be welcomed.

[1] This problem is covered by Gary R. Collins in *Christian Counselling* (1989), pp 425-427, who writes that women especially feel guilty and inadequate. Tension can disrupt marital stability and delay conception itself.
[2] 1994 O.U.P.
[3] This paper should not be regarded as a comprehensive statement of the law; rather it is an overview of the general rules. It should also be noted that the law develops through amending legislation, case-law and European Convention jurisprudence.
[4] The translation is from the New International Version, which the writer recommends as a good translation.
[5] New International Version
[6] Fathers who have not married the mothers of their children can gain parental responsibility through being registered on the births register as the father by virtue of section 111 of the 2002 Act as from 1st December, 2003.
[7] HFEA 1990, s 29
[8] The general rule about motherhood in section 27(1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs (s 27(3)).
[9] 'Sperm' derives from the Greek 'sperma' meaning seed.
[10] Quoted in *Evans v Amicus Healthcare Ltd; Hadley v Midland Fertility Services Ltd* [2003] EWHC 2161; [2004] 1 FLR 67, 85.
[11] HFEA 1990, s 29
[12] HFEA 1990, s 28(6)
[13] When she was born the presumption of legitimacy applied to babies born apparently within wedlock. Also there was no legal provision made for consensual AID conception. The position was changed by subsequent legislation and the current law is contained within the 1990 Act.
[14] The writer would add that the same thinking would apply to women who had donated eggs.
[15] 1st December, 2003. Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (Commencement) Order 2003 (2003 No. 3095)

[16] There are time-limits within which birth registration or re-registration must take place. Couples who are planning to conceive children in the event of the man's death should read HFEA guide CE(03)02 carefully.
[17] In the first instance, the application will be made to a magistrates' family proceedings court in England or Wales.
[18] It could make a residence order in favour of the commissioning couple, but the surrogate would remain the child's parent.
[19] Parental Orders (Human Fertilisation and Embryology) Regulations 1994, sch. 1. Amending regulations may make the law on human fertilisation and embryology consistent with the law on adoption under the Adoption and Children Act 2002 when the new adoption law is in force. If so, the criterion would be the paramountcy of the child's welfare throughout his life.

Privacy on the Internet and Legal Protection

Hurriyah El Islamy, PhD Student and Part-time Tutor at University of Strathclyde, United Kingdom

Abstract
Invasion of privacy on the Internet may occur in so many ways. Hence the main purpose of this paper is to study the coverage and efficacy of legal protection on privacy issues arising from Internet activities. The right to privacy will be discussed in general and its use in relation to online activities. Situations where breaches of privacy may occur online will be highlighted. Subsequently suggestions regarding simple ways that can be adopted to ensure privacy online will be made. However it will be highlighted that there is a need for legal protection as no matter what precautions that have been taken, not all-personal information can be exclusively confidential, especially not in the context of cyberspace activities. Therefore the study will examine whether the existing legal provisions can be adopted and adjusted to the cyberspace circumstances.

INTRODUCTION

What's in a name? A lot! Nowadays by knowing one's name people can know almost (if not) everything about that person. It's a very common phenomenon that everyone who maintains an e-mail account will, at least once, receive e-mail from sender unknown to him/her (often e-mail account owners receive many of junk e-mails everyday). Interestingly in the topic of such e-mail the sender greets the recipient using his/her name. This makes one wonder, "How does (it seems that) everyone know me?"

Internet offers access to a vast amount of information. It lets everyone communicate in so many ways with so many people whether they are down the street or on the other side of the globe. It gives power over the way one shops, lives, works and has fun. It's the greatest information-gathering resources ever invented – but that also means it's an easy way to gather information about oneself.

When one goes online, people and websites can see whatever information is being sent across the Internet. In fact, in January 1999 Scott McNealy, the chief executive officer of Sun Microsystems, said: "you have zero privacy", "get over it". Consider this - Google, a World-Wide Web site (website) featuring a very large and fast Web search engine, places on the wall of its headquarters a real-time projection of daily searches taking place on its site – everything from cars to songs to condoms. Just imagine when a person searches for something very personal under the impression that no other person knows about it, the moment he starts "searching" for it online, others can see his activities. It's a shame! But doesn't he have the right to be let alone?

People take the right to privacy for granted. When one is within the area of his property, he takes for granted that he can do what he likes in any manner he prefers, believing that no one has any right to interfere with his personal business or to monitor his movement. As long as he is within the four corners of his house, he believes that he is secured against any intrusion by outsider in whatever manner. This might be true in the context of those who lived one century ago, when technology was not so developed so as to allow others to get access to many places without the need of being physically present at that place.

The introduction of advance technology offers many advantages and disadvantages at the same time. It eases one's way of life but it also offers easy way for other to intrudes' one's life.

RIGHT TO PRIVACY

There is an unsettled dispute concerning whether there is a broad doctrine that protects what people claim as the right to privacy. In 1890 Warren and Brandeis asserted that the advancement of technology requires legal recognition to allow an individual to determine what to be published and what not to be published about him/herself. Some writers responded to this. While some of them are in support of this idea by citing more grounds to show that this right should be recognized (Bloustein 1964; Fried 1968), others are of the opinion that there is no need to have the broader doctrine known as right to privacy (Prosser 1960; Thomson 1975). Despite the unsettled dispute of the existence of the right to privacy, this right is expressly recognized not only at national level but also at inter-

national level.

Definition of 'Privacy'
The Oxford Concise English Dictionary defines the word privacy as a state in which one is not observed or disturbed by others; or – freedom from public attention. Therefore Judge Cooley called the right to privacy as the "right to be let alone."

Generally it is defined as the quality or condition of being secluded from the presence or view of others. Hence a person's right to privacy is the state of being free from unsanctioned intrusion.

However, it is undesirable to adopt this definition because not every secret is the subject of privacy protection and not everything that has been disclosed loses its privacy characteristic.

In order not to restrict the scope of the right to privacy, it is sufficient to say the term 'privacy' refers to the right of an individual to be free from any interference by other(s) with any of his/her private activities so long as the activities he/she does are not illegal and do not harm other(s)

Scope of the Right to Privacy

Based on the literal definition, many attempts have been made to determine the scope of the right to privacy. Some has restricted its scope to cover only to certain aspects such as information (Fried 1968), property and personal rights (Thomson 1975), etc.

It is claimed that privacy does not need specific legal recognition (Prosser 1960; Thomson 1975). When there is illegal intrusion to what is claimed as the right to privacy, the plaintiff can claim for remedy under any existing legal doctrines, such as defamation; breach of intellectual property rights; breach of confidential information; breach of contract; or breach of trust.

However, the right to privacy protects the wider scope of private life. It protects violation of an individual's honour involving publication of his private life even when the statement is true and thus is not protectable by the law of defamation.

It protects one's right to determine the right of publicity of himself or his thoughts, sentiments and emotions regardless of the method of expression adopted and regardless whether it is an intellectual product or otherwise. The existing intellectual property protection cannot cater for this aspect unless the product is an intellectual product.

The action for breach of confidential information is not sustainable unless the plaintiff - directly or indirectly - imparted the information to the defendant. Hence there will be no remedy available for breach of confidential information if the defendant has gathered the information without getting the plaintiff to disclose it; or merely by monitoring the plaintiff – while it is clear that one's right to privacy will confer protection whether or not the disclosed facts have been communicated by the plaintiff or otherwise.

Furthermore though in most instances breach of privacy may be remedied under the existing doctrine such as breach of contract or breach of trust, it does not confer protection against violation by strangers upon whom neither contractual relation nor fiduciary duty can be inferred.

The recognition of right to privacy is necessary in this broad aspect. Hence it is submitted that privacy protection shall not be restricted to certain aspects of private life but rather to cover all aspects of it so long it does not transgress any laws or regulations.

Sources of Right to Privacy

The roots of right to privacy go back to ancient times even before civilization. Milton Konvitz, as cited by DeCew (1997), resorted to biblical passages that can be interpreted as distinguishing a realm of privacy. He said "almost the first page of the Bible introduces us to the feeling of shame as violation of privacy." He quoted the story of Ham who violated Noah's privacy by looking at his father's (Noah) nakedness and telling this to his brother.

In Islam, the right to privacy is well protected and recognised. Islam prohibits entrance to and spying upon other's premises without the owner's permission (al-Qur'an 24:27 and 33:53). More particularly, Islam prohibits individuals from interfering with one's private life and prohibits individuals from saying bad things against another, which that person may not like to hear about, even if the statement is true (al-Qur'an 49:21). Islam even recognises the existence of this right among family members (al-Qur'an 24:58 and 59).

The right to privacy is recognized as a fundamental human right as declared in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.

Some countries expressly recognise this right as constitutional right of individuals as provided by the Constitution of some countries such as Namibia (art. 13), Russian Federation (art. 23, 24 & 25), The State of Eritrea (art. 18), Romania (art 26), Spain (art 18 and 20), Netherlands (art 10 & 13), The Republic of Turkey (Part Two -Chapter two IV), Thailand (Section 34), Oceania (art 1 (4)), Belgium (art 22 & 32), Hungary (s. 59), Republic of Korea (art 17 & 18), Finland (art. 8), Greece (art 19), Poland (art 51), Portugal (Art. 35), Slovak Republic (art. 16), Republic of Slovenia (art. 35, 37 & 38), Republic of South Africa (s. 14), and by some states in the US that include Louisiana, Florida, California, Illinois, Montana, Alaska and Hawaii.

The importance of this right is also underlined with the enactment of legislation by most countries in order to protect several aspects deemed to be part of the right to privacy.

To mention a few, the USA enacted the Federal Wiretap Act 1968, the Privacy Act 1974, the Cable Act 1984, the Video Privacy Protection Act 1998, the Polygraph Protection Act 1998, the Telephone Consumer Protection Act 1991; Australia has Privacy Act 1988, Data-matching Program (Assistance and Tax) Act 1990 and Freedom of Information Act 1982; Austria has Datenschutzgesetz; Canada has Federal Access to Information Act, Federal Privacy Act, Alberta Freedom of Information and Protection of Privacy Act, British Columbia Freedom of Information and Protection of Privacy Act; France has Loi n° 78-17 du 6 Janvier 1978 relative à l'informatique, aux fichiers et aux libertés; Netherlands has Wet Persoonsregistraties 1988; New Zealand has Privacy Act 1993, Privacy Amendment Act 1993 and Privacy Amendment Act 1994; Norway has The Data Register Act, Switzerland's Federal Law on Data Protection 1992; UK has Consumer Credit Act 1974 and many other countries that include Germany, Hungary, Ireland, Italy, Spain and Russia.

In Malaysia, there is no specific legislation that has been enacted to provide the protection for the right to privacy.

The Federal Constitution of Malaysia - being the supreme law of the land - does not expressly recognise right to privacy as one of fundamental liberties provided for in Part II.

However, Article 5 provides that 'no person shall be deprived of his personal life and liberty save in accordance with law.' This implies that so long what one does is legal; he has all the right to do whatever he wishes free from any interference of others. This may be used as safeguard for one's right to privacy.

Further, Article 13 of the Malaysian Federal Constitution guarantees one's rights to property. In *Re Kah Wai Video (Ipoh) Sdn Bhd* [1987] 2 MLJ 459, it was argued that the search and seizure in this case violated Article 13. It is interesting to note that in this case, reference was made to the case *Sharma & Ors* v. *Satish Chandra* 1954 SC 300 where similar point was taken based on the corresponding Article 19 of the Indian Constitution and it was held, *inter alia*: "A power of search and seizure is … an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of *the fundamental right to privacy* … there is no justification for importing into it, a totally different fundamental right by some process of strained construction." (Emphasis added)

Although it was held that such seizure and search are not unconstitutional as they were only temporary in nature and necessary for the limited purpose of investigation – the Court did acknowledge privacy as fundamental right. Unfortunately despite reference was made to this case, Edgar Joseph Jr. J. abstained from giving any opinion as to whether Article 13 provides protection to the right to privacy. However it is submitted that the very words used in Article 13 does guarantee that one has the exclusive right over his property and he has all the right to exclude any unlawful act of intrusion to his property.

Further support for this can be inferred from the judgment of Callow J in *PP* v. *Lee Sin Long* [1949] 1 MLJ 51 where his lordship held that "[t]he privacy of a person in his home must be respected, and cannot be disturbed unless first shown to proper authority that reasonable cause for interference is warranted." Hence, one's fundamental right to property warranted upon him – to certain extent – the right to privacy.

There is no specific legislation has been enacted by the Malaysian Parliament to protect individual's right to privacy - not in its general scope, neither for certain aspect of privacy. The word privacy, however, has been used in several statutes and regulations, including: Births and Deaths Registration Act 1957 (Revised 1983); Child Act 2001; Law Reform (Marriage & Divorce) Act 1976; Penal Code (Revised 1997); Private Healthcare Facilities & Services Act 1998; and two regulations namely Communica-

tion and Multimedia (Licensing) Regulations 1999 and Private Hospitals Regulations 1973.

The word 'privacy' has been used in the context of right to data protection can be found in sections 4 of the Births and Deaths Registration Act 1957; s. 9 of the Communication and Multimedia (Licensing) Regulations 1999; s. 46A of the Law Reform (Marriage and Divorce) Act 1976 and s. 107 of the Private Healthcare Facilities and Services Act 1998. In each of these provisions, the word 'privacy' has been used in connection with confidentiality and security of individuals' information. The provisions require that the person maintaining the data has to assure that the data he keeps are well protected and safe.

In Private Hospitals Regulations 1973 (s. 10) and the Child Act 2001 (s. 12(2)) the word privacy has been used to connote the state in which one is secluded from public's monitor. In the former, the law has made it compulsory upon private hospitals that in each room shall be made available individual bed screen facilities for privacy for patients – that is to say – to allow the patients to exclude him/herself from the public's or others' monitor and observation. Similarly section 12(2) of the Child Act 2001 requires that if Courts for Children is to be at the same building as other courts, it shall have different entrance and exit to allow the children to be brought to and from the court with privacy – that is – without being monitored and observed by the public or others.

Penal Code (s. 509) perhaps suggests the use of the word 'privacy' in wider scope. It reads: "whoever, intending to insult the modesty of any person, … intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extent to five years, or with fine, or with both" The phrase 'intrudes upon the privacy of such person' as used in this provision offers the wider scope of privacy. The scope of the privacy in this context is not limited to individuals' data, neither to particular designated place or limited area owned by individuals. It implicates that the offence is committed if the intrusion of privacy is committed with the intention of insulting the modesty of the victim – regardless the where being of such person so long it is reasonable for such person to expect that he/she shall have privacy in such a place or condition. Although the provision seems to imply that intrusion will involve physical act of intruding one's privacy, at least in this context the provision is not limited to the where being of the victim. However, this aspect of privacy can only be safeguarded if the intrusion is done with the intention to insult the modesty. Otherwise, there is still no express statutory provision that recognises or confers protection over the right of privacy, in its broad aspect, in Malaysia.

In a nutshell, generally there is no specific legislation that provides protection for one's right to privacy except for very limited circumstances as provided in the above-mentioned legislation. However it is arguable that the right to privacy shall be recognised and intrusion to this right is actionable in the court of law in Malaysia on the basis of one's right to liberty and in lesser degree, his/her fundamental right to property, except, of course, the intrusion is legally sanctioned or warranted.

PRIVACY ON THE INTERNET

When one goes online, one may feel so secure to give any information - either true or false - searching for information - either for personal use or other purposes - etc., believing that no other person knows whatever he is doing. This mistaken belief is the common phenomena since one's mind is used to the idea that intrusion may only happen when physical act of intrusion involves. Since no one has access to his personal computer (PC) neither has the physical access to view what he is typing using his keyboard and to see anything that he is viewing on his monitor, one feels secure that whatever he does is private and confidential. The recent incident in New Zealand involving a Judge that has been demanded to resign because he was spotted visiting porn sites is one of the evidence about how ignorant a Netizen may be about zero privacy that he/she may expect from the Internet.

Netizens have been frequently warned about this. The Internet poses a serious threat for privacy invasion. The very fact that Internet was designed to be as open as possible makes it plain that one should not expect that any activities he does on the Internet is exclusively private. It shall remind Netizens that whatever information they send across the Internet and any activities they do online are open to monitoring by other/s.

Privacy Invasion on the Internet and how to Safeguard Privacy Online

Invasion of privacy on the Internet may occur in so many ways. Websites can look at Internet settings on PCs and learn a great deal of information about the person surfing the Internet. It can also track what is done. Someone could "steal" other's identity. Web databases can in-

clude private information about individuals. Unauthorised persons can read e-mail. Information about one's interests and personal life can be gathered from public discussion areas. Someone can steal other's passwords. Marketing groups and companies can compile comprehensive files about one's buying and Web surfing habits and worst, credit card information can be stolen.

The best way to safeguard one's privacy is by being anonymous. There are many kinds of anonymous remailers that allow individual to send e-mail or participate in newsgroups without having his/her name and address attached to the postings.

Encryption provides an alternative solution for individual that do not want the content of his e-mail being read by others.

Other safeguards that could be taken include choosing the Internet Service Provider (ISP) that has good privacy policy; selecting only necessary cookies and refusing to accept unnecessary ones; frequently deleting caches; and bluffing when necessary.
The development of Internet security system has tremendously contributed to the better protection of online privacy. One will have confidence to surf or transact over secured websites pages compared to unsecured ones. It is believed that technology is the only solution that may offer the protection for online privacy. It is true that having legislation without having the technology that can support the enforcement of the legislation is like a toothless tiger. The legislation is there to protect one's right to privacy. However if the culprit cannot be traced due to the very nature of Internet that allows the very fast and effective spread of information with very minimum (if not zero) opportunity to trace the source of such information - the legal safeguards become useless as the law cannot be enforced anyway.

However, this toothless tiger may still have claws. The legislation is important because no matter how advanced the technology may be, without any legislation that regulates the rights and duties of Netizens the technology can be abused. The technology offers solution by providing method on how information can be sent safely through the Internet. However, the technology can also be developed to break the supposedly secured system. Furthermore, technology cannot provide any solution if the breach of privacy is voluntarily done by the data-user either directly or indirectly. Supposedly when one submitted his/her data to a website, acting under the assurance of the site's privacy policy that the site will ensure the privacy of the data and will not disclose the data to any third party without getting the data-subject's consent- one may not be able to pursue any legal remedy in case if the data-user disregard the self- adopted privacy policy – especially when the wording used for such policy is so vague that can be interpreted in a way that will protect merely the interest of the data-user. The situation will become even more complicated if the claimant has given no consideration to the service provider, as a contract is not actionable by the claimant who would be regarded as volunteer.

Legal Protection

The right to privacy has also been defined as "the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others."(Westin, 1967) This definition suits the nature of protection of one's right to privacy while online.

Despite the dispute on the existence of the broad doctrine of the right to privacy, most countries acknowledge the importance of protection of personal data. This is evidenced by the number of countries that have enacted the law to provide some kind of protection of individual data either to protect data that have been collected either online, or offline, or both.

It was reported in October 1998 that there were more than 40 countries around the world that have enacted, or are preparing to enact, laws that protect the privacy and integrity of personal consumer data. (http://www.wired.com/news/politics/0,1283,15428,00.html)

Legislation

Statutes have been enacted in order to protect personal information against misuse either by businesses or government and government agencies or both. This approach is implemented because it is believed that the government's involvement is very crucial in order to ensure the protection of personal data.

At the International level, the Organization for Economic Cooperation and Development (OECD) had issued "Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data". The Council of Europe (CoE) committee of Ministers in 1981 adopted the

"CoE Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data". The European Parliament and the Council in 1995 adopted the Data Protection Directive 95/46/EC (EU Directive) that attempts to harmonize the various national privacy laws in Europe to promote European-wide commerce.

At the national level European countries adopted this approach pursuance to the EU Directive on Data Protection. Most countries including Australia, New Zealand, Canada, Argentina, Brazil, Hong Kong, South Korea, Taiwan, and Thailand also adopted this similar approach. Malaysia prepared the draft legislation in 1998, but the bill has yet to be tabled in Parliament.
Despite the unresolved debate whether or not the data protection legislation offers any benefit that outweighs the possible economic shortfall as a result of data-sharing restriction, there are several reasons that make it necessary to have legislation to regulate this aspect. Among the reasons are:

1. The ability of technology to gather, retrieve, disseminate and manipulate personal data has given rise to concerns that the privacy of the individuals can be easily compromised and abused.
2. Lack of privacy protection is often cited as one of the main reasons for the slow growth of electronic transactions.
3. The legislation may promote e-commerce in the country, as the availability of legal protection of personal data will encourage the consumers to transact online.
4. Having legislation is necessary for some countries to counter the effect of regulation that gives room for activities that may amount to privacy intrusion, such as unwarranted police wiretapping or corporate abuse of information.
5. There is a need to respond to legislative developments in other parts of the world in order to lift the data-sharing restriction imposed by several states' legislation.

The last reason is one of main concerns to many countries in disregard of the countries' preference of the method to regulate the flow of information over the Internet. This is because article 25 of the EU Directive provides that no personal data may be transferred to a third country unless the "third country in question endures an adequate level of protection."

On the 24th of July 1998, the Working Party on Data Protection suggested adequate protection is determined by assessing the content of the rules applicable and the means for ensuring the effective application of the rules. Six basic principles were suggested in order to assess the adequacy of protection that include the purpose limitation principle; the data quality and proportionality principle; the transparency principle; the security principle; the right of access, rectification and opposition; and restriction on onward transfer principle.

The Directive does not require that the third country must have data protection legislation before it can be considered to provide adequate protection. However, countries that take a self-regulation approach will face more serious problems in order to comply with this requirement due to non-availability of a formal standardized yardstick to measure the extent of available protection of personal data. This was the reason that forced the U.S. Department of Commerce to develop the 'safe harbor' framework. Even this will only allow the transfer of data from EU countries to organizations listed in the 'safe-harbor' list.

In short, the advantage for non-EU countries that provide adequate protection for personal data is that the free flow of data from all 15 EU states will henceforth be assured.

In Malaysia, the availability of legislation that may confer protection to personal data is also important to provide safeguards against abuse of some provisions that allows some acts that will otherwise amount to invasion of data privacy. One of provision of such nature is section 79 of the Digital Signatures Act 1997 which provides that a police officer conducting a search with or without warrant (in accordance with sections 77 and 79 respectively) shall be given access to computerised data whether stored in a computer or otherwise (s. 79(1)). What is meant by 'access' is explained in the subsequent subsection as to include being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of computerised data.

Similar provision is also provided in section 249 of the Communications and Multimedia Act 1998. This legislation goes further by providing the power to intercept communication, which, in the opinion of the Public Prosecutor, is likely to contain any information, which is relevant for the purpose of any investigation into an offence under this Act. In fact, for the sake of national interest, the Minister may determine that a licensee or a class of licensees shall implement the capability to allow authorised interception of communication (s. 265(1)).

Without the availability of legal provision that provides protection to personal data, these provisions – and any other provision of similar nature – can easily be abused. The officer conducting a search will be able to access any data whatsoever, in disregard of the nature of the data and the necessity for having the access to such data. Hence it is necessary to have legislation that protects personal data so as to limit such power only to the necessary extent and not to allow its application to any data whether or not the data accessed are really relevant to the purpose of the search or interception.

Self-Regulation

In the USA, the legislators' concern about privacy goes back to 1980. The approach adopted however is slightly different to the approach discussed above. Instead of providing one general statute that provides for general protection of personal data, the USA government prefers to take a sector-based approach. Hence, the Health Insurance Portability and Accountability Act (HIPAA) was enacted to deal with protection of health information; the Gramm-Leach Biley Act (GLB) governs financial privacy provisions; the Children's Online Privacy Protection Act (COPPA) is meant to regulate the privacy of children under the age of 13 and the Electronic Communications Privacy Act (ECPA) limits the circumstances under which federal and state government may access the contents of transactional data in both real time communications and stored communications.

As regard to the general protection of personal information over the Internet, the USA government leaves the matter to industries to self-regulate this matter. By adopting a self-regulation approach, companies and industry bodies establish codes of practice and engage in self-policing with regard to the protection of the personal data of consumers.

It is said that individuals' privacy in the USA is protected through a combination of constitutional guarantees, federal and state statutes, regulations, and voluntary industry codes of conduct. However this is only true when an individual deals with any organizations that have voluntarily bound themselves to some privacy provisions. Otherwise, USA Netizens are left with no choice. They have to either relinquish their privacy in order to surf the websites of some organizations that do not adopt any privacy policy, or not to deal with them at all.

Adequacy and Enforceability are among the major problems of this approach. It will be difficult to determine whether any particular website has offered adequate protection of personal data or otherwise because there are no concrete and fixed guidelines that can be used as a yardstick to measure its adequacy.

It is also not known which body has the right to hear complain or to take action if any website, in disregard of its self-adopted privacy policy, abuses or misuses its customers' personal data.

Beside USA, Singapore and Japan also take this approach. However, the Japan government is in the midst of preparing data protection legislation.

Personal Data Protection Bill

As stated earlier, there is no specific legislation has been passed by the Parliament that provides protection for right to privacy, either in general scope or specific aspect.

Personal Data Protection Bill was prepared in Malaysia since 1998. This bill, however, has not yet been tabled to the Parliament until today. The proposed legislation is meant to regulate the protection of personal data relating to individuals and to provide for matters incidental thereto or connected therewith.

The Bill provides for the appointment of Commissioner for Personal Data Protection and for establishment of the Personal Data Protection Tribunal and matters related thereto.

Among the features of the proposed legislation is it provides protection only for natural person.

The word 'personal data' has been defined as any information recorded in a document in which it can practically be processed wholly or partly by any automatic means or otherwise which relates directly or indirectly to a living individual who is identified or identifiable from that information or from that and other information in the possession of the data user, including any expression of opinion about the individual and any indication of the intentions of the data user in respect of that individual.

By adopting this interpretation, the duties of data user will be in respect of all personally identifiable data of a living person. This interpretation also provides that the protection shall be conferred to all data either processed by automatic means or manual, wholly or in part. This aspect differs from the UK Data Protection Act 1998 that only applies to information that is being

processed by means of equipment operating automatically (section 1(1)) and the EC Directive on Data Protection that only applies to data processed wholly or partly by automatic means and some manual files (Art. 3).

Furthermore, the EC Directive requires that specific controls be afforded to sensitive data that includes personal data revealing radial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life (Art. 8). Section 54 of the Bill provides for similar provision. However, the provision does not list out what types of data are considered as sensitive data but rather leaving the matter to the Minister's discretion to prescribe any personal data as sensitive data by order published in the gazette (s. 54(3)). The Minister here is the Minister in charged with the responsibility for personal data protection (s. 3).

The duties owed by the data user to data subject can be summed up to nine (9) Data protection Principles - as follow:

1. Fair & Lawful Collection of Data
2. Purpose of Collection of Data
3. Use of Data
4. Disclosure of Data
5. Accuracy of Data
6. Duration for Keeping the Data
7. Access to & Correction of Data
8. Security of Data Keeping
9. Duty to inform

The first principle as provided in the first schedule to the Personal Data Protection Bill provides the method for collection of personal data. It requires that data shall be collected fairly and lawfully. This may be determined by looking at the method how the data have been collected and whether the data subject has been misled or deceived as to the purpose of collection. There is presumption that collection of data has been fairly done if a person who is authorised by or under *any law* to supply such information supplies the data or if the person is required to supply it by or under any convention or other instrument imposing an international obligation on Malaysia. It is not clear whether the term 'any law' is intended to have restricted application so as to be applicable only for any law in force in Malaysia or otherwise.

For the second principle, personal data shall only be held for specified purposes. In addition to that, only necessary data – data directly related to the purpose related to a function or activity of the date user – shall be collected and the data collected shall not be excessive.

The third – use of personal data – principle requires that personal data shall be used only for the purpose for which they were to be used or any purpose directly related to that purpose, unless the consent of the data subject is obtained.

Similarly, there shall be no disclosure of personal data other than for the purpose for which the data were obtained or purpose directly related to that purpose, unless the consent of the data subject has been obtained. This is provided in the fourth – disclosure of personal data – principle which is in line with the right of data subject as provided by section 42 of the Bill.

It is also necessary for the data user to take reasonable steps to ensure that the personal data are accurate, complete, relevant, not misleading and up-to-date as required by the fifth – accuracy of personal data – principle.

Principle 6 requires that personal data shall not be kept for longer than it necessary for that purpose. This provision is in support of the right granted to data subject as provided by section 44 of the Bill.

Principle 7 – Access to and correction or personal data – is in line with the right of data subject as provided by sections 32 and 36 of the Bill.

Principle 8 requires that the data user to take all practicable steps to ensure security shall be taken against unauthorised or accidental access, processing or erasure to, alteration, disclosure or destruction of, personal data and against accidental loss of personal data. This shall have regard to the nature of personal data and the harm that would result from such access, processing, erasure, alteration, disclosure, loss or destruction; the place or location where the personal data are stored; the security measures incorporated into any equipment in which the personal data re stored; the measures taken for ensuring the reliability, integrity and competence of personnel having access to the personal data; and the measures taken for ensuring the secure transmission of the personal data. Therefore, although by literal reading of the Bill it will be necessary for someone who runs a very small business (such as selling 'nasi lemak' or pisang goreng') to ensure reasonable protection of the suppliers' and/or customers' personal data, it will not be necessary for him/her to keep personal data in the lockable fire-proof cabinets – taking into account the nature of personal data and the harm that would result from unauthorised or ac-

cidental access, etc.

The last principle requires the data user to take all practicable steps to ensure that a person can ascertain a data user's policies and practices in relation to personal data and he can be informed of the kind or personal data held by the data user and for which purpose.

It is interesting to note that the provision that regulates the transfer of personal data to places outside Malaysia is provided in section 55 which comes within part VIII under the heading Matching Procedure, Direct Marketing, Etc. Unlike personal data legislation of other countries, the practice as proposed by the Bill provides that transfer of any personal data to a place outside Malaysia shall only be done if such place is specified by the Minister by order published in the Gazette. He may do so if he has reasonable grounds for believing that that place has the law that is substantially similar and serves the same purpose as the Malaysian Personal Data Protection Act 1998 (The Bill) or at least, that place ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the collection, holding, processing or use of the personal data.

By looking at this provision, it is obvious that the process will involve two steps. First there must be assurance on the Minister's mind that the place where the data will be transferred does provide adequate protection or better – enforces the law similar to that of Malaysia. When the Minister is satisfied that this element is fulfilled, he then will specify the name of that place by order in gazette.

The EU Directive merely requires that the transfer of personal data to third countries be allowed if such third countries afford adequate level of protection (Art. 25). Similar provision was provided in Schedule 1, Part I, Paragraph 8 of the UK Data protection Act 1998. The second process proposed by the Bill - whereby the Minister will specify the name of the place by order in Gazette - is similar to the step that had to be taken by the USA government in providing the safe-harbor list of companies.

The jurisdictional issue is dealt with in section 105 of the Bill. Section 105(1) reads "[t]his Act shall not apply to any personal data held or processed wholly outside Malaysia unless the personal data are used or intended to be used in Malaysia." This provision excludes the application of the proposed legislation in cases where the data are not held or used or intended to be used within Malaysia regardless whether the data subject may be Malaysian or anyone residing in Malaysia. This limits the application of the proposed legislation. Hence anyone who resides in Malaysia cannot seek for the protection that may otherwise be conferred by the proposed legislation if he/she deals with a company that neither holds or uses or has the intention to use the data submitted in Malaysia.

On the other hand, there is ambiguity as to whether it is justifiable to impose the provision of the proposed legislation to foreign data that are not used or intended to be used in Malaysia yet the data are held within Malaysian territory merely by virtue of any foreign company that hosts its website in any machine or repository that is located in Malaysia.

Section 57 of the Bill allows data subject to make a complaint to the Commissioner about any act or practice in contravention to the requirement of the Bill. However, by virtue of section 59 (1) there are several grounds that allow the Commissioner to refuse to carry out or continue an investigation initiated by a complaint. It includes the fact that the complainant was not a resident in Malaysia (s. 59(1)(d)) or was not in Malaysia (s. 59(10(f)) at any time the act or practice was done or engaged. The implication of this, the protection conferred by the Bill is not guaranteed if the subject matter is neither the resident in Malaysia not being in Malaysia when the act complained of is committed. This provision may cause concern to other countries. In this way although the Bill – once it comes into force – may provide adequate protection of personal data, the protection is not necessarily extended to foreign data subject or even to Malaysian who is not in Malaysia during the commission of the act complained of, even if their personal data are held, used or intended to be used in Malaysia.

Existing Malaysian Law

There are some provisions that may be read as to provide protection for the right to online privacy.

Generally the protection may be inferred from the provisions of the Computer Crimes Act 1997, particularly sections 4, 5, and 7 which make unauthorised access to computer material, either with or without the intention to commit fraud or act of dishonesty or which causes injury as an offence. It is also an offence to abet the commission or attempt to commit such offence. The Act further provides that there is presump-

tion of unauthorised access if one has in his custody or control any program, data or other information which is held in any computer or retrieved from any computer which he is not authorised to have in his custody or contract

These provisions, however, may only protect the personal data against intrusion by a person who has not been trusted with the data. It does not make it as an offence for someone who has been trusted by the data to disseminate the data without or contrary to the consent of the data subject.

Section 72 of the Digital Signature Act 1997 imposes obligation of secrecy to anyone who has access to any record, book, register, correspondence, information, document or other material obtained under the Act (s. 72(1)). Anyone who is convicted for having had committed an act contrary to the above shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both (s. 72(2)). However this provision is subjected to the provision that allows the disclosure to a police officer as discussed earlier and its application is limited to those data that have been submitted pursuance to the provisions of the Digital Signature Act 1997 and not otherwise.

Section 234 of the Communications and Multimedia Act 1998 offers wider scope by providing that anyone who intercepts, attempts to intercepts, or procures any other person to intercept or attempt to intercept any communication (s. 234(1)(a)); or discloses, or attempt to disclose the information obtained through interception (s. 234(1)(b)) or uses or attempts to use such information (s. 234(1)(c)) commits an offence under the Act. This provision expressly prohibits interception of communication and disclosure or use of such communication and any attempts or procurement to do such acts. However it still does not provide any protection of data privacy if the breach of this right is committed by a person having the data with the consent of the data subject.

Hence, there is a lack of legislation that may offer protection to data privacy in its broad aspect. Although generally Articles 5 and 13 of the Malaysian Federal Constitution may be read to infer the protection of right to privacy, it may be hard to extend the right to life or personal liberty as inferring the right of individual to determine who may hold his data and for what purpose. This implicates the an individual has the right to do or not to do what he wishes however, it is doubtful if such right can be extended so as by putting restriction to other about what he/she can or cannot do. Furthermore the person disclosing such information may shield himself by saying that he has the right to do so as part of fundamental right to freedom of speech and expression as guaranteed by Article 10(1)(a) of the Malaysian Federal Constitution.
Whether the protection can be inferred from one's right to property is subject to the ability of confessing the court that one's personal data are part and partial of his property that is constitutionally protected. This argument is defective especially since it is arguable that information is free and it wants to be free.

CONCLUSION

The protection of online privacy is the compelling ground that needs to be taken care of for e-commerce to flourish. In disregard of the approach that may be preferred by any particular country, there is a need to ensure the Netizens that their online privacy is protected, both legally and technologically as this assurance will make them feel comfortable to surf the internet and more importantly to submit their data and spend their money online.

In addition to that, there is also the need to have a standardized and unified system so as to facilitate the transfer of data from one country to another. Technologically, this need has been met as xml (that stands for extensible Markup Language) is currently being used as a standardized format for data transfer around the globe. However, the law has been slow to respond to this so that there is no certainty as to which law shall prevail in cases where conflict of laws may arise in case there is failure to protect the privacy of personal data that have been transferred across countries.

The fact that e-commerce is borderless in nature shall open the eyes of businesses, either individuals or body corporation, to realize that they have huge market on the Net and it will be against their advantage to limit the market merely to certain territory due to limitation that may be imposed regarding the transfer of data.

While the self-regulatory approach emanates uncertainty as regards the sufficiency of self-adopted privacy policy and the efficiency (if at all the possibility) to enforce the self-adopted regulation in cases where disputes arise or infringements occur, this approach is still acceptable in countries where no legislation has been enacted to provide protection of data privacy.

In some circumstances the availability of such legislation becomes inevitable especially when other existing legislation provide provisions that may facilitate the intrusion of online privacy.

Even so, having legislation alone is not the complete solution. Legislation alone without the supporting technology is just like a toothless tiger that looks scary yet cannot do much to cause any injury. It is similar by analogy because it will be useless to have good legislation if the available technology does not provide the facilities to trace the wrong doer or to provide any means to enable the enforcement of such legislation. However it may be argued that in such situation, this toothless tiger is not totally useless as it can still use its claws. In other word, in circumstances where it is possible to trace and catch the wrong doer, the law is there to bring him to the justice and make him liable for the wrongdoing he has committed or attempted to commit. This is especially true in the light of earlier discussion that the existing law in Malaysia does not provide sufficient remedy for breach of privacy in its broad aspect.

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Welcome to Dr. Penelope Richards. A new member of the Editorial Board of Obiter .

Alan Lowe, JP. - Editor-in-Chief

As the, now, Editor-in-Chief of Obiter I would like to take this opportunity to welcome our very first member of the new Editorial Board of Obiter, Dr. Penelope Richards.

Dr. Richards is from the Republic of South Africa where she lives with her husband, Father Peter Richards.

Over the years Dr. Richard's work has taken her all over the world and she has written and presented numerous papers for and at conferences.

Several months ago Dr. Richards wrote an article for Obiter which received positive approval by the readers.

It is hoped that the relationship between Dr. Richards and Obiter will be both long and prosperous so that together we may bring you a much improved publication and articles which have been rigorously approved by the Editorial Board. From the moment of appointment Dr. Richards brought improvement to Obiter and now we will be providing feedback to our article authors prior to publication.