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It's not me, it's you: law's performance anxiety over gender identity and cohabitation

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Abstract

Legal discourse constructs "truths", not in relation to legal identity, but also in relation to other categories of identity. This article is concerned with a small but important part of those "truths" – that of correctly performed gender identity. It does so by exploring how some legal judgments determine the property interests of cohabiting couples in constructive trusts. However, this paper is not about constructive trusts as such. Rather, it is an interrogation of law's language which creates and perpetuates types of behaviour seen as legally relevant. It uses a Butlerian approach to offer an alternative way of conceptualising how an applicant seeking to establish a beneficial interest has to perform behaviours of a certain type (usually financial). Bringing a post-structuralist analysis to bear on this very traditional doctrinal area of law, the paper suggests that there is scope for legal discourse to re-evaluate what performances "count" when deciding upon proprietary interests.

Key words: gender, Judith Butler, constructive trusts, law

Introduction

This paper is concerned with exploring how some of the legal constructions and performances of gendered identity come to exist within law. It will argue that law should recognise (more than it does presently), the plurality of the learnt nature of gender and its performativity. Although the subject matter I have chosen utilises constructive trusts, this paper is not about constructive trusts per se. There is a multitude of research covering this area of law and I do not intend to compete with it.[1] Instead, I wish to offer a different perspective of this well-trodden path. I wish to apply Judith Butler's concept of gender performativity to argue that within this context, law continues to adhere to and perpetuate "appropriate" notions of gender identity performativity. In so doing, the paper explores the notion that law continues to use a process of normalisation of performativity to perpetuate certain established notions of femininity and masculinity, "revealing the implicit essentialism of normative judgments".[2] In other words, law only recognises gender as it is normatively performed, and, as law repeatedly confirms these recognitions in individual cases, it is engaged in a performance of its own (i.e. of application of the principle of precedent) and in this way constructs not only the "truth" of law but reinforces also the

1 See, for example, A Bottomley, "Women and trust(s): portraying the family in the gallery of law" in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford: OUP 1998), pp. 206–28.

2 V Munro and C F Stychin, *Sexuality and The Law: Feminist engagements* (London: Routledge-Cavendish 2007), p. 201.

"truth" of gender performativity. This paper offers an interrogation of "law" and "the law" and examines some of the ways in which it continues to produce and regulate identities and the discourses that surround them.

A brief overview of constructive trusts law

A brief overview of some of the leading judgments in constructive cases will help to illustrate that performativity of so-called feminine (and therefore undervalued) behavioural traits, such as home-making, cooking, cleaning, nurturing, caring and child rearing, which when performed by women, is evidence of nothing at all; such activities have little, if any, probative force.

Even the black-letter lawyer would agree that only certain types of behaviour will be successful in creating and then enforcing beneficial proprietary interests.[3] If the title deeds do not declare beneficial interests, an applicant has to show that they acquired an interest either from a resulting trust, a constructive trust or by proprietary estoppel.[4] In constructive trusts, only financial behaviour or performance will be successful in establishing a property interest.[5]

There is no "clear and all embracing definition of a constructive trust"[6] and the meaning is "continually developing".[7] Despite the absence of a universally agreed definition of a constructive trust, they generally fall into one of two categories: firstly, where there is an express common intention which arises from an express (though informal) agreement, arrangement or understanding between the parties; and, secondly, where there is an inferred common intention, which will arise where one party has engaged in conduct referable to the acquisition of an interest in the property.[8] In both cases, a constructive trust has always been seen as arising by way of operation of the law rather than the intentions of the parties.[9] Interestingly, although the parties may "go to the law" to have their dispute settled, it will be equity which determines the outcome. Although the common law is considered to be masculine, equity is considered feminine. Ironically, despite the perception that equity is feminine, it still embodies the masculine normative values of gender performativity used by a judiciary "educated and embodied in ways that make them deaf to the pleadings of 'the other', the woman".[10]

Within the context of cohabitation disputes, the ongoing existence of this requirement continues to privilege financial behaviour and excludes those individuals who have never made (or made very little) direct financial contributions. When Butler argues that gender is

3 Married couples are dealt with under Matrimonial Causes Act 1973 and civil partners under the Civil Partnership Act 2005.

4 Hayton has argued that it is possible for a claimant to bring a claim under proprietary estoppel, although there has been debate about whether there is indeed a difference between a constructive trust and proprietary estoppel, or whether the difference is merely illusory, see D Hayton, "Equitable rights of cohabitees" (1990) *Conv* 370, p. 380.

5 Trusts of Land and Appointment of Trustees Act 1996.

6 *Carl Zeiss* v *Herbert Smith and Co. No 2* (1969) 2 Ch 276, CA, per Edmund-Davies, at p. 300.

7 J McGhee and H Turner, *Snell's Equity*, 31st edn (London: Thomson, Sweet & Maxwell 2000), p 192.

8 Law Commission, *Cohabitation: The financial consequences of relationship breakdown* No 307 Cm 7182 (Norwich: TSO 2007).

9 S Wong, "Constructive trusts over the family home: lessons to be learned from other Commonwealth jurisdictions?" (1998) 18(3) *Legal Studies* 369–90, p. 370.

10 P Pether, "Measured judgments: histories, pedagogies, and the possibility of equity" (2002) 14(3) *Law and Literature* 519. See also R Mackenzie, who has suggested that equity "is frequently marginalised as elusive, uncertain, irrational, subjective, quintessentially feminine". This is in contrast to a common law which is "purportedly authoritative as precedent-based, rational, objective and certain": R Mackenzie, "Beauty and the beastly bank: what should equity's fairy wand do?" in A Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law* (London: Routledge-Cavendish 1996).

a "set of repeated acts . . .. that congeal over time to produce the meaning of substance, of a natural sort of being",[11] her analysis can be applied to law, allowing us to view law as a set of repeated stylised acts; a set of repeated performances which lawyers call the common law of precedent. It follows, therefore, that the authority and force of judgments rest upon the repeated performances of previous judgments. In the light of this, it might be helpful to briefly examine some of the leading cases decided since the 1970s.

Arguably, any examination of the doctrine of constructive trusts should perhaps, start with the case of *Gissing* v *Gissing*. Mrs Gissing had been married to Mr Gissing for 16 years and had paid substantial sums towards the upkeep of the house, but the house had been conveyed into the sole name of Mr Gissing. Mrs Gissing had made no direct contributions towards its purchase. On their divorce, she attempted to claim a beneficial interest.

Lord Diplock held that in the absence of direct financial contributions to the purchase price, and where the legal title to a property was owned by one person, cohabitees could only successfully claim a beneficial interest in the property if they could provide evidence that both cohabitees had a *common intention* that the beneficial interest would be shared. In addition, it also had to be evidenced that the legal owner had induced the beneficiary to act to their own detriment in reliance of this agreement. Lord Diplock explained it thus:

> [A trust] is created . . . whenever the trustee has so *conducted* himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have *conducted* himself if by his *words* or *conduct* he has induced the cestui que trust to *act* to his own detriment in the reasonable belief that by so *acting* he was acquiring a beneficial interest in the land.[12] (emphasis added)

Performativity in the guise of "behaviour", "conduct" and "acting" were clearly types of behaviours important to the court here. The court held (unanimously) that there was no beneficial interest acquired here by the wife, firstly, because she had made no financial contribution to the purchase price of the property and, secondly, because she had failed to establish the necessary common intention. Thus, her behaviour, her conduct and her acts were not deemed to be legally relevant, whereas the conduct, behaviour and acts of Mr Gissing were. Judgments that only recognise certain types of behavioural function and commitment became a pattern throughout subsequent cases. *Eves* v *Eves*[13] is another example. This case is often used to illustrate the (mistaken) understanding that non-financial conduct can establish a beneficial interest. In *Eves* v *Eves*, the court was more concerned that an errant husband should not be allowed to benefit from dishonesty, than they were with ensuring a wide interpretation of what kind of behaviour "counts". Janet and Stuart Eves had lived together for four years during which time a house had been paid for by and conveyed into Stuart Eves' sole name. Janet Eves had been explicitly led by Stuart Eves to believe when they set up home together that the property would belong to them jointly and that the only reason the legal title was vested solely in his name was because she was then under 21. She later moved out of the house with the children and claimed a beneficial interest. The Court of Appeal imposed a constructive trust on the house and awarded her a quarter share.

Janet Eves' conduct and behaviour were not considered legally relevant (she had undertaken redecoration, demolition of a garden shed, used a 14-pound sledgehammer to break up an area of concrete at the front of the house and, of course, been in an intimate cohabiting relationship for four years). Again, similar to *Gissing* v *Gissing*, Janet Eves'

11 J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge 1990), p. 31.

12 [1971] AC 886, per Diplock, p. 905B–C

13 [1975] 1 WLR 1338.

performativity of her gender – her acts, her conduct – were not legally relevant to the court. Ironically, it was the dishonest behaviour of Stuart Eves in misrepresenting the age requirement which influenced the court's decision. However, future cases mistakenly relied on this aspect in the hope of demonstrating that physical labour counts.

Arguably, one of the most infamous cases in this area of law is still *Burns* v *Burns*.[14] The performance of the so-called feminine behaviour of looking after the home and the children was not enough to support the necessary inference of common intention. The facts are well known: the couple had cohabited for 19 years, 17 of those years in their home which was registered in his sole name. She made no financial contribution to the purchase price or subsequent mortgage. Valerie Burns' behaviour was constituted by being in an intimate relationship for 19 years, looking after the home and having primary responsibility for raising the couple's two children. Valerie Burns had not been able to undertake paid employment due to her domestic responsibilities and, in the few times when she had had some income, she had used the money for the children or family expenses.[15] It was held that she was not entitled to a beneficial interest in the property – her behaviour had not been sufficiently *financial*. Valerie Burns' performatively constituted gender role meant that she did not behave "correctly". The failure of the court to recognise her contribution was due to the courts' inability to recognise behaviour and conduct that was other than financial.

These early examples clearly demonstrate that performativity of so-called feminine traits was of no legal interest to the courts. Relying as they do on the repeated set of stylised acts of precedent, it is no surprise that the later cases are no different. For example, in *James* v *Thomas*, the Court of Appeal gave some interesting comments on what kinds of behaviour and words might be capable of giving rise to a constructive trust. The leading judgment (given by Sir John Chadwick) stated that the couple had lived together "*as* husband and wife" for 15 years (emphasis added). The use of the word "as" in that sentence raises an issue of performativity. Chadwick stated that the woman's evidence "as to which there was no real dispute . . . was that she drove a tipper, dug trenches, picked up materials, laid concrete, tarmac and gravel and generally undertook (alongside Mr Thomas) the manual work associated with a business of that nature".[16]

In fact, in relation to Ms James' improvement of the property, Chadwick refers to "the near Herculean labours of the Claimant".[17] Despite this, however, the work that she had done did not, according to the court give rise to the necessary "detrimental reliance". Her behaviour did not count because "in the absence of an express post-acquisition agreement, a court will be slow to infer from *conduct alone* that parties intended to vary existing beneficial interests established at the time of acquisition"[18] (emphasis added). Indeed, Chadwick was firmly of the opinion that what Ms James was *doing* gave rise "to no inference that the parties had agreed (or had reached a common understanding) that she was to have a share in the property: what she was doing was wholly explicable on other grounds".[19] The "other grounds" were because "she and Mr Thomas were making their life together as man and wife", the clear implication being here that it was not financial self-interest, but for reasons

14 [1984] 1 All ER 244.

15 A Bottomley, "From Mrs Burns to Mrs Oxley: do co-habiting women (still) need marriage law?" (2006) 14(2) *Feminist Legal Studies* 181–211.

16 [2007] EWCA Civ 1212, per Chadwick, at para. 4.

17 Ibid. para. 11.

18 Ibid. para. 24.

19 Ibid. para. 27.

of love and affection.[20] It is also clear from reading Chadwick's judgment that there was only one way to interpret the words and conduct:

> Nor, as it seems to me, can it be said that the observation "this will benefit us both", when made in the context of a discussion of matters relating to the business, was intended or understood to be a promise of some property interest in The Cottage. Given that the outgoings of both parties were funded by the receipts of the business – and that, from about 1999, the business was carried on in partnership – there is no reason to think that the observation "this will benefit us both" (in relation to the business) was more than a statement of *the obvious*: what was of benefit to the business was of benefit to both Mr Thomas and Miss James, for whom the business was their livelihood.[21] (emphasis added)

It is clear from this passage that, according to the judge, there was only one possible interpretation of behaviour – it was "obvious". The physical labour was not considered legally relevant. What was considered relevant was the conversation which included the sentence "this will benefit us both". The judge was of the opinion that there was only one possible interpretation of this sentence. I strongly disagree with Chadwick's opinion that there is only one way to interpret the words "this will benefit us both". These words are capable of more than one, if not multiple, interpretations. Chadwick's pronouncement that there's only one interpretation exemplifies law's idea that conduct is always gender neutral. I would suggest that this assumption demonstrates an andocentric approach to the interpretations given to conduct and behaviour, and that conduct, like identity, is performatively constructed. Chadwick took these words to mean relating only to the business the couple owned, but they are equally capable of relating to the relationship between the couple themselves. If we apply some of the work undertaken by Miles,[22] Douglas and Woodward, it is reasonable to put forward the premise that the couples' understanding of the basis of their relationship was fundamentally at odds with each other. Further, the masculine nature of law failed in this instance to comprehend the woman's approach to justice. The meaning(s) and importance ascribed to being in an intimate relationship per se – doing "herculean" physical labour, working without pay with one's partner – are thus likely to be different depending upon whether one is performing femininity or masculinity.

Conduct clearly counts

It is clear therefore, that conduct and performance are the benchmark for the determination of beneficial interests. However, whilst this might appear to be an objective requirement and that there is some tacit acknowledgment that conduct can be constituted by words and conduct, this is still predicated upon financial behaviour. Thus, "the determination of beneficial interests is evidenced by what the parties *said and did* at the time of the acquisition"[23] (emphasis added). Indeed, various Law Commission reports have recognised that conduct counts. In its 2002 report, the Commission suggested that conduct was an important indicator in relation to the question of quantification of beneficial entitlement and that a survey of the whole undertaking between the parties should be undertaken which

20 [2007] EWCA Civ 1212, para. 36. See also S Greer, "Back to the bad old days?" (2008) 158 *NLJ*, issue 7306.

21 At para. 34.

22 See, for example, J Miles "Property law v family law: resolving the problems of family property" (2003) 23 *Legal Studies* 624–48; and also G Douglas, J Pearce and H Woodward, "A failure of trust: resolving property disputes on cohabitation breakdown" (2007) www.bris.ac.uk/law/research/centres-themes/cohabit/cohabit-rep.pdf (last accessed 2 June 2012).

23 *Oxley* v *Hiscock* per Chadwick LJ, at para. 69.

should take into account "*all conduct* which throws light on the question of what shares were intended"[24] (emphasis added).

The Law Commission in 2006 recommended that some couples should obtain beneficial interests where they could demonstrate "qualifying contributions to the relationship giving rise to certain enduring consequences at the point of separation".[25] The next, obvious questions are: what is understood by a "qualifying contribution" and how does someone "establish" this? What particular methodology has been chosen to arrive at a determination of what counts and what does not count? The Commission states that a qualifying contribution is:

> [A]ny contribution arising from the cohabiting relationship which is made to the parties' shared lives or to the welfare of members of their families. Contributions are not limited to financial contributions, and include future contributions, in particular to the care of the parties' children following separation.[26]

Clearly, one of the Commission's concerns in 2006 was to make provision for any children of a cohabiting relationship. More precise examples of what constitutes qualifying contributions include: care for children of both parties, both during and after the relationship; care for other members of their families, including children who are not children of both parties and elderly relatives; financial support of the family; activities (whether financial or non-financial) which enhance the value of, or enable the respondent to acquire or retain, capital assets, including savings and investments; unpaid work in the respondent's business; funding professional and other training; and giving up secure accommodation in order to commence cohabitation.[27] In a limited way, these proposals are almost undoubtedly an improvement upon what already exists. However, it is extremely doubtful whether the ambit of what behaviour counts is capable of being drawn much more widely than is the case currently. Even if the Law Commission had been able to include a much wider range of legally relevant behaviours, it would not matter much if the parties themselves continue to repeat their gendered performances. The Commission was at pains to stress in its report that:

> [F]inancial relief should not be available simply because an applicant could establish that he or she made a qualifying contribution. Qualifying contributions would only give rise to relief where they had resulted in a retained benefit or an economic disadvantage. For example, carrying out routine maintenance work on property in one's spare time, without adding to its value, would not give rise to relief. Nor would buying groceries where the respondent was able to pay the mortgage without that contribution being made.[28]

I would suggest that both "routine maintenance work" and "buying groceries" have an easily identifiable financial cost. Further, it is possible that such behaviour could be viewed by some individuals as "evidence" of their emotional commitment and intimacy. It is well documented that there are gendered differences in the ways in which men and women view domestic labour within the household with studies consistently showing that:

> Women, even those who work outside the home full-time, retain the bulk of responsibility for organising and performing domestic labour including child care. Although many studies reveal that men are increasing the amount of work

24 Law Commission, *Sharing Homes* No 287 (Norwich: TSO 2002), para. 4.27.

25 Law Commission, *Cohabitation*, n. 8 above.

26 Ibid. para. 4.34.

27 Ibid. para. 4.44.

28 Ibid. para. 4.45.

> they do in the home, their contribution still falls well short of what would be needed to make the division equal.[29]

The performance of femininity and masculinity could arguably "cause" men and women to vary in their experiences and expressions of intimacy in relationships resulting in men viewing and valuing certain types of behaviour differently to how women might view and value certain behaviours.[30] However, given its specific exclusion in the Law Commission's report, it clearly does not desire or envisage such behaviour as being legally relevant, presumably because such contributions could be seen as common incidences of house-sharing (such as flatmates) and not necessarily exclusive to intimate relationships. However, whilst there may be instances where it might be problematic to determine where flatmates end and couples in an intimate relationship begin; it is unarguable that there are significant, fundamental and legally relevant differences between the two. Indeed, the Law Commission expressly acknowledged that "intimate" relationships bore the "hallmarks of intimacy and exclusivity, giving rise to mutual trust and confidence between Partners".[31] There are further disadvantages with the commission's proposals in terms of how someone "establishes" a qualifying contribution. What is clear is that past contributions resulting in economic disadvantage would still have to be "proved" in evidential terms. As pointed out by Douglas et al., this could produce "the same kinds of disputes and difficulties over the evidence that trusts Law currently generates".[32] The Law Commission's 2006 report heavily influenced the outcome of the case of *Stack* v *Dowden*[33] which arguably goes partway to ameliorating some of the harshness of *Lloyds Bank* v *Rosset*.[34] Hale suggests that *Rosset* had set the hurdle for a constructive trust "rather too high". In *Stack* v *Dowden*, the House of Lords held that the beneficial ownership of a house should ordinarily follow the legal ownership. Thus, where a property is in joint names and there is no express declaration of trust, there is a presumption that the beneficial interest is held in equal shares. Hale was insistent that the parties' conduct be taken into consideration because:

> The Law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their *whole course of conduct* in relation to it.[35] (emphasis added)

In *Stack* v *Dowden*, Hale was at pains to stress the "holistic" approach taken by the Law Commission in 2006. At first glance this, and Hale's emphasis upon the parties' conduct is to be welcomed. However, it is still the case that the ambit of conduct in question continues to be narrowly drawn. Firstly, *Stack* v *Dowden* is only of use in situations where the property is vested in joint names. Where only one of the parties owns legal title to the property, sole beneficial ownership is still the starting point. Yet again, it would appear that performativity is called for as the onus falls on the other party to show a beneficial interest in the property and this can only be done by demonstrating a certain type of conduct. *Stack* v *Dowden* was discussed at length in the recent Supreme Court decision of *Jones* v *Kernott*,[36] where Hale (in

29 A Diduck and F Kaganas, *Family Law, Gender and the State* 2nd edn (Oxford: Hart 2006), p. 194.

30 See, for example, M Hook et al., "How close are we? Measuring intimacy and examining gender differences" (2003) 18(4) *Journal of Counselling and Development* 462–72; see also J Ridley, "Gender and couples: do men and women seek different kinds of intimacy?"(1993) 8(3) *Sexual and Relationship Therapy* 243–53.

31 Law Commission, *Sharing Homes*, n. 24 above, para. 3.6.

32 Douglas et al., "A failure of trust", n. 22 above, p. 144.

33 [2007] UKHL 17.

34 [1991] 1 AC 107.

35 *Stack* v *Dowden* [2007] UKHL 17, per Hale, para. 60.

36 [2011] UKSC 53.

particular) attempted to clarify her leading judgment in *Stack* v *Dowden*. The Supreme Court in *Jones* v *Kernott* re-iterated constructive trust orthodoxy by stating that the fact that "where a family home is bought in . . . joint names . . . . the starting point is that equity follows the law and they are joint tenants both in law and in equity".[37] In this respect, the judgment does not *say* anything new. However, Hale did state that this presumption can be rebutted by evidence that it "ceased to be, the common intention of the parties to hold the property jointly".[38] Again, however, this is nothing new – law is still concerned with "common intention". If we are concerned with asking how law arrives at "legally relevant behaviour", we need to know what the Supreme Court in this instance understands by the term "common intention". I would suggest that Hale has usually advanced the jurisprudence in this area by stating that the parties' "common intention is to be deduced from their conduct".[39] Indeed, the court went so far as to suggest that although financial contributions should still be considered relevant "there are many other factors which may enable the court to decide what shares were either intended or fair".[40] However, the judgment further states that the couples' "common intention is to be deduced objectively from their conduct". However, it is clear from what has been discussed above that one person's objectivity is another person's subjectivity.

Despite such "progress", however, *Lloyd's Bank* v *Rosset* is still regarded as a leading case in this area. *Rosset* re-affirmed the principle that financial performativity is what the courts are most interested in ascertaining. In so doing, the House of Lords failed to acknowledge the importance of the performance of gender roles and, indeed, that gender itself is normatively performed. Importantly, Bridge LJ, in giving the leading judgment, was insistent that in the absence of some express agreement, discussion or understanding between the parties, even substantial unpaid labour would not give rise to the necessary intention and he was "extremely doubtful whether anything less [than a direct financial contribution] will do".[41]

The *Rosset* judgment underlines a continuing intense preoccupation with financial performativity. Given that masculinity and femininity are capable of being performed differently to each other, this requirement privileges masculine performativity.

At the risk of stating the obvious, it still remains the case that we are dealing here with personal and intimate relationships not business relationships; couples "deal with each other more by trust and collaboration than by organised thinking about their respective rights".[42] Despite the increase in the popularity of cohabitation agreements, it is still comparatively rare for couples to draw up cohabitation agreements and/or declarations of trust.[43] Reliable figures as to how many cohabiting couples enter into cohabitation agreements are hard to come by, but over half of those surveyed in the 2000 British Social Attitudes Survey incorrectly believed that cohabitants have a "common law marriage" giving them the same legal rights as married couples.[44] The 2001 census shows there were 2 million cohabiting couples in England and Wales in 2001, an increase of 67 per cent on the figures from the 1991

37 *Jones* v *Kernott* [2011] UKSC 53, per Hale, para. 51.

38 Ibid. para. 51.

39 Ibid. para. 51.

40 Ibid. para. 51.

41 Bridge LJ, p. 1117.

42 A Barlow and C Lind, "A matter of trust: the allocation of rights in the family home" (1999) 19(4) *Legal Studies* 473.

43 Actual take-up figures are difficult to come by although there seems to be a proliferation of companies offering cohabitation agreements – even Tesco has got in on the act and offers a Cohabitation Agreement Form Pack for £4.39.

44 A Barlow et al., "Family affairs: cohabitation, marriage and the law" (London: Nuffield Foundation 2002). See also R Probert, "Why couples still believe in common-law marriage" (2007) 37 *Family Law* 403.

census. The number of cohabiting couples in England and Wales is expected to rise from 2.25 million in 2007 to 3.7 million in 2031.[45] Even at a brief glance therefore, these figures tell us that there are a significant number of people who will not be seeking a cohabitation agreement or something similar. Yet is seems that this is what the courts are implicitly looking for. Legal discourse continues to expect that the parties' rights will be determined according to their common intention – a matter they will rarely have thought it necessary to consider.

Despite attempts at reform in this area, the language of law continues to operate on the presumptive level of financial contributions and behaviour. The most recent statutory attempts at reforming the law of cohabitation still deny the existence of gendered difference. Lord Lester's unsuccessful Cohabitation Bill 2008 contained a proposal (clause 9) similar to s. 25 of the Matrimonial Causes Act 1973. Clause 9 would have directed the courts to test the couple's "degree of commitment" in deciding beneficial interests. This was, however, just another test of performativity not guaranteed to be free from preconceived ideas of the masculine and feminine and the possibility of gendered differences of perceptions of commitment. In addition to the welfare of any relevant child, the matters to be considered by the court included the contributions each party had made to the relationship in financial terms. There was to have been no presumption of equal sharing of property. The Bill received a second reading in the House of Lords on 13 March 2009, but failed to proceed any further having run out of parliamentary time. Another Private Members' Bill, introduced in March 2009 also failed to proceed.[46] In 2002, the Law Society had stepped into the fray with its report on cohabitation,[47] which placed its focus upon cohabitation, not just on property issues.[48]

Various solutions offered

There has been extensive research relating to the question of how the law does and should deal with property division upon the separation of cohabitants. Miles, for example, has provided a useful analysis of the conceptual boundaries of this debate by exploring the doctrinal differences between the approach taken by family law and the approach taken by property law associated with people who share homes.[49] Miles' work usefully identifies some of the myriad of problems associated with reform in this troublesome area of law, but in particular suggests that these problems cannot be solved "without express reference to the nature or effects of the relationship between the parties and an express policy aimed at dealing specifically with the problems encountered in such relationships".[50] What should underline any approach, therefore, is not necessarily an examination of the law per se, but also an examination of the basis upon which couples understand their relationship. Barlow has explored how law is responding (or not), to the trends of family restructuring away from marriage in the UK and the rest of Europe.[51] Barlow identifies the UK legal responses to cohabitation as being developed on an "ad hoc basis leaving the law complex, confusing and often illogical".[52] Barlow argues for a methodological approach that allows for an examination of both "form" and "function" of the particular familial relationship,[53]

45 Office for National Statistics, *Social Trends* (London: ONS 2009), p. 8.

46 Cohabitation (No 2) Bill 2008–2009.

47 Law Society, *Cohabitation: The case for clear law* (London: Law Society 2002).

48 Cited in S Wong, "Would you 'care' to share your home?" (2007) 58 *NILQ* 1.

49 Miles, "Property law v family law", n. 22 above.

50 Ibid. p. 648.

51 A Barlow, "Regulation of cohabitation, changing family policies and social attitudes: a discussion of Britain within Europe" (2004) 26(1) *Law and Policy* 57–86.

52 Ibid. p. 60.

53 Barlow, "Regulation of cohabitation", n. 51 above, p. 78.

which would help to provide a "plurality of legal regulative structures" in response to diverse family forms. The extensive research undertaken by Douglas and Woodward clearly exposes the tensions between cohabitants' expectations and legal positions.[54] One of their key findings identifies the extreme mismatch between cohabitants' perception of issues over property they have with their partners and the legal view. This mismatch extends far beyond matters of interpretation, practice and procedure and is so severe that: "The redefinition of their issues into legal concepts may bear little relation to the categories as perceived from the perspective of cohabitants."[55]

Barlow and Lind usefully suggest that the way forward in this area is legislative reform which has the best chance of being able to ensure that "intimacy, trust and collaboration are significant features in the legal concept of 'family'".[56] The authors explore several different methods in which this might be achieved, but arguably the most convincing of these is the idea that there should be a legal presumption of joint ownership of the family home.[57] On the face of it, this is an attractive idea. However, of concern is the fact that it is based upon the idea that all cohabitating relationships can, and should, be "treated alike".[58] The basis of Barlow and Lind's argument is that it "looks to the degree of commitment that relationships demonstrate".[59] Whether an applicant can demonstrate the necessary "degree of commitment" would be necessarily contingent upon subjectively assessed factors. There is of course no guarantee that a court will interpret the phrase "degree of commitment" to specifically include the differences between the performativity of femininity and masculinity.

Thus, despite some of the excellent work that has been undertaken in this area of law over the years, the operation of constructive trusts is still reliant upon a *certain type* of behaviour. I do not dispute the principle of behaviour, what I do dispute is the type of behaviour that "counts" or is considered legally relevant evidence to intention. I suggest that what constitutes legally relevant evidence is a matter of subjective interpretation. That which constitutes legally relevant behaviour is not the result of applying objective criteria, but rather, it is arrived at as a result of subjectively constituted notions of the norms of gendered performativity. Thus, it is not just the behaviour of individuals within a cohabiting relationship which should be subject to interrogation, but also the performativity of law and legal discourse.

Applying Butler to constructive trusts

The application of a Butlerian methodology suggests that much of law's authority and legitimacy comes in the form of repetition. Thus, the importance of common law's reliance on previous cases cannot be underestimated: "If the common Law judgment is accepted as correct, it will be instantiated within the legal system as a general rule properly applicable to a range of similar or analogous circumstances."[60]

A Butlerian analysis allows for an interpretation of legal judgments which can be regarded as a "set of repeated performances" constituting a discursive body of knowledge. These repeated performances purport to constitute a (singular) "truth" – "the law" on any

54 Douglas et al., "A failure of trust", n. 22 above.

55 Ibid. p. 77.

56 Barlow and Lind, "A matter of trust", n, 42 above.

57 Ibid. p. 478.

58 Ibid. p. 487.

59 Ibid. p. 487.

60 D E Edlin, *Common Law Theory*, Cambridge Studies in Philosophy and Law (Cambridge: CUP 2007), "Introduction".

issue – such as, in our context, that there is only one way to constitute legally relevant evidence of behaviour and that that way is financial. This arguably raises the question of what comes first – does law reflect gender norms or does it construct and impose them? Butler might answer this question by suggesting that there was "no beginning" as such, only a "repeated set of acts". I would go further and argue that the discourse of law, as a part of the society in which it is situated, reflects, constructs and imposes gender norms. Thus, it would be misleading to ask "Which comes first: law or society?" when, in fact, neither can exist without the other. The question should be: how do law and society interact to produce truth and knowledge?

The cohabitation cases clearly demonstrate that law fails to recognise the contingent aspects of these truths and the resultant categories of legal relevance. Butler's work also allows for an acknowledgment of the contingent nature of the truths that performativity purports to create. In the context of constructive trusts, the contested and contingent categories include "woman", "man", "conduct" and "relationship". These categories are used by legal discourse in essentialist ways. Butler has argued that some aspects of feminism had made a mistake by using essentialist ideas in trying to assert that "women" were a group with common characteristics and interests. This approach had the disadvantage of reinforcing a binary view of gender relations in which human beings are divided into two clear-cut groups, women and men. Women should not be viewed as a unified homogenous group as the "very subject of women is no longer understood in stable or abiding terms".[61] Butler's theories have the potential to allow for the rejection of such essentialist constructs as the antitheses to the potential fluidity of the categories mentioned above. Such an approach provides therefore for a site of resistance to the idea that women and men behave in certain ways due to biological essentialism and provides instead for the opening up of spaces allowing for the idea that individuals behave in certain ways because they are performing their gender.

Butler first suggested the idea that gender is performatively constructed in *Gender Trouble*, arguing that conduct is performatively constituted – it is the repeated performances of a certain type of behaviour which lead to it being (mistakenly) regarded as "natural" or "innate":

> Gender is the repeated stylisation of the body, a set of repeated acts within a highly rigid regulatory frame that congeal overtime to produce the appearance of substance, of a natural sort of being. A political genealogy of gender ontologies, if it successful, will deconstruct the substantive appearance of gender into its constitutive acts and locate and account for those acts within the compulsory frames set by the various forces that police the social appearance of gender.[62]

Thus, gender is not something a person *is*, rather it is something a person *does* – an act, or a series of repeated acts. A person's gender therefore can be viewed as a verb rather than a noun, a "doing" rather than a "being".[63] These performances and repeated acts and behaviours take place within different discourses, including the "highly rigid regulatory frame" of legal discourse. A Butlerian analysis of law suggests therefore that, although both a man and a woman demonstrate legally recognised relevant masculine and feminine behaviour repeatedly, they do so differently. Thus, as usefully pointed out by Scott-Hunt and Lim, the legally recognised behaviour repeatedly "heard" or "understood" by law is that of the masculine identity:

> One important reason why equity rarely embodies women's points of view is precisely because there is often no place for them within law and the legal

61 Butler, *Gender Trouble*, n. 11 above, p. 1.

62 Ibid. pp. 40–4.

63 Ibid. p. 25.

> process to be heard or because, if heard, they are not understood. The sorry saga of disputes over the family home in English trust law is a classic instance of judges operating entirely within the equitable domain, but failing to hear the woman's point of view or to comprehend her approach to justice.[64]

The judges can't "hear" or "comprehend" because in most cases, the women are performing their femininity as expected. As pointed out by Smart, the discourse of law insists on a "rigid distinction between male and female, masculine and feminine, insisting that certain attributes follow this biological distinction".[65] It is conceivable that the performance of gendered identities leads women and men to use language differently thereby creating different expectations within a relationship.[66] Arguably, cohabitants may have differing perceptions about what "commitment" means in their relationships. Deech points out that:

Cohabitants have different perceptions about their commitment to each other. In particular, the man normally does not accept commitment until he has made a clear decision about their future together, whereas the woman will see it in her moving in.[67]

There has been some important work, particularly feminist work, carried out over the years in this field suggesting that there are indeed identifiable differences between the performance of femininity and the performance of masculinity. Work undertaken by Bottomley in this area usefully exposes that the potential conflict between men and women may well be due to a "narrative of differing expectations".[68]

For example, Gilligan's important analysis in the early 1980s opened up the possibility that men and women use language differently, to communicate different things. Gilligan argued that women are more likely to voice their concerns in terms of conflicting responsibilities and their effect on relationships with others, while men are more likely to view the world in terms of hierarchical principles that determine what is right and wrong. Thus, "the way people talk about their lives is significant, the language they use and the connections they make reveal the world that they see and in which they act".[69]

Tannen writing in the early 1990s, argued that gender differences are parallel to cross-cultural differences.[70] Tannen explored the notion that, when interpreting the cultural information encoded by language, men and women rely on different subcultural norms. Female subculture uses language to build equal relationships, while male subculture uses language to build hierarchical relationships. Tannen's research opened the door to the possibility that women place more attention and importance on underlying meanings about intimacy. Conversely, men, to a greater extent than women, are more sensitive to "between the lines meanings" about status. Oropesa, writing in 1996, took this slightly further arguing that responses given to questions about attitudes to cohabitation demonstrate that individuals can have internalised norms about appropriate and "normal" behaviour with

64 S Scott-Hunt and H Lim, *Feminist Perspectives on Equity and Trusts* (London: Cavendish 2001), p. 10.

65 C Smart, *Law, Crime and Sexuality: Essays in feminism* (London: Sage 1995), p. 219.

66 R Lakoff, *Language and Women's Place* (New York: Harper & Row 1975).

67 Baroness Deech, 13 March 2009, HL debs, col. 1419, Cohabitation Bill Second Reading. Deech was speaking against legal recognition of cohabiting relationships – a position she has taken for some considerable time. See, for example, her article "The case against legal recognition of cohabitation" (1980) 29 *International and Comparative Law Quarterly* 480.

68 A Bottomley, "Self and subjectivities: languages of claim in property law" (1993) 20(1) *Journal of Law and Society* 60–1.

69 C Gilligan, *In a Different Voice* (Cambridge MA: Harvard UP 1982).

70 D Tannen, *You Just Don't Understand: Women and men in conversation* (New York: Morrow 1990).

respect to their cohabiting relationship.[71] More recent work, such as that of Skeggs, usefully draws out that law places values on the behaviour of an individual in an intimate relationship: "explicit quantification of value still takes place in Law where the 'proper' of an intimate relationship is adjudicated".[72]

The research into the use of language briefly outlined above facilitates a different interpretation of words and actions in relation to property disputes between cohabitating couples. It allows us to acknowledge the possibility that conversations between men and women have significance and meaning attached to say "moving in together". These actions can mean different things according to whether one is a man or woman or, using Butler's argument, dependent on whether one is performing one's masculinity or femininity. However, the range of possible responses, meanings and interpretations are not acknowledged by law, which continues to advance one singular interpretation of behaviour and conduct in intimate relationships. It is, arguably, masculinised behaviour that privileges and interprets financial behaviour as legally relevant.

Some conclusions

It would appear then that legal judgments continue to construct not only the truth of law but also continue to reinforce the truth of correctly performed masculinity/femininity. If so, reforms of the law based on family function or measures of commitment won't, on their own, make any significant difference to constructive trusts because both function and commitment are still comprehended only in gendered terms and will continue to be performed by law in the same old ways. However, viewing what is going on through the performativity lens also means that there is room for resistance. Because truth or identity is always being performed/constructed/reconstructed, it can be performed differently, opening up space to understand it differently. Law, for example, does depart from precedent occasionally, so there is the possibility that legal truth can come to look different. Similarly, gender performance can shift, so ideas of proper wifehood/husbandhood/demonstrations of commitment/intention are not fixed. However, two things need to happen simultaneously: firstly, space needs to open up within legal discourse to "test" differently for functionality or commitment and, secondly, men and women need to begin to "do" intimacy/commitment/cohabitation differently. Unless these two things happen, nothing much will change. If we want to stay within law's rules of intention, detriment, etc., we need law to understand evidence of intention to share outside of currently performatively constructed gendered rationalities.

Given that constructive trusts are "imposed by equity in order to satisfy the demands of justice and good conscience",[73] it is a source of continuing disappointment that they fail to do so in many cases. It is clear that "particularly in cohabitants' cases, the courts seem to continue to attach substantial weight to the parties' respective financial contributions".[74] Cases such as *Stack* v *Dowden* and *Oxley* v *Hiscock* clearly illustrate that parties' non-financial contributions get little if any mention during the court's deliberations on quantification.[75]

Law should take the opportunity to re-examine at a fundamental level what "counts" as legally relevant behaviour and resist the temptation to adhere to the current persistent and

71 R S Oropesa, "Normative beliefs about marriage and cohabitation: a comparison of non-Latino whites, Mexican Americans and Puerto Ricans" (1996) 58(1) *Journal of Marriage and Family* 49–62.

72 B Skeggs, "The value of relationships: affective scenes and emotional performances" (2010) 18 *Feminist Legal Studies* 29–51, p. 38.

73 McGhee and Turner, *Snell's Equity*, n. 7 above, p. 192.

74 Law Commission, *Cohabitation*, n. 8 above, p. 79.

75 Ibid.

performatively constructed overly narrow, rigid idea of legally relevant behaviour. The discourse of law continues to expect individuals to perform their gender roles in the expected way, but only rewards a narrow range of legally recognised behaviour performances. Individuals who are seeking to gain a proprietary interest have little immediate choice but to perform the gender identity expected of them notwithstanding that this is a reflection of law's discourse, not an identity of their own making – as Butler states, the subject is "led to embrace the terms that injure me because they constitute me socially".[76] The ways in which law and society continue to perceive gender roles arguably lies at the very root of inequality of the sexes. If we deconstruct socio-legal views of gender roles, changes in society might follow "arresting the reproduction of systematic inequalities".[77]

The continuing inability or denial of law to recognise gendered difference is not to suggest, however, that we are "stuck" with law's expected gender performances. Arguably, there remains the possibility of a "space" which will allow some degree of resistance to the strictures of power.[78] There are ways in which there might be potential for resistance to some of the hegemonic norms constructed by legal discourse through "resignification": "the site of radical reoccupation and resignification". Juridical power conceals the mechanism of its own productivity, thus;

> Juridical power inevitably "produces" what it claims merely to represent. In effect, the Law produces and then conceals the notion of a "subject before the Law" in order to invoke that discursive formation as a naturalised foundational premise that subsequently legitimates law's own regulatory hegemony.[79]

During the course of this paper I have attempted to offer an alternative reading of conduct and behaviour as performatively constituted. If, as Butler argues, the subject is not formed once and for all, but it is continuously and repeatedly produced, there is the scope for legal discourse to re-evaluate what performances count when deciding upon proprietary interests. There is a need to place much greater focus upon the "use of language", to move away from a financial focus.[80] I am not suggesting that the ideas presented in this paper have the solution for the seemingly intractable problems of cohabitants' property disputes. However, the fact remains that, despite numerous attempts and what must amount to thousands of hours spent trying to solve the problem, no solution has been found and, at the time of writing, does not look likely to be found. Nevertheless, if there is one relatively uncontroversial statement that can be made, it is that reform is chronically urgently overdue.[81] Until law recognises the plurality of the learnt nature of gender and its performativity, the property interests of cohabitants will continue to be determined according to an inaccurate perception of identity formation and relationships meaning that the demands of justice and good conscience will continue to go unfulfilled.

76 J Butler, *The Psychic Life of Power: Theories in subjection* (Stanford: Stanford UP 1997), p. 104.

77 M T Talbot, *Language and Gender: An introduction* (Cambridge: Polity Press 1998), p. 15.

78 M Foucault, *History of Sexuality vol. 1: An Introduction*, R Hurley (trans.) (New York: Vintage/Random House 1980).

79 Butler, *Gender Trouble*, n. 11 above, p. 3.

80 Bottomley, "Self and subjectivities", n. 68 above, p. 61.

81 In fact, the need for reform has been "urgent" for some considerable amount of time. See, for example, Barlow and Lind, "A matter of trust", n. 42 above, p. 488.

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Caveat sublessee

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Conveyancers will be familiar with assurances in which the grantor is expressed to convey "as beneficial owner" or "as trustee" or in some other capacity. The purpose is to import into the assurance the covenants for title set out in s. 7 of the Conveyancing and Law of Property Act 1881, thereby avoiding the necessity of setting out such covenants in full in the deed itself. The provisions of s. 7 do not apply, however, to the grant of a lease,[1] though such an instrument is commonplace, and the need for the lessee to be protected is no less than that of grantees in assurances to which s. 7 does apply. The purpose of this note is to examine the protection afforded to a sublessee by covenants for title on the part of the sublessor, though much of what is said will be equally applicable in the case of the grant of a lease. The consideration which makes the position of a sublessee of interest is that his enjoyment of his land under the sublease depends upon the continued existence of the headlease. While a lessee from a lessor in fee simple is likewise at risk that his enjoyment of the land will come to an end as a result of a claim by someone with title paramount,[2] the risk for a sublessee is greater, not only because the sublessor's estate *must* terminate (by effluxion of time), but also because of the danger that it may end earlier than anticipated by forfeiture, if the rent reserved by the headlease is not paid or the covenants in it are not observed by the sublessor. It is the fact that the sublessee depends for his enjoyment of the land demised to him on someone else carrying out her obligations to a third party that makes the position of the sublessee different from that of an assignee of a lease or a purchaser in fee simple. While the assignee or purchaser may be at risk if she does not observe the terms of any covenants affecting the land she has acquired, her fate lies in her own hands, and the former owners of the land effectively step out of the picture once the transaction takes place. The sublessee is in a different position: he may well comply with all the obligations contained in the sublease; it may be also that he does nothing to contravene anything in the headlease; yet if the sublessor fails to perform her obligations in the headlease, the sublessee may suffer the consequences. The question is whether he has a remedy against the sublessor if that turns out to be the case.

1 S. 7(5).

2 "[E]viction by title paramount means eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence": *Neale* v *Mackenzie* (1836) 1 M & W 747, at 759 per Lord Denman CJ. Cp. *Matthey* v *Curling* [1922] AC 180, at 227 per Lord Buckmaster : "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor".

The picture which emerges is unusual in some respects. First, in contrast to assurances to which s. 7 of the Conveyancing Act applies, sublessees may well feel confident from being able to point to covenants on the part of the sublessor expressly set out in the assurance to them. Such confidence may be misplaced, however, since the very fact that the sublessor's covenants are expressed in the instrument on which the sublessee relies is likely to limit the liability of the sublessor rather than secure the protection of the sublessee,[3] and, more importantly, displaces the covenants which would be implied at common law. While this might suggest that a sublessee would be in a better position were he to rely simply on the covenants which would be implied at common law in the absence of any provision in the sublease, this would be inaccurate. While at common law an action of covenant would lie in favour of a sublessee against the sublessor if the former was disturbed in his enjoyment of the land by the latter notwithstanding the absence of any express covenant in the sublease, the sublessor was under no liability where the sublessee was dispossessed at the behest of a superior lessor.

A second feature which makes the picture unusual relates to the position in Ireland. The position of lessees and sublessees in Ireland significantly improved with the enactment of the provisions contained in s. 41 of Deasy's Act. What is notable about the section, however, is not its applicability, but the fact that it will be *in*applicable in most cases. The invariable practice of including express covenants for quiet enjoyment in leases and subleases in Ireland has the effect of excluding the operation of the section and results in the protection afforded to sublessees being limited to what the sublease provides. What may be more notable, however, is that it may be the case that lessees and sublessees may be entitled to the wider protection that the section provides, yet settle for less. If the sublease has come about as the result of a contract made by the parties beforehand, the sublessee's entitlement under that contract may be to a covenant from the sublessor more extensive than the one usually found in leases and subleases. A consideration of the position independently of s. 41, and under its provisions, may serve to prompt conveyancers to reconsider whether they should be content to accept the usual form of covenants on the part of lessors when approving a lease or a sublease, or should try to negotiate better protection for their clients, or (strange though it sounds) should insist that *no* covenant appear in the lease or sublease to their client.[4]

Basic principles

It is not difficult to appreciate that, in the absence of statutory provisions to provide otherwise, a lessee's right to enjoy the land demised to him is dependent on the title of the person who made the lease. So, for example, in the case of a lease made by a tenant for life, on the death of the lessor the lease will not be binding on the remainderman, who accordingly will have a better right to possession than the lessee. So, too, in the case of a lease (the headlease) and sublease, the starting point in analysing the situation is that termination of the headlease will give the person who made it (the superior lessor) a right to possession which will take priority over that of the sublessee. Whatever may be the position as between sublessor and sublessee, as between the superior lessor and the sublessee, the latter will have no defence to a claim to possession of the land by the former. Thus, where the headlease comes to an end by effluxion of time,[5] by service of a notice to

3 Anon, "Landlords' Covenants" (1937) 2 *Conv* (NS) 11, at 12.

4 See *Colhoun* v *Trustees of Foyle College* [1898] 1 IR 233, at 234 and 237; below, p. 215.

5 *Thai Holdings Ltd* v *The Mountaineer Ltd* [2006] 1 NZLR 772.

quit,[6] by exercise of a break clause,[7] or by forfeiture,[8] the sublessee will have to go, as the superior lessor has a better right to possession than the sublessee. It is otherwise if the headlease comes to an end by surrender[9] or merger,[10] the explanation being that in such cases the consensual act on which the headlease ends cannot prejudice the interest of a third party, the sublessee.[11] Likewise, the sublessee's rights remain good as against the superior lessor where the headlease is disclaimed on the sublessor's insolvency.[12] The lessee under a lease created by a tenant for life, and the sublessee whose enjoyment depends on the continued existence of a headlease, may be aggrieved that they can no longer enjoy the land demised to them, but it is not hard to see why. What may surprise them is to learn that they may have no remedy against their respective lessors.

Of the two cases mentioned, the dangers for someone wanting to take a lease from a tenant for life are surmountable because of the Settled Land Acts. A tenant for life observing the provisions of the Acts is able to make a lease which will be binding on the remainderman after the death of the tenant for life. The lessee who takes a lease from a tenant for life needs only to be sure that the lease is made in accordance with the provisions of the legislation. The more common case where the same danger arises is that of someone taking a lease from a lessee. The sublessee's enjoyment of his land is dependent not only on performance of his own obligations under the sublease, but also on the continued existence of the headlease. If the term of the headlease runs out naturally before the term created by the sublease is due to end, then while the sublessee can complain that he has not had the benefit of what the sublessor contracted to give him, it is arguable that the sublessee has only himself to blame in not ascertaining what the sublessor's title was.[13] Given, however, the statutory restrictions on the ability of lessees and sublessees to investigate the title of the person making the lease or sublease,[14] culpability might appear harsh. Nonetheless, it is well established.[15] Aside from that, sympathy for the sublessee must surely exist if the headlease comes to an end otherwise than by running its full term. The continued existence of the headlease may well depend on the performance and observance of covenants in it on the part of the sublessor in her capacity as lessee under the headlease. Failure by the sublessor to perform and observe such covenants will expose the headlease to forfeiture, and forfeiture will bring down the sublease as well. True, the sublessee has a measure of

6 *Sherwood* v *Moody* [1952] 1 All ER 389; *Pennell* v *Payne* [1995] QB 192; *Barrett* v *Morgan* [2000] 2 AC 264; *McBirney & Co. Ltd* v *Morris* [1942] IR 364.

7 *PW & Co.* v *Milton Gate Investments Ltd* [2004] Ch 142; *Kay* v *London Borough of Lambeth* [2006] UKHL 10.

8 *Great Western Railway Co.* v *Smith* (1876) 2 Ch D 235; *Viscount Chelsea* v *Hutchinson* [1994] 2 EGLR 61; *Hammersmith & Fulham London Borough Council* v *Top Shop Centres Ltd* [1989] 2 All ER 655, at 669 per Walton J: "once the headlease has been forfeited, the underlessees are, vis-à-vis the freeholder, trespassers".

9 *Doe d Breadon v Pyke* (1816) 5 M & S 146; *Mellor* v *Watkins* (1874) 9 QB 400; *Pleasant* v *Benson* (1811) 14 East 234; *Fleeton* v *Fitzgerald* [1998] NSWSC 696; *Crosswell* v *Meriton Pty Ltd* [1993] ASSC 114. See, however, also discussion in *Kay* v *London Borough of Lambeth* [2006] UKHL 10, at [143].

10 *Robert Bryce & Co. Ltd* v *Stowehill Investments Ltd* [2000] 3 NZLR 535; *Canada Safeway Ltd* v *Surrey (City)* (2004) 35 BCLR (4th) 73.

11 For statements of the relevant principles, see *Pennell* v *Payne* [1995] QB 192; *Barrett* v *Morgan* [2000] 2 AC 204; *PW & Co.* v *Milton Gate Investments Ltd* [2004] Ch 142; *London Borough of Islington* v *Green* [2005] EWCA Civ 56; *Kay* v *London Borough of Lambeth* [2006] UKHL 10; *Thai Holdings Ltd* v *The Mountaineer Ltd* [2006] 1 NZLR 772.

12 *Hindcastle Ltd* v *Barbara Attenborough Associates Ltd* [1997] AC 70.

13 See *Adams* v *Gibney* (1830) 6 Bing 656; *Besley* v *Besley* (1878) 9 Ch D 103; *Clayton* v *Leech* (1889) 41 Ch D 103; *Keech* v *Hall* (1778) 1 Doug 21.

14 Vendor and Purchaser Act 1874, s. 2; Conveyancing and Law of Property Act 1881, ss. 3 and 13.

15 See *Imray* v *Oakshette* [1897] 2 QB 218 where a sublessee was refused relief against forfeiture of the headlease on the basis that he had been negligent in not discovering the terms of the headlease, notwithstanding that he was precluded from calling for the headlease by the statutory provisions.

protection, in that if he is aware that the sublessor has not paid the rent due under the headlease to the superior lessor, the sublessee may be able to fend off forfeiture proceedings by the latter by paying the superior lessor what he is owed, in order to protect the sublessee from eviction. If he does so, the sublessee will be able to set up such payment in defence of any later action by the sublessor for rent due to her from the sublessee.[16] If the sublessor has received the rent she is owed by the sublessee, the payment made by the sublessee to the superior lessor is recoverable from the sublessor in an action for money had and received,[17] or by sale of the sublessor's interest, the sublessee being a secured creditor for the amount he has paid.[18] Even if the superior lessor has not threatened eviction, the sublessee may voluntarily make payment to the superior lessor of so much of the rent payable under the sublease as is needed to discharge the rent due under the headlease, by virtue of s. 21 of Deasy's Act.[19] Apart from such salvage provisions, if forfeiture of the headlease does take place, for non-payment of rent or for breach of any other term of the headlease, the sublessee is able to apply for relief against forfeiture.[20] Relief is not, however, assured, and even if obtained, will put the sublessee to inconvenience and expense. If the forfeiture has been occasioned by fault on the part of the sublessor, it might be expected that the sublessee should have an action against the sublessor.

Eviction by title paramount

The dispossession of a sublessee as a result of a claim by someone with a title paramount to that of the sublessor, such as a superior lessor, will suspend the sublessee's obligation to pay the rent reserved by the sublease for as long as the dispossession subsists.[21] In such circumstances, the sublessee is not precluded from defending any claim the sublessor may bring for the rent by the rule that a lessee may not impugn the title of his lessor.[22] So far as the sublessee's liability under covenants in the sublease is concerned, if the rent is suspended, no action will lie on any covenant by the sublessee to pay it.[23] Nor, on the basis of *Andrews* v *Needham*,[24] will an action lie for breach of a covenant by the sublessee

16 *Sapsford* v *Fletcher* (1792) 4 TR 511; *Taylor* v *Zamira* (1816) 6 Taunt 524; *Carter* v *Carter* (1829) 5 Bing 406. The basis on which the cases rest was explained by Rolfe B in *Graham* v *Allsopp* (1848) 3 Ex 186, at 198, as being that the sublessor "is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorised by the landlord so to apply his rent due or accruing due". See also *Jones* v *Morris* (1849) 3 Ex 742.

17 *Graham* v *Allsopp* (1848) 3 Ex 186; *Ryan* v *Byrne* (1883) 17 ILTR 102; *Murphy* v *Davey* (1884) 14 LR Ir 28.

18 *Locke* v *Evans* (1823) 11 Ir Eq Rep 52; *O'Geran* v *McSwiney* (1874) IR 8 Eq 500 & 624.

19 See *Ahearne* v *McSwiney* (1874) IR 8 CL 568; *Grogan* v *Regan* [1902] 2 IR 196.

20 Conveyancing and Law of Property Act 1892, s. 4; S Tromans, "Forfeiture of leases: relief for underlessees and holders of other derivative interests" [1986] *Conv* 187; *Hammersmith & Fulham London Borough Councils* v *Top Shop Centres Ltd* [1989] 2 All ER 655; *O'Connor* v *Mooney & Co.* [1982] ILRM 373; *Enock* v *Lambert Jones Estates Ltd* [1983] ILRM 532.

21 See *Matthey* v *Curling* [1922] AC 180, at 227, Lord Buckmaster referring to "the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent". Atkin LJ (dissenting) had explained the principle in the same case in the Court of Appeal (ibid. 200): "If a third party enters and evicts the lessee claiming by a lawful title superior to that of the lessor or lessee, then the obligation to pay rent is suspended entirely during the eviction if the eviction is from the whole of the demised premises, and is apportioned if it is from part."

22 *Hopcraft* v *Keys* (1833) 9 Bing 613; *Parker* v *Manning* (1798) 7 TR 537; *Levingston* v *Somers* [1941] IR 183; *Industrial Properties (Barton Hill) Ltd* v *Associated Electrical Industries Ltd* [1977] QB 580; *Yeung Lam Wilson* v *Lam Po Chong Priscilla* [2000] HKCA 398.

23 *Morrison* v *Chadwick* (1849) 7 CB (NS) 266; *Matthey* v *Curling* [1922] AC 180, at 227 per Lord Buckmaster.

24 (1597) Noy 75; Cro Eliz 656.

to yield up the premises at the end of the term created by the sublease, if the sublessee is evicted by someone with title paramount. Noy's report of the case records the ratio as being that "if the land be gone, the obligation is discharged". All that this means, however, is that the sublessee may be excused from performing his obligations in the sublease if he loses possession to someone claiming by title paramount: it does not mean that he will be compensated for that loss. To succeed in that, he must rely on one of the possibilities next considered.

Claims against the sublessor

Breach of covenant

One possible ground for an action by the sublessee against the sublessor is that the eviction of the sublessee by someone claiming by title paramount amounts to a breach of covenant by the sublessor. The covenant in question may be one which is expressly set out in the sublease. Even, however, if it is not, it is possible that an action will lie on the basis that a covenant on the part of the sublessor is implied.

Covenant(s) implied at common law

It is convenient to begin with considering the position if there is no covenant set out in the sublease on which the sublessee may base his action. The position in Ireland with regard to implied obligations is different from that which existed at common law.[25] It is necessary to examine briefly the latter first, in order to understand the improvements which legislation in Ireland brought about in the context with which we are concerned.

Covenant for quiet enjoyment

Where the sublessee's enjoyment of the property held by him is interrupted during the term created by the sublease, redress against the sublessor may be possible if there exists on the part of the sublessor a covenant by the sublessor for quiet enjoyment. In *Southwark London Borough Council* v *Tanner*,[26] Lord Millett explained that a such a covenant was originally regarded as one to secure title or possession, but its scope had been extended to cover any substantial interference with the ordinary enjoyment of the land, though neither title nor possession were affected. The recovery of possession by a third party such as a superior lessor will clearly come within the scope of a covenant for quiet enjoyment by the sublessor, but the question is whether recovery by such a third party is a breach for which the sublessor is liable under her covenant.

From the time of Coke it has been clear that an action would lie for a lessee against his lessor if the former was disturbed in his enjoyment of the land, notwithstanding the absence of an express covenant in the lease, on the ground that a covenant for quiet enjoyment might be implied from the use of the word "demise".[27] Use of the word imported what is variously described as a *covenant in law* or an *implied covenant*,[28] on the

25 For the position at common law, see further Russell, "Leasehold covenants for title" (1978) 47 *Conv* (NS) 418.

26 [2000] 1 AC 1, at 22.

27 For early authorities, see *Styles* v *Hearing* (1605) Cro Jac 73; *Holder* v *Taylor* (1614) Hob 12; *Coleman* v *Sherwyn* (1689) 1 Show KB 79.

28 "A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate: so that after they have had their primary operation in creating that estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created.": *Williams* v *Burrell* (1845) 1 CB 402, at 429 per Tindal CJ. The term "covenant in law" was considered more correct than "implied covenant" by Lord Russell CJ in *Baynes & Co.* v *Lloyd & Sons* [1895] 1 QB 820, at 822.

ground that a demise was held to carry with it an agreement for enjoyment of the thing granted.[29] Whether any other word would suffice to import this covenant remained, somewhat surprisingly, unsettled until comparatively recent times. Despite clearly expressed views that any expression equivalent to "demise" would suffice to import a promise for quiet enjoyment, and that this would be so whether the tenancy was created by deed, by instrument in writing or indeed by parol,[30] in 1895 Kay LJ thought that the weight of authority was in favour of the view that a covenant was not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease.[31] Shortly thereafter, however, a further review of the authorities led the Divisional Court (Lord Alverstone CJ, Darling and Channell JJ) to the opposite conclusion.[32] A few years later, Swinfen Eady J seems eventually to have settled the question, holding that a covenant for quiet enjoyment was implied in an agreement in which the words used were "agrees to let", saying that he was "bound to follow what the current of authority for more than the last sixty years had determined to be the law, and what three Chief Justices of England have successively held to be the common law, both upon principle and authority, and to be the only view consistent with common sense."[33]

Covenant for good title

An alternative basis upon which a claim may be possible against the sublessor, again resting on a covenant by the sublessor, is that the dispossession of the sublessee as a result of the termination of the headlease gives rise to breach of a covenant by the sublessor that she had good title to make the sublease. If such a covenant was entered into by the sublessor, then the destruction of the sublessor's title should allow a claim by the sublessee under the covenant. Whether the obligations implied on the part of a lessor at common law included a covenant for good title is, however, a matter of some difficulty. There are certainly statements that such a covenant would be implied, at least if the tenancy were created in writing.[34] Thus, in *Holder* v *Taylor*,[35] the court held that an action of covenant would lie where the lessor was not seised of the land he had purported to demise, on the basis that "the breach of covenant was, in that the lessor had taken upon him to demise that, which he could not; for the word [demisi] imports a power of letting, as [dedi] a power of giving". In *Line* v *Stephenson*,[36] Lord Denman CJ speaks of a covenant for title being implied from "demise", and Alderson B says that the term "raises a covenant, of which either want of title, or eviction would be a breach". The explanation of Parke B in *Sutton* v *Temple*[37] was

29 *Kean* v *Strong* (1845) 9 Ir LR 74, at 81 per Crampton J.

30 See *Hart* v *Windsor* (1843) 12 M & W 68, at 85 per Parke B: "it is clear that from the word 'demise,' in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let,' or any equivalent words, (Shepp. Touch, 272), which constitute a lease, have, no doubt, the same effect, but not more". See also *Bandy* v *Cartwright* (1853) 8 Ex 913; *Hall* v *City of London Brewery Co. Ltd* (1862) 2 B & S 737; *Penfold* v *Abbott* (1862) 32 LT NS 67; *Mostyn* v *West Mostyn Coal and Iron Co. Ltd* (1876) 1 CPD 145; *Robinson* v *Kilvert* (1889) 41 Ch D 88.

31 *Baynes & Co.* v *Lloyd & Sons* [1895] 2 QB 610, at 615. For earlier doubt whether alternative expressions to "demise" would suffice to import a covenant for quiet enjoyment, see *Messent* v *Reynolds* (1846) 3 CB 194.

32 *Budd-Scott* v *Daniell* [1902] 2 KB 351.

33 *Markham* v *Paget* [1908] 1 Ch 697, at 716.

34 According to *Bandy* v *Cartwright* (1853) 8 Ex 913, no covenant for good title would be implied if the tenancy had been created orally.

35 (1614) Hob 12.

36 (1838) 5 Bing 183, at 186 and 185 respectively. See also *Mostyn* v *West Mostyn Coal and Iron Co. Ltd* (1876) 1 CPD 145.

37 (1843) 12 M & W 52, at 64.

that the law annexes to the word "demise" "a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term". In *Fraser* v *Skey*,[38] after stating that the plaintiff's declaration was bad, the report proceeds to say "or else it should have alleged a breach, that the lessor had no title to demise for so long a term". The clearest statements, however, that such a covenant is implied from use of the word "demise" are to be found in *Burnett* v *Lynch*[39] and *Baynes & Co.* v *Lloyd & Sons*.[40] In the former, Littledale J explained that "[a]n action of covenant will lie by the lessee against the lessor upon the word 'demise' in the lease; . . . that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term"; in the latter Lord Russell CJ said that "the word 'demise' . . . imports a covenant for title and a covenant for quiet enjoyment".

Notwithstanding such statements, doubts about what covenant is implied at common law from use of the term "demise" remain. Kay LJ in *Baynes & Co. v Lloyd & Sons*[41] commented that that no authorities had been cited by Littledale J for the proposition advanced in *Burnett* v *Lynch*, and described Lord Denman's statement as an admission made somewhat doubtfully. In *Leonard* v *Taylor*,[42] Fitzgerald and Barry JJ appear to consider the covenant implied from use of the term "demise" to be one for quiet enjoyment. Doubt exists also as to whether the covenant implied for good title is a separate covenant or part of the covenant for quiet enjoyment which undoubtedly is implied. While there is a clear dictum in *Norman* v *Foster*[43] that the covenant for good title and that for quiet enjoyment are separate, this was explained in the Common Pleas in *Line* v *Stephenson*[44] as referring to a lease in which there were express covenants. Lord Russell's view, quoted above, suggests, however, that no such distinction is needed. Most recently, the position has been said to be that the promises implied from "demise" are that the lessor is entitled to grant some term in the demised premises, and that the lessee will have quiet enjoyment; and that such promises are more properly to be regarded as embodied in one single covenant, and that this covenant may be broken either by want of title or by eviction of the tenant.[45]

Eviction by title paramount

Although a covenant on the part of a lessor was implied by "demise" or an equivalent expression, it eventually became established that the covenant so implied would not render a sublessor liable to her sublessee where the latter was dispossessed as a result of a claim by title paramount. An early authority is *Andrews' Case*,[46] the short report of which records Gawdy and Fenner JJ as holding that the covenant implied from "demise" would protect the lessee against entry by the lessor but not against entry by a stranger.[47] A line of

38 (1773) 2 Chitty's Reports 646.

39 (1826) 5 B & C 589, at 609.

40 [1895] 1 QB 820, at 825.

41 [1895] 2 QB 610, at 616.

42 (1873) 7 LR Ir 207, at 216 and 217 respectively.

43 (1673) 1 Mod 101.

44 (1838) 4 Bing (NC) 678, at 683; 1 Arn 294, at 298.

45 *Miller* v *Emcer Products Ltd* [1956] Ch 304, at 319 per Romer LJ.

46 (1589) 2 Leon 104.

47 Note, however, the explanation of *Andrews' Case* given by in *Markham* v *Paget* [1908] 1 Ch 697, at 717–18, in which Swinfen Eady J considered that the authority establishing the rule that the covenant for quiet enjoyment implied from "demise" does not render the lessor liable for claims by title paramount is the much later decision in *Jones* v *Lavington* [1903] 1 KB 253, and that until *Baynes & Co.* v *Lloyd & Sons* [1895] 2 QB 610 the received view was that lessors *would* be liable as a result of such claims. For the view that the covenant would render the covenantor liable if the covenantee were dispossessed by someone claiming by title paramount, see

authorities relevant to the question exists involving leases made by a tenant for life, where the lessee had been dispossessed during the term created by the lease by a remainderman who had become entitled to possession following the death of the tenant for life/lessor. In these cases, the courts took the view that the lessor's executors would not be liable in an action on the covenant for quiet enjoyment implied on the part of the lessor.[48] The explanation was that such covenant would not bind the lessor to do more than was in his power.[49] In *Penfold* v *Abbott*,[50] a yearly tenant failed in an action against his landlord following a claim brought by someone with a title paramount, Wightman J saying that "the agreement on the part of the lessor implies no more than that the lessee shall have quiet enjoyment so long as his, the lessor's, interest in the premises lasts".[51]

The result reached in the cases involving leases by tenants for life was reached also in cases involving leases and subleases. *Penfold* v *Abbott*, mentioned already, is one. In *Granger* v *Collins*,[52] an action of assumpsit by a sublessee evicted by a superior lessor failed on the basis that no promise by the sublessor against eviction by the superior lessor was implied from the relation of landlord and tenant between the defendant and the plaintiff. In *Schwartz* v *Locket*,[53] an action by a yearly tenant against his landlord, a lessee, for breach of an implied covenant for quiet enjoyment failed where the tenant had been dispossessed before the end of the current year of the tenancy as a result of proceedings by the superior lessor after expiry of the lease. *Baynes & Co.* v *Lloyd & Sons*[54] involved a subletting where the term of the sublease exceeded the remainder of the term of the lease under which the sublessor held the premises. On expiry of the lease, possession was recovered by the superior lessor, and the sublessee brought an action against the sublessor for damages, alleging breach of an implied covenant for title or alternatively for quiet enjoyment. Again, the action failed. Finally, in *Jones* v *Lavington*,[55] a sublessee who acted in contravention of a restrictive covenant contained in the headlease (of which covenant he was unaware) was unable to recover against the sublessor on the implied covenant for quiet enjoyment after the superior lessor had obtained an injunction restraining the sublessee's activity. The position was eventually summarised by Pearson J in *Kenny* v *Preen*[56] as being that "[t]he implied covenant for quiet enjoyment is not an absolute covenant protecting a tenant against eviction or interference by anybody, but is a qualified covenant protecting the tenant against

[n. 47 cont.] *Hayes* v *Bickerstaff* (1669) Vaughan 118, at 119; *Hart* v *Windsor* (1843) 12 M & W 68, at 85; and the doubt expressed by Charles J in *Hoare* v *Chambers* (1895) 11 TLR 185, at 186. Holdsworth mentions a number of decisions in the Year Books in which the view had been that the covenantor would be liable in such circumstances: see Holdsworth, *History of English Law* (1925) vii, pp. 251–2.

48 *Swan* v *Stransham* (1566) 3 Dyer 257a; *Cheiny and Langley's Case* (1588) 1 Leon 179, sub nom. *Landydale* v *Cheyney* Cro Eliz 157; *Bragg* v *Wiseman* (1614) 1 Brownl 22; *Adams* v *Gibney* (1830) 6 Bing 656.

49 *Monypenny* v *Monypenny* (1861) 9 HLC 114, at 139 per Lord St Leonards: "*Adams* v *Gibney* . . . shows that, in a case like this, where the estate of the lessor ceased with his life, the executors shall not be charged with the implied covenant, because the covenant in law ends and determines with the estate and interest of the lessor. That is a rule of law; it does not depend upon particular circumstances. It is an abstract rule of law, that if there is a demise, upon which demise at common law there is an implied covenant, that implied covenant is restrained and restricted in the way I have stated. The covenant does not bind them to do more than he himself can do."

50 (1862) 32 LT NS 67.

51 Ibid, 68.

52 (1840) 6 M & W 458.

53 (1889) 61 LT NS 719.

54 [1895] 2 QB 610.

55 [1903] 1 KB 253.

56 [1963] 1 QB 499, at 511.

interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord".

Ireland: s. 41 of Deasy's Act

The provisions of s. 41 of Deasy's Act mean that in Ireland some of the questions as to the obligations of a sublessor at common law can be left aside. Where s. 41 applies, a sublessee can rely on the agreement on the part of the sublessor implied by the section. The security the section provides will, however, not be available in all cases. Some of the cases in which the section will not apply are apparent from its terms: others are less obvious.

The section provides as follows:

> Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply an agreement on the part of the landlord making such lease, his heirs, executors, administrators, and assigns, with the tenant thereof for the time being, that the said landlord has good title to make such lease, and that the tenant shall have the quiet and peaceable enjoyment of the said lands or tenements without the interruption of the landlord or any person whomsoever during the term contracted for, so long as the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant.

In cases where the section applies, the agreement implied on the part of a sublessor will be more beneficial to the sublessee than the obligations which would be implied at common law. Not only is it clear that an agreement is implied that the sublessor has good title; the agreement is that she has good title to make "such lease", i.e. the sublease in question, not just *some* lease. It is, however, in the agreement implied as to quiet enjoyment that the improvement in the position of the sublessee effected by the section can be seen. The agreement implied under the section is that the sublessee will have quiet enjoyment *during the term contracted for* and without interruption of the sublessor *or any person whomsoever*. The former expression extends the liability of the sublessor beyond that under the covenant implied at common law, which was limited to the continuance of the sublessor's estate.[57] The latter expression is clearly capable of extending to interruption by a superior lessor.[58] If it does, then the existence of the agreement provided by s. 41 should provide the sublessee with a remedy against the sublessor in the circumstances. Despite this, in some cases sublessees may not be in as strong a position by reason of the section as they might suppose. First, the section will not apply unless there is a lease, defined in s. 1 of the Act as meaning an instrument in writing. A sublessee whose tenancy has been created orally will not therefore be able to rely on the agreement as to title and quiet enjoyment which the section specifies.[59] Secondly, the section will not apply if the tenancy of the sublessee is rendered void by s. 18 of the Act.[60] The reasoning is that the agreement mentioned in s. 41 is implied where there is "a lease, a landlord and a tenant", all of which are absent if the

57 Above, p. 208. Cp. the position under express covenants in which similar words to those in s. 41 have appeared: *Evans* v *Vaughan* (1825) 4 B & C 261; *Williams* v *Burrell* (1845) 1 CB 401; below, p. 211.

58 Cp. *Foster* v *Pierson* (1792) 4 TR 617 where similar words appeared in an express covenant; below, p. 212.

59 Whether a sublessee whose tenancy has been created orally can assert instead that there exists on the part of the sublessor the covenant implied at common law for quiet enjoyment (none for title being implied in an oral tenancy) is not clear. The competing arguments are that in stating that obligations are implied in leases, none are implied otherwise; or alternatively, that the section defines the terms of the obligations implied in a lease, and in failing to deal with oral tenancies leaves the position at common law untouched. The latter appears to have been the view of Gibson J in *Canavan* v *Burton* [1900] 2 IR 359, at 364.

60 *Canavan* v *Burton* [1900] 2 IR 359 at 370; *Knight* v *Smith* [1947] Ir Jur Rep 17; *Carew* v *Jackson* [1966] IR 177.

tenancy is void by reason of s. 18.[61] In contrast, if the position is merely that the sublessor has no title to grant the tenancy, the sublessee will be able to sue on the implied agreement as the sublessor will be estopped from denying the tenancy exists.[62] Thirdly, even if the section does apply, and there is implied on the part of the sublessor the agreement mentioned in the section, *Whelan* v *Madigan*[63] and *Riordan and Mulligan* v *Carroll*[64] show that the sublessor's obligation under the agreement is dependent upon the sublessee's performance of his own obligations.[65]

The final caveat to note regarding the applicability of s. 41 is potentially the most significant for present purposes. The terms of the section are that an agreement will be implied on the part of the sublessor "unless otherwise expressly provided by such lease" (i.e. by the sublease). No agreement will be implied under the section if the sublease contains terms bringing the case within this proviso. In this regard, the section mirrors the position at common law. A series of decisions beginning with *Nokes' Case*[66] had established that the presence of an express covenant in a lease would exclude implication of a covenant which would otherwise be implied from the grant made. It was clear too that this was the case also if the express covenant was not as extensive as the covenant which would otherwise be implied. In *Merrill* v *Frame*,[67] a lessee sought to rely on the implied covenant for good title to recover against the lessor where the lessee had been evicted as a result of a claim by title paramount. The court held that the existence of an express covenant for quiet enjoyment prevented the lessee from doing so. *Line* v *Stephenson*[68] illustrates the extent of the principle, the court rejecting the lessee's argument that two covenants were implied from "demise", namely a covenant for good title and a covenant for quiet enjoyment, and that the latter only was excluded by an express covenant in the lease for quiet enjoyment.[69]

61 *Canavan* v *Burton* [1900] 2 IR 359, at 366 per Gibson J. In the words of Palles CB (at 361) "it is not sufficient that the instrument should *purport* to create the relation of landlord and tenant, if in fact it is inoperative to do so". Whether the sublessee can rely on express covenants in a void sublease is a matter which the authorities leave open.

62 *Downes* v *Hamilton* (1949) 83 ILTR 78.

63 [1978] ILRM 136.

64 Unreported, 28 July 1995, High Court, Ireland.

65 In this regard the position under the section is different from that in cases in which lessors have been held liable under express covenants for quiet enjoyment to lessees who were in breach of their obligations even where the covenant appears premised on the lessee paying the rent and performing his obligations: see *Dawson* v *Dyer* (1833) 5 B & Ad 584; *Edge* v *Boileau* (1885) 16 QBD 117; *Slater* v *Hawkins* [1982] 2 NZLR 541. For the contrary view, see *Anon* (1589) 4 Leon 50; *Crofter Properties Ltd* v *Genport Ltd* unreported, 15 March 1996, High Court, Ireland.

66 (1599) 4 Co Rep 80b, also reported sub nom. *Nokes* v *James* Cro Eliz 674, but note the preference in *Line* v *Stephenson* (1838) 7 LJCP 263 for the former report. For later cases applying the principle, see *Proctor* v *Johnson* (1609) 2 Brownl 212; *Brown* v *Brown* (1638) 1 Lev 57; *Deering* v *Farrington* (1674) 1 Mod 113; *Clarke* v *Samson* (1748) 1 Ves 100; *Dennett* v *Atherton* (1872) 7 QB 316; *Clayton* v *Leech* (1889) 41 Ch D 103; *Grosvenor Hotel Co.* v *Hamilton* [1894] 2 QB 836; *Miller* v *Emcer Products Ltd* [1956] Ch 304; *Cowan* v *Factor* [1948] IR 128; *Murphy* v *Bandon Co-operative Agricultural and Dairy Society Ltd* [1909] 2 IR 510.

67 (1812) 4 Taunt 329.

68 (1838) 4 Bing NC 678; 1 Arn 294; 7 LJCP 263 (Common Pleas); (1838) 5 Bing NC 184; 7 Scott 69 (Exchequer Chamber).

69 The position was explained by Lord Cozens-Hardy MR in *Malzy* v *Eichholz* [1916] 2 KB 312, at 313: "when in a deed you find an express covenant dealing with a particular matter as to the demised premises there is no room for an implied covenant covering the same ground or any part of it. That is very old law . . . The very object of inserting a covenant for quiet enjoyment in a conveyance of freehold or leasehold property is to get rid of the implied covenant which is found in the word 'grant' or 'demise', whichever it may be. Then it is said that if the express covenant does not go far enough you can fall back upon the implied covenant from the word 'grant' or the word 'demise'. That proposition would be absolutely contrary to the uniform practice of all owners who deal with real property, and would moreover, be contrary to the law which has been perfectly established for more than half a century."

Whether the position was the same under s. 41 as that at common law just described was the issue in *Leonard* v *Taylor*.[70] Here a lease contained a covenant by the lessor for quiet enjoyment without interruption by the lessor or persons claiming under him. The lessee brought an action for breach of the agreement as to good title implied by s. 41. Though all three members of the Queen's Bench agreed that the action failed, different views of the effect of the legislation, and whether the position in Ireland was the same as that at common law, were expressed. For Whiteside CJ, it was to be assumed that Parliament was aware of the existing law, so that the same meaning should be attributed to the language of the agreement in s. 41 as had been given to covenants in similar language hitherto.[71] Fitzgerald and Barry JJ expressed doubts, however, on the decision reached, the former disagreeing with the view that the section merely declared the existing law[72] and doubting the application of the maxim upon which the decisions from *Nokes' Case* to *Line* v *Stephenson* had been decided,[73] the latter construing the expression "unless expressly provided by such lease" as meaning "unless there be a different express provision as to good title or quiet enjoyment contained in the lease".[74] On a writ of error to the Exchequer Chamber, the decision was affirmed, Palles CB saying that it was impossible to conclude that the agreement implied under s. 41 was identical to that at common law implied from "demise", and that little assistance to the meaning of the section could be gathered from considering the law before the section. He went on, however, to explain that the terms of the covenant in the lease were a provision contrary to what he described as both branches of the statutory agreement.[75]

Eviction by title paramount

One case is reported in which a claim under the agreement for quiet enjoyment implied under s. 41 has arisen in the context of a sublease, where the sublessor has been in breach of obligations owed by her to the superior lessor under a headlease, resulting in eviction by the superior lessor. In *Kearns* v *Oliver*,[76] the sublessee's claim was brought after he had been evicted by the superior lessor following non-payment of the rent due from the sublessor under the headlease. The sublessee argued that the sublessor would be liable under the implied agreement for quiet enjoyment "if (by himself suffering ejectment for non-payment of rent) he permitted his tenant to be evicted".[77] Unfortunately, for present purposes, Morris CJ was able to dismiss the sublessee's claim on other grounds, leaving unanswered the question whether the sublessee's argument was right.

Express covenant(s) by the sublessor

A sublessee wishing to recover against a sublessor following dispossession as a result of a claim by someone with title paramount may not have to worry about the niceties of the common law, or to rely on s. 41, if instead he can point to an express covenant in the sublease which deals with the issue. The sublessee may reasonably expect that a covenant for quiet enjoyment will be found in the sublease. The question is whether that is enough.

70 (1872) IR 7 CL 207 (Queen's Bench); (1874) IR 8 CL 301 (Exchequer Chamber).
71 (1872) IR 7 CL 207, at 213.
72 Ibid. 216.
73 Ibid. 217.
74 Ibid. 218.
75 (1874) IR 8 CL 310, at 305.
76 (1889) 24 LR Ir 473.
77 Ibid. 477.

Covenant for quiet enjoyment

Where the sublease has been professionally prepared, it will commonly be the case that a covenant for quiet enjoyment appears in the sublease. The precise terms of the covenant will of course determine the circumstances in which the lessor is to be liable. It is possible for the covenant so to be drafted that the sublessor will be liable for interruptions by someone claiming by title paramount,[78] but commonly the covenant found is one limiting the liability of the sublessor to her own acts and those of persons claiming under her. If such is the case, the prospect of a successful claim against the sublessor by a sublessee dispossessed during the term of the sublease in consequence of a claim by a superior lessor following termination of the headlease is slight, if it exists at all, as the act of the superior lessor in recovering possession is unlikely to be seen as the act of the sublessor or someone claiming under the sublessor. In *Spencer* v *Marriott*,[79] a sublessee was dispossessed following forfeiture of the headlease by the superior lessor in consequence of the use to which the premises were put by the sublessee, this contravening a covenant in the headlease. The sublessee's action against the sublessor on a covenant in the sublease for quiet enjoyment failed, the court holding that "the eviction was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises". Likewise, in *Besley* v *Besley*,[80] a sublessee failed in an attempt to recover compensation from the sublessor where a superior lessor entered on expiry of the headlease, and in *581834 Alberta Ltd* v *Alberta (Gaming and Liquor Commission)*[81] a sublessee failed in an action against his lessor on foot of a covenant for quiet enjoyment in the usual form where possession had been obtained by a mortgagee after default under a mortgage by a superior lessor.[82] In *Doyle* v *Hort*,[83] Palles CB said of a covenant limited to acts of the lessor and those claiming under him that the covenant "would not, of course, extend to acts of [a superior lessor], or of the owner of the fee". On appeal, Ball C was of the same view, saying that if the fee simple owner, in consequence of a breach of the provisions of the headlease, had elected to treat it as void, no remedy on the covenant for quiet enjoyment could have been had by the sublessee against the sublessor, for the disturbance would not have been by the sublessor or anyone claiming under him.[84] The decisions are in line with cases involving leases by tenants for life and entry by remaindermen, which proceed on the basis that such entry was not by someone claiming under the tenant for life.[85] While decisions do exist in which executors of tenants for life have been held liable where the lessee has been dispossessed as a result

78 *Brennan* v *Kettel* [2003] EWCA Civ 1186 (covenant against interruption by lessor or anyone claiming under or in trust for lessor or by title paramount); *Queensway Marketing Ltd* v *Associated Restaurants Ltd* [1988] 2 EGLR 49 ("lessor" defined as including superior lessor); *Foster* v *Pierson* (1792) 4 TR 617 (covenant covering acts of any person whomsoever). Covenants expressly rendering the lessor liable for the acts of someone with title paramount can be found also in *B & Q plc* v *Liverpool and Lancashire Properties Ltd* (2001) 81 P & CR 20 and *Matalan Discount Club (Cash & Carry) Ltd* v *Tokenspire Properties (North Western) Ltd* (unreported, 18 May 2001, Technology and Construction Court) though both cases proceed on other grounds. The decision in *Andrew* v *Pearce* (1803) 1 Bos & Pull 158 (covenant against interruption by any person whomsoever) in favour of the covenantor's executor likewise proceeds on a different ground.

79 (1823) 1 B & C 457.

80 (1878) 9 Ch D 103.

81 [2007] AJ No 1184 (Alberta CA).

82 Contrast the position where the mortgage is by the sublessor himself: *Sutherland* v *Wall* [1994] CLY 1448; *Yeung Lam Wilson* v *Law Po Chong Priscilla* [2000] HKCA 398; *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd* [2001] HKDC 150; cp. *Carpenter* v *Parker* (1857) 3 CB (NS) 206.

83 (1878) 4 LR Ir 455, at 467.

84 (1879) 4 LR Ir 455, at 477.

85 *Woodhouse* v *Jenkins* (1832) 9 Bing 431.

of a claim by a remainderman, the basis on which these proceed is that the covenantor had been party to a disposition from which the claimant's title was derived.[86]

The same result, viz. that a sublessor would not be liable on a covenant for quiet enjoyment where the dispossession of the sublessee was by reason of a claim by the superior lessor, was reached where the reason the headlease ended was fault on the part of the sublessor. In *Kelly* v *Rogers*,[87] the superior lessor recovered possession after forfeiting the headlease for non-payment of the rent by the sublessor. The dispossessed sublessee brought an action against the sublessor on the basis that the interruption of the sublessee's enjoyment was caused by the sublessor's failure to pay the rent, and that accordingly this was an act of the sublessor for which he was responsible under the covenant. The Court of Appeal disagreed, distinguishing the act of the sublessor which allowed the lease to be forfeited from the forfeiture itself, which was the act of the superior lessor. The interruption was accordingly not an act of the sublessor or someone claiming under him within the terms of the covenant.[88]

One or two authorities can be found taking the view that a covenantor would be liable in such circumstances. A different result from that in *Kelly* v *Rogers* had been reached on similar facts in the earlier case of *Stevenson* v *Powell*.[89] Though the case was cited to the court in *Kelly* v *Rogers*, it is not mentioned in any of the judgments in that case. In *Lady Cavan* v *Pulteney*,[90] Lord Loughborough LC considered *obiter* that if lessees of a tenant in tail were evicted by any person claiming paramount to the lessor "they must upon that eviction have under the covenant in the leases satisfaction from his assets".[91] A similar situation, involving a lease by a tenant for life, arose in *Williams* v *Burrell*.[92] An action by the lessee against the lessor succeeded, the court basing its decision on the ground that the lessor had promised for quiet enjoyment *during the term created* by the sublease.[93] Notwithstanding such decisions, it appears that a sublessee seeking to recover from the sublessor under a covenant in the sublease for quiet enjoyment, where the complaint arises from dispossession of the sublessee by a superior lessor, is going to be on an uphill struggle. Two cases illustrate the point. The first is *Cohen* v *Tannar*,[94] which at first sight appears favourable to a sublessee, but on further examination gives less comfort than might initially be supposed. In it, forfeiture proceedings were brought by a superior lessor for breach of covenant. The sublessor notified the sublessee, but did not defend the action, and later consented to judgment. An action against the sublessor by the sublessee for breach of a covenant for quiet enjoyment was successful. Vaughan Williams LJ made it clear, however, that there was no obligation on the sublessor to defend the action by the superior lessor, and that it was the sublessor's consenting to judgment which rendered him liable, saying that:

86 See *Evans* v *Vaughan* (1825) 4 B & C 261; *Calvert* v *Seabright* (1852) 15 Beav 156; *Lock* v *Furze* (1866) 1 CP 441. See also *Hurd* v *Fletcher* (1778) 1 Doug 43.

87 [1892] 1 QB 910. Pawlowski, "Forfeiture; quiet enjoyment; underleases" [1999] *Landlord and Tenant Review* 76.

88 Cp. *Stanley* v *Hayes* (1842) 3 QB 105 (lessee unsuccessful in an action on a covenant for quiet enjoyment following distraint as a result of non-payment of land tax by the lessor, on the ground that the distraint was not by someone claiming under the lessor); *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 (sublessor not liable on covenant for quiet enjoyment where notice requiring work to demised premises issued by local authority, notwithstanding want of repair by sublessor at outset of sublease may have led to notice).

89 (1612) 1 Bulst 182.

90 (1795) 2 Ves Jr 544.

91 Ibid. 561.

92 (1845) 1 CB 402.

93 Cp. *Evans* v *Vaughan* (1825) 4 B & C 261.

94 [1900] 2 QB 609.

> if all the defendant had done had been to omit to defend the action, there would have been no breach of the covenant for quiet enjoyment. The reason I say so is this: there may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty, and there was no duty cast upon the defendant of defending this action after he had given notice to the plaintiff of the pendency of the action, when the plaintiff might perhaps, if he had so chosen, have applied for an order under s. 4 of the Conveyancing Act, 1892.[95]

The other decision is *Thai Holdings Ltd* v *The Mountaineer Ltd*.[96] In it, the sublessor held under a headlease for a term to expire in 2004, but had an option to renew the headlease for a further term of eight years. The term created by the sublease was for a period ending in 2000, but the sublessee had options to renew the sublease for successive periods of two years each, up to 2010. The sublessee renewed the sublease up to 2004. It was then told that the headlease had expired. In proceedings by the sublessee for an order that the sublease be renewed further, the question arose whether the sublessor was in breach of its covenant in the sublease for quiet enjoyment, by failing to exercise its right to renew the headlease and thereby preventing the sublessee being able to renew the sublease after 2004. The court held, contrary to a suggestion in *Neva Holdings Ltd* v *Wilson*,[97] that no breach occurred.

Covenant for good title

In contrast to a covenant for quiet enjoyment, an express covenant by the sublessor that she has title to make the sublease is unlikely to appear in the sublease. One writer mentions two authorities[98] in which covenants for title can be found in leases, but makes the point that in modern times it is not the practice for leases to contain such provisions.[99] Nor is the situation any different in Ireland, despite the provisions of s. 41 of Deasy's Act which imply an agreement that the lessor has good title to make the lease if the lease is silent on the point.[100]

Covenant to observe terms of headlease

The sublessee may not need to concern himself about the absence of a covenant for good title, or with the question whether any covenant for quiet enjoyment given by the sublessor renders the sublessor liable in circumstances where the headlease is terminated following default by the sublessor, if he can instead rely on a covenant by the sublessor in the sublease that she will perform her obligations in the headlease. In such cases, the sublessee's entitlement to recover against the sublessor in the event of forfeiture of the headlease seems clear.[101]

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95 [1900] 2 QB 609, at 614.

96 [2006] 1 NZLR 772.

97 [1991] 3 NZLR 422, at 428 per Bisson J: "One must assume the sublessor will keep the head lease alive. Indeed, he is contractually bound to do so to assure the sublessee quiet enjoyment and avoid any re-entry by the head lessor."

98 *Robert Bradshaw's Case* (1612) 9 Co Rep 60b; sub nom. *Salman* v *Bradshaw* Cro Jac 304 (covenant by lessor that he had full power and lawful authority to make the demise); *Muscot* v *Ballet* (1615) Cro Jac 369 (covenant that lessor seised in fee of the land demised). See also, however, *Andrews* v *Pearce* (1805) 1 Bos & Pull 158 (covenant that lessor had good right to grant and demise, as well as covenant for quiet enjoyment).

99 Russell, "Leasehold covenants for title" [1978] *Conv* 417, at 423.

100 The precedents in Edge, *Forms of Leases and Other Forms Relating to Land in Ireland* (1884) and Stubbs and Baxter, *Irish Forms and Precedents* (1910) do not contain any express covenant that the lessor has title to make the lease.

101 For the sublessor's liability under the covenant where no action is taken by the superior lessor, see *Matania* v *National Provincial Bank Ltd* [1936] 2 All ER 633 and *Ayling* v *Wade* [1961] 2 QB 228. See also *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 for a claim by a sublessee based alternatively on a covenant by the sublessor for quiet enjoyment, a covenant to observe the terms of the headlease, and derogation by the sublessor from its grant.

Sublessee's entitlement to covenant(s)

The grant of a sublease will in some instances have come about as a result of a preceding contract between the parties. The terms of that contract ought to be carried into effect in the sublease.[102] It remains to be considered whether, under the terms of the contract, the sublessee is entitled to a covenant or covenants by the sublessor in the sublease, and if so, what the terms of such covenant(s) should be.

The parties may well specify in their contract what covenants are to be contained in the lease. If, however, they do not, the position at common law was that the parties would be entitled to have covenants included in the lease, and those covenants would be what were considered "usual".[103] The same was true in the case of an open contract for a sublease, so that the sublessor could not insist on the sublessee entering into covenants mirroring restrictions in the headlease where the restrictions were unusual, and where the sublessee was not aware of them.[104] The question for present purposes is what covenants the sublessee is entitled to from the sublessor. The answer provided in *Colhoun* v *Trustees of Foyle College*[105] is that the sublessee will be entitled to covenants corresponding to the provisions of s. 41 of Deasy's Act. In *Colhoun*, a contract for a fee farm grant of building land was entered into, such grant to contain "all covenants usual and proper in building leases". The question was whether the grantors were entitled to limit their liability under the covenant to be contained in the grant to liability for their own acts and acts of those claiming under them. The court considered that in the absence of agreement otherwise, the parties to a lease would be entitled to covenants corresponding to the provisions of ss. 41 and 42 of Deasy's Act, so that the grantee was entitled to a covenant for title by the grantors in the form provided in s. 41. Fitzgibbon LJ made it clear that if a lessor wants to cut down the statutory obligations, he must stipulate expressly to that effect.[106] Walker LJ thought it not unreasonable to hold that the parties should be taken as having contracted with reference to the law which bound the grantors "in the absence of an express statement to the contrary, by the implication of an absolute covenant".[107]

Once the sublease takes effect, the rights of the parties will be regulated by it and not by the contract.[108] If the sublease contains provisions which do not correspond to the terms of the preceding contract made by the parties, proceedings for rectification of the sublease may be possible. If the sublease contains a covenant by the sublessor for quiet enjoyment, qualified in the usual way to acts of the sublessor and those claiming under the sublessor, but the contract entitles the sublessee to an unqualified covenant, it would appear open to the sublessee to seek rectification on this ground. In such circumstances, rectification would extend the liability of the sublessor under the covenant. The converse situation, where rectification in order to make the covenantor's liability correspond with the terms of the parties' agreement would *limit* the liability of the covenantor under a covenant

102 An extreme example is *Onions* v *Cohen* (1865) 2 H & M 354 in which the plaintiff was entitled to have a lease from the defendant contain an unqualified covenant for quiet enjoyment, this being the term of the agreement between the parties, notwithstanding that it was discovered that the defendant did not have title to part of the property to be demised.

103 *Church* v *Brown* (1808) 15 Ves Jr 258; *Propert* v *Parker* (1832) 3 My & K 280; *Chester* v *Buckingham Travel Ltd* [1981] 1 All ER 386.

104 *Melzak* v *Lilienfeld* [1926] Ch 480. Contrast the position where the agreement is that the sublessee is to be subject to the same restrictions as are contained in the headlease: *Hoare* v *Chambers* (1895) 11 TLR 185.

105 [1898] 1 IR 233.

106 Ibid. 236.

107 Ibid. 237.

108 *Baynes & Co.* v *Lloyd & Sons* [1895] 1 QB 820, at 823; *Knight Sugar Co. Ltd* v *Alberta Railway & Irrigation Co.* [1938] 1 All ER 266.

for title, arose in *Butler* v *Mountview Estates Ltd.*[109] Though the case concerns an assignment of an existing lease rather than the grant of a sublease, the relevant principles are equally applicable in either case. Rectification of the assignment was ordered in order that the assignor's liability under the covenants for title implied under the Law of Property Act[110] should correspond to what the parties had agreed in their preceding contract.

Derogation from grant

An alternative possibility for a sublessee wanting to recover from the sublessor following eviction by a superior lessor may be a claim based on derogation from grant.[111] The principle was explained by Blanchard J in *Tram Lease Ltd* v *Croad*[112] in the following terms:

> The principle of law called "non-derogation from the grant" consists in this: that no one who has granted a right of property, whether by sale, lease or otherwise, may thereafter do or permit something which is inconsistent with the grant and substantially interferes with the right of property which has been granted.

The principle can be seen in operation in the law of easements, where it may operate to confer easements on a grantee of land where none are expressed in the grant, and in the law of landlord and tenant, where it has been applied to prevent lessors carrying on activity on land adjacent to the land they have demised, where that activity is such as to frustrate the purpose of the lease under which the lessee holds.[113]

The principle that a grantor may not derogate from her grant has been formulated in different ways in the authorities. In *Specialist Diagnostic Services Pty Ltd* v *Healthscope Ltd*,[114] Croft J identified four different ways in which the principle had been put, namely a presumption of law, an implied obligation, an implied contract, or an implied covenant. The last appears to be the most common formulation in recent Australian decisions.[115] In *Healthscope*, Croft J went on to say that the obligation arises from the implication of terms in order to give effect to the contract.[116] The view differs from that in *Molton Builders Ltd* v

109 [1951] 1 All ER 693.

110 Law of Property Act 1925, s. 76, corresponding to Conveyancing and Law of Property Act 1881, s. 7.

111 Elliott, "Non-derogation from grant" (1964) 80 *LQR* 244; Peel, "The nature of rights arising under the doctrine of non-derogation from grant" (1965) 81 *LQR* 28; Hopper, "Landlord's implied covenant not to derogate from the grant" (2008) 16 *APLJ* 157.

112 [2003] 2 NZLR 461, at 469.

113 *Lyttelton Times Co. Ltd* v *Warders Ltd* [1907] AC 476; *Mount Cook National Park Board* v *Mount Cook Motels Ltd* [1972] NZLR 481. For discussion whether the appropriate test for application of the principle is frustration of the purpose of the lease or something less, see *Nordern* v *Blueport Enterprises Ltd* [1996] 3 NZLR 450; *Specialist Diagnostic Services Pty Ltd* v *Healthscope Ltd* [2010] VSC 443. For recent applications of the principle, see *Oceanic Village Ltd* v *Shirayama Shokusan Co. Ltd* [2001] All ER (D) 62 (Feb); *Platt* v *London Underground Ltd* [2001] 2 EGLR 121; *Dorrington Belgravia Ltd* v *McGlashan* [2009] 1 EGLR 27; *Carter* v *Cole* [2009] EWCA Civ 410.

114 [2010] VSC 443, at para. 151 of judgment. See also *Shilkin* v *Taylor* [2011] WASCA 255, at para. 51 of judgment.

115 See *Karaggianis* v *Malltown Pty Ltd* (1979) 21 SASR 381; *Lend Lease Development Pty Ltd* v *Zemlicka* (1985) 3 NSWLR 207; *Aussie Traveller Pty Ltd* v *Marklea Pty Ltd* [1997] QCA 2; *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264; *Glasshouse Investments Pty Ltd* v *MPJ Holdings Pty Ltd* [2005] NSWSC 456. The formulation appears also in English authorities: see *Duke of Westminster* v *Guild* [1984] 3 All ER 144; *Nynehead Developments Ltd* v *RH Fibreboard Containers Ltd* [1999] 1 EGLR 7.

116 [2010] VSC 443, at para. 151 of judgment.

City of Westminster London Borough Council,[117] in which Lord Denning said the principle was not based on an implied term, but was "a principle evolved by the law itself".[118]

The significance of the difference between the various formulations of the principle has not been fully worked out in the authorities. One question which arises is how successors in title to the original parties to a lease are affected.[119] A second question is whether the obligations are personal or necessarily linked with adjoining land retained by the lessor.[120] A third is whether there is any difference between the liability arising under the principle and that arising under a covenant for quiet enjoyment. Apropos the last of these questions, the weight of authority appears to favour the view that there is "little, if any, difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant",[121] though, in some instances, cases have proceeded on the basis that the defendant will be liable (if at all) on the basis that what he has done is a derogation from his grant, but not on the basis of breach of his covenant for quiet enjoyment.[122] A final question, also concerning the relationship of the principle to a covenant for quiet enjoyment, is whether a claim based on derogation from grant is excluded by the presence of a covenant in the sublease for quiet enjoyment. It has been seen

117 (1975) 30 P & CR 182.

118 In *Glasshouse Investments Pty Ltd* v *MPJ Holdings Pty Ltd* [2005] NSWSC 456, Young CJ in Eq. explained the difference between a covenant for quiet enjoyment and the principle that a grantor may not derogate from his grant as being that "the former springs from the relevant instrument, but the latter from "the duty imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee".

119 In *Molton Builders Ltd* v *City of Westminster London Borough Council* (1975) 30 P & CR 182, the plaintiff, a sublessee, brought an action against a superior lessor. No action on the defendant's covenant for quiet enjoyment was possible, as the plaintiff had neither privity of contract nor privity of estate with the defendant entitling it to sue on the covenant. An action based on the defendant having derogated from its grant was possible, however, though in the end unsuccessful. In *Harmer* v *Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200, an action based on derogation from grant was successful against a licensee of the owner of land, whose predecessor in title had made a lease to the plaintiff. It was accepted that the defendant could be in no better position than the lessor so far as liability for derogation was concerned. It was argued, however, that no liability under a covenant for quiet enjoyment by the lessor could arise as the defendant was not owner of the reversion on the lease. For discussion of the principle with regard to successors in title to the grantor, see also *Cable* v *Bryant* [1908] 1 Ch 259 and *Johnston & Sons Ltd* v *Holland* [1988] 1 EGLR 264.

120 See *Gordon* v *Lidcombe Developments Pty Ltd* [1966] 2 NSWR 9.

121 *Southwark London Borough Council* v *Tanner* [2001] 1 AC 1, at 23, per Lord Millett. Contrast the view of Higgins J (dissenting) in *O'Keefe* v *Williams* (1910) 11 CLR 171, at 217: "To my mind, it is a grave error to treat the obligation not to derogate from one's grant as if it were a mere replica of the obligation under a covenant for quiet enjoyment. There would be no need to express such a covenant, there would be no need to imply such a covenant, if the grantor were already under the same obligation from the very nature of his grant. The two kinds of obligation may cover, indeed, much of the same ground; but they do not coincide." For support for Lord Millet's view, see *Robinson* v *Kilvert* (1889) 41 Ch D 88, at 95; *Tebb* v *Cave* [1900] 1 Ch 642, at 646; *Booth* v *Thomas* [1926] Ch 109, at 114; *Penn* v *Gatenex Co. Ltd* [1958] 2 QB 201, at 226; *Malzy* v *Eichholz* [1916] 2 KB 308, at 314 and 323; *Platt* v *London Underground Ltd* [2001] 2 EGLR 121, at 122; *Glasshouse Investments Pty Ltd* v *MPJ Holdings Pty Ltd* [2005] NSWSC 456, at para. 28; *Rank Profit Industries Ltd* v *Secretary for Justice* [2008] HKCA 152. In *Kennedy* v *Elkinson* (1937) 71 ILTR 153, the lessee relied on both derogation from grant and the agreement implied under s. 41 of Deasy's Act. His action was successful, though it is not clear on which of the grounds relied on the decision is based.

122 See *Harmer* v *Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 (Eve J at first instance finding no breach of covenant; appeal proceeds on question whether derogation from grant established); *Kelly* v *Battershell* [1949] 2 All ER 830 (plaintiff not relying on covenant, but proceeding on question whether derogation from grant); *Molton Builders Ltd* v *City of Westminster London Borough Council* (1975) 30 P & CR 182 (no action possible on covenant for want of privity); *Grosvenor Hotel Co.* v *Hamilton* [1894] 2 QB 836 (express covenant not sufficiently wide to cover act complained of); *Lend Lease Development Pty Ltd* v *Zemlicka* (1985) 3 NSWLR 207 (no breach of implied covenant but plaintiff succeeds on derogation from grant). In *Nordern* v *Blueport Enterprises Ltd* [1996] 3 NZLR 450, Elias J explained that derogation by a landlord from his grant will "often but not inevitably" entail breach of the covenant for quiet enjoyment.

already that the presence of a covenant for quiet enjoyment in the sublease will exclude the implication of the covenant that would have been implied at common law, or under s. 41 of Deasy's Act. It seems, however, that the presence of an express covenant for quiet enjoyment does not have the same effect on the principle of non-derogation from grant. In *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd*,[123] an agreement for lease contained a term on the part of the landlord in the usual form of a covenant for quiet enjoyment, and while it was accepted that such would exclude the covenant which would be implied at common law, the court held that it would "not exclude the operation of the implied covenant on the part of the [landlord] not to derogate from its grant". Similarly, in *Nordern* v *Blueport Enterprises Ltd*,[124] Elias J considered that the principle was not excluded by the inclusion in a lease of a covenant for quiet enjoyment.

There seems to be no difficulty in applying the principle that a grantor may not derogate from her grant where a sublessee is dispossessed during the term of the sublease by action on the part of the sublessor. The basis of the principle is that the grantor may not give with one hand and take away with the other,[125] so that a sublessor who terminates a sublease early should be liable under the principle if the termination is not justified, e.g. by fault on the part of the sublessee entitling the sublessor to forfeit the sublease. In both *Pennell* v *Payne*[126] and *Barrett* v *Morgan*,[127] it appears to be the view that that the act of a sublessor in serving a notice to quit to determine a headlease, thus entitling the superior lessor to possession, would expose the sublessor to an action for damages by the sublessee on the ground that the sublessor had derogated from her grant.[128] The difficulty for a sublessee wishing to rely on the principle will be to establish that there has been a derogation if there is no such positive step on the part of the sublessor. The basis of the sublessee's complaint is likely in many instances to be *inaction* on the part of the sublessor, such as failure to pay the rent reserved by the headlease or to perform the lessee's covenants in it, rather than some positive step taken by the sublessor. Claims that inaction on the part of a grantor has amounted to a derogation from grant have been brought, but have failed in a number of cases.[129] In one of these, reference is made to "the essentially negative effect of the

123 [2001] HKDC 150.

124 [1996] 3 NZLR 450, at 455.

125 *Southwark London Borough Council* v *Tanner* [2001] 1 AC 1, at 23 per Lord Millett. Cp. *Northern Ireland Housing Executive* v *Sloan* [1984] NI 29, where the court considered that were the landlord of premises demised for use as a supermarket so to restrict (under a power in the lease) the goods the tenant could sell that the tenant's business was effectively destroyed, this would amount to "a repudiation of the grant and a denial of the right contractually conferred".

126 [1995] QB 192, at 202.

127 [2000] 2 AC 264, at 274.

128 See also *Conoid Pty Ltd* v *International Theme Park Pty Ltd* [2000] NSWCA 189. Though the case proceeds only on the question whether the sublessor was in breach of his covenant for quiet enjoyment, it would seem that *Cohen* v *Tannar* [1900] 2 QB 609 could have been determined on the basis that the act of the sublessor in consenting to judgment in the action for possession brought by the superior lessor amounted to a derogation from grant.

129 See *Penn* v *Gatenex Co Ltd* [1958] 2 QB 210 (alleged duty of lessor to supply power to serve refrigerator in demised premises); *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 (alleged duty of lessor to consent to work on demised premises required by local authority); *Gold Shine Investment Ltd* v *Secretary for Justice* [2010] 1 HKC 212 (alleged duty of lessor to consent to development); *William Old International Ltd* v *Arya* [2009] EWHC 599 (Ch) (alleged duty to enter into grant of easement to electricity supplier); also *Secure Parking (WA) Pty Ltd* v *Wilson* [2008] WASCA 268 (alleged duty to renew lease for benefit of purchaser from lessee: Murray AJA (dissenting) holding that derogation not established, the other members of the court not deciding the point. Cp. *Mount Cook National Park Board* v *Mount Cook Motels Ltd* [1972] NZLR 481, Woodhouse J considering (at 496) that a lessor, which was also a licensing authority, would be acting in derogation of its grant were it arbitrarily to refuse to grant a licence needed by the lessee, or to impose conditions willing licensees would not accept.

derogation doctrine".[130] There are, however, authorities suggesting otherwise. In *Chartered Trust plc* v *Davies*,[131] Henry LJ thought that there must come a point where a landlord becomes legally obliged to take action to protect that which he has granted to his tenant.[132] In *Booth* v *Thomas*,[133] a lessor was held liable on his covenant for quiet enjoyment where damage was caused to the lessee as a result of failure of a culvert on the lessor's adjacent land. Russell J at first instance[134] had held that the lessor was liable also on the basis that he had derogated from his grant by omitting to keep the culvert in repair. Closer, however, to the situation under discussion is *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd*[135] in which the court held that a landlord who had defaulted on its mortgage repayments, resulting in an order for possession being made in favour of the mortgagee, was under a duty to the tenant to make repayments under the mortgage, and in breach of what was described as an implied covenant not to derogate from its grant.

Multi-Progress illustrates the essential point neatly: if a sublessee is to succeed on the basis of the principle in an action against the sublessor, where what is relied on is failure by the sublessor to perform his obligations in the headlease, it must be shown that the sublessor undertook an obligation to the sublessee to perform those obligations. As Ribeiro PJ explained in *Rank Profit Industries Ltd* v *Secretary for Justice*:[136]

> The application of that general principle to particular facts . . . requires identifying in the first place what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit in the grant, taking into account the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time it was entered into. Only then can one determine whether the grantor's conduct constitutes a derogation from grant in violation of the implicit obligation identified.

Breach of a duty in tort

A third possible basis for an action by a sublessee against a sublessor following dispossession as the result of a claim by a superior lessor is that the sublessor is under a duty in tort to the sublessee, breach of which, if it leads to loss by the sublessee, will render the sublessor liable. The possibility of a claim on this basis arises from *Hancock* v *Caffyn*.[137] To understand the decision, however, it is necessary briefly to refer to an earlier case, *Burnett* v *Lynch*.[138] In it, a lessee was successful in an action against an assignee to recover money the lessee had had to pay to the lessor in a claim by the latter for breach by the assignee of a covenant in the lease after the assignment had taken place. The difficulty for the lessee was that the assignee had not entered into a covenant in the assignment to perform the lessee's covenants and to indemnify the lessee against claims by the lessor for breach of them. That was enough to preclude the lessee bringing an action of covenant, but the lessee succeeded in an action on the case, on the basis of a duty owed by the assignee to the lessee arising

130 *William Old International Ltd* v *Arya* [2009] EWHC 599 (Ch), at para. 42 per Judge Pelling.

131 (1998) 76 P & CR 396, at 408.

132 See also *Yankwood Ltd* v *Havering London Borough Council* [1998] EGCS 75 (suggestion that lessor might be in breach of his obligation by failure to control trespassers on lessor's adjoining land).

133 [1926] Ch 397. See also *Bowes* v *Lord Mayor etc. of Dublin* [1965] 1 IR 476.

134 [1926] Ch 109.

135 [2001] HKDC 150.

136 [2009] HKCFA 63, at para. 12 of judgment.

137 (1832) 8 Bing 358.

138 (1826) 5 B & C 589.

independently of covenant, breach of which had led to loss by the lessee. Littledale J explained the position thus:[139]

> where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach . . . Here there having been neither an express contract to indemnify, nor any express promise to perform the covenants, I think an action on the case, founded upon a breach of duty, is more proper than an action of assumpsit founded on the breach of a supposed promise. The ground of the present action is the damage to the plaintiffs resulting from a default of duty by the defendant.

Not long after *Burnett* v *Lynch*, the possibility of the principle being applied in a case involving a lease and sublease arose in *Hancock* v *Caffyn*. Here a sublessor failed to pay the rent reserved by the headlease, resulting in the superior lessor levying distress on goods of the sublessee. Assignees in bankruptcy of the sublessee brought an action against the sublessor based on the loss sustained by the sublessee. The duty alleged to have been breached was to pay the rent reserved by the headlease, and to indemnify the sublessee. In giving judgment for damages in favour of the sublessee, Tindal CJ considered the sublessor to be under the same obligation to pay rent to the superior lessor as the assignee in *Burnett* v *Lynch* had been to pay rent to the lessor:[140]

> The duty alleged is, that [the sublessor], by paying over to the superior landlord the rent received from the under-tenant, should protect the under-tenant from the superior landlord's distress. And that is no more than one of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment. Even if there be no actual agreement by the mesne landlord to pay to the superior landlord the rent received from the under-tenant in order to secure his quiet enjoyment, still, in the case of *Burnet* v. *Lynch*, it was held to be an implied duty on the part of the assignee of a lease to perform the covenants contained in it, in order to keep the assignor harmless . . . And *Burnet* v. *Lynch* is also an authority that case is the more proper form of action, although assumpsit may also lie.

The view expressed in *Hancock* v *Caffyn* must, however, be considered in light of two Irish decisions given shortly earlier. In *Joyce* v *Steele*,[141] a sublessee's action on the case against a sublessor failed on the basis that the sublease contained a qualified covenant by the sublessor for quiet enjoyment, the presence of which was considered by the court to define the sublessor's liability and exclude any other liability.[142] *Joyce* v *Steele* was considered to settle the issue before the court in *Geraghty* v *Darcy*,[143] where a sublessee brought assumpsit against a sublessor after distress had been levied by a superior lessor. The report does not indicate whether a covenant for quiet enjoyment existed, merely that the jury found in favour of the sublessor.

139 (1826) 5 B & C 589, at 609.

140 (1832) 8 Bing 358, at 366.

141 (1827) 1 Ir Law Rec 56.

142 See also *Schlencker* v *Moxsy* (1825) 3 B & C 789.

143 (1829) 2 Ir Law Rec 499.

Breach of a fiduciary duty

It may be possible in some cases for a sublessee who has been dispossessed as the result of forfeiture of the headlease to base a claim against the sublessor on breach of a fiduciary obligation owed by the sublessor to the sublessee. A trustee is under a duty to preserve the trust estate, and if the same principle is applicable to the case of sublessor and sublessee, forfeiture of the headlease as a result of failure by the sublessor to perform her obligations under it to the superior lessor should be actionable as a breach of that duty. Such a principle was the basis of Nourse LJ's decision in *Bland* v *Ingram's Estates Ltd*,[144] in which an application for relief against forfeiture of a lease on the ground of non-payment of rent was made by someone who had obtained a charging order against the lessee. Nourse LJ held that relief could be granted as the lessee was under an obligation to the applicant to take reasonable steps to preserve the applicant's security, and that, in a case where the lease had been forfeited for non-payment of rent, such steps would include initiating and pursuing an application for relief against the forfeiture. If the obligation requires a lessee to pursue an application to reinstate the lease, it would seem to follow that it should require him so to act as to avoid the lease being forfeited in the first place, and that his failure to perform his obligations under the lease, resulting in forfeiture, should be actionable by the person to whom he owes the obligation referred to by Nourse LJ.

The difficulty for a sublessee seeking to rely on breach of a fiduciary obligation owed to him by the sublessor will be in establishing that a fiduciary relationship exists between the parties. The relationship of landlord and tenant between the parties will itself not be enough to give rise to fiduciary obligations on the part of the sublessor.[145] One instance where a sublessee should, however, succeed is where leasehold property has been mortgaged by way of subdemise, so that the sublessor and sublessee are also mortgagor and mortgagee. Though concerned with a charging order rather than a mortgage, Nourse LJ's view in *Bland* v *Ingram's Estates Ltd* that the lessee was under an obligation to the chargee to preserve the chargee's security appears applicable to the latter case.

Breach of an implied contractual term

Modern cases have emphasised that a lease not only involves the creation of an estate in the lessee, but is also a contractual relationship between the parties to it. The extent to which principles in the law of contract can be used to resolve disputes between the parties to a lease is an issue which courts are now having to determine. One aspect of the issue relevant for present purposes is whether obligations on the part of one or other of the parties to a lease can be implied on the basis of principles in the law of contract, or whether the only obligations implied in the case of a lease are those hitherto considered, arising either at common law or under statutory provisions. If, for example, it is possible to imply an obligation on the part of a lessor to repair part of the demised premises, on the basis that the obligation is needed to give business efficacy to the contract the parties have made,[146]

144 [2001] Ch 767.

145 See *Lytle* v *Fox* [1898] 1 IR 340, at 352 per Chatterton VC: "the parties were only in the relation of landlord and tenant, which does not ordinarily import anything in the nature of a trust or fiduciary relation". Also *McSweeney* v *Drapes* [1905] 1 IR 186, at 193, Barton J saying that the defendants (successors in title to a sublessor) "did not stand in any fiduciary or quasi-fiduciary relation towards the plaintiff, and did not owe the plaintiff any duty outside of the obligation defined by the covenant in the sublease". More recently, see *Scrapbook Alley Ltd* v *Chow* CIV-2011-454-141 (New Zealand High Court, Palmerston North Registry, 5 September 2011); *Fotherby* v *Cowan* [2012] NSSC 182 (Nova Scotia).

146 *Barrett* v *Lounova* (1982) Ltd [1981] 1 All ER 351. The decision has met with criticism: see *Carbure Pty Ltd* v *Brile Pty Ltd* [2002] VSC 272; *Carrathool Hotel Pty Ltd* v *Scutti* [2005] NSWSC 401.

is it so very different to say that a sublessor should be under an obligation to the sublessee to perform the sublessor's obligations as lessee under the headlease, since otherwise the sublessee will (if the superior lessor elects to forfeit the headlease) not be able to enjoy the benefit of the contract the parties have made?[147] The implication of such a term appears to fall within the principle stated by Cockburn CJ in *Stirling* v *Maitland*,[148] that:

> if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

In Australia it is clear that obligations on one or other of the parties to a lease can arise through application of principles derived from the law of contract.[149] In *Aussie Traveller Pty Ltd* v *Marklea Pty Ltd*,[150] McPherson JA explained that, while in some of the older authorities the liability of a lessor had been treated as depending on the presence of words such as "demise", in Australia it had been settled by *O'Keefe* v *Williams*[151] that the matter "is properly one of implication of terms in order to give business efficacy to the contract". Likewise, in *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd*,[152] Austin J said that it was:

> permissible and necessary for the Court, where the parties to a lease are in a commercial contractual relationship . . . to consider whether any implied term arises under the principles applicable to commercial contracts, rather than limiting its attention to the implied covenants recognized by the law of landlord and tenant.

Accordingly, the court considered that the plaintiff in *Advance Fitness* was right in submitting that the court should have regard not only to the principle that the lessor would not derogate from its grant, but also to implied contractual terms such as that in *Mackay* v *Dick*.[153]

In cases where the relationship between the parties cannot be characterised as commercial in the way described by Austin J, the position may be different. In *Carbure Pty Ltd* v *Brile Pty Ltd*,[154] Balmford J was doubtful whether it was possible "to imply into a

147 In considering what answer should be given to the question, regard should be had to comments made by Lord Russell CJ in *Baynes* & *Co. v Lloyd & Sons* [1895] 1 QB 820, at 826: "The Courts, in my humble opinion, have too often sought in order to avoid hardship, to import by implication protective provisions not to be found expressed in written contracts. It is not desirable to make further effort in this direction. I think it much better that contracting parties should be made clearly to understand that their duty is to put into the contracts into which they enter such express provisions as may be needed for their protection."

148 (1864) 5 B & S 840, at 852.

149 The possibility that an implied obligation on the part of a lessor arising from application of the law of contract could improve the position of the lessee was recognised in *Softplay Pty Ltd* v *Perpetual Trustee WA Pty Ltd* [2002] NSWSC 1059, Barrett J saying (at para. 9 of judgment) that the implied term contended for by the lessee (an obligation of the lessor to act in good faith) "would have the capacity to bolster significantly the arguments based on the covenant for quiet enjoyment and derogation from grant".

150 [1997] QCA 2.

151 (1910) 11 CLR 171.

152 [1999] NSWSC 264, at para. 94 of judgment.

153 (1881) 6 App Cas 251. For the principles upon which terms may be implied into contracts, see now *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) 180 CLR 266; *A-G of Belize* v *Belize Telecom Ltd* [2009] 1 WLR 1988. In the context of a lease, the test, according to Palmer J in *Edward Kazas & Associates Pty Ltd* v *Multiplex (Mountain Street) Pty Ltd* [2002] NSWSC 840, at para. 59 of judgment is: "in the light is the factual circumstances at the time the lease is granted, is the alleged term reasonable and equitable; is it necessary to give business efficacy to the lease, 'business efficacy' meaning implementation in a practical and businesslike way of the intended use of the demised premises by the lessee consistently with the reasonable use of the whole property by the lessor and any other occupiers; is the term so obvious that it goes without saying; is it capable of clear expression; does it contradict any express terms of the lease?"

154 [2002] VSC 272, at para. 29 of judgment.

simple lease, where there is no relationship between the parties other than that of landlord and tenant" the obligation contended for (an obligation on the part of the landlord to repair the property demised).

Summary

The position would therefore appear to be that in the common case, where there is a covenant by the sublessor in the sublease for quiet enjoyment, and such covenant is in the usual form, the sublessor will not be liable to the sublessee under the covenant where the sublessee is dispossessed as a result of action taken by a superior lessor, notwithstanding that such action is based on failure by the sublessor to perform her obligations to the superior lessor, resulting in forfeiture of the headlease. In contrast, if there is no such covenant in the sublease, the sublessee stands a better chance of success, as the agreement which will be implied on the part of the sublessor under s. 41 of Deasy's Act is wide enough to render the sublessor liable for the action of the superior lessor. Independently of any express or implied covenant for quiet enjoyment, the principle that a grantor may not derogate from her grant may afford a remedy for the sublessee. If the sublease is a commercial arrangement, it may be possible to argue that an obligation is to be implied that the sublessor will perform her obligations to the superior lessor, on the basis that such term is needed in order to give business efficacy to the sublease. If there is a fiduciary relationship between the parties, the sublessee may be able to base a claim on an obligation arising from that relationship. The easiest means, however, for the sublessee will be a covenant in the sublease by the sublessor to perform and observe her obligations under the headlease, and to indemnify the sublessee against loss arising from the sublessor's failure to do so. Finally, the sublessee may have an action in tort, based on a duty of the sublessor to perform her obligations to the superior lessor, breach of which will give rise to a claim by the sublessee for his loss.

The existence of several different possible bases for a claim against the sublessor has been the subject of comment in a number of the authorities. Ormrod LJ did not attach much weight to what he described as the label of the cause of action in *Hilton* v *James Smith & Sons (Norwood) Ltd.*[155] In *Edward Kazas & Associates Pty Ltd* v *Multiplex (Mountain Street) Pty Ltd*,[156] Palmer J, speaking of the process of implying obligations to resolve disputes between the parties to a lease, said memorably that "[t]he routes by which one reaches that implication have different street names . . . but in truth, these names simply mark adjacent lanes on the same highway, not different roads leading in different directions".[157] He went on:

> In the context of contracts for the creation of interests in land, whether limited or unlimited, it may be time to regard the tags "necessarily implied term", "implied grant" and "non-derogation from the grant" as denoting distinctions without differences, leading more to confusion than to consistent application of an over-arching principle.[158]

That result may well be desirable, but the authorities have yet to go so far. The cases appear reconcilable only on the basis that different forms of action or different principles of law have been the basis on which they have proceeded. The view in *Kelly* v *Rogers* that a sublessor is not liable on an express covenant for quiet enjoyment in the usual form is based on construction of the terms of the covenant. The cases deciding he is not liable on the covenant for quiet enjoyment implied at common law are based on the view that that

155 [1979] 2 EGLR 44.

156 [2002] NSWSC 840.

157 Ibid. para. 56 of judgment.

158 Ibid. para. 58.

covenant lasts only as long as the covenantor's estate lasts. If the sublessor is not liable under the principle that a grantor may not derogate from her grant, it may be because that doctrine operates negatively and not positively. If the sublessor is liable on the basis of *Hancock* v *Caffyn*, this can be reconciled with the cases on implied covenants on the basis that the duty breached is one arising in tort. Standing back from the details, however, there is a difference of view on the question whether the sublessor is under a duty to the sublessee to perform her obligations to another party, in order to protect the sublessee. Rolfe B had said in *Graham* v *Allsopp*[159] that the sublessor was bound to protect his tenant from paramount claims. Likewise, in *Jones* v *Morris*,[160] Pollock CB spoke of a landlord being bound to protect the party holding under him from claims by someone with title paramount. Tindal CJ thought a duty existed in *Hancock* v *Caffyn*.[161] Judge Lok in *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd*[162] said that the landlord "certainly owed a duty" to the tenant to make mortgage repayments. Such views cannot easily be reconciled with that of Vaughan Williams LJ in *Cohen* v *Tannar*[163] that the sublessor was under no duty to defend forfeiture proceedings brought by the superior lessor. The question is a simple one: ought the sublessor to be liable to the sublessee if the sublessor does not fulfil her obligations under the headlease, where this is the root cause of the sublessee being dispossessed, and has the effect of rendering worthless the grant the sublessor made? The question is essentially the same where the context is a lease made by a mortgagor. In that context, payment of what was due to the mortgagee was described by the court in *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd* as a fundamental obligation on the part of the lessor.[164]

Conclusion

Although the practice of creating leases on the sale of property has been curtailed by Article 30 of the Property (NI) Order 1997, the existing pyramid of titles made up of fee farm grants, leases and subleases will exist until such time as redemption of superior interests takes place. So long as the pyramid continues to exist, the risk exists for anyone in the pyramid holding under a sublease that a claim may be made by someone claiming a title paramount to that of the person who created the sublease. The same risk exists in cases where new subleases are made. Such a claim may be based simply on the ground that the term created by the headlease has come to an end by effluxion of time, or because the superior lessor has forfeited the headlease for non-payment of rent by the sublessor or breach by her of some other term of the headlease. The chances of a sublessee recovering against his lessor where the sublessee is evicted as a result of a claim by title paramount are slight. The weakness of the position of a sublessee at common law was noted by the Jenkins Committee in 1950[165] and again by the Law Commission in 1975,[166] with the fact that a claim by title paramount would not be a breach of the covenant for quiet enjoyment being seen by the Law Commission as giving rise to the worst defects in the existing law.[167] Eventually, the law in England was changed on the basis of the Law Commission's view

159 Above, p. 204.

160 (1849) 3 Ex 742, at 747.

161 Above, p. 220.

162 [2001] HKDC 150, at para. 13 of judgment.

163 Above, p. 213.

164 [2001] HKDC 150, at para. 13 of judgment.

165 Lord Jenkins, *Report of the Leasehold Committee* Cmd 7982 (London: HMSO 1950), para. 318.

166 Law Commission, *Report on Obligations of Landlords and Tenants* No 67 (1975).

167 Ibid, para. 46.

that lessees should enjoy the same protection in the form of implied covenants for title as grantees under other forms of assurance.[168] In Northern Ireland too, successive reviews have pointed out the problems.[169] For existing sublessees, success will depend, in the absence of a covenant that the sublessor will perform and observe the covenants in the headlease, on there being an unqualified covenant in the sublease for quiet enjoyment, but such is seldom likely to be the case, the usual covenant being one limiting the sublessor's liability to interruptions by the sublessor and persons claiming under or in trust for her. For those proposing to take a sublease, the die has not yet been cast. The desired result will be to obtain from the sublessor a covenant unqualified as to the persons for whom she will be liable, and (on a "belt and braces" approach) a covenant by the sublessor to perform and observe her covenants in the headlease. The means by which to achieve that result may, however, require some consideration. If the sublessor will agree to the sublease containing a covenant by her sufficient to render her liable if a superior lessor forfeits the headlease, well and good. The danger of course is that the sublessor's bargaining power is greater than that of the sublessee. An alternative tactic may be to say nothing: if the contract the parties enter into does not specify that the covenant for quiet enjoyment the sublease will contain will be a limited one, then the sublessee will be entitled to a covenant in accordance with s. 41 of Deasy's Act, which should render the sublessor liable if there is a claim by title paramount. What the sublessee must not do is to give up the protection an open contract will afford him by then accepting a sublease with a qualified covenant in place. For those intending to grant a sublease, the moral is equally clear: if what is intended is that liability will be restricted and the usual qualified covenant only entered into, this needs to be made clear in the contract, by annexing to the contract a draft of the sublease to be granted on completion.

168 Law Commission, *Transfer of Land: Implied covenants for title* No 199 (1991), para. 4.5; Law of Property (Miscellaneous Provisions) Act 1994.

169 See Queen's University Belfast Working Party, *Survey of the Land Law of Northern Ireland* (Belfast: QUB 1971), para. 302 ff; Land Law Working Group, Discussion Document No 3, *Landlord and Tenant* (1982), para. 3.4ff; Land Law Working Group, Final Report, *The Law of Property* (1990), para. 4.3.5.

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Law reform and devolution: consultation processes and divorce law in Scotland

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1 Introduction

That apparently rather modest divorce law reform – the reduction of the length of non-cohabitation as a ground for divorce – has proved especially difficult in UK jurisdictions. Despite extensive and costly activity by law reform bodies, governments, parliaments and lobby groups in Scotland, Northern Ireland and England and Wales only Scotland has succeeded in modernising the law in this area. This article critically examines the law reform process begun in Scotland in the late 1980s and carried on after devolution in 1999, with particular emphasis on the central role of consultation and compares the approaches to consultation of three key bodies, namely the Scottish Law Commission (SLC), Scottish governments[2] and the Scottish Parliament.

The religious-based norm, that marriage should be for life and could only be ended by grave marital fault and not by a decision of one or both of the parties to the marriage remained dominant in Scotland from the Reformation in 1560 until the Divorce (Scotland) Act 1976 brought to Scotland the same compromise between fault and non-fault grounds that England and Wales had introduced by way of the Divorce Reform Act 1969.[3] The 1976 Act provided that divorce could be granted where a marriage had "broken down irretrievably" if, but only if, adultery, intolerable behaviour, desertion, or separation of two years with consent of the other party, or five years without such consent were proved.[4]

1 My thanks to Professor Peter McEleavy and Edward Dempsey for their helpful comments and also to the anonymous peer reviewer for comments which led to significant improvements in this article. The views expressed and any errors are the responsibility of the author.

2 The first two governments, Scottish Labour and Scottish Liberal Democratic (LibDem) coalitions, were styled "Scottish Executive" while the third, a minority SNP administration, adopted the title "Scottish government". For clarity, the term government is used throughout.

3 For a brief authoritative overview of the history of divorce in Scotland see E Clive, *The Law of Husband and Wife in Scotland* 4th edn (Edinburgh: W Green 1997), ch. 20.

4 The five fact situations which established the single ground of irretrievable breakdown will be referred to as the grounds for divorce.

This compromise between fault and non-fault was criticised from the inception of the Act.[5] Indeed, former SLC chairman, Lord Hunter, has stated that, even as the 1976 Act was being passed, there was a feeling that the thinking behind the compromise was "obsolescent" but the difficulty in finding time for any Scottish measures in the UK Parliament meant that pressing for more appropriate reform would delay matters for many years.[6]

In 1988 the SLC, prompted by demands for similar reform in England,[7] consulted on the more radical, and arguably more honest and modern, option of a single non-fault ground of divorce following a short period of notice or a short period of separation. As we shall see, despite strong support for abolition of "fault", the SLC instead recommended the reduction of the non-cohabitation periods from two and five to one and two years, in the interests of reducing acrimony and allowing people to "move on" in their lives, something of particular importance, it was said, to any children of the family.[8] It would take 17 years and four more consultation exercises to introduce this modest reform in Scotland.

In contrast, the even more modest reforms proposed for Northern Ireland in the Family Law (Divorce etc.) Bill 2002, which would have retained the two-year non-cohabitation with consent period but reduced the five-year without consent to three years, were lost when the Northern Ireland Assembly was suspended between 2002 and 2007. That Bill was not "marriage saving" but sought to "encourage good post-divorce relationships between the parties and between them and their children, by encouraging agreement".[9]

While reform was stalled elsewhere in the UK, the proposals for a non-fault-based law of divorce for England and Wales were progressed as far as legislation.[10] Had the relevant part of the Family Law Act 1996 come into force it would have abolished the three fault grounds and provided for divorce exclusively on the basis of a period of separation and reflection. Such reform may seem surprisingly progressive for a "back to basics" Conservative government but the Act was in fact strongly "pro-marriage" as the courts would have been required to have regard to the principles that "the institution of marriage is to be supported" and encourage parties to "take all practicable steps . . . to save the marriage".[11] Following the failure of a pilot study, due to the cost of compulsory mediation and resistance of parties to the process, the provisions were not brought into force.[12]

Where successive Conservative governments failed to legislate for Scotland in this area between 1989 and 1997, the newly elected New Labour government initiated moves to reform in 1999 which would lead to legislation in the new Scottish Parliament to give effect to the SLC's 1989 recommendations. The focus on the role played by the consultation

5 W A Wilson "Divorce for abracadabra" (1976) *SLT* 27. Clive took the view that the Act only "pretended to make irretrievable breakdown the sole ground of divorce" and was in fact concerned with the five more readily establishable factual tests rather than whether the marriage had in fact broken down, Clive, *Husband and Wife*, n. 3 above, 20.003. Such compromises are, however, at the heart of modern family law, J Dewar, "The normal chaos of family law" (1998) 61 *MLR* 467.

6 Lord Hunter, "Law reform; the Scottish Law Commission" (1988) *JR* 158, p. 174.

7 SLC, *The Ground for Divorce: Should the law be changed?*, Discussion Paper No 76 (Edinburgh: SLC 1988), p. 1.

8 SLC, *Report on Reform of the Ground for Divorce*, Report No 116 (Edinburgh: SLC 1989).

9 Explanatory and Financial Memorandum available at http://archive.niassembly.gov.uk/legislation/primary/2002/niabill1_02-efm.htm (last accessed 8 June 2012).

10 For an exploration of the reasons legislation was pursued in England and Wales, see E Hasson, "Setting a standard or reflecting reality?" (2003) 17 *International Journal of Law, Policy and the Family* 338.

11 S. 1(a) and (b). For the Act as a means of imposing the concept of a "good divorce", see H Reece, *Divorcing Responsibly* (Oxford: Hart 2003). Dewar notes the Act sought to promote two objectives simultaneously by seeking "both to give the parties greater autonomy while at the same time seeking to influence how they use it", Dewar, "Normal chaos", n. 5 above, p. 476.

12 See J Eekelaar, *Family Law and Personal Life* (Oxford: OUP 2006), pp. 19–21.

process in law reform allows analysis of its importance as a tool of legitimation over a period of time in which devolution was intended to facilitate more legitimate law reform. The reform of the grounds for divorce has been selected as an appropriate focus for four main reasons. First, it is a very simple change in legislative terms (and so the specific mechanism for the change is unlikely to be controversial). Secondly, this area involves a legislative change that has also been mooted or attempted in both England and Wales and Northern Ireland so that conclusions reached will also have some resonance in these jurisdictions. Thirdly, it allows scrutiny of the law reform activities of all three main players – the SLC, the Scottish governments and the Scottish Parliament – and examines stated aspirations that devolution would improve the law-making process and engage "the authentic voice of Scotland . . . of non-aggregated opinion".[13] Lastly, as we shall see, this apparently modest legislative change provoked a considerable degree of reaction, the impact of which on the law reform process raises important issues for all societies.

2 The Scottish Law Commission

The SLC,[14] like its English counterpart the Law Commission (LC),[15] was established in 1965 as part of the incoming Labour government's commitment to the professionalisation of law reform.[16] Commissioners are appointed by the Scottish Ministers[17] and have a statutory duty to keep under review, and to modernise, the law of Scotland. As early as December 1966 the government invited the SLC to consider reform of the law of divorce in the context of the LC's earlier report *Reform of the Grounds of Divorce – The field of choice*.[18]

From their inception, fears were expressed that the commissions might usurp executive functions but in the event "constitutional propriety" was maintained with the Cabinet and individual ministers responsible to Parliament for law reform proposals and the commissions in the role of advisors.[19] Indeed, there is no duty placed on the Lord Advocate or other Scottish Ministers to respond to the recommendations of the SLC, let alone implement them.[20]

Despite their role as mere advisors, many commentators have found "difficulty in explaining what mandate the commissioners have to recommend change in the law affecting

13 D Arter, "From 'spectator democracy' to 'inclusive democracy'? The peripatetic Scottish committees as linkage" (2006) 16 *Regional and Federal Studies* 239, p. 252.

14 See, generally, *Stair Memorial Encyclopaedia*, vol. 22, 'Sources of law (general and historical)', paras 623–704; Lord Hope, "Do we still need a Scottish Law Commission?" (2006) *ELR* 10; Lord Hunter, "Law reform", n. 6 above; and N Brotchie, "The Scottish Law Commission: promoting law reform in Scotland" (2009) *LIM* 30.

15 See e.g. S Cretney, "The politics of law reform – a view from the inside" (1985) 48 *MLR* 493; S Cretney, "The Law Commission; true dawns or false dawns" (1996) 59 *MLR* 631; M Zander, *The Law Making Process* (Cambridge: CUP 2004), ch. 9 "The process of law reform"; and more recently Hon. Mr Justice Etherton, "Law reform in England and Wales: a shattered dream of triumph of political vision?" (2008) 73 *Amicus Curiae* 3 (my thanks to Alan Page for this reference).

16 Cretney, "Politics of law reform", n. 15 above, p. 493.

17 Law Commissions Act 1965, s. 2(1).

18 SLC, *Divorce: The grounds considered* Cmnd 3256 (Edinburgh: SLC 1967)

19 Cretney "Law Commission", n. 15 above, p. 641.

20 It is perhaps surprising how often this constitutionally correct position is lamented, with repeated complaints that government is "failing" to implement proposals of the commissions. For a robust if not entirely convincing rebuff, see Lord Rodger, "The bell of law reform" (1993) *SLT* 339 and for an overview see P M North "Law reform: process and problems" 1985 [101] *LQR* 338, pp. 351–5 and the references therein. The current chair, Lord Drummond Young, has on a number of occasions expressed concern at the rate of implementation of SLC reports by the Scottish government especially in relation to civil matters, though he notes "with satisfaction that the Scottish Ministers have put into practice their agreement to respond to our reports within a period of three months": SLC Annual Report (Edinburgh: SLC 2010), p. 7.

their fellow citizens' lives".[21] This is especially so when the commissions stray beyond the tidying-up of somewhat technical matters (so called "lawyers law")[22] to consider socially contentious areas such as divorce law.[23] However, I would take the view that it is precisely because family law involves disputes over moral and social values and the legal regulation in that area may be the inherently "contradictory, disordered, incoherent and, in part at least, antinomic"[24] that an informed "professional" view of legal regulation is required. Such contested areas of law require more than what Elaine Sutherland has characterised as Scottish governments' somewhat shallow "conversational law reform" approach which she compared unfavourably with the coherent and comparative SLC approach which provides a well-researched and reflective result.[25]

One answer to the question of the legitimacy of unelected commissioners recommending reform is the consultation process.[26] As we shall see, at least in relation to this reform process, it cannot be argued that the SLC failed to be swayed by the responses of powerful political interest groups but it would be difficult to assert with any validity that its resulting recommendations took proper account of popular opinion.

The SLC discussion paper

I have explored the SLC's 1988 discussion paper *The Ground for Divorce: Should the law be changed?*, the positions adopted by respondents and the reaction of the SLC to these responses in depth elsewhere.[27] Although the paper clearly sought to influence the debate,[28] the arguments for and against each anticipated position were fairly rehearsed. The consultation document ranged very broadly over a host of possible negative and positive aspects of the Divorce (Scotland) Act 1976, asking whether there was a case for reform at all and specifically if "no fault" divorce based solely on a period of either separation or notice would be acceptable. Various periods from three months up to a maximum of a year were suggested as possibilities by the SLC. While no specific proposal was made to abolish the periods of separation of two and five years, the strong possibility that these were

21 Cretney, "Law Commission", n. 15 above, p. 654.

22 Work that even the commissions' least enthusiastic reviewers acknowledge as important, e.g. D M Walker, "The Scottish Law Commission under review" (1987) *Statute Law Review* 115, though political decisions may be required even within "apparently anodyne" areas of reform, Cretney, "Politics of law reform", n. 15 above, p. 497.

23 These concerns are more commonly articulated in relation to the LC which has had slightly more difficult relations with government than appears to be the case with the SLC, see e.g. Hunter, "Law Reform", n. 6 above, p. 159. The SLC has also been spared the ill-informed attacks of the tabloid press which befell the LC over its recommendation to extend domestic violence protection to cohabiting couples in 1992, Cretney, "Law Commission", n. 15 above, pp. 632–3.

24 Dewar, "Normal chaos", n. 5 above, p. 468, but cf. M Henaghan, "The normal order of family law" (2008) 28 *OJLS* 165.

25 E Sutherland, "The future of family law reform" (2001) 50 March *Family Law Bulletin* 2. See also E Sutherland, "What has a decade of devolution done for Scots family law?" in B Aitken (ed.) *International Survey of Family Law* 2009 (Family Law: Bristol 2009).

26 E.g. North "Law reform", n. 20 above, pp. 338–9; Cretney, "Law Commission", n. 15 above, p. 655; and Cretney "Politics of law reform", n. 15 above, p. 504. Lord Scarman, first chair of the LC, considered the consultation paper "the greatest contribution to the public life of the nation made by the Commission" which subsequent governments "borrowed", quoted in North, "Law Reform", n. 20 above, pp. 338–9. However, North, a former English law commissioner, is "highly sceptical" as to whether any legitimate purpose is in fact properly achieved: ibid. pp. 339–46.

27 B Dempsey, "The difficulty of reforming divorce law" (2009) *JR* 1.

28 For example, those reading the discussion paper are advised that divorce after a short period of separation is not "easier" merely "more quickly available" and that the divorce process "is not a punishment for having failed in marriage": SLC, Discussion Paper, n. 7 above, p. 10.

overlong and encouraged conflict by making fault-based divorce more attractive was articulated and a move to a much shorter period of either separation or mere notice contemplated.[29]

According to my classification, responses were received from seven family interest groups, seven women's groups, five religious groups, the Scottish Humanist Council, 15 lawyers or legal groups and three advice/support organisations. As we shall see, this is a broadly similar number and range of organisational responses as would be received by the later Scottish government and Scottish parliamentary consultations.

An immediate difficulty for the SLC was the startling range of views expressed not only by organisations in different categories but even between those with similar remits and experiences.[30] For example, on the specific question of whether or not to retain fault as a ground, seven legal groups or organisations supported retention and seven supported abolition; four family interest groups supported retention and three abolition; and two women's groups supported retention of fault with seven calling for abolition. Only the religious groups appear relatively coherent with all five advocating retention of fault but even here there was division on whether it should be made the sole ground.

This reflects the profound dissensus on the appropriate role of legal regulation of divorce and the underlying values this should reflect. Many respondents passionately urged proposals ranging from divorce on demand at a registry office to returning to scripture and denying divorce even in the face of violence. Reform, it was argued, should promote the presumed interest of society in upholding marriage and make the securing of divorce other than "easy"; promote equality between the spouses; protect children; promote conciliation; provide a public forum in which to validate individual's feelings of anger and/or make divorce as easy as possible. As Cretney amongst others has pointed out, the views of competing interest groups which inevitably reflect value judgments are no sound basis for decisions.[31]

Despite coverage of the consultation in the media, only 25 responses from individuals were received.[32] These expressed widely divergent opinions covering the full range of reform options, were often written in highly subjective terms and show no signs of having been produced by any form of organised campaign, a position that would change radically by the time of the second Scottish government consultation in 2000. The SLC did, however, receive a three-page petition with 76 signatures which expressed disapproval of the SLC seeking to erode "the legal and moral institution of marriage"[33] which was perhaps a precursor of things to come.

In an unusual development, the SLC commissioned a public opinion survey which revealed that the overwhelming majority supported abolition of fault as a ground, although opinion was split on what non-fault ground should replace it.[34] While only 21 per cent of all respondents opposed any change, 63 per cent supported separation, notice or both as

29 The information on the SLC's consultation is taken from Dempsey "Difficulty of reforming divorce law", n. 27 above, unless otherwise indicated.

30 A number of responses were somewhat muddled and self-contradictory while others admitted that there was no consensus within their membership.

31 Cretney "Politics of law reform", n. 15 above, p. 506.

32 See SLC, *Report,* n. 8 above, pp. 22–3.

33 Ibid. pp. 23–4. This was probably organised by the Cupar Baptist Church, see Dempsey, "Difficulty of reforming divorce law", n. 27 above, pp. 19–20.

34 On the practical difficulties in the use of opinion polls and therefore the rarity of their use by commissions, see Cretney, "Politics of law reform", n. 15 above, pp. 505–6.

ground(s) for divorce: of those with personal experience of divorce, 76 per cent supported abolition of the fault grounds.[35]

The SLC's reaction

The SLC responded to the confusion of the consultation responses and the clear public support for abolition of fault by recommending that fault be retained. This approach appears to require that improvement of the law achieve some undeclared "super majority" of support.[36] While those in support of abolition of fault were certainly not unanimous on what single ground should be introduced or in their reasons for supporting reform, equally those who supported retention of fault did so on very different, sometimes mutually contradictory, bases. But those who advocated retention of fault won, despite the SLC acknowledging the substantial support for abolition of fault and that it was unconvinced by many of the arguments put forward for retention.[37] The SLC was of the view that the varied opinions of opponents of reform had to be "taken fully into account" and concluded that too much controversy would be generated by certain interest groups if fault were abolished.[38]

However, the SLC noted that the "vast majority" of respondents supported reduction in the non-cohabitation periods, whatever their views on other matters, and so recommended the admittedly "modest" proposed reform that the periods of separation be reduced from two years with and five years without agreement to one and two years respectively. In so doing it hoped that the damage that fault-based divorce did would be ameliorated and that its suggestion would meet with "general support from a broad middle band of responsible opinion".[39] Qualifying as being of "responsible opinion", and supporting the SLC's somewhat "pusillanimous" proposals,[40] were therefore somehow intimately linked in commissioner's minds.

There is an obvious argument that decisions on such matters as acceptability of reform to entrenched interest groups should be left to elected politicians: appointment as a law commissioner is not subject to public approval, commissioners have no constituents who can lobby them and present information that may contradict the views of well-financed and well-organised political interests, and appear even less representative of society than the judiciary and elected politicians.[41] Perhaps as a result of such considerations, the SLC, at least in this case, favoured a pragmatic recommendation which would produce some improvement without, it thought, creating overwhelming opposition from conservative political forces, rather than recommend the most coherent and arguably most progressive options for reform which on many measures did command majority support.

On the other hand, North rejects the "purist" concept that commissions should "unfailingly and uncompromisingly propose what [they think] to be right" without

35 SLC, *Report*, n. 8 above, para. 2.10.

36 There is a widely held assumption that there is a need for a "broad base" for any recommendation by a commission, see, eg, Hunter, "Law Reform", n. 6 above, p. 162; North, "Law reform", n. 20 above, p. 339; Michael Kerr, "Law reform in changing times" (1980) 96 *IQR* 515, p. 516; and Cretney, "Politics of Law Reform", n. 15 above, p. 497.

37 SLC, *Report*, n. 8 above, para. 3.2.

38 Ibid. para. 3.4.

39 Ibid. para. 1.3.

40 Editorial, "Divorce – business more or less as usual" (1989) *SCOLAG* 162.

41 Commissioners are drawn from the senior judiciary, the Bar, and the professoriate of two of Scotland's universities. The SLC gained its first female commissioner when Laura Dunlop QC was appointed to a part-time position in 2009.

considering the "general political, implications of any proposal"[42] and producing reports that may be too readily rejected by government because of fear of the reaction of interest groups which may simply be a waste of public money.[43] It might be that commissions would play a more beneficial role if they proposed a small number of possible reforms, with some indication of which would be most coherent and desirable, and left government or Parliament to worry about considerations of cost or the reaction of interest groups.[44]

Yet, despite the SLC's attempt to appeal to "reasonable opinion", by rejecting a move away from fault its recommendations were not acted on by government. Evelyn Gillan,[45] drawing on the work of political scientist John Kingdon,[46] concludes convincingly that while the SLC had addressed the "problem" of arguably outdated divorce law and produced a "policy solution", these two streams could not "couple" with the "political" stream as there was an absence of "value compatibility" between the (modest) progressive reforms advocated by the SLC and the "back to basics" agenda of the then Conservative government.[47] Such "value compatibility", and hence the opportunity to advance the SLCs reforms, would come about only on the election of a New Labour government at Westminster almost 10 years later.

3 The Scottish government

Limited devolution of power to Scotland was one of the most significant constitutional commitments of the incoming New Labour government in 1997. The Scotland Act 1998 created a Scottish government and a Scottish Parliament to which were bestowed wide-ranging legislative powers, including in Scots private law.[48]

Devolution was intended to make a difference to law-making for Scotland in a number of ways. The most obvious would be the greater opportunity to consider Scottish matters, which often struggled for parliamentary time at Westminster. The limited divorce law reforms enjoyed by England and Wales in 1969 had taken a further seven years to come to Scotland and had seen the failure of no less than seven Private Members' Bills before the 1976 Act was passed.[49] The SLC's modest proposals to reduce the separation time periods had made no legislative progress at Westminster while the LC's more complex proposals of the same year had been taken forward in the guise of the 1996 Act.[50] It is perhaps fortunate that the Conservative government of the day had other priorities as Scotland might have had the radical and unworkable "marriage-saving" legislation of the 1996 Act imposed upon it.

To avoid creating a "Westminster writ small",[51] the Scottish Ministerial Code required ministers to ensure a participative approach to development of policy and legislation to

42 North, "Law reform", n. 6 above, p. 347.

43 Cretney, "Politics of law reform", n. 15 above, p. 508.

44 North notes that commissions might indicate alternatives to recommendations they anticipate will face opposition by government, "Law reform", n. 6 above, p.339.

45 E Gillan, *Influencing Family Policy in Post-Devolution Scotland: The policy process of the Family Law Bill and the sexual health strategy*, PhD Thesis, University of Edinburgh 2008.

46 Especially, J W Kingdon, *Agendas, Alternatives and Public Policies* 2nd edn (New York : Longman 2003).

47 Gillan, *Influencing Family Policy*, n. 45 above, p. 118.

48 Scotland Act, ss. 28 and 29. See C M G Himsworth and C M O'Neill, *Scotland's Constitution* 2nd edn (Haywards Heath: Bloomsbury Professional 2009), ch. 5.

49 E Clive "Family law reform in Scotland – past, present and future" (1989) *JR* 133, p. 137.

50 See Hasson, "Setting a standard", n. 10 above.

51 The wide-spread aspiration for a "better politics" is described in G Jordan and L Stevenson, (2000) "Redemocratizing Scotland, towards the politics of disappointment?" in A Wright, *Scotland; The challenge of devolution* (Aldershot: Ashgate), especially pp. 171–2.

reflect "the sharing of power between the people of Scotland, the legislators and the Scottish Government"[52] rather than merely consulting on fixed legislative proposals.[53] This desire for a more participative legislative procedure had its roots in the "democratic deficit" prior to 1997 when Scotland experienced a series of Conservative governments which were felt by many to be remote and hostile to "Scottish Policy traditions" and for which the Scottish electorate did not vote.[54] Open and frequent consultation would, therefore, be central to Scottish government practice.

Lardy too has identified Scottish governments' "apparent appetite for the views of the electorate" but cautions that it is far from easy to move from such consultations to "evidence based" policy development.[55] Scottish governments would consult on the SLC's proposal in relation to divorce law no less than three times between 1999 and 2004 and not only were the same difficulties with developing policy on the basis of irreconcilable consultation responses which the SLC faced repeated in all of these consultations but the political stakes were raised by the instigation of highly organised fundamentalist Christian lobbyists in the 2000 and 2004 consultations in the context of an extraordinary campaign by the same forces against the repeal of "section 28" in 1999.[56]

The results of this analysis of the divorce reform process both pre- and post-devolution will support Gillan's conclusion that certain "faith groups" were successful in reframing the basis of debate away from the SLC's focus on appropriate legal regulation of divorce in a modern society, taking account of such issues as power imbalances between spouses and the interests of any children, to a moral discussion about the place of marriage in society.[57] While it would remain resistant to this political pressure, the government nonetheless was forced to shift its terms of engagement towards the "marriage as gold standard" position thereby allowing the minority fundamentalist faith groups to profoundly influence and change the terms of debate.[58]

Improving Scottish Family Law (1999)

With the SLC's considered proposals in hand but some 10 years old, the Scottish Office[59] launched a consultation on family law in early 1999, with the responses to be considered by the new Scottish government following the first Scottish election to be held later that year. The consultation paper, *Improving Scottish Family Law*, sought views on a whole range of issues from significant innovations such as parental responsibilities and rights for unmarried fathers to somewhat minor technical matters. The approach to divorce law reform is set out

52 The Scottish Ministerial Code, "Key principles", para. 3.1. See also B Thomson, "Access and participation: aiming high" in C Jeffrey and J Mitchell (eds), *The Scottish Parliament 1999–2009: First decade* (Edinburgh: Luath 2009), p. 46.

53 A Page, "A parliament that is different?", in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic 2005), p. 22.

54 P Cairney, D Halpin and G Jordan, "New Scottish Parliament, same old interest group politics?" in Jeffrey and Mitchell, *The Scottish Parliament*, n. 52 above, p. 105.

55 H Lardy, "Devolution and democracy" in A McHarg and T Mullen, *Public Law in Scotland* (Edinburgh: Avizandum 2006), p. 103.

56 The impact of "faith groups" on post-devolution Scotland is explored in M Steven, "The place of religion in devolved Scottish politics" (2007) 58 *Scottish Affairs* 96.

57 Gillan's study, *Influencing Family Policy*, n. 45 above, examines the post-devolution development of the policies which would result in the Family Law (Scotland) Act 2006 (including the reduction in the separation periods for divorce) and also those relating to a sexual health strategy for Scotland.

58 E.g. ibid. pp. 93 and 144.

59 The Scottish Office was the Westminster department in charge of Scottish business and was headed by UK government ministers. As many of the New Labour Scottish Office ministers went on to be ministers in the Scottish government, there was continuity of personnel as well as policy and approach.

here in some detail as it will apply, with only minor changes of tone, to the following two consultations and to the resulting Bill.

The main stated aims were "modernisation" of the law and addressing the interests of children.[60] The modernising agenda is clear from the opening sentence where "strengthen family life" is situated in the context of progressive "family friendly" employment rights, improved child care and action on domestic abuse.[61] "Modernising" then takes on the hue of promoting the interests of children who benefit most from "secure" families.[62]

It should be noted, however, that "family stability" did not necessarily mean "marriage-saving". Although the government's view was that "two parents offer the best prospects for their children and that stability is most easily found within marriage",[63] the only practical expression of this was a commitment to fund non-compulsory family mediation and support services: while doing nothing to encourage divorce, the aim of any reform "must surely be to enable couples whose marriages cannot be saved to part on fair terms with the least possible acrimony".[64] The disproportionate use of the fault grounds in divorces where children were involved, the government asserted, "increases the likelihood of acrimony" and not only negatively affected the parties but also might "interfere with continued parenting after divorce".[65]

In keeping with the aspiration for participative reform noted above, views were sought on a wide range of options. The first was to do nothing either in order to see how the 1996 Act worked in practice in England and Wales or on the view that the Scottish system was already moving away from fault; the second to implement the SLC's proposal to reduce the time periods for non-cohabitation and the third to proceed with something akin to the "radical changes" found in the 1996 Act.[66]

Sixty-one consultation responses addressed the grounds of divorce; a mere eight from individuals and 53 from organisations.[67] The organisational responses included three local authorities, five children's groups, four family organisations, five counselling or mediation groups, 10 religious groups, and 24 legal organisations, lawyers or legal academics. As with the SLC consultation, there was no consensus of view even within these categories.[68] The very small number of individual responses and the dominance of legal and religious interests suggest that it was the "usual suspects" who felt entitled or obligated to respond.[69]

60 Equality and protection were also significant aims though these had relatively little specific impact on reform of the grounds for divorce.

61 Scottish Office, *Improving Scottish Family Law* (Edinburgh: Scottish Office 1999), p. iv.

62 Ibid. p. v.

63 Ibid.

64 Ibid. p. 6. Here we can detect echoes of the 1996 Act, which is understandable given the consultation document was written by ministers in a Westminster government which was, at the time, committed to bringing the 1996 Act into effect. For the 1996 Act, see Reece, *Divorcing Responsibly*, n. 11 above.

65 The most recent statistics then available revealed that in 1997, where children were present, 12% of divorces were based on adultery and 57% on intolerable behaviour compared to 6% and 17% respectively where there were no children, Scottish Office, *Improving*, n. 61 above, p. v.

66 Ibid. pp. 5–6.

67 Some of the responses are available at www.scotland.gov.uk/Resource/0039/00396139.pdf while a summary is available at www.scotland.gov.uk/Resource/0039/00396140.pdf (both last accessed 29 June 2012).

68 For example, of those in the religious groups category, which had been the most consistent group in the SLC consultation, two wanted no reform, one wanted reduction in non-cohabitation periods, six sought radical change similar to the 1996 Act and one opposed all of the options presented.

69 There were possibly fewer responses from family and children's groups than might have been expected and a notable scarcity of e.g. women's groups, father's groups and trade unions. For an overview of "civil society" activity in the UK, including trade unions and religious groups, see S Daly and J Howell, *For the Common Good?* (London: Carnegie 2006).

Overall nine organisations favoured no action, 26 favoured reduction in non-cohabitation periods and 16 more radical reform.

Parents and Children (2000)

In late 1999 and early 2000 the Scottish government faced what was, at least for Scotland, an unprecedented onslaught in reaction to its plans to repeal the homophobic section 28 legislation which banned promotion of homosexuality and labelled same-sex relationships "pretended families".[70] The Keep the Clause campaign was well funded and made good use of the media, in particular the best-selling, Labour-supporting tabloid *The Daily Record* and also a private poll, financially underwritten by Christian businessman Brian Souter, which delivered anti-repeal literature to every household in Scotland. Although section 28 was eventually repealed in the Ethical Standards in Public Life Etc. (Scotland) Act 2001 the pressures placed on the government to draw back from progressive and rational reform in favour of promoting traditional values was profound.[71]

At the height of the Keep the Clause furore the government drafted and then launched its White Paper responding to the 1999 consultation. The paper, *Parents and Children*, continued the theme of modernisation and responding to the reality of family change and, while the interests of children were still to the fore, the emphasis now shifted slightly towards supporting families through transition.[72] Although the government acknowledged the importance of marriage to society, it was resolute in not being drawn into a discussion of "the merits of different family styles".[73]

As before, there were echoes of the "good divorce" approach found in the 1996 Act but the government revealed that it had rejected both that "radical" option and the status quo.[74] The government now firmly supported the SLC's proposed reduction in the periods of non-cohabitation as this had been backed by slightly more than half of those who expressed a view in the 1999 consultation.[75] However, one radical possibility, that adultery might be subsumed within a single ground of intolerable behaviour, was raised for the first time.[76] This cannot be viewed as an attempted move away from fault but was, rather, a further example of a more rational and modern law as it was not necessarily the mere act of adultery which should found the divorce (after all many marriages survive admissions of adultery) but the fact that the other spouse may find the behaviour intolerable.[77] While the inclusion of this issue may have been a genuine "modernising" idea which the government must have known would provoke the ire of Christian fundamentalists, especially given the febrile atmosphere created by the Keep the Clause campaign, it can also be seen as a potential lightning rod for conservative respondents; if attacked it could be easily jettisoned

70 See B Dempsey (1999) "Section 28 – the repeal of 'vindictive Tory legislation'" (1999) *SCOLAG* 144–7 and K Armstrong "Contesting government, producing devolution: the repeal of 'section 28' in Scotland" (2003) 23 *Legal Studies* 205. For the impact of the campaign on individual lesbian and gay people, see e.g. B Cant, *Footsteps and Witnesses* (Edinburgh: Word Power 2008), p. 111.

71 See the quotes from senior civil servants and politicians at Gillan, *Influencing Family Policy*, n. 45 above, pp. 139–44, and especially those of Susan Deacon, then Minister for Health and Social Care, p. 141.

72 Scottish Executive, *Parents and Children* (Edinburgh: Scottish Executive 2000), p. iii.

73 Ibid. p. iii. The paper addressed other contentious issues, including parental responsibilities and rights for unmarried fathers and step-parents and proposals for recognition of unmarried cohabiting couples.

74 Ibid. p. 1.

75 Ibid. p. 17. Only 15% had supported the status quo.

76 Ibid. p. 18.

77 The government did not champion the concept but asked for views: in doing so it appears to echo points made by Kenneth Norrie in his submission to the 1999 consultation.

thus allowing the government to appear accommodating while pressing ahead with the reduction in the periods of non-cohabitation.[78]

The responses to *Parents and Children* show a number of interesting developments.[79] The most significant of these was that a large number of responses were submitted by private individuals in response to a sustained campaign against government policy by the evangelical political lobby the Christian Institute (CI). In the face of this, a further development was the classification of responses by the government into "CI" and "non-CI" responses on the basis of the similar wording and the restriction of comments to those issues raised in the CI campaign.

The government identified 160 individual responses and six organisational responses as resulting from the CI campaign. All of the individual responses asserted the writer's opposition to the government's supposed intention to make divorce "easier" and to "equate" marriage and cohabitation as undermining marriage.[80] These submissions rarely acknowledged that they were in response to the CI campaign nor did they display any familiarity with the content of the consultation document. The source and nature of these individual responses hardly suggest that devolution had resulted in a better engagement of the Scottish public with policy development, at least this early on in the process.

In contrast to the individual responses, the public statements of the CI itself were generally carefully argued and supported by reference to a number of published studies which purported to establish the negative social and individual effects of divorce.[81] The CI's position was that divorce on non-fault grounds was not acceptable to Christians and it challenged the government's central argument that shorter time periods would lead to a move away from fault grounds and therefore reduce acrimony.

Of the non-CI responses, 10 were from private individuals and 44 from organisations or professionals. While the number of individuals had not increased, and many of the organisational respondents were the same ones who replied to the earlier consultation,[82] the presence of respondents such as the UK Men's Movement and Families Need Fathers indicates that slightly more than the usual suspects were engaged by this particular exercise.

Yet again, there was no consensus on reform. Fifteen non-CI groups or individuals supported reduction in the periods of non-cohabitation with 11 opposed. On the merger of adultery and intolerable behaviour, 13 non-CI organisations and individuals were in support and 30 opposed. In relation to the merging of adultery into the general intolerable behaviour ground, there was a fairly clear trend so the consultation could be said to have served some purpose, though, as before, this does not answer any question about what values should underpin the legal regulation of divorce or whether retaining adultery as a separate ground is rational or coherent. In relation to the separation periods, it is difficult to see any benefit in terms of policy development from the results of this consultation.

78 Which, in the event, was exactly what happened.

79 Responses are available at www.scotland.gov.uk/Topics/Justice/law/17867/FLSA2006/13804/Responses and an analysis at www.scotland.gov.uk/Resource/0039/00396142.pdf (both last accessed 29 June 2012).

80 Eric Clive has made the point that marital breakdown comes before divorce, easy or otherwise, and that "[i]t seems likely that more difficult divorces would no more save marriages than more difficult funerals would save lives", *Husband and Wife*, n. 3 above, 20.014, fn. 44.

81 Christian Institute, *Marriage: Worth Fighting For* (Edinburgh: Christian Institute 2000).

82 Including 12 religious groups and 16 lawyers or legal groups.

Family Matters (2004)

The impact of the CI intervention in the 2000 consultation, linked with the profoundly politically uncomfortable experience of the Keep the Clause campaign, was responsible in large part for there being no legislative progress on reform of divorce law, or other progressive family reforms, for a number of years.[83] In the 2003 Scottish election campaign, several Christian political groups targeted progressive MSPs who had supported repeal of section 28 but their challenge proved unsuccessful.[84] The election resulted in the formation of another Labour/LibDem coalition and that government issued what would be a final consultation, the 2004 White Paper *Family Matters*, which closely resembled the previous papers by emphasising the best interests of children within a clearly articulated agenda of meeting the needs of "all of Scotland's people".[85] The reductions in the time periods of non-cohabitation were now "firm proposals", though the government invited people to "record" their views if they so wished.[86] The possibility of merging adultery with intolerable behaviour was not progressed.

While we are told that opposition to the government's proposals among individual respondents outweighed support by 9:1 the responses are difficult to analyse as, from a total of 142, 80 were submitted "in confidence" and so are unavailable for scrutiny.[87] Individuals may, of course, have legitimate reasons for seeking anonymity but that could be achieved in most cases by redaction thus allowing the content of the response to evaluated. As almost all of these "in confidence" responses were opposed to the government's position and we know from the responses to the 2000 consultation that many of such responses show no indication of their authors having read the consultation document, anonymity makes it difficult for parliamentarians as well as the public to take a view on whether the government gave the appropriate weight to whatever argument there may have been in these responses. What can be said is that these individuals appear not to be representative of the generality of public opinion in Scotland at the time.[88]

Of the 48 organisational responses, 11 were from religious groups, relatively steady in number over the three consultations, and nine from legal groups, legal academics or lawyers, a significant drop from 24 in 1999 and 16 in 2000. The reason for the decline in engagement by legal groups and professionals is unknown but may be related to consultation fatigue or a view that the case for or against reform had been set out several times and that there was a degree of contentment with the likely outcome given that the reduction in non-cohabitation periods were now "firm proposals". In any event, on this occasion there was a high degree of consensus with 40 organisations in support of the government's proposals and only eight (seven religious groups and one legal group) opposed.

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83 A civil servant involved in family policy at the time is quoted as saying: "The Family Law Bill, I suspect, got put into the long grass prior to the election because you don't want the backlash from the right-wing saying you're in favour of quickie divorces and all the rest of it just prior to an election.", Gillan, *Influencing Family Policy*, n. 45 above, pp. 140–1.

84 See Armstrong, "Contesting government", n. 70 above, and P Cumper and M Bell "Reforming section 28: lessons for Westminster from Holyrood" (2003) 4 *EHRLR* 400.

85 Scottish Executive, *Family Matters* (Edinburgh: Scottish Executive 2004), p. 3. Again it was asserted that the reductions in the periods of non-cohabitation would "not cause divorces", p. 17.

86 Ibid. pp. 16–17.

87 L Nicholson, *Improving Family Law in Scotland: Analysis of written consultation responses*, p. 20, available at www.scotland.gov.uk/Resource/Doc/26350/0025007.pdf. The responses themselves are available at www.scotland.gov.uk/Publications/2004/10/20073/44798 (both last accessed 1 June 2011).

88 At the time, 47.5% of Scots indicated that they had "no religion", Gillan, *Influencing Family Policy*, n. 45 above, pp. 91–2, citing information from the Scottish Social Attitudes Survey 2004.

Overview

Some important differences between the SLC's consultation in 1988 and the first governmental consultation in 1999, on the one hand, and the responses to the two White Papers in 2000 and 2004 have been identified. The most significant of these is the well-resourced intervention by the CI to encourage individuals to oppose the government's reforms in the context of the highly charged campaign against repeal of section 28. As we shall see below, reference was made by some parliamentarians to the "overwhelming" number of negative responses from individuals to these consultations without addressing the particular circumstances of the CI campaign.

However, the similarities outweigh the differences. Few private individuals were moved to respond other than the unrepresentative group, numbering between 130 and 160,[89] mobilised primarily by the CI. The desire for more participative policy development in a devolved Scotland was intended to move away from "consultation with the 'usual suspects', or the most powerful interest groups".[90] It is true that latterly a small number of interest groups did come forward to present their views for the first time[91] but those labelled the "usual suspects", especially generally conservative religious and to some extent legal groups, continued to dominate.[92] This can be seen as a reflection of the "logic of consultation"[93] which tends to favour those organisations with the greatest resources.[94]

The responses themselves continued to be as fundamentally contradictory as those received by the SLC. Based on a self-declared prioritisation of the needs of children, for example, different respondents called repeatedly and emphatically for no change, for reduction in the separation periods *and* for more radical reform. Those who enter the process with firm views might refine the presentation of their views over time but those who do not have firm answers appear muddled: neither show evidence of developing their positions. The conclusion to be drawn from the government's experience is that conducting repeated consultation on the grounds of divorce, a contentious issue which involves competing interests, does not lead to greater clarity on what the law should be as there is no means to resolve basic conflicts in respect of values.

The hiatus between 2000 and 2004, caused by fears in relation to the 2003 election and the slight increase in acknowledgment that marriage remained an important institution which should not be undermined, suggests a government under pressure. However, throughout this extended process of consultation, the government stood resolute in favour of "modernisation" of the law, aiming, as it saw it, to meet the needs of families as they

89 A fairly modest number given the CI's claim to be supported by "2,300 individuals from across the Christian denominations in Scotland of which 370 are Church leaders", written submission from CI to the Justice 1 Committee available at http://www.christian.org.uk/scotland_archive/familylaw/2005/responsetojustice1_april05.pdf (last accessed 8 June 2012).

90 Cairney et al., "New Scottish Parliament", n. 54 above. This desire has also affected Westminster, at least in terms of greater "pre-legislative scrutiny", A Brazier, "Pre-legislative scrutiny: a positive innovation" in A Brazier (ed.), *Parliament, Politics and Law Making* (London: Hansard Society 2004), p. 59.

91 E.g. those associated with the "men's movement", for which see R Collier and S Sheldon, *Father's Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart 2006).

92 D Halpin and G Baxter, "Searching for tartan policy bandwagons", available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/7/9/4/4/pages279441/p279441-1.php, especially p. 20, table 7 (last accessed 4 July 2012). However, consultations are open processes and the use of this somewhat derogatory label for those who do consistently take the trouble to respond seems somewhat harsh.

93 Cairney et al., "New Scottish Parliament", n. 54 above, p. 107.

94 For a generally positive review of attempts at "participative democracy", see G Reid "The fourth principle: sharing power with the people of Scotland", in Bernard Crick and Andrew Lockyer (eds), *Active Citizenship: What could it achieve and how?* (Edinburgh: EUP 2010).

actually existed and functioned rather than promoting a traditionalist view of marriage. Many individual MSPs would not prove so resilient in the face of lobbying by religious fundamentalists representing the interests of a small minority of Scottish society.

4 The Scottish Parliament

With this extended consultation process and the 2003 election behind it, in early 2005 the government introduced the Family Law (Scotland) Bill 2005, clause 10 of which would reduce the non-cohabitation periods for divorce to one year with agreement of the other party and two years without such agreement. The policy memorandum which accompanied the Bill noted that "family life" should generally be a private matter for individual families but, if legal intervention was required, the three principles to be applied were "safeguarding the best interests of children; promoting and supporting stable families [and] updating the law to reflect the reality of family life".[95] Reduction in the non-cohabitation periods was intended to reduce unnecessary conflict and recrimination, especially in cases where children were present.[96] The government had been able to reject the submissions of those who favoured the "marriage saving" approach of the 1996 Act since implementation had been abandoned in England and Wales as being neither cost-effective nor helpful in reducing acrimony between divorcing parties.[97]

While the question of precedent in the relationship between the SLC and government is clear, the proper relationship between government and Parliament is more contested. As noted above, the architects of devolution sought a power-sharing dynamic involving "the people of Scotland", government and parliamentarians.[98] The Scottish Parliament was designed to be "a committee-based parliament in the Scandinavian or German mould"[99] to provide an effective check on Westminster-style executive dominance, but many commentators have expressed serious doubts as to whether this has been effective.[100] Page goes so far as to conclude that Scottish governments have been able to exercise a "power-hoarding rather than power-sharing" approach based on their view that "possession of a parliamentary majority brings with it the right to have its wishes translated into law".[101]

While it may be true that the wishes of the two governments prevailed in the majority of cases in the first two sessions of the Parliament, its proposals on divorce would be challenged and, indeed, amended in ways not to its liking. This despite the fact that the lead committee scrutinising the bill, Justice 1, had, as with all committees, a government majority.[102]

The committee

The process in the Scottish Parliament is that a lead committee is tasked with scrutinising a Bill and reporting in advance of the Bill receiving approval or disapproval of its general principles before the whole chamber (Stage 1). Those Bills which progress are then closely scrutinised (and often amended) during Stage 2 which is conducted by the committee. The

95 Family Law (Scotland) Bill 2005, policy memorandum, paras 3 and 4.

96 Ibid. para. 27.

97 Ibid. para. 30.

98 See nn. 51–5 above.

99 D Arter (2003) "The Scottish Parliament and the goal of a 'new politics': a verdict on the first four years", p. 5, available at www.ecprnet.eu/standinggroups/parliaments/papers/arter.pdf (last accessed 8 June 2012). See also Himsworth and O'Neill, *Scotland's Constitution*, n. 48 above, pp. 264–70.

100 E.g. C Charman and M Shephard (2009) "Committees in the Scottish Parliament" in Jeffrey and Mitchell, *The Scottish Parliament*, n. 52 above, pp. 23–5.

101 Page, "A parliament that is different?", n. 53 above, p. 13.

102 The committee consisted of three Labour, one LibDem, two SNP and one Conservative MSP.

Bill then returns to the whole chamber for Stage 3 where it can again be amended and faces a final vote of approval or disapproval.[103]

To inform its deliberations the committee launched a "call for evidence" on the proposals contained within the Bill, effectively yet another consultation process.[104] Although this might merely duplicate previous consultations and add to the danger of "overload",[105] the responsibility for this cannot be attributed to the committee itself as the original intention of those who constructed the devolution settlement, that consultations would be undertaken jointly by the government and the lead committee, was not approved in the Parliament's Standing Orders.[106] Indeed, far from there being pressure not to hold what was effectively another consultation, the fact that any amendments to the legislation made by the committee subsequent to its consideration of this evidence are not then subject to yet another consultation process may leave the amendments open to challenge.[107]

Of the 120 individual responses to the call for evidence that can be scrutinised and which addressed the question of divorce, only one welcomed the proposals. The other 119 responses were similar in tone, structure and content, and, while not acknowledging the CI leaflet as a source, attacked the proposals as undermining marriage by "making divorce easier and quicker".[108] Organisations supported the introduction of a one-year period by 25 to 13 (with 11 of those opposed being religious bodies) and the two-year period by 23 to 15 (with 10 of those opposed being religious groups). The committee then chose to invite oral evidence in public session from seven religious groups, two mediation groups, two children's groups, two legal academics and the Law Society of Scotland, as well as officials and the minister from the relevant department.[109] The pattern of all the previous consultations, with a lack of consensus reflecting fundamentally competing value judgments and rigorous intervention by particular minority interest groups, was repeated and in fact exacerbated by disproportionate access being granted by the committee to religious organisations.

Based on the opinions presented to it, in its report to Parliament in advance of the Stage 1 debate, the committee's starting position was not specifically the interests of children or of reducing acrimony and allowing people to "move on" but the more conservative aim of striking a balance between not increasing the number of divorces and "recognising the value that the institution of marriage brings", on the one hand, and "not unnecessarily interfering in the private lives of individuals", on the other.[110] In particular, the majority of the committee were sceptical about the government's claims of reducing

103 Himsworth and O'Neill, *Scotland's Constitution*, n. 48 above, ch. 8. For full details of the progress of the Bill, see www.scottish.parliament.uk/business/bills/36-familyLaw/36-familyLaw-progress.pdf (last accessed 4 July 2012).

104 The Committee's Stage 1 report on the Bill, with details of evidence submitted, is available at http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm (last accessed 8 June 2012).

105 Page, "A parliament that is different?", n. 53 above, p. 28.

106 B Winetrobe (2004) "Making the law in devolved Scotland" in Brazier, *Parliament, Politics and Law Making*, n. 90 above, p. 59.

107 In the Stage 3 debate the minister, Hugh Henry, labelled the committee's Stage 2 amendments "arbitrary" and noted that their favoured periods of 18 months and three years had been "subject to no consultation whatever", OR col. 21768.

108 Justice Committee Report, SP Paper 401, 7 July 2005, para. 37.

109 The committee enjoyed the services of Professor Kenneth Norrie as advisor.

110 Justice Committee Report, n. 108 above, para. 45. The committee expressly recognised "that for a significant section of Scottish society marriage is a life-long commitment and that for some people divorce is intrinsically wrong", para. 46.

acrimony by shortening the non-cohabitation periods, echoing the view of the CI and others opposed to reform that it was divorce itself that caused acrimony and distress rather than the length of separation periods and that the government had failed to justify its proposed reforms of the non-cohabitation periods.[111] Despite these particular concerns, the general principles of the Bill, which contained many other provisions, survived its Stage 1 reading[112] and moved to Stage 2.

Although amendments are often made at Stage 2 these generally do not go against government policy as the makeup of the committee reflects the strength of the parties in the Parliament.[113] An avowedly "marriage-saving" amendment from the Conservative member, Margaret Mitchell, which would have denied divorce unless the pursuer had made attempts at reconciliation, was lost by two votes to four, with the element of compulsion the stumbling block for the majority.[114] A Scottish National Party (SNP) amendment to retain the two-year period for divorce with consent was lost by just four votes to three.[115] The failure of these amendments indicates some resistance to the influence of the CI and other fundamentalist religious lobbies. However, to the surprise of many, two further amendments from Mitchell, replacing the government's proposed one year with and two years without agreement periods with 18 months and three years respectively, passed by four votes to three with the support of the two SNP members and Labour's Mary Mulligan.[116]

Gillan attributes this reversal for the government, despite its majority on the committee, to the influence of the CI and the Catholic Church. These groups, which were unrepresentative of "mainstream opinion in Scotland", were "highly successful in framing policy debate, elevating marriage as the 'gold standard' of family relationships in political discourse and embedding this key influencing message into cross-party consciousness".[117] This appears to have been particularly effective in relation to the committee given a combination of the personal religious backgrounds of the committee members and the particular religious make-up of their constituencies.[118] A Labour colleague of Mulligan on the committee, Marlyn Glen, professed herself "totally shocked" that the government's position was rejected and that members allowed their personal beliefs, background and circumstances to determine their actions rather than a concern for the needs of particular families living in Scotland at the time.[119]

The Chamber

When the Bill moved to Stage 3 in late 2005 the government tabled two amendments to reinstate the non-cohabitation periods originally proposed by the SLC in 1989 and consulted on by government no less than three times. The question of what weight to attach

111 Justice Committee Report, n. 108 above, para. 47–50.

112 OR col. 19233–4, 15 September 2005.

113 The Stage 2 debate can be found at Justice 1 Committee OR 2 November 2005, col. 2179.

114 The SNP's Bruce McFall joining Mitchell and the other SNP MSP, Stewart Stevenson abstaining, OR col. 2191–2.

115 The two SNP members being joined by Labour's Mary Mulligan, OR col. 2219–20.

116 Ibid.

117 Gillan, *Influencing Family Policy*, n. 45 above, p. 274.

118 A civil servant interviewed by Gillan was of the opinion that "Margaret Mitchell's amendment was pulled from the Christian Institute and the SNP . . . Fergus Ewing and Brian Adam, they're quoting from the wee frees . . . Mary Mulligan is a practising Catholic and I think there is a lot of Catholic MSPs, primarily West Coast and the minister was under a lot of pressure.": ibid. p. 104.

119 Gillan, *Influencing Family Policy*, n. 45 above, p. 103.

to consultation responses and the proper relationship between parliamentary committees and government were key issues raised by those opposed to the reforms.

Mary Mulligan made explicit reference to the numerically overwhelming opposition from consultation respondents, without apparent concern for the fact that many of these responses were near identical, rarely showed evidence of their author having seen the consultation papers, and were overwhelmingly generated by a single lobby group.[120] As noted above, this was countered by the observation that the committee's amendments, drawn up in light of its call for evidence, had not been subject to any consultation process.[121] Murdo Fraser complained that the government was, not for the first time, seeking to overturn a committee's carefully considered amendments and was "riding roughshod" over the aspirations for consensus and participation.[122] However, the strength of this argument was challenged by the Deputy Justice Minister, Hugh Henry, who pointed out that if amendments made at Stage 2 should not be challenged at Stage 3 then there was no point in having a Stage 3 and also by the fact that Fraser's Conservative group itself frequently opposed Committee determinations in Stage 3 debates.[123]

When put to the vote, the Labour/LibDem coalition government succeeded in reinstating its time periods with only a handful of its own MSPs dissenting.[124] The amendment to reduce the period without consent from five to two years passed by 91 votes to 34 while the reduction from two to one year with consent was passed by 93 to 31.[125] On the final vote on the entire Bill the government prevailed by 104 votes to 12.

Despite this emphatic result, those forces opposed to progressive reform were not left without gain. Although these groups ultimately failed to control the specific legislative outcome, they succeeded in reframing the policy debate, most notably by shifting the debate from modernisation of the law to marriage as the "gold standard".[126]

At the outset of the Stage 3 debate the minister announced additional government funding of £300,000 for family support services, a move which would perhaps allow some wavering MSPs to support reform.[127] In contrast to the earlier declared focus on the interests of children and on modernising the law, the minister was now at pains to recognise the "special status" of marriage and acknowledge divorce as "always a sensitive issue" which for many people touched "on their core beliefs about the sanctity of marriage and its importance as one of the principal building blocks of society."[128] While the government would not undermine marriage, the minister insisted that divorce law had to address the needs of particular families when a marriage ended in separation, especially in the interests of children.

The most commonly asserted principle among those opposed to reform was not modernisation or the interests of children but the importance of marriage as an institution. Murdo Fraser openly stated that his test was whether the Bill supported marriage and

120 OR col. 21772.

121 See text at n. 107 above.

122 OR col. 21776.

123 OR col. 21783.

124 OR col. 21786–92 and 21947–9. Labour and the LibDems applied the party whip while the other parties allowed a free vote, Gillan, *Influencing Family Policy*, n. 45 above, p. 136.

125 On each vote four Labour and one LibDem MSP joined all Conservative and a number of SNP MSPs in opposing the reduction, OR col. 21788–92.

126 Gillan, *Influencing Family Policy*, n. 45 above, p. 144.

127 Supposedly over and above the existing annual support of £630,000 and the extra £500,000 provided "this year and last", OR col. 21765.

128 OR col. 21764.

couples staying together[129] while others referred to marriage as the "gold standard" of adult relationships.[130] Even those who most strongly supported reform, such as Green Party MSP Patrick Harvie, insisted that he had "always valued" marriage and had never "criticised the institution of marriage or proposed some way of undermining it".[131]

In both the committee and in the Parliament as a whole it is clear that strong feelings were engaged by the proposals, reflecting both personally held beliefs on the part of MSPs and concern at the reaction to reform expressed by particular interest groups. The evidence here confirms Gillan's conclusion from her study of the progress of the Family Law (Scotland) Bill as a whole, where she finds that although "faith groups" had a significant influence on the terms of the debate they failed in their attempt to control Parliament.

5 Conclusion

Examination of this particular extended law reform process informs consideration not only of the proper relationship between law commissions, executives and parliaments but also the value of consultation exercises. The effort involved in conducting, considering and responding to several consultations, only to arrive back at the "modest" proposal recommended by the SLC some 17 years previously, appears disproportionate. Devolution, with its aspirations for accessibility and participation, can, as we have seen, increase the effort involved in even modest law reform without contributing a great deal in terms of outcome.

Given the greater openness and accessibility of government and Parliament following devolution, and the problems of repeated consultation, it might be argued that the important role played by the SLC in keeping a focus on Scottish law reform in the past is no longer necessary.[132] Abolition is not unthinkable[133] but, given the (justifiably) very high regard that informed commentators have for the quality of the SLC's work and the combination of politicians' vulnerability to lobbying and the tendency of government to regulate so many areas of our lives, the role of the SLC may be viewed as more, not less, important in a country where politicians have more time to legislate.[134] Although not impervious to criticism, commissioners cannot be lobbied or targeted in the way ministers, and even more so, particular MSPs, can. The time spent on consultation by the SLC does appear to influence, and perhaps improve, law reform proposals, with the caveat that the SLC should be careful not to necessarily give "the public" what it wants.[135]

The Scottish government was right to consult in 1999, given the 10 years which had passed since the SLC report, the change of UK government and the onset of devolution, but serious doubt must exist over the appropriateness of consulting a further twice before the production of the Bill in 2005. The government's commitment to the SLC's proposals was clear following the 1999 consultation and there was no new factor thereafter to justify inviting views again in 2000 nor, other than political expediency, in 2004. The drawn-out process was a waste of resources for government and respondents and tended to favour

129 OR col. 21932. See also e.g. SNP MSP Fergus Ewing at col. 21774.

130 Stewart Stevenson, OR col. 21769.

131 OR col. 21940 and 21777–8. Harvie asserted that "locking people into relationships when they have gone wrong" would hardly enhance the status of marriage.

132 For a wide-ranging attack on commissions in general, see A Samuels "The Law Commission: do we really need it?" (1986) *NLJ* 747.

133 Canada abolished its Law Commission in 2006, Brotchie, "Scottish Law Commission", n. 14 above, p. 34, fn. 23.

134 Hope, "Do we still need a Scottish Law Commission?", n. 14 above.

135 In contrast, Lord Hope notes with approval the "widespread appreciation throughout Scotland of the close harmony which has been achieved between what the Commission does and what the public wants", "Do we still need a Scottish Law Commission?", n. 14 above, p. 26.

well-resourced usual suspects: there is little evidence that the government consultations attracted responses from those who might fail to respond to an SLC consultation.[136]

Although there was some delay and a change in emphasis of rhetoric, the government was able to remain focused on improving the legal response to those whose marriage had broken down. No less a figure than Lord Hope of Craighead has stated that "[c]redit must go to the [Scottish government] for not finding itself too busy *or too afraid* to get on with this task" of producing a modern regime of family law.[137]

The creation of the Parliament's committee system offered a new opportunity for interested parties to attempt to influence policy. It is, however, difficult to discern any new information arising from the Justice 1 committee's call for evidence on the government's proposed reforms which might justify the expenditure of effort on the part of those expected to respond. While it is refreshing that legislators resist toeing the party line, the comments by those working most closely with these particular MSPs that this was done on the basis of their individual religious affiliations and in light of the supposed religious make-up of their constituencies rather than in the interests of individual families in difficulty is worrying.

Devolution has meant that both government and more especially Parliament (whether as individual MSPs or in committee) have been more open to, and engaged by, interest groups than was the case in relation to Scottish legislation at Westminster. What there is no evidence of is achievement of what Arter calls the aspiration to engage with the "authentic voice of Scotland".[138] The question of what value to attach to particular views, especially when presented by powerful media-savvy and well-resourced minority groups, remains unresolved. What is clear is that such groups can have a significant effect on the law reform process with, at least in this case, little discernible impact on the eventual outcome. In that respect, the resources expended on multiple consultation may be viewed as a significant cost of devolution.

136 In particular, service providers, whether in the voluntary, public or private sector, may have "opportunity costs" when their resources are expended not in their central role as support worker or academic or solicitor but on presenting the same arguments and evidence several times in repeated consultation processes, see e.g. North "Law reform", n. 20 above, pp. 344–6.

137 Hope, "Do we still need a Scottish Law Commission?", n. 14 above, p. 25, my emphasis.

138 Arter, "From 'spectator democracy' . . .", n. 13 above.

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Mens rea and the general inchoate offences: *another* new culpability framework

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Introduction

This article examines approaches to reforming the mens rea of inchoate offences, focusing in particular on recently published proposals of the Irish Law Reform Commission,[1] and contrasting them with very different recommendations recently adopted by the English Law Commission.[2] Both sets of proposals recommend a departure from the orthodox position which is that for a defendant to be liable for an inchoate offence they must *intend* that the full offence be committed. In recommending a departure from that approach, each Commission's proposal involves an expansion of the scope of inchoate criminal liability, though, as we will see, the Irish Commission goes considerably further in this regard. In exploring the commissions' proposals, we are concerned to identify and evaluate the implications of the approaches they suggest. We will argue that deciding what the mens rea of inchoate offences should be requires a clear conception of what the wrong is that is inherent in these offences which it is proposed to criminalise. Furthermore, any culpability framework must be rational and coherent, and therefore must consistently accord with whatever wrong it is claimed inchoate liability is there to penalise.

By way of introduction, it is useful to draw attention to the centrality of the mens rea of inchoate offences in characterising the wrong which is being criminalised. In the case of completed offences, in most cases the wrong in question comprises engaging in conduct which amounts to a concrete realised harm, combined with some element of fault on the defendant's part in bringing about that harm. For inchoate offences, the defendant's conduct is often significantly removed from that harm and, by definition, the objective harm encompassed by the completed offence is not realised. In the case of inchoate offences then, we are, at best, concerned with a *prospective* harm which *may* result/have resulted from the defendant's conduct. In the absence of the concrete realised harm contemplated by the

* We would like to thank Professors Robert Cryer, Jeremy Horder and Lucy Vickers for reading an earlier draft of this article. The normal disclaimer applies.

1 Law Reform Commission of Ireland, *Inchoate Offences* Consultation Paper No 48 (Dublin: LRC 2008) and *Inchoate Offences* No 99 (Dublin: LRC 2010), hereinafter, Ire. Consultation No 48 and Ire. Com. No 99 respectively.

2 See, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* No 300 (London: Law Commission 2006), hereinafter Eng. Com. No 300; Law Commission, *Conspiracy and Attempts: A consultation paper* Consultation No 183 (London: Law Commission 2007) and *Conspiracy and Attempts* No 318 (London: Law Commission 2009), hereinafter Eng. Consultation No 183 and Eng. Com. No 318 respectively.

completed offence, the defendant's mens rea as regards prospectively bringing about the commission of that offence plays a crucial role in characterising the wrong encompassed by inchoate criminal liability. For that reason the commissions' proposals have considerable importance. In suggesting a departure from the orthodox approach and proposing alternative culpability frameworks for the mens rea of inchoate liability, the commissions are not merely recommending changes to the technical basis upon which criminal liability will be imposed. More fundamentally, they are, whether or not they expressly acknowledge it, proposing that inchoate criminal liability should target wrongs which are different to the wrongs which were previously identified as the target of inchoate criminal liability, and in respect of which criminalisation was substantively claimed to be justified.

In the sections which follow, we first seek to explain the implications of each Commission's proposals, and in so doing we endeavour to identify the wrong, or indeed wrongs, which their proposals seem to imply underlies inchoate criminal liability. We then proceed to explore possible principled justifications which may exist for criminalisation on that basis. However, before examining these matters, we first begin with an explanation and an analysis of the orthodox approach. Our objective in so doing is, in particular, to explain why the orthodox approach was thought by both commissions to present difficulties which required that alternative approaches be formulated.

The orthodox position and its apparent problems

The orthodox position regarding the mens rea for inchoate offences is reflected in the current law in England and Wales,[3] Northern Ireland,[4] and the Republic of Ireland,[5] along with most of the common law world.[6] In general, for a defendant to be liable for an inchoate offence they must: intend to commit the substantive offence (for attempt); intend that the person encouraged commit the offence (for incitement); or in agreeing with someone else to commit the offence, intend that the offence be committed (for conspiracy).[7] According to McAuley and McCutcheon:

3 See, the Criminal Attempts Act 1981, s. 1 (attempt) and the Criminal Law Act 1977, s. 1 (conspiracy). The recently created offences of assisting and encouraging (which also apply to Northern Ireland) set out in the Serious Crime Act 2007, Part 2, depart from the orthodoxy as far as incitement is concerned. This offence replaces common law incitement and its creation follows (partly) the English Commission's recommendations set out in Eng. Com. No 300, discussed below.

4 Criminal Attempts and Conspiracy (Northern Ireland) Order 1983, No 1120 (NI 13), Articles 3 and 9.

5 *The People (Attorney General)* v *Thornton* [1952] IR 91, 93, and P Charleton, P McDermott and M Bolger, *Criminal Law* (Dublin: Butterworths 1999) [4.105–7] and [4.134].

6 The main exception arises in Scot's law of criminal attempts. See *Cawthorne* v *HM Advocate* 1968 SLT 330. As Plaxton notes: "The idea that someone can attempt something recklessly is peculiar to Scotland – and, in fact, is simply peculiar." See further M Plaxton "Foreseeing the consequences of Purcell" (2008) *SLT* 21, especially pp. 23–4. See also T H Jones and M Christie, *Criminal Law* (Edinburgh: W Green 2008) [6-09] and [6-10]. Thanks to Luke Price, research assistant at Birmingham Law School, for his help in finding a range of relevant Scot's law materials.

7 In the case of conspiracy, the position is more complicated. For instance, in England and Northern Ireland the common law offences of conspiracy to corrupt public morality, conspiracy to outrage public decency and conspiracy to defraud, involve agreements to engage in conduct which are not themselves substantive offences. In the Republic of Ireland, the position in law remains that set out in *R* v *Parnell* (1881) 14 Cox 508 where it was explained that in addition to catching agreements to commit a crime, conspiracy also includes agreements "where the object is lawful, but the means to be resorted to are unlawful; and where the object is to do injury to the third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime". The specific common law conspiracies noted above are also offences. The Irish Law Reform Commission has recommended the enactment of a statutory version of conspiracy limited to agreements to carry out a crime, with the exception of conspiracy to defraud which they think should be retained. See Ire. Com. No 99, [3.64], [3.87–93], [3.106–9].

> The logic of this arrangement is easily explained: since incitement, conspiracy and attempt are auxiliary crimes, it is a necessary condition of relational liability that the defendant's factual objective, the state of affairs he set out to achieve, must have amounted to an intention to commit whatever substantive offence they are being used to complement.[8]

Not only does the requirement of intention to commit the substantive offence fit with this dominant rationale for these species of offences, it is deceptively attractive, since being easy to state, it might be assumed that it is easy to apply. Furthermore, requiring intention to commit the substantive offence assuages concerns about criminalising actions which may, relatively speaking, be remote from the *harm* of the prospective offence, thus ensuring that "as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability . . . . become more narrow".[9]

It might be useful to take the offence of criminal damage as an example to illustrate the orthodox approach. In both of the jurisdictions under discussion, a person will be liable for criminal damage where they damage property belonging to another intending to damage the property or being reckless as to whether the property would be damaged.[10] Imagine that D tries to wake up V by throwing small stones at V's window. D does not want to damage the window, but foresees the possibility that one of the stones may cause damage. If one of the stones thrown by D were to cause damage to V's window, D will be liable for criminal damage having damaged property belonging to another, and being reckless as to whether damage would be caused. However, where D does not cause damage, the current law will only impose liability where D intended to cause the damage. This is because under the orthodox approach to inchoate liability, the underlying wrong which is thought to justify criminalisation is that the person intends to commit the full offence, which is not the same wrong as consciously risking commission of the full offence.

However, in some situations a rigid application of these general principles to particular substantive offences has been objected to because it is thought to give rise to unacceptable under-criminalisation by producing outcomes which fail to catch culpable behaviour that many argue ought to be caught. One well-known example that exercised both the Irish and English commissions,[11] and has appeared central to their proposals departing from the orthodoxy, is the crime of attempted rape. Say D and P go out to find a person (V) with whom to have sex. Without caring whether V consents or not, but recognising the likelihood that V will not, both D and P attempt penetration. Only P is successful. In this example,[12] P has committed the offence of rape.[13] P commits rape because at the time of penetration he is reckless/does not reasonably believe[14] V is consenting. However, if the orthodox

8 F McAuley and P McCutcheon, *Criminal Liability: A grammar* (Dublin/London: Roundhall 2000), p. 445.

9 A Ashworth, *Principles of Criminal Law* 4th edn (Oxford: OUP 2003), p. 425. For further analysis of this principle, see J Child and A Hunt, "Risk, pre-emption, and the limits of the criminal law" in J Child, K Doolin, A Beech and J Rain (eds), *Whose Criminal Justice? Regulatory state or empowered communities* (Sherfield-on-Loddon, Hook: Waterside Press 2011), pp. 51–68.

10 See Criminal Damage Act 1991, s. 2(1) (Ireland) and Criminal Damage Act 1971, s. 1(1) (England). The position is the same for Northern Ireland, see Criminal Damage (Northern Ireland) Order 1977, No 426 (NI 4), Article 3 (1).

11 See, Ire. Com. No 99, [2.93], and Eng. Com. No 318, [8.116], which makes reference to Eng. Consultation No 183, [14.37–45].

12 Loosely based on an example from A Ashworth, *Principles of Criminal Law* 5th edn (Oxford: OUP 2006), pp. 448–9.

13 We are assuming that V does not consent to sexual intercourse and that P does not have a valid defence.

14 In the Republic of Ireland, the mens rea of rape is knowledge or subjective recklessness as to lack of consent: Criminal Law (Rape) Act 1981, s. 2(1)(b). In England and Wales (and Northern Ireland), the Sexual Offences Act 2003, s. 1(1)(c) provides that the defendant must "reasonably believe" that the other person is consenting to penetration.

position for criminal attempt (*intending to commit the offence*) is to require intention as to every element of the substantive offence, including what might be referred to as a *circumstance* (i.e. V's lack of consent), D's recklessness/lack of reasonable belief as to that element would not be sufficient to ground his liability in attempt. Therefore, D would not be liable for attempted rape. In fact, to be liable for attempted rape, it would appear necessary for D either to intend V to lack consent, or at best to have full knowledge of V's lack of consent, both of which the commissions (and many other commentators)[15] find unduly restrictive.

The problem identified above does not merely apply to the offence of attempted rape. It would apply to any substantive offence that, like rape, includes a circumstance element which requires a mens rea less than intention or knowledge. However, rather than applying the intention-based framework rigidly in line with the orthodox position, the courts have instead shown willingness to distort the framework in certain cases. In *Khan*,[16] for example, where the English Court of Appeal was presented with the sort of attempted rape problem described above, the court proceeded to interpret the intention requirement in s. 1 of the Criminal Attempts Act 1981 to apply only to the consequence and conduct elements of the substantive offence (the sexual penetration) and not the circumstance element (V's lack of consent). The court held that recklessness as to the circumstance element would suffice.

Similar to circumstance elements, issues have also arisen with substantive offences requiring that D's conduct causes particular consequences. For example, in the English case of *AG's Reference (No 3 of 1992)*,[17] D was charged with the offence of attempted arson, being reckless as to whether life be endangered arising from his throwing of a petrol bomb at an occupied car where the bomb missed the car and smashed against a wall behind it. The Court of Appeal's decision was to the effect that whatever mens rea is sufficient for any "present consequence" for the full offence would suffice for attempt liability, provided that D intends to bring about a "missing" consequence. Therefore in this case, D's intention to set fire to the car (the missing unrealised consequence) combined with his recklessness as to whether life might be endangered thereby (the present realised consequence)[18] was sufficient.[19]

It is possible to defend *Khan* and *AG's Reference (No 3 of 1992)* on their own facts, or even to defend them as reinterpretations or reform of the original orthodox position. However, the central problem which these examples illustrate for present purposes is that they involve bespoke solutions departing from the orthodoxy for individual substantive offences only. They are not therefore consistent with the treatment of other offences, such as criminal damage, where the orthodox position is rigidly applied. The desire of the Irish and English commissions to move away from the orthodox position is therefore motivated both by a belief that rigid application of an intention-based framework would lead to unacceptable under-criminalisation, and the observation that if not applied rigidly then it can lead to inconsistency.

However, the observation that problems may be identified with the orthodox approach does not mean devising an alternative is likely to be any less problematic. This is partly

15 See, for example, Ashworth, *Principles*, n. 12 above.

16 [1990] 1 WLR 813.

17 [1994] 1 WLR 409.

18 It might be contended that a better analysis for the court to have adopted would have been to treat the stipulation that D be reckless as to whether life be endangered as ulterior mens rea, comparable to crimes of ulterior intent, albeit in this instance recklessness as distinct from intent is sufficient for the substantive offence. See, generally, J Horder "Crimes of ulterior intent" in A P Simester and A T H Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press 1996), p. 153.

19 For discussion of an approach based on missing elements, see J Stannard, "Making up for the missing element – a sideways look at attempts" (1987) *LS* 194.

because, as the problems just discussed illustrate, there is a tension between the relational and parasitic nature of inchoate offences, and the fact that the general inchoate offences have been developed as part of the general part of the criminal law.[20] The solutions adopted in *Khan* and *AG's Reference (No 3 of 1992)* were adopted because of a focus on the former, being derived from an analysis of what should constitute inchoate versions of the individual substantive offences themselves. They were not the product of a fully theorised account of what wrongs inchoate liability should target for the purposes of formulating a general doctrine of inchoate liability. However, if general inchoate offences are to be devised and are to be useful at all, the legitimacy of criminalisation of, say, attempted murder, or conspiracy to rape, or inciting criminal damage, and so on, are not core questions which arise when one comes to decide what the general rules for inchoate liability should be. Rather the core question is, more generally, when is it legitimate to criminalise attempt/conspiracy/incitement to commit any substantive offence?

The interplay between the relational and the general therefore presents considerable challenges in framing alternatives to the orthodox approach: what is required is a set of general principles which accurately capture a conceptually coherent approach, which when applied to individual substantive offences ensures that inchoate liability consistently attaches in situations which properly accord with principled views as to what it means to attempt, incite or conspire to commit the offence in question. To some extent the routes chosen by the Irish and English commissions fall on very different sides of the relational/general divide. The Irish Commission's proposals involve abandoning any particular or additional mens rea requirements for inchoate liability. It recommends that, with the exception of inchoate versions of murder, "the culpability for [attempting, inciting and conspiring to commit] a substantive offence ought to track the culpability for that substantive offence".[21] In contrast, the English Commission's recommendations involve an effort to generalise and elevate to the level of general doctrine some of the solutions reflected in the individual situations described above. This is to be done by distinguishing generally between conduct, circumstance and consequence elements of substantive offences, and stipulating particular approaches to the mens rea in respect of each of those elements for the purposes of inchoate liability.

In the sections which follow we examine the justifications for, and implications of, the adoption of these different approaches.

The Irish Commission's approach

In proposing that the mens rea for inchoate offences simply track the mens rea requirements for the relevant substantive offence, the Irish Commission's proposed culpability framework represents a radical departure from the orthodox position. It means that where the substantive offence imposes liability upon persons who are reckless as to consequences and/or circumstances, such persons will be liable for the inchoate version of the offence if they are reckless as to consequences which do not actually result from their conduct, and/or are reckless as to the existence of circumstances which may not objectively exist. However, the Irish Commission's proposals have more far-reaching effects than this. This is because if the substantive offence does not require any mens rea at all as regards consequences or circumstances – as is the case with strict liability offences – then neither will inchoate versions of the offence.

Therefore, these proposals involve a dramatic expansion of the scope of criminal liability, bringing within its ambit many players who currently sit outside its boundaries.

20 Apparently this was not always the case. See F B Sayre, "Criminal attempts" (1928) *Harvard LR* 881; J Hall "Criminal attempt – a study of foundations of criminal liability" (1940) 49 *Yale LJ* 789.

21 Ire. Com. No 99 [2.123]. In relation to conspiracy and incitement see [3.61] and [4.13] respectively.

Furthermore, in abandoning the requirement that D must intend the consequences of actions which do not come about, or circumstances that do not exist, it involves adopting a different view as to the underlying wrong which inchoate criminal liability may target. However, the Irish Commission does not itself engage in a process of identifying the wrongs which its proposed approach to inchoate criminal liability will target, let alone engage in a principled justification for criminalising such wrongs as it might identify. Rather, it is content for the most part to rely on a critique of the difficulties described above in relation to the orthodox position,[22] as well as more specific criticisms of the complexity of the English Commission's alternative approach which will be discussed later in this article. Whilst appeals to consistency, certainty and simplicity are not without merit, they do not in and of themselves stand as a coherent principled justification for adopting the Irish Commission's solution.

Therefore, in examining the implications of the Irish Commission's proposals we attempt to subject some of the key implications of the proposed culpability framework to principled examination. We shall do so first in respect of the criminalisation of persons who engage in conduct whilst being reckless as to the consequences of their action when such consequences do not actually result from their conduct. Second, we consider principled arguments concerning the imposition of criminal liability through forms of inchoate strict liability offences.

Recklessness as to consequences

One implication of the Irish Commission's proposal that the mens rea of inchoate offences should track the mens rea of the full offence arises where the substantive offence imposes criminal liability on persons who are reckless as to the consequences which their conduct brings about. In these cases, persons will be liable for inchoate versions of the offence where they are reckless as to whether the consequences that do not actually come about might have done.

We can illustrate this by returning to the example of criminal damage discussed above involving D who tries to wake up V by throwing small stones at V's window where, although D does not want to damage the window, he foresees the possibility that one of the stones may cause damage. We saw above that where D does not cause damage, the current law will only impose liability for attempt where D intended the damage to be caused. However, the Irish Commission's proposal that the mens rea of inchoate offences track the mens rea of substantive offences means D's recklessness would render him liable for attempted criminal damage. So, despite not intending to cause damage, despite no damage being caused, and if stopped by V just before throwing the first stone, despite not having thrown a stone, D would be liable for attempted criminal damage because he is reckless as to whether damage might be caused. Furthermore, it ought not to be forgotten that the Irish Commission's proposed culpability framework also applies to conspiracy and incitement. Therefore, if D had discussed his plan to wake V in this manner with X, and if X were to agree with the plan, or to encourage it in any way, X would be liable for conspiracy or incitement if she too is reckless as to whether damage will be caused.

Although the Irish Commission does not expressly acknowledge it, the above account shows that in the case of criminal damage, and indeed every other similarly configured substantive offence (of which there are many), its proposals involve changing the wrong targeted by inchoate criminal liability from engaging in conduct with the intention of bringing about the prohibited consequence, to engaging in conduct which consciously risks

22 Ire. Com. No 99, ch. 2(C).

the prohibited consequence being caused.[23] The question which arises in this context therefore is whether there is any principled justification for imposing a form of generally applicable inchoate liability to the latter?

The prevailing weight of opinion in common law thought and jurisprudence would say there is not.[24] Indeed, both the so-called *subjectivist* and *objectivist* schools are at one in so far as they identify the intention of a person to achieve the prohibited consequence of his conduct as central to justifying the imposition of inchoate liability. In the case of the so-called subjectivist position, it has been argued that "the emphasis in criminal liability should be upon what D was trying to do and believed he was doing, rather than upon the actual consequences of his conduct".[25] In the case of the so-called objectivist position, it has been argued that

> [w]hen harm or injury to some legally protected interest is potential rather than actual, the ascription of criminal liability must depend on whether, and how intimately, the agent's action is related to that potential harm. Someone who thus attacks, intending harm to, a legally protected interest relates himself, as an agent, as closely as he can to that harm. His intention defines his action as an attack on that interest as an action whose intrinsic character is structured by the harm it is intended to do. His action is, we can say, essentially harmful even when no harm is actually caused; the actual occurrence of that harm completes the action's character, rather than giving it a harmful character which it did not already have.[26]

However, whilst these positions certainly provide a basis for justifying inchoate liability, they do not of themselves provide a basis for saying there can be no principled justification for criminalising individuals who engage intentionally in conduct whilst being recklessness as to the consequences of such conduct, even if those consequences do not come about.

Indeed, as regards the point of principle, Ashworth concedes that there is "no relevant moral difference" between reckless persons whose conduct fails to bring about the relevant consequences, as distinct from reckless persons whose conduct succeeds in doing so, and he observes that this provides a "principled" basis for imposing inchoate liability in such cases.[27] However, he also argues that the fact that there is no relevant moral difference between the two situations does not "inexorably lead to the conclusion"[28] that liability for attempt should be imposed because he is mindful of the practical effects of increasing the scope of criminal liability. These include an "increase in the powers of the police" and "an individual's liability to both lawful and unlawful police intervention".[29] For this reason he seems more comfortable that imposition of inchoate liability in this form be effected by means of bespoke endangerment offences, as distinct from adopting a general doctrine of *reckless* attempts.[30] Nonetheless, the issue of principle has not been denied, though Ashworth has rightly argued that other principles may well lead to the conclusion that a narrower and more focused approach be adopted.

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23 Though this is by no means the full extent of the change, see our discussion of "Substantive offences lacking mens rea" below pp. 255–8.

24 Even though those explanations do not themselves all speak with one voice: see R A Duff "Subjectivism, objectivism and criminal attempts" in Simester and Smith, *Harm and Culpability*, n. 18 above, and A Ashworth, "Taking the consequences" in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (Oxford: Clarendon Press 1993), pp. 105–24.

25 A Ashworth, "Criminal attempts and the role of resulting harm under the code and in the common law" (1988) *Rutgers LJ* 726, p. 736.

26 Duff, "Subjectivism", n. 24 above, pp. 40–1.

27 Ashworth, "Criminal attempts", n. 25 above, pp. 756–7.

28 Ibid. p. 756.

29 Ibid. p. 757.

30 Ibid. p. 757.

The objectivist position, as espoused by Duff, is fundamentally different and does not on its face at least provide any basis for justifying reckless attempts of the sort which would be criminalised under the Irish Commission's proposals. In the first place, Duff would not accept the equivalence Ashworth draws between reckless persons whose conduct fails to bring about the relevant consequences and reckless persons whose conduct succeeds in doing so. This is because, from Duff's perspective, for the purposes of ascribing criminal responsibility and attaching criminal liability thereto, "objective aspects are also relevant: what I am properly held liable for, what can properly be ascribed to me, is my action as it actually impinges on the world – as it actually engages with the material world, and with the social world of rational thought and deliberation".[31] Therefore, on this basis, a distinction would need to be drawn between those whose conduct does result in the particular consequence and those whose conduct does not result in that consequence, even if they are both reckless. Secondly, Duff argues that in cases where the conduct does not actually bring about the relevant consequence, as is the case in criminal attempts, there is a difference between a person who intends that it should do, and a person who is reckless as to whether it will, since the latter's

> action's intrinsic character is not structured by the prospect of doing harm, in the way that that prospect does structure the action of someone who intends harm. Both an action which is intended to injure some legally protected interest, and one which recklessly endangers such an interest, threaten harm: but the character of that threat differs significantly in each case, since only the former is directed against the threatened interest.[32]

The argument here then is that the *wrong* where a person is reckless as to the consequences is not the same *wrong* where the person who intends the consequences of their conduct and that this is a categorical difference such that inchoate versions of the substantive offence should not catch those who are merely reckless as to consequences.

As for resolving the substantive debate, we would observe that both schools of thought are concerned with intentional conduct that fails, but nonetheless culpably risks bringing about the consequences which the substantive offence prohibits. The core issue then is how differing degrees of fault in creating that risk should be regarded by the law. We have seen above that reducing the level of fault to recklessness is not inconsistent with the underlying rationale of the subjectivist position. However, we would also argue that it is not inherently inconsistent with Duff's objectivist position either. This is because Duff's guiding principle is:

> [w]hen harm or injury to some legally protected interest is potential rather than actual the ascription of criminal liability must depend on whether, and how intimately, the agent's action is related to that potential harm.

It does not *necessarily* follow from this that the line for inchoate liability has to be drawn at the point where the agent's action is related to that potential harm because he intended it, as distinct from being reckless as to whether it might ensue. It is true that the action of D who throws stones at V's window being reckless as to whether damage may result is not *as* intimately related to the (same) harm which might have been caused if he had intended to damage the window. The "character of the threat", to use Duff's terminology, is not "directed against the threatened interest". However, as he admits, it does "recklessly endanger" it. Even if we accept this is a categorical difference, as distinct from being a difference of degree, it is not self-evident to us why this distinction of itself should definitively determine where the line should be drawn between inchoate liability, on the one

31 R A Duff, *Criminal Attempts* (Oxford: Clarendon Press 1996), p. 237.

32 Duff, "Subjectivism", n. 24 above, p. 41.

hand, and other forms of criminal liability, such as a general or a bespoke set of endangerment offences, on the other. Indeed, it is significant that Duff, and others who espouse an objectivist stance[33] do not deny that those who recklessly risk a consequence, which in the event does not result, should necessarily escape criminal liability altogether. Thus, for instance, Duff concedes that in certain situations we may wish to criminalize some "relatively serious kinds of endangerment".[34]

The account of these perspectives has been necessarily brief. However, our conclusion is that it tends to demonstrate that, despite the Irish Commission's lack of engagement with the principled debate, there is some principled basis to justify a form of inchoate criminal liability targeting persons who knowingly risk the impugned consequences even when they do not in the event result. Having said that, this does not serve to justify the totality of the Irish Commission's approach. The Irish Commission's approach is that the mens rea of inchoate offences should be whatever the mens rea of the substantive offence is. Therefore this is an approach which is by no means confined to criminalising the wrong of knowingly risking the prohibited consequences of one's conduct. Most significantly, as we shall now go on to examine, it would include forms of *objective fault*, and indeed situations where there is no fault at all.

Substantive offences lacking mens rea

Whatever may be one's view of the lowering of the mens rea for inchoate liability as regards potential consequences, one can at least say that the Irish Commission's tracking proposal would require some level of subjective fault *when* the substantive offence requires it. The approach may therefore be logically underpinned by an identified wrong for inchoate criminalisation that maintains that it is legitimate to criminalise conduct that *culpably* risks achieving the harm that the substantive offence is designed to prohibit. However, the Irish Commission's tracking approach loses such a logical connection when it is applied to offences which it calls "crimes that feature non-traditional forms of mens rea".[35] These are substantive offences where liability is based on negligence or is strict. The Irish Commission's discussion of this category of offence concentrates principally upon strict liability offences, and therefore so shall we.

Say D attends a party where X, anxious that D should have a good time, spikes D's non-alcoholic drinks with alcohol. At the end of the evening, despite being over the proscribed alcohol limit, D drives home. In this example, D has committed an offence of driving "while under the influence".[36] D commits the offence despite his lack of knowledge regarding the presence of alcohol. We may feel some sympathy for D and, indeed, strict liability offences are a contentious species of liability.[37] But the imposition of criminal liability may be argued to be justifiable due to the risk created to other road users by D's intoxicated state (the actus reus).

However, now let us consider an inchoate version of the offence. Imagine that D is stopped by X just as he is about to switch on the ignition of his car, and X tells D what he has done suggesting that D should not drive. In this situation, if D does not in fact drive, our response is surely one of relief. We may be unhappy with X's conduct throughout the affair, but it would surely strike us as excessive to punish D for *attempting* to drive over the

33 See A Enker, "Mens rea and criminal attempt" (1977) *American Bar Foundation Research Journal* 845, p. 859.

34 Duff, "Subjectivism", n. 24 above, p. 41. See further R A Duff, *Answering for Crime Responsibility and Liability in the Criminal Law* (Oxford: Hart 2009), ch. 7.

35 Ire. Com. No 99 [2.120].

36 Road Traffic Act 1961, s. 49 (Ireland).

37 See, generally, the essays in A P Simester (ed.), *Appraising Strict Liability* (Oxford: OUP 2005).

proscribed limit. Yet, applying the Irish Commission's proposal that the mens rea of the inchoate offences should track the mens rea of the substantive offence, D would be liable for attempting to commit the offence.[38]

Equally, imagine that Y asked D if he could provide a lift home from the party. In this case, if Y was unaware of the fact that D's drinks had been spiked and may even have been assured by D that he had not been drinking alcohol, surely Y is not doing anything wrong. Yet, applying the Irish Commission's tracking approach, Y will have committed the offence of inciting D to drive while under the influence.

The Irish Commission recognises that the expansion of inchoate liability to include these situations may attract the objection of over-criminalisation.[39] However, the Irish Commission does not propose that these types of situations should be an exception to its tracking approach. A number of reasons are offered for this position, which we examine below.

First, the Irish Commission relies on the role of strict liability offences in targeting certain types of *harms* and *risks*. For the Irish Commission,

> [a]ttempt liability using the tracking principle merely carries through this choice, and because an attempt, by definition, will have come close to the prohibited harm, such harm has been *risked*.[40]

The main problem with this justification is the assumption that if certain risks can be the target of an offence, then all related risks should also be targeted. Operating as strict liability offences do at the edges of the criminal law, this assumption is highly debateable. For example, despite the absence of fault, we concluded above (in line with the current law) that the offence of drink-driving could be justified because of the risk of harm other road users are exposed to. However, the provision of attempt liability does not centre on this same risk: someone attempting to drink-drive does not pose a direct risk to other road-users; they merely create a risk of posing that risk in the future. Therefore, whilst we may accept the strict nature of a drink-driving offence, this does not necessitate also accepting strict liability for attempt: the wrongs involved are different.

Similar objections arise in relation to strict liability offences that criminalise harms, as distinct from risks. For example, the Irish Commission discusses the example of a person who commits a strict liability offence by pouring pollutants into a river[41] reminding us in a footnote that the Irish Supreme Court has recognised the pollution offence as being constitutionally valid.[42] For the Irish Commission,

> If this is acceptable and correct then so too it is in respect of a prosecution for attempted river pollution. The logic and rationale of a strict river pollution offence . . . is pursued in respect of the attempt offence also.[43]

This is unconvincing reasoning. Whilst the aim of protecting rivers may be shared between the strict polluting offence and a strict attempt offence, this does not mean we cannot accept that liability may be imposed for the former but not the latter. To take one extreme example, banning people from going anywhere near all rivers would undoubtedly protect from pollution, but such an offence would be vastly disproportionate to the aim and therefore unacceptable. The criminal law represents a balancing of priorities and rights, not a simple means to a single end. Extending strict liability from the harm-based polluting

38 Assuming that being in the process of switching on the ignition is a sufficiently *proximate* act.

39 Ire. Com. No 99 [2.120].

40 Ibid. [2.121].

41 Contrary to the Fisheries (Consolidation) Act 1959, s. 171(1)(b). Ire. Com. No 99 [2.121].

42 The reference is to *Shannon Regional Fisheries* v *Cavan County Council* [1996] IESC 33; [1996] 3 IR 267.

43 Ire. Com. No 99 [2.121].

offence to a risk-based attempt would represent a significant expansion of the law, and again, a different set of wrongs. Although we recognised the potential for strict liability to target risks above (in relation to drink-driving), this does not mean that risks should always be targeted in this manner. Unlike the risks associated with drink-driving, for example, the risk associated with the pollution is a contained one: D's handling of the pollutant is not an active risk to the river, it merely becomes a risk when D unleashes it into the river (by which time D will have committed the substantive offence). We may wish to intervene if D, unaware of the polluting nature of the waste, is about to dispose of it in the river. However, if D is informed and prevented from polluting the river then no harm or risk of harm has been unleashed and, therefore, no use of the criminal law is justified.

The pollution example also provides a useful illustration of further problems encountered by the Irish Commission's justification, outside of its focus on attempts. It must be remembered that although many of the examples we are using focus on attempt, the Irish Commission's inchoate framework is intended to operate in the same manner across each of the inchoate offences. This is undoubtedly a benefit of the scheme, bearing in mind the overlap between offences. However, it must also be carefully considered when extending liability in this area. For example, when the Irish Commission considers the attempted river pollution example, it is clearly envisaging D on the edge of the river about to pour in the waste. On this basis, the Irish Commission is able to claim (in our view unconvincingly) that D's behaviour is so closely connected to that required for the substantive offence that strict liability for the attempt is also justified. However, such close proximity is not required for the other inchoate offences. For example, if X saw D with a bucket of what looked like dirty water and suggested that D throw it into the river, X would be liable under the Irish Commission's framework for inciting river pollution. X will be liable despite her belief that the bucket simply contained dirty water, and despite the fact that, for the harm to be caused (or the potential risk of harm to be unleashed), D would have had to decide to follow that advice. However, where D knows that the bucket contains a pollutant, it is more likely that he will simply inform X and they will both agree that it should not be disposed of in the river after all.[44] Criminalising X in this example begins to show the true breadth of liability which the tracking approach would entail.

In defending its position, the Irish Commission also argues that in so far as problems may be raised concerning these inchoate versions of strict liability offences, they arise from the substantive offence and not its inchoate derivative and it is not its task here to "second guess"[45] the legislature's decision as to the appropriateness of strict liability offences. Therefore, its position regarding inchoate versions of strict liability offences is presented as the necessary corollary of those decisions. However, blame-shifting of this kind will only be effective if the culpability framework recommended by the Irish Commission was the only one available. Since this is not the case,[46] simply claiming that other areas of the law should adapt to accommodate the new framework, and not telling us how that could be achieved, is surely insufficient.

Although strict liability remains controversial, there are many such offences within the criminal law and their continued existence does not seem in any doubt. We do not claim that strict liability offences cannot be justified *and therefore* inchoate versions of strict liability offences are not justified. Rather, we contend that, whilst many strict liability offences are

44 Of course, if they do not come to this conclusion, and X still recommends that D should dump the pollutant in the river then she will be liable under the current (fault-based) inchoate liability framework.

45 Ire. Com. No 99 [2.120].

46 One could, for example, decide that the mens rea for inchoate versions of such offences should require knowledge or recklessness as to the relevant consequence.

justifiable, it would not be acceptable to allow inchoate versions of these offences to also lack mens rea. Inchoate liability may have a role to play in relation to strict liability offences, however, that role should be restricted to where D attempts/conspires/incites a strict liability offence with some mens rea as to every element of the (not completed) actus reus. If such fault is not required, this form of inchoate liability involves criminalising behaviour where, by definition, no *risk* is actually posed or no *harm* is caused, and there is no subjective fault of any kind. The implications of the Irish Commission's proposal, therefore, are that it positively promotes targeting behaviour where there is no *wrong* at all such as might justify criminalisation.

Some conclusions on the Irish Commission's proposals

Stepping back from the detailed implications of the Irish Commission's proposed culpability framework, a number of more general observations may usefully be made at this juncture. First and foremost, we would contend that the Irish Commission has failed properly to recognise the role of mens rea as an essential feature in characterising the distinct wrong which inchoate criminal liability may legitimately target. To say that the mens rea for inchoate offences should be whatever the mens rea of the substantive offence is, is to leave all of the work in distinguishing between the substantive offence and the inchoate version of the offence to the actus reus part of the inchoate offence. The position adopted by the Irish Commission then is that there should be no general doctrine of mens rea of inchoate liability. One of the consequences of this approach is that it leads to a considerable expansion of the scope of inchoate liability because inchoate offences will target a whole range of different wrongs depending on the mens rea of the full offence. Only some of these manifestations of inchoate liability are capable of being justified on a principled basis, and indeed in the case of strict liability offences, inchoate liability will operate so as to criminalise persons who have committed no discernible wrong whatsoever.

It is instructive to note, however, that the Irish Commission proposes that inchoate versions of murder should be an exception to its tracking approach methodology. The mens rea of murder in the Republic of Ireland is an intention to kill or cause serious injury.[47] So, taking attempted murder as an example, if the tracking approach was to be applied to murder for the purposes of attempt liability, a person would be liable for attempted murder where he or she acted with the intention to cause serious harm, even where death does not result. However, the Irish Commission concluded that "such a person is not accurately labelled as attempting to kill"[48] and can more appropriately be held liable for one of the offences set out in the Non-Fatal Offences Against the Person Act 1997[49] (or, one assumes, an inchoate version of one or other of them if appropriate). Clause 2 of the draft Bill that the Irish Commission appends to its report therefore proposes to define the fault element for inchoate versions of murder solely as an intention to kill.

The difference between the Irish Commission's approach to inchoate versions of murder and its approach to inchoate versions of every single other offence serves to highlight the problem generally with the its approach to all other offences. In the case of murder, the Irish Commission has engaged in the process of examining precisely what is the underlying wrong that inchoate versions of murder should target and, having done so, has quite rightly decided that the mens rea of inchoate versions of murder requires a

47 Criminal Justice Act 1964, s. 4(1) (Ireland).

48 Ire. Com. No 99 [2.102].

49 This Irish statute very usefully replaces and/or codifies common law assault, as well as most of the Offences Against the Person Act 1861 offences which had formerly applied in the Republic of Ireland. See Charleton et al., *Criminal Law*, n. 5 above, [9.77–185].

particular approach which does not wholly reflect that of the complete offence. However, for all other offences currently in existence, and indeed for any substantive offence to be created in the future, the Irish Commission has not properly examined the question of what is the underlying wrong that may legitimately be targeted by inchoate offences.

The Irish Commission's principal justification for eschewing a generally applicable substantive doctrine for mens rea of inchoate offences is that any such doctrine would have to be overly complex if it is to deal with the sorts of problems that the orthodox approach presents. It is for this reason that examination of the English Commission's proposals (to which we now turn) may be especially instructive, since it recommends such a "complex" different solution to the same problems.

The English Commission's approach

The development of the English Commission's approach presents something of a convoluted picture because the English Commission divided the matter into two separate stages. First it produced a consultation paper and a report examining reform of incitement (extended to include assisting crime),[50] and then in a separate consultation paper and report it addressed conspiracy and attempt. Matters are even further complicated by the fact that, whereas the recommendations as regards conspiracy and attempt have yet to be incorporated into legislation, the UK Parliament has legislated to amend the law concerning incitement, but in so doing departs significantly from the approach that the English Commission recommended as regards mens rea of incitement. Whereas the English Commission recommended that liability for incitement should, at a minimum, require D to *believe* that each element of the principal offence would be committed,[51] the Serious Crime Act 2007 provides that criminal liability for incitement arises where D is *reckless* as to any circumstances or consequences required for the principal offence.[52]

Despite Parliament's preference for adopting a recklessness standard for *both* circumstance and consequence elements in the case of incitement, when the English Commission subsequently turned to attempt and conspiracy (our major focus below) it opted for a more restricted approach. Thus, it proposed that D must *intend* the conduct and consequence elements of the principal offence, and his fault in relation to circumstances should be permitted to track that required by the principal offence *to a minimum level of recklessness*.[53] This recommendation therefore embraces *both* a distinct approach to the mens rea of inchoate liability (through the requirement of intention for acts and consequences) *and* a relational approach (through a tracked circumstance element though not permitting it to "go below" recklessness).

Despite the apparent complexity that the sequence of events just described presents, a core methodological consistency may be identified in the English Commission's approach. First, in like manner to the Irish Commission, the English Commission's analysis was rooted

50 Eng. Com. No 300.

51 This was also combined with the requirement that D must believe that his acts will, in fact, assist or encourage P to commit the offence. See Eng. Com. No 300, cl. 2 of the appended Bill. See also, G R Sullivan, "Inchoate liability for assisting and encouraging crime – the Law Commission report" (2006) *Criminal LR* 1047.

52 Serious Crime Act 2007, s. 47.

53 This is not a new approach. In fact, it was first mooted by the Law Commission's Working Party in 1968, and even formed the basis of its approach to inchoate liability in the 1989 Draft Criminal Code. See, Law Commission, *Codification of the Criminal Law General Principles: Working Party's preliminary working paper – The field of inquiry* Consultation No 17 (London: Law Commission 1968), p. 11; and Law Commission, *A Criminal Code for England and Wales vol. 1: Report and Draft Criminal Code Bill* No 177 (London: Law Commission 1989); *A Criminal Code for England and Wales vol. 2: Commentary on Draft Criminal Code Bill* No 177 (London: Law Commission 1989).

in uneasiness concerning the way in which the orthodox approach operated,[54] highlighting the problem cases, such as attempted rape, and the ad hoc solutions adopted by the courts to resolve them.[55] Second, however, despite highlighting the "unduly restrictive"[56] nature of the orthodox position, the English Commission nonetheless adopted the principled position that the remoteness of the actus reus of inchoate offences from the eventual substantive offence made an "uncompromisingly narrow fault element essential".[57] Thus, in the case of incitement, the English Commission's proposal that D must believe that each element of the principal offence will be committed is only a modest adjustment to the orthodox position. Furthermore, in the case of attempt and conspiracy, the English Commission continued to stress the view that the wrong which these forms of inchoate liability should target is engaging in conduct with the intention that this should lead to the commission of the substantive offence.[58] Therefore, the English Commission maintains the position that its proposals as regards attempt and conspiracy do not undermine its desire that these inchoate offences target only those who intend that the full offence be committed.

In our analysis below, we concentrate in particular on the English Commission's recommendations as regards the fault element for attempt and conspiracy. It should be apparent at the outset that by requiring a minimum level of subjective fault for every element of the substantive offence (regardless of the mens rea requirements of that particular offence), the English Commission is able to avoid what we have identified as some of the worst excesses of the Irish framework. D will not be liable for attempting or conspiring to drive over the prescribed alcohol limit, or for offences in relation to polluting rivers, unless he intends to drive or intends to discharge pollutants (conduct) and is at least reckless as to his intoxicated state or the fact that what he is discharging into the river is in fact a pollutant (circumstances). Likewise, D will not be liable for attempted murder unless he intends to kill, not because of a statutory exception, but because of a framework that requires D to intend consequence elements in order to establish liability. On the other hand, the largely relational posture adopted towards the circumstance element will expand the scope of liability beyond that under the orthodox position. In relation to the problem case of rape, for example, D would be liable for attempt or conspiracy if he intended sexual penetration (conduct/consequence) and was reckless as to consent (circumstance). In this manner, the breadth of inchoate liability is expanded, but it is not expanded to criminalise simple proximity to risk. Unlike the Irish framework, subjectively innocent and objectively non-harmful defendants are kept outside of the general inchoate offences.

Nonetheless, below we examine two objections to the English culpability framework. The first harks back to the aversion to "complexity", which we have noted above was a matter about which the Irish Commission was especially concerned. We deal with this only briefly, since the arguments are well known.

The second objection is more fundamental, we believe. Above we argued that the Irish Commission's approach to its task was defective because it failed properly to focus on the role of mens rea as an essential feature characterising the distinct wrong that inchoate criminal liability may legitimately target. The same criticism does not apply to the English Commission's approach. However, as we will discuss below, although the English

54 See, Eng. Com. No 300; Eng. Consultation No 183; and Eng. Com. No 318.

55 For incitement, distortion was found to have occurred as a result of an overly narrow actus reus (not allowing for assisting as well as encouraging). However, for attempts and conspiracy, similar problems related to the narrowness of the mens rea (see discussion of the orthodox position above).

56 Eng. Com. No 300, [5.88].

57 Ibid. [5.117].

58 Eng. Consultation No 183, [1.2–7].

Commission does purport to identify the wrong that is the target of its culpability framework, in fact, the operation of that framework does not rationally or consistently cohere with the wrong identified.

Complexity and the separation of elements

The issue here arises out of the English Commission's proposal that the mens rea for attempt and conspiracy should require intention as regards the conduct and consequence elements of the substantive offence but that, as far as the circumstance element is concerned, the fault requirement should track the substantive offence to the minimum of recklessness. The adoption of such an approach seems necessarily to require that the conduct, consequence and circumstances elements of the substantive offence be individually identified in order that the different mens rea standards just mentioned may be applied for the purposes of inchoate liability. This is therefore clearly a more complex scheme than is required under the orthodox approach, which simply requires that intention is required for all elements. It also seems more complex than the scheme favoured by the Irish Commission, which simply proceeds on the basis that mens rea for inchoate liability should just be whatever the mens rea of the substantive offence is.

We have already observed that an objection on the grounds of complexity alone is rather weak. The general inchoate offences are always going to be complex due to their unique relationship with substantive offences, and a technique that is complex but effective is infinitely preferable to one that *simply* reaches undesirable conclusions.[59] However, in the context of the English culpability framework, "complexity" is a criticism that has an added significance. This is because there is a wide body of scholarship that contends that substantive offences cannot be objectively dissected into individual elements in the manner required by the English Commission.[60] An offence often used to illustrate this point is the "abduction of an unmarried girl under the age of sixteen from her parent or guardian",[61] where critics have claimed that the task of separating offence elements becomes "virtually a matter of taste"[62] in which different parts of the offence can be defensibly placed in almost any of the elements. For example, although one commentator might describe D's conduct element as "taking" with all other aspects of the offence considered circumstances, another might legitimately claim that D's conduct element is the "taking of a girl" or even the "taking of an unmarried girl under the age of sixteen from her parent or guardian". Further, as one looks to isolate the consequence element, the same problems arise.

59 Indeed, it is possible that any merit of simplicity within the Irish Commission's approach could be compromised by judicial interpretation seeking individual case justice, an experience that we have already seen in relation to the equally simple orthodox approach. Certainly, arguments may well be made canvassing the guarantee in Article 38.1 of the Irish Constitution that "no person shall be tried on any criminal charge save in accordance with due course of law", along with Articles 40.3.1 and 2 and 40.4. Whether such claims would succeed may be debated, see F McAuley, *Report of the Criminal Law Rapporteur for the Legal Protection of Children* (Dublin: Office of the Minister for Children/Department of Health and Children 2007), [2.01–3.59]. However, the willingness of Irish Supreme Court judges to employ these constitutional provisions, especially where strict liability offences are at issue, cannot be gainsaid. See Keane J (dissenting) in *Shannon Regional Fisheries* v *Cavan County Council* [2006] IESC 33; [1996] 3 IR 267, 289–92. Hamilton CJ in *Article 26 of the Constitution and the Employment Equality Bill 1996, In Re* [1996] IESC 6; [1997] 2 IR 321, 373–4; and Hardiman J in *CC* v *Ireland & Others* [2006] IESC 33; [2006] 4 IR 1, 74–87.

60 See, for example, R Buxton "The working paper on inchoate offences: incitement and attempt" [1973] *Criminal LR* 656; and G Williams, "Intents in the alternative" (1991) 50(1) *CLJ* 120; Duff, *Criminal Attempts*, n. 31 above.

61 Sexual Offences Act 1956, s. 20 (repealed by the Sexual Offences Act 2003, s. 42, sch. 7, para. 1). Although the offence was abolished in 2004, its provisions are mirrored to a large extent by the Child Abduction Act 1984, ss. 1–3.

62 Buxton, "The working paper", n. 60 above.

Difficulties of this kind do not directly undermine the principled justification of the English Commission's approach, but they do have the potential to do so *in*directly. This is because, although we might agree that intention should only be required for conduct and consequence elements, if we are unable to distinguish what those elements are, then our agreement is meaningless. This is a concern that led several common law jurisdictions to reject this approach.[63] Indeed, it was this concern that led the English Commission 30 years ago to reject this approach in favour of the orthodox position.[64]

The *current* English Commission denies the destructive effects of this criticism, and even contends that subjectivity as regards the separation of elements can be beneficial.[65] It is in any event an old debate that still lacks a clear resolution. Without taking it any further in this paper, our point at this juncture is to draw attention to what we see as a missed step. Before we discuss further *how* to separate offence elements, it must surely first be established that such separation is *necessary* and this is the issue to which we now turn.

Is it necessary to distinguish between circumstances and consequences?

We have noted above that the view that it is necessary to distinguish between circumstance and consequence elements seems logically to follow from the desire, as reflected in the English Commission's culpability framework, to allow for the orthodox approach to prevail as regards conduct and consequences, but to allow for a different approach towards mens rea to suffice for circumstance elements. It may seem therefore that, as far as the English Commission's culpability framework is concerned, distinguishing between these elements is essential.

However, we question whether this is really the case. Our starting point for doing so is to refocus our thinking on the central theme of this article thus far: what is the wrong which inchoate liability does or should target? It is our contention that this is a prior question to the question of what the culpability framework for inchoate liability should be. Only if one has a clear view of the rationale for criminalisation can one proceed to construct one's culpability framework. Furthermore, for any such culpability framework to be rational, and coherent, there must be a clear and consistent relationship between the culpability framework and the wrong that, it is claimed, inchoate criminal liability may justifiably target. It follows therefore that whether it is necessary to distinguish between circumstance and consequence elements turns on whether distinguishing between them is necessary for the purposes of targeting the wrong that, it is claimed, justifies imposing criminal liability.

In the case of the orthodox approach then, the distinction is not necessary. Liability is imposed on a person because he or she performs proximate acts[66] with the intention that the substantive offence should be completed; the person intends every element of the

63 It is a pattern that has been particularly evident in jurisdictions such as Canada, Australia and New Zealand. In each case, a similar approach to that recommended by the English Commission has either been recommended by law reform bodies or through the courts, only to be rejected as unworkable. See Law Reform Commission of Canada, *Secondary Liability: Participation in crime and inchoate offences* Working Paper No 45 (Ottawa: LRCC 1985); Law Reform Commission of Canada, *Re-codifying the Criminal Law* Report No 30 (Ottawa: LRCC 1987); R Cooke, "The Crimes Bill 1989: a judge's response" (1989) *New Zealand Law Journal* 235; Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand: Crimes Consultative Committee 1991).

64 Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* No. 102 (London: Law Commission 1980), [2.11–13]. This was a reiteration of its position from the two previous reports: Law Commission, *Criminal Law: Report on conspiracy and criminal law* Reform No 76 (London: Law Commission 1976), [1.41–2] and *Criminal Law: Report on the mental element of crime* No. 89 (London: Law Commission 1978), p. 61.

65 Eng. Com. No 318, [2.19–29].

66 The proximate act is defined separately between the actus reus of the three inchoate offences.

principal offence. We agree with both commissions that this gives rise to understandable objections concerning under-criminalisation. However, this criticism does not undermine its internal coherence as an approach to inchoate liability.

The approach of the English Commission, in contrast, is less clear and, we would argue, confused as to what precisely is the wrong that inchoate liability should target. In its report the English Commission repeatedly refers to the importance of "intending the principal offence".[67] For example, referring to the need for D to intend the consequence element in conspiracy, the English Commission states: "It would not be appropriate, in the case of an inchoate offence such as conspiracy, to impose liability in the absence of an intention to commit the offence."[68]

However, the problem here is that the English Commission's approach to mens rea does not match with this identified wrong; it does not require D to intend every element of the principal offence. The court in *Khan*, forced to manipulate the wording of the Criminal Attempts Act 1981, may have opened the way for this interpretation, but it is a fiction.[69] Taking the rape example, let us imagine that D attempts to sexually penetrate V whilst being reckless as to V's non-consent. As outlined above, unlike the orthodox position, the English Commission's approach will provide for D's liability for attempted rape where he intends the conduct and consequence elements (sexual penetration) and is reckless as to the circumstance element (non-consent).[70] We may agree with this outcome, but we cannot say that the justification for criminal liability lies in the fact that D has acted with the intention to commit the substantive offence. D acts with the intention to sexually penetrate V, but he is not *intending* that V should not consent. D could achieve his desired aims without committing rape. D's behaviour is still culpable, he is still intentionally doing something that risks rape, but it is this accepted *risk-taking* and not an intended *offence* that signifies the wrong being targeted.

Therefore, when the English Commission's recommended culpability framework is analysed in this way, we must now conclude that the wrong underpinning its approach must be (at minimum) *an intention to do something that knowingly risks the completion of a substantive offence*.[71] Once acknowledged, we can now straightforwardly explain the requirement under the English Commission's culpability framework for D to intend the conduct element of the principal offence, as D's inchoate culpability is contingent on his intention that the future risk should be run. Beyond this, it also explains and supports a minimum requirement of subjective fault (recklessness) as to the circumstance and consequence elements, as D's inchoate liability is also contingent on his awareness of the risk being run.

However, once it is accepted that this is the true rationale for inchoate liability as reflected in the English Commission's approach, it exposes the inconsistency in its framework. If the wrong underpinning the English Commission's approach must be (at minimum) *an intention to do something that knowingly risks the completion of a substantive offence*, why is it necessary to apply a different mens rea standard as between circumstances and consequences, and, in particular, why is it necessary to require intention as to consequences? If the wrong being targeted is

67 For example, Eng. Com. No 318, [2.131–4], [3.130–8.133].

68 Eng. Com. No 318, [2.50].

69 R Buxton, "Circumstances, consequences and attempted rape" (1984) *Criminal LR* 25, pp. 33–4. Compare G Williams, "The problem of reckless attempts" (1983) *Criminal LR* 365.

70 Note that although English law of rape merely requires an objective standard of fault as to the circumstance of non-consent, the minimum fault required within the English Commission's scheme for inchoate liability is subjective recklessness.

71 Our views about this expansion of the wrongs targeted by the general inchoate offences will be discussed later.

an intention to do something that knowingly risks the completion of a substantive offence, then recklessness could suffice for each of these elements.

We can support this argument by considering the following scenario.

D finds two vases. He is not sure whether he owns them, or whether they belong to his neighbour V.

a) Vase 1: D throws to the floor, intending to damage it.
b) Vase 2: D throws into the air, intending to catch it again but reckless as to whether it might be damaged.

In the event, neither vase is damaged.

In relation to the first vase, although D would not be liable for attempted criminal damage under the orthodox position – because he does not know the property belongs to another – he would nonetheless be liable under the English Commission's framework. This is because, although he does not intend every element of the substantive offence, he does intend the conduct and consequence elements (causing damage) and his recklessness as to the circumstance element (ownership of the vase) is all that is required by the substantive offence.[72] As with reckless sexual penetration, D is not *intending* to complete the substantive offence because it is possible for D to achieve his aim (damaging the vase) without completing the substantive offence.[73] However, the imposition of inchoate liability under the English Commission's culpability framework may be thought justifiable here so long as the wrong which that framework is targeting includes consciously *risking* the completion of a substantive offence.

Turning to the second vase, here the English Commission's culpability framework will allow D to escape liability for attempted criminal damage. Although recklessness as to the consequence element (damage) is sufficient for the substantive offence, the English Commission's mens rea framework for inchoate liability will always require intention as to that element. But is this coherent? If D is intentionally throwing the vase and is reckless as to whether the vase will be damaged, surely D is *trying* to do something that *knowingly risks* the completion of the principal offence.[74] If this is the wrong that underpins the English Commission's culpability framework for inchoate liability, some justification is required as to why this form of intentional risk-taking is not caught by this framework, when D's treatment of the first vase would be.

It could be contended that criminal liability should not be imposed in respect of the second vase because of the desire to maintain inchoate liability as *more* of a distinct, as opposed to relational, form of liability. Thus, although it may be tolerable to allow for a mens rea of less than intention for one offence element, it should not be allowed to spread to other elements. However, although this might be a basis for distinguishing between each of the vase scenarios above, such a defence still requires an explanation as to why the *circumstance* element warrants special treatment but the consequence element does not.

To illustrate the need for such a justification, let us consider the following scenario. Imagine that D finds a third vase that is clearly marked as belonging to his neighbour. D throws the vase into the air, intending to catch it again but being reckless as to whether it

72 Criminal Damage Act 1971, s. 1.

73 If the vase in fact belongs to D, then damaging it will not constitute criminal damage.

74 We accept that where the mens rea of the principal offence requires intention or a higher level of fault then recklessness for the inchoate offence should not be sufficient, as this would have the potential to undercut and undermine the principal offence. However, in cases such as criminal damage where only recklessness is required for the principal offence, we believe that there is no reason (short of the orthodox approach) for requiring intention. For a discussion of the former point, see Child and Hunt, "Risk", n. 9 above, pp. 51–68.

might be damaged. In the event, the vase is not damaged. Here, D intends/knows that the third vase does not belong to him (circumstance). This, combined with D's intentional conduct, therefore provides intention for two of the three offence elements, with recklessness as to the consequence element. However, despite recklessness not having spread across more than one element, and despite D intentionally acting in a manner that knowingly risks the completion of the substantive offence, the English Commission's culpability framework will not allow for inchoate liability here either.

This seems incoherent. As we have seen, the fact that liability will ensue where persons are reckless as to circumstances means that the wrong targeted by the English Commission's framework includes consciously risking the commission of the substantive offence. However, the strict requirement of intention as to consequences which the framework demands means that conscious risk-taking by being reckless as to consequence elements does not attract liability. Whereas the wrong in each case seems to be the same, criminal liability turns solely on the mode/means through which that wrong is achieved.

However, it will rightly be pointed out that our claim that this is incoherent would only hold if there is no qualitative difference for inchoate liability between a person being reckless as to circumstances and being reckless as to consequences. Enker, who also bases his theory of inchoate liability on conscious risk-taking,[75] argues that such a qualitative difference does exist and therefore it is necessary to treat circumstances and consequences differently for mens rea purposes. He contends that the essential difference is that, although consequences relate to the *harm* of a substantive offence (and so an intention to bring them about demonstrates a harmful intention), circumstances are merely conditions of culpability and unrelated to that harm.[76] Therefore, unlike vases two and three, where D throws the first vase with the intention of causing damage, Enker would argue D has engaged in harmful risk-taking regardless of his mens rea as to the vase's ownership.[77] If this approach is accepted, the English Commission would be able to point to a rationale for inchoate liability between the orthodox approach and that of intentional risk-taking that would justify treating circumstances and consequences differently since the wrong being targeted is a form of intentional *harmful* risk-taking and the distinction between circumstances and consequences becomes essential to its success.

However, we do not believe this analysis is correct. We would contest Enker's claim that the harm of a substantive offence lies solely within the consequence element. This is because the various consequence elements discussed above, including damage and sexual penetration, are not *necessarily* harmful. It is not harmful, for example, to intentionally damage one's own property or to have consensual intercourse. It is only harmful to do these things in certain proscribed circumstances, where you do not own the property damaged, or where intercourse is not consensual. Therefore, it is surely more accurate to describe the *harm* within a substantive offence as being an amalgam of each element, with each playing an equal role. If the harm within the substantive offence is in fact an amalgam of each of the elements, then it is difficult to see any basis at all for distinguishing between circumstances and consequences for the purposes of attaching mens rea for inchoate liability.

75 Enker, "Mens rea", n. 33 above, p. 874.

76 Ibid. pp. 869–71.

77 The structure of this point is modelled on Enker's discussion of attempted child abduction. Again, in his example, Enker contends that it is the intention to abduct and not the knowledge of V's age that risks the harm of the offence: ibid. p. 869.

Some conclusions on the English Commission's approach

It may be worthwhile at this stage to draw together the threads of our argument here. We have seen that, although the English Commission identifies wrongs to be targeted by the inchoate offences, those orthodox intention-based wrongs are undermined by a recommended culpability framework that goes beyond intention, and actually criminalises certain conscious risk-taking. However, if we allow the wrongs to be reinterpreted to include such risk-taking, the framework seems incoherent. This is because the English Commission's scheme adopts a different approach to mens rea as to consequences of the substantive offence, on the one hand, and circumstances on the other, when in fact recklessness as to either element would mean that D is consciously risking the commission of the substantive offence. Since this is the case, the distinction that the English Commission's culpability framework for inchoate liability draws between consequences and circumstances is difficult logically or coherently to link with the wrong being targeted. A distinction of this kind, with such a significant effect on the boundaries of liability, requires a justification that ties back to the wrongs being targeted and those we wish to exclude from liability. However, as we have argued in our examination of Enker's analysis, those who have attempted such a justification have not done so successfully.

It follows, therefore, that even if we are able to separate circumstances and consequences in the manner required by the English Commission's approach, it would be a distinction without a principled justification.[78] There may be analytical differences between the two elements, but whether the wrong being targeted by inchoate criminal liability is an intention to commit a substantive offence (the orthodox position), or as an intention to knowingly *risk* committing a substantive offence, the common role of circumstances and consequences within the definition of the substantive offence requires a consistent approach to them both in defining the mens rea requirements for inchoate versions of those offences.

Alternative approaches

Having questioned the viability of approaches of both the Irish and English Commissions, it may now appear that our options for moving away from the orthodox position are fundamentally reduced. For example, in order to bring coherence to the English Commission's culpability framework in a manner that expands liability from the orthodox position, it may appear that the mens rea requirement for consequences will have to be adapted in line with the circumstance element, tracking the principal offence to a minimum of recklessness. However, the objections to this have already been briefly canvassed above in our discussion of the Irish approach. Although we explained that there may be a principled justification for targeting conscious risk-taking, we also drew attention to misgivings expressed by Ashworth[79] that such an expansion of inchoate liability may be unacceptable in the eyes of many, and may also pose the added risk of police abuse.

With this in mind, it may therefore be useful briefly to examine two alternatives that share similar ambitions of the English (and Irish) Commission, but avoid the expansion of liability inherent in a culpability framework that allows recklessness for circumstances and consequences. Our aim here is not to provide an *answer* as to what reform in this area should be. Rather, it is simply to highlight the fact that constructing a culpability framework for mens rea of inchoate offences does not necessarily mean simply choosing between the orthodox intention-based framework and one centred on recklessness.

78 Buxton, "The working paper", n. 60 above; P H Robinson, "A functional analysis of the criminal law" (1994) *Northwestern University LR* 891.

79 See text at nn. 28–30 above.

The first alternative is provided by Duff. His approach was not explicitly considered by either Commission and may (at first glance) appear attractive.[80] Duff claims that it may be possible to expand the orthodox position regarding mens rea, and yet maintain that the wrong targeted by inchoate liability should be confined to acting with the *intention to commit* a substantive offence. Unlike the English Commission, Duff is able to maintain this line by supplementing his approach with objective factors. Thus, if D does not intend a particular circumstance of an offence, D may nevertheless be inchoately liable if (a) he has the requisite mens rea required by the substantive offence, and (b) the circumstance *is (objectively) present*. For example, if D attempts to sexually penetrate V whilst reckless as to V's (actual) non-consent, then he will be liable for attempted rape under Duff's approach. As V lacks consent in fact, D's intention *objectively* constitutes an intention to commit the principal offence.[81] In this manner, although not discussed by either Commission, Duff's objectivist approach is both able to maintain a narrow focus on intending an offence, whilst broadening liability to include a number of the problem cases.

Although Duff's approach may have some appeal, it shares several of the problems identified above. First, as the *broadening* of liability under Duff's approach (allowing a mens rea of less than intention) only occurs when circumstances are objectively present, it will only take effect in a minority of cases. This is because, although we may know whether a circumstance is or is not present in the context of a completed attempt, such knowledge in relation to incitement and conspiracy (and even incomplete attempts) will involve future states of affairs. Therefore, unless we encourage courts to speculate as to what might be the case at some future time, without the benefit of objective facts, Duff's framework will revert to the orthodox position in a whole range of situations.[82] The second objection to Duff's approach is that in cases where the objective facts are known, we encounter problems tending to the other extreme. This is because, in common with the Irish Commission's approach, in these cases Duff allows the mens rea of the inchoate offence to track the principal offence even below a floor of subjective fault. Therefore, we may again have cases, such as those discussed in the first part of this article, where D seems to be criminalised on the basis of mere proximity.[83] Finally, although this cannot be fully explored here, it is also contended that Duff (like the English Commission) relies on a distinction being made between circumstances and consequences:[84] accepting that objectively present circumstances can allow for a tracking of mens rea, but not allowing the same in relation to consequence elements.[85]

Having questioned the viability of Duff's approach, it is the second approach that we believe has the most potential *if* a middle ground is required between the orthodox and recklessness-based culpability frameworks. This would involve accepting the known risk model, but trying to limit the class of risks targeted within that model by requiring a

80 Duff, *Criminal Attempts*, n. 31 above. It is notable that, despite several references to Duff's work, neither Commission explicitly engaged with his approach to mens rea.

81 Ibid. pp. 321–2 and 362–78 generally.

82 This is not necessarily a compelling criticism of Duff's approach, which was constructed in relation to attempts alone (although it does stand as a criticism in relation to incomplete attempts). However, if we (in line with both commissions) value the importance of a consistent approach to mens rea across the inchoate offences, then it is a reason for rejecting this approach.

83 Duff recognises this problem, but does not attempt to provide a solution: Duff, *Criminal Attempts*, n. 31 above, pp. 374–8.

84 This claim is contrary to Duff's expressed aim to create an approach that does not rely on such distinctions: ibid. p. 27.

85 See, for example, Duff's discussion of the reckless hunter who intentionally kills "that thing", reckless as to whether it is a person: ibid. pp. 28–9.

minimum mens rea of belief, as distinct from recklessness, for both circumstances and consequences. This approach is still based on targeting the wrong of consciously risking the completion of the substantive offence because, unlike intention, belief allows for the possibility of the believed circumstance or consequences not coming about without D having failed in his endeavour. However, requiring *belief* means that the expansion of inchoate liability to include known risks will be tailored to exclude less significant risks that D does not *believe* will come about.

Such an approach to mens rea of inchoate offences will not be universally acceptable. It represents only a modest extension from the orthodox position, only convicting in our previous examples if D believes V does not consent, or does not own the vase etc. However, any further defence of this approach will have to wait for another time.

Conclusion

The reports of both commissions examined in this article contain a host of valuable and well-reasoned recommendations concerning the reform of various aspects of inchoate liability. However, our concern has been with their approach to mens rea, and it will be apparent from the analysis set out above that our view is that both approaches should be questioned. The Irish Commission's mens rea framework is the product of focusing on individual offences and failing more generally clearly to identify the wrong being targeted by inchoate liability. The result is a scheme for mens rea for inchoate liability that, in our view, would lead to unwanted and unjustifiable results, and we hope that those proposals never see "the light of legislative day".

However, as our analysis of the English Commission's recommendations indicate, the process of formulating alternatives to the orthodox position requires not simply that the wrong inherent in inchoate liability must be properly identified. Criminalisation will only be justified if the framework for mens rea coherently and consistently reflects that wrong. If this means that the scope for reform is reduced, because, for example, a coherent framework would have to permit liability to arise where there is recklessness as to consequences, and this might not be considered acceptable, then so be it. If this alternative framework may nonetheless lead to outcomes that people think "go too far" in terms of criminalisation, then we will find ourselves having to consider some other approach that is nonetheless rationally coherent. We have briefly outlined one possibility based upon *belief* which is rooted in a known risk-based approach. However, should one be wedded to an "intention" based-rationale, then the only principled and coherent framework is one where the orthodox approach is applied rigidly, without exception.

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The politics of youth justice reform in post-conflict societies: mainstreaming restorative justice in Northern Ireland and South Africa

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Abstract

Criminal justice reform plays a pivotal role in helping to foster reconciliation and peace-building in post-conflict societies. In the wake of their respective political transitions, both Northern Ireland and South Africa have formulated proposals for reform of their youth justice systems based upon restorative principles. This article analyses the attempts to roll out these reforms in both jurisdictions. It considers why new youth justice arrangements have largely been well received in Northern Ireland, yet have struggled to be implemented successfully in South Africa and reflects on possible lessons to be learnt in the context of post-conflict transformations.

1 Introduction

The political conflicts, and subsequent peace processes, in Northern Ireland and South Africa have received considerable international attention in recent years, with commentators apparently eager to draw comparisons between the two jurisdictions.[1] Whilst such comparative scholarship is not without its caveats because of the very different cultural influences and demographic dynamics at play,[2] both societies share a history of conflict that they have sought to overcome through the introduction of new constitutional settlements. As in other transitional societies in Eastern Europe and Latin America,[3] criminal justice reform was seen as a vital component of both the Northern Irish and South

1 See e.g. M McDonald, *Children of Wrath* (Cambridge: Polity Press 1986); J Alderdice, "If talks can work in South Africa, why not here?", *Sunday Times*, 22 January 1995; T G Mitchell, *Native versus Settler: Ethnic conflict in Israel/Palestine, Northern Ireland and South Africa* (Westport CT: Greenwood Press 2000); B Hamber, *Past Imperfect: Dealing with the past in Northern Ireland and societies in transition* (INCORE/University of Ulster: Derry/Londonderry 1998); J McGarry, "Political settlements in Northern Ireland and South Africa" (1998) 46 *Political Studies* 854.

2 For example, it has been suggested that studies are often paraded as comparative when they fail to adequately investigate the historical, social, economic, political and legal context of the country under investigation: P Legrand, "European legal systems are not converging" (1996) 45(1) *ICLQ* 52. Legrand proceeds to argue (at p. 238) that law "is inevitably socially, historically, culturally and epistemologically situated" and that it does not "exist in a vacuum" because "it operates within society". See also D Nelken, (2004) "Using the concept of legal culture" (2004) 29(1) *Australian Journal of Legal Philosophy* 1; M D Dubber, "Comparative criminal law" in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford: OUP 2006).

3 See D Bayley, *Changing the Guard: Developing democratic police abroad* (Oxford: OUP 2006); M Hinton, *The State on the Streets: Police and politics in Argentina and Brazil* (Boulder: Lynne Rienner 2006), P Messitte, "Expanding the rule of law: judicial reform in central Europe and Latin America" (2005) *Washington University Global Studies LR* 617.

African peace processes. It was recognised by the key players in the peace processes that large sections of the population perceived the state machinery as being inextricably entangled with the conflict. Thus, without the introduction of fresh criminal justice structures and processes, the long-term prospects for the success of the political settlements and societal reconciliation would undoubtedly have been severely hampered.

The youth justice arena has always proven fertile ground for introducing new and innovative approaches,[4] with restorative approaches in particular being rolled out worldwide. Northern Ireland and South Africa have been no exception to this trend, and both have sought to prioritise restorative principles in the respective reforms of their youth justice systems. To some extent, the eagerness to make use of the restorative paradigm is unsurprising, since there is a clear paradigmatic overlap between restorative justice and transitional justice. Both discourses share common themes and objectives, such as accountability, the acknowledgment of truth, symbolic reparation, restoration of dignity, healing, reconciliation, conflict resolution and democratic participation. Transitional justice, like restorative justice, is increasingly conceived in terms of "a form of dialogue between victims and their perpetrators" rather than a punitive blame allocation exercise.[5] Moreover, both transitional and restorative models place considerable emphasis on supportive and non-adversarial frameworks,[6] and the core *raison d'être* of both processes is, essentially, to engineer a moral transformation in making amends for a past injury or wrongdoing. Arguably, the archetypal transitional mechanism in recent times, the South African Truth and Reconciliation Commission (TRC) had the self-proclaimed moral objective of promoting "the restorative dimensions of justice".[7] Yet in the years since its inception in 1995, the extent to which the TRC delivered restorative justice in practice has been open to debate.[8] Whilst no comparable truth recovery process has been established in Northern Ireland, the political transition has been accompanied by a number of independent inquiries into the role of the state during the conflict, which has included investigations into the

4 K Haines, "Some principled objections to a restorative justice approach to working with juvenile offenders" in L Walgrave (ed.), *Restorative Justice for Juveniles: Potentialities, risks and problems* (Leuven: Leuven UP 1997).

5 R Teitel, "Transitional historical justice" in L Meyer (ed.) *Justice in Time: Responding to historical injustice* (Baden-Baden: Nomos 2004), p. 80.

6 A du Toit, "The moral foundations of the South African TRC: truth as acknowledgment and justice as recognition" in R Rotberg and D Thompson (eds), *Truth v. Justice: The morality of truth commissions* (Princeton NJ: Princeton UP 2000).

7 The TRC was established by the Government of National Unity to help deal with what happened under apartheid. One of its aims was to afford victims with "an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights". See, generally, TRC website www.doj.gov.za/trc/ (last accessed 4 June 2012).

8 See further J Llewellyn and R Howse, "Institutions for restorative justice: the South African Truth and Reconciliation Commission" (1999) 49 *University of Toronto Law Journal* 355–88, who argue that the TRC lacked any mechanism that would enable perpetrators to make amends to victims. See further H Klug, *Constituting Democracy: Law, globalism and South Africa's political reconstruction* (New York and Cambridge: CUP 2000). The most cynical analysis of the function of the TRC is offered by R A Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: CUP 1999), who argues that restorative justice was used as a transformative mechanism through which to challenge approaches and attitudes to dispute resolution and increase the legitimacy of state institutions, particularly the criminal justice system. Furthermore, Claire Moon's analysis, *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (Lanham: Lexington Books 2008), demonstrates that the TRC had *political* reconciliation as a goal, despite its promotion of reconciliation on the basis of interpersonal acknowledgment and forgiveness, not restorative measures.

alleged collusion of the security forces in a number of high-profile murders,[9] and perhaps most notably, the judicial inquiry into the events of Bloody Sunday.[10] In January 2009, the Consultative Group on the Past published a report (known as the Eames-Bradley Report) which proposed the establishment of a "legacy commission" to investigate deaths and past atrocities which had occurred.[11] The proposals differed considerably from the South African TRC in a number of ways, not least insofar as the proposed process would be conducted with a view to prosecuting perpetrators rather than simply recovering facts. There was also a restorative component to the proposals, insofar as they proposed that an "ex gratia recognition payment" of GB£12,000 should be offered to all the families of all those who were killed in the Troubles.[12] Whilst the prospect of direct engagement between victims and perpetrators was always unlikely, the payment of a sum of money to victims by the state was intended as a form of official acknowledgment of their plight rather than direct recompense for the death. Perhaps more important than the payment of compensation for many victims' families was the prospect of receiving information about what precisely happened to their loved ones.[13] This also formed a core element of the proposals, but more than three years on from their publication, they seem to have become stuck in the long grass and there remains no consensus as to the best means to deal with Northern Ireland's troubled past.[14]

In both South Africa and Northern Ireland, the potential for restorative principles to bolster peace-building has been acknowledged. By the same token, it has been tentatively suggested that the adoption of a more restoratively orientated framework of criminal justice reform may help boost general confidence in the justice system and thereby assist in peace-building and forging inter-community trust.[15] Put more simply perhaps, the restorative paradigm may both reflect and propel the values of the political transition. In contrast to the norms that traditionally underpin conventional criminal justice which

9 As part of the peace process a, retired Canadian judge, Peter Cory, was appointed jointly by the British and Irish governments to investigate allegations of state-sponsored collusion in six high-profile murders. His report, published in 2003, called for public inquiries to be established in five of the six cases. Four such inquiries were subsequently established by the British government, and one by the Irish government.

10 The Saville Report was finally published on Tuesday 15 June 2010. See further http://www.bloody-sunday-inquiry.org/ (last accessed 4 June 2012). See also D Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (Basingstoke: Palgrave Macmillan 2000); A Hegarty, "Truth, law and official denial: The case of Bloody Sunday" (2004) 15 *Criminal Law Forum* 199.

11 Report of the Consultative Group on the Past (Eames-Bradley Report) (2009), available at www.publications.parliament.uk/pa/cm200910/cmselect/cmniaf/171/171.pdf (last accessed 4 June 2012).

12 The Eames-Bradley Report was launched in Belfast in January 2009. The extent to which it will be implemented remains to be seen. The previous government had already ruled out making any *ex gratia* payments. The level of controversy surrounding the report reflects the fact that there is a profound lack of consensus within Northern Ireland as to how to deal with the legacy of the Troubles. See further C Lawther, "Securing the past: policing and the contest over truth in Northern Ireland" (2010) 50(3) *British Journal of Criminology* 455.

13 There is a vast body of literature evaluating the benefits and drawbacks of truth commissions and other truth recovery mechanisms. See, generally, R Teitel, *Transitional Justice* (Oxford: OUP 2000); J-P Lederach, *Building Peace: Sustainable reconciliation in divided societies* (Washington DC: US Institute of Peace 1997); N Roht-Arriaza and J Mariezcurrena (eds.), *Transnational Justice in the Twenty-First Century: Beyond truth versus justice* (Cambridge: CUP 2006); P B Hayner, "Fifteen Truth Commissions – 1974 to 1994: a comparative study" (1994) 16 *Human Rights Quarterly* 597; Rotberg and Thompson, *Truth v. Justice*, n. 6 above; T Borer (ed.), *Telling the Truths: Truth telling and peacebuilding in post-conflict societies* (Notre Dame IN: University of Notre Dame Press 2006).

14 See further "Talking about the past as the present erupts on the streets", *Belfast Telegraph*, 23 June 2011.

15 J Doak and D O'Mahony, "In search of legitimacy: restorative youth conferencing in Northern Ireland" (2011) 31(2) *Legal Studies* 305–25.

conceptualise crime as an offence against the state,[16] restorative justice views crime primarily as a breakdown between private relationships.[17]

In theory at least, the ownership of disputes is thereby devolved more towards the victim, the offender and the community. Members of the community participate directly within the decision-making process, and in doing so help lay down norms of acceptable and unacceptable conduct.[18] This holds clear potential in post-conflict environments, since communities may feel as though they (as opposed to the state) are being offered the chance to take charge of criminal justice. In practice, this inevitably means that the traditional role afforded to state agencies, such as the police, the courts and civil service, is radically altered. As noted below in respect of Northern Ireland, the contraction of the state role can potentially ignite fierce tensions around the question of who "owns" criminal justice.[19] The roll-out of alternative justice schemes also highlights an ongoing debate as to whether the role of the state should be limited to mere facilitation and some degree of oversight of restorative processes, or whether leadership and operational management is compatible with the concept of restorative justice at all.[20]

This article considers the reforms introduced to the youth justice systems of Northern Ireland and South Africa in the wake of their new political settlements. In particular, it probes some of the reasons as to why the new youth justice arrangements in Northern Ireland appear to be operating relatively successfully, whilst those in South Africa have struggled to be passed into legislation and implemented. Examining each jurisdiction in turn, we highlight the background to criminal justice reform and the extent to which policymakers have attempted to mainstream restorative values in devising new juvenile justice arrangements. We argue that the system established in Northern Ireland is both more developed and mainstreamed than that in South Africa and explore possible reasons for this divergence. While the relative success of the Northern Ireland scheme certainly holds lessons for South Africa, and many other jurisdictions besides, a number of social, economic and cultural differences mean that South Africa still faces challenges in seeking to further develop restorative justice.

2 Developments in Northern Ireland

Reform of the Northern Ireland youth justice system came about as part of a package of criminal justice reforms introduced in the wake of the 1998 Belfast Agreement (or Good Friday Agreement), which was a core constituent of the peace process. A central element of the Agreement was the establishment of a fundamental review of the criminal justice system (known as the Criminal Justice Review), with one of its aims being to make the criminal justice system more accountable and acceptable to the community as a whole and to

16 See further N Christie, "Conflicts as property" (1977) 17(1) *British Journal of Criminology* 1; J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the role of third parties* (Oxford: Hart 2008).

17 H Zehr, *Changing Lenses: A new focus for crime and justice* (Scottsdale, PA: Herald Press 2005).

18 A Dzur and S Olson, "The value of community participation in restorative justice" 35(1) *Journal of Social Philosophy* 91–107 (2004).

19 See further K McEvoy and A Eriksson, "Who owns justice? Community, state, and the Northern Ireland transition" in J Shapland (ed.), *Justice, Community and Civil Society* (Cullompton: Willan Publishing 2008).

20 Some commentators argue that the state has a vested interest in promoting and controlling structures which support hegemony; see e.g. C Boyes-Watson, "In the belly of the beast? Exploring dilemmas of state-sponsored restorative justice" (1999) 2 *Contemporary Justice Review* 261. Those advocating a more central role for the state include J Dignan and K Lowey, *Restorative Justice Options for Northern Ireland: A comparative review* (Belfast: TSO 2000); J Shapland, "Restorative justice and criminal justice: just responses to crime?" in A von Hirsch, J Roberts, T Bottoms, K Roach and M Schiff (eds), *Restorative Justice and Criminal Justice: Competing or reconcilable paradigms* (Oxford: Hart 2003).

encourage community involvement and be responsive to the community's concerns.[21] The Criminal Justice Review, published in March 2000, made a total of 294 recommendations. Included in these, it advocated a wholly new restorative approach in virtually all criminal cases involving young offenders. To this end, the Review Group proposed a model of youth conferencing, somewhat similar to that which had been relatively well established in New Zealand and parts of Australia. The scheme was to be contained in statute, and was to become the primary method of dealing with juvenile offenders.[22]

The introduction of youth conferencing constituted a paradigmatic shift in the juvenile justice system.[23] Although the police had begun to use restorative techniques as alternatives to the traditional cautioning process since 2000,[24] disposals beyond caution were largely effected in an orthodox fashion through the courts system. The new legislation, the Justice (Northern Ireland) Act 2002, provided for the establishment of an independent Youth Conferencing Service to organise and facilitate conferences. The legislation provided for two types of conferences, "diversionary" and "court-ordered". In both instances, the conferences are organised with the goal of providing a recommendation to either the prosecutor (in the case of a diversionary conference) or the court (in the case of a court-ordered conference) on the appropriate disposal for the young person.

A diversionary conference, as its name suggests, aims to divert young people away from the criminal justice system in order to avoid net-widening.[25] These are convened following referral to the Youth Justice Agency from the Public Prosecution Service. The prosecutor is expected to make a referral where they would otherwise have instituted court proceedings. Therefore, they are not intended as a disposal for first-time offenders or offenders who commit minor criminal acts – who should normally be dealt with by the police, by way of caution or warning. Rather, diversionary conferences are intended for young people who may have offended and may have been cautioned in the past or where formal action is deemed necessary. For the diversionary conference to take place, the young person must admit to the offence and must consent to the process. If either of these conditions is not met the young person will not be dealt with through this process and may be referred through the court for prosecution.

For court-ordered conferences, the young person is referred for conferencing through the court. Again, the young person must admit to the offence and consent to the conferencing process. If there is a dispute of the facts, these will be heard by the court and following a finding of guilt the case may then proceed to conferencing – with the young person's consent. The distinctive feature of the Northern Ireland system is that the court *must* refer a young person to a youth conference and the court-ordered conference is not a diversionary intervention, it is part of the sentencing process. The mandatory nature of referrals highlights the intended centrality of conferencing to the new youth justice process.[26]

21 Criminal Justice Review Group, *Review of the Criminal Justice System* (London: HMSO 2000).

22 Ibid. p. 205. Juvenile offenders include all young people aged 10–17 years.

23 See D O'Mahony and C Campbell, "Mainstreaming restorative justice for young offenders through youth conferencing: the experience of Northern Ireland" in J Junger-Tas and S H Decker (eds.), *International Handbook of Juvenile Justice* (New York: Springer 2006).

24 See D O'Mahony and J Doak, "Restorative justice – is more better?" (2004) 43(5) *Howard Journal of Criminal Justice* 484–505.

25 On the potential dangers of net-widening, see S Levrant et al., "Reconsidering restorative justice: the corruption of benevolence revisited?" (1999) 45(1) *Crime and Delinquency* 3; O'Mahony and Doak, "Restorative Justice", n. 24 above.

26 O'Mahony and Campbell, "Mainstreaming restorative justice", n. 23 above. Only offences with a penalty of life imprisonment, offences which are triable under indictment only and scheduled offences (terrorism) are not automatically eligible for youth conferencing.

The conferencing process typically involves a meeting to which the young person is invited to reflect upon their actions, offer some form of reparation to the victim and complete requirements to address their offending. The conference is chaired by a professionally trained conference co-ordinator, employed by the youth conferencing service. The victim, who is encouraged to attend, can explain how the offence has impacted them and can gain an understanding of why the offence occurred. This process is designed to give the offender an understanding of the impact of their actions and to understand the victim's perspective. It also gives the victim the opportunity to understand why they were victimised. Following a group discussion a conference plan will be drawn up which takes the form of a negotiated "contract" which is enforceable and requires the offender to complete acts, such as reparation to the victim, requirements to address their offending and/or restrictions on the young person's conduct or whereabouts.[27] The agreement process, like participation in the conference, is voluntary and the young person must consent before the contract becomes enforceable.

A major evaluation of the youth conferencing arrangements was published in 2005.[28] From an orthodox criminological perspective, the findings were largely positive, with high levels of victim and offender participation[29] and engagement with the process.[30] Victims generally felt positively about the process, and appreciated the opportunity to put questions to the young person. For offenders, it was evident that the conferencing process held them to account for their actions, insofar as they were expected to explain to the conference and victim why they offended and they had to complete specific requirements as part of the conference plan. The majority of offenders stated that they had wanted to attend to "make good" for what they had done, or to apologise to the victim.

A recent qualitative study by Maruna et al. (2007) of the longer-term impacts of the youth conferencing process on young offenders in Northern Ireland has also found "many of the post-conference outcomes were positive",[31] and an independent report produced by the Criminal Justice Inspectorate in 2008 corroborated these findings.[32] By the same token however, it would be foolhardy to suggest restorative youth conferencing works well all the time and in all cases. Both the Campbell et al. and Maruna et al. studies noted difficulties in the practice of delivering restorative conferences effectively. Furthermore, an evaluation of police-led restorative cautioning practice in Northern Ireland observed some evidence of

27 A conference plan can include a wide range of requirements, for example, to take part in offending programmes, complete unpaid work, or be excluded from particular places or activities. The conference plan may even recommend a custodial sentence, the length of which will be determined by the court. See Justice (Northern Ireland) Act (2002), s. 57.

28 C Campbell, R Devlin, D O'Mahony et al., *Evaluation of the Northern Ireland Youth Conference Service* NIO Research and Statistics Series, Report No 12 (Belfast: NIO 2006).

29 Over two-thirds of conferences (69%) had a victim in attendance, which is high compared with other restorative-based programmes. Of these, 40% were personal victims and 60% were victim representatives (such as in cases where there was damage to public property or there was no directly identifiable victim). Indeed, nearly half of personal victims attended as a result of assault, whilst the majority (69%) of victim representatives attended for thefts (typically shoplifting) or criminal damage. These results compare favourably with other research focusing on victim participation in restorative processes. Cf. G Maxwell and A Morris, "Restorative justice and reconviction" (2002) 5 *Contemporary Justice Review* 133–46; A Crawford and T Newburn, *Youth Offending and Restorative Justice: Implementing reform in youth justice* (Cullompton: Willan Publishing 2003).

30 83% of victims were rated as "very engaged" during the conference and 92% said they had said everything they wanted to during the conference. See Campbell et al., *Evaluation*, n. 28 above

31 S Maruna, S Wright, J Brown, F Van Marle, R Devlin and M Liddle, *Youth Conferencing as Shame Management: Results of a long-term follow-up study* (Belfast: Youth Conferencing Service 2007), p. 2.

32 Criminal Justice Inspectorate, *Inspection of the Youth Conferencing Service* (Belfast: CJINI 2008).

"net-widening", whereby the process sometimes drew relatively petty offenders into very challenging interventions.[33] Notwithstanding these caveats, the research evidence has been largely positive and there is now a considerable international body of research evidence demonstrating some of the advantages of restorative justice, particularly over "traditional" and retributive models of criminal justice.[34]

However, one further disconcerting issue to emerge from Campbell et al.'s research was that there was very little evidence of co-operation with either of the Northern Ireland community-led restorative schemes, Community Restorative Justice Ireland (CRJI) or Greater Shankill Alternatives (GSA).[35] These community schemes developed largely as alternatives to "self-policing" by paramilitary organisations in the mid-1990s, particularly in some divided working-class communities in Belfast.[36] They deal mostly with low-level offences and neighbourhood disputes, and sometimes involve juveniles. Until very recently, they operated entirely independently of the formal criminal justice system due to the ongoing legacy of suspicion and mistrust – despite the end of the political conflict and apparent success of the subsequent peace process. Relations between these groups and the police and Northern Ireland Office were highly strained at the time the research was undertaken.[37] While both the statutory and community schemes have adopted a similar approach to juvenile offenders, with, presumably, the same restorative-based goals in mind, there was little active consultation or exchange between them and ownership of justice in areas that were traditionally self-policing became hotly contested.

On a purely theoretical level, however, there was reason to be optimistic about the potential for the youth conferencing scheme to overcome these difficulties. Commentators have pointed to the potential of restorative justice to reinvigorate democracy through creating new community bonds and strengthening existing ones,[38] though it is worth underlining that this is only likely to be achieved if the new structures are perceived by all communities as a fair and effective means of delivering justice. However, there are three particular aspects of the Northern Ireland scheme that hold legitimating potential and have

33 O'Mahony and Doak, "Restorative justice", n. 24 above.

34 See, for example, D Miers, *An International Review of Restorative Justice* (London: Home Office 2001); L Sherman and H Strang, *Restorative Justice: The evidence* (London: The Smith Institute 2007); J Shapland, G Robinson and A Sorsby, *Restorative Justice in Practice* (London: Routledge 2011). However, Goldson is critical of restorative youth conferencing, especially as a model for criminal justice reform as proposed by the Commission on Youth Crime and Antisocial Behaviour (2010) in England and Wales: B Goldson, "Time for a fresh start" (2011) 11(1) *Youth Justice* 3. Whilst Goldson provides a thoughtful critique of the Commission's report, his specific thoughts on the drawbacks of restorative youth conferencing have limited evidence or empirical support.

35 Campbell et al, *Evaluation*, n. 28 above, p. 117.

36 For a good description of the community schemes in Northern Ireland, see, generally, H Mika and K McEvoy, "Restorative justice in conflict: paramilitarism, community, and the construction of legitimacy in Northern Ireland" (2001) 4 *Contemporary Justice Review* 291–319; K McEvoy and A Eriksson, "Restorative justice in transition: ownership, leadership and 'bottom up' human rights" in D Sullivan and L Tifft (eds), *Handbook of Restorative Justice: A global perspective* (London/New York: Routledge 2006). For a useful comparison between these structures and those in South Africa, see R Monaghan, "Community-based justice in Northern Ireland and South Africa" (2008) 18 *International Criminal Justice Review* 83–105.

37 See further McEvoy and Eriksson, "Restorative justice in transition", n. 36 above; A Eriksson, J*ustice in Transition: Community restorative justice in Northern Ireland* (Cullompton: Willan Publishing 2009).

38 A Alfieri, "Community prosecutors" (2002) 90 *California LR* 1465. See also J Braithwaite and C Parker, "Restorative justice is Republican justice" in G Bazemore and L Walgrave (eds), *Restorative Juvenile Justice: Repairing the harm of youth crime* (Monsey, NY: Criminal Justice Press 1999); J Braithwaite, "Building legitimacy through restorative justice" in T Tyler (ed.), *Legitimacy and Criminal Justice: International perspectives* (New York: Russell Sage Foundation 2007).

already shown some evidence of assuaging lingering difficulties that exist in terms of legitimacy and ownership.

First, the model that has been adopted envisages a wide range of stakeholders participating in the process. By law the young person, the conference coordinator, a police officer[39] and an appropriate adult must attend a conference.[40] The victim of the offence is entitled to attend with a supporter, but is not required to do so.[41] Crucially, however, it should be underlined that the coordinator is empowered to widen the ambit of the conference: he or she is able to include anyone else who they feel may be "of value" to the process. For example, because the offenders were juveniles, all of the conferences observed included parents or guardians, and some included other supporters, such as social workers or probation officers, who had been working with or knew the young person. Campbell et al.'s research showed that 77 per cent of supporters were engaged to some extent when discussing the crime. Many, by invitation of the coordinator, described positive aspects of the offender's life and several supporters were seen to actively step in when the young person was having difficulty expressing him/herself. In addition, supporters often spoke of their feelings of regret, disappointment and shame which no doubt added to the restorative impact of the conference on the young person.

A second major form of wider engagement was through the participation of victim representatives or "proxy victims". Here, if appropriate, a representative of local business or a community could attend a conference if the direct victim was unable or unwilling to attend. For the most part, victims' representatives were keen to play a proactive part in discussions. As representatives of local businesses or community organisations/groups, they were able to inject fresh community perspectives and understandings into the conference and thus helped to reinforce on the offender the wider impact of their actions.[42] In addition, it was apparent that the Youth Conference Service had established networks with a range of community organisations and service-providers. These included voluntary, statutory and non-statutory bodies and community organisations which provided services to youth conferencing, such as one-to-one mentoring services, drug and alcohol awareness, voluntary and community-based work programmes, victim and offence awareness sessions, peer education and diversionary programmes. The reliance upon the voluntary and

39 There has been some debate as to whether having police officers present at a restorative conference is desirable or whether their presence might stifle proceedings. For example, in an evaluation of the police restorative cautioning programme in the Thames Valley, Hoyle et al. noted in the early stages of their research that some police officers tended to dominate proceedings: C Hoyle, R Young and R Hill, *Proceed with Caution: An evaluation of the Thames Valley Police initiative in restorative cautioning* (York: JRF 2002). However, Campbell et al. found that having a police officer present at the conference often provided a rare opportunity for the young person to engage with a police officer, allowing some dialogue to take place and may even have been an opportunity to break down barriers and hostility towards the police: *Evaluation*, n. 28 above. This modest opening-up of a dialogue may even help foster a greater respect for the police and the law, see L Sherman et al., *Experiments in Restorative Policing: A progress report on the Canberra reintegrative shaming experiments* (Canberra: Research School of Social Sciences, Australian National University 1998).

40 Criminal Justice (Children) (Northern Ireland) Order 1998, Article 3A. The young person is entitled to have legal representation at the conference, but they may only attend in an advisory capacity and cannot speak on the young person's behalf.

41 Where victims choose not to attend, they may still opt to participate indirectly. This can be achieved through the use of a telephone link, a written statement, letter or tape-recording in which the victim can express the impact of the crime.

42 It should be noted that the use of a "proxy victims" is generally less effective than integrating the actual victim into the restorative process. However, see J Dignan, *Understanding Victims and Restorative Justice* (Maidenhead: Open UP 2005), who describes how a victim's perspective can be helped to be brought to a conference through the use of vicarious stakeholders, especially in cases where there was no actual or identifiable victim – such as in a case of criminal damage to public property (p. 101).

community sector was significant and 83 per cent of conference plans included activities or programmes which were usually provided through the community and voluntary sector. This would seem to suggest that the programme has been successful to some extent in further encouraging community participation and civic engagement.

The third – and potentially most significant – legitimating factor is the capacity of the scheme to forge new and mutually beneficial links with the various community-based restorative schemes that had hitherto existed with very little contact with the established criminal justice system. Yet, after several years of stalemate in which disputes over policing and criminal justice reform precluded political progress, the St Andrews Agreement of 2006 heralded a fresh era of devolved government, with Sinn Fein offering its support for the police and new criminal justice structures. In January 2007, the Northern Ireland Office published a Protocol for Community-Based Restorative Justice Schemes which marked the beginning of a process which eventually resulted in ten CRJI and four NIA (Northern Ireland Alternatives) schemes being accredited by the Criminal Justice Inspectorate.[43] Subsequently, the Northern Ireland Office accepted that community restorative justice projects have a valuable role to play in dealing with low-level criminality in Northern Ireland, and limited government funding and a promise of mutual co-operation was announced which should help secure the future of the projects, at least in the short term. In the years since Campbell et al.'s research was carried out, relationships have been forged between the Youth Conferencing Service and the community-based schemes as well as other state and non-state actors who may not have engaged with each other at all in years gone by.

In summary then, Northern Ireland has seen a relatively successful process of mainstreaming restorative justice principles in its youth justice system. The ideals of restorative justice have, in many respects, been also intertwined with the process of transitional justice, and while by no means providing a panacea, the two appear to be at least contributing to the process of peace-building and inter-community trust. It is against this backdrop that we consider reforms to the youth justice system in South Africa.

3 Developments in South Africa

Even before the establishment of the South African transition, the treatment of juveniles by the criminal justice system had become a major cause for concern.[44] Although the political detention of children drew to an end in the late 1980s,[45] large numbers of children continued to be held in custody awaiting trial.[46] This issue came to a head in 1992 with the high profile brutal murder of a 13-year-old boy in custody by older cellmates.[47] As a result, there was considerable pressure to address the basic rights of children caught up in the criminal justice system. South Africa responded by ratifying the United Nations Convention

43 The Northern Ireland Office has now agreed funding for the projects which should secure their future in the short term – see "Goggins to fund restorative justice plan, despite row", *Belfast Telegraph*, 30 July 2008.

44 SALRC, *Juvenile Justice*, Issue Paper 9, Project 106 (Pretoria: SALRC 1997); L Ehlers, *Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America* (2006), available at www.childjustice.org.za/publications.htm (last accessed 4 June 2012).

45 Concern about the political detention and possible torture of children held in custody is well documented, for example, see UN Commission on Human Rights reports, especially *Detention, Torture and Other Inhuman Treatment of Children in South Africa*, 22 February 1991, E/CN.4/RES/1991/8, available at UNHCR Refworld, www.unhcr.org/refworld/docid/3b00f0b440.html (last accessed 4 June 2012).

46 SALRC, *Juvenile Justice*, n. 44 above.

47 D Pinnock, R Shaprio, A Skelton et al., "New juvenile justice legislation for South Africa: giving children a chance" (1994) 3 *South African Journal on Criminal Justice* 338; A Skelton, *Children and the Law* (Pietermaritzburg: Lawyers for Human Rights 1998).

on the Rights of the Child (UNCRC) in 1995 and enshrined a series of specific rights for young people in the South African Constitution the following year.[48]

The increasing sense of urgency surrounding criminal justice reform also resulted in the establishment of a Project Committee on Juvenile Justice in 1997. Drawn broadly from non-governmental organisations (NGOs), the committee was set up under the auspices of the South African Law Reform Commission (SALRC) and was charged with drafting legislative proposals for a new justice system dedicated to children. Following an intensive period of consultation, the SALRC produced a draft Child Justice Bill, which contained a number of sweeping proposals designed to radically overhaul the existing system. This draft Bill was accompanied by a discussion paper that set out in considerable detail the rationale for the recommendations put forward.[49]

It was apparent from the discussion paper that the SALRC was guided by a number of factors that influenced the decision to improve the existing system for dealing with children accused of crimes in South Africa. The first of these factors was the intention to further the protection of children's rights as espoused in both the UNCRC and the passing of the South African Constitution. Secondly, the drafting process of the Bill was strongly influenced by the notion of restorative justice.[50] The SALRC identified reconciliation, restoration and harmony as being at the heart of African approaches to the adjudication of disputes and the proposed objectives section explicitly linked the indigenous concept of *ubuntu* to the values underpinning the juvenile justice system.[51] As previously noted, these very concepts of reconciliation and restoration have been regarded as central to the transitional process of South Africa following the establishment of the TRC. Essentially, the SALRC's vision of the new youth justice system thus constituted an "Africanisation" of established international principles, which embraced restorative ideals through placing core emphasis upon the roles to be exercised by the family and the broader community. A third rationale for the reforms proposed was the need to legislate for diversion. It had been normal practice for prosecutors to channel children away from the criminal courts on a purely discretionary basis. However, this practice was infrequently and inconsistently used throughout the country and it was hoped the provision of a legislative basis for diversion would create a greater degree of certainty and effectiveness.[52]

In the aftermath of the discussion paper, a consultation took place with police, prosecutors, magistrates, judges, NGOs and academics, together with a specially designed consultation process with children. The final report of the SALRC was submitted to the Minister of Justice in August 2000. The proposals largely echoed the core objectives of reform outlined in the discussion paper, and to this end, the Child Justice Bill (B49 of 2002) was introduced to the National Assembly in 2002. Despite early debate by the Portfolio

48 S. 28 of the constitution granted specific rights to children for the first time. In addition, the African Charter on the Rights and Welfare of the Child and a number of other international instruments relevant to juvenile justice have also influenced deliberations and policymaking regarding juvenile justice in South Africa – particularly the drafting of the Child Justice Act.

49 SALRC, *Juvenile Justice*, n. 44 above..

50 South Africa's connection with modern ideas of restorative justice began in the non-government sector. As early as 1992, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), a national NGO, took the lead in seeking to frame its diversion and sentencing programmes firmly within a restorative justice paradigm: Skelton, *Children and the Law*, n. 47 above.

51 Whilst *ubuntu* is not easily translated into English, Mafeje suggests that the concept includes "human sympathy, willingness to share, and forgiveness" (A Mafeje, "Africanity: a combative ontology" 1 *CODESRIA Bulletin* 67 (2000) as cited by A Skelton, "Africa" in G Johnstone and D Van Ness (eds), *Handbook of Restorative Justice* (Cullompton: Willan 2007).

52 Skelton, *Children and the Law,* n. 47 above.

Committee on Justice and Constitutional Development, and a series of government briefings and public hearings in February 2003, the Department of Justice and Constitutional Development failed to redraft the Bill or take any steps to ensure that it was reintroduced by Parliament. Although the proposed legislation had reached an advanced stage of the Portfolio Committee deliberations, Parliament had, in the meantime, continued to busy itself with other legislation.[53] In effect, the draft legislation was left in a state of limbo for a further five years. Only in January 2008 was the Bill tabled again in Parliament, and eventually became law on 11 May 2009.

Section 2 of the Child Justice Act expounds its five major objectives: to protect the rights of children; to promote *ubuntu* in the child justice system;[54] to provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities and encourage these children to become law-abiding and productive adults; to prevent children from being exposed to the effects of the formal criminal justice system by making use of disposals that are more appropriate to the needs of children, including diversion; and, finally, to promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system. These objectives are to be achieved through the formulation of an entirely new system of procedure for young people with diversion being a central aspect of the new regime.[55]

Under the system, the police are expected to release young offenders into the care of their parents or guardians, with probation officers then expected to undertake an assessment of the child.[56] The probation officer therefore exercises a central role and must prepare an assessment report, which should be passed to the magistrate presiding over a preliminary inquiry within 48 hours. This inquiry is defined in s. 43(1)(a) as "an informal pre-trial procedure which is inquisitorial in nature". It should be noted that the age of criminal responsibility has been increased from seven to 10. However, the rebuttable presumption of *doli incapax* remains for those aged 10 to 14.

The prosecutor may divert children who commit minor offences,[57] before appearing at the inquiry. However, the preliminary inquiry is compulsory for *all* children who are 10 years or older[58] who have allegedly committed an offence and who have not been diverted by the prosecutor or had the case against them withdrawn. It should nonetheless be underlined

53 A Skelton, *The Influence of Restorative Justice on South Africa's Developing Child Justice System*, unpublished LLD thesis (University of Pretoria, 2005).

54 S. 2 envisages that *ubuntu* will be promoted through "(i) fostering children's sense of dignity and worth; (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community; (iii) supporting reconciliation by means of a restorative justice response; and (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children".

55 The Portfolio Committee has chosen to link diversion to schedules of offences, which would work as follows: for Schedule 1 offences where the assessment recommends diversion and the prosecutor agrees, the child will automatically be diverted. Schedule 1 offenders who are not automatically diverted, Schedule 2 offenders, and Schedule 3 offenders will participate in the preliminary inquiry to determine the suitability of diversion as a disposal.

56 A Skelton and C Frank, "Conferencing in South Africa: returning to our future" in A Morris and G Maxwell (eds.), *Restorative Justice for Juveniles: Conferencing, mediation and circles* (Oxford: Hart 2001). A child is defined in s. 28 of the constitution as a person under the age of 18 years. Any child between the ages of 14 and 17 (and, exceptionally, those aged 10–14 where the doctrine of *doli incapax* has been rebutted, and those aged 18–21) may be considered for diversion.

57 These are contained in Schedule 1 of the Bill.

58 Unless a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved cl. 5(3)(b).

that a child may only be considered for diversion if he or she voluntarily acknowledges responsibility for the offence; has not been unduly influenced to accept responsibility; there is a prima facie case against the child; the consent of the child and his or her parent(s) is obtained; and the prosecutor or Director of Public Prosecutions indicates that the matter may be diverted.[59]

Although diversion is a central feature of the new system, the magistrate is not confined to the range of options listed in the Act. He or she may also tailor any diversionary measure to suit the individual child, as long as such measures are in keeping with the objectives and standards of diversion set out in ss. 51 and 55 respectively. Section 55(2)(b) of the Act also states that diversion options must, where reasonably possible, include a restorative justice element which aims to heal relationships, including the relationship with the victim; and an element of "responsibilisation" which may include compensation or restitution.[60] One key difference with the Northern Ireland scheme is that in South Africa such restorative processes are only a *possible* disposal or diversion mechanism. By contrast, in Northern Ireland, restorative justice processes are a *mandatory consideration* in the vast majority of cases. Whether or not such arrangements are put in place will depend upon the particular circumstances of the individual case;[61] as Stout points out, there is no indication that restorative justice interventions are any more likely to be used with child offenders than any other diversion option.[62]

Restorative justice disposals are available as a diversionary option, a sentence or as a process through which a sentence may be decided on for the court after conviction.[63] Where such an option is taken up, any subsequent victim–offender mediation or youth conference is to be convened by a probation officer, appointed by the inquiry magistrate, no later than 21 days after the referral has been made.[64] In each of these processes, the probation officer may regulate the procedure to be followed and facilitate the meeting so that participants can reach an agreement on a plan to which the child must adhere. The plan has to specify the objectives for the child and his or her family, the period in which the agreement has to be completed, the details of services and assistance, and other matters relating to education, employment, recreation and the welfare of the child.

While the Child Justice Act seeks to "expand and entrench the principles of restorative justice in the criminal justice system" and to "balance the interests of children and those of society, with due regard to the rights of victims"[65] the extent to which such restorative justice principles will be a defining feature of the system remains to be seen. Whilst the Northern Ireland programme places a strong emphasis on victim participation and may be said to be victim-centred, only very limited reference is made to the role of the victims in the South Africa legislation.[66] Victim participation is widely regarded as a *sine qua non* of

59 Child Justice Act 2008, cl. 52.

60 Ibid. cl. 55(2)(c).

61 K Johansson and T Palm, "Children in trouble with the law: child justice in Sweden and South Africa" (2003) 17(3) *International Journal of Law, Penal Policy and the Family* 308. Skelton notes that it is unlikely that cases involving murder and rape will be diverted: Skelton, *Children and the Law*, n. 47 above.

62 B Stout, "Is diversion the appropriate emphasis for South African child justice?" (2006) 6 *Youth Justice* 129. Children who are not diverted will proceed to plea and trial in conventional fashion at the Child Justice Court (cl. 52(6)). In terms of sentence, there are many sanctions available to Child Justice Courts, varying from community-based sanctions to restorative justice disposals such as conferencing and victim offender mediation (VOM), and finally imprisonment (ss. 47–9).

63 Child Justice Act 2008, s. 73.

64 Ibid. s. 61.

65 See "objects" and "principles" of Child Justice Act 2008.

66 See ss. 10; 48(1)(b)(iii); 52(2)(a); 53(3)(b)(i); 55(1)(e); 69(4); 70.

restorative justice theory, without which schemes might not be considered properly "restorative" at all.[67]

Moreover, although the South African legislation enshrines the principle of victim consent to participate in any restorative process, it also leaves open a series of important unanswered questions concerning how informed consent will be obtained and what safeguards will be in place to protect victims from being used merely as information providers.[68] It is not apparent which agency is responsible for contacting victims and taking steps to familiarise them with the process, nor are victims conferred with any specific rights to attend or participate within such proceedings. In this sense, South Africa seems to be adopting a system similar to that of the Scottish Children's Hearing system, by focusing more on the best interests of the child.[69] When a victim does not participate, either directly or indirectly, questions clearly arise as to just how "restorative" the process is.[70] This is not only an issue for the South African system, as the problem of securing victim participation does occur in other jurisdictions such as New Zealand and England. Resolving the issue of how to encourage victims to participate, whilst being mindful of their right not to do so, is something of a conundrum which confronts policymakers worldwide.[71]

Perhaps the most difficult challenge to overcome is that the promotion of restorative justice as a means of dealing with offending, especially in serious cases, is often at odds with the current penal climate. South Africa's criminal justice system is overburdened and currently fails to generate a sense of security and legitimacy amongst the population that it serves. This has had a direct impact on the extent to which the government could proceed with liberal reforms in this area of justice and President Jacob Zuma has shown an increasing tendency to follow crime control methods featuring zero tolerance, minimum sentencing tariffs and tougher bail laws.[72] It is therefore not surprising that a strong element of punitivism has remained in the Child Justice Act with restorative disposals as only one of a long list of considerations for dealing with young people who offend. While there is evidence, following the first year of implementation of the Act that the number of children being detained prior to trial and sentenced to imprisonment has decreased, there is no further detail about what diversionary mechanisms are being used.

The tension between elites within the government and those within the criminal justice community are longstanding. Nevertheless, a number of examples may be cited where restorative justice has been successfully forced onto the agenda following the country's first democratic elections, namely: the National Crime Prevention Strategy (1996), which for a variety of reasons was never fully implemented; the Welfare White Paper (1996) and Correctional Services White Paper (2005); a number of policy recommendation reports by the SALRC; the Probation Services Amendment Act (35 of 2002); and the Service Charter for Victims of Crime (2007). In addition to this, reference has been made to restorative justice in the country's superior courts.[73]

67 See Doak, *Victims' Rights*, n. 16 above, ch. 6.

68 P McCold, "Primary restorative justice practices" in Morris and Maxwell, *Restorative Justice for Juveniles*, n. 56 above.

69 S McVie, "Doing children justice? A longitudinal review of the children's hearing system" (paper presented at the Centre for Criminological Research, University of Sheffield, 15 November 2006).

70 McCold, "Primary restorative justice practices", n. 68 above.

71 Campbell et al, *Evaluation*, n. 28 above,

72 See further D van Zyl Smit, "Criminological ideas and the South African transition" (1999) 39 *British Journal of Criminology* 198.

73 See Bertelsmann, *Joyce Maluleke and Others vs The State* Case No CC 83/2006; Pickering, *Antoinette Saayman vs The State* Case No CA&R 82/2007.

The production of such documents has proved to be a contentious exercise because of the disjuncture between hard-line, punitive rhetoric, on the one hand, and an almost dogged determination to transform the approach to dispute resolution on the basis of a vision of African justice under the banner of restorative justice or *ubuntu*, on the other. Notwithstanding some of the altruistic intentions, there are a number of issues that will make the translation of these restorative justice ideals difficult to fulfil and, combined with practical obstacles, the implementation of such radical changes will be a major challenge for South African society. In the following discussion, we attempt to unpick some of the reasons why restorative principles have been successfully integrated and mainstreamed in the Northern Ireland youth justice system, yet have struggled to become embedded in South Africa.

4 Discussion

In analysing the efforts of Northern Ireland and South Africa to pursue a restorative agenda in their youth justice reform, there are three key factors that merit closer analysis. These relate to the political context of the reforms, the different legal cultures and ideologies, and the impact of differing crime rates.

4.1 The political context of the reforms

As the burgeoning body of transitional justice scholarship continues to expand, it is becoming increasingly clear that there are many different forms a transition can take. Altruistic concepts such as "peace-building", "democratisation" and even the idea of "transition" itself remain contested terms and are fraught with difficulty.[74] Scholars have proposed various models or genealogies of transitional justice, based on the nature of the conflict, the parties involved and the means used to resolve it.[75] While the particularities of such modelling are open to debate, it is clear that transition progresses at different rates, with divergent issues and obstacles are likely to arise in relation to any law reform process. Thus, political priorities and moral principles will differ, and so too will the substance of particular reforms be affected by a range of localised, domestic and international pressures.[76]

There are a number of differences in the nature of the transitions which go some way to explaining why the Northern Ireland reforms have taken root so much quicker than their South African counterparts. In much of the South African discourse, the concept of transition implies a much deeper, transformative process than a mere regime shift from authoritarian to democratic rule.[77] The apartheid state had to be dismantled and rebuilt. While the Northern Ireland process resulted in power-sharing under new constitutional arrangements, the basic state apparatus remained intact (i.e. with Northern Ireland

74 See e.g. E Cousens, C Kumar, K Wermester (eds), *Peacebuilding as Politics* (London: Lynne Rienner 2001); T Carothers, "The end of the transitions paradigm" (2002) 13(1) *Journal of Democracy* 5; C T Call and S Cook, "On democracy and peacebuilding" (2003) 9(2) *Global Governance* 233; C Bell, C Campbell and F Ní Aoláin, "Justice discourses in transition" (2004) 13 *Social and Legal Studies* 305; N Roht-Arriaza, "The new landscape of transitional justice" in Roht-Arriaza and Mariezcurrena (eds.), *Transnational Justice*, n. 13 above.

75 See e.g. R Teitel, "Transitional justice genealogy" (2003) 16 *Harvard Human Rights Journal* 69; P Harrell, *Rwanda's Gamble: Gacaca and a new model of transitional justice* (New York: Writers Club Press 2003); G Adler and E Webster, "Challenging transition theory: the labor movement, radical reform and transition to democracy in South Africa" (2003) 23 *Politics and Society* 75; M Nalepa, "Punish all guilty or protect the innocent? Designing institutions of transitional justice" (2003) 20(2) *Journal of Theoretical Politics* 221.

76 See further M du Plessis and J Ford, "Transitional justice: a future truth commission for Zimbabwe?" (2009) 58 *ICLQ* 73; R Teitel, "Transitional justice globalised" (2008) 2 *International Journal of Transitional Justice* 1; H W Jeong, *Peacebuilding in Postconflict Societies: Strategy and process* (Boulder: Lynne Rienner 2005).

77 H Brocklehurst, N Stott, B Hamber and G Robinson, "Lesson drawing: Northern Ireland and South Africa" (2001) 18 *Indicator SA* 89.

remaining under the ultimate control of the British government, as part of the UK). Moreover, for the time being at least, it was recognised that the criminal justice system would not immediately fall under the remit of the new power-sharing executive; it would still be managed and operated by the British government – a party to the conflict.[78] Thus, in Northern Ireland, criminal justice reform had to be afforded greater priority and was widely perceived to be systemically interlinked to the overall political picture.[79]

Indeed, since a well-developed institutional framework was already in place in Northern Ireland, even bold and innovative changes could be implemented relatively smoothly. Having invested so heavily in developing a new criminal justice system that sought support from all sections of the community, it would have been inconceivable that the government would not have invested a considerable amount of effort and resources in ensuring that the major recommendations of the Criminal Justice Review Group were fully implemented.[80] In the years after the Good Friday Agreement, Northern Ireland's so-called "peace dividend" heralded massive financial investment. This enabled the government to establish a new youth criminal justice agency, the Youth Conferencing Service,[81] which received substantial investment to roll out the new arrangements and to train prosecutors and defence lawyers on how the new system would operate. In the intervening time period, the arrangements have clearly made a contribution to the stated objective of the Criminal Justice Review of enhancing community involvement and support for the criminal justice system. It is evident that the programme has been effective in broadening participation of parties other than individual victims and offenders, and in doing so has engaged with community and voluntary organisations that have not traditionally worked in close partnership with criminal justice agencies.

On the other hand, in South Africa the need to reconstruct core state structures from afresh and to put in place a process to deal effectively with the past were afforded priority over and above immediate reform of the criminal justice system. Youth justice reform, whilst flowing from years of campaigning by NGOs and the subsequent report of the SALRC, were not conceived as part of a package that was linked directly to the transition from apartheid to democracy. This can be attributed to a number of factors. For a start, fears governing the prevalence of youth crime or low-level crime tended to be overshadowed by a widespread surge in serious crime. As such, an effective and legitimate reconstituted police force would inevitably be the most pressing criminal justice issue. In other words, while many South Africans perceived a need for radical change in the way the wider criminal justice system was organised, it was assumed that this would follow in the years after a new majority government came to power. Moreover, with economic resources considerably more stretched than in Northern Ireland, a radical overhaul of the youth justice system was simply not a political priority.[82]

78 Policing and criminal justice was finally devolved to the Northern Ireland Assembly in April 2010.

79 Recommendations of the Criminal Justice Review in relation to youth justice were interlinked with the core objectives of making the criminal justice system better able to deliver a fair and impartial system of justice to the community. See the preface to the *Review*, n. 21 above.

80 Considerable investment was made in ensuring the recommendations of the Criminal Justice Review were implemented. The government accepted almost all of the recommendations and published an "Implementation plan" and "Updated implementation plan", as well as establishing a Justice Oversight Commissioner to ensure progress. See www.nio.gov.uk/criminal_justice_review_implementation_plan_june_2003.pdf (accessed 10 June 2012).

81 The Youth Conferencing Service is part of the Youth Justice Agency, which was launched as a new executive agency following the recommendations of the Criminal Justice Review.

82 As the preamble to the Child Justice Act 2008 explains, "there are capacity, resource and other constraints on the State which may require a pragmatic and incremental strategy to implement the new criminal justice system for children".

Indeed, as far as restorative justice is concerned, the public hearings of the TRC also exposed the South African public to this different understanding of the concept. Despite an initial sense of optimism, the use of this particular form of restorative justice may have blighted the public's sense of fairness. Victims were seen to be required to tell their stories in lieu of any compensation while some offenders appeared to escape justice.[83] This context, coupled with the fact that under the new scheme restorative justice is conducted largely in the context of diversion for young offenders, has arguably served to create a perception of restorative justice that it is a "soft option", suitable only for less serious offences.[84] For Northern Ireland, the language of restorative justice was entirely new, and as such the public did not associate the concept with the sense of despondency that the TRC had created for many South Africans.

4.2 Differences in legal cultures or ideologies

Both the Northern Ireland and the South African youth justice systems are broadly modelled on the family group conferencing approach that originated in New Zealand. Although this model has been readily adapted for use elsewhere, including Northern Ireland, Skelton and Frank note that there has been "little analysis on the part of practitioners or policy makers about whether family group conferencing is really suitable for the South African context".[85] Comparative lawyers and legal sociologists have long emphasised that what works well in one set of circumstances will not necessary work in another.[86]

The importance of "legal culture" has been the subject of extensive academic inquiry in recent years;[87] Nelken defines it as the product of the ideas and practices of legal professionals,[88] whereas Sanders and Hamilton adopt a broader definition in viewing legal culture as the "attitudes, values and opinions about not only law per se but also the appropriate way to resolve disagreements and process disputes".[89] Indeed, there have been a number of unsuccessful experiments where South African policymakers have rushed to import policy initiatives from other jurisdictions, with undesirable consequences following.[90]

Notwithstanding the transitional setting of both societies, the cultural norms, legal traditions and population profiles of these countries are extremely divergent. For its part, South Africa has an ethnically diverse population of some 48 million, with considerable cultural and linguistic variations within the Black population, and geographically it is a very

83 See further C C Byrne, "Benefit or burden: victims reflections on TRC participation" (2004) 10 *Peace and Conflict* 237.

84 Skelton, *Children and the Law*, n. 47 above.

85 A Skelton and C Frank, "How does restorative justice address human rights and due process issues?" in H Zehr and B Toews (eds), *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press 2003), p. 16.

86 Most comparative lawyers and legal sociologists agree that rules and institutions cannot be neatly separated from their purpose or from the circumstances in which they are made. See e.g. O Kahn-Freud, "On use and misuse of comparative law" (1974) 37 *Modern Law Review* 1.

87 Lawrence Friedman is frequently credited with first introducing the notion that law is essentially a product of the society in which it operates: *The Legal System: A social science perspective* (New York: Russell Sage Foundation 1975).

88 Nelken, "Using the concept", n. 2 above. Nelken proceeds to draw a distinction between *internal* legal culture which encompasses the ideas and practices of legal professionals, and *external* legal culture which refers to opinions, interests and pressures brought to bear on the law by wider social groups.

89 J Sanders and L Hamilton, "Legal cultures and punishment repertoires in Japan, Russia, and the United States" (1992) 26 *Law and Society Review* 117, p. 120.

90 G Simpson, B Hamber and N Stott, "Future challenges to policy-making in countries in transition" (presentation to the workshop Comparative Experiences of Policy-making and Implementation in Countries in Transition, 6–7 February 2001, Derry/Londonderry, Northern Ireland). Available at www.csvr.org.za/wits/papers/papdipp1.htm (last accessed 4 June 2012).

large country.[91] By contrast, Northern Ireland is a small jurisdiction, relatively homogenous in cultural terms, with a population of just 1.7 million.[92] Likewise, in contrast to Northern Ireland's "peace dividend",[93] South Africa had to weather a number of severe economic difficulties in the years following the transition to democracy.[94] Such differences inevitably have had an impact on how the respective reforms to the youth justice system could be operationalised by criminal justice agencies.

One such difference lies in the role played by prosecutors. In South Africa, prosecutors have traditionally exercised a broad ad hoc discretion to divert and prosecute as they see fit – and this discretion is largely retained (albeit subject to certain statutory factors) under the Child Justice Act 2009. In particular, the fact that the prosecutor retains *dominus litis* raises questions about the volume and types of cases that will be referred to restorative justice processes.[95] Research conducted in South Africa by Naudé and Prinsloo found that magistrates did not support restorative justice in cases involving sexual offences, repeat offences and serious assault.[96] This may explain low referral rates in South Africa, as traditional retributive sanctions still feature heavily in each stage of the criminal justice process and it remains questionable whether a judge will refer a case to a restorative justice process if it has already been rejected by the inquiry in favour of prosecution. Against this backdrop, it seems somewhat doubtful whether the legislation is capable of translating broad policy aspirations that promote and seek to integrate restorative ideals into criminal justice practice.

This appears to be supported by evidence concerning the use of restorative schemes in relation to other diversion programmes. In the 2006/2007 financial year, the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) provided services to a total of 17,786 diverted young people; however, only around 10 per cent of these were involved in a conference or victim–offender mediation.[97] While it is very difficult at this stage to predict what will happen as the Act is rolled out, the extent to which the prosecutor will alter practice to divert more cases and offence types to these processes is questionable – the trend to divert to offender-focused disposals for low tariff, first-time offences may well continue. Indeed, research conducted by Stout has yielded further intriguing results in South Africa on the attitudes of magistrates, probation officers and prosecutors towards diversion.[98] By using four hypothetical cases at the preliminary inquiry, Stout investigated both the decisions that practitioners would make and the reasoning that led them to those decisions. Findings indicate that emphasis was put on previous clear records to such an extent that first-time offenders were more likely to be diverted than those who had records

91 Statistics South Africa, *Mid-year Population Estimates* (2007), available at www.statssa.gov.za/publications/P0302/P03022007.pdf (last accessed 4 June 2012).

92 Registrar General for Northern Ireland, *Annual Report* (2008), available at www.nisra.gov.uk/demography/default.asp132.htm (last accessed 4 June 2012).

93 See further D O'Hearn, "Peace dividend, foreign investment, and economic regeneration: the Northern Irish Case" (2000) 47(2) *Social Problems* 180.

94 See M Nowak, "The first ten years after apartheid: an overview of the South African economy" in M Nowak and L Ricci (eds), *Post Apartheid South Africa: The first ten years* (Washington DC: International Monetary Fund 2005).

95 The prosecutor has the right to proceed with criminal charges against children at his or her discretion in the face of alternatives.

96 B Naudé and J Prinsloo, "Magistrates' and prosecutors' views of restorative justice", in E Maepa (ed.), *Beyond Retribution: Prospects for restorative justice in South Africa* (Pretoria: Restorative Justice Center 2001).

97 See K Clamp, "Assessing alternative forms of localised justice in post-conflict societies – youth justice in Northern Ireland and South Africa" in D A Frenkel, and C Gerner-Beuerle (eds.), *Selected Essays on Current Legal Issues* (Athens: ATINER 2008).

98 Stout, "Is diversion the appropriate emphasis?", n. 62 above.

for minor offences, despite committing much more serious offences.[99] It is noteworthy that the only case where restorative justice was explicitly stated was in the case of a white offender, who had no previous criminal history, but who had committed a relatively serious offence.[100] While the study was largely hypothetical and conducted on a relatively small scale, the findings tend to indicate that the Act may lead to a bifurcated system,[101] whereby relatively minor first offences are diverted and serious offences, or those where the offender has more than one conviction, proceed through to the courts. The wide discretionary authority enjoyed by prosecutors could also result in race, class and gender prejudices influencing which children are afforded access to diversion interventions.[102]

International experience indicates that, where referrals are discretionary, restorative programmes tend to flounder on the periphery of the criminal justice system.[103] By contrast, in Northern Ireland, the power to make decisions by professionals is curtailed by conferencing as decision-making is achieved through consensus by those participating in the process. In addition, under the Northern Ireland scheme, there is considerably less potential for the scepticism among criminal justice professionals to thwart the operation of the youth conferencing arrangements. The scheme is mandatory in nature, with both the Public Prosecution Service and the courts having a duty to refer the vast majority of cases to conferencing. Thus, even where magistrates or prosecutors feel unsure whether a particular case is suitable for conferencing, there is little room for discretion to interfere with statutory stipulations. Previous studies from elsewhere in Europe have shown that attitudinal resistance can act as a major obstacle to restorative justice initiatives, thereby producing a chasm between "law in the books" and law in practice.[104] The potential for this gap to expand is clearly exacerbated where decision-makers are given maximum scope for manoeuvre; this is clearly not the case with restorative youth conferencing in Northern Ireland.

4.3 The impact of rising crime

A third differential between the two jurisdictions relates to the public perception of crime. Crime rates in South Africa increased very dramatically in the early 1990s and, despite the fact that they have stabilised in recent years, they remain at exceptionally high levels,[105] with one international survey ranking South Africa second in the world for assaults and gun violence and first for firearm-related homicide and rapes per capita.[106] The callousness of

99 Stout, "Is diversion the appropriate emphasis?", n. 62 above. Stout reports that these findings are supported by figures from NICRO, which state that 94% of children diverted to its services are first-time offenders (p. 137).

100 His class and relative wealth were also identified as affecting the lenient approach taken.

101 M Cavadino and J Dignan, *The Penal System: An introduction* 4th edn (London: Sage 2007).

102 C Wood, *Diversion in South Africa: A review of policy and practice, 1990–2003* Occasional Paper 79 (Pretoria: Institute for Security Studies 2003).

103 J Dignan and K Lowey, *Restorative Justice Options for Northern Ireland: A comparative review* (Belfast: The Stationery Office 2000); J Shapland et al., *Implementing Restorative Justice Schemes* Online Report 32/04 (London: Home Office 2004); Crawford and Newburn, *Youth Offending*, n. 29 above.

104 See e.g. A Mestitz and S Ghetti, "Victim-offender mediation and young offenders: the Italian experience" in A Mestitz and S Ghetti (eds), *Victim-Offender Mediation with Youth Offenders in Europe* (Dordrecht: Springer 2004); K Edgar and T Newell, *Restorative Justice in Prisons: A guide to making it happen* (Winchester: Waterside Press 2006).

105 See further A Altbeker, *A Country at War with Itself: South Africa's crisis of crime* (Johannesburg: Jonathan Ball 2007). See also P Burton, A Du Plessis, and T Leggett, *National Victims of Crime Survey: South Africa 2003* (Pretoria: ISS Monograph Series 2004) and *The Independent*, 1 July 2008. Note, however, that concerns have been raised about the reliability of South African crime data: see B Dixon, "Introduction" in B Dixon and E van de Spuy (eds), *Justice Gained? Crime and crime control in South Africa's transition* (Cape Town: UCT Press 2004), p. xxi.

106 United Nations, *Eighth Survey on Crime Trends and the Operations of Criminal Justice Systems* (New York: UNODC 2002).

such crimes has received considerable attention in the media, resulting in something of a moral panic. Policymakers have faced increased calls from community activists and sections of the media for harsher penal measures to be introduced, including the death penalty.[107] For its part, the government has found itself in something of a quandary, being eager to be seen to both promote human rights and restorative justice, whilst simultaneously responding to calls for more punitive measures to be put in place.[108] Since the end of apartheid, all political parties have been keen to adopt law-and-order rhetoric, with election manifestos adopting terminology such as "zero tolerance" and "nail and jail".[109] While the South African government is far from alone in its shift towards a harsher form of penal policy, it does mean that the state may be less ready to engage in the promotion of restorative practices for fear of being perceived as being "soft" on crime. This is particularly salient given the rise of well-known vigilante groups such as People against Gangsterism and Drugs (PAGAD) and Mapogo a Mathamaga. Despite state opposition to both groups, their willingness to deal with crime and anti-social behaviour (often in a brutal manner) means that they enjoy a degree of support in sections of the community.[110]

On the other hand, Northern Ireland appears to have comparatively lower levels of crime, despite the high-profile and serious terrorist-related offences that have been in the media in the recent past.[111] Police-recorded crime statistics show that recorded crime levels in Northern Ireland have generally been lower than those recorded in England and Wales.[112] While making direct comparisons between different jurisdictions is problematic because of differing counting rules, definitions of crime and the contrasting ways criminal justice systems operate and measure crime, the most reliable evidence supports the view that Northern Ireland has comparatively lower levels of police-recorded crime.[113] For example, if we consider offences defined as "crime index offences" that are used in America, and which are normally included in data from Northern Ireland, it is evident that from the seven categories included, Northern Ireland has lower levels of crime per 100,000 population than the USA or England and Wales. The rates of all recorded serious offences in Northern Ireland are considerably lower than those of South Africa.[114]

Victimisation surveys support the comparatively lower levels of police-recorded crime in Northern Ireland. Recent results of the Northern Ireland Crime Survey show that Northern Ireland has comparatively low victimisation rates, about 14 per cent of those

107 S Swart, 'The Appeal of Restorative Justice to Policy Makers' (unpublished paper presented at the Ancillary Sessions on Restorative Justice, 10th United Nations Crime Congress, Vienna, 10–17 April 2000).

108 L Camerer, "Crime, violence and punishment? Putting victims on the agenda" (1997) 6 *African Security Review* 46.

109 Dixon, "Introduction", n. 105 above.

110 See, generally, B Dixon and L-M Johns, *Gangs, Pagad and the State: Vigilantism and revenge violence in the Western Cape* (Pretoria: Centre for the Study of Violence and Reconciliation 2001).

111 For a good discussion of crime rates and policing issues in Northern Ireland, see J Moran, *Policing the Peace in Northern Ireland: Crime and security after the Belfast Agreement* (Manchester: Manchester UP 2008). See also Northern Ireland Statistics and Research Agency (NISRA), *Digest of Information on the Northern Ireland Criminal Justice System* (Belfast: NISRA 2011).

112 When 2009/2010 recorded crime rates per 100,000 population are calculated for each jurisdiction, it is apparent that the rates in England and Wales are higher than those in Northern Ireland for overall crime (7970 versus 6149). See *Digest of Information on the Northern Ireland Criminal Justice System* (Belfast: Department of Justice 2011).

113 However, it should be acknowledged that national data can hide local crime problems and no doubt many local communities suffer considerably higher levels of crime and disorder. See D O'Mahony, K McEvoy, R Geary and J Morrison, (eds), *Crime, Community and Locale: The Northern Ireland communities crime survey* (Aldershot: Ashgate 2000).

114 United Nations, *Eighth Survey on Crime Trends*, n. 106 above.

questioned in the 2009/2010 survey had been a victim of crime.[115] Similarly, a comparison of the Northern Ireland Crime Survey with the British Crime Survey (2009/2010) also shows that the risk of becoming a victim of crime is lower in Northern Ireland (14 per cent) than in England and Wales (21 per cent).[116] Thus, unlike South Africa, the introduction of restorative youth conferencing was able to take place without the backdrop of exceptionally high crime rates.

Undeniably one of the biggest challenges for the South African government, post-apartheid, has been transforming the role of the criminal justice system from "enforcer" to service provider.[117] Although this has also been a major issue for Northern Ireland, the situation in South Africa is much more acute, as it has experienced dramatic increases in crime levels and fear of crime in its period of post-apartheid transition.[118] As a result, South Africa's criminal justice system has been overburdened and is failing to generate a sense of security and legitimacy amongst the population that it serves. The new legislation seeks to divert young offenders away from formal criminal justice institutions, arguably, to alleviate some of the pressure and backlog. Although tight deadlines have now been imposed upon key criminal justice stakeholders, it is questionable how effective these will be in turning around an overburdened and under-resourced system of criminal justice which comes into contact with around 10,000 children every month. If the Act is to make a real difference in terms of diversion, not only do its provisions require adequate financing and effective management, but it also needs to be perceived within the wider society as a just and legitimate response to crime. So long as government policy continues to be driven by an undercurrent of popular punitivism,[119] any prospect that South Africa's youth justice system may have entered a new and progressive era seems fraught with difficulty.

Conclusions

It is now more than ten years since it became clear that both youth justice systems faced the prospect of a radical overhaul. However, only in Northern Ireland have the reforms been fully implemented (and, indeed, generally positively received). While South Africa's legislature has recently passed a quasi-restorative set of reforms, it is some 12 years after the draft Bill was first published by the SALRC. In a sense, the greatest challenge is still to come for South Africa, as criminal justice institutions seek to roll out a radical programme with limited resources against a climate of popular punitivism.

There are a number of important lessons to be drawn concerning the adoption of restorative justice measures in societies going through a transitional justice process. First, it is clear that restorative programmes are more likely to operate effectively if they are both mainstreamed and victim-centred. In Northern Ireland, the scheme is anchored in legislation and imposes an obligation on the courts to use them for particular types of cases, with an emphasis on victim participation. This largely reflects findings from other societies,

115 See NISRA, *Experience of Crime: Findings from the 2009/10 Northern Ireland Crime Survey* (Belfast: NISRA 2010). For an international comparison see, L Hague, "International crime survey 2000: key findings for Northern Ireland" (2001) 1 *Research and Statistical Bulletin*.

116 NISRA, *Experience of Crime*, n. 115 above.

117 M Brogden and C Shearing, *Policing for a New South Africa* (London: Routledge 1993).

118 Altbeker, *A Country at War*, n. 105 above.

119 "Popular punitivism" is a label coined by Bottoms to describe a drift toward harsher punishment in public policy: see A Bottoms, "The philosophy and politics of punishment and sentencing" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Oxford: Clarendon Press 1995). See also D Garland, "The limits of sovereign power, strategies of crime control in contemporary society" (1996) 36 *British Journal of Criminology* 460, where it is argued that punishment has become highly fashionable and is much more readily embraced by the public than in previous times.

which show the adoption of such schemes is more successful if they are rooted in legislation and mainstreamed.[120] Yet even while children's rights activists in South Africa celebrate the implementation of the Child Justice Act, questions remain as to whether the new scheme can properly be said to be "restorative" given its discretionary platform and apparent lack of capacity to engage with victims. From an international perspective, the use of these types of "quasi-restorative" schemes is not necessarily undesirable: such programmes can often represent a significant improvement on the status quo. However, when rolled out in a post-conflict environment, it should be borne in mind that schemes that pay lip service to restorative principles may fail to deliver a broader transformative potential that some have argued is an inherent component of the restorative paradigm.[121]

It has been contended that restorative justice mechanisms may not only hold the potential to restore individual victims and offenders, but may be a particularly useful tool in a transitional society to restore a degree of trust among the citizenry in the capacity of the state to address crime in a fair and legitimate manner. In terms of bolstering legitimacy in a divided society, there is thus something inherently attractive in adopting restorative justice models, as opposed to state-centred or retributive models. On a normative level, the restorative paradigm is designed to bolster the capacity of both individuals and communities to engage in hitherto exclusionary criminal justice processes. Through encouraging lay participation, restorative programmes should, in theory at least, act as a social catalyst for broader inter-communal reconciliation.[122] This perhaps explains why, as noted above, restorative models are so commonly adopted as a tool for transitional justice and truth recovery. In short, the ideology that underpins the restorative paradigm broadly reflects the core values that should help to propel and sustain the political transition.

In Northern Ireland, there is evidence that the new restorative youth conferencing arrangements have already begun to enhance levels of community participation in criminal justice. Although there are still some concerns about the extent to which any state-led programme can genuinely be considered a form of community justice, the creation of new networks between people of different social and cultural identities can assist in building democratic values and reducing collective prejudices.[123] Over time, a broader range of actors from former conflict-ridden communities will have some degree of interaction with the conferencing process, be that as a victim, offender, supporter or service-provider. In this way, restorative schemes hold the potential to further act as both a vehicle for and beneficiary of peace-building, and thus may have a modest role to play in boosting the overall legitimacy of any given criminal justice system.

Thus, while Northern Ireland and South Africa have embarked on major reforms of their youth justice systems in a period of post-conflict transition, the impact of their reforms has been vastly different. The contrast between these two jurisdictions clearly

120 See e.g. A Morris and G Maxwell, "Restorative justice in New Zealand: family group conferences as a case study" (1998) 1 *Western Criminology Review* 1; L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (Sydney: NSW Bureau of Crime Statistics and Research 2000); New Zealand Ministry of Justice, *Court-Referred Restorative Justice Pilot: Evaluation* (Wellington: Ministry of Justice 2005).

121 See D Sullivan and L Tifft, *Restorative Justice: Healing the foundations of our everyday lives* (Monsey, NY: Willow Tree 1999).

122 C Cunneen, "Reviving restorative justice traditions?" in Johnstone and Van Ness, *Handbook*, n. 51 above. Cunneen cites the example of the Queensland Murri Court, where indigenous elders sit on the bench alongside magistrates and have an input into the sentencing process. Some offenders will thus receive customary punishments or work within the community as alternatives to a prison sentence.

123 D C Mutz, "Cross-cutting social networks: testing democratic theory in practice" (2002) 96 *American Political Science Review* 111. See, generally, R D Putnam, *Bowling Alone: The collapse and revival of American community* (New York: Simon & Schuster 2000).

shows that, while restorative justice principles have the potential to contribute to post-conflict transition and transitional justice, it is by no means inevitable that restorative principles will actually develop into strong practices in such different circumstances. Yet, the experience of Northern Ireland shows the potential of reforms which embrace restorative justice as a method of bolstering post-conflict transformation. Prior to its peace process, Northern Ireland was a society in which secrecy, suspicion and mistrust interacted to undermine public confidence in the criminal justice system. The Belfast Agreement, along with the Criminal Justice Review and devolution of power which followed, served to establish fresh normative themes and values such as reconciliation, inclusivity, accountability and healing, similar to the communitarian values as espoused in restorative justice theory and practice. It is these same themes and values which, it is hoped, will continue to influence governance, transitional justice and criminal justice reform for the future – not only in Northern Ireland – but also in other divided societies as well.

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Feminisation of poverty: rural Indian women and the environment

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Introduction

This paper examines and evaluates the vulnerability of poor, rural women in India due to environmental degradation. It explores the effectiveness of the Indian "gender-engaging approach" which seeks to overcome poverty, promote gender equality and empower women in order to achieve the Rio aspirations, Millennium Development Goals and protect their human rights as laid down in the Indian Constitution. This approach is a combination of domestic policy and laws, non-governmental organisations (NGOs) and women's self-help groups (SHGs) with special reference to environmental recognition, environmental entitlement and environmental stewardship.

However, engendering ecology is a global challenge. Twenty years ago, the 1992 Rio de Janeiro United Nations Conference on Environment and Development (UNCED) aimed to "elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of strengthened national and international efforts to promote sustainable and environmentally sound development in all countries".[1] The nations represented at UNCED agreed to Agenda 21, an action plan to promote sustainable development by adopting national strategies, plans, policies and processes supported and supplemented by international cooperation.[2]

To achieve the goal of sustainable development, UNCED and Agenda 21 stressed the need for effective participation of all stakeholders, including women. Principle 20 of the Rio Declaration recognised that "women have a vital role in environmental management and development". Chapter 24 of Agenda 21, entitled "Global action for women towards sustainable development", contains several commitments with specific recommendations to

1 UN General Assembly Resolution 44/228, para. 3.

2 P Birnie, A Boyle and C Redgwell, *International Law and Environment* (Oxford: OUP 2009); A C Kiss and D Dinah, *Guide to International Environmental Law* (Leiden: Martinus Nijhoff 2007); P Sands, *Principles of International Environmental Law* (Cambridge: CUP 2003).

strengthen the role of women in sustainable development and eliminate obstacles to their equal and beneficial participation, particularly in the decision-making process.[3]

Despite international recognition of the gender dimensions of sustainable development, social and economic inequities persist. The worst sufferers are women and children. They form the majority of the world's poor. The UN estimates that approximately 70 per cent of the 1.3 billion people living on less than one dollar a day are women, and these figures are rising with the current food, fuel and financial crisis.[4] Two-thirds of the world's poor are found in the Asian and Pacific Regions and of these two-thirds are females who live in rural areas.[5]

Twenty years on, the Rio plus 20 took place in June 2012 to secure renewed political commitment for sustainable development, to assess progress, identify remaining gaps in the implementation of sustainable development and address new and emerging challenges.[6] There are two thematic areas: a green economy in the context of sustainable development; and poverty eradication; as well as progressing institutional frameworks for sustainable development.[7]

Integrating women as key actors in a sustainable green economy and institutional framework will help promote a transition to a more equitable and sustainable world. At the time of writing, the Global Women's Major Group had submitted its recommendations for the zero-draft for Rio plus 20. It called upon governments to renew and support their commitments through action and direct financing to support gender-equitable sustainable development.[8]

In the light of the spirit of Rio plus 20, this paper critically examines the existing gender inequities facing rural Indian women affected by environmental degradation in terms of limited recognition, rights and access to productive programmes, all of which lead to the feminisation of poverty. Despite attempts to bridge the gaps between policy, law and implementation concerning gender equality, there remain contradictions which reflect systemic failure arising from bureaucratic, patriarchal and deeply conservative mindsets that place rural Indian women in a position of subservience.

There is reliance on illustrative material throughout this article. Data-gathering in India represents a major task and challenge, not simply because of the size of the population and rural inaccessibility. Representative data concerning women can be affected by the gender insensitivity of the investigators, usually male; poorly constructed questionnaires; culturally constructed, work-related formats; and the unwillingness to deconstruct the daily lives of rural women into paid and unpaid work, family support and agricultural labour. Personal histories become increasingly valuable and are used throughout this paper. They represent primary source material for researchers reviewing the issues raised herein.

3 To strengthen the role of women in sustainable development, Agenda 21's recommendations included: reviewing policies and increasing the proportion of women as decision-makers, managers, planners; strengthening women's NGOs; eliminating illiteracy among females by providing education; supporting and strengthening equal employment opportunity and equitable remuneration for women; facilitating and increasing rural women's access to credit and agricultural inputs; eliminating negative images, attitudes and prejudices against women; establishing and strengthening preventive and curative health practices.

4 UN Bureau of Social Affairs, UN Department of International Economic and Social Affairs, *Report on the World Social Situation* (New York: UN 1997); see also UNDP, *Taking Gender Equality Seriously: Making progress, meeting new challenges* (New York: UNDP 2006), p. 9.

5 Asian Development Bank, *Fighting Poverty in Asia and the Pacific: The poverty reduction strategy* Policy Document 1999 (Manila: Asian Development Bank 1999), p. 12.

6 www.uncsd2012.org/rio20 (last accessed 4 June 2012).

7 Ibid.

8 Rio + 20: Global Women's Submission for the Rio + 20 zero-draft document.

This paper is divided into five sections. Section 1, "India", presents and illustrates the impact of environmental degradation on the daily routines of rural Indian women. Section 2, "Environmental recognition: women–environment interdependence", recognises the role of women as environmental managers. Section 3, "Environmental entitlement: towards a legal framework" critically examines legal entitlements in terms of agriculture, wages, governance and decision-making. It also presents the failure of legislation to address fully the gender differences of those who live and work in rural India. Section 4, "Environmental stewardship: a participatory approach", examines the grassroots, bottom-up approach to the formation of women's SHGs supported by NGOs, the Indian government and international initiatives. Section 5 offers concluding comments.

1 India

"Mahatma Gandhi was asked: 'When we plan for our country what should we remember the most?' His reply was: 'Think about the last man. Invariably the last man is a woman.'"[9] In India the rural woman is invisible, deprived, disadvantaged and subject to discrimination. This inequality claim is supported by evidence found in the United Nations Development Programme (UNDP) Human Development Report 2010. It states that India, in the gender inequality index, is placed 122nd out of 138 countries. Females in the neighbouring states of Bangladesh and Pakistan are ranked at 116 and 112 respectively.[10] Notwithstanding India's "tiger economic growth", inequality is rising as a consequence of the uneven pattern of human development. Such development is not simply about health, education and income. It is also about people's active engagement in shaping development, issues of equity and sustainability and the ability of people to lead lives they have reason to value.[11]

Limited access to natural resources, schools and health centres, along with unpaid employment and unequal asset ownership contribute towards the "feminisation of poverty". This is a complex and multidimensional problem that particularly impacts on rural women. No other group is more affected by environmental destruction than poor, village women:

> Every dawn brings with it a long march in search of fuel, fodder and water. It does not matter if the women are old, young or pregnant: crucial household needs have to be met day after weary day, ever longer and more tiresome. As ecological conditions worsen the long march becomes even longer and more tiresome.[12]

In India, environmental degradation and displacement from their land, changes in land usage and agricultural patterns have made the lives of rural women much harder.[13] They are more likely to becoming "resourceless". Basanti Bai, an underprivileged, displaced woman from the Bargi Dam area of Madhya Pradesh, said: "the land is not ours, the forest is not ours, water is not ours – what then is ours? They either belong to the government or

9 A Agarwal, "Towards green villages" (2004) *Gobar Times Down to Earth Supplement*, Centre for Science and Environment, New Delhi, 15 July, pp. 66–7.

10 J Klugman, *Human Development Report (20th Anniversary Edition): The real wealth of nations: pathway to human development 2010* (Basingstoke: UNDP/Palgrave Macmillan 2010)

11 See M ul Haq, *Human Development in South Asia: Crisis of governance* (Karachi: Human Development Centre 1999).

12 Agarwal, "Towards green villages", n. 9 above.

13 See, generally, International Fund for Agricultural Development (IFAD), *Enhancing the Role of Indigenous Women in Sustainable Development: IFAD experience with indigenous women in Latin America and Asia, Third Forum on Indigenous Issues* (Rome: IFAD 2004); B Agarwal, *Gender, Environment and Poverty Interlinks in Rural India: Regional variations and temporal shifts 1971–1991* Discussion Paper (Geneva United Nations Research Institute for Social Development April 1995).

to men. What do we get when all these are taken away?"[14] Women of Ichassar and Dev Nagar, near Shimla town, stated "some time ago, it took very little time to collect wood, but now the forest wood is scarce because of too much cutting. Now we have to go about two kilometres or more to find wood."[15]

Thomas Hobbes wrote in *Leviathan*, 1651, that "the life of man [sic] is solitary, poor, nasty, brutish and short".[16] Let us consider, briefly, the life of the rural Indian woman in 2012. In the Indian Himalayas on a one-hectare farm, a pair of bullocks is made to work annually for 1064 hours; a man works for 1212 hours and a woman works for 3485 hours.[17]. In Gujarat, gathering and cutting wood takes three hours a day whereas in the foothills of the Himalayas, it takes a full day to gather firewood.[18] In Garhwal, women carry 35–40 kilograms of firewood over a distance of 5–8 kilometres taking them up to three walking hours. This is a daily task.[19] Women in Pura, a village in Karnataka, spend 46 per cent of their waking hours on agricultural, industrial and domestic work. Men in that area devote 37 per cent of their time to these tasks. Pregnant women in western Uttar Pradesh work daily between 14 and 16 hours.[20] Women not only undertake the household tasks but are also the backbone of agricultural production. They sow, weed, hoe, harvest, process and store the crops. In Himachal Pradesh, women input 61 per cent of the total work as opposed to that of men who perform 39 per cent.[21] These are not isolated illustrations. Several studies confirm that the working days of rural women last between 14–18 hours with shorter rest periods than men.[22]

Despite the long working hours and drudgery, women's labour remains largely unrecognised and undervalued, yet it constitutes a major invisible contribution.[23] As a result of the deeply rooted, patriarchal culture and social bias against women, such work is perceived as "unproductive", especially in the agricultural and unorganised labour sectors. Work is defined as activities performed for pay or profit.[24] Women normally perform work for which no payment is made. Their labour falls outside the formal definition of "work". These home-based activities are relegated to a secondary position, while the male is

14 E G Thukral "Poverty and gender in India: issues and concerns defining an agenda for poverty reduction" (2002) 1 *Proceedings of the First Asia and Pacific Forum on Poverty* 246.

15 B Cranney, *Local Environment and Lived Experience: The mountain women of Himachal Pradesh,* Livelihood and Environment Series (India: Sage Publications 2001).

16 T Hobbes, *Leviathan* (Oxford: Bail Blackwell 1960)

17 Food and Agricultural Organization (FAO), *Sustainable Development: People, gender and development: Asia's women in agriculture, environment and rural production: India* (Rome: Sustainable Development Department FAO 1997).

18 UNDP, *Human Development Report* (New York: UNDP/Oxford University (1995), p. 93.

19 S N Sidh and S Basu, "Monetisation of women's unpaid work and time use survey in Garsain block of Garhwal Himalayas" (paper presented at X11 National Conference of the Indian Association for Women's Studies, Lucknow, 7–10 February 2008).

20 Agarwal, "Towards green villages", n. 9 above.

21 Environmental Information System (ENVIS), *Women and Environment* (Himachal Pradesh: ENVIS Centre State Council for Science, Technology and Environment 2007); see also J P Bhati and D V Singh, "Women's contribution to agricultural economy in hill regions of north-west" (1987) XX11(17) *India Economic and Political Weekly* 7–11.

22 S Kaur and R Punia, "Performance and satisfaction from household work" (1986) 16(4) *Indian Journal of Home Science* 215–20; J Kishtwaria, R Aruna and S Sood, "Work pattern of hill farm women: a study of Himachal Pradesh" (2009) 3(1) *Studies on Home and Community Science* 67–70; M Chander and R Mukherjee, "Indigenous cattle for sustainable development in Himalaya Region of India" (1995) 20 *Asian Livestock* 141–3.

23 UNDP, *Human Development Report*, n. 18 above.

24 See, K Sankaran and R Madhav, *Gender Equality and Social Dialogue in India* WP 1/2011 (Geneva: International Labour Office 2011); R M Krishna, "Women's work in Indian census; beginnings of change" (1990) XXV(48 and 49) *Economic and Political Weekly* 1–8; J Renu and G Deepti, "Work participation of females and emerging labour laws in India" (2010) 2(1) *Asia-Pacific Journal of Social Sciences* 161–72.

promoted to the head of the family and sole breadwinner. Women's invisible work is a given. For example, one husband was asked what his wife did. He answered that she does not work and stays at home. The wife's response was that she worked all the time, all the days and that there was no escape from the daily work schedule.[25] The Human Development Report states that $16 trillion of global output is "invisible" of which $11 trillion is produced by women.[26]

The combination of poverty, illiteracy, patriarchy and social subordination result in rural women being amongst the most vulnerable and marginalised groups. Despite 65 years of independence, continuous gender-related inequities have put millions of women into continuous cycles of disadvantage. Calls have been made for India to adopt a gender-engaging approach for sustainable development that recognises women's involvement. Gender-engaging approaches include planning, design, analysis, advocacy, research, implementation, monitoring and evaluation of policies and their strategic application.[27] Such actions would transform the current relationship between rural men and women by producing a redistribution of power and status. It is argued here that addressing gender equality is the key to protecting the environment and supporting sustainable development.

Empowering women through environmental recognition, environmental entitlements and environmental stewardship will support regeneration, development, transformation and general improvement in the political, economic and social status of rural Indian women.

2 Environmental recognition: women–environment interdependence

Rural women and the environment are inextricably linked. Recognising and promoting this relationship is crucial. Indian traditions and customs reflect this women-environment nexus.[28] It is one of reciprocity, symbiosis, harmony and interrelatedness.[29] This interdependence is indicative of an emotional and intellectual bond, whether knowingly or unknowingly. Women's sensitivity to the ecology and developmental processes and their roles as producers, managers, income-generators and educators must be respected.[30] They are the repositories of traditional knowledge and related skills. Simply put, they know what works and what does not within their local environment.

As de facto managers, women are traditionally responsible for many of the conservation activities, such as protecting the soil, water, forests and promoting reclamation of land previously damaged by poor husbandry. A study in the hilly areas of Himachal Pradesh discovered that women preferred a mixed forest which could meet their demands for fuel, fodder and fruit. This also maintained the biological diversity of the area.[31] Local

25 D Neera and T Usha, *Women in Indian Society* (New Delhi: National Book Trust India 2001), p. 18.

26 UNDP, *Human Development Report*, n. 18 above, p. 97.

27 See M Laudazi, *Gender and Sustainable Development in Drylands: An analysis of field experiences* (Rome: FAO 2003).

28 The Hindu traditions and customs view the earth as distinctly feminine – a living being, a mother, a woman, a Goddess who is to be loved, respected and nurtured, as she (earth) nurtures humanity. In Hindu traditions, Mother Earth has a name: Bhu Devi. In Sanatana Dharma, the dual issues of respecting the way of nature and women are inseparable. For instance, the peepul tree, known for being sacred and antique is worshipped by village women as it is considered a symbol of fertility and progeny. Similarly, tulsi plant, an ancient variety of basil, is grown in Hindu households and women offer daily prayers for protecting the family against danger and difficulties.

29 M Mies and V Shiva, *Ecofeminism* (London: Zed Books 1993); V Shiva, *Staying Alive: Women, ecology and development* (London: Zed Books 1988).

30 FAO, *The State of Food and Agriculture (2010–2011): Women in agriculture – closing the gender gap for development* (Rome: FAO 2011).

31 B Archita, "Himachal villagers resist pine monoculture, reclaim forest for fodder", *Down to Earth*, 15 November 2007.

knowledge and skills in exercising natural resource management allow women to take decisions that promote environmental rehabilitation. In the above study, women resisted the plantation of pine trees in Karsog village in the Mandi district. They knew a pine monoculture produces no cattle feed or fertiliser. They were aware of the inflammable nature of pine needles and the increased likelihood of forest fires. Instead, the women planted broadleaved species such as oak, amla (Indian gooseberry), pomegranate and similar trees. One campaigner, Maina Devi of Mahader Banboru village, said "the forest belongs to us and let us decide".[32]

Women of the Bajeena village in Almora district (Uttarakhand) used their local knowledge and skills to revive depleted underground water resources that had decreased because of the reduction in forest cover. Consequently, they became involved in tree plantation and built water-harvesting structures. Recharge ponds were also built that increased the water resources threefold.[33]

Studies reveal that women are active in small-scale livestock rearing that produces eggs, milk and poultry. Consequently, their financial position is enhanced.[34] An estimated two-thirds of livestock keepers, totalling approximately 400 million people are women.[35] A study in Rajasthan's Jhunjhunu district shows the impact of cattle and buffalo-rearing on the economic development of women. Rajasthan has 6.06 per cent of the cattle and 11.2 per cent of the buffalo numbers in India. It produces 8.05 million tons of milk annually, being 10 per cent of all Indian production.[36]

However, it is in the area of forest products that women display their special awareness and skills. Women are particularly knowledgeable in matters of medical plants, building materials, leaf collection and materials for household usage. Some 51 per cent of the non-timber forest produce (NTFP) workforce, in the small industry sector are women.[37] Significantly, the export of NTFP has brought valuable foreign exchange earnings to India.[38] The quantity and value of NTPF exports amounted to 989,457.08 tonnes, realising a value in lakh rupees 167,855.92 ($397,386,174).[39] These figures suggest that rural women are an integral part of the global value chain and this should have an impact on reducing the feminisation of poverty and gender disparity. Unfortunately, wage inequality, limited

32 Archita, "Himachal villagers", n. 31 above.

33 P Rakesh, "Communities revive traditional water springs" (2010) September *Leisa India* 14–15.

34 FAO, *The State of Food*, n. 30 above, p. 14; ENVIS, *Women and Environment*, n. 21 above; V K Taneja, "Women in livestock production and economics" (1998) *Indian Farming* 48–55.

35 R L Kruska, R S Reid, P K Thornton et al., *Mapping Poverty and Livestock in the Developing World* (Nairobi: ILRI (International Livestock Research Institute 2002), available at www.ilri.org/Link/Publications/Publications/Theme%201/Kruska%20et%20al%20Livestock%20systems%20Ag%20systems.pdf (last accessed 4 July 2012).

36 K Poonam, R Rajendra and K Manoj, "Livelihood improvement of farm women through cattle and buffalo rearing in Jhunjhunu district of Rajasthan" (2009) 16(1) *International Journal of Rural Studies* 39–40.

37 S Hasalkar and V Jhadav, "Role of women in the use of non-timber forest produce: a review" (2004) 8(3) *Journal of Social Science* 203–6.

38 NTFP has been broadly grouped into 12 categories, namely, edible products, medicinal products, spices, essential oils, oil seeds and fatty oils, gums/resins, tans/dyes, fibres/flosses, bamboo/canes, miscellaneous plant origin, animal origin and mineral origin. In international trade terms, there are at least 150 products considered as important export commodities.

39 M P Shiva, "MFP trade trends urge to switch over to NTFP-oriented sustainable forest management" (2009) XIX(3) *MFP News* 1–4. The Indian Rupees (INR) are converted to US dollars. The conversion rate as on 27 February 2012 is 1US$ = 42.24 INR.

access to market information, inability to bargain on equal terms with distributers and retailers, have all placed limits on these anticipated gains.[40]

Nevertheless, a feature of women as managers is their ability to work together for effective action. Integrating plurality and diversity based upon individual and collective experiences promotes sustainability and empowerment. Although rural women are not a homogenous group, environmental movements such as Chipko and Stri Mukti Sangarsh Calval[41] demonstrate women's ability to unite in common cause despite differences in caste, class, language and education.

3 Environmental entitlement: towards a legal framework

Amartya Sen and Leach's work offers an explanation of the terms "entitlement" and "environmental entitlement". Sen states that entitlements represent "the set of alternative commodity bundles that a person can command in a society using the totality of rights and opportunities that he or she faces".[42] Thus, entitlements are effective demands that people gain from their endowments (rights in legislation) to improve their well-being or capabilities. Leach et al. describe environmental entitlements as:

> alternative sets of benefits derived from environmental goods and services over which people have legitimate, effective command and which are instrumental in achieving well-being. These benefits may include direct uses in the form of commodities, such as food, water or fuel; the market value of such resources or of rights to them; and the benefits derived from environmental services, such as pollution sinks or the properties of the hydrological cycle.[43]

Entitlements, in turn, enhance people's capabilities.

In the normative sense, environmental entitlements create the legal foundation for maintaining and protecting environmental value. They empower people by offering a guarantee regarding access to benefits through law and policy (statutory and customary), both internationally and nationally.

3.1 International entitlements

In the international context, taking gender equality seriously in matters of environmental protection and sustainable development was unheard of until the 1980s. Women's voices were neither heard nor registered. The focus of the international community was on issues such as

40 M Carr and M Maria, *Gender and Non-timber Forest Products: Promoting food security and economic empowerment* (Rome: IFAD 2008).

41 The well-known Chipko Movement of 1974 began in Uttar Pradesh's Chamoli district. The movement saw the active involvement of village women to preserve Himalayan ecology by using Ghandhian techniques of protest. Women encircled and hugged trees to save them from commercial timber operators axes, thereby ensuring long-term gains of saving the forest and the environment. The women told the tree-cutters that they would first have to cut off the women's heads. Scholars have interpreted the Chipko Movement either as an example of women's special relation to nature or in the context of peasant movements. Stri Mukti Sangharsh Calval (Women's Liberation Struggle Movement) had its genesis in the Mukti Sangharsh Movement, a peasant movement aimed at eradicating drought by constructing a small dam, the Bali Raj Memorial Dam, in Sangli district, South Maharashtra. The peasants, including women, demanded the right to use the sand in their area in a non-damaging way to finance the dam. Gradually, Stri Mukti Sangharsh became a broad platform of ecological movement from 1990, advocating hirvi dharti, stri Shakti, manav mukti (green earth, women's power, human liberation).

42 A Sen, "Rights and capabilities" in A Sen (ed.), *Resources, Values and Development* (Oxford: Basil Blackwell 1984), pp. 307–24.

43 M Leach, R Mearns and I Scoones, "Environmental entitlements: dynamics and institutions in community-based natural resource management" (1999) 27(2) *World Development* 233.

migration, disarmament or technology transfer.[44] It was at the Nairobi Forward Looking Strategies 1985 that the role of women as active and equal participants in progressing sustainable development was first recognised "to enhance awareness by individual women and all types of women's organisations of environmental issues and the capacity of women and men to manage their environment and sustain productive resources".[45]

From the 1990s many international instruments and decisions have recognised environment and development as interdependent and mutually re-enforceable themes, while women and development have been accorded a separate and equal status. For example, Agenda 21 emphasises global action by women towards sustainable and equitable development. An active involvement of women decision-makers, planners, technical advisers, managers and extension workers in the environmental and development fields is vital for the success of Agenda 21. In addition, the World Summit on Sustainable Development contains 30 references to gender and stresses the importance of a gender-sensitive approach to decision-making and a participatory process.[46]

Within the international context, the gender dimension has been accepted with a view to integrating it in policies and associated agreements. Yet the issues of gender, knowledge of existing resources and expertise on gender matters and the collection and use of sex dis-aggregated data need to be addressed to mainstream gender in sustainable development.[47] India is a signatory to these international instrument but there remains the challenge of establishing and protecting environmental entitlements at the national level.

3.2 National entitlements

In India the constitution commits to democratic social order which in turn promotes the rights and legitimate aspirations of women to be treated as equal citizens. Current legal and policy frameworks in India aim to ensure equality for women. In reality, there is still much to be achieved in order to bring practice up to the level of policy statements. For example, in regard to gendering ecology, the National Conservation Strategy and Policy Statement on the Environment and Development[48] recognises the active involvement of women at the grassroots level in the conservation programme. It should be income-generating, self-financing and sustainable on a long-term basis.[49] Paradoxically, many projects undertaken by women complement and contribute to income-generating projects basically aimed at men. There women are usually involved in the implementation rather than at the planning stage. The principle "those who till the soil are the best avenue for feedback" is not applicable to women. For example, the planting of what proved to be inappropriate species of trees, such as eucalyptus, deodar and chili, without general consultation, was criticised by rural women.[50] This illustrates the practical importance of gender mainstreaming at the

44 K A Patel, *Women and Sustainable Development: An international dimension* (India: Ashish Publishing House 1995).

45 UN Department of Public Information, *The Nairobi Forward-Looking Strategies for the Advancement of Women* (New York: UN 1986), pp. 53–4.

46 The Fourth World Conference on Women, Beijing 1995, asserted that human beings are at the centre of concern for sustainable development and that women have an essential role to play in the development of sustainable and ecologically sound consumption and production patterns and approaches to natural resource management, para. 246, Platform for Action. See also the Convention on Biological Diversity 1992.

47 Laudazi, *Gender*, n. 27 above, p. 7.

48 Government of India Ministry of Environment and Forests (1992).

49 Ibid. para. 8.8.

50 See M Singh Neera, "Women and community forests in Orissa: rights and management" in S Krishna, *Livelihood and Gender: Equity in community resource management* (India: Sage Publications 2004), pp. 306–24; M Sarin and R Khanna, "Women organize for wasteland development: a case study of Sarthi in Gujarat" in A Singh and N Burra (eds), *Women and Wasteland Development in India* (New Delhi: Sage Publications 1993), pp. 91–127.

planning stage where women's knowledge and opinions regarding suitability, needs and benefits can help ensure best practice is implemented.

Equality is a cornerstone of Indian democracy[51] and the constitution guarantees, in Article 14, the right to equality.[52] Discrimination on the grounds of sex is prohibited by Article 15.[53] It covers all state activities although by the "substantive equality clause" the state can make special provision for women and children. This allows issues of socio-economic backwardness affecting women to be addressed. For example, under gender equality, both job opportunities and reservations are possible.[54] However, nearly 93 per cent of women working in the unorganised sector[55] are not covered by labour laws.[56]

India presents a legal picture of duality – promising and reassuring in theory but of limited effectiveness in practice. Discrimination is evident when applied to ecological issues, particularly concerning rural women and agriculture, land and access to resources, wages and governance issues.

3.2.1 Agriculture and land

India feeds itself but is dependent upon an effective agricultural sector that accounts for 18 per cent of gross domestic product.[57] The involvement of Indian rural women is widespread in the agricultural sector. Their roles range from managers to marginal workers, which includes cultivators and landless labourers. The national average for women's share of time use in agriculture is 32 per cent.[58] The National Agricultural Policy makes a reference to mainstreaming gender. It initiates structural, functional and institutional measures aimed at empowering women by improving their access to inputs, technology and other farming resources and encouraging them to participate in farming activities.[59]

Gender is not simply about "more women numbers", but also about contextualising and integrating them at the point of constructing policies and programmes. It takes into account the socio-cultural relationship between the sexes and its effect and differentiating impact. Previously, Indian policymakers were blind to the contribution of women. Today their vision is merely blurred! An effective agricultural policy needs to implement a sustainable economy that recognises women and men as equals in terms of productivity and participation. Such progress would help achieve the Millennium Development Goal of reducing poverty and hunger.

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51 *Indra Sawhney* v *Union of India* AIR 1993 SC 477.

52 Article 14 of the Constitution of India states: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

53 Article 15 of the Constitution of India states: "(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children."

54 *Government of Andhra Pradesh* v *Vijay Kumar* AIR 1995 SC 1648; M P Jain, *Constitutional Law* (Wadhwa Nagpur: LexisNexis/Butterworths 2011), p. 993.

55 http://labour.nic.in/ss/InformalSectorinIndia-approachesforsocialsecurity.pdf (last accessed 4 June 2012).

56 K Sankaran and R Madhav, *Gender Equality and Social Dialogue in India* WP 1/2011 (Geneva: International Labour Office 2011).

57 Department of Agriculture and Cooperation Ministry of Agriculture, National Policy for Farmers 2007, Government of India.

58 SOFA Team and Doss Cheryl, *The Role of Women in Agriculture ESA* Working Paper No 11-02 (Rome: FAO March 2011).

59 National Policy for Farmers, n. 57 above.

One legal change that would improve the standing of rural women is redefining the official meaning of "farmer". The National Policy for Farmers 2007 defines the farmer as:

> a person actively engaged in the economic and/or livelihood activity of growing crops and producing other primary agricultural commodities and will include all agricultural operational holders, cultivators, agricultural labourers, sharecroppers, tenants, poultry and livestock rearers, fishers, beekeepers, gardeners, pastoralists, non-corporate planters and planting labourers, as well as persons engaged in various farming related occupations such as servi-culture, vermi-culture, and agro-forestry. The term also includes tribal families/persons engaged in shifting cultivation and in the collection, use and sale of minor and non-timber forest produce.[60]

The Minister of Agriculture, Sharad Pawar, applauded the National Policy for Farmers by stating that the term farmer is defined both holistically and comprehensively.[61] Although the National Policy for Farmers is more positive than that of the government in terms of encouraging female participation in farm productivity and crop livestock integrated farming systems, the definition remains inadequate. The term farmer continues to imply male farmer. Female farmers continue to be presented as performing caring activities as wives operating in the shadow of the male farmer. The deeply rooted patriarchal system within rural India fails to recognise women as farmers with consequential failures not simply of appreciation but of policy, planning and implementation of agriculture purpose and its social impact. There is no word in the official language of India, Hindi, for female farmer. This linguistic failure of recognition applies to the term farmer although words exist for female workers in other traditional occupations.[62] It is argued that a policy that explicitly defines "farmer as both men and women" would promote both rural community awareness and gender equality.

Access to land and agricultural support services are essential for poverty reduction, sustainable development and female empowerment. Limited access to land ownership, as a consequence of historical, cultural, customary and personal laws, has relegated women to positions of subordination and subjugation. Land ownership in the Indian psyche is associated with male lineage in a horizontal line of descent. Despite the Hindu Succession Act 1956,[63] which provides a right to women to inherit, societal pressures and family taboos are so powerful as to pressurise women to relinquish these legal rights particularly in matters of land. Institutional functionaries are a part of this social milieu and accordingly implement the decisions with a mindset that is often biased or prejudiced against the notion of woman's right to share in the property.[64] The Food and Agricultural Organization database states that only 9.21 per cent of Indian women farmers own farmland.[65] As a consequence, limited access to land ownership reduces their incentive to maintain soil, thereby affecting food production.

Male bias amongst the agricultural support services, which include technology, information, training and credit facilities, increase female vulnerability and women's marginalisation. There is evidence that most of the technology is focused on male usage so that mechanical equipment such as combined harvesters and tractors are seen as male

60 National Policy for Farmers, n. 57 above, para. 3.2.

61 Ibid. "Preface".

62 Neera and Usha, *Women*, n. 25 above; see also Country Report, *Fourth World Conference on Women: Beijing* (New Delhi: Government of India 1995).

63 Hindu Succession Act 1956, s. 6.

64 See Thukral "Poverty and gender", n. 14 above, and Neera and Usha, *Women*, n. 25 above.

65 www.dnaindia.com/india/report_only-9-21pct-women-own-farm-land-in-country-fao_1350710 (accessed 29 June 2012).

preserves while the women undertake the menial, unskilled work.[66] Information and training regarding innovative practices are not easily accessible to women. They have low levels of education, are often illiterate and have to undertake the additional traditional tasks of housework and child care.[67] In addition, rural women are poor risks when the issue of credit at reasonable rates is addressed. They cannot offer collateral to banks and credit unions as they are effectively without assets: land.

However, international commitments coupled with initiatives of grassroots activists[68] have impacted at the political and bureaucratic levels. The government of India has launched gender-specific programmes for economic empowerment and sustainability. These programmes include Support to Training and Employment Programmes (STEP), Rashtriya Mahila Kosh (RMK) and Swaranjayanti Gram Swarozgar Yojana (SGSY). STEP aims to enhance and broaden the skills and knowledge of poor, rural women in traditional occupations.[69] Its function is to encourage employment opportunities that include self-employment and the promotion of entrepreneurship. Services include training, extension, infrastructure, market and credit linkages. In 2008–2009, some rupees 1602.28 lakhs ($3,253,948.43) were released as funding under STEP.[70] The National Credit for Women scheme (RMK) provides loans and microfinance to poor women to set up small enterprises, including agriculture, with help from NGOs, Women Development Corporations (WDCs) and certain state government agencies. RMK established a quasi-informal, credit delivery mechanism. It is client friendly and uses a relatively simple and flexible repayment procedure. Since its establishment in 1993 and up to the end of 2009, some rupees 28,413.09 lakhs ($57,701,980.66) were sanctioned for loans. Of this sum, rupees 23,490.89 lakhs ($47,705,859.54) were distributed and 662,177 women were beneficiaries of the scheme.[71] Under the SGSY, a programme initiated by the Ministry of Rural Development, 70.77 per cent of the beneficiaries were women. They formed SHGs, commenced employment and entered the cash economy.[72]

A holistic approach to the agricultural sector in relation to gender should be promoted by establishing women as farmers. Situation specificity, project flexibility, farmer participation and mainstreaming women's programmes will have a meaningful and sustainable impact.[73]

3.2.2 Wages

Unequal employment opportunities in development programmes contribute to gender-related inequalities. Eco-development programmes seek income generation and empowerment of women but, in reality, experience disappointing participation. The segmented labour force – with women perceived as an uneducated, supplementary, labour

66 See A Stephens, *Gender Issues in Agriculture and Rural Development Policy in Asia and the Pacific*, Regional Consultation on Gender Issues in Agricultural and Rural Development Policy, 1–5 November 1993 (Bangkok: FAO 1993); A Rodda, *Women and Environment* (London: Zed Books 1991), p. 102.

67 J Jiggins, R K Samanta and J E Olawoye, "Improving women farmers' access to extension services" in *Improving Agricultural Extension: A reference manual* (Rome: FAO 1997), pp. 74–82.

68 See further below.

69 These include agriculture, animal husbandry, dairying, fisheries, handlooms, sericulture, social forestry and wasteland development.

70 National Institute of Public Cooperation and Child Development, *Statistics on Women in India 2010* (New Delhi: NIPCCD 2010), pp. 274–5.

71 Ibid. p. 276.

72 Ibid. p. 278.

73 World Bank, *Towards a Gender Strategy for Nigeria: Integrating Women's Issues into the Development Agenda* (Washington DC: World Bank 1992).

force, unsuitable for commercial and technological involvement – deepens women's economic vulnerability. This position is in contrast to population statistics that show that women constituted 48 per cent of the population[74] and 30.79 per cent of the rural labour force in 2001. There was a rise in female rural workers to 41.6% per cent in 2004–2005.[75]

The pay gap remains a major issue, particularly given the data provided by international reports. The International Trade Union Confederation (ITUC) report of 2008 states that there is a gender pay gap of 30 per cent in India.[76] In 2010, the Global Gender Gap Report[77] stated that India had the lowest ranking on gender parity, including pay parity, among the BRIC countries (Brazil, Russia, India and China). In no Indian state do males and females working in the agricultural sector have pay parity.[78] An estimated 60 per cent of agricultural operations are undertaken by women and, on average, the hourly wage rates vary from 50 to 75 per cent of the male rate.[79]

Protective legislation, including the Equal Remuneration Act 1976 (ERA) and the Minimum Wages Act 1948, has proved to be of limited effect.[80] It is paradoxical that the constitutional mandates found in Articles 39,[81] 42[82] and 43,[83] which guarantee economic equality, remain unfulfilled. Yet the mandates underpin a nation's commitment to the concept of social justice through such rights as an adequate means of livelihood, equal wages and an appropriate standard of living.

The ERA not only addresses equal pay for equal work but also prohibits the employer from reversing pay scales in order to achieve equality of wages.[84] This was recognised in the *Mackinnon Mackenzie* case.[85]

74 R Jamwal and D Gupta, "Work participation of females and emerging labour laws in India" (2010) 2(1) *Asia-Pacific Journal of Social Sciences* 164.

75 See n. 55 above, pp. 6–7.

76 International Trade Union Confederation (ITUC), *Gender (In)equality in the Labour Market: An overview of global trends and developments* (Belgium: ITUC 2008), available at www.ituc-csi.org/IMG/pdf/GAP-O9_EN.pdf (last accessed 29 June 2012).

77 R Nagrajan, "Unequal pay for equal work dogs working women in India: study", *The Times of India*, 9 March 2011, available at http://articles.timesofindia.indiatimes.com/2011-03-09/india/28671960_1_gender-parity-equal-remuneration-act-wage-discrimination (last accessed 4 June 2012).

78 Swayam, "The status of women: a reality check facts on inequality and crimes against women", leaflet available at www.swayam.info (last accessed 4 June 2012).

79 S Ahmed and P Maitra, "Gender wage discrimination in rural and urban labour markets of Bangladesh" (2010) 38(1) *Oxford Development Studies* 83–112; M Fontana, "Gender Dimensions of Rural and Agricultural Employment Differentiated Pathways out of Poverty" (paper presented at the FAO-IFAD-ILO Workshop on Gaps, Trends and Current Research in Gender Dimensions of Agricultural and Rural Employment: Differentiated Pathways Out of Poverty, FAO, Rome, 31 March–2 April 2009).

80 India has also ratified the Equal Remuneration Convention 1951 No 100, Discrimination (Employment and Occupation) 1958.

81 Article 39 of the Constitution of India provides for certain principles of policy to be followed by the state, one of them being equal pay for equal work for both men and women.

82 Article 42 of the Constitution of India provides that the State shall make provision for securing just and humane conditions of work and for maternity relief.

83 Article 43 of the Constitution of India provides that the state shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the state shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

84 S. 4 of the Equal Remuneration Act 1976.

85 *Mackinnon Mackenzie and Co. Ltd* v *Andrey D Costa* AIR 1987 SC 1281. See also *S Nagaraj* v *State of Karnataka* (1993) 4 SCC 595; *Vijay Kumar* v *State of Punjab* AIR 1994 SC 265; State of *West Bengal* v *P Chatterjee* AIR 2003 SC 3569.

The equal pay legislation addresses industry and those sectors that employ a set minimum number of workers.[86] The Supreme Court of India also added a rider directing that the law is effective only in organised sectors where work is performed under the orders and control of competent authorities.[87]

The unorganised sector faces discrimination. Women suffer the most. To overcome this problem and provide social security, Parliament enacted the Unorganised Workers Social Security Act 2008, which provides social security and welfare benefits through various government schemes.[88] However, there are serious criticisms concerning its definitions and scope.[89] A precondition for the application of the Act is the earning of a monthly wage as notified by the central or state government. This clearly suggests that unpaid women workers and women dependent for their livelihood on resources such as forests fall through the legislative net and remain without recourse to law. The "invisible work" undertaken by rural women is indeed "invisible" and therefore is not notifiable by the authority.

Gender inequality is also illustrated in the setting of minimum wages. The Minimum Wages Act 1948 sought to prevent labour exploitation through payment of low wages in respect of scheduled employment. The government reviews and revises the minimum rate of wages at least every five years.[90] On 1 April 2011, the central government revised the National Floor Level Minimum Wage (NFLMW), a non-statutory measure, from rupees 100 ($2.03) a day to rupees 115 ($2.34) a day, and requested all states to implement this change in such a way that in none of the scheduled employments the minimum wage is less than the NFLMW.[91]

Studies indicate that gender-related wage inequity is experienced by female agricultural labourers whose wages in most states remain lower than the official minimum wages. These women accounted for 41.6 per cent of the agricultural workforce of 259 million in 2004–2005.[92] The National Commission for Enterprises in the Unorganised Sector (NCEUS) states that:

> most studies that have examined the application of minimum wage legislation to workers in the unorganised sector show that the Act has not been used to protect the interests of the poor and the unorganised sector worker. The "technical"

86 Sankaran and Madhav, *Gender Equality*, n. 56 above.

87 *Ajmer Vidut Vitran Nigam Ltd* v *Navin Kumar Saini* (29 October 2010).

88 Schedule 1 of the Act lists ten schemes that have been accorded the status of social security schemes. These are Indira Gandhi National Old Age Pension Scheme, National Family Benefit Scheme, Janani Suraksha Yojna, Handloom Weavers Comprehensive Welfare Scheme, Pension to Master Crafts Persons, National Scheme for Welfare of Fishermen and Training and Extension, Janshree Bima Yojana, Aam Aadmi Bima Yojana, Rashtriya Swasthya Bina Yojana

89 See J John, "Social Security Act: the great Indian tamasha on unorganised workers" (2008) 6(6) *Labour File* 5–11; V Shankar, "Unorganised Workers Social Security Act 2008: a beginning for bigger struggles!" (2009) Liberation Central Organ of CPI (ML), available at www.cpiml.org/liberation/year_2009/feb_09/commentary_3.html (last accessed 29 June 2012); T Sankaran, "A critique of India's Unorganised Worker's Social Security Act 2008" (2009) *South Asia Labour Activist Library*, available at www.sacw.net/article658.html (last accessed 4 June 2012).

90 Paycheck India, "Minimum wages India – current minimum wages rate India" (2011), available at www.paycheck.in/main/officialminimumwages (last accessed 4 June 2012).

91 www.pib.nic.in (last accessed 4 June 2012).

92 M van Klaveren et al., *An Overview of Women's Work and Employment in India* Working Paper 10-90 (Amsterdam: Amsterdam Institute for Advanced Labour Studies University of Amsterdam May 2010); NCEUS, *Report on the Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* Research Paper (New Delhi: National Commission for Enterprises in the Unorganised Sector Government of India 2007); P Chavan and R Bedamatta, "Trends in agricultural wages in India 1964–1965 to 1999–2000" (2006) 41(38) *Economic and Political Weekly* 4041–51.

> coverage of the Minimum Wages Act was 38.1% of the labour force, but the effective coverage was only a fraction. The proportion of female casual workers receiving less than the required minimum was 95% as against 74% in the case of male workers.[93]

Wage differential, particularly in the agricultural sector, is a complex matter when "skill" is taken as the criterion that determines the wage. Rural women, within the patriarchal society, have little opportunity to acquire the skill sets that would move them to parity with males.

An inherent weakness in the Minimum Wages Act in relation to gender parity is the exclusion of unpaid work. The calculation of minimum wages in India proceeds on the assumption that an earning member should support another adult and two children.[94] Males are assumed to be the principal workers. The dividing line between skilled and unskilled or paid and unpaid is very thin depending on the work-based situation. Defining activities complicates the issue, thus placing women in a disadvantageous and vulnerable situation in a changing economy.

The failure of social engineering to alter deep-seated rural male dominance has resulted in the legislation failing to address the wider issues that beset women. A consequence is that the legislation has had limited impact on the economic standing of rural women.

On the other hand, a progressive step to close the gender gap is seen in the passing and subsequent activities of the Mahatma Gandhi National Rural Employment Guarantee Act 2005 (NREGA). It offers a legal entitlement to work and has revised the employability status of rural women. NREGA targets the underprivileged, including women, by providing a legal guarantee of at least 100 days a year of unskilled manual work to each rural household at the statutory minimum wage. This has had a positive impact on the lives of rural women. Visible positive impacts under NREGA include an increase in agricultural wages and also in cultivation, building and reviving water conservation structures and a decline in distress migration. The National Report 2011–2012 states that 3.31 crore (331 hundred thousand) of persons were employed for a total of 96.23 crore (9623 hundred thousand) of "person days" out of which 50.1 per cent were women.[95]

NREGA is a powerful instrument for producing rural transformation, especially for women. However, its implementation remains partial. Structural issues such as work record-keeping, delayed payments for work completed and inadequate attention to the quality of the assets created in conjunction with the issue of fraud, misuse of funds, negligence, incompetence, and the ever-present problem of corruption ensure that the social impact of the legislation has yet to be fully realised.

3.2.3 Governance and decision-making

Women's participation in governance and in the decision-making process has a transformative impact on empowerment. In turn, decentralisation of power towards the grassroots level strengthens democracy and promotes local responsibility. The Constitution

93 NCEUS, *The Challenge of Employment in India: An informal economy perspective, vol. 1 Main report* (New Delhi: NCEUS/Government of India 2009), p. 141.

94 *Workmen* v *The Management of Reptakos Brett and Co. Ltd* AIR 1992 SC 504; P Belser and U Rani, *Extending the Coverage of Minimum Wages in India: Simulation from household data* Conditions of Work and Employment Series 26 (Geneva: International Labour Organization 2010), p. 8.

95 http://nrega.nic.in/netnrega/home.aspx (last accessed 4 June 2012).

of India, in the 73rd[96] and 74th[97] constitutional amendments, provides for the establishment of strong, effective and democratic local administration (panchayat) both in urban and rural areas. In *Bihari Lal Rada* v *Anil Jain (Tinu)*,[98] the Supreme Court of India observed that:

> economic development and implementation of schemes securing social justice may not be possible without providing for adequate representation to the weaker sections of society. Its paramount objective was to empower the vulnerable sections of the society who were hitherto precluded from participating in the local self-government for various historical reasons due to which the constitutional objective of securing social justice remained unfulfilled.

The constitutional mandate made possible women's participation in governance with a 33 per cent reservation in certain key positions within the panchayat. Nationally, elected women representatives account for about 10 lakh out of 28 lakh of elected panchayat representatives.[99]

There has been a mixed response to women panchayat members' involvement in natural resource management. In some states, including Himachal Pradesh, Maharashtra and Bengal, women have gained confidence within the male-dominated society and thereafter have made contributions at grassroots levels. Elected women members have encouraged village women to use bio-gas systems, to plant and protect small areas of forest near their villages, to oppose limestone quarrying in hilly regions and to lobby for gender budgets for rural development, including education, water and improved sanitation. These activities have helped redefine the gender roles within the participatory process which in turn has enhanced self-respect and women's independence.[100]

On the other hand, the elected women are sometimes little more than proxies because their husbands, fathers or male siblings are the de facto decision-makers. Illiteracy, lack of awareness, confidence and general isolation from public life have contributed towards their non-participation.[101] The Panchayati Raj Ministry has received complaints of non-participation of elected women members. Consequently, the ministry, in an advisory capacity, has requested state governments to ensure that male relatives of elected women members are excluded from meetings.[102]

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96 The main features of the 73rd Amendment are: 1 Constitution of a three-tier structure of Panchayats in every state (at village, intermediate and district levels) having a population of 20 lakhs (Article 243B). 2 Reservation of seats for scheduled castes, scheduled tribes and women (Article 243D). 3 Fixed tenure for panchayat bodies (Article 243E). 4 Transfer of powers, authority and responsibilities to panchayats, including 29 subjects listed in the 11th Schedule (Article 243G).

97 The 74th Amendment classifies urban settlements as corporations, municipalities or nagar panchayats (a hybrid designed for settlements in transition from rural to urban). All these three categories, broadly labelled as nagarpalikas, are to be constituted with representatives elected from territorial constituencies called wards. One-third of the seats as well as the chairperson positions are to be reserved for women.

98 (2009) 4 SCC1.

99 PTI, "Women empowerment in Panchayati Raj remains unrealised", *The Economic Times*, April 25 2010, p. 2.

100 See S Akerkar, *Gender and Participation Bridge* Overview Report (Brighton: Institute of Development Studies 2001); S Akerkar, "Panchayats working women" (1998) 7(13) *Down to Earth*.

101 B Agarwal, *Gender and Governance: The Political economy of women's presence within and beyond community forestry* (New Delhi: OUP 1998); A Behar and Y Kumar, *Decentralisation in Madhya Pradesh India: From Panchayati Raj to Gram Swaraj (1995–2001)* Working Paper (London: Overseas Development Institute 2002).

102 PTI, "Women empowerment", n. 99 above.

3.2.4 Legislative vacuum

Integrating gender into conservation laws is one area that requires special attention. There is a need to promote greater harmony and synergy between policy frameworks and legal measures. For example, in matters of forestry and biological diversity there remains a distance between policy and legislation.

An illustration of the failure of legislation to bring about change to women's status is found in the Forest (Conservation) Act 1980 as amended in 1988. The amendment did not meet an objective of the National Forest Policy 1988.[103] The policy emphasised the environmental protection and conservation of forests through the creation of a widespread people's movement that included women.[104] This broad-based participatory approach was the required procedure for the success of this policy. The Ministry of Environment and Forests, having administrative jurisdiction over national forest policy, issued circulars to the State Forest Secretaries in 1990 concerning the adoption of Joint Forest Management (JFM).[105] The policy stresses the involvement and participation of people, in particular, women, but the Forest (Conservation) Act 1988 Amendment nowhere reflects the intention of this policy. The preamble to the Act provides for the conservation of forests and, thereafter, the provisions adopt a "command and control" approach by imposing restrictions on the de-reservation of forests and the use of forest land for non-forest purposes. Critics argue that the amended 1988 Act prevents the restoration of degraded lands and watershed development through a participatory procedure.[106] Policy is a plan of action to influence future actions. The 1988 policy stresses a participatory process, involving women. This is not found in the Forest (Conservation) Act thereby producing a failure of a policy which aimed to produce popular participation and gender equality.

A further illustration of legislative failure regarding gender balance is that of the Biological Diversity Act 2002 (BDA). It was considered progressive legislation but it fails to explicitly include women as stakeholders in matters of local conservation and management of biodiversity and the associated traditional knowledge. There is no provision for this in the Act, which directly spells out the need for a participatory approach that includes women. For instance, practitioners of traditional medicine, vaids and hakims, have always been males. However, women also practise traditional medicine as midwives. Their role is undervalued by their exclusion from this legislation. The denial of recognition of women for their abilities and skills as local managers of biodiversity is also a denial of environmental entitlement.

India is proud of its commitment to implement global conventions at the national level by introducing reflective legislation and appropriate strategies, policies and programmes. The enactment of the BDA is one such example. India ratified the United Nations Convention on Biological Diversity 1992 (CBD). One of the preambular objectives of CBD is "recognising the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for full participation of women at all levels of policy making and implementation for biological diversity convention".[107]

It is disheartening to note that there is legislative invisibility of women's role in the BDA. Whilst recognising that under general Indian law "he" also includes "she", this fails to appreciate that within a deeply conservative patriarchal society the semiology of the legal

103 Ministry of Environment and Forests, Government of India, No 3-1/86-FP, 7 December 1988.

104 Ibid. para. 2.1.

105 A Rosencranz and S Divan, *Environmental Law and Policy in India* (New Delhi: OUP 2002), p. 292.

106 Ibid, p. 293.

107 Preamble, UN Convention on Biological Diversity 1992.

"he" reinforces patriarchal domination in its social interpretation and application, thereby extenuating gender inequality.

The relationship between biological diversity and women is one of adaptation and co-existence for the purpose of livelihood. Livelihood comprises capabilities, assets (including both material and social resources) and activities required for means of livelihood.[108] It is suggested that a gender-sensitive approach needs to be adopted within general policy (law) for creating entitlements and their effective implementation.

The Indian judiciary is known for its willingness to make expansive and proactive decisions in environmental cases.[109] Expanding and fortifying the participatory approach, with reference to women, would be a significant step towards gender equality for rural women.

4 Environmental stewardship: a participatory approach

Environmental stewardship is a value system of responsibility to protect and conserve natural resources for present and future generations. Environmental stewardship in the USA envisions a positive contribution in improving human prosperity and environmental quality by encouraging and adopting long-term strategies, programmes and practices for a sustainable future.[110] In an ideal world, regulation is replaced by stewardship – an inherent respect for the environment. In this concept of stewardship, everyone takes responsibility for their actions and use of resources for the benefit of the community.[111] In the UK, environmental stewardship involves an agri-environment scheme that provides funding to farmers and other land managers in England to deliver effective management of the land.[112]

In a holistic perspective, environmental stewardship achieves sustainability by embracing a mindset of continuous improvement by leveraging partnerships, voluntary programmes, market incentives and collaborative functioning.

In India, environmental stewardship is less of a political movement being more of a transitional step towards sustainability committed to ideals of community development, land ethics, grassroots activism and governmental support.[113] For poor rural women, environmental stewardship is not a choice but a necessity for poverty alleviation and empowerment.

In fact, the bottom upwards and horizontal approaches of women taking charge of their natural resource base and contributing towards overall improvement and sustainability indicates the success stories of environmental stewardship. Self-initiated micro-level programmes have paved the way for financial benefits, leading to the formulation of new policies and collaborative programmes.

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108 R Chambers and G R Conway, *Sustainable Rural Livelihoods: Practical concepts for the 21st century* Discussion Paper No 296 (Brighton: Institute of Development Studies 1992); see also Foundation for Ecological Security, *Biodiversity Conservation, Land Use, Land Use Change and Forestry (LULUCF) Programmes: Ideas for implementation* (New York: UNDP 2008).

109 *M C Mehta* v *Union of India* AIR 1988 SC 1037; *T N Godavarman* v *Union of India* AIR 1997 SC 1228; *India Council for Enviro-Legal Action* v *Union of India* 1996 (3) SCC 212; *Narmada Bachao Aandolan* v *Union of India* AIR 2000 SC 3753.

110 Environmental Protection Agency (EPA), Environmental Stewardship Staff Committee, *Everyday Choices: Opportunities for environmental stewardship* Technical Report (Washington DC: EPA 2005).

111 Ibid.

112 Natural England, "Environmental Stewardship" (2011), available at www.naturalengland.org.uk/ourwork/farming/funding/es/default.aspx (last accessed 4 June 2012).

113 A Carr, *Grass Roots and Green Tape: Principles and practices of environmental stewardship* (Australia: Federation Press 2001).

There is a gradual realisation that the successful implementation of any environmental programme is based upon collaborative partnerships between governmental agencies and people's participation, including NGOs and civil rights activists.[114]

The Government of India (Ministry of Women and Child Development) launched the National Policy for the Empowerment of Women 2001 and the National Mission for Empowerment of Women 2010. The policies aim to build and strengthen partnerships with those NGOs that help in the advancement, development and empowerment of women. Favouring women, the National Mission 2010 mandates achieving social, economic and legal empowerment of women by identifying gaps in developmental goals and setting up appropriate institutional frameworks to overcome bottlenecks in the process of ensuring coordinated and effective service delivery to women at grassroots level.[115] For the implementation of these policies and the inter-sectoral convergence of all-women-centric programmes that interface with the environment, government departments are now reviewing gender budgeting.[116]

Gender budgeting is an evolving area that needs better understanding and appreciation in order to address gender equity in the developmental process and public expenditure and policy. The figures for the national budget outlay for women have increased from rupees 56,294.22 crores ($11,432,364,427.28) (2009–2010) to rupees 67,749.801 ($13,758,791,131.80) (2010–2011).[117] This is a welcome step in schemes that have 100 per cent provision for women and other schemes where the allocation for women constitutes at least 30 per cent.

4.1 Partnership and grants programmes

In the Indian context, environmental stewardship obtains support through partnership and grant programmes, in terms of skills and innovative approaches to sustainability. These programmes encompass a two-pronged strategy by addressing economic development coupled with personal and family development. Economic development focuses on the immediate need to transform the lives of poor women by creating opportunities to earn money and access independent income, thereby making them self-reliant and self-sufficient. Personal and family development, going beyond economics, is a long-term strategy to readdress the inequalities of opportunities, empowering women without destabilising their families, and leaving a positive impact on men. This development provides voice to the "marginalised" by integrating them into social programmes and decision-making processes and helps in capacity building of women through education, training and awareness programmes. Mainstreaming gender is not about exclusion of men but it is a process of women becoming equal partners.[118]

114 EPA, *Everyday Choices*, n. 110 above, p. 17; S Vadaon, "Role of NGOs in environmental conservation and development" (2008) *Karmayog*, available at www.karmayog.org (last accessed 4 June 2012).

115 Press Information Bureau Government of India (2010) http://pib.nic.in/newsite/erelease.aspx?relid=59237 (last accessed 4 June 2012).

116 A Parikh, S Acharya and M Krishnaraj, "Gender budgeting analysis – a study in Maharashtra" (2004) 39(44) *Economic and Political Weekly* 4823–30.

117 www.indiainfoline.com/Budget/Budget-Details/Detailed-Union-Budget-2010-11/435512 (last accessed 4 June 2012).

118 R Bhat, "Feminisation of Poverty and Empowerment of Women: An Indian Perspective and Experience" (paper presented at James Cook University, 3–7 July 2002); K Acharya, "Women farmers ready to beat climate change" (2009) InterPress Service News Agency, available at http://ipsnews.net/news.asp?idnews=46131 (last accessed 4 June 2012).

4.1.1 NGOs and SHGs

Partnership programmes aim to involve NGOs as a resource base for women's involvement and confidence building at the rural level. The NGOs are crucial to fostering a gender participatory approach. The involvement of NGOs came about from a

> post-emergency euphoria of the restoration of democracy [that], coupled with the recognition that the state alone cannot deliver the goods in an iniquitous market-oriented society, led to the emergence of new movements, new organizations, new activities, new actors and new issues. Concerns of gender, environment and human rights were taken up in a new entitlement framework.[119]

The NGOs have been actively involved in redesigning gender-responsive development projects and participatory governance through dialogue process, networking and monitoring the implementation of existing policies.[120] The strength of NGOs lies in encouraging all stakeholders to share a common platform for effective sustainable solutions.

The NGOs emphasise an overall integrated development of poor rural women by facilitating programmes, including financial, that are locally self-managed and self-sustaining. Organizing mahila mandals and sanghas (village level organisations of women)[121] and initiating the formation of SHGs has proved beneficial for rural poverty reduction and female empowerment. The SHG movement is an entrepreneurial venture combining low-cost financial services with a process of self-management and development for women who are members. The SHGs mobilise their own savings which are used as loans to their members. SHGs are seen as empowerment organisations that improve women's access to micro-credit, economic resources, bank linkages and community platforms and also address social issues such as abuse of women, alcohol abuse or the dowry system.[122] For example, the Deccan Development Society undertakes commendable work in 75 villages in the arid, interior part of Andhra Pradesh, South India. It supports 5000 dalit women from the lowest strata of society, through SHGs that manage agricultural systems. They plant interspersing crops that do not need extra water, chemical inputs or pesticides. The women formed sanghas, evolved and mapped crop-financing, sold and distributed food. Not only did these dalit women become economically stronger but they have also been able to educate their children, build new houses and buy cattle and land.[123] The crops have been labelled with Participatory Guarantee Scheme (PGS) certification: a scheme endorsing ecologically sound practice that helps combat global warming.

The NGOs have received support from government agencies to form SHGs. The government launched the Swayamsidha Scheme in February 2001 and aimed for a holistic empowerment of women in the ongoing sectoral programmes. Against a target of 645,000 SHGs, 69,803 SHGs were formed and 1 million women were covered by the scheme.

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119 V Ramachandran, "Literacy, development and empowerment: conceptual issues" in R Wazir, *The Gender Gap in Basic Education: NGOs as change agents* (New Delhi: Sage Publications 2000).

120 Aga Khan Foundation, "Rural development in India" (2007) The Aga Khan Development Network, available at www.akdn.org/rural_development/india.asp (last accessed 4 June 2012).

121 S Medhapurkar, "From subjects of change to agents of change: a travelogue in Himachal Pradesh" in S Krishna (ed.), *Livelihood and Gender Equity in Community Resource Management* (New Delhi: Sage Publications 2004); K Marathi, "People's land reform initiatives: a note on the Bundelkhand-Baghelkhand area" in ibid.

122 EDA Rural Systems Pvt Ltd, *Self Help Groups in India: A study of the lights and shades: CRS, USAID, CARE, GTZ and NABARD* (Guragaon: EDA 2006); C Datar and A Prakash (2004) "Engendering communities rights: women access to water and wasteland in Gujarat, Maharashtra, Madhya Pradesh, Andhra Pradesh and Karnataka" in Krishna, *Livelihood*, n. 121 above.

123 Acharya, "Women farmers", n.118 above.

During 2007–2008, rupees 2287.3 lakhs ($4645,103.38) were released as funds, covering 335 districts and 650 blocks. The scheme closed in March 2008.[124]

SHGs have emerged as an effective, financially viable instrument in terms of micro-finance transactions. Currently, studies are in progress to evaluate issues of guidance, the knowledge of women's groups regarding financial aspects of improving record-keeping and transparency, and credit facilities in SHGs' initial years of formation.[125]

4.1.2 Forestry

The JFM is an important area involving a participatory approach of "care and share". It lays emphasis, with the help of NGOs, on the involvement of local communities for the protection, afforestation and sharing of benefits. The involvement of NGOs in encouraging stakeholders, particularly women, to be a part of forest conservation activities has gained momentum in the last decade primarily for two reasons: a changed mindset of forest department personnel towards forest management; and pressure from international funding agencies to involve NGOs.[126]

The JFM was established by the National Forest Policy 1988 and the subsequent guidelines of Ministry of Environment and Forests (MOEF) in 1992,[127] 2000[128] and 2002,[129] thereby giving impetus to the participation of village stakeholders in the management of degraded forests. The MOEF 2000 guidelines specifically considered the potential and need for women's participation in the JFM programmes and suggested at least 50 per cent membership of the JFM general body should be women and 33 per cent of the JFM Executive/Management Committee, out of which at least one office should be filled by a woman. Most states passed their own resolution according to local socio-economic status and cultural characteristics.

For sustainable forests, the MOEF formulated the National Afforestation Programme (NAP) to be implemented through the JFM. NAP – a flagship programme of MOEF – is implemented through Forest Development Agencies (FDAs) that work in conjunction with the Joint Forest Management Committees (JFMCs) under a memorandum of understanding. The funding, both nationally and internationally, is sanctioned by FDAs to the JFMCs, thereby making JFM an integral part of afforestation projects.[130] JFM became a centre of attraction for officials when funds came from external bodies including the World Bank, OECF-Japan, DFID-UK, SIDA-Sweden, UNDP and Germany.[131] In 1990, rupees 4,220 crores ($857,007,662.30) were given for the programme, making the JFM a campaign and target-oriented scheme rather than a region-specific measure to address the issue of forests and forest people.[132]

Equity in participation and benefit-sharing constitute the core components of JFM, creating employment opportunities and income generation with emphasis on marginalised groups, including women. In relation to gender, equity in participation presupposes the active involvement in the decision-making process and determining forest management

124 See National Institute, *Statistics*, n. 70 above, p. 286.

125 See EDA Rural Systems, *Self Help Groups*, n. 122 above.

126 K Balooni and M Inoue, "Joint forest management in India: the management change process" (2009) *IIMB Management Review* 6.

127 No 6-21/89 PP (1 June 1990).

128 No 22-8/2000 (21 February 2000).

129 No 22-8/2000 JFM (FPD) (24 December 2002).

130 Balooni and Inoue, "JFM", n. 126 above, p. 9.

131 S Bera et al., "Is JFM relevant?", *Down to Earth,* Centre for Science and Environment, 15 September 2011.

132 Ibid.

policies. Despite legal backing of the government's policies and regulations, meaningful participation of women lags behind the stated objectives. Studies indicate women either as active participants or meek spectators in the JFM programmes.[133] The active participants are vocal about their opinions and eager to take initiatives in order to protect their forests. A sense of responsibility towards the forests enthuses confidence to carry out forest activities on an equal footing with men. One women states: "The forest does not belong to just men. Its protection is everyone's responsibility. In fact, for women the forest feels like home and gives more benefits than to men. So even if we go to pick a small thing like a datun, we keep our eyes open for any misuse."[134]

On the other hand, traditional and cultural constraints make some women act as meek spectators, showing indifference or lack of interest in forestry activities. Factors such as constant invisible work, a condescending attitude of men towards women as "knowing nothing or incompetent", the inability or shyness to express an opinion, lack of awareness about forestry activities, absenteeism from meetings due to men's drunkenness or women's avoidance due to lack of confidence, all contribute towards low female participation. The position is made worse when forest officials identify and nominate women to take up office-holder positions simply to achieve their statutory targets. To quote: "I am unable to handle this post. There are no protection activities, no one goes to the forests and no one listens to me. I had even submitted my resignation but the forest department people told me to continue till I end my tenure. So here I am."[135]

Equity in benefit-sharing derived from protected forests affects both men and women equally. States have passed their own resolutions for benefit-sharing between villagers and forestry departments, making it a contentious issue.[136] Questions are being raised about the effectiveness of JFM programmes as "villagers are disillusioned and dejected with the tricky money mathematics that forests officials use to bring down the monetary share to nothing; few states give cash to communities".[137]

Presently, there is a debate about the effectiveness of the JFM programme. There is mounting pressure to abolish it as it has neither reduced rural poverty nor strengthened social security. Factors such as lack of clarity, no working plans, bureaucratic interference and enactment of new laws such as the FRA and PESA[138] have put a question mark on the government's flagship programme. In fact:

133 B Agarwal, "Participatory exclusion, community forestry and gender: an analysis for South Asia and a conceptual framework" (2001) 29(10) *World Development* 1623–48; R Ghate and D Mehra, "Does leadership matter? A study of self-initiated forest management from central India" (2003) 13(1) *Asia-Pacific Journal of Rural Development* 89–104; C A Drijver, "Peoples participation in environmental projects in developing countries" (1991) 20 *Landscape and Urban Planning* 129–39; C Correa, *Gender and Joint Forest Management: Research in Uttara Kannada District Karnataka* (Dharwar: Indian Development Service and Society for Promotion of Wastelands Development 1997); M Gupte, "Participation in a gendered environment: the case of community forestry in India" (2004) 32(3) *Human Ecology* 365–82.

134 D Mehra, "Does Lead Role of Women in Local Forest Governance Guarantee Gender Equity in Costs and Benefits from Forests? A Study of Four Case Studied from Vidharbha Region of Maharashta" (paper presented at 13th Biennial Conference of the International Association for the Study of Commons (IASC) on Sustaining Commons: Sustaining our Future, Hyderabad, India, 10–14 January 2011).

135 Ibid.

136 S Bera et al., "Promised moon, paid pittance – Madhya Pradesh"; "Lost in interpretation – Maharashtra"; "Sour and sweet – Gujarat"; "No transparency – Andhra Pradesh" (2011) *Down to Earth*, Centre for Science and Environment, 15 September 2011 (studies in four states of India).

137 Bera et al., "Is JFM relevant?", n. 131 above.

138 FRA (Forest Rights Act 2006) and PESA (Panchayat Extension to Scheduled Areas Act 2006) confer rights to tribal and forest dwellers over forests resources and their management.

> JFM never sought to make the system of forest governance fundamentally reoriented towards recognising rights of the communities along with achieving conservation objectives. Rather these programmes were largely conceived as a tool for getting some local participation in pre-defined goals of conventional conservation by extending some concession or wage labour benefits.[139]

4.2 United Nations development programme, global environment facility (Small Grants Programme)

Nevertheless, the UNDP-GEF SGP India[140] provides hope and expectation for rural women. The SGP India programme has adopted a community-led ownership, participatory and gender-sensitive approach. At the project level, the programme is open, critical and is learning by doing. Spread across India, the programme has provided support to 303 projects, in six thematic areas, namely, biological diversity conservation, climate change mitigation, prevention of land degradation, protection of international waters, phasing out persistent organic pollutants and multi-focal areas.[141]

The programme focuses on partnership for action on sustainable development and a green economy. Gender-driven, innovative, small-scale and local entrepreneurship provides a foundational approach, integrating social, economic and environmental benefits. The very "hands-on management style" and "do it" approach have accelerated transition towards a green economy by motivating women to identify their potential as stewards for a sustainable future. Nearly 2000 villages, 50,000 households and 1 million people have been directly supported by the programme. There are nearly 7000 female SHGs with 150,000 members producing savings of rupees 45 lakhs ($91,387.07) and access to additional credit from banks and institutions of nearly rupees 250 lakhs ($507,705.96).[142]

Successful projects often benefit from strong and dynamic leadership, such as UNDP-GEF SGP India, where the national coordinator, Prabhjot Sodhi, fills a crucial post. The role of the national coordinator is like a fulcrum, maintaining a balance between stakeholders for the smooth functioning of the programme. Despite challenges, conflicting situations and biases, the national coordinator of India has networked with nearly 300 NGOs to generate a financial resource of nearly US$12 million and nearly US$10 million from various other sources.[143] As a consequence, the "voiceless women" have benefitted as a homogenous group.

4.2.1 Case studies

Two case studies help to understand and evaluate the role of rural women as entrepreneurs, their impact on poverty reduction and environmental protection at the micro-level.

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139 Bera et al., "Is JFM relevant?", n. 131 above.

140 The Small Grants Programme (SGP) is funded by Global Environment Facility (GEF). SGP believes that community-led initiatives can make a significant difference to their environment and livelihood. SGP seeks to support initiatives which demonstrate community-based initiatives, gender-sensitive, participatory approaches and lessons learnt from other development projects that lead to reduce threats to local and global environment. In India, the programme is hosted by the National Host Institution, Centre for Environment Education (CEE) under the supervision and guidance of MOEF Government of India and executed through UNDP.

141 www.sgpindia.org (accessed 4 June 2012).

142 The author is a member of the National Steering Committee GEF-SGP (India) Programme. The information and statistics regarding GEF-SGP (India) Programme were provided by the national coordinator in personal correspondence, 2011.

143 Ibid.

Jagriti,[144] a grassroots-level women-centred NGO, initiated a project to secure livelihood options for rural women and conserve high-altitude threatened species of medicinal plants in a remote village in the Lag and Gadsa valley of Himachal Pradesh situated at an altitude varying between 2000–2700 metres. Many of the villages have no road connection and are linked by narrow pathways. A deep-rooted caste system, harsh climatic conditions and inaccessibility to basic services impose even greater drudgery and livelihood pressures on poor people. The worst affected are the women whose work increased both in time and labour. The rapid depletion of resources including fuel wood is a major cause of concern and the burden of obtaining resources a challenge. Jagriti emphasised the importance of women as a homogenous group and encouraged them to form women self-care groups (WSCGs).

More than 30 WSCGs are now functioning with 1000 women members. The women members are directly involved in the project implementation through collective planning and execution of group activities. Stakes in projects are built by enlisting community contributions both in cash and kind. The outputs have been significant in terms of managing the environment, financial and enterprise activities, poverty reduction and social mobilisation. With the help of Jagriti and the forest department, women were made aware of the sustainable use of threatened medicinal plants such as aconitum, heterophyllum and picrorhiza kurroa. Women members were distributed hamam (energy efficient water-heating devices) on a cost-sharing basis. The result was a reduction in fuel wood usage in traditional stoves. Less exposure to indoor pollution and fewer trips to forests to collect fuel wood greatly reduced the time and drudgery for these hill women. Ordinarily, the local women were working 16–18 hours daily.

Financial and enterprise activities brought dramatic changes to the lives of these poor women. The WSCGs were registered with banks and linked to credit facilities and additional benefits. They established marketing outlets such as Mountain Bounties to market local fruits and forest produce. Products including amaranthus flour, apple chips, apricot oil and scrub, beeswax cream, cornflour, rosehip herbal tea, roasted barley and soya beans are some of the products marketed by Jagriti and the Himachal Pradesh Tourism Department. The cumulative sales of these products, amounting to rupees 21 lakhs ($42,647.30), has provided income and empowerment for local women.

Social mobilisation, through education, training programmes, workshops, mahila mela forum (women fair forum) for confidence-building and effective participation in village-level bodies, has built collective pressure to involve women in the decision-making process. Thus, a new phase of development and progress has witnessed women becoming "women workers".

Mamring Torkyoy Conservation and Development Project[145] is another SGP India achievement, bringing change in the Kurseong sub-division, West Bengal. Land degradation by landslides threatened biological diversity and affected agricultural production. Flash floods and heavy rainfall created deep crevices and landslides. The residents cut trees for

144 Jagriti is a community-based organisation working for the empowerment of poor, disadvantaged hill women (www.jagritikullu.org, accessed 4 June 2012). Jagriti won the Seeds Award 2008 for its potential project to improve the health and secure livelihood for herb collectors, otherwise engaged in destructive extraction of endangered species of medicinal plants

145 Mamring Toryok Farmers Association (MTFA) a community-based organisation is involved in protecting the environment in a sustainable manner. MTFA ensures health and well-being of the community and conservation of the local biodiversity. The organisation includes both men and women. The women play a special role in conserving biodiversity in the remote area of Sittong Panchayat under Kurseong sub-division of West Bengal.

firewood. The women suffered the most as a consequence of deforestation. To address the community issues, in particular for women, the Marming Torkyoy Farmers Association (MFTA) was formed, consisting of 23 members of whom 16 were women. Interestingly, MFTA was a community-based initiative without legal regulation regarding female representation. The project benefitted seven villages comprising 641 households with a population of 6000 people. With the help of SGP India, 34 women's SHGs were formed. These SHGs coordinated and developed links with the banks for both credit and loan facilities. The total savings of SHGs amounted to rupees 250,000 ($5077.06). Organic farming by women was a great success. With the help of the Alphonsus Social and Agricultural Centre (SASAC), square-metre vegetable gardening (SMVG) was introduced as an improved method of gardening in a mountainous region suffering from a scarcity of fertile land. Women were made aware of the importance of cultivating varieties of vegetables that improved the soil quality and increased soil nutrients, thus, improving health.

Establishment of herbal gardens by reviving the traditional knowledge and practices of indigenous women was a success. Extracted juice from the root/flower/leaves of the herbs or dried herbs or even tonic made out of herbs was used to treat 30 per cent of 2000 patients annually with herbal medicines in Mamring dispensary. Ailments like jaundice, asthma, urinary infection, high blood pressure, diabetes and piles were treated with herbal medicines. Thus, herbal gardening served the twin purpose of protecting diversity and human health.

In addition, alternative livelihoods, marketed by SHGs, through mushroom cultivation, preparation of marmalade and pickle and weaving bags, became a source of income for poor women.

Thus the project not only promoted biological diversity and improved people's health but it also provided an income-generating source to poor women to improve their lives.

Environmental stewardship is becoming a major factor in supporting rural women. In particular, the role of the NGOs and grants programmes in this development is crucial and it is anticipated that this growth will continue. In addition, policymakers have started to acknowledge and support gender equality "as the great untapped potential for sustainable development intrinsic in indigenous spirituality and cosmogony".[146]

5 Conclusion

India is a complex set of paradoxes. Nowhere is this more evident than in an examination of the distribution of wealth. Internal economic liberalisation and globalisation changes that commenced in 1990 have resulted in the quadrupling of India's economy, positioning it as the expected third largest global economy by 2030. Foreign direct investment in India surged to £23 billion in 2009, followed by £16 billion in 2010. Economic growth is forecast to exceed 7 per cent in 2012. The rich are becoming richer and there is a burgeoning middle class, but the poor remain disturbingly poor, particularly those who live and work in rural India.

The population of India is 1.2 billion while the rural population is 833.1 million or 68.84 per cent of the total population. Despite the growth of poverty migration to the metro-cities, India remains a rural society where men account for 427.9 million (51.4 per cent) and women number 405.1 million (48.6 per cent)

Rural women make crucial contributions to environmental resource usage and its management by using their knowledge and skills, thereby supporting the rural economy of India. Their position and roles are not static. They are constantly affected by global economic changes and market-led growth and by changing family and community

146 N Smith (2011) "All eyes on the prize", *The Sunday Times*, 9 October 2011, p. 3.

structures and technological developments. As a consequence, women face gender-specific constraints that promote deep inequities and the continuing feminisation of poverty.

The process of development in terms of encouraging gender equality and improving the material conditions of the rural woman's life is disappointingly slow. Many local factors contribute to the disadvantaged situation of women. Women undertaking invisible work remain unaccounted and un-reflected in the formal definition of "work". Elusive or unequal effective rights to land, limited access to productive resources and restrictions on credit services coupled with inequity within the labour market contribute to their vulnerability. Illiteracy or low levels of education act as a hindrance for poor rural women, resulting in their exclusion from community resource management roles, particularly as decision-makers. The language of gender equality and women's rights in the framing and implementing of legal provisions has not been fully appreciated or employed. Non-integration of gender into policy and law is evident in environmental protection and conservation. The constant usage of the legal term "he" in legislation means, to the average person, that women are excluded. The general public do not appreciate that in law, "he" also means "she". There are deep-rooted patriarchal and caste prejudices that work against rural women, thereby exacerbating poverty and discrimination.

The Indian bureaucratic federal and state systems are often inefficient, confused and even corrupt. As a consequence, top-down effectiveness for social change has been limited. Other engines for change have emerged, in particular at the grassroots level. As a consequence of successful grassroots participatory processes, the government has been encouraged to review its policies and schemes for the "resourceless" regarding sustainable development and an equitable livelihood. The organisational approach and support of NGOs, SHGs and international funding agencies are positive developments providing a platform and impetus to female empowerment by helping women to organise and improve their conditions of work. Rural women are being acknowledged as stewards of natural resources. Employment opportunities, economic independence, participation and governance in local institutions, securing and asserting their rights and deriving strength and confidence as a homogenised group, all have the potential to draw out rural women from their poverty.

A holistic perspective to empowering women and gender mainstreaming by legal and institutional mandates reflects a three-D approach – determined, dynamic and democratic change for a sustainable future. A synthesis of macro-economic growth, environmental regeneration and poverty alleviation is the key to the strengthening of resources for the poor rural woman's identity.

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Book review

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The Vantage of Law: Its role on thinking about law, judging and bills of rights, J Allan (Aldershot: Ashgate 2010), hardback (with index) 202pp

This original and imaginatively well-written book addresses three interrelated topics. These are: the separation of law and morality; judges and judging; and bills of rights. These topics are viewed through the prism of jurisprudence and legal philosophy, with particular emphasis on how a shift of vantage can influence one's views on all three issues. Approaching these jurisprudential and constitutional polemics in this nuanced way, the book will be an invaluable contribution and will add to the nascent literature on legal philosophy and constitutional law.

The first two chapters deal with the perennial debate between separating law and morality. Allan questions: "Is it good or desirable to keep separate law and morality, law as it happens to be and law as it ought to be?" After critically discussing eminent legal philosophers' views on this question (such as Bentham, Hart and Dworkin), the remainder of the first chapter addresses the question by looking at the different vantages in the different legal systems he outlines in the "Introduction". Allan sets out three primary vantages. The first is that of the "Concerned Citizen" – he/she is an "average" citizen who has a stake in the legal system. The second is the judge's vantage. The judge is from an appeal court or from one of the highest courts in the land, whose role is to interpret statutes and/or constitutional provisions. The last vantage is through the eyes of the "Holmesian Bad Man". This is the "amoral actor" whose decisions are unaffected by morality but for whom law and legal rules are important factors in deciding how to act. The author does refer to other vantages, such as the "Visiting Martian": described by Allan as "the Descriptive Sociologist", "the Outside Observer" who has no concern in what is being observed apart from seeking clarification and accuracy. Another is the vantage of the "Legislator" or "Law-Maker" – the person who turns policies into law/legislation. Others are "the Omniscient Being, the Moral Philosopher, the Sanctimonious Man and the Law Professor". The author makes a valid point that all vantages need to be placed in context: a concerned citizen living in a democratic and stable society will have different views on a bill of rights or whether law and morality should be separate from those of a concerned citizen who comes from an autocratic and authoritarian regime. In this regard, the author chooses to locate the discussion in what he describes as a "nice, benevolent, liberal democracy". However, for the purposes of making certain claims more widely applicable, he also talks

about three other legal systems – they are the "Wicked Legal System", the "Theocratic Legal System" and the "So-So Legal System". The first refers to a Hitler or Stalin-style dictatorship where millions are massacred; the second is concerned with God as the law-maker; and, under the third system, life is relatively "pretty good" but is not as good as in the benevolent legal system. In describing these legal systems, the author acknowledges that the list is not exhaustive.

For the concerned citizen's vantage, separating law and morality is relatively easy. However, from the judge's vantage, it is more difficult to keep separate "law as it is" and "law as it ought to be". This is in stark contrast to the bad man's vantage where separation is necessary. That said, Allan continues to argue that even from the judicial vantage, there are times where it is possible, indeed preferable, to separate law and morality. A "clear cut and obvious" example is where a dissenting judge outlines his or her reasoning from the majority judgment. In so doing, the judge is making a distinction between what the majority thinks the law is and what he/she thinks it should be. When discussing the judge's vantage, chapter 1 also briefly touches upon what Allan describes as "the central and most important issue", namely: who should decide contentious social and moral issues, the legislature or the judiciary? One of the canonical points of reference in this debate are Jeremy Waldron's writings. It is therefore not surprising that some of the discussion in chapter 2 covers Waldron's thinking. However, Allan puts his own mark on the debate by discussing the question and the consequences through the lenses of the different vantages in the different legal systems. From the judge's vantage, in a benevolent legal system where law and morality are blended, there is greater scope for judges to have the last and final say on contentious issues. While this is beneficial for judges, Allan argues it is less attractive from the concerned citizen and the legislator's vantage.

This chapter also briefly raises the much-discussed and important issue of judicial appointments. Allan argues, rightly or wrongly, that the judicial appointment process in America for the Supreme Court is more than likely to result in a broader spectrum of moral ideas or sensibilities. However, judges who are appointed by a judicial appointment committee may hold narrower moral views than society at large. The issue of judges is continued into the following two chapters as they examine topics related to judges and judging. In keeping with the theme of the book, the issues are examined from the different vantages but with the primary focus based in the context of the benevolent legal system. That focus raises a set of further tangential issues such as how to best understand the amorphous concept of democracy, the appointment of judges, the merits and shortcomings of the use of foreign law, and how the rule of law and common law constitutionalism differs from rule by judges.

In his quintessentially quirky style, Allan discusses the problems judges face when interpreting bills of rights by creating a fictitious judge, Judge Waldron. How should Judge Waldron deal with the issues raised in the bill of rights and the cognate problem of who should have the "last-word moral input"? Allan provides possible solutions. For Judge Waldron, he could adopt the Holmesian or Posnerite or Frankfurterite or John-Ely-type approach. Another possibility mooted is the Dworkin approach. However, given Waldron's thinking on the importance of the right to participate and his views about courts in having the last word, it is not surprising Judge Waldron does not lean towards the Dworkinian approach. In this respect, Allan also raises an interesting question: should Professor Waldron accept the job in a top court? Again Allan offers two options: he could take up the post and try to lessen the so-called illegitimacy of the legal system or he could decline the job. That is as far as Allan is prepared to go, and he acknowledges that there may not be a

right answer to the question.

Following the same approach as the previous chapters, the theme of vantage is pervasive in the next two chapters. Here Allan addresses how vantage affects a person's views on the strengths and weaknesses of bills of rights. The first of these chapters, dealing with bills of rights, lays the foundations for the following chapter as it sets out the jurisprudential debate on why rights matter. In that respect, Allan offers two sets of theories in defence of rights. The first concerns the "weak-rights theories" and the second are "strong-rights theories". The former view rights as necessary evils, the latter state that each human being has basic rights. Discussing these different theories, Allan refers to well-known and eminent scholars such as Hume, Hobbes, Bentham, Rawls, Kant, Gewrith and Dworkin. The author then continues to put down the next layer of the foundations by addressing the relationship between paternalism, rights and bills of rights. The last section of chapter 5 provides the "last stop" in laying down the foundational work. This section provides an interesting, albeit controversial, discussion on how statutory bills of rights, such as the Human Rights Act 1998, can result in a strong form of judicial review, something akin to the judicial review of the constitutionalised bill of rights of the USA.

Chapter 6, the second of the bill of rights chapters, considers the pros and cons of a bill of rights from the law professor's vantage and is limited to the benevolent legal system. The reason for this limitation is straightforward and sensible. There are more serious problems in non-benevolent legal systems than discussing the merits or otherwise of bills of rights. Allan makes an interesting observation: if one counts the number of articles favouring bills of rights in any top English language legal journal, and then tallies those who oppose such instruments, it is doubtful if the latter outnumbers the former. This is an interesting challenge that the author of this book review is keen to further explore. After revisiting the Waldronian counter-argument against handing too much power to the judiciary, Allan puts forward his own view in distinctive style by studying Waldron's arguments, not from one vantage, as Waldron does, but from different ones. In so doing, he aptly illustrates the underlying argument of his thesis, that is, how vantage can shape and determine one's views vis-à-vis bills of rights. Take, for example, the law professor who will be inclined to support bills of rights for several reasons, some of which are egotistically based. Allan argues that having a bill of rights in place will make the law professor's adjudication-centred theory stronger and more convincing. Furthermore, in terms of "raw professional self-interest", bills of rights generate books, blogs, conferences and so on for law professors. It is doubtful if any academic, be it a professor, reader, senior or junior lecturer disagrees with this point!

The book concludes with the perennial call for legal education to be less judge-centric. To this end, Allan is echoing the voices of O W Holmes and W Twining. On reading this book, it is clear that vantages really do matter because the choice of vantage one adopts will influence one's views on the question of law's relationship to morality or about bills of rights. In the final chapter, Allan emphasises that there is no reason why one cannot oscillate across the different vantages when considering the issues discussed in this book. Such oscillation allows for a more fluid and open discussion about the issues discussed in this book and beyond.

All in all, this is an entertaining as well as an erudite book, suitable for the "well-informed jurisprude" and scholars and students alike, especially those studying or teaching courses in legal philosophy and constitutional law.