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MacDermott Lecture 2008: Litigating international disputes – the work of the International Court of Justice in a changing world

GIVEN AT QUEEN'S UNIVERSITY BELFAST ON 16 APRIL 2008 BY
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The MacDermott Lecture is delivered annually at Queen's University Belfast. Previous speakers in recent years have included Lord Hutton and Rabinder Singh. Lord John MacDermott studied at Queen's in the early years of the twentieth century and went on to pursue a distinguished political and legal career, later returning to Queen's to teach and to hold the position of pro-vice chancellor. He was Lord Chief Justice of Northern Ireland from 1951 to 1971.

I am very pleased to deliver this MacDermott lecture, named for Lord MacDermott who presided over the Courts of Northern Ireland for two decades. I also take this opportunity to offer my congratulations to Queen's University Belfast on the occasion of its centenary. I have so admired the role of the University generally, and its Law Department specifically, in the difficult times of the recent past, and it gives me a very real pleasure to be here among you.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations and one of its main organs, along with the General Assembly, Security Council, Secretariat and the Economic and Social Council. We share with the other UN organs the purpose stated in Art. 1 of the Charter: the maintenance of international peace and security. Our particular contribution to this goal is the judicial settlement of international disputes in conformity with the principles of justice and international law.

We have a dual role: to settle in accordance with international law the legal disputes submitted to the court by states, and to give advisory opinions on legal questions referred to the court by certain organs of the United Nations and sixteen duly authorised specialised agencies. The ICJ was established sixty-two years ago at the end of the Second World War. It was the successor to the Permanent Court of International Justice that was functioning at the time of the League of Nations.

In its early years the International Court had to operate against the negative background of the Cold War. There was a multi-polar international system of power, on which was superimposed the great doctrinal hostilities of capitalism and Marxism. These factors necessarily constrained the overall contribution that the court could make. It had a small, but meaningful docket during this period. A different challenge then faced the court in the 1970s with the emergence, a few years earlier, from colonialism, of new independent states. These states needed reassurance that international law was a law relevant to *their* interests as well as to the interests of the so-called First World. At the same time, the longer established states wanted to feel secure that international law would continue to provide a core stability

that would be applicable to all nations. During this era, the court's caseload was relatively light and it entered a dormant period.

This all changed in the late 1980s, with the end of the Cold War and greatly improved East–West relations. There was new enthusiasm for third-party dispute settlement. Of the ninety-five judgments the court has handed down in its sixty years of existence, *one half* have been delivered in the past twenty years.

Recent years have been characterised by the phenomenon of globalisation. States are no longer the only actors in international law: individuals, corporations, and non-governmental organisations are now regarded as having both rights and responsibilities under international law. The widening reach of technology and the constant flows of information, currency, arms, narcotics and diseases have rendered national borders porous. International law has expanded to cover entirely new topics, such as space, human rights, trade law and environmental law.

The International Court lives in the real world and these changes in the world have their impact on us, too. Today, I will discuss three key features of the litigation of international disputes before the International Court of Justice: the identity of the parties, the subject-matter of the disputes, and issues of procedure.

1 Identity of the parties

I begin with some words on how our changing world has had implications for who litigates before us today.

The International Court is being more widely used than ever before, both in terms of the number of parties submitting cases to us and the regions of the world represented by those parties. Seventy-nine states have engaged in court proceedings in the past decade. They have participated as applicants and respondents in contentious cases or have submitted written or oral statements in advisory opinion proceedings. This has naturally had an impact on the workload of the court.

From 2002 to the end of 2005, the court decided eighteen cases. Over the same period, eight new contentious cases were filed with the court, along with one request for an Advisory Opinion. In 2006, the court disposed of one case (*Congo* v *Rwanda*) and continued deliberations in three other cases. Three new contentious cases were filed with the court in 2006 (one of which was later withdrawn), as well as two requests for the indication of provisional measures. Such requests have priority over all other cases and were rapidly answered by the court.

In 2007, we had our most productive year since the court was established. We issued two judgments on the merits, two judgments on preliminary objections to jurisdiction and an order regarding provisional measures. These cases have involved states from Latin America, Europe and Africa.

Thus far this year, we have held hearings in one case between Djibouti and France and two new contentious cases have been filed with the court: one between Peru and Chile concerning the delimitation of their maritime zones; and one between Ecuador and Colombia on the alleged aerial spraying by Colombia of toxic herbicides over Ecuadorian territory in connection with opium and coca plantations. Our current docket stands at thirteen cases. You will understand that when states litigate, we are speaking of mega-cases, usually larger in terms of pleadings than even the most major commercial cases.

Our cases come from all over the world: our docket presently contains five cases between Latin American states, three between European states, two between African states, one between Asian states and two of an intercontinental character. Interestingly, 2006 was

an "African year" for the Court with cases between the Democratic Republic of the Congo (DRC) and Uganda, the DRC and Rwanda, and Guinea and the DRC. The following year, 2007, was a "Latin American and Asian year" with cases between Nicaragua and Honduras, Nicaragua and Colombia, and Malaysia and Singapore. This year, 2008, is shaping up to be a truly international year with both an intercontinental case, *Djibouti* v *France*, and two Eastern European cases, *Croatia* v *Serbia and Montenegro* and *Romania* v *Ukraine*.

Over the past few decades, the court has been gratified to see the trust placed by Asia and Africa – as well as Latin America – in third-party dispute settlement in general, and in the resolution of interstate disputes by the International Court in particular.

The past decade, in particular, has seen a dramatic increase in the number of cases brought to the court by African States. From 1960 to 1980, only five cases came to the International Court involving African countries. In the past decade, eleven such cases – more than double in half the time – have come to the court. And in very recent times – just the past three years – eight Latin American states have submitted their disputes to the court for resolution. Of the current docket, more than one-third of the cases involve Latin American states. There seems no particular reason why this should be so.

That states from all regions of the world are now ready to appear before the International Court is warmly to be welcomed. It confirms that the International Court is truly the court of the United Nations as a whole.

Within this general trend towards wider use of the court, there are several noticeable tendencies in terms of *how* states are choosing to come to the court. The Statute of the Court is annexed to the Charter and each of the 192 member states of the United Nations is thereby a party to the Statute. That constitutes an *entitlement* to use the court. But states cannot be compelled to use the court – consent is required to be a party to a case. There are several ways in which that consent can be expressed.

I refer first to the so-called "optional clause", by which a state formally notifies to the Secretary General of the United Nations its agreement to be taken to court by any other state accepting the same commitment. In recent times, a number of states have taken this route: of the sixty-five declarations accepting the optional clause, one-third have been deposited in the past fifteen years.

Today, approximately 300 treaties refer to the court in relation to the settlement of disputes arising from their application or interpretation and there has been a distinct trend for states to withdraw reservations they made to such treaties in earlier years. Last year, Russia passed legislation removing reservations to the ICJ's jurisdiction in six international treaties against terrorism. The court today receives many of its cases based on such jurisdictional provisions in treaties. For example, between 1998 and 2003, three cases were brought to the court by Paraguay, Germany and Mexico, claiming the United States had violated the right of their arrested nationals to consular notification. Jurisdiction was based on a clause contained in the Vienna Convention on Consular Relations.

Two states may have reached the end of the road in trying to settle a dispute diplomatically and may jointly decide to let the court resolve the matter. Two cases from Asia recently came to the court in this manner: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, which was decided in 2002, and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, in which hearings were held in November 2007. That case is currently under deliberation. Such cases have been coming in from every corner of the world: *Benin/Niger*; *Botswana/Namibia*; *Hungary/Slovakia*. This would seem to show both an increased readiness on the part of states everywhere to have recourse to a judicial resolution of their disputes, and a continuing global confidence in the ICJ.

The final method of consenting to the court's jurisdiction is *forum prorogatum* whereby one state brings a case, simply inviting the intended respondent to accept the court's jurisdiction for the purpose of the case. Since 1978, when this method of consent was included in the Rules of Court, there have only been two occasions that it was been used. It is striking that both instances have taken place in the past three years and both involved France and an African State. In 2003, France accepted the jurisdiction of the court with respect to the case concerning *Certain Criminal Proceedings in France* brought by the Republic of the Congo. And in 2006, France consented to the court's jurisdiction in a case brought by Djibouti, concerning *Certain Questions of Mutual Assistance in Criminal Matters*. That case is also under deliberation at the moment.

You may be interested to know that the International Court enjoys a very high rate of compliance with its judgments from all kinds of states in all types of cases; a rate that compares favourably with that of any national court. It is to be hoped that this is a result of the quality and impartiality of the judgments, but also due to the court's special status within the UN. No member state wants to sit in the General Assembly or Security Council, knowing that it is violating a decision issued by another main organ of the UN, which is binding upon it. That is why even in cases that have been bitterly fought and have a volatile history, we have seen the commitment to implement the judgment once it is given.

2 Subject matter of the disputes

In our contemporary world we are finding that not only do the cases come in from all the regions of the globe, but they also address all types of legal problems.

States continue to bring the classical types of disputes to the court – many years after the era of decolonisation, we continue to have a steady stream of territorial and maritime border disputes submitted to the court for resolution. At the same time, cases on cutting-edge topics of international law are also being brought by parties seeking judgments on disputes concerning the use of force, immunities, or mutual legal assistance in criminal matters.

To set the scene, let me give you a few examples that show how at one and the same time we continue to deal with classical topics but also increasingly respond to current preoccupations.

This "classic topic" example is from 1994, when Cameroon brought a case against Nigeria concerning sovereignty over 1800 km of land frontier, the vast Bakassi Peninsula, and the entire maritime delimitation offshore. As you can imagine the political and economic issues at stake for both of the states were enormous. The court's judgment delimited the long land frontier, held that the Bakassi Peninsula belonged to Cameroon, and delimited the respective maritime spaces. With some assistance from Kofi Annan while he was Secretary General, the court's judgment was implemented step by step. Generally, good relations have resumed between the two states and the military have stepped back.

We continue to receive cases concerning territorial and maritime matters. In the past year alone, the court has heard three such cases. A dispute between Malaysia and Singapore concerning the sovereignty over certain maritime features is currently under deliberation. Then there are two cases brought by Nicaragua against Honduras and Colombia. The court delivered its judgment in the *Nicaragua* v *Honduras* case last December 2007. The dispute concerned the maritime boundary between the two countries as well as sovereignty over four cays in the Caribbean Sea. The court carefully examined the evidence, including the circumstances of an Award of the King of Spain made in 1906, diplomatic exchanges between the various governments of Nicaragua and Honduras, and whether there had been an actual exercise or display of authorities by the two states over the islands in dispute. The

court decided the four cays belonged to Honduras and a bisector line should serve as the maritime boundary.

We dealt in 2007 with the jurisdictional phase of a case involving Nicaragua and Colombia, which also concerned title over islands and the location of the maritime frontier. The parties are now proceeding with their written pleadings.

Later in 2008, we will hold hearings in a case between Romania and Ukraine concerning maritime delimitation in the Black Sea. As you can see, disputes involving classical territorial and maritime issues continue to occupy an important place on the court's docket and come from all over the world.

But we inevitably find, in the greater readiness that exists today to have disputes resolved by judicial means, that we are also deciding cases that involve the use of force and violations of human rights law and humanitarian law.

In 2005, the court issued a judgment in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Uganda*). That case involved very grave allegations relating, inter alia, to the unlawful use of force, violation of territorial sovereignty, occupation, human rights and humanitarian law violations, as well as the illegal exploitation of natural resources. This was by no means an easy case for the court. In the first place, when the deliberations on the merits started, the armed conflict was not entirely settled on the ground. Moreover, the number of specific violations alleged by the parties and the amount and variety of material submitted in support of these allegations were unprecedented.

In its judgment of 19 December 2005, the court ruled favourably on several of the Congo's claims although it did follow Uganda on one of its counter-claims. The court's detailed and objective findings helped resolve at least some of the intractable issues of fact and law in the Great Lakes region.

I am also going to have to say some words on the *Genocide* case between Bosnia and Herzegovina and what was then known as Serbia and Montenegro. The case concerned what is widely regarded as the most serious violation of human rights – the commission of genocide. Given that this was the first legal case in which allegations of genocide had been made by one state against another, the International Court was acutely sensitive to its responsibilities. The court – as it always does – meticulously applied the law to each and every one of the issues before it.

In its judgment, delivered in February 2007, the court found it clearly established that massive killings and other atrocities were perpetrated during the conflict throughout the territory of Bosnia and Herzegovina, but the evidence had not convincingly shown that those acts in these many locations were committed with the specific intent required for the crime of genocide, that is, the intent to destroy, in whole or in part, the group as such. However, it did find that the killings in Srebrenica in July 1995 were committed with the specific intent to destroy, in part, the group of the Muslims of Bosnia and Herzegovina in that area and that what happened there was indeed genocide.

The court then turned to the question of Serbia's responsibility for such genocide in Srebrenica. It found that all the evidence indicated that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS (army of the Republika Srpska) Main Staff. The army of Serbia and Montenegro was not proved to have itself been actively engaged, nor was there an "evidence trail" to show the orders came from Belgrade.

Nonetheless, the court found that Serbia *had* violated its obligation to prevent the Srebrenica genocide. This obligation is contained in Art. 1 of the Genocide Convention.

It requires states that are aware, or should normally have been aware, of the serious danger that acts of genocide would be committed, to employ all means reasonably available to them to prevent genocide. Serbia could, and should, have acted to prevent the genocide, but did nothing.

The court further held that the respondent had violated its obligation to punish the perpetrators of genocide, including by failing to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia (ICTY) with respect to the handing over for trial of General Ratko Mladić

The case has generated considerable publicity. The concept of genocide is often used loosely and inaccurately, not only by victims but also by those in authority. It must be welcome that today politicians and others are so committed to the idea that all efforts must be mobilised against the occurrence of genocide. But this phenomenon, so laudable in principle, has brought with it its own problems, too. We see governments passing legislation instructing citizens as to what events in history they may not deny were "genocide"; we see art and other exhibitions being threatened or closed down because of angry responses to certain events being classified (or not classified) as "genocide". We see confident assertions by press, politicians, yes, and victims too, as to this or that being "genocide". We are at risk of losing the idea of genocide as a concept of international law. Those who invoke it know little or nothing of the Genocide Convention, in which genocide and related offences are meticulously defined.

It seems generally appreciated that other concepts of international law most usually require legal training to be appropriately invoked: and when they are invoked in the context of international litigation, it might be thought that there is a need for these legal definitions to be tested against evidence proven in accordance with relevant standards of proof. Not so, apparently, with genocide, which has become a term of general use, in much the same way that, for example, the concept of "aggression" has. To politicians, the media and – more understandably – victims genocide has come to be synonymous with large-scale slaughter of civilians. That is not, of course, what genocide means in law. Article 2 of the Genocide Convention defines genocide very precisely as certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" – within that definition, there are many, many complicated elements of law and fact always to be addressed.

The judgment of the court in the *Bosnia* v *Serbia* case sought not only to answer the claims before it, but also systematically to elaborate and explain each and every element in the Genocide Convention, believing this latter task is also a necessary contribution to clarity and understanding. The genocide claims that Croatia has started against Serbia and Montenegro remain on our docket, and the case is scheduled to be heard in May 2008 on preliminary objections to jurisdiction.

Another contemporary type of dispute that has been appearing on the court's docket arises from the increasing tendency for states to assert jurisdiction over heinous crimes committed against their nationals abroad, or indeed to assert a more general jurisdiction over these things. The corollary is that in so far as high state officials or even the head of state themself are implicated in these charges, state immunity is taking on a renewed and lively importance.

There has been an outburst of judicial activity in national courts on these topics in the past few years – for example, the *Pinochet* cases in the United Kingdom and the *Guatemala Genocide* case in Spain. The "International Law in Domestic Courts" database, covering the period from 2000 to the present day, contains fifty-nine cases concerning immunities in

twenty jurisdictions, ranging from Botswana to Finland and Sierra Leone. These trends have been having a knock-on effect in international courts.

At the International Court, questions of universal jurisdiction and immunities of high-level government officials were raised in the *Arrest Warrant* case of 2002. An international arrest warrant had been issued by a Belgian investigating judge against Mr Yerodia, the Minister for Foreign Affairs of the Congo. It sought his provisional detention pending a request for extradition to Belgium for alleged crimes constituting "serious violations of international humanitarian law". Mr Yerodia was accused of having made various speeches directly inciting racial hatred before he became Foreign Minister (at which later time the arrest warrant was issued). By the time the case came to court, Mr Yerodia had ceased to be Foreign Minister and had become Minister of Education. The International Court stated that the immunities of Ministers for Foreign Affairs were not granted for their personal benefit, "but to ensure the effective performance of their functions on behalf of their respective States". Freedom to travel and freedom of communication were important, as was the fact that a foreign minister "occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office". This immunity protected the individual concerned against any act of authority of another state "which would hinder him or her in the performance of his or her duties". The court ordered that the warrant be annulled and Belgium immediately complied.

Immunity issues have again been raised before the International Court in the *Djibouti* v *France* case; this time in relation to the State Prosecutor and the Head of National Security.

The rising interest among states in the investigation and prosecution of individuals outside of national borders for crimes such as crimes against humanity, torture, terrorism, and trafficking has resulted in the International Court receiving some cases concerning questions of mutual legal assistance. The current proceedings instituted by Djibouti against France are a good example. Djibouti is claiming that the refusal of French authorities to execute an international letter rogatory regarding the transmission of the record relating to a certain murder investigation violates obligations under treaties in force between the two countries. A judgment in this case will be rendered before long. In the pending case concerning *Certain Criminal Proceedings in France*, the Republic of the Congo seeks the annulment of the investigation and prosecution measures taken by French judicial authorities in response to a complaint of crimes against humanity and torture filed against, inter alia, the President of the Congo, the Congolese Minister of the Interior and the Inspector General of the Congolese Army.

I should also refer to the frequent recourse to the court for provisional measures. (This is the term used by the court for injunctions.) Whereas between 1985 and 1995 only seven requests for provisional measures were made, over the past decade the court has been asked nineteen times to exercise its power to issue provisional measures to preserve the respective rights of parties to a case. It granted the measures in fifteen of those instances. In 2001, the court ruled that provisional measures were indeed binding obligations. This phenomenon is raising a cluster of important legal issues that will surely merit our particular attention in the period ahead.

3 Procedural issues

I am now going to say a few words on procedural matters. The proceedings before the International Court include a written phase, in which the parties file and exchange pleadings, and an oral phase, consisting of public hearings at which agents and counsel

address the court. As the court has two official languages (English and French), everything written or said in one language is translated into the other.

As I mentioned earlier, all the cases that come to the ICJ are massive. Parties often raise complex jurisdictional questions as well as alleging a number of specific violations of international law on the merits. In recent cases, they have been submitting hundreds of pieces of evidence as annexes to their written pleadings. The *Bosnia and Herzegovina* v *Serbia and Montenegro* case, for example, required public hearings that stretched over two-and-a-half months covering both jurisdictional and merits issues. The court sifted through vast amounts of documentary and audiovisual evidence and heard witness testimony in the courtroom. Moreover, the court paid careful attention to the findings of the ICTY, which necessitated reading and analysing dozens of decisions issued by that tribunal over the past decade. The judgment ultimately numbered 170 pages, with about one-third devoted to analysing the evidence and making detailed findings as to whether alleged atrocities occurred in specific locations and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group that would classify them as genocide.

We work under the Statute of the Court (which is annexed to the UN Charter), the Rules of Procedure and the Practice Directions, which we introduced a few years ago to give us greater flexibility in the handling of litigation. We have Practice Directions aimed at accelerating proceedings on preliminary objections (Practice Direction V), encouraging succinct oral statements (Practice Direction VI) and controlling the submission of new documents after the closure of written proceedings (Practice Direction IX).

The Rules and Practice Directions can be amended by the court, but the Statute can only be amended in the same way as the UN Charter, that is, by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the UN, including all the permanent members of the Security Council. The Statute provides in Art. 34 that only states may be parties in cases before the court. We cannot change that, but we can and do amend our Rules and Practice Directions to allow for non-state actors – who are now such important players on the international stage – to have a voice in relevant proceedings. In 2005, the court adopted amendments to Art. 43 of its Rules to establish a mechanism to enable international organisations to submit observations on conventions that they are party to that are at issue in a case before the court. Practice Direction XII was introduced to allow states to refer to written statements or documents submitted by international NGOs in advisory proceedings.

Occasionally the court faces a situation that is right at the margin of its Statute and Rules. During the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the court faced the problem of assimilating Palestine's position with that of a state or an international organisation. The hurdle of participating in the proceedings before the court was overcome due to the General Assembly resolution requesting the opinion, the report of the Secretary General transmitted to the court with the request, Palestine's special status of observer at the UN, and the fact that it was the co-sponsor of the draft resolution requesting the advisory opinion. Palestine was therefore permitted to submit a written statement and take part in the hearings.

What has greatly changed in today's world is that there are now many litigation opportunities for states. Until the 1960s, the International Court stood almost alone as a vehicle for resolving international law disputes. But the past two decades, in particular, have seen the burgeoning of international courts and tribunals equipped to deal with disputes

that might arise under the growing reach of international law. The International Court is now joined by regional human rights courts, by international criminal courts and tribunals, by courts which are part of treaty systems for regional economic integration, by a Tribunal for the Law of the Sea, by decision-making panels on trade – and very many more.

The international criminal courts and tribunals are not interstate courts. Rather, they are designed to deal with the accountability of *individuals* for war crimes, crimes against humanity and genocide. Nonetheless, these courts may apply the same law as the ICJ, in particular on the use of force, the conduct of hostilities and the meaning of international crimes, and they can and do end up analysing the same situations (for example, the Balkans, Congo and Uganda).

There are fears in certain quarters of international law being "fragmented" by conflicting decisions of international courts and tribunals operating in a horizontal, decentralised environment. But the reality suggests that such fears are exaggerated. What is striking is not the differences between the international courts and tribunals, but the efforts made at compliance with general international law. We see this in a variety of areas where more than one judicial body is operating, such as the law of the sea, human rights law and environmental law. The ICJ enjoys cordial relationships with other international courts. We have an informal system of exchange whereby judges at international courts and tribunals receive relevant excerpts of our cases that address legal questions of particular interest, and vice versa. And the ICJ has been hosting inter-court seminars to discuss legal topics of mutual interest.

Conclusion

As a judicial institution, the International Court must provide that core predictability that distinguishes law from politics. But we have to do this in a way that is responsive to the changes in the world around us, such as the diversity of parties who appear before the court, the wide array of subject-matter involved in the disputes, the dramatic growth of other international courts and tribunals, and the fact-intensive nature of recent cases. Not all of these phenomena may be visible when reading our judgments, but they are very much in the minds of the judges.

The International Court has been actively engaged with these changes, adjusting its rules and working methods where necessary. In the past, there was a problem with long gaps between the close of the written proceedings and the opening of the oral hearings; a backlog had built up. In 2007, we eliminated this backlog and also had our most productive year on record. And now four months into 2008, we are on schedule for another busy year fulfilling our role as the principal judicial organ of the United Nations.

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New landlords: problems and solutions: Part 2

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The first part of the examination of the law concerning the rights and liabilities of successors in title of a landlord[1] dealt with the period up to the passing of the Landlord and Tenant Law Amendment Act (Ireland) 1860, invariably, despite the stricture noted by Palles CB,[2] called Deasy's Act. In this part, the law contained in that and subsequent measures is considered. The matters identified in the first part of the article as the matters of concern to someone who acquires property which is subject to a tenancy remain the same: the new landlord will be concerned to ensure that the rent is paid, and that the obligations undertaken by the tenant are performed and observed. Those, therefore, are the focus of the examination presently being undertaken. A new landlord will want, however, not only to know the benefits which will accrue to him or her: but also be concerned about the obligations which will be passed on when the takeover is completed. The extent to which the obligations of the original landlord will be binding on any successor must therefore also be considered in the discussion.

Legislation

One of the peculiarities of the law of landlord and tenant in Ireland is that in some cases the law governing the position of the parties may be found in two different enactments whose provisions do not correspond. The period under discussion in this part of the examination of the law which governs the position of a new landlord begins with the enactment of Deasy's Act. Two decades later, the provisions of the Conveyancing and Law of Property Act 1881 were enacted and made applicable to Ireland. It is the incongruity of some of the provisions in these enactments that poses the difficulties. It is clear that the provisions of Deasy's Act and those of the Conveyancing Act overlap in some instances, and that in such cases a new landlord wishing to recover rent or to enforce covenants in a lease against the lessee could look to either for assistance. The same is the case if it is the lessee who wishes to enforce covenants undertaken by the lessor against a new landlord. If, for example, a fee simple owner of land makes a lease by deed for twenty-five years, reserving a rent, and with a covenant by the lessee to keep the property in repair, someone who purchases the owner's estate will be able to recover the rent and enforce the covenant by reason of the provisions of either statute. Equally, if the lease contains an obligation by

1 A Dowling, "New landlords: problems and solutions: Part 1" (2008) 59(3) *NILQ* 249–89.

2 *Irish Land Commission* v *Holmes* (1898) 32 ILTR 85 at 86.

the lessor to repair the property, the lessee will be able to enforce the obligation against the new landlord by relying either on Deasy's Act or on the Conveyancing Act. In a number of cases, however, the two sets of provisions do not correspond exactly, and in such cases the plaintiff may be able to recover by reason of one statute only. The discussion which follows, therefore, proceeds by considering the provisions of each enactment which are relevant to matters of concern to a new landlord, such as recovery of rent or enforcement of covenants. Before that, however, it is possible to identify some situations where one or other (but not both) of the enactments in question will be applicable to the situation. In order to identify these situations, it is convenient at this stage to set out the provisions of s. 10 of the 1881 Act, though further comment on the provisions of the section will be necessary later.

The section provides as follows:

> Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased.

It is apparent that the section deals with a number of matters: rent and its recovery; the benefit of covenants entered into by a lessee, and their enforcement; and conditions in a lease. These are considered below, but for the moment it is other aspects of the section that are of concern, namely: the applicability of the section only where there is a lease; the annexation of the various matters referred to in the section to the reversionary estate; and the ability to enforce payment of rent and performance of the lessee's covenants being based on entitlement to the income of the land leased. These requirements do not exist in the sections of Deasy's Act which are relevant to the situation where a new landlord wishes to recover rent and enforce covenants against a lessee, or where a lessee wishes to enforce covenants against the new landlord. From the provisions in s. 10, it is therefore possible to identify a number of situations involving successors in title to the original parties to a tenancy where only the provisions of Deasy's Act can regulate the rights and obligations of those concerned, or alternatively only the provisions of the Conveyancing Act will govern the situation.

Tenancies created orally

Both before and since Deasy's Act, it has been possible for a tenancy to be created orally in some instances.[3] In the case of such a tenancy, a new landlord seeking to rely on statutory provisions to enable rent to be recovered or covenants to be enforced against the tenant will be able to rely only on the provisions of Deasy's Act. Section 45, which provides for recovery of rent by action, and ss 12 and 13, which regulate the enforcement of covenants, apply respectively to rent reserved by and to agreements contained in "the lease or other contract of tenancy". While "lease" is defined in s. 1 to mean an instrument in writing, "other contract of tenancy" immediately following must refer to tenancies created otherwise than in writing, and so include tenancies created orally and tenancies arising by implication from the acts of the parties, as where a tenant holds over after the expiry of a lease and rent is paid and received. In contrast, the provisions of s. 10 of the Conveyancing Act apply only where there is an instrument in writing. The section refers to rent reserved

3 See Deasy's Act, s. 4.

by a lease, and to the benefit of covenants "therein contained". Although "lease" is not defined in the 1881 Act, the decisions on the section show that while the term is not restricted to an instrument under seal,[4] a tenancy created otherwise than by instrument in writing does not come within the provisions of the section.[5]

Tenancies with no reversion

One of the alterations to the law of landlord and tenant in Ireland effected by Deasy's Act was to enable the relation of landlord and tenant to be created although the landlord did not retain a reversion in the land that was the subject of the tenancy.[6] Consequently, it became possible for the relation to exist in cases where it would not exist at common law. Perhaps the most obvious result of this provision of the section is the existence in Ireland of fee farm grants creating the relation of landlord and tenant between grantor and grantee.[7] For this, and any other case where no reversion is retained, the provisions of Deasy's Act will be relevant for a new landlord: those of the Conveyancing Act will not, since they refer to rent and covenants being annexed to the landlord's reversionary estate.

Tenancies reserving no rent

Conversely, one case which falls within the Conveyancing Act, but may not come within the provisions of Deasy's Act, is that of a tenancy in which no rent is reserved. Strictly, this misstates the problem, since the question is whether an arrangement which would otherwise be a tenancy is prevented in Ireland from being a tenancy if no rent is reserved. At common law there is no difficulty, rent not being an essential element for the relation of landlord and tenant to exist.[8] Accordingly, if a lease is created in which there is no reservation of rent, the case will still fall within the provisions of the Conveyancing Act. The difficulty in Ireland is that it may not come within the provisions of Deasy's Act. The problem arises because of the definition of "lease" in s. 1 of Deasy's Act, and because of s. 3 of the Act. In s. 1, "lease" is defined as an instrument in writing containing a contract of tenancy "in consideration of a rent or return". Section 3 states that the relation of

4 In this regard, the position under the Conveyancing Act is different from that under the Grantees of Reversions Act 1540 and the Statute of Reversions (Ireland) 1634, which applied only where the tenancy had been created by deed. Independently, however, of the Conveyancing Act, the significance of a seal was considered by Denning LJ in *Boyer* v *Warbey* [1953] 1 All ER 269 at 274 to have diminished by reason of the Judicature Act 1873 (cf. Judicature Act (Ireland) 1877): "I know that before the Supreme Court of Judicature Act, 1873, it was said that the doctrine of covenants running with the land only applied to covenants under seal and not agreements under hand . . . but since the fusion of law and equity the position is different. The distinction between agreements under hand and covenants under seal has been largely obliterated. There is no valid reason nowadays why the doctrine of covenants running with the land – or with the reversion – should not apply equally to agreements under hand as to covenants under seal, and I think we should so hold, not only in the case of agreements for more than three years which need the interposition of equity to perfect them, but in the case of agreements for three years or less which do not." The reference to agreements for three years is to the requirements in the Law of Property Act as to formalities in England and Wales.

5 See *Rickett* v *Green* [1910] 1 KB 253 (landlord's successor successful in proceedings for possession where letting contained in instrument in writing not under seal, the court considering the case within the doctrine of *Walsh* v *Lonsdale* (1882) LR 21 Ch D 9 and the parties as in the position they would have been in had a lease under seal existed); *Cole* v *Kelly* [1920] 2 KB 106 (correspondence recording parties' agreement for tenancy following the expiration of lease held sufficient for the purposes of s. 10); *Rye* v *Purcell* [1926] 1 KB 446 (letter containing terms of tenancy sufficient though signed only by landlord). Contrast *Blane* v *Francis* [1917] 1 KB 252 (landlord's successor unable to enforce repairing obligation where tenancy had arisen by implication from tenant's holding over after expiry of lease).

6 Deasy's Act, s. 3.

7 Such grants can no longer be created: see Property (NI) Order 1997, Art. 28(1).

8 *Ashburn Anstalt* v *Arnold* [1998] 2 All ER 147.

landlord and tenant exists in all cases where there is an agreement by one party to hold land from or under another "in consideration of any rent". The absence of an obligation to pay rent therefore prevents an instrument being a lease, and accordingly, s. 12 can only apply to an arrangement where no rent is payable if the arrangement can come within it as being a "contract of tenancy". The problem in doing so is s. 3, which seems to make rent a necessity.[9]

The problems posed by Deasy's Act for arrangements under which no rent is payable may be of interest to academics, but are of little practical significance for present purposes, for two reasons. First, practitioners have long been aware of the problem of rent-free arrangements and have overcome it by providing for payment of a nominal rent, in order to avoid the doubt raised by Deasy's Act and so ensure that the relation of landlord and tenant will be created. Secondly, and more fundamentally, since the premise upon which the present discussion is based is the attraction of tenanted land as an investment for a new landlord, an arrangement under which no rent is payable by the occupier is hardly likely to be one which will make the purchase of the landlord's interest attractive.

Landlord's title to sue

A question still to be considered in comparing the provisions of the two enactments concerns the title of the new landlord to sue. While in many cases a successor to the original landlord may come within the terms of both statutes, the different terminology used in the statutes means that in some cases a new landlord may come within one of the statutes but not the other.

So far as Deasy's Act is concerned, the relevant sections base the ability to sue simply on being the landlord at the relevant time. Section 45 of Deasy's Act provides that "every person entitled to any rent" may bring an action to recover the rent. Likewise, s. 12 of the Act provides that "every landlord" has the same action and remedy for breach of the agreements by the tenant as the original landlord had. Other sections dealing with remedies for the landlord refer simply to "the landlord" or to "any landlord".[10] "Landlord" is defined in s. 1 as including the person for the time being entitled in possession to the estate or interest of the original landlord, whether the interest has been acquired by assignment, devise, bequest or act and operation of law.[11] The term clearly covers the ordinary case of someone who acquires the estate formerly held by the original landlord. Though authority is lacking, the expression is unlikely to include some individuals who do fall within s. 10 of the Conveyancing Act.

Under s. 10 of the Conveyancing Act, the plaintiff's ability to sue is based on the plaintiff being "the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased". The expression clearly covers someone who acquires the estate of the original landlord, even where the title to the land is registered and the transfer to the new landlord has not yet been registered.[12] Beyond that, however, the section has been held to mean that a mortgagor of the land can bring an action, so long as the mortgagee has neither taken possession nor given notice of the

9 Such was the view of Kenny J (dissenting) in *Irish Shell & BP Ltd* v *Costello Ltd* [1981] ILRM 66.

10 See ss 52 (ejectment for non-payment of rent) and 51 (distraint) respectively.

11 So, in *Liddy* v *Kennedy* (1871) LR 5 HL 134, the original landlord and his brother together constituted "the landlord" following the execution by the original landlord of a deed whereby the original landlord covenanted to stand seised of the land to the use of himself and his brother as tenants in common, thereby overcoming the argument by the tenant that there had been a severance of the reversion: see below, p. 365.

12 *Scribes West Ltd* v *Relsa Anstalt and Others (No. 3)* [2004] EWCA Civ 1744.

intention to do so.[13] Formerly, the mortgagee as assignee of the reversion would have been the proper plaintiff in an action to recover rent or to enforce the covenants in the lease. Such would seem to remain the position under Deasy's Act.[14] Mortgagors apart, the question is whether the terms of s. 10 would enable others who would not come within Deasy's Act to bring an action for the rent or to enforce covenants by a lessee.[15]

Recovery of rent

The various courses of action open to a landlord to secure payment for the land let by him or her were considered in the first part of this article. To recover rent, the landlord might bring an action of debt, or of covenant if there was a covenant by the tenant to pay the rent. In cases where there was a promise, but the promise was not under seal, an action of *assumpsit* might be available instead. Alternatively, the landlord might bring an action for reasonable satisfaction for the tenant's use and occupation of the land. Independently altogether of litigation, the landlord had the ability to distrain for rent due, or might be able to terminate the tenancy if there was a right to re-enter in the event of non-payment of rent. Both Deasy's Act and the Conveyancing Act contain provisions concerning the recovery of payment for the tenant's enjoyment of the land.

Deasy's Act

Deasy's Act preserved the various options available to a landlord seeking to recover rent or a reasonable satisfaction for the use and occupation of the landlord's land. The Act made little alteration to the law as to distraint for rent.[16] Ejectment for non-payment of rent was dealt with to a greater extent, s. 52 providing a means by which a landlord could bring proceedings where a year's rent was in arrear under one of the various forms of tenancy mentioned in the section, and the sections following making provision for various matters concerning the action. Landlords wishing simply to obtain judgment for money due to them could look to ss 45 and 46. Both sections remain in force. By the former, every person entitled to any rent in arrear under any lease or other contract of tenancy may bring an action to recover such arrear from the tenant of the land at the time the arrear accrued. By the latter, every person entitled to any lands who suffers the lands to be held or occupied under an agreement not specifying the amount of rent may recover by action a reasonable satisfaction for the use and occupation of the land. In each case, the opening words of the section ("Every person entitled . . .") are wide enough to enable successors in title to the original landlord to bring the action in question. Section 45 makes clear that those entitled to bring an action for rent include persons acting in representative capacities, referring to

13 *Turner* v *Walsh* [1909] 2 KB 484.

14 See, however, Judicature (NI) Act 1978, s. 93 (replacing Judicature Act (Ireland) 1877, s. 28(5)), which enables a mortgagor to sue for rent though the reversion is in a mortgagee. For the effect of the 1877 Act, see *Patterson* v *O'Reilly* (1882) 10 LR Ir 304. Under the corresponding provision of the Judicature Act 1873 a mortgagor was unable to sue for damages for breach of covenant by a lessee (*Turner* v *Walsh* [1909] 2 KB 484) or to recover possession based on forfeiture, the right to forfeit being in the mortgagee and not having been exercised by the mortgagee (*Matthews* v *Usher* [1900] 2 QB 535).

15 In *Shalit* v *Joseph Nadler Ltd* [1933] 2 KB 79, a beneficiary under a trust declared by the landlord was held not to be a person entitled to the rent under the corresponding provisions of the Law of Property Act, and so was unable to distrain for rent, since his entitlement was not to the rent, but to an account from his trustee of the profits received from the land.

16 S. 51 provided that it would not be lawful to distrain for rent accruing due more than a year before. The absence of other provisions dealing with distraint is perhaps the most obvious difference between Deasy's Act and the Bill introduced in 1852 which is the source of the provisions of the Act (see below, p. 356). Cll 68–97 of the earlier Bill made extensive provision for distraint, but only cl. 68 was enacted in Deasy's Act, as s. 51.

cases where the plaintiff is entitled to the rent in right of his see, dignity, benefice or corporation, or in right of his wife, or as executor or administrator of any party deceased.

Conveyancing Act 1881

The recovery of rent by a successor in title to the landlord is also provided for under the Conveyancing Act. Section 10 of the Act provides that rent reserved by a lease is annexed and incident to and shall go with the reversionary estate in the land, and is capable of being recovered by the person from time to time entitled, subject to the term, to the income of the whole, or any part of the land leased. Those who later acquire the reversion acquire therefore also the rent reserved by the lease and can enforce payment of the rent.[17] The position of mortgagors and others who do not have the reversion has already been considered.

Apportionment

The position at common law was that rent was not apportionable in respect of the period to which it related, so that the person who was entitled to the landlord's interest on the day rent fell due was entitled also to the whole of the rent then payable, even if it related in part to a period when the landlord's interest was owned by someone else. The position changed by statutes of 1783 and 1834, but these were repealed by Deasy's Act and new provisions put in their place.[18] One of these provisions, s. 50, remains in force,[19] and provides that, in cases not falling within s. 34 of the Act, a landlord is entitled to a reasonable proportion of the rent payable under a tenancy where the tenancy determines between gale days otherwise than by an act of the landlord.[20] Not long after Deasy's Act however, other provisions for apportionment of rent were enacted in the Apportionment Act 1870. Section 2 of the 1870 Act provides that rents are to be considered as accruing from day to day and are apportionable in respect of time accordingly. The effect of the Act where the new landlord was a devisee of the original landlord can be seen in *Roseingrave* v *Burke*,[21] where Chatterton V-C held that the Act had made an apportionment necessary as between the new landlord and the original landlord's estate.[22] Whether the same reasoning would apply in the case of

17 For an argument that the effect of the section was to change the nature of the right to rent from an interest in land to a contractual right see *Inland Revenue Commissioners* v *John Lewis Properties plc* [2002] 1 WLR 35. The basis of the argument was that since, by the section, rent is annexed to the reversionary estate and goes with it, a transferee of the reversion will be entitled to the rent despite the prior assignment by the landlord of the right to receive the rent to another party. The argument was rejected by Lightman J. The decision of the Court of Appeal ([2003] Ch 513) does not deal with the point.

18 Deasy's Act, ss 49 and 50.

19 S. 49 was repealed by the Statute Law Revision Act 1893.

20 S. 50 reads: "In every case not coming within the provisions of clause thirty-four, when the tenancy determines otherwise than by the act of the landlord, at any time before the day on which the rent would become payable, the landlord, at the time of such determination (unless it is otherwise agreed), shall be entitled to a reasonable proportion of the rent according to the time that has elapsed from the commencement of the tenancy, or the last gale day, to the day of the determination of such tenancy, including such day."

21 (1873) IR 7 Eq 186. The case was followed in England the following year in *Capron* v *Capron* (1874) LR 17 Eq 288. See also *Hasluck* v *Pedley* (1874) LR 19 Eq 271; *Constable* v *Constable* (1879) 11 Ch D 681; *In re Ford* [1911] 1 Ch 455.

22 In reaching a decision different from that in *Sealy* v *Stawell* (1868) IR 2 Eq 326, decided before the 1870 Act came into force, the Vice-Chancellor explained (at 191): "But the Statute since enacted [the 1870 Act] appears to me to affect the question materially. It makes rents to accrue from day to day, and therefore, for the purposes of apportionment, makes each day's rent of the nature of an accrued and completed gale. It would therefore, in my opinion, in order to pass the portion of a current half-yearly gale, accrued before the testator's death, with the estate in the lands to the devisee, require words as clear as to give him a gale the whole of which had accrued due before the death."

a gift *inter vivos* does not seem to have been decided. Where the new landlord is a purchaser, the contract between the parties will determine whether an apportionment is needed. In the ordinary case, a vendor is entitled to the rents and profits up to completion, so that an apportionment will be required where completion takes place between the dates on which rent is payable.[23] So far as the tenant of the land is concerned, however, the Act adopted the same procedure as had existed under the earlier legislation, namely that the tenant should pay the whole of the rent to the new landlord when it fell due, but the original landlord or the landlord's estate would be entitled to recover from the new landlord the proportionate part attributable to the period before the transfer of the land to the new landlord.[24]

Covenants

The difficulties at common law for successors in title to a landlord lay not so much in impediments to the recovery of rent, but with the enforcement of covenants, and led in England to the enactment of the Grantees of Reversions Act 1540, and in Ireland to the Statute of Reversions (Ireland) 1634. The Statute of Reversions is one of the measures repealed by Deasy's Act.[25] In place of the provisions of the Statute of Reversions, Deasy's Act contained provisions which continue to govern the rights and obligations of successors in title to the original parties to a tenancy today. Unfortunately, they are not the only provisions: ss 10 and 11 of the Conveyancing and Law of Property Act 1881 are also of relevance in determining the ability of a successor to a landlord to enforce the obligations of the tenant, and the liability of new landlord.

Deasy's Act

Sections 12 and 13

Sections 12 and 13 of Deasy's Act provide for the enforcement by a new landlord of the obligations of a tenant, and the liability of a new landlord to a tenant on covenants undertaken by the original landlord. Simplifying matters by omitting consideration of the tenant's successors, the sections provide that an assignee of the landlord has the same action

23 See *Coal Commission* v *Earl Fitzwilliam's Royalty Co* [1942] Ch 365. Contrast *In re Dawson's Estate* (1888) 21 LR Ir 441 where Monroe J held a purchaser entitled to the full rent payable after completion of the contract, referring to the practice of the court being based on the assumption that the Apportionment Act did not apply. The explanation for the decision in *In re Dawson's Estate* lies in *Waldon* v *Condon* (1854) 3 Ir Ch R 431, in which Cusack Smith MR explained that in cases of sales in the Incumbered Estates Court the purchaser was required to pay the purchase money into court shortly after the contract was made, and so should be entitled to the full rent payable by tenants of the land.

24 Apportionment Act, s. 4 (proviso). If the new landlord's title is itself a leasehold title, the 1870 Act will also operate on the rent which is payable *by* the new landlord. If the transfer takes place between days appointed for payment of rent, the new landlord as assignee of the lease will be liable to the superior landlord only for a proportionate part of the rent payable to the superior landlord: see *Glass* v *Patterson* [1902] 2 IR 660. Note, however, the comments of Kenny J, dissenting, at 664: "It is a somewhat singular circumstance to find this point only now for the first time raised in a definite shape in this country . . . I can account for the absence of authoritative decision only on the assumption that no one thought of questioning what was generally supposed to be the liability of the tenant's assignee, who became such assignee in the interval between two gales, for the *full* gale of rent that became due and payable while the estate was vested in him. If the Act does apply in the manner and to the extent contended for by the defendant, I can only say I am confident that not only has property been uniformly dealt with on a wholly different basis during these thirty-two years as between three sets of parties, namely – (1) landlords and their tenant's assignees; (2) successive owners of the tenant's interests; and (3) successive owners of the landlord's estate – but that the result of holding that there is an apportionment in such cases as the present will be to create mischiefs and inconveniences, instead of – in the words of the statute – removing them." See also *Swansea Bank Ltd* v *Thomas* (1879) 4 Ex D 94; *Parry* v *Robinson-Wyllie Ltd* (1987) 54 P & CR 187.

25 Deasy's Act, s. 105 and Sch. B.

and remedy against the tenant as the original landlord had, for breach by the tenant of the agreements contained in the tenancy. Correspondingly, the liability of a new landlord appears intended to be the same as that of the original landlord, the sections providing that a tenant has the same action and remedy against an assignee of the landlord as existed against the original landlord, for breach of the agreements on the part of the landlord contained in the tenancy.

Looking at the sections in more detail, s. 12 of Deasy's Act provides as follows:

> Every landlord of any lands holden under any lease or other contract of tenancy shall have the same action and remedy against the tenant, and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant, or his heir or personal representative respectively; and the heir or personal representative of such landlord on whom his estate or interest under any such lease or contact shall devolve or should have devolved shall have the like action and remedy against the tenant, and the assignee of his estate or interest, and their respective heirs or personal representatives, for any damage done to the said estate or interest of such landlord by reason of the breach of any agreement contained or implied in the lease or other contract of tenancy in the lifetime of the landlord, as such landlord himself might have had.

Section 13 provides:

> Every tenant of any lands shall have the same action and remedy against the landlord and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in the lease or other contract concerning the lands, as the original tenant might have had against the original landlord, or his heir or personal representative respectively; and the heir or personal representative of such tenant on whom his estate or interest shall devolve, or should have devolved, shall have the like action and remedy against the landlord, and the assignee of his estate or interest, and their respective heirs and personal representatives, for any damage done to the said estate or interest of such tenant by reason of the breach of any agreement contained or implied in the lease or other contract of tenancy in the lifetime of the tenant, as such tenant might have had.

The provisions of s. 12 have been justifiably described as convoluted.[26] The same is true for those of s. 13. Before considering how the sections altered the law which existed before 1861 in relation to successors in title to the landlord, a word about the origin of the provisions may be appropriate, as the history of the provisions throws some light on one question which has given rise to discussion subsequently, namely the reference in s. 13, but not in s. 12, to agreements "concerning the lands".

Parliamentary history

The origins of Deasy's Act have been charted elsewhere.[27] Briefly, the measure began life as one of four Bills introduced by Joseph Napier, Attorney General for Ireland, on behalf of the Government in 1852, in an effort to solve what is known as the Irish land problem. Opposition to some of the measures, along with changes in government, contributed to the failure to enact the measures. In the ensuing years attempts were made to have the measures passed. Eventually, in 1860, the Government saw through the passage of what was

26 J C W Wylie, *Landlord and Tenant Law* 2nd edn (Horsham: Tottel, 1998), para 21.22.

27 A Dowling, "The genesis of Deasy's Act" (1989) 40 *NILQ* 53

essentially the least controversial of the Bills of 1852, as Deasy's Act. So far as ss 12 and 13 of Deasy's Act are concerned, the origins of the provisions can be traced to Bills introduced in 1854. A comparison of Bills published in July 1853[28] and June 1854[29] shows the evolution of the original text proposed by Napier into what became ss 12 and 13 of Deasy's Act. In that evolution, not only did the provisions become more complicated, they acquired the words "concerning the lands" which had been absent from the clauses of the earlier Bill.[30] The wording appears, however, in both clauses of the 1854 Bill.[31] The similarity between the clauses of the 1854 Bill and the provisions of ss 12 and 13 of Deasy's Act is obvious at a glance. Not so obvious is the omission from s. 12 of the words in question. It seems reasonable to suppose that ss 12 and 13 were intended to be mirror images of each other: that at least appears to have been the intention of the corresponding provisions in the earlier Bills. Unfortunately, when later the Bill[32] which became Deasy's Act was prepared, the words "concerning the lands" were omitted from what became s. 12, while remaining in what became s. 13.[33] Given the consistency of the provisions in the earlier Bills, either in the exclusion of the expression from each of the respective clauses, or in its

28 (1852–3) *British Parliamentary Papers* (House of Commons) iv. 167 (Bill No. 796).

29 (1854) *British Parliamentary Papers* (House of Commons) iii. 381 (Bill No. 130).

30 Cl. 15 of the 1853 Bill provided: "Every Tenant, whether by original Contract, lawful Assignment, or by Operation of Law, of any Lands holden under any Lease, or of any Part thereof, and his Executors and Administrators, shall have the same Action and Remedy against the Landlord, and the Assignee of his Estate and Interest, or of any Part thereof, in respect of all the Agreements contained in the Lease, as the original Tenant might have had against the original Landlord." Cl. 16 read: "Every Landlord, whether by original Contract or lawful Assignment, Devise, Bequest, or Act and Operation of Law, of any Lands holden under any Lease, or of any Part thereof, and his Heirs, Executors, and Administrators, shall have the same Action and Remedy against the Tenant and the Assignee of his Estate or Interest, or any Part thereof, in respect of the Agreements contained in the Lease, as the original Landlord might have had against the original Tenant." Cl. 16 differs slightly from that in Napier's original Bill, which did not contain the words "Devise, Bequest, or Act and Operation of Law": see (1852–3) *British Parliamentary Papers* (House of Commons) iv. 45 (Bill No. 18).

31 Cl. 13 of the 1854 Bill provided: "Every Landlord, whether by original Contract, lawful Assignment, Devise, Bequest, or Act and Operation of Law, of any Lands holden under any Lease or other Contract of Tenancy shall have the same Action and Remedy against the Tenant, and the Assignee of his Estate or Interest, or their respective Heirs, Executors or Administrators, in respect of the Agreements contained or implied in the Lease or other Contract concerning the Lands, as the original Landlord might have had against the original Tenant, or his Heir or personal Representative respectively, and the Heir or personal Representative of such Landlord on whom his Estate or Interest under any such Lease or Contract shall devolve or should have devolved shall have the like Action and Remedy against the Tenant, and the Assignee of his Estate or Interest, and their respective Heirs or personal Representatives, for any damage done to the said Estate or Interest of such Landlord by reason of the Breach of any Agreement contained or implied in the Lease or other Contract of Tenancy in the Lifetime of the Landlord, as such Landlord himself might have had." Cl. 14 read: "Every Tenant, whether by original Contract, lawful Assignment, Devise, Bequest or Act and Operation of Law, of any Lands holden under any Lease or other Contract of Tenancy shall have the same Action and Remedy against the Landlord and the Assignee of his Estate or Interest, or their respective Heirs, Executors, or Administrators, in respect of the Agreements contained or implied in the Lease or other Contract concerning the Lands, as the original Tenant might have had against the original Landlord, or his Heir, or personal Representative respectively; and the Heir or personal Representative of such Tenant on whom his Estate or Interest shall devolve or should have devolved, shall have the like Action and Remedy against the Landlord, and the Assignee of his Estate or Interest, and their respective Heirs, and personal Representatives, for any Damage done to the said Estate or Interest of such Tenant by reason of the breach of any Agreement contained or implied in the Lease or other Contract of Tenancy in the Lifetime of the Tenant, as such Tenant might have had."

32 (1860) *British Parliamentary Papers* (House of Commons) iv. 21 (Bill No. 92).

33 It should be pointed out, however, that the expression is not the only one which appears in s. 12 of the Act but is missing, or partially missing, from s. 13. Section 12 refers to lands "holden under any lease or other contract of tenancy", and later to the interest of a landlord "under any such lease or contract", whereas s. 13 refers in the corresponding locations of the section simply to a tenant of lands and the interest of such tenant.

inclusion in each case, the omission of the expression from s. 12 and its appearance in s. 13 is unfortunate. Whether the omission of the expression from s. 13 was deliberate or accidental is not clear from the parliamentary debates or elsewhere, and the choices of explanation seem therefore to be either that the sections should be seen as mirror images notwithstanding the appearance in the one but not the other of the expression, or that the difference signifies an unexplained intention that the sections operate differently. Consistency and the absence of any expressed reason why the sections should operate differently are arguments for the former.

Conveyancing Act 1881

A number of provisions in the 1881 Act need to be mentioned in connection with the ability of a successor in title to enforce covenants in the lease.

Sections 6 and 63

Sections 6 and 63 of the 1881 Act are some of the "word saving" provisions of the Act, designed to avoid the need for conveyances to set out in detail all the matters intended to pass under the deed in question, and which led to the Act acquiring the soubriquet the Drudgery of Conveyancers Relief Act.[34] By s. 6(1) it is provided that a conveyance is deemed to include and to convey (inter alia) all rights appertaining to the land.[35] In *Kumar* v *Dunning*,[36] it was argued that the equivalent provision in the Law of Property Act 1925[37] meant that a successor in title to a landlord acquired the benefit of a surety covenant made with the landlord. The action was between an original tenant and the surety, who had entered into the covenant with the landlord in consideration of the landlord giving consent to an assignment of the lease. Some time later the landlord assigned the reversion to a successor, who brought an action against the original tenant when the assignee of the lease failed to pay the rent. The tenant paid the sum due, and now sought to recover from the surety, on the basis that the tenant was entitled to be subrogated to the rights of the new landlord. The success of the action depended on whether the new landlord had acquired the benefit of the surety covenant, the tenant arguing that he had, because of the equivalent provision to s. 6(1) of the Conveyancing Act, there having been no express assignment of the benefit of the covenant. The court disagreed, Browne-Wilkinson V-C holding that even if the benefit of a covenant could be said to come within the expression "rights . . . appertaining to the land", a right under covenant could not appertain to the land unless the benefit was in some way annexed to the land. The court went on, however, for other reasons, to find that the new landlord could have enforced the surety covenant, and so the tenant was entitled to be subrogated to the rights of the new landlord and his action against the surety succeeded.[38]

34 See *Re Healing Research Trustee Co Ltd* [1992] 2 All ER 481 at 485.

35 S. 6(1) provides: "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

36 [1987] 2 All ER 801.

37 S. 62(1).

38 See p. 374, below.

Section 63 is another provision intended to simplify conveyancing, by providing that a conveyance is effectual to pass all the estate of the grantor in the property conveyed.[39] Speaking of the corresponding provision of the Law of Property Act 1925,[40] Lindsay J explained that:

> Its object, like that of section 63 of the 1881 Act, was to avoid the litany of express mentions of ancillaries and sweepings up which, in order to ensure that everything passed that could pass with the conveyance, had become the standard language of conveyancers.[41]

Whether the benefit of a break clause in a lease passed to an assignee of the lease by reason of s. 63 of the Law of Property Act 1925 was the issue in *Harbour Estates Ltd* v *HSBC Bank plc*,[42] Lindsay J holding that it did, overcoming the argument that the break clause, by being expressed to be personal to the lessee, could not be relied on by an assignee, by regarding the clause as touching and concerning, or having reference to the subject matter of, the lease, and its benefit accordingly passing as a right "in, to or on the property conveyed", within the meaning of the statutory provision. The reasoning appears equally applicable were the situation was concerned with a new landlord rather than an assignee of a lessee.

While, therefore, s. 63 of the 1881 Act may incidentally enable successors in title to the original parties to a lease to sue on covenants contained in the lease, it is the provisions of ss 10 and 11 of the Act which are primarily intended to achieve that purpose.

Sections 10 and 11

As with rent, s. 10 annexes to the reversionary estate in land demised by a lease the benefit of the covenants undertaken by the lessee in the lease. Removing references to rent and conditions, the section provides that, for leases made after the end of 1881, the benefit of every covenant or provision in a lease, having reference to the subject matter thereof, and on the lessee's part to be observed and performed, is annexed to and goes with the reversionary estate in the land. The section further provides that the benefit of such covenants can be taken advantage of by the person from time to time entitled, subject to the term, to the income of the land leased.

While s. 10 provides that a new landlord will enjoy the benefit of covenants entered into by the lessee with the lessor, s. 11 provides that, in the case of leases made after 1881, the new landlord will be subject to the burden of covenants made by the lessor with the lessee, and will be liable to the lessee for breach of such covenants. The section provides as follows:

> The obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

39 S. 63(1) reads: "Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to or on the same."

40 S. 63.

41 *Harbour Estates Ltd* v *HSBC Bank plc* [2005] Ch 194 at [30].

42 [2005] Ch 194.

Differences

The situations in which either the provisions of Deasy's Act, or those of the Conveyancing Act, but not both, can apply have already been considered. In cases, however, where the provisions of both enactments apply, a new landlord may prefer to rely on one enactment rather than the other, because of the differences in the relevant provisions.

Collateral covenants

Under the Grantees of Reversions Act, only covenants which touched and concerned the land were enforceable by and against successors to the original parties to the tenancy. The position under the Conveyancing Act is the same. Although neither s. 10 nor s. 11 of the Conveyancing Act uses the expression, the references to covenants "having reference to the subject matter thereof [i.e. of a lease]" in s. 10 and "having reference to the subject matter of a lease" in s. 11 have been held to mean the position is the same under the 1881 Act as pertained under the Grantees of Reversions Act.[43] The limitation means, for example, that a new landlord is not bound by an option granted to the lessee to purchase the lessor's estate;[44] or by a right of pre-emption;[45] or by an obligation to repay money deposited by the lessee as security for the rent;[46] or by a covenant to pay a sum to the lessee at the end of the tenancy.[47] On the other hand, it also means that the benefit of certain covenants entered into by the lessee will not be enforceable by a new landlord.

Whether the position is the same under the provisions of Deasy's Act is a question for which no satisfactory answer exists. We have seen already that s. 13 contains the expression "concerning the lands" when referring to agreements which are enforceable against successors of the landlord, and that there is no corresponding expression in s. 12. Leaving aside the question as to why the expression appears in the one section but not in the other, there remains the question whether it was intended to import the same requirement as existed before 1861, namely that only covenants which touch and concern the land are enforceable between successors. The hope expressed in 1944[48] that light would soon be shed on the darkness has yet gone unfulfilled. *Lyle* v *Smith*[49] remains the one case where any significant discussion of the sections has taken place.[50] In it, after stating his view that Deasy's Act was intended to get rid of technical rules, Gibson J went on to say that:

> The express language of sections 12 and 13 cannot be restricted or altered by forcing on it *Spencer's Case* applicable to the law of covenants at common law, which was so precious in the eyes of legal schoolmen that they could hardly conceive a statute disregarding it.[51]

43 *Davis* v *Town Properties Investment Corpn Ltd* [1903] 1 Ch 797; *Hua Chiao Commercial Bank Ltd* v *Chiaphua Industries Ltd* [1987] AC 99; *Caerns Motor Services Ltd* v *Texaco Ltd* [1994] 1 WLR 1249.

44 *Woodall* v *Clifton* [1905] 2 Ch 257. Insofar, however, as the option creates an equitable interest in the lessee, the option may be enforceable against a new landlord on the basis that the new landlord will be bound by equitable interests in the land unless he or she is a bona fide purchaser for value of a legal estate without notice. The need for registration must also, however, be taken into account: see *Webb* v *Pollmount* [1966] Ch 584.

45 *Charles Frodham & Co Ltd* v *Morris* (1972) 229 EG 961.

46 *Hua Chiao Commercial Bank Ltd* v *Chiaphua Industries Ltd* [1987] AC 99.

47 *Re Hunter's Lease* [1942] Ch 124.

48 M G Bready, "Covenants affecting land" (1944) 6 *NILQ* 48, at 59.

49 [1909] 2 IR 58.

50 Notable for the lack of discussion of the sections are *Athol* v *Great Western Railway Co* (1868) IR 3 CL 333, *Borrowes* v *Delaney* (1889) 24 LR Ir 503 and *Fitzgerald* v *Sylver* (1928) 62 ILTR 51.

51 *Lyle* v *Smith* [1909] 2 IR 58 at 76.

While this might suggest that the provisions of the sections are such that all the obligations which the original parties to a tenancy undertake pass to their successors, Gibson J did allow that some obligations might not burden successors to the party who undertook them, mentioning terms depending on personal considerations and not capable of vicarious performance, and collateral agreements disconnected with the land.[52] Unfortunately, Gibson J thought it undesirable to attempt an exhaustive definition as to covenants which are within or outside the statute.[53]

The only other case which requires mention for its comment on the question whether ss 12 and 13 are subject to the restrictions which applied in the law before they came into force is *Borrowes* v *Delaney*,[54] though whether the case lightens the darkness or makes it deeper is another question. The relevant comment is Andrews J's statement that even assuming the covenant in question not to run with the land, the assignee of the lease "was entitled to the right which was incident to the tenancy by virtue of the covenant when he became assignee".[55] Whether, and if so, how, this expression differs from the "touch and concern" formula is not explained.

The result therefore is that a new landlord seeking to enforce a covenant in the lease against the tenant, or a tenant wishing to enforce a covenant against the new landlord, in reliance on the provisions of the Conveyancing Act, will be able to do so only if the covenant is one which would have been described before 1881 as touching and concerning the land, and, since 1881, is, in the phraseology of the Conveyancing Act, one which has reference to the subject matter of the lease. If it is not, there remains hope that the provisions of Deasy's Act may come to the plaintiff's aid, assuming that the views expressed by Gibson J in *Lyle* v *Smith* are correct. Even then, however, the covenant may be one which falls within the description mentioned by Gibson J as incapable of vicarious performance, or so disconnected with the land as not to pass to the assignee, in which case a new landlord will take clear of the obligation created by it.

Leases of the reversion

The position in Ireland where a new landlord is a lessee of the reversion rather than a transferee of the landlord's estate is not as clear as it might be. In cases in England governed by the Grantees of Reversions Act, the courts held that the Act applied, with the result that

52 *Lyle* v *Smith* [1909] 2 IR 58 at 77: "There may be terms depending on personal considerations and not capable of vicarious performance . . . which might not come within sections 12 and 13; and collateral agreements might be conceived so disconnected with the land and demise that they might not pass to the assignee. Such terms would be construed as not intended – *prima facie*, at least – to apply or attach to the tenancy proper."

53 Little guidance on the meaning of ss 12 and 13 is given by the other members of the court. None is given by Madden J. Kenny J (at 89) thought it enough to say that the burden of the covenant under consideration was an incident of the tenancy when the defendant purchased the lessee's interest, and as assignee the defendant was liable under s. 12. Lord O'Brien LCJ comes closest to the view that Deasy's Act effected a change in the law, saying (at 70–71): "But taking, as I am told to take, the *ipsissima verba* of the section [s. 12], is there anything to prevent my giving to them their ordinary meaning? Nothing that I can see . . . The Landlord and Tenant Act of 1860 has reference to 'land,' and contracts in reference to land, and the contract under consideration is calculated to affect the subject-matter of demise. The relation of landlord and tenant does not, as it did, rest upon tenure; it now rests upon privity of contract, and if the relation of landlord and tenant rests upon privity of contract, why should not an assignee be bound by an instrument in which the word 'assigns' is used, when he takes under that instrument, and must be presumed to have known its contents? . . . The defendant has entered on the subject-matter of the tenancy under an instrument of contract which uses the word 'assigns,' and now endeavours to renounce the contractual obligations which relate to the subject-matter of the contract. This, in my opinion, he cannot do."

54 (1889) 24 LR Ir 503.

55 Ibid. at 517.

where, after making a lease of land, the lessor made a lease of the reversion, the lessee of the reversion was able to enforce the covenants in the first lease against the lessee under it. The same is the case under the Conveyancing Act, Lush J commenting that "it is not possible now to contend that a lease for years is not the grant of a reversion expectant on the determination of an existing shorter term if the lease is made to take effect in praesenti".[56] There are no reported decisions as to how the provisions of Deasy's Act apply to leases of the reversion. Bringing lessees of the reversion within the provisions of ss 12 and 13 of Deasy's Act is more difficult than seeing them as entitled to rely on the provisions of the Grantees of Reversions Act or the Conveyancing Act 1881. The Grantees of Reversions Act and the Statute of Reversions both referred to *grantees* of the reversion. The Conveyancing Act annexes the rent and the benefit of the covenants to the reversion, so that a lessee of the reversion takes his or her interest with benefits annexed. In contrast, ss 12 and 13 of Deasy's Act refer to *assignees of the estate* of the original landlord or tenant. Taken along with the definition of "landlord" and "tenant" in s. 1, the sections provide that someone who takes an assignment of the estate of the landlord is within the expression "every landlord" in s. 12, and someone who takes an assignment of the estate of an original tenant is within the expression "every tenant" in s. 13, and so is able to enforce covenants made by the tenant. Apropos liability, the sections refer to enforcement of the obligations in a tenancy against *assignees* of the landlord or of the tenant. If a lessee of the reversion is able by reason of s. 12 to enforce covenants against a tenant, it must surely be the case that the tenant can enforce covenants made by the original landlord against a lessee of the reversion. If that is so, it can only be because the reference to an "assignee" of the landlord in s. 13 includes a lessee of the reversion. Yet if "assignee" includes "lessee", it would seem reasonable to suppose that the same word in s. 12, referring to an assignee of the tenant, would include a lessee of the tenant, which would lead to the position that a landlord should be able to sue subtenants. That is certainly not the case either at common law or under the Conveyancing Act.[57] Accordingly, if lessees of the reversion are able to enforce covenants against a tenant of the land, and are liable on covenants made by the landlord with such a tenant, yet cannot sue subtenants and are not liable to them, the word "assignee" in s. 12 must be given a different meaning from that given to "assignee" in s. 13.

Breaches before assignment

Where a breach of covenant by a lessee takes place after the transfer of the reversion to a new landlord, the new landlord can bring proceedings against the lessee by virtue of the statutory provisions mentioned. Where the breach took place *before* the transfer of the reversion, the position is more difficult. Where the breach which preceded the transfer of the reversion was a breach of a covenant to pay rent, the decision in *Flight* v *Bentley*[58] meant that the new landlord was unable to recover the arrears of rent which existed at the time the transfer took place. Whether the position was the same in the case of other covenants which had been broken by the lessee before the reversion was transferred and whether the law had in any event changed since *Flight* v *Bentley* because of legislative changes were the subjects of the discussion and differing opinions in *Re King (deceased)*.[59] The view which prevailed is that the relevant provisions of the Law of Property Act 1925 brought about a change and that, because of such provisions, a new landlord was able to sue a lessee for

56 *Horn* v *Beard* [1912] 3 KB 181 at 187; see also *Cole* v *Kelly* [1920] 2 KB 106.

57 In equity a landlord may be able to bring an action against a subtenant under the doctrine of *Tulk* v *Moxhay* (1848) 2 Ph 774; 1 H & Tw 105. See, p. 375, below.

58 (1835) 7 Sim 149.

59 [1963] 1 All ER 781.

breaches of covenant which had taken place before the transfer of the reversion, this being so whether the breach was of a covenant to pay rent,[60] or any other covenant,[61] though it was open to the parties to arrange matters between them to enable the original landlord to sue.[62] The provisions of the Law of Property Act considered in *Re King (deceased)* replaced those in s. 10 of the Conveyancing Act 1881 and in s. 2(1) of the Conveyancing Act 1911.[63] The position under s. 10 has recently been held to be the same as that under the 1925 measure, Lightman J saying that the effect of s. 10 is to vest the right to sue in respect of all breaches of covenant occurring before as well as after the date of the transfer in the transferee of the reversion.[64]

If, then, the result of s. 10 of the Conveyancing Act is that a new landlord takes over the ability to sue for breaches of covenant by a lessee which took place before the transfer of the reversion took place, it may be asked whether the new landlord takes over also the liability for the breaches of covenant committed by his or her predecessor. Under s. 11, the obligation of a covenant entered into by a lessor is annexed to the reversionary estate. Garland J had to consider the question under the comparable provisions of the Law of Property Act in *Duncliffe* v *Caerfelin Properties Ltd*[65] and concluded that the new landlord did not by reason of such provisions become liable for a breach of covenant which had been committed before the reversion was transferred.[66] Thus, it would appear that the effect of the 1881 Act is that a new landlord acquires the right to sue for breaches of covenant committed by the lessee before the transfer of the reversion, but that the new landlord is not liable for breaches of covenant committed before the transfer by his or her predecessor in title.

The question is whether the situation is the same under Deasy's Act. Section 14 provides that:

> No landlord . . . being such by assignment . . . shall have the benefit or be liable in respect of the breach of any covenant or contract contained or implied in the lease or other contract of tenancy, otherwise than in respect of such rent as shall have accrued due, and such breaches as shall have occurred or continued subsequent to such assignment, and whilst he shall have continued to be such assignee . . .

60 *London and County (A & D) Ltd* v *Wilfred Sportsman Ltd* [1971] Ch 764. See also *Rickett* v *Green* [1910] 1 KB 253; *Kataria* v *Safeland plc* [1998] 1 EGLR 39; *Arlesford Trading Co Ltd* v *Servansingh* [1971] 3 All ER 113.

61 *Re King (deceased)* [1963] 1 All ER 781 (covenant to reinstate).

62 Ibid. at 793 per Upjohn LJ.

63 S. 2(1), which remains in force in Northern Ireland, provides: "Section 10 of the Act of 1881 shall apply to the benefit of every condition of re-entry or forfeiture for a breach of any covenant of condition in a lease, so as to enable the same to be enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased, although that person became, by conveyance or otherwise, so entitled after the condition of re-entry or forfeiture had become enforceable, provided that he became so entitled as aforesaid after the commencement of this Act."

64 *Inland Revenue Commissioners* v *John Lewis Properties plc* [2002] 1 WLR 35 at [6]; for the case on appeal see [2003] Ch 513.

65 [1989] 2 EGLR 38.

66 "[W]hat section 142 [of the Law of Property Act] is talking about is the obligation arising under the lease to observe and perform the repairing covenant as a repairing covenant running with the land and binding the assignee of the reversion. I would find it very hard indeed to construe 'obligation' as it is used in this section as meaning the consequences of a past breach prior to the assignee becoming entitled to the reversion, where that breach has accrued into a cause of action in respect of damage to chattels or other property, and is no longer a continuing breach of the covenant to keep in repair.": *Duncliffe* v *Caerfelin Properties Ltd* [1989] 2 EGLR 38 at 39.

It would appear from this that the situation under Deasy's Act differs from that under the Conveyancing Act, and that under the former a new landlord is unable to sue for breaches of covenant by the tenant which took place before the new landlord acquired the title, unless the breach continues after the assignment.[67] Equally, however, (and in this regard apparently in common with the position under the 1881 Act) the new landlord does not take over liability for breaches of covenant which his or her predecessor committed before the transfer.[68]

The last word concerning the consequences for a new landlord of a breach of covenant committed by his or her predecessor prior to the new landlord acquiring title relates to set-off. Discussion has taken place in a number of recent cases on the question whether, in an action by a new landlord for rent, the tenant can set off damages to which he or she is entitled arising from the claim he or she has as a result of the breach. The matter is considered below.

Conditions

Deasy's Act

At common law only the original landlord and the landlord's heirs could rely on a condition in a lease, so that a purchaser of the landlord's interest would be unable to rely on conditions as a sanction to enforce payment of the rent and performance of covenants by the lessee. The position changed in Ireland with the enactment of the Statute of Reversions. The Statute of Reversions was repealed by Deasy's Act. Unlike the Conveyancing Act mentioned below, there are no specific provisions in Deasy's Act dealing with conditions. The reason appears to be that s. 12 of the Act is wide enough to avoid the need for separate provision to be made. The section provides that every landlord shall have the same action and remedy against the tenant as the original landlord might have had. If the original landlord could rely on a condition as a remedy for the lessee's failure to perform his or her obligations, it seems clear that the new landlord can do so also. Whether the position is any different in the case of severance of the reversion is considered below.

67 In *Patterson* v *O'Reilly* (1882) 10 LR Ir 304 at 307, O'Brien J considered the assignee of a mortgagee of a landlord's estate to have taken nothing by the assignment "except from the date of it, and [to have] acquired no power to serve any notice as to the rents, which were not then vested in him, but merely as to the future rents . . . He succeeded to no right, and was subject to no liability except from the date of his deed." Cf. *Doyle* v *Hort* (1878) 4 LR Ir 455 at 467 per Palles CB, speaking of the assignee of a lease: "It is clear that being an assignee he can only recover damages for what the Court shall consider to be a breach in his own time." See also *Morris* v *Kennedy* [1896] 2 IR 247 at 251 per Holmes J: "When we speak of an assignee being entitled to the benefit or liable to the burden of a covenant that runs with the land, we refer to an unbroken covenant or to a covenant which, although broken, is continuing in its obligation, and of which there is a continuous breach as long as it is unperformed. But there may be a covenant in a lease which touches or concerns the premises demised, which, if broken, is broken finally and once for all. The covenantee is thereupon entitled to bring an action; but a subsequent assignment of his interest in the land does not transfer the right to the assignee. A covenant to pay rent reserved is broken as regards any particular gale when it is not paid at the time appointed; and the amount cannot be recovered from or sued for by an assignee taking under a subsequent assignment. The same rule applies to every covenant to do an act not continuous in its character . . ."

68 See *Riordan and Mulligan* v *Carroll* [1996] 2 ILRM 263 (assignment of reversion dated 1 April 1994); lessee bringing counterclaim in action for possession brought by successor to lessor, alleging breach of implied covenant by lessor, arguing "that the operative date for purposes of the implied covenant to [sic] quiet enjoyment was in or around September 1993 not simply when the lease was assigned on the 1 April 1994 or any later date"; *held*, however, "this argument is entirely inconsistent with section 14 of Deasy's Act . . .".

Conveyancing Act 1881

Section 10 of the Conveyancing Act 1881 deals not only with rent and the benefit of covenants by a lessee in a lease. It deals also with conditions, and provides that the benefit of a condition in a lease, whether a condition for re-entry or otherwise, is annexed to and goes with the reversionary estate in the land. As with recovery of rent and enforcement of covenants, the section provides that the condition can be relied on by the person from time to time entitled to the income of the land leased. There has been some discussion as to whether the section means that a new landlord can avail of a condition in the lease no matter what the terms of the condition are, or whether a new landlord can rely only on a condition which has reference to the subject matter of the lease,[69] with the view being expressed that the identical wording in s. 141 of the Law of Property Act qualifies covenants but not conditions, and appears intended to allow a new landlord to rely on a condition though unrelated to the land.[70] If so, s. 10 effected a change, the position under the Grantees of Reversions Act being that a new landlord could forfeit a lease only where the condition touched and concerned the land.[71]

Severance of the reversion

The inability at common law of a successor in title to part of the land demised to take advantage of a right of re-entry contained in the lease was addressed shortly before the commencement of the period we are considering by s. 3 of the Law of Property Amendment Act 1859. That section applies, however, only where there has been a legal apportionment of the rent reserved by the lease. In the absence of such an apportionment, the position of a successor in title to the landlord, who acquired part only of the land demised by the lease, remained that at common law. The position changed by provisions enacted in the Conveyancing Act. It may have changed in Ireland before that, by reason of provisions in Deasy's Act.

Conveyancing Act 1881

The effect of severance of the reversion is dealt with in s. 12 of the 1881 Act. For leases made after 1881, the section provides:

> Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised

69 R Megarry and H W R Wade, *The Law of Real Property* 6th edn (London: Sweet & Maxwell, 2000), paras 15.058–9.

70 Ibid., para. 15.089.

71 Ibid., para. 15.088, citing *Stevens* v *Copp* (1868) LR 4 Ex 20 (assignee of reversion unable to maintain ejectment pursuant to proviso entitling landlord to re-enter if tenant convicted of offence against the game laws; per Martin, Channell and Cleasby BB, on the ground that the condition did not touch and concern the land, Kelly CB dubitante on the point). See also *Horsey Estate Ltd* v *Steiger* [1899] 2 QB 79 and *Lewis* v *American & Colonial Distributors Ltd* [1945] 1 All ER 592. Note, however, the comment of Lord Wilberforce in *Shiloh Spinners Ltd* v *Harding* [1973] 1 All ER 90 at 96: "Neither of these cases [*Stevens* v *Copp*; *Horsey Estate Ltd* v *Steiger*] give me satisfaction."

> in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

Three decisions under the comparable provisions of s. 140 of the Law of Property Act 1925 may be mentioned as they afford guidance as to meaning and effect of s. 12 of the 1881 Act.

The first case is *Persey* v *Bazley*.[72] The background to it, however, is the decision in *Smith* v *Kinsey*[73] in which the Court of Appeal held that following severance of the reversion the owner of one of the severed parts could serve a notice to quit terminating a periodic tenancy in that part. In *Persey* v *Bazley*, the landlords had executed deeds transferring part of the land occupied by a tenant to trustees for the purpose of being able to terminate the tenancy in the part of the land transferred by service of a notice to quit by the trustees. May LJ was reluctant to uphold the efficacy of the device unless driven to do so, pointing out that as the trustees held the land on trust for the transferors, it was possible for the land to be restored to the transferors immediately after the notice to quit was given. He was able to avoid the conclusion that the transfer enabled the trustees to terminate the tenancy by holding that the transaction was not properly described as a "severance" within the meaning of s. 140. Unfortunately, other than saying that the section was intended to apply where there was "a real conveyance from the original reversioner", the Lord Justice did not indicate what he considered was meant by the term.[74]

Persey v *Bazley* was relied on by the tenant in *John* v *George*,[75] where landlords had executed a transfer of the reversion in part of the land occupied by a tenant, the transferees being trustees for a member of the landlords' family. Describing *Persey* v *Bazley* as "a decision of the Court of Appeal by which I am bound however surprising it may be to a real property lawyer", Judge Moseley QC was able to distinguish the case before him on the ground that in it there was a bona fide transfer of the legal estate in the land transferred to the trustees and a genuine trust for a third party, noting also that the landlords were unable to call for a reconveyance of the land to them.

Persey v *Bazley* is important for what it says about "severance" in s. 140 of the Law of Property Act, as the same word appears in s. 12 of the Conveyancing Act. Beyond that, however, the efficacy of the device of transferring the reversion in part of the land in order to terminate a periodic tenancy in the land transferred needs to be considered further. The problem is that s. 140 of the Law of Property Act contains a provision for which no counterpart exists under the preceding legislation still applicable in Northern Ireland. By s. 140(2) it is declared that, for the purposes of the section, a right of re-entry includes a right to determine the lease by notice to quit. Shortly before that provision was enacted it had been held that a transferee of part of the land occupied by a tenant under a periodic tenancy was unable to terminate the tenancy in the part the transferee had acquired,[76] and the provision was seen as intended to reverse that decision.[77]

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72 (1983) 47 P & CR 37.

73 [1936] 3 All ER 73.

74 See (1983) 47 P & CR 37 at 44: "I am quite satisfied, had the mind of the draftsman been directed to the circumstances which have arisen in this case, that he would not have intended section 140 to apply. In my opinion this section was intended to deal with the situation where there has been a real conveyance from the original reversioner and thus a severance. It would be unwise and I do not propose to try to define what is meant by the word 'severance' in section 140 of the Act. Each case will have to be dealt with on its merits as and when it arises. It is sufficient for the purposes of deciding the present appeal for me to say that in my opinion the two conveyances . . . did not effect such a severance."

75 [1995] 22 EG 146. The decision was reversed on appeal on another ground: see (1996) 71 P & CR 375 and p. 372, below.

76 *Re Bebington's Tenancy* [1921] 1 Ch 559.

77 See *Smith* v *Kinsey* [1936] 3 All ER 73.

The last case, useful for illustration purposes, is *Epron International Ltd* v *Lilachall Ltd*,[78] which concerned an estate comprising two buildings, known respectively as The Grange and The Park. Each building comprised residential accommodation, The Park having thirty-three residential units and The Grange fourteen. Each unit was the subject of a lease from the owner of the estate. Later the reversion in The Park became vested in Epron, and that in The Grange in Lilachall. The question for the court was whether Epron was entitled to recover from the lessees of units in The Grange a portion of the costs incurred by Epron in maintenance of The Park, there being a covenant in each lease by the lessee to pay a service charge. The basis of Epron's argument was that the leases of the units in The Grange conferred on the lessees rights of way over land belonging to Epron as owner of The Park, and that there had been a severance of the reversion of each lease in The Grange, Epron's ownership of the land over which the easements were exercisable being a severed part of the reversion for the purposes of s. 140 of the 1925 Act. That being so, the benefit of the lessees' covenants to pay a service charge could be enforced by Epron to recover expenditure relating to the easements. Rattee J agreed, holding that the benefit of the covenant to pay part of the costs of maintaining The Park remained annexed to the reversion to The Park expectant on the termination of the easements over it, and was enforceable by Epron as owner of that reversion.

Deasy's Act

Before the provisions of the Conveyancing Act were enacted, the House of Lords in *Liddy* v *Kennedy*[79] had considered whether the provisions of Deasy's Act had made any change to the position at common law regarding the effect of a severance of the reversion. The issue was whether a notice served by two brothers pursuant to the terms of a lease was effective to entitle them to possession of the land demised by the lease. The lease had been made by one of the brothers who was then sole owner of the land. A year later he executed a deed in which he covenanted to stand seised of the land to the use of himself and his brother as tenants in common. Arguing that the notice was ineffective, the tenant contended there had been a severance of the reversion, the effect of which was to destroy the right to resume possession under the lease. Rejecting the argument, Lord Hatherley LC found assistance in s. 44 of Deasy's Act,[80] but more fundamentally saw the Act as intended to get rid of technicalities which had been found to lead to injustice, considering the argument advanced as within such criticism.[81] The Lord Chancellor went on to hold that the Act meant that "all the persons interested as one collective landlord are to have all the benefits which belonged to those from whom they derive their title".[82] For Lord Westbury also, Deasy's Act was intended to make, and had made, matters more straightforward: the correct construction of the Act was that the assignee "is to have the same right which the assignor had at the time of the assignment; and if the assignor could have entered for breach of the condition by force of the Statute, the assignee may do the same."[83]

78 Unrep, 8 May 2001, Rattee J.

79 (1871) LR 5 HL 134.

80 The section provides that: "The surrender to or resumption by a landlord, or eviction of any portion of the premises demised by a lease, shall not in any manner prejudice or affect the rights of the landlord, whether by action or entry, or ejectment, as to the residue of said premises."

81 (1871) LR 5 HL 134 at 143: "It appears to me that this statute has been framed for the express purpose of removing some of the technical difficulties which stood in the way of justice, and which, though devised originally with logical regard to consequences, have been found in practice to involve far more frequently the failure of justice than to secure any beneficial result to the parties."

82 (1871) LR 5 HL 134 at 146.

83 Ibid. at 154.

Whom to sue

In the earlier part of this examination of the law relating to new landlords, we saw that the original tenant remained liable under any express covenants into which he or she had entered, and could be sued for breach of such covenants notwithstanding that the tenancy had become vested in an assignee. The position was not affected by the Conveyancing Act, but provisions in Deasy's Act need to be considered.

So far as recovery of rent is concerned, the right to bring an action for rent conferred by s. 45 of the Act entitles the landlord to recover rent "from the tenant of such lands at the time of the accruing of the said rent". No action therefore will be possible under the section against the original tenant where the arrear accrues after the tenant assigns the tenancy: the action must be against the assignee who has the leasehold estate when the rent accrues. It is thought, however, that the section has no relevance to an action brought upon a covenant by the lessee to pay the rent, so that if such a covenant exists, the lessee will remain liable notwithstanding the provisions of the section. Certainly, prior to the abolition of the forms of action, the original lessee would have been liable in an action of covenant, though an action of debt against the original lessee might not have succeeded. In addition, an action based on a covenant to pay the rent is not one for the rent, but for damages because the rent has not been paid, so that, in speaking of the entitlement to recover rent in arrear, the section leaves untouched any entitlement to damages which may exist independently by reason of a covenant to pay the rent.

Section 16 of Deasy's Act makes provision for the discharge of an original lessee from future liability to the lessor. It provides that:

> From and after any assignment hereafter to be made of the estate or interest of any original tenant in any lease, with the consent of the landlord, testified in manner specified in section 10, the landlord so consenting shall be deemed to have released and discharged the said tenant from all actions and remedies at the suit of such landlord, and all persons claiming by, through, or under him, in respect of any future breach of the agreements contained in the lease, but without prejudice to any remedy or right against the assignee of such estate or interest.

The section applies to leases, and so has no application where a tenancy is created otherwise than by instrument in writing. If, however, it does apply, the section enables a lessee to rid him or herself of liability for any breach of the agreements in the lease occurring after the lessee assigns the lease, if the lessee obtains the consent of the lessor to such assignment. Such consent must be testified in the manner specified in s. 10, that is by the landlord being an executing party to the instrument of assignment, or by indorsement on or subscription of such instrument. This, however, invites a question as to the effect of a consent by the landlord in any other way, for example where the landlord signifies consent by letter, email, telephone call, or any other means not mentioned in the section. A consent in accordance with the terms of the lease, though not in accordance with the provisions of s. 10, was sufficient for the purposes of that section in *In re Ulster Permanent Building Society*,[84] and it was suggested in *Craigdarragh Trading Co Ltd* v *Doherty*[85] that a waiver of a covenant by a landlord might be effective by way of estoppel though not in writing, as required for the purposes of s. 43 of Deasy's Act, so that the answer to the question may be that consent by the landlord, testified otherwise than in accordance with s. 10, may yet be sufficient to discharge an original lessee from future liability. Although, so far as successors in title to the landlord consenting are concerned, considerations may have to be taken into account which

84 (1884) 13 LR Ir 67.

85 [1989] NI 218.

would not be necessary if the terms of s. 16 as to the manner in which consent is required to be shown are complied with.

Defences

Assuming that a new landlord is able to establish that rent has not been paid, or that a breach of covenant has been committed, two matters may be considered which may be relevant in an action brought by the new landlord. In each case, the question is whether a new landlord may be affected by matters which took place between his or her predecessor and the tenant.

Set-off

Assuming that a new landlord can sue on covenants entered into by the tenant, the question arises whether the tenant can set off, against the new landlord's claim, any claim the tenant has by reason of a breach of a covenant by the original landlord. The matter has been considered recently on two occasions by the Court of Appeal in England. Each case was concerned with equitable set-off, the tenant's claim being for an unliquidated amount.[86] In Ireland, set-off between landlord and tenant is provided for, however, in s. 48 of Deasy's Act, and it will be convenient to consider the position under that section before looking at the cases mentioned.

Section 48 of Deasy's Act provides that:

> All claims and demands by any landlord against his tenant in respect of rent shall be subject to deduction or set-off in respect of all just debts due by the landlord to the tenant.

Without considering the ambit of the section,[87] it seems clear from the use of the definite article when referring to setting off just debts due from "the landlord" in an action by "any landlord" that the landlord indebted is one and the same person as the person who is bringing the claim in respect of rent against the tenant. As such, the section appears to be inapplicable in the situation under consideration of a tenant who wishes to set off claims he or she has against a former landlord in an action by the landlord's successor.

Which brings us to *Muscat* v *Smith*.[88] The case concerned an action by the successor in title to a landlord for possession of premises to which the Rent Acts applied. At the time of the transfer of the reversion, arrears of rent had accumulated, as the tenant had ceased

86 As Buxton LJ explained in *Muscat* v *Smith* [2003] EWCA Civ 962 at [40], equitable set-off is so called "because, but only because, it permits the setting-off in an action at law of unliquidated claims that, before 1873, could only be pursued at law by a separate action, and could only affect the proceedings at law by way of an equitable injunction. The institution does not otherwise appeal to any specifically equitable doctrine, and in particular does not permit of any deduction from or reduction of the claim other than by the assertion of a counter-claim that is sufficiently connected with or related to the original claim." The advantage of equitable set-off for a tenant is, as Buxton LJ indicates, that it allows the tenant to set off unliquidated claims against claims by a landlord, provided the claims of the parties meet the requirement of being sufficiently closely connected to each other. For the differences between legal set-off and equitable set-off, and their consequences so far as landlord and tenant are concerned, see *Fuller* v *Happy Shopper Markets Ltd* [2001] 1 WLR 1681; *Eller* v *Grovecrest Investments Ltd* [1995] QB 272.

87 Two points, however, may briefly be noted. Unlike equitable set-off, the section allows a tenant to set off liquidated sums only against the landlord's claim: *MacCausland and Kimmitt* v *Carroll and Dooley* (1938) 72 ILTR 158; *Riordan and Mulligan* v *Carroll* [1996] 2 ILRM 263; see also *Leopardstown Club Ltd* v *Templeville Developments Ltd* [2006] IEHC 133. Secondly, the section does not enable a tenant to set off monies due from the landlord in an action for possession under s. 52 of Deasy's Act to reduce the amount owing to the landlord below the amount referred to in that section: see *Wilson* v *Burne* (1888) 24 LR Ir 14; *Riordan and Mulligan* v *Carroll* [1996] 2 ILRM 263.

88 [2003] EWCA Civ 962.

paying rent because of the landlord's failure to carry out repairs. Following the transfer of the reversion, and a separate assignment to the new landlord of the arrears of rent, the new landlord terminated the tenancy by notice to quit. In order to recover possession, however, the landlord had to show arrears of rent existed and that it was reasonable for the court to make an order for possession. The tenant sought to defend the action by setting off a claim for damages for breach by the original landlord of a repairing covenant.[89] The decision of the Court of Appeal, that the tenant had a right to set off his claim, has been criticised,[90] and remarks in the case by Sedley LJ, insofar as they suggested that this right extends to rent accruing *after* the transfer of the reversion, have elsewhere been described as "obiter, a little Delphic . . . inconsistent with two Court of Appeal decisions not cited to him, and in conflict with the views expressed on the topic in the leading textbooks".[91] Nonetheless, Buxton and Ward LJJ came to the same decision in the case, which suggests that closer analysis may be appropriate.

The basis of Sedley LJ's decision that a tenant should be allowed to set off a claim he had arising out of a breach by the original landlord against a claim by the new landlord was that "the debt, a chose in action, vest[ed] in [the new landlord] as assignee subject to all equities which were available to [the tenant] against the assignor".[92] Buxton LJ was of similar opinion, adding that he saw no reason for thinking that s. 141 of the Law of Property Act 1925[93] was intended to exclude the rule that an assignee of a chose in action took subject to equities from a case where the landlord asserted a claim as an assigned chose in action.[94] Ward LJ's short judgment is likewise based on the assignee of a chose in action taking the chose subject to equities affecting it.

The view that a tenant can, in an action by a new landlord, set off a claim the tenant has arising out of a breach of covenant by a previous landlord, because the new landlord has acquired a chose in action subject to equities affecting it, was discussed by the Court of Appeal again in *Edlington Properties Ltd* v *J H Fenner & Co Ltd*.[95] It is the judgment of Neuberger LJ in the case which contains the criticism of the views of Sedley LJ already quoted. In the case, a tenant sought to set off, against a claim by an assignee of the reversion for rent accruing after the transfer of the reversion, a claim for damages arising out of the breach of an obligation of the original landlord, contained not in the lease, but in the agreement preceding it. The tenant's case was based on two alternative propositions: first, that the transferee of the reversion took subject to the equities which were available against the transferor; and secondly, that the tenant's right of equitable set-off against the original landlord was a right which ran with the land and was therefore enforceable against a

89 Cf. *Riordan and Mulligan* v *Carroll* [1996] 2 ILRM 263.

90 R Derham, "Equitable set-off: a critique of *Muscat* v *Smith*" (2006) 122 *LQR* 469.

91 *Edlington Properties Ltd* v *J H Fenner & Co Ltd* [2006] EWCA Civ 403 at [41] per Neuberger LJ.

92 [2003] EWCA Civ 962 at [31].

93 Corresponding to s. 10 of the Conveyancing Act 1881.

94 [2003] EWCA Civ 962 at [54].

95 [2006] EWCA Civ 403.

transferee of the reversion.[96] Neuberger LJ thought neither proposition correct, at least where the transfer was at arm's length,[97] concluding that

> [w]here the reversion to a lease is transferred, a tenant cannot set off, against rent falling due after the transfer, a claim for damages he has arising out of a breach by his original landlord of the lease, let alone of the agreement pursuant to which the lease was granted, unless of course the lease specifically provides that he should have that right.[98]

Where does this leave *Muscat* v *Smith*? The case was described by Neuberger LJ as "not entirely easy to analyse"[99] and it was pointed out both that a number of relevant authorities had not been cited to the court in it, and that there appeared to be a difference between the judgments of Sedley and Buxton LJJ. Nonetheless, as in *Edlington Properties*, the landlord's action was for rent accruing *after* the transfer of the reversion, *Muscat* v *Smith* was distinguishable. Insofar as the result of the two cases is that a right of set-off, for damages arising as a result of a breach of covenant by the landlord before the transfer of the reversion, exists against a claim for rent accrued at the date the reversion is transferred, but not against a claim for rent accruing thereafter, Neuberger LJ explained:

> The right to recover the accrued rent, although it goes with the reversion, is a chose in action, whereas the right to recover future rent is not: it is simply an incident of the reversion. The distinction is readily understandable in terms of principle and it is easily reconcilable with commercial common sense. When the rent accruing due before the transfer actually fell due it can be said to have been impeached by the right of set-off because the person then entitled to recover the rent was the immediate landlord, whereas the same point cannot be made in relation to the rent accruing due after the transfer.[100]

Estoppel

A similar question to that considered in the preceding section is whether a successor in title to the landlord can be bound by reason of statements or actions by the landlord's predecessor. If, for example, the original landlord agrees to accept a reduced rent from the tenant, the landlord may be prevented from requiring payment of the full rent until notice that the full rent is required again is given to the tenant.[101] But would the statement be binding on a transferee from the landlord? If the answer to that is yes,[102] it would seem just that the landlord's successor should be able to take advantage of a situation where the tenant

96 [2006] EWCA Civ 403 at [9].

97 Ibid. at [10]. Apropos the first proposition, Neuberger LJ said that a comparison of the statutory provisions concerning assignment of choses in action and the provisions for the transfer of the benefit and burden of leasehold covenants showed that, under the former (Law of Property Act 1925, s. 136 (cf. Judicature (NI) Act 1978, s. 87)), the right of a debtor to rely on any rights of set-off was expressly preserved. He explained, however, that the right of a transferee of the reversion to recover rent was an incident of the right of ownership of the reversion, and different from the right of an assignee of an ordinary debt, and accordingly might have different features from the right to recover a debt. As to the second proposition, the Lord Justice explained that a purchaser of land, including a transferee of the reversion, took subject to an equitable right only where that right was an interest in land, and that a tenant's right to damages was not an interest in land. The contention that the liability to pay damages was one which ran with the reversion was considered both contrary to principle and difficult to reconcile with *Duncliffe* v *Caerfelin Properties Ltd* [1989] 2 EGLR 38.

98 [2006] EWCA Civ 403 at [64].

99 Ibid. at [35].

100 Ibid. at [47].

101 *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130.

102 See *Hazel* v *Ashtar* [2001] EWCA Civ 1883 at [24].

is prevented from denying something by reason of something the tenant said to a preceding owner of the landlord's interest. It is clear that a successor in title to a landlord may be estopped from denying a state of affairs by something the successor him or herself has said to the tenant, or from something the successor has done. The estoppel here, however, has nothing to do with the landlord's predecessor. What is to be considered is where the events which have taken place occurred before the transfer of the reversion to the new landlord.

Discussion of the various principles at work – waiver, forbearance or estoppel – and whether, and if so how, the situation of a successor in title differs according to which principle, or which type of estoppel, applies in the particular case, is outside the scope of the present investigation.[103] Suffice to say that it appears from the cases that a successor in title to a landlord may be entitled to take advantage of an estoppel operating in favour of the original landlord, and equally that a successor in title to the landlord may be bound by an estoppel operating against the original landlord. Most of the cases appear to concern the latter situation. An exception is *Culbertson* v *Irving*,[104] where a successor in title to the landlord was successful in an action of covenant against the lessee, the lessee's defence, that the original landlord had no title to make the lease (and accordingly that the plaintiff had no title on which to base the action), being of no avail as the lessee was estopped from denying his lessor had title.[105] Before concluding that a successor can avail of an estoppel arising from something said to his or her predecessor, the differing views expressed in *Brikom Investments Ltd* v *Carr*[106] need to be taken into account. Such views concerned an assignee of the lessee and the original landlord, rather than an assignee of the reversion and the original tenant, but there would seem to be no difference between the two situations: the question is whether the assignee can take advantage of the statement made. Lord Denning MR thought he could;[107] Cumming-Bruce LJ thought not.[108] Roskill LJ too was unwilling to concur with the view expressed by Lord Denning.[109]

So far as a successor in title to the landlord being bound by estoppels operating against his or her predecessor is concerned, a number of cases illustrate the possibility that the successor will be in no better position than the predecessor. In *John* v *George*,[110] trustees to whom the landlords had transferred the reversion were bound by an estoppel operating against the landlords, thereby preventing the trustees from determining the tenancy by service of a notice to quit. The trustees were voluntary transferees, but purchasers for value were held to be bound by an estoppel operating against their predecessors in *Keith* v *Gandia & Co Ltd*[111] and in *Hammersmith and Fulham LBC* v *Top Shop Centres Ltd*,[112] Warner J in the latter saying that any estoppel operating against the defendants' predecessors "of course binds their successors in title".[113] Such also was the view of Lord Denning MR, *obiter*, in

103 For explanation of the various principles, see *Chitty on Contracts* 28th edn (London: Sweet & Maxwell, 1999), paras 3.076–106; S Wilken and T Villiers, *The Law of Waiver, Variation and Estoppel* 2nd edn (Oxford: OUP, 2002).

104 (1860) 6 H & N 135.

105 See also *Ward* v *Ryan* (1875) IR 10 CL 17.

106 [1979] QB 467.

107 Ibid. at 484.

108 Ibid. at 490: "I do not see how an assignee can claim the benefit of an estoppel founded on a promise made to somebody else, even though that other person is the assignor who is assigning the unexpired term of the lease."

109 Ibid. at 486.

110 (1996) 71 P & CR 375.

111 [1904] 1 Ch 774.

112 [1989] 2 All ER 655.

113 Ibid. at 668.

Brikom Investments Ltd v *Carr*,[114] on the basis that "It would be most unjust and unfair if [a purchaser of the reversion] could go back on the promise. Equity would not allow him to do it." More recently, Neuberger J concluded that the authorities supported the proposition that

> once an estoppel (perhaps other than estoppel by representation) is established as between a landlord and a tenant, then it would normally bind their respective successors in title. As a matter of logic the same conclusion must apply to a convention which in due course may give rise to an estoppel.[115]

Other principles

The provisions which have been examined above are the obvious ones to be considered in connection with the ability of a new landlord to sue for rent or for breach of covenant, or in determining whether he or she becomes liable to the tenant on covenants undertaken by the original landlord with the tenant. There are, however, other principles which may be relevant. Some of these may assist a new landlord in circumstances where those already considered will not. Others may operate to the disadvantage of a new landlord, by subjecting the new landlord to liability where, on the basis of the law considered so far, no such liability would arise.

Collateral contracts

If there is a collateral contract between the parties to the tenancy, it appears that a new landlord may be bound by the terms of it. In his judgment, at first instance, in *Business Environment Bow Lane Ltd* v *Deanwater Estates Ltd*,[116] Briggs J explained, in a passage approved by the Court of Appeal, that a collateral contract might arise "[w]here one party . . . says that he will only enter into the written contract or, as here into the lease, if the other party . . . agrees not to enforce some provision of it against him in specific circumstances."[117] An example is *Brikom Investments Ltd* v *Carr*,[118] where a landlord was unable to recover a contribution towards the cost of repairs from a lessee who had entered into a lease containing a covenant on her part for contribution, on the basis that prior to the lease the landlord had represented that it would carry out the repairs at its own expense.[119] In *Business Environment Bow Lane Ltd* v *Deanwater Estates Ltd*,[120] the Court of

114 [1979] QB 467 at 484.

115 *PW & Co* v *Milton Gate Investment Ltd* [2004] Ch 142 at [196]. The most recent example of an estoppel being prayed in aid by a lessee against a transferee of the reversion, where the estoppel alleged was based on a statement made by the transferee's predecessor, is *Business Environment Bow Lane Ltd* v *Deanwater Estates Ltd* [2007] EWCA Civ 622. It was common ground, however, before the Court of Appeal that the lessee's defence, based on estoppel, to the transferee's action for breach of covenant added nothing to its defence based on a collateral contract said to exist at the time the lease was made, and the case proceeded on the question of whether a collateral contract existed.

116 [2006] EWHC 3363 (Ch).

117 Ibid. at [7]. For collateral contracts generally, see *De Lasselle* v *Guildford* [1901] 2 KB 215; *Heilbut Symons* & *Co v Buckleton* [1913] AC 30; *J Evans & Son (Portsmouth) Ltd* v *Andrea Merzario Ltd* [1976] 1 WLR 1078; *Esso Petroleum Co Ltd* v *Mardon* [1976] 2 All ER 5; *Howard Marine & Dredging Ltd* v *A Ogden & Sons (Excavations) Ltd* [1978] QB 574; *Inntrepreneur Pub Co Ltd* v *East Crown Ltd* [2000] 3 EGLR 31.

118 [1979] QB 467.

119 For other cases involving collateral contracts in disputes between landlord and tenant see *De Lasselle* v *Guildford* [1901] 2 KB 215 (landlord liable to tenant for representation as to state of drains of demised premises made prior to delivery of counterpart lease by tenant); *City & Westminster Properties (1934) Ltd* v *Mudd* [1958] 2 All ER 733 (landlord unable to forfeit lease on account of breach of covenant to use premises only for business, because of representation made at time of lease that landlord would not object to tenant's continued residence in premises). See also *Riordan and Mulligan* v *Carroll* [1996] 2 ILRM 263.

120 [2007] EWCA Civ 622.

Appeal, disagreeing with the conclusion of Briggs J on the facts, held that no such contract had been established. The significance of the case for present purposes lies in the comments of Morritt C in the Court of Appeal on the question whether such a contract would, if established, bind successors in title to the landlord. The Chancellor said that: "It must also be recognised that [a promise said to be binding as a collateral contract] may be binding on successors in title of both parties without the need for notice or registration as a Land Charge or in the Land Registry."[121] Morritt C went on to say that the basis on which such a contract would bind successors was either estoppel or a contractual waiver, according to which view was taken of the reasoning in *Brikom Investments Ltd* v *Carr*.[122]

Running of covenants at law

Sections 12 and 13 of Deasy's Act allow a successor in title to the landlord to sue, and make the successor liable upon, covenants contained in the lease or contract of tenancy. Section 10 of the Conveyancing Act speaks of covenants "therein [i.e. in the lease] contained". In each case, the covenants to which the sections apply are covenants made between landlord and tenant. For covenants made outside the lease the sections have no application. Nor will they apply to covenants entered into by third parties, whether in the lease or outside it. Cases where, for example, a covenant is entered into by a surety guaranteeing payment of the rent and performance of the covenants by the tenant will not fall within the provisions of the sections, whether the covenant by the surety is contained in the lease or in a separate deed. A successor in title to the landlord wishing to rely on the benefit of a covenant made by a surety with the original landlord could of course take an express assignment of the benefit of the covenant along with the transfer of the reversion, but in the absence of such an assignment, the successor will be unable to rely on the provisions mentioned in order to enforce the covenant against the surety. Such was the difficulty for which happily a solution was found in *Kumar* v *Dunning*,[123] in which the Court of Appeal, having reviewed a number of earlier decisions at first instance,[124] held that a surety covenant was one which touched and concerned land of the covenantee, namely the reversion on the lease, so that a successor in title to the landlord who had acquired the reversion would have been able to enforce the covenant without having to rely on statutory provisions.[125] The basis on which the court in *Kumar* v *Dunning* found the new landlord could have enforced the surety covenant was that the covenant was one which touched and concerned the reversion to the lease, and that the new landlord as assignee of the reversion took the benefit of the covenant automatically. The statutory provisions equivalent to ss 10 and 11 of the Conveyancing Act had no bearing on the matter, since there was neither privity of contract nor privity of estate between the surety and the new landlord. Nonetheless, following *Smith* v *River Douglas Catchment Board*,[126] Browne-Wilkinson V-C was able to hold that the benefit of the covenant ran to the successor in title of the reversion. The decision has been approved by the House of Lords,[127] which has subsequently held that a transferee of the

121 [2007] EWCA Civ 622 at [42].

122 See p. 372, above.

123 [1987] 2 All ER 801.

124 *Pinemain* v *Welbeck International Ltd* (1984) 272 EG 1166; *Re Distributors and Warehousing Ltd* [1986] BCLC 129; *Coastplace Ltd* v *Hartley* [1987] 2 WLR 1299.

125 In Ireland, the same result had been reached by White J some time earlier in *Berryman* v *McCrum* (1907) 42 ILTR 19, on the basis that "looking at the contract as a whole, it is clear that it was intended to subsist for the benefit of all successive and continuing landlords who should represent the lessor's interest in the fee".

126 [1949] 2 All ER 179.

127 *P & A Swift Investments* v *Combined English Stores Group plc* [1988] 2 All ER 885.

reversion was able to enforce a covenant by a surety to take a new lease should the original lease be disclaimed on the tenant's insolvency.[128]

A similar problem to that which exists for a landlord may exist for a tenant, as where the landlord undertakes obligations in an instrument other than the lease, which the tenant now wishes to enforce against a new landlord. If the obligation in question is contained in an instrument other than the lease, the provisions of s. 13 of Deasy's Act will not apply. The solution in *Kumar* v *Dunning* will be of no use, since while the benefit of a covenant can run at common law, the burden does not, so that a new landlord will not be bound by the obligation. One possibility might be to contend that, while not contained in the lease, the obligation is yet contained in the "contract of tenancy" mentioned in s. 13, such contract being comprised in more than one document. Fortunately, the provisions of s. 11 of the Conveyancing Act may avoid the need to argue the point. Unlike s. 10 of the 1881 Act, which applies to covenants by a lessee contained in the lease, s. 11 refers merely to the obligation of a covenant by the lessor, without mentioning where such covenant is to be found. Accordingly, in *Weg Motors Ltd* v *Hales*,[129] decided under the comparable provisions of the Law of Property Act, an option granted by a landlord to renew a lease was held binding on a successor in title to the landlord, notwithstanding that the option was contained in an instrument other than the lease, executed at the time the lease was made.[130] Likewise, an undertaking, contained in a letter, by which a lessor agreed to accept a surrender of a lease was held to be enforceable against a successor in title to the lessor in *System Floors Ltd* v *Ruralpride Ltd*.[131] For the same reason, in *Lotteryking Ltd* v *AMEC Properties Ltd*,[132] a lessee concerned about its ability to enforce an undertaking by the lessor in a collateral agreement to carry out remedial work was refused an injunction to restrain the sale of the landlord's interest to a purchaser, the court considering the lessee would be able to enforce the undertaking against the purchaser.[133]

Running of covenants in equity

Under the doctrine of *Tulk* v *Moxhay*,[134] a successor in title to someone who undertakes an obligation in a covenant may be restrained from acting in contravention of the covenant. Equally, a successor in title to the person with whom a covenant is made may under the doctrine be able to enforce the covenant. From this summary of the doctrine it would seem that it could be applied in the case of a covenant contained in a lease, so enabling a new landlord to sue a tenant on covenants by the tenant, and, equally, making a new landlord liable to be restrained from acting in contravention of covenants undertaken in the lease by his or her predecessor. The doctrine is concerned only, however, with negative covenants,[135] so that many obligations commonly found within a lease, whether on the part of a landlord or on the part of a tenant, such as a covenant to carry out repairs, will not fall within the scope of the doctrine. Nonetheless, in cases where the relevant obligation meets

128 *Coronation Street Industrial Properties Ltd* v *Ingall Industries plc* [1989] 1 All ER 979.

129 [1962] Ch 49.

130 And notwithstanding also that the option was not made under seal.

131 [1995] 07 EG 125.

132 [1995] 28 EG 100.

133 In reaching his decision that the lessee would suffer no prejudice from the transfer of the reversion, Lightman J considered that any right of set-off available to the lessee would be available against a purchaser from the lessor. His views on this point are discussed in *Edlington Properties Ltd* v *J H Fenner & Co Ltd* [2006] EWCA Civ 403 (see p. 370, above).

134 (1848) 2 Ph 774; 1 H & Tw 105.

135 *Haywood* v *Brunswick Permanent Building Society* (1881) 8 QBD 403.

this requirement, the doctrine would seem to provide an alternative ground for establishing liability as between tenant and new landlord.

There is, however, a difficulty. The doctrine operates on the basis that the covenant in question is a burden on land of the covenantor, and is a benefit to land of the covenantee. The principle that there must be dominant land and servient land was not originally the basis of the doctrine, but became established at the beginning of the twentieth century.[136] The requirement means that someone who does not own land cannot rely on the doctrine to enjoin a successor in title to the covenantor from acting in contravention of the covenant.[137] Equally, someone other than the person who enters into the covenant will not be affected by it unless he or she has become the owner of land on which the covenant is a burden. In the context of the situation of a new landlord and a tenant, the question is whether this requirement is fulfilled. The problem centres on the question whether the landlord's interest in the land demised constitutes land for the purposes of the doctrine, or whether the doctrine requires that the land in question must be corporeal property. The basis of the decisions in *Kumar* v *Dunning* and *P & A Swift Investments* v *Combined English Stores Group plc*[138] is that the landlord's interest counts as land for the purposes of the rule at common law that the benefit of a covenant passes to successors in title of the covenantee where that covenant touches and concerns land of the covenantee, but that is not to say that the same must be the case with the doctrine in *Tulk* v *Moxhay*. A number of cases can be found in which landlords have been able to rely on the doctrine to restrain breaches of covenants in leases,[139] but for the most part these were decided before the rule requiring the plaintiff to have land benefited by the covenant was established. Nonetheless, statements can be found in modern cases supporting the view that the landlord's interest is sufficient for the purposes of the doctrine.[140] That being the case, a new landlord should be able to rely on the doctrine to restrain a breach of covenant by the tenant, assuming the various requirements of the doctrine are met. Equally, the doctrine might enable a tenant to prevent a new landlord acting in contravention of a covenant entered into by the original landlord. This situation is more complicated, however, since the covenant will not only have to be negative in substance, but will also have to be one which meets the requirement that it touches and concerns the land of the covenantor; in this case the landlord's interest in the land demised.

Conclusion

This examination of the law applicable where a landlord transfers his or her interest to a new party began by pointing out the difference between the case where a tenancy has been created and that where the arrangement between the parties lies merely in contract. The law of contract has in recent years come to play a more significant role in resolving disputes between landlord and tenant, in order to arrive at results which avoid injustices or shortcomings which might otherwise exist. The cases in which principles of the law of contract have been applied, however, in such disputes have yet to explore the situation

136 *Formby* v *Barker* [1903] 2 Ch 539; *London County Council* v *Allen* [1914] 3 KB 642.

137 *London County Council* v *Allen* [1914] 3 KB 642.

138 [1988] 2 All ER 885.

139 *Parker* v *Whyte* (1863) 1 H & M 167; *Tritton* v *Bankart* (1857) 56 LT 306; *Hall* v *Ewin* (1887) 37 Ch D 74; *Teape* v *Douse* (1905) 92 LT 319.

140 See *Northern Ireland Carriers Ltd* v *Larne Harbour Ltd* [1981] NI 171; *Hemingway Securities Ltd* v *Dunraven Ltd* (1994) 71 P & CR 30.

where a third party is involved, such as a new landlord.[141] The law which has been examined in the foregoing discussion deals with precisely that situation: it ensures that obligations undertaken by the parties to one particular type of contract (a contract of tenancy) will be enforceable by and against persons other than those who entered into that contract. The law contained in the Grantees of Reversions Act and the Conveyancing Act falls short, however, of providing that a new landlord simply steps into the shoes of his or her predecessor: not all benefits enjoyed by the original landlord, and not all burdens to which the original landlord was subject, will affect a new landlord. The limitation that covenants must touch and concern the land, or have reference to the subject matter of the lease, means that a new landlord is not simply substituted for his or her predecessor in the eyes of the law. In Ireland, the situation comes nearer to that, if the observations in *Lyle* v *Smith* are to be given effect. Even then, however, there is a reticence to say that what the original landlord promised, a new landlord must do. *Lyle* v *Smith* recognises that there may be obligations incapable of vicarious performance, either because they are dependent on the person of the original landlord or because they are so unrelated to the tenancy that they cannot have been intended to affect others than the original parties to the tenancy. With regard to obligations incident to the tenancy (to use the expression in *Borrowes* v *Delaney*), no difficulty exists, and it is hard to see why one should. If someone buys the interest of a landlord with the intention of reaping the benefits of it, why should the purchaser not have to accept the burdens that go with it also? The declared basis of the law of landlord and tenant in Ireland is the contract of the parties. If the aim of the legislature was to put the law in Ireland on a modern footing, getting rid of feudal considerations and technicalities,[142] why should the bargain entered into between a landlord and a purchaser of his interest be one to which such technicalities continue to apply?[143]

Leaving that question aside, the situation which exists at present leaves something to be desired. The law applicable in some situations involving new landlords is contained in statutory provisions, and in other cases where such provisions do not apply, in rules developed either at common law or in equity. And just for good measure, more than one statute exists to deal with some instances. In the main, the provisions of Deasy's Act seem more favourable to new landlords wishing to enforce obligations undertaken by tenants, and for tenants wishing to enforce against a new landlord obligations undertaken by their original landlord, than the provisions of the Conveyancing Act: not only does the scheme of Deasy's Act seem intended to make the position simpler, some questions which arise under the Conveyancing Act, such as whether a covenant has reference to the subject matter

141 See, however, *Rainey Brothers Ltd* v *Kearney* [1990] NI 18 (lease forfeited for non-payment of rent by assignee of lessee; lessor held entitled to damages in action against personal representative of assignee for loss sustained following reletting at rent lower than rent payable by assignee): *Gumland Property Holdings Pty Ltd* v *Duffy Bros Fruit Market (Campbelltown) Ltd* [2008] HCA 10 (High Court of Australia) (new landlord able to recover loss of bargain damages from lessee).

142 See observations in *Lyle* v *Smith* [1909] 2 IR 58 (p. 360 above), and in *Liddy* v *Kennedy* (1871) LR 5 HL 134 (p. 367 above).

143 Cf., for leases in England and Wales made after 1995, Landlord and Tenant (Covenants) Act 1995, based on Law Com No. 174, *Landlord and Tenant Law: Privity of contract and estate* (1988). One of the principles on which the proposals of the Law Commission were based was that "all the terms of the lease should be a single bargain for letting the property. Where the interest of one of the parties changes hands the successor should fully take his predecessor's place as landlord or tenant, without distinguishing between the different categories of covenant." (Law Com No. 174, para 4.1) The Act provides that the benefit and burden of "landlord covenants" and "tenant covenants" pass to successors of the original parties to the tenancy. S. 2(1) provides that the Act applies to a landlord covenant or a tenant covenant "whether or not the covenant has reference to the subject matter of the tenancy". See further *Oceanic Village Ltd* v *United Attractions Ltd* [2000] Ch 234; *BHP Great Britain Petroleum Ltd* v *Chesterfield Properties Ltd* [2002] Ch 194; *London Diocesan Fund Ltd* v *Phithwa* [2005] UKHL 70; *Wembley National Stadium Ltd* v *Wembley (London) Ltd* [2007] EWHC 756 (Ch).

of the lease, or whether a condition is enforceable by a new landlord only if it too has reference to such subject matter, do not arise under Deasy's Act. Conversely, however, for a new landlord who is a lessee of the reversion, the provisions of the later Act may provide the legislative basis for an action against the lessee to enforce covenants, where the applicability to such a case of the provisions of Deasy's Act is unclear.

The last troubling question is whether, given that there are two sets of statutory provisions each of which may be applicable to a dispute between a new landlord and a lessee, it is open to one or other of the parties to select the provision which better suits him or her. To take an example: can a new landlord bring an action for breach of covenant when the breach took place before the new landlord acquired the interest of the original landlord, relying on s. 10 of the Conveyancing Act, or will the lessee be able to point to s. 14 of Deasy's Act as a defence? The more fundamental question, of course, is why the sections of the Conveyancing Act dealing with landlord and tenant matters were made to apply in Ireland, when Deasy's Act had been in force for twenty years already. Were it not that cases exist where different results will follow according to which of the provisions govern the case, the question would not matter. The trouble is that they do, and it does. The provisions of the later statute have received little attention in Ireland because of those of the earlier. If the suggestions in the examination above are correct, it may be necessary for that to change.

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Arms trade and public controls: the right to information perspective

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I Introduction

It was recently reported that "the UK was the top global defence exporter in 2007, winning a UK record £10 billion ($19 bn) of new business and a 33% market share".[1] Such exports[2] are regulated by government departments – the Department for Business Enterprise and Regulatory Reform (BERR) (formerly Department for Trade and Industry), the Ministry of Defence (MoD) and the Foreign and Commonwealth Office (FCO) have powers to exercise and roles to play in endorsing or denying arms sales abroad.[3]

While the industry does have significant economic and security benefits to both Britain and the weapon-recipient countries, there are always questions of a legal and ethical nature attached to the business. This is why the British public is keen to learn how, to whom and on what basis arms supplies are authorised (and denied) by government officials.

The Scott Inquiry of 1993–96 into the legality and legitimacy of machine tools and weapon equipment sales to both Iran and Iraq, when both were at war, and the five-volume report (and the findings therein) published as a result of the inquiry greatly augmented the public's awareness of the issue. Scott was critical of ministers for lack of transparency and for misleading Parliament and the public on the issue.[4] One of his recommendations was

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1 UKTI, *DSO Today*, 17 June 2008; see also Z Yihdego and A Savage, "The UK arms export regime: progress and challenges" (2008) *Public Law* Autumn 546–7. The SIPRI Trend Indicator Value of major conventional weapons transferred from the twenty largest suppliers between 1977 and 2006 placed the UK at number six in the list.

2 The piece concerns conventional weapons such as war planes, battle tanks, major artilleries, small arms, light weapons, explosives, and ammunition and components of these weapons. For a list of such weapons see UN General Assembly Resolution 46/36L 1991, Transparency in Armaments, Annex – UN Register; see also UN Group of Governmental Experts on Small Arms, *Report of 1997* (1997), para. 25.

3 "Introduction to the Export Control Organisation and to export controls" (2006) January, at http://www.berr.gov.uk/files/file18678.pdf (accessed 24 November 2008).

4 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-use Goods to Iraq and Related Prosecutions* (London: HMSO, 1996), at p. 211, d1.165.

that it is the duty of ministers to give accurate and reliable information about arms transactions to the public (and Parliament).[5]

In response to this and the overall demand for better governance in Britain, the Labour Government, as part of its election manifesto and in the light of promises to ensure openness and accountability of government, undertook various legal, political and practical measures across governmental activities, including in the area of arms export control. In the late 1990s, when parliamentary scrutiny on arms exports intensified, ministers began submitting detailed reports (both written and oral) to Parliament, and the process of promulgating an appropriate law also started. Despite criticism of delays, the Export Control Act 2002 (ECA 2002) was passed and came into force in May 2004. As the main UK legislation on weapon exports, it refers to some guiding principles (including human rights, humanitarian, security and sustainable development standards) for arms export decision making and imposes reporting obligations upon ministers.[6]

There is no doubt that the post-Scott era brought important changes to levels of transparency, accountability and responsibility on arms transfer. However, the public and civil societies (including Parliament, the press and courts) continue to raise crucial questions of responsibility on arms export authorisation (for example, exports to Israel, Tanzania, Saudi Arabia), possible corruption (for example, the BAE Systems–Saudi bribery allegation),[7] and inappropriate use of public power (for example, halting an inquiry by the Serious Fraud Office (SFO)). What is interesting, however, is that some of these issues have been dealt with and investigated not only by parliamentary Select Committees but also by courts (and tribunals), including the House of Lords, upon the initiation of members of the public, the relevant aspects of which are considered in this piece (see section IV below).

This article examines the impact of the Freedom of Information Act 2000 (FoIA) on public accountability as it relates to arms sales. It looks at the application of the Act (both the principle as enshrined in s. 1(1) and the exemptions in s. 1(2), with emphasis on the harm-based exemptions); the interpretation and application of *some* of these by the Information Commissioner (IC) and the Information Tribunal (IT) in respect of arms export-related information; and at recent judicial decisions, as appropriate.

This examination will involve asking: first, to what extent can the FoIA be relevant to the subject of arms trading? Second, how should the public interest be defined in arms sales cases? Third, how is the law and the underlying concept of public interest applied in practice (by government departments, the IC and the IT)? And finally, what are the roles and limits of the public in scrutinising the Government?

II Relevance of the FoIA in general

Section 1(1) of the FoIA grants citizens a statutory right to official information and "the assumption lying behind the FoI legislation is that the release of information is something which is desirable in general terms, with the burden lying on government to justify refusal

5 Scott, *Report* (n. 4 above), at d4.57; see also A Tomkins, *The Constitution after Scott: Government unwrapped* (Oxford: OUP, 1998), pp. 25–49.

6 For a detailed account of the history and developments see Z Yihdego, "Arms sales and parliamentary controls: the role of the Quadripartite Committee" (2008) 61(4) *Parliamentary Affairs* 661–80; see also M Blakeney, "Export controls in the United Kingdom" (2003) 9(6) *IntTLR* 148–58; for reports of the Government from 1997 to 2007, see http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Front%3fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029395474 (accessed 24 November 2008).

7 See, e.g. Committees on Arms Export Controls, *First Joint Report of Session 2007–08* (2008) HC 254, 17 July. The report dedicated about ten pages to the corruption issue relating to arms trading (pp. 50–60).

to release in particular cases".[8] The law is subject to class and harm-based exemptions. The latter include any disclosure of information which will "prejudice or would be likely to prejudice" national security (s. 24), defence and the armed forces (s. 26), international relations (s. 27) and the economy (s. 29); but the authorities, as per s. 2, are required to release the information unless "in all circumstances of the case, the public interest in maintaining the exemptions *outweighs* the public interest in disclosing the information".[9] In contrast, class-based exemptions, such as any disclosure of information which may contravene another Act of Parliament – such as the Official Secrets Act (OSA) 1989 (s. 12) – and a disclosure of information which may lead to "actionable breach of confidence" (s. 41), are neither subject to the harm nor to the public interest tests, although some of these have successfully been challenged in the light of the public interest test[10] (see further section IV below).

In principle, therefore, the public has the right to have access to official information. Authorities have the duty to inform the public about the workings of their respective departments. Most of the exceptions have to be strictly interpreted and justified against the public interest criterion. The laws (primary and secondary) must also be interpreted in accordance with the protection of convention rights, including the right to freedom of expression, as enshrined in Art. 10 of the European Convention on Human Rights and enforceable under s. 3 of the Human Rights Act 1998.[11]

The FoIA has also provided an implementation framework, the starting point being a request for official information from a relevant *public* department; if this information is denied by authorities then there is the right to appeal to the IC. Even if the IC decides in favour of openness (relying on the public interest test), ministers (for example, the secretaries for BERR, MoD and the FCO on matters of arms trading) can veto[12] the decision. Other procedures include an appeal to the IT and a court of law (s. 18).[13] However, it is of note that "[E]very month there are an average of 20 decisions by the commissioner and five by the tribunal",[14] the contents of which cover matters of arms exports (see section IV below).

Now, it has to be asked whether information concerning arms transfer must, as of right (and as the duty of the Government), be communicated to the public. If yes, to what extent and in what circumstances? Scott's response to these questions relied on the notion of ministerial accountability and underlined that authorities are required to provide "the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or mislead . . . the public"[15] on this subject. He added that "[W]ithout

8 See H Fenwick, *Civil Liberties and Human Rights* (London: Cavendish, 2002), p. 380; see also I Walden, "Accessing public information: features of the FoIA" (2005) 7 *Electronic Business Law* 8–10.

9 Fenwick, *Civil Liberties* (n. 8 above), pp. 390–1.

10 For example, breach of confidence-based civil actions taken by the state against private individuals (in particular journalists) are subject to the harm and public-interest (either to disclose or withhold information) tests, and, as shown in *AG* v *Jonathan Cape* [1976] QB 752 and *Lion Laboratories* v *Evans and Express* [1985] QB 526; [1984] 2 All ER 417, CA, are less likely to prevail over freedom of information and expression; see also Walden, "Accessing public information" (n. 8 above), p. 8.

11 The details of which are not, however, within the scope of this article; see Human Rights Act 1998, c. 42, s. 3, see also Sch. 1 for the convention rights and freedoms; see also Fenwick, *Civil Liberties* (n. 8 above), p. 139.

12 Fenwick, *Civil Liberties* (n. 8 above), p. 394.

13 The particulars of which are not concerns of this work. For an excellent account of the procedures and relevant considerations see e.g. Walden, "Accessing public information" (n. 8 above), p. 8.

14 For the level of requests and appeals see e.g. I Hasan, "Freedom of information" (2008) 35 *Law Society Gazette*, 18 September, p. 20.

15 Scott, *Report* (n. 4 above), at v1, 1–5, d4.57; see also Tomkins, *The Constitution* (n. 5 above), pp. 38–41.

the provision of full information it is not possible for . . . the public, to hold the executive fully to account."[16] For Scott, therefore, withholding information concerning the arms business "should always require special and strong justification".[17]

These views were praised by commentators, although the Scott Report was criticised for not exploring the usual exceptions to freedom of information, inter alia concerns of national security, foreign policy and commercial confidentiality.[18] But authors have later begun to look at these exceptions in the light of the newly introduced FoI legislation.

In her (general) commentary on the FoIA, Fenwick argued that:

> the use of the national security exemption, albeit accompanied by the harm test, may mean that sensitive matters of great political significance remain undisclosed. In particular, the breadth and uncertainty of the term "national security" may allow matters which fall only doubtfully within it to remain secret. Had the Act been in place at the time of the change in policy regarding arms sales to Iraq, the subject of the Scott Report, it is likely information relating to it would not have been disclosed since it could have fallen within the exception clauses. The whole subject of arms sales will probably fall within the national security exemption and possibly within other exemptions as well.[19]

Before dealing with the last but crucial sentence of the quote, it may be helpful to identify two less contentious issues. Fenwick rightly observes that not only national security but also economic and financial interests could all be relied on by government as reasons not to disclose arms export-related information. The decision to quash an investigation by the Director of the SFO (who is appointed by and accountable to the Attorney General) concerning £1 bn-worth of bribes allegedly paid by BAE systems to the Saudi princes in relation to a £40 bn arms deal (known as the Al Yamamah project signed in the 1980s) could be a good case in point. The controversial payment was said to be made with the complicity of the MoD. Authorities gave various, and at times contradictory, reasons for discontinuing the inquiry. The SFO justified its decision by "the need to safeguard national and international security" and that it was "necessary to balance the need to maintain the rule of law against the wider public interest". Also, while the Prime Minister (then Tony Blair) relied on both "national interest" and a risk to "thousands of British jobs",[20] the Attorney General claimed that economic factors had not played a part in the decision; the move was made on "national security" grounds, in particular concerns over the "war on terror",[21] the merits of which will be discussed later (see section IV below).

Fenwick is also right to argue that the breadth of "national security" is not well defined and so may be used (or abused) by authorities to withhold arms sales-related information. In the Al Yamamah controversy, the Attorney General admitted that the Government withheld facts and details of the case for purposes of "national security". He particularly stressed that "the SFO would have been cautious about unnecessarily revealing information

16 Scott, *Report* (n. 4 above), at d4.58; see Tomkins, *The Constitution* (n. 5 above), pp. 49–52.

17 Scott, *Report* (n. 4 above).

18 Ibid., p. 714.

19 Fenwick, *Civil Liberties* (n. 8 above), p. 391.

20 B Carlin, T Helm et al., "Blair refuses to order fresh BAE arms inquiry", *Daily Telegraph*, 8 June 2007; see also L Lustgarten, "Constitutional discipline and the arms trade: the Scott Report and beyond" (1998) 69(1) *The Political Quarterly* 501–5; see also BBC Timeline, "BAE corruption probe", http://news.bbc.co.uk/1/hi/business/6182137.stm (accessed 24 November 2008).

21 O Morgan, "Blair faces new challenges over Saudi arms deal", *The Observer*, 7 January 2007.

which could have gone widely into public circulation, leading to the very damage to national security which the decision to stop the investigation was designed to avoid".[22]

In accordance with the FoIA, such decisions have to be assessed against the public interest test. Concerning the same case, the Attorney General told the House of Lords that the move was made on "public interest grounds – the risk of non-cooperation from Saudi Arabia on the 'war on terror' threatens Britain's security".[23] However, the then leader of the Liberal Democrats, Menzies Campbell, criticised the Government for not revealing information about the allegations and said that "these events make yet another powerful case for transparency and more effective scrutiny"[24] on the issue. Moreover, several NGOs, called upon the UK Government to reopen the case, referring to national and international obligations and interests of Britain, and recalling "the devastating impacts of corruption on democracy, sustainable development, human rights and poverty",[25] a claim some elements of which were endorsed by the High Court but later rejected by the House of Lords (see section IV below).

However, it is argued here, based on the FoIA and the responses of MPs and interest groups to the BAE–Saudi and other similar affairs, that the use of the "national security" (and other harm-based) exemption(s) in respect of arms sales can convincingly (at least theoretically) be challenged if public interest demands full disclosure. Fenwick's view on national security-based exemption is certainly right if stated in this context. The problem is how and through which mechanisms the public interest regarding confidentiality over matters of arms export can be determined – on the first question Scott recommended a public debate.[26]

III Factors for public interest test

The first factor for determining the public interest concerns national security. Normally, these concerns relate to threats from, and policies of, war, armed forces and intelligence services.[27] It has also been extended to threats arising from terrorism, sensitive weapons and technologies, and aviation security.[28] In this sense, and as shown in Sch. 3(2) of the ECA, the arms trade and related policies have legitimate national security dimensions. Britain can therefore lawfully consider its national security interests without contravening domestic and international norms. In reality, authorities rely heavily on national security to justify the supply of weapons, even in predominantly commercial arms deals, but with adverse impacts on human rights, security and development abroad.[29]

22 D Leigh and R Evans, "Attorney General says BAE details were withheld for fear of leaks", *The Guardian*, 14 June 2007.

23 Morgan, "Blair faces new challenges" (n. 21 above).

24 M Campbell, "Attorney General politically inept over BAE Systems", 14 June 2007, at http://www.libdems.org.uk/news/story.html?id=12764&navPage=news.html (accessed 24 November 2008).

25 "Legal challenge to decision to drop BAE corruption inquiry: NGO letter to Prime Minister Tony Blair", 15 January 2007 at http://www.thecornerhouse.org.uk/item.shtml?x=548924 (accessed 24 November 2008).

26 Scott, *Report* (n. 4 above), at k8.14.

27 See e.g. US National Security Act 1947. See also I Cameron, *National Security and the European Convention on Human Rights* (London: Martinus Nijhoff, 2000), pp. 39–52.

28 *R* v *Director of Serious Fraud Office*, House of Lords [2008] UKHL 60; see also Anti-terrorism, Crime and Security Act 2001.

29 See e.g. J Aitken, *Officially Secret* (London: Weidenfield & Nicolson, 1971), pp. 138–9; see also the use or "abuse" of the Anti-terrorism Act in the recent financial crisis, BBC News, "Iceland: Britain's unlikely new enemy", 15 October 2008, at http://news.bbc.co.uk/1/hi/magazine/7667920.stm (accessed 13 November 2008).

This led Lustgarten and Leigh to submit that:

> The Protection of human rights and the health of democratic institutions is the core of what should be regarded as national security, and often national security is as much in jeopardy from the actions of those in positions of political and economic power at home as it is from any threats from overseas.[30]

Indeed, the excessive discretion of the executive in using the notion of national security in arms sales can have serious adverse impacts on national security in two senses. First, the unrestrained use of the concept may work against the UK's security interests in practical ways. For example, exported weapons can be diverted to others or may later be used against the exporting country (at home and abroad) and its allies. A parliamentary Joint Committee Report of 2002–03 underlined that:

> . . . an effective arms export control regime can make an important contribution to the security of the United Kingdom . . . Yesterday's ally of convenience can become today's enemy. Future generations must not have cause to regret equipment supplied today to allies in the war against terror.[31]

Second, general (and excessive) reliance on national security as a reason to withhold information would mean less transparency, fewer checks on arms sales decision making and a high probability of defects in such transactions, the consequences of which may endanger UK national security. Thus, while there will always be an overlap between security and non-security reasons for arms sales, national security should not be used as a shield for other essentially distinct interests. Authorities are required specifically and exceptionally to justify their reliance on national security relating to the public interest test.

The House of Lords' ruling in R v *Director of the Serious Fraud Office*[32] – the subject of which concerned the controversy over stopping an inquiry into alleged bribery involving BAE Systems and Saudi officials – appears to have endorsed this approach. While the niceties of the case are dealt with elsewhere (section IV below), Lady Hale's words are particularly pertinent here.

> The "public interest" is often invoked but not susceptible of precise definition. But it must mean something of importance to the public as a whole . . . The withdrawal of Saudi security co-operation would indeed have consequences of importance for the public as a whole. I am more impressed by the real threat to "British lives on British streets" than I am by unspecified references to national security or the national interest. "National security" in the sense of a threat to the safety of the nation as a nation state was not in issue here. Public safety was. (Para. 53).

The second factor to consider is the economic interest attached to the arms trade. Clearly, the arms industry (as in other democracies) is a highly significant sector of the British economy. An average of £5 bn income annually, 90,000 jobs and the tax which is levied from the industry and employees are considerable economic and commercial

30 Lustgarten, "Constitutional discipline" (n. 20 above), p. 501; see also L Lustgarten and I Leigh, *In From the Cold: National security and parliamentary democracy* (Oxford: OUP, 1994).

31 Quadripartite Committee, *Strategic Export Controls – Annual Report for 2001*, HC 474, 20 May 2003, para. 1.

32 [2008] UKHL 60.

imperatives.[33] Some city councils[34] and universities and colleges[35] have, for example, shares in the arms industry. Most banks and pension funds are said to have shares also. The Government's Annual Report of 2004 made it clear that "[T]he vibrant UK defence industry is . . . significant in terms of employment and the economy more generally."[36] The Al Yamamah deal alone covers £40 bn of revenue. In the BAE–Saudi arms deal debate, the Government emphatically mentioned that thousands of jobs would have been at risk had the inquiry proceeded.

However, many sensibly argue that the economic and commercial significance of the arms trade is exaggerated. The monetary gain from the industry is "less than half a per cent of GDP". The Government subsidises the industry at the rate of more than £400 m per annum, and so taxpayers have a legitimate interest in what should and should not be done using their money.[37] The industry also gets other privileges, such as a credit guarantee, from the state.[38] Moreover, the economic advantages cannot decisively justify the moral and ethical issues attached to the commerce in weapons.[39] This is why the shares of some public entities in the arms industry have been criticised as unclean investment.[40] It is thus justified to say at the very least that the British public and its democratic institutions have a direct interest in the economics of the arms trade.

The third factor which may be relevant when considering where the public interest lies concerns the applicable legal rules and adherence of authorities to such rules. As reflected in the ECA and the Consolidated Criteria, arms transfers in violation of arms embargoes, whenever there is a risk of the use of them in conflicts, terrorism and against humanitarian principles, contravene Britain's "international obligations and commitments".[41] Arguably, however, as there is not an arms trade treaty or an express statutory restriction which applies to the trade in most conventional weapons, and the application of international human rights is limited to Britain's territory and jurisdiction, respect for human rights and concern about conflicts in other countries (in which the UK has no jurisdiction) may not bind the Government to refrain from supplying weapons.

33 S Brittan, "The ethics and economics of the arms trade" (2001) *Royal Society of Arts Journal* 08, at http://www.samuelbrittan.co.uk/text87_p.html. para. 15; see also P Ingram and I Davis, *The Subsidy Trap: British Government financial support for arms exports and the defence industry* (Oxford: Oxford Research Group, 2001), p. 4; see also Scott, *Report* (n. 4 above), at d1.24.

34 CAAT, "Local councils have over £300 million invested in BAE", 9 July 2007, at http://www.caat.org.uk/press/recent.php?url=090707aprs (accessed 5 December 2008).

35 CAAT, "Clean investment: universities and colleges", at http://www.caat.org.uk/campaigns/clean-investment/unis2006/ (accessed 5 December 2008).

36 UK Strategic Export Controls, *Annual Report 2004* (2005) Cm 6646, July, p. 1.

37 Ingram and Davis, *The Subsidy Trap* (n. 33 above), pp. 4 and 8; see also S. Martin, "The subsidy savings from reducing UK arms exports" (1999) 26(1) *Journal of Economic Studies* 15–37; see CAAT, *Submission to the Quadripartite Committee* (January 2005), para. 30. Their estimate of the subsidy is "around £890 million per year"; see Saferworld, "The good, the bad and the ugly: a decade of Labour's arms exports", 21 May 2007, at http://www.saferworld.org.uk/newslist.php?lang=en&id=347 (accessed 5 December 2008).

38 Ingram and Davis, *The Subsidy Trap* (n. 33 above), p. 9.

39 Lustgarten, "Constitutional discipline" (n. 20 above), p. 500; see also Z Yihdego, "Irresponsible transfers of small arms and humanitarian norms: principles of humanity and public conscience perspective" (2006) 2(3) *Journal of Human Security* 29–42; see also CAAT, *Submission* (n. 36 above), para. 34. It was reported that "voters would be happy to see Government support for arms exports removed".

40 See CAAT, "Clean investment" (n. 35 above).

41 See Export Controls Act 2002 (criterion two); see also *The Consolidated EU and National Arms Export Licensing Criteria*, 26 October 2000 – HC 199–203W.

Many would strongly reject this viewpoint;[42] at least, aiding and abetting other wrong-doing states or non-state-actors through arms provision is unacceptable and may entail state responsibility in appropriate circumstances, and this covers complicity in human rights violations and abuses.[43] Even if one implausibly adopts the second argument, arms transfer contrary to national policy (the Consolidated Criteria) would obviously raise questions of legal and constitutional legitimacy.[44]

The fourth factor in assessing where the public interest lies is that moral and ethical issues constitute vital bases for arguing against (or maybe in favour of) the unrestrained international arms sales. Those who oppose unrestricted arms transfer from Britain submit that it is immoral to make profit from the supply of tools of conflict, crime and human misery.[45] They particularly focus on the immorality of supplying arms to repressors of civil liberties, those engaged in armed conflict and to the least developed countries. Others, however, regard military, economic and material benefit as more important than human security "in foreign policy";[46] they rely on the need to have a competitive defence industry, and on the fact that, even if the British arms industry were to refrain from arms supply, another state would definitely take over the trade instead.[47]

Brittan responds:[48]

> It is like saying that you should not stop knocking your head against a brick wall until your friends have also stopped knocking theirs . . .The argument that others will export weapons if Britain desists is a dangerous defence for any aspect of the arms trade. The very same argument was used to defend the slave trade in the 18th century and the opium trade to China in the 19th century.

Some may also argue that "Britain . . . must withdraw from the arms trade" and the arms industry should be converted to "civilian uses", a policy which will "cause major unemployment" in the short term, but "for reasons of constitutional and moral scruple may be justifiable to achieve the higher good".[49] This is neither a new argument, as it was a popular view even during the time of the League of Nations,[50] nor inconceivable if there

42 See e.g. Z Yihdego, *The Arms Trade and International Law* (Oxford: OUP, 2007), ch. 8; for human rights treaty perspective, see D McGoldrick, "Extraterritorial application of the International Covenant on Civil and Political Rights" in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Oxford: OUP, 2004), pp. 52–3.

43 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art. 16; see also B Frey, "Small arms and light weapons: the tools used to violate human rights" (2004) 3 *Disarmament Forum* 44.

44 Scott, *Report* (n. 4 above), at d3.30(v), rightly referred to the view that "public opinion and Parliamentary opinion would not understand a volte face in policy".

45 Saferworld, "The good, the bad and the ugly" (n. 37 above), p. 4; see also P Towle, *Ethics and the Arms Trade* (London: Institute of Economic Affairs, 1998), p. 30; see UK Strategic Export Controls, *Annual Report* (n. 36 above), p. 1; for general discussion on ethics as a constitutional concern, see D Woodhouse, *In Pursuit of Good Administration: Ministers, civil servants and judges* (Oxford: Clarendon Press, 1998), pp. 15–22. She referred to the Matrix Churchill case as an example of unethical conduct of ministers and civil servants (p. 19).

46 Lustgarten, "Constitutional discipline" (n. 20 above), pp. 508–9. He characterised this argument as "amoralist view"; this line of argument was also rejected by Lord Scott in his *Report* (n. 4 above), at d4.59–60).

47 Lustgarten, "Constitutional discipline" (n. 20 above), pp. 509–13; see also Scott, *Report* (n. 4 above), at d8.16.

48 Brittan, "The ethics" (n. 33 above), p. 10.

49 Lustgarten, "Constitutional discipline" (n. 20 above), p. 514.

50 See e.g. *Committee for the Regulation of the Trade in, and Private and State Manufacture of, Arms and Implements of War*, 12 November 1932 (3), The League of Nations, paras 9–10.

is a political and moral will to restrict arms production only for national defence and security, and not for international markets.[51]

However, Brzoska observes that "when the new Labour government in Britain announced a policy on using military technology in the civilian domain, it was called 'defence diversification' with no mention of diversion at all".[52] The consensus (although not necessarily the practice) appears to be that arms sales must be restrained, strictly controlled and scrutinised but not banned. Be that as it may, it is hardly possible to win the hearts and minds of the public to try to justify unethical deeds by relying on actual or potential wrongdoings of other countries and their arms industries. Having resort to strengthening multilateral efforts is rather a convincing remedy to fight unscrupulous arms sales competition.

The final but fundamental factor in assessing the public interest is that, for all the reasons cited above, (security, economic, ethical etc), the public has a legitimate interest in putting arms sales decision making under democratic control,[53] through the various available methods, notably parliamentary and public scrutiny.

In a few words, there are a number of different ways that the term "public interest" can be considered. It is not something which can be easily defined and its potentially ambiguous meaning has often provided a cloak with which to prevent the disclosure of information. The above factors are to be viewed as general considerations associated with the term, as is the "candour" argument, often stated as a reason to withhold information, which relates to the idea that it is in the public interest for ministers and officials to speak candidly without fear of constant scrutiny and suggests that those persons would not be able to perform their duties efficiently if all their decisions were subject to public scrutiny. There is, however, something which remains an important and perhaps overriding concern: the notion that members of the public have a right to adequate information as to what acts the Government is carrying out in their name. This is a basic yet essential right which allows the voters the opportunity to make a clear and informed choice on polling day and should be crucial to the running of democratic society.[54]

IV The public's right to arms sales-related information: the law in practice

"[K]nowledge by the people of the activities of government" and their ability "to restrain government and hold it accountable" are among the crucial features of democracy.[55] This also applies to the arms trade. By virtue of the FoIA and the ECA, the public has the right to know about the administration of arms exports, not only via Parliament but also from government authorities and departments. This reinforces the ability of the public to hold authorities to account, as clearly acknowledged by ministers in their 2006 report on the issue.[56] Although the Scott Report seems to consider the need for openness by officials towards the

51 See e.g. Ottawa Mines Convention 1997, for states which ceased or converted their production see http://en.wikipedia.org/wiki/Land_mine#Manufacturers (last accessed 13 November 2008).

52 M Brzoska, "Military conversion: the balance sheet' (1999) 36(2) *Journal of Peace Research* 131.

53 Lustgarten, "Constitutional discipline" (n. 20 above), p. 508.

54 For a general account of the issue, see e.g. A Austin, "The Freedom of Information Act 2000 – a sheep in wolf's clothing?', in J Jowell and D Oliver (eds), *The Changing Constitution* 5th edn (Oxford: OUP, 2004), pp. 401–8.

55 R Pyper (ed.), *Aspects of Accountability in the British Systems of Government* (Gateshead: Tudor, 1996), p. 14.

56 UK Strategic Export Controls, *Quarterly Report* (2006) October–December, at http://www.fco.gov.uk/Files/kfile/quarterlyreportoctober-december06.pdf (accessed 13 November 2008); see also UK Strategic Export Controls, *Annual Report* (n. 36 above).

public in general and their admission of wrongdoing in particular,[57] the consequences of failure to comply with laws and policies should, in appropriate circumstances, go as far as the questioning, resignation and calling back of ministers from public office.[58]

Yet, the right at issue is not absolute but subject to lawful exemptions (see section II above). However, the public interest test applies to such (harm-based) restrictions as evidenced by the MoD's provision of detailed (but general) data on weapon deliveries which was requested by the Campaign against the Arms Trade (CAAT) on the basis of the FoIA,[59] and the disclosure by some local government and academic institutions of their share-holdings in the arms trade, in response to FoIA-based requests.[60]

The author has also used the FoIA to ask the Department for Trade and Industry (DTI) (now BERR), the MoD, the FCO and the IC to provide detailed information about "the requests they have received from members of the public in respect of arms export or delivery concerns and their responses to them". The replies received vary from procedural to substantive issues. The FCO formally refused the author's request on the basis that "it will take more than 3½ working days" to do so.[61] However, the Export Control Organisation (ECO) of the DTI,[62] the Defence Export Services Organisation (DESO) of the MoD[63] (which has now been dissolved) and the IC's office[64] replied positively with letters of 31, 8 and 5 pages respectively (plus pdf links to eight decided cases).

From these responses the following can be deduced. First, areas of interest of members of the public in 2006–07 included arms supplies to Saudi Arabia, Israel and Tanzania, the role of BAE and DESO in weapon deals and questions of pertinent policies.[65] Secondly, in their responses to the requests, these departments repeat or refer to the official reports of the Government on arms exports; they refuse the disclosure of specific information on arms sales referring, for example, to "information provided in confidence" (s. 41), "prejudice to the effective conduct of public affairs" (s. 36), "information accessible to the applicant by other means" (s. 21) and the outweighing public interest to withhold information.[66]

Thirdly, most of the s. 50 FoIA decisions (of 2007) of the IC on arms sales-related complaints have been decided in favour of government departments. Out of the eight decided cases supplied to the author – four of which were about the UK–Saudi affair, brought against either the MoD or the National Archives – the complaints were not upheld by the IC on the ground that the requests were exempt under s. 1(2) and that "the balance of

57 Scott, *Report* (n. 4 above), at k8.1, k8.15–16.

58 For general discussion on public scrutiny, see Pyper, *Aspects of Accountability* (n. 55 above), pp. 15ff; for specific discussion, see I Leigh and L Lustgarten, "Five volumes in search of accountability: the Scott Report" (1996) 59(5) *Modern Law Review* 707–8.

59 CAAT, "Clean investment" (n. 35 above); see also Scott's recommendation (*Report*, n. 4 above), at k8.10.

60 CAAT, "Clean investment" (n. 35 above).

61 FOI Request-0584-07-FCO Reply, 26 July 2007; s. 12 of the FoIA makes provisions for public authorities to refuse requests for information where the cost of dealing with them would exceed the appropriate limit.

62 Letter dated 16 August 2007.

63 Ref DESP/14/09, 9 August 2007.

64 Ref FOI/693, 14 August 2007.

65 DESO's reply (Ref DESP/14/09, 9 August 2007) and the attached table which shows the twenty-five FoIA requests which demonstrate this.

66 The responses to the requests on Tanzania, Israel and Saudi Arabia arms supplies affirm this: ECO (DTI), letter dated 16 August 2007, annex.

the public interest favours withholding the information sought".[67] In the complaint filed against the Export Credits Guarantee Department (ECGD) for refusing a "request for information about support given to BAE Systems", however, the commissioner submits that:

> the public interest is best served where access to information would: further public understanding of, and debate about, issues of the day; facilitate the accountability and transparency of public authorities for their decisions; and, improve accountability and transparency in the spending of public money. He has seen that ECGD commits significant sums of public money to support UK exports. These factors favour full disclosure of information by ECGD. The Commissioner considers that disclosing the general financial exposure of ECGD to public scrutiny can assist ECGD and its partners in managing their credit risks effectively.[68]

The analysis and sifting of evidence by the commissioner seems to be a detailed search of the public interest concerning the subject at issue. Unfortunately, in assessing the public interest, the IC relied on only some aspects or factors, for example, economic benefits and international relations. Other important factors, such as the respect for human rights, were not mentioned. Some of the cases have been appealed to, and decided by, the IT.

In *Gilby* v *the Information Commissioner*[69] (of 2007), for instance, the appellant to the IT claimed that the denial of his FoI requests by the National Archives of FCO files of the late 1960s on arms sales (including tanks) to Saudi Arabi (and its National Guard) and their subsequent endorsement by the IC are contrary to his freedom to official information for two main reasons: first, s. 27 of the Act (prejudice to international relations) has been wrongly applied to exempt the information from disclosure while public interest relating to "corrupt practices" in those transactions outweigh public interest to withhold them. And second, the breach of confidence argument doesn't work here as the Saudi Government is aware of the fact that the UK releases historical documents to the public.

The IC (joined by the FCO) rebutted these saying that there is strong evidence (which includes the statement of the then PM, the Attorney General and the testimony of the UK Ambassador to the Kingdom) that the release of such confidential documents would "seriously harm the bilateral relationships" between the UK and Saudi Arabia and that it would constitute a breach of confidence on the part of the British Government – so withholding the information best serves the public interest. It added that the 40-year rule to disclose information as historical documents is not automatic; it can be reviewed depending on the nature of archives.

The tribunal, questioning the reliability of the claim over corrupt practices and recognising the economic and other interests of the UK "both here and abroad", agreed with the analysis and conclusion of the IC and dismissed the appeal saying:

> The principal issue in these appeals is where the balance of public interest lies. The Commissioner's conclusion . . . was that the public interest in maintaining the exemption outweighed the public interest in disclosure. . . Indeed, the clear evidence of HM Ambassador to Saudi Arabia, Mr William Patey, highlights the sensitivities at play in the UKG's [United Kingdom Government's] relationship with the SAG [Saudi Arabian Government) and the damage that would result

67 See e.g. Decision Notice (DN) FS50086784, 04/04/2007, MoD; DN FS50125539, 07/08/2007, National Archives; DN FS50111530, 04/07/2007, National Archives; DN FS50119364, 31/07/2007, National Archives.

68 DN FS50087290, 27 March 2007, para 21.

69 *Nicholas James Gilby* v *The Information Commissioner* EA/2007/0071,0078,009; for similar rejection, see also *Evans* v *The Information Commissioner* EA/2006/0064, 26 October 2007.

> from disclosure. Whilst the Commissioner recognises that there is a strong public interest in transparency in relation to the transactions underlying these appeals, he considers that the balance in this case lies in favour of maintaining the exemption. (Para. 11)

Moreover, in *CAAT* v *The IC* (the MoD joined the latter),[70] an appeal decided a few months after the *Gilby* case, which concerns an MoD refusal of an FoI request by CAAT of seven memoranda of understanding (MoU), the subject matter of which is again the Saudi-UK arms deal of the late 1990s, the tribunal reached a pretty similar conclusion but with detailed legal and policy reasoning – the facts and issues have been summarised as follows.

The MoD rejected the request based on s. 27 (harm to international relations under subs. (1) and confidentiality under subs. (2)) and s. 43 (harm to commercial interest) of the FoIA. CAAT appealed to the IC against this decision. The IC upheld the s. 27 exemption but neither accepted nor rejected the s. 43 argument of the MoD (para. 8).[71]

The question before the tribunal was, thus, whether the disclosure of the MoU outweighed the public interest to not do so in terms of the confidentiality and the harm to international relations exemptions (para. 55). In respect of the first barrier to disclosure, the tribunal concurred with the MoD's argument that the MoU are confidential documents – the two states wanted them to be so treated. They can only be disclosed if the Kingdom of Saudi Arabia were to consent to that effect. However, the tribunal supported CAAT's criticism of the MoD that seeking consent from a foreign state is not compatible with British democracy and so the fact that these documents are confidential does not mean that the exemption of the MoU outweighed the public interest in disclosing them (para. 78).

It then went on to examine and apply the public interest balance test on disclosing or withholding the information in accordance with s. 2(2) of the FoIA and taking into account its case law – *Gilby and Department for Education and Skills* v *IC* (EA/2006/0006). While recognising that the presumption is always in favour of disclosure, and the need for greater transparency and accountability on the subject (in particular when there are concerns of corruption), the Tribunal concluded that:

> Starting with the public interest in maintaining the exemption, the exemption under s. 27(2) and (3) is based on confidentiality arising out of circumstances in which information was obtained from a state . . . Thus parliament recognised and we accept that there is an inherent disservice to the public interest in flouting international confidence. (Para. 95)

It also made a distinction between confidentiality on matters of the arms trade and allegations of corruption. It indicated that had the MoU contained some evidence of corruption, its verdict would have been different, but the tribunal affirmed that it had read the MoU and there had been no evidence of corruption in the documents (para. 98). It must be noted that confidentiality under s. 27 (3), which is attached to international relations, and confidentiality under s. 41, which may lead to an actionable breach of confidence, are distinct, the former being subject to the public interest test but the latter "is not" (see further section II above).

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70 *CAAT* v *Information Commissioner* LTL30/7/2008.

71 For absolute exemptions on transactions of commercial nature, see e.g. Walden, "Accessing public information" (n. 8 above), p. 8. He underlined that "[C]onfidential [commercial] information is considered an absolute exemption, where the disclosure would be an actionable breach of confidence. However, the courts recognise that 'public interest' considerations may arise in such an action (see *AG* v *Guardian Newspapers (No 2)* [1990] 1 AC 109, 282), which effectively means that confidential information faces a similar situation to that applicable to the qualified exemptions."

Likewise, regarding the second controversy, the content of which was about prejudice to international relations and other related issues, CAAT submitted that the arms trade is not in the interest of the UK (rather it is in the interest of the industry in question), and a potential misuse of weapons by Saudi Arabia and the alleged corruption in the transactions, among others, are relevant to the public interest test. While the bad human rights situation in Saudi Arabia had been noted by the tribunal, the claim of the appellant was rejected for several reasons: first, securing good relations with Saudi Arabia (including "the sales in arms and services in connection therewith") "is to the interest of" Britain; second, the issue involves not the interests of companies or individuals but rather of the UK in general; third, Saudi Arabia is important to the UK in terms of the interests of British citizens living there, the influence and power of the country in the region and the continuing interest of Britain in the relationship; and, finally, as mentioned earlier, the claim of corruption was said to be unproven (paras 79–90).

It is no surprise that CAAT has to date not filed an appeal against this (or other similar) decision(s) before a court of law. The House of Lords' ruling in *R* v *Director of the Serious Fraud Office* (of 2008), as referred to by the IT in the above-mentioned case, seems to have had a crucial impact on the controversy under consideration – although not about FoI (it is, rather, a judicial review case), the relevant aspects of it are worth looking at.

Initially, the SFO decided to halt an inquiry into the alleged bribery involving BAE Systems and the Saudi prince on grounds inter alia of national security threats to the UK and its citizens – it was stated that Saudi Arabia threatened to withdraw from its security and intelligence cooperation with Britain on "the war on terror"; the claimant (a civil society) challenged the decision before the High Court[72] as contrary to the British criminal justice system and democracy and as an improper use of the notion of national security to justify the action. The court essentially endorsed this and concluded that the threat (from Saudi Arabia) was an intervention into the British legal system which was not impartially challenged by the director – the court emphasised "we intervene in fulfilment of our responsibility to protect the independence of the Director and of our criminal justice system from threat. On 11 December 2006, the Prime Minister said that this was the clearest case for intervention in the public interest he had seen. We agree."[73]

Yet, the Law Lords *unanimously* disagreed with the decision and overturned it. For the Lords "the right question was whether, in deciding that the public interest in pursuing an important investigation into alleged bribery was outweighed by the public interest in protecting the lives of British citizens", they also thought that the issue was "not whether his [the Director's] decision was right or wrong, nor whether the Divisional Court or the House agreed with it" (para, 1).

Lord Bingham, referring to "[T]he decision of the then Attorney General to release Leila Khalid to avert a threat by the PLO to execute Swiss and German hostages" and its subsequent endorsement by the Divisional Court as a defensible act (paras 39–40), considering the evidences and their interpretation including "the withdrawal of co-operation might lead to 'another 7/7'" and the need "to take account of threats to human life as a public interest consideration", strongly disagreed with both the formulation of the issue by the lower court and its judgment (paras 35–47).

72 *R* v *Director of the SFO* [2008] EWHC 714; for a good summary of the High Court's decision, see Yihdego and Savage, "The UK arms export regime" (n. 1 above), pp. 559–60.

73 *R* v *Director of the SFO* [2008] EWHC 714, paras 161, 18.

Lady Hale agreed and further pointed out that:

> The . . . British public may still believe that it was the risk to British commercial interests which caused him [the Director] to give way, but the evidence is quite clear that this was not so. He only gave way when he was convinced that the threat of withdrawal of Saudi security co-operation was real and that the consequences would be an equally real risk to "British lives on British streets". (Para. 52)

However, she also added:

> I do not however accept that this was the only decision he could have made. He had to weigh the seriousness of the risk, in every sense, against the other public interest considerations. These include the importance of upholding the rule of law and the principle that no-one, including powerful British companies who do business for powerful foreign countries, is above the law. It is perhaps worth remembering that it was BAE Systems, or people in BAE Systems, who were the target of the investigation and of any eventual prosecution and not anyone in Saudi Arabia. The Director carried on with the investigation despite their earnest attempts to dissuade him. He clearly had the countervailing factors very much in mind throughout, as did the Attorney General. (Para. 55)

Some observations are worth making here: the Lords referred to a specific security (or public) threat and not national security in general, which suggests extreme and/or exceptional cases (like hostage taking and the responses to it). They did not refer to economic/commercial considerations to justify the action, despite the Government's reliance on them to halt the inquiry. Indeed, they seemed to reject commercial justification as a reason for the Director's action, although, they also rejected the need to scrutinise the substantive aspect of the Director's decision, without which it appears to be difficult to weigh where the public interest balance lies – to continue with the inquiry or halt it – without examining both the facts and the judgment made based on them. In any event, although the case was basically concerned with a question of (un)lawful exercise of public power, the decision is likely to have an indirect and perhaps a major impact on FoI vis-à-vis national security questions. In short, the cases considered provided evidence that the public is entitled to get (official) information concerning arms sales as a matter of principle, and we have witnessed the realisation of this to some extent. Authorities may deny this right if they can specifically justify the balance of public interest in favour of doing so on clear and strong threats to national security, international relations, etc. Commercial confidentiality has also been assessed in the light of the public interest criterion. The practices of the IC, the IT and the House of Lords endorsed this.

These developments give a twofold impression. On the one hand, the ever-increasing challenges by members of the public, including involving tribunals and courts, will certainly increase the level of public scrutiny and awareness on arms sales issues. The assurances given by the tribunal (and others) regarding the bribery matter and the gravity of the threat which arose from Saudi's threat to cease security cooperation with Britain are of significant value also, as is the fact that tribunals and courts have managed to see confidential evidence in the course of examining the public interest which should mean more oversight and scrutiny over arms dealings. In particular, the ruling of the High Court in favour of civil societies was generally seen as a major development – these are significant successes, indeed.

On the other hand, however, the overall trend of the IC and the IT (in adopting a restrictive approach to the public's right to specific arms trade-related information), which seems to be generally supported by the House of Lords, means that it will be extremely difficult for the public to have access to such information even when serious public concerns are involved; and whether the assurances given by the Tribunal or the House of

Lords can fully satisfy the public on the problems and doubts is difficult to envisage. What is clear, however, is that these and the hesitation to consider other principles (especially human rights) by the tribunals may lead to disappointment, at least to some portions of the public (such as CAAT, the Corner House, Mr Gilby, and their supporters) who are undoubtedly determined to scrutinise the Government and arms companies with the intention of upholding constitutional principles and other international standards (for example, the fight against corruption, the need to halt arms supplies to repressive regimes and to armed-conflict situations).

V Conclusion

How to conclude then on the roles and limits of the public in controlling the Government using their right to (official) information? Certainly, the introduction of the FoIA 2000 and its implementation have considerably improved the public's role in scrutinising government actions (and omissions) in the field of arms supplies. These efforts are represented inter alia by civil societies, individual members of the public, journalists and even academics. There are encouraging outcomes as well as disappointments. One of the positive developments includes the general acceptance by the law, authorities, tribunals and members of the public that official information concerning arms transactions must be disclosed to the public unless there is a compelling and a specific reason to protect the public interest by withholding it. In principle, therefore, contrary to what some may have believed not long ago, the public is entitled to have access to arms trade-related official information – specifically, the whole subject matter of the arms trade is not exempt from disclosure.

In addition, members of the public have begun to exercise this right by making requests to appropriate departments (for example, the BERR, MoD, FCO). The responses of these departments have been quite positive in respect of general information. What is remarkable is that refusal decisions by departments have been challenged before the IC and the IT, although the outcomes usually favour the departments. The decisions of the IC and IT (and the House of Lords) appear to suggest that the exemptions for harm to national security, international relations, confidentiality etc must strictly and specifically be proved in consideration of the public-interest test – the extensive search for evidence by the IT and the House of Lords seems to affirm this. Additionally, the IT and the Law Lords seem to focus more on harm to security and international relations than on commercial factors, contrary to the claims of departments (for example, the MoD).

Yet, dozens of questions (and disappointments) remain. So far, the practice of officials, the IC and the IT suggests that specific information (for example, individual licences, arms sales contracts, and communications between officials and lobbyists (as shown in *Evans* v *IC* EA/2006/0064, 26 October 2007)) should not be disclosed, as the public interest to do so overweighs the public interest to disclose the secrets. This conclusion can be generally correct; but the problem is, however, if the public has overriding concerns over some transactions (for example, the use and misuse of arms, corrupt practices, tax evasion, public subsidy, etc). The IT responded to this question by ensuring that the MoU with Saudi Arabia do not indicate any corrupt practices; the Lords emphasised that the problem with the action of the Director of the SFO was purely a matter of grave security concern (as opposed to a commercial concern).

Are these and similar assurances satisfactory in terms of ensuring both public confidence and democratic controls? Those who are actively campaigning to promote accountability and transparency on this matter will certainly say no; to some extent this doubt has merit, for the simple reason that neither the IT nor the House of Lords addressed the details of the allegations raised by members of the public, Parliament and the

press, although their observations and judgments are of significant value. Also, neither the FoIA institutions nor the Lords seem to be courageous enough to define clearly and address the competing issues – for example, national security and confidentiality versus human rights and democratic values (transparency and accountability, for example) as matters of public concern. Equally, authorities may reasonably say that confidential documents are shared with the IT and parliamentary committees, publication and reporting schemes are in place and therefore democratic oversight is already there – it is not in the interest of the public to disclose particular information to individuals (and civil societies). These developments (and defences) may be real but are they enough?

This and other problems relating to the notion of freedom of information led Leigh et al. to envisage that:

> Laws of this type [the FoIA] enable members of the public to initiate a bureaucratic procedure to extract information specifically requested, a rather more limited tool than the investigative powers of a parliamentary or other public body. Serious deficiencies would remain, requiring a more innovative approach.[74]

The fact that some Government departments frustrate FoIA requests for the most inadequate reasons[75] embraces this claim (for example, the refusal by the FCO as mentioned earlier).

The initiatives of members of the public and interest groups to gain and publish information using the FoIA and related mechanisms must, however, be considered as a major accomplishment. Their embryonic practices, along with other endeavours, may be the birth of strong public scrutiny on arms trade matters. This is not to deny the deficiencies of this process as one public scrutiny mechanism (as considered earlier). In the US, this field has gone far further in favour of freedom of information. For example, interest groups obtain prior notifications from Government to Congress of arms export licences as part of the right to information.[76] But the public's right to government information as a tool of scrutiny is still important in Britain, along with other methods, notably parliamentary checks. Each complements the other in promoting transparency, accountability and responsibility in respect of the arms business (similar to that of other sensitive Government activities).

On the basis of the practices and some shortcomings, one final point is worth making: The public interest in its full sense has to be at the centre of decision making either to disclose or withhold information by relevant departments, the IC and the IT. So far, the consensus (in Government plus tribunals) seems to accept that the public is entitled to general but not specific information on this subject matter. But it would be absurd to deny disclosure of specific information if so doing is in the interest of the public. The first step should be to conduct public debate and research from which some general factors can be formulated on public interest with respect to the arms trade. As discussed, security, economic, legal and ethical advantages and disadvantages of openness or secrecy with regard to the business in question, must be taken into account, openness being the principle and secrecy an exception to it.

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74 Leigh and Lustgarten, "Five volumes" (n. 58 above), p. 715.

75 In December 2006, *The Independent* newspaper published an article highly critical of the departments' conduct. Crucially, the newspaper submitted a number of requests for information under the Act from the serious (asking for the documents relating to the legality of the Iraq war to be revealed) to the not-so-serious (asking for more information regarding the sweater given to Tony Blair by George Bush and for the names of people on Tony Blair's Christmas card list). Unfortunately, the not-so-serious requests received similar responses, deemed "not in the public interest" and "harmful to international relations" respectively. See R Verkaik, "What freedom of information?", *The Independent*, 28 December 2006.

76 See e.g. Yihdego, "Arms sales" (n. 6 above), pp. 678–80.

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Solving the impossible: the puzzle of coherence, consistency and law

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Abstract

Though considerable claims are made for the use of coherence in law, its meaning is routinely taken to be elusive, controversial or even mystical. Some argue that defining coherence is logically impossible. This is surprising at best, and at worst should prompt serious alarm. It is generally agreed, at least, that consistency provides one necessary condition for coherence, though the list of additional elements required is keenly disputed. I pitch the dispute further back, and argue that the agreed-upon relation with consistency is unsustainable and damaging, and arises only because of a striking methodological oversight. This oversight accounts for and resolves the perceived impossibility and complexity of coherence. Freed from consistency, I argue for coherence just as "sticking together", and close by considering the implications of my analysis for writing that presently presses coherence into legal service.

> The concept of coherence and its practical utility in reference to the legal system and legal argumentation are still very far from showing unanimity and precision of content and definition . . .[1] (Zaccaria, 1990)
>
> A further puzzle . . . has its roots in the fact that coherence theorists have been unable to reach anything like a consensus on how to define their central notion.[2] (Olsson, 2005)

1 G Zaccaria, "Hermeneutics and narrative comprehension in law" in P Nerhot (ed.), *Law, Interpretation and Reality* (Dordrecht, Netherlands: Kluwer, 1990), p. 265.

2 E Olsson, *Against Coherence: Truth, probability and justification* (Oxford: OUP, 2005), p. viii.

One

In law, the ascendancy of coherence has been as unobtrusive as it is complete; look, and suddenly it is everywhere, extolled for its practical and jurisprudential value in any one of a multitude of legal applications.[3] Indeed, such is the present standing of coherence that retrospectives of the concept are starting to emerge in legal historical scholarship.[4] And yet, despite the now bewildering number of applications in which it is invoked, and despite the grave legal significance of the outcomes that are claimed for its employment, nobody has been able to agree what coherence actually *is*.

Naturally enough, the difficulty encountered in setting down the meaning of the concept has been leapt upon by those sceptical of the claims made for it in application, for it can scarcely be solid ground to employ coherence in, say, reasoning to a verdict of guilt on a capital charge,[5] if coherence itself remains an "elusive", "complex", or even "mystical" notion.[6] Indeed, the small legion of its detractors is now so confident that one writer recently proclaimed (in a monograph entitled *Against Coherence*) that "defining coherence is *logically* impossible".[7] However, the persistent difficulty with the concept is not only recorded by those hostile to its use; in fact, doubts about the meaning of coherence have most frequently been articulated by those urging its application – even if these doubts often lie buried within the detail of the application in question.[8] Plainly, all of this ought properly to give practitioners and scholars alike serious pause when contemplating the employment of coherence, such that there is now a clear burden upon the supporters of a coherence

3 See, e.g. R Alexy and A Peczenik, "The concept of coherence and its significance for discursive rationality" (1990) 3(1) *Ratio Juris* 130–47; J M Balkin, "Understanding legal understanding: the legal subject and the problem of coherence" (1993) 103 *Yale LJ* 105; R Dworkin, *Law's Empire* (Cambridge, Mass; Harvard UP, 1986); K Gunter, "A normative conception of coherence for a discursive theory of legal argumentation", (1989) 2 *Ratio Juris* 155–66; J Hage, "Law and coherence" (2004) 17 *Ratio Juris* 87–105; S L Hurley, "Coherence, hypothetical cases, and precedent" (1990) 10 *Oxford Journal of Legal Studies* 221–51; B Jackson, "The normative syllogism and the problem of reference" in P Nerhot (ed.), *Law, Interpretation and Reality* (Dordrecht, Netherlands: Kluwer, 1990), pp. 379–401; K Kress, "Coherence" in D Patterson (ed.), *A Companion to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), pp. 533–52; N MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978); N MacCormick, "Coherence in legal justification" in A Peczenik et al. (eds), *Theory of Legal Science* (Dordrecht: Kluwer, 1984), pp. 235–51; N MacCormick, *Rhetoric and the Rule of Law* (Oxford: OUP, 2005); J Morgan, "Tort, insurance and incoherence" (2004) 67(3) *Modern Law Review* 384–401; J Raz, "The relevance of coherence", in *Ethics in the Public Domain* (Oxford: OUP, 1994), pp. 277–325; V Rodriguez-Blanco, "A revision of the constitutive and epistemic coherence theories in law" (2001) 14(2) *Ratio Juris* 212–32; A Schiavello, "On 'coherence' and 'law': an analysis of different models" (2001) 14(2) *Ratio Juris* 233–43; L M Soriano, "A modest notion of coherence in legal reasoning: a model for the European Court of Justice" (2003) 16(3) *Ratio Juris* 296–323; E Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard, 1995).

4 See M Walters, "Legal humanism and law as integrity" (2008) 67(2) *Cambridge Law Journal* 351–75.

5 See MacCormick, "Coherence" (n. 3 above), pp. 245–7, who uses the infamous brides-in-the-bath English murder case (*R* v *Smith* (1915) 11 Cr App R, 229) in careful illustration of the importance of coherence in reasoning to justified conclusions using circumstantial evidence alone. Smith was convicted and hanged on 13 August 1915.

6 See J Sinclair, *Corpus, Concordance, Collocation* (Oxford: OUP, 1991), p. 102, noting that coherence is "a rather mystical notion".

7 See Olsson, *Against Coherence* (n. 2 above), p. 137 (italics in the original). The attack on coherence has prompted an equally trenchant retaliatory literature; see, e.g. W Meijs and I Douven, "On the alleged impossibility of coherence" (2007) 157 *Synthese* 347–60.

8 Thus, BonJour's observation is typical, writing of attempts to define coherence that "the main work of giving such an account, and in particular one which will provide some relatively clear basis for *comparative* assessments of coherence, has scarcely been begun, despite the long history of the project"; L BonJour, *The Structure of Empirical Knowledge* (Cambridge, Mass: MIT, 1985), pp. 93–4 (italics in the original). BonJour's attention to the meaning of coherence, in this seminal work on coherence and justification, begins only at p. 93, and even there he notes, as an addendum to the preceding quotation: "My response to this problem, for the moment at least, is a deliberate – though, I think, – justified, evasion."

approach to identify with some precision what coherence amounts to, or risk the rejection of its application altogether.[9]

My aim in this paper is to move towards the clear understanding of coherence that is rightly demanded for its application. However, I undertake this project in an unconventional way, by first attacking one of the few features of coherence that is routinely agreed upon by its supporters and detractors alike, that consistency is necessary for coherence, though insufficient for it. Fortunately, the attack turns out to be constructive, as the dismissal of this relation helps clear the way for the "more general and precise account of coherence"[10] sought throughout the literature. It does so because analysis of the relation exposes a striking methodological oversight under which all of the frustrations about coherence can be accounted. But here I need to add a significant caveat: I do not propose by this means to uncover the true nature of coherence (whatever that might look like).[11] Instead, I aim to show that preoccupation with consistency has unwittingly caused impassable difficulties in the provision of a precise and usable account of coherence, and that its rejection immediately helps resolve the strange conceptual frustrations that are recorded otherwise in the literature. My method thereby employs an internal critique, and to the extent that it trades on some or other aspect of philosophy of language, this will be just what is also accepted by the work that I investigate.[12]

I begin, in section Two, by setting out both the perceived complexity of coherence and the precise modal relation between coherence and consistency articulated in legal writing and elsewhere. In section Three, I try to show that the relation is unsustainable, and then provide an explanation for its present popularity. This explanation will turn out to be crucial to the prospect of finding the better account of coherence that is sought in the literature. The section closes with a proposal for such an account, aiming at an understanding that is general and clear, and which fits our present linguistic and intuitive practice. In the final section, Four, I suggest some implications of the preceding commentary, considering in general terms its utility in relation to the present literature on coherence and law, and examining one case in particular in which its application can claim to have material legal impact.

Two

To plunder a line from Donald Davidson, in comparison to coherence, consistency is a "beautifully transparent" notion,[13] and so there should be little surprise that the former concept has come to be articulated by reference to the latter. There is certainly no doubt that coherence has been found complex and multifaceted. Ken Kress's observation is typical, writing that, in law,

> [normative] theories differ over whether reconstruction aims at coherence alone, or also at moral and political values. If other values are included, how are they combined with coherence? The best combination of coherence and morality? The morally best reasonably coherent theory? The most coherent,

9 Thus Millgram writes: "A coherence concept that the troops cannot use in the field is also one whose adoption it will be next to impossible to justify."; E Millgram, "Coherence: the price of the ticket" (2000) 97(2) *The Journal Of Philosophy* 83.

10 P Thagard, *Coherence in Thought and Action* (Cambridge, Mass: MIT, 2000), quoting from p. xii.

11 In fact, my sympathy here is with pragmatism, not realism; see section Three, below.

12 That is, principally, that predicates are capable of disambiguation from whatever they are predicated of – hence the quest in the literature for a clearer, more general account of the concept (to be used in comparative assessment across the range of its use), and hence the frustration at the perceived elusiveness of such an account (see sections Two and Three below).

13 D Davidson, "A coherence theory of knowledge and truth" in E Lepore (ed.), *Truth and Interpretation* (Oxford: Blackwell, 1986), p. 309. In fact, Davidson notes that *truth* is beautifully transparent in comparison to coherence!

> reasonably moral theory? *The most important differences are over what coherence itself means.*[14] [italics in original]

And Jonathan Morgan comments in his paper, "Tort, insurance and incoherence": "Legal coherence, one would have thought, must be shared as a universal aspiration by lawyers (and even legal philosophers) . . . Quite what 'coherence' requires, however, is immensely controversial."[15]

Indeed, the glut of conceptions of coherence – and the controversy attending them – dogs the literature, and this has lead BonJour and others to lament that "a better account of coherence is beyond any doubt something devoutly to be sought".[16] Hence, in a paper as early as 1984, MacCormick set out as his principle aim "to elucidate this elusive notion of 'coherence', of 'hanging together', of 'making sense'".[17]

But, in spite of this and other attempts to resolve the controversy, the frustrations in law remain, and nor does there appear to be a prospect of importing a solution from any other discipline. Thus, in a recent special edition of *New Literary Theory* devoted entirely to coherence, Colomb and Griffin write that "Coherence is a more complex, more ubiquitous, and in many ways less accessible phenomenon than our intuitions and scholarship ever led us to believe."[18] And Barry Allen adds: "Coherence is not one thing. That doesn't make it incoherent, although it rules out a conceptual definition."[19] The same dissatisfaction is recorded in many other fields, too, Bublitz, for example, writing in linguistics that "Coherence is a concept which in its complexity is still not fully understood and a matter of continuing debate [sic]."[20]

Regardless of disputes concerning the complete account of coherence, one matter is more or less settled; consistency is necessary, but insufficient, for it. The relevant relation is exemplified in BonJour's note that,

> A serious and perennial mistake in discussing coherence, usually committed by critics but occasionally also by would-be proponents of coherence theories, is to assume that coherence means nothing more than logical consistency, the absence of explicit contradiction. It is true that consistency is one requirement of coherence, that inconsistency is a very serious sort of incoherence. But it is abundantly clear, as many coherentists have pointed out, that a system of beliefs might be perfectly consistent and yet have no appreciable degree of coherence.[21]

Dancy writes similarly in *Contemporary Epistemology*, where he describes the views of "coherentists" under the general title, "What is coherence?":

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14 See Kress, "Coherence" (n. 3 above), p. 537.

15 See Morgan, "Tort" (n. 3 above), p. 395.

16 BonJour, *The Structure* (n. 8 above), at p. 94.

17 See MacCormick, "Coherence" (n. 3 above), p. 235. MacCormick's influential paper has been hugely successful in articulating the notions of "normative coherence" and "narrative coherence", but – perhaps surprisingly – this has not helped produce a better understanding of coherence itself: the general reason for this is set out in section Three below.

18 G Colomb and J Griffin, "Coherence on and off the page: what writers can know about writing coherently" (2004) 35 *New Literary Theory* 273–301, p. 275.

19 B Allen, "The ubiquitous artefact: on coherence" (2004) 35 *New Literary Theory* 259–71, p. 259.

20 W Bublitz, "Introduction: views of coherence" in W Bublitz, U Lenk and E Ventola (eds), *Coherence in Spoken and Written Discourse* (Amsterdam: John Benjamins, 1999), p. 1.

21 BonJour, *The Structure* (n. 8 above), p. 95. MacCormick picks up this point in relation to law, demanding "Why is it that a set of legal norms might sometimes appear incoherent, even when as a set they are not inconsistent?"; MacCormick, *Rhetoric* (n. 3 above), p. 190.

> All coherentists agree that consistency is a necessary condition for coherence. Bradley added that a coherent set should be complete or comprehensive in some sense . . . But consistency and completeness were not enough; they did not capture the feeling that a coherent set stuck together or fitted in a special way. To capture this, classical coherentists use the notion of entailment . . .[22]

Alcoff, also writing within epistemology, notes similarly that "Some minimalist formulations of coherence require only simple consistency, while other, stronger versions require mutual entailment",[23] while Grayling writes, directly under the section title, "The character of coherence":

> In general, the coherence notion has the following overall character. Because truth is to be determined by means of a test of "coherence" somehow specified, the question of a proposition's value turns on its relations with other propositions in a set, and accordingly the notion of a context or system plays a vital role in the account we are to give of truth. The notion of a system, in turn, is to be made out in terms of consistency, connectedness, and completeness, and it is these ideas which need to be specified precisely if the theory is to recommend itself.[24]

Bertea, meanwhile, observes that,

> Coherence is an inherently elusive and slippery notion . . . While there is wide agreement among contemporary legal theorists on the characterization of coherence in the negative as lack of inconsistencies, it is still a question how coherence might be defined in positive terms. Coherence is generally held to be something more than logical consistency of propositions. But it is not clear exactly what this "something more" amounts to.[25]

Zaccaria concurs, drawing a similar picture of the necessary but insufficient contribution of consistency:

> With Aarnio, Peczenik and Alexy, one might say that the principle of coherence may be regarded as including the principle of consistency as a negative aspect, in the sense that the absence of logical self-contradictoriness . . . is a necessary, but not sufficient condition for there to be coherence.[26]

He adds, however:

> Though moving within the broad framework constituted by the extended consideration of coherence which, especially as put forward by Aarnio, Alexy and Peczenik, covers the range of hypotheses going from formal logical derivation to consistency, we shall here refer to the theses of the author who, in the contemporary debate so far, has perhaps given the clearest, most circumstantial presentation, namely Neil MacCormick.[27]

Yet, even in the preferred work in question, the core idea is once more affirmed. Hence MacCormick expresses there the necessity but insufficiency of consistency, just as follows:

> Coherence in reasoning is one important test of its soundness in reasoning. It is a test which is not fully satisfied by mere consistency, in the absence of self-

22 J Dancy, *Contemporary Epistemology* (Oxford: Blackwell, 1985), p. 110.

23 L Alcoff, *Real Knowing: New versions of the coherence theory* (Ithaca: Cornell, 1996), p. 5.

24 A C Grayling, *An Introduction to Philosophical Logic* 2nd edn (Oxford: OUP, 1997), p. 135.

25 S Bertea, "The arguments from coherence: analysis and evaluation" (2005) 25(3) *Oxford Journal of Legal Studies* 369–91, pp. 371–2.

26 Zaccaria, "Hermeneutics" (n. 1 above), pp. 266–7.

27 Ibid., p. 266, picking out MacCormick's paper "Coherence" (n. 3 above).

> contradiction. What I say may be free of any internal inconsistency and yet fail to "hang together" or to "make sense" as a whole.[28]

In this way, and through a multitude of other accounts, the prevailing view emerges; that consistency in the negative aspect is necessary for coherence but is insufficient for it.[29] So, nothing can be coherent that exhibits inconsistency, whatever further disputed and slippery elements are then added by particular theorists, but something could be consistent and fail to be coherent all the same.

Caution must be exercised, however. Many of those offering accounts of coherence do so with circumspection, carefully restricting their observations to particular cases, or to spheres within which coherence is to be used. Thus, Bertea appends to his comment above the footnote that,

> It should be noted, here, by way of disclaimer, that this section is limited in scope to the argument from coherence (rather than to the concept of coherence). Therefore, only those contributions will be considered that impact directly on the definition and characterization of the argument from coherence. So the reader should not expect this to be anything like a comprehensive and exhaustive introduction to coherence.[30]

MacCormick, too, offers an account of coherence only in specific spheres, for whilst he states his aim is "to elucidate this elusive notion of 'coherence'", he never addresses this matter directly, examining instead "normative coherence" and "narrative coherence", particularly as these relate to legal justification.[31] Be this as it may, the sensible caution exhibited here still leaves standing whatever is said about coherence within these limited spheres, and what is said is that, in at least these spheres, consistency is a necessary but insufficient condition for coherence. Bertea is rightly wary of making more general claims to the *concept of* coherence, understanding that accounts offered in other spheres differ markedly from the account of it that he presents in his own topic field. This caution is not without its problems, however, as it is difficult to see what sense could be brought to the argument *from* coherence without addressing the concept of coherence first, just as little sense could be brought to an argument from prejudice without first picking out what prejudice is. Regardless, it is enough for the purpose of the present paper that the relevant modal claim is made, even if it is cautiously restricted to the sphere in which the writer has undertaken investigation.

Of consistency itself, little further is noted except to emphasise its employment in the logical sense – of an absence of self-contradiction. Pared down this way, there seems little

28 See MacCormick, "Coherence" (n. 3 above), p. 235.

29 This implies, of course, that coherence and consistency are distinct and distinguishable notions. I write of a "prevailing" view because it has occasionally been subject to criticism; thus, Wintgens concludes his paper "Coherence of the law" by stating boldly that "Consistency is not a necessary requirement of coherence." However, even here it turns out that the view is qualified in the relevant way, Wintgens writing that: "With the requirement of the systematic character of law, as expressed by the idea that consistency is a necessary condition of coherence, we nevertheless miss an important point. This is due to the fact that consistency as a necessary condition of coherence leaves the discussion on the level of theoretical reason alone. But in practical reasoning there can appear inconsistencies or incompatibilities between norms without the level of coherence of the system itself becoming too low. A perfectly coherent legal system must be consistent. This is a regulative idea. But, as a matter of course, no legal system is perfect in itself."; L Wintgens, "Coherence of the law" (1993) 79 *Archiv fur Rechts und Sozialphilosophie* 483–519, first quotation p. 514, second p. 485. So, "perfect" coherence in a legal system requires consistency. In similar vein, see the discussion of MacCormick at pp. 401–3 below and Kress at pp. 405–6 below.

30 See Bertea "The arguments" (n. 25 above), p. 371, n. 4.

31 See, e.g. MacCormick, *Rhetoric* (n. 3 above), pp. 229–33, section titled, "Narrative and normative coherence distinguished".

to object to and, indeed, the elusive aspects of coherence are typically held to emerge only after this component is identified. So, presumably, where a witness asserts in oral testimony first X and then not-X, this self-contradiction dictates that coherence does not and cannot obtain, with whatever consequences are then taken to follow. No-one doubts that coherence and consistency are different concepts, but almost everyone writing in law accepts the necessary modal relation between the two.[32]

Even MacCormick's more recent, subtle approach to the relation in question finally accedes to the modality recorded elsewhere. He begins in unusual fashion:

> I interpret consistency as being satisfied by non-contradiction. A set of propositions is mutually consistent if each can without contradiction be asserted in conjunction with every other and with their conjunction. By contrast, coherence, as I said, is the property of a set of propositions which, taken together, "makes sense" in its entirety. Complete consistency is not a necessary condition of coherence, since unlike consistency, coherence can be a matter of degree.[33]

These last observations appear to herald a move away from the orthodox position, for if complete consistency (in the sense of non-contradiction) is not necessary for coherence, then some room can be allowed for inconsistency whilst maintaining coherence itself. And this can be put more bluntly, as there appears to be nothing to separate consistency from "complete consistency" here, as the former notion depends upon the *absence* of self-contradiction in any event. Moreover, as MacCormick moves in his next sentence to distinguish the two core concepts on the further ground that "unlike consistency, coherence can be a matter of degree", there is still further reason for supposing that complete consistency and consistency *simple* are one and the same – as consistency cannot be a matter of degree. Thus, MacCormick would appear to commit to the bold view that "consistency is not necessary for coherence", thereby putting himself at odds with the view expressed elsewhere.

All this suggests a significant shift from MacCormick's earlier view, exemplified in the quotation from "Coherence in legal justification" provided above. The older formulation, although proposed specifically in relation to reasoning and to narrative and normative coherence in particular, nonetheless sits squarely with the orthodox general view, that consistency is a necessary but insufficient condition for coherence. As Zaccaria notes, MacCormick's view was that coherence "is something different from and *more than* mere consistency"[34] (my italics). But this view cannot fully account for the practical examples produced in evidence by MacCormick in recent writing. Thus he observes that,

> A story can be coherent on the whole and as a whole, though it contains some internal inconsistencies – and in this case, the sense of the overall coherence of a story may be decisive for us in deciding which among pairs of inconsistent propositions to disregard as anomalies in an overall coherent account or opinion. (Sometimes exact consistency in a story can be a ground of suspicion. For in trying to recall the past, people usually make some mistakes or have inexactness in memories, or two witnesses have a different perspective and do not quite coincide in what they say. Perfect consistency may therefore arouse suspicion that a concocted but untruthful story is being told.)[35]

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32 See, e.g. Raz, "The relevance" (n. 3 above), who writes at p. 280: "What is incoherent is unintelligible, because it is self-contradictory, fragmented, disjointed. What is coherent is intelligible, makes sense, is well expressed, with all its bits hanging together."

33 MacCormick *Rhetoric* (n. 3 above), p. 190.

34 Zaccaria, "Hermeneutics" (n. 1 above), p. 266. The italics are mine. The orthodox relation can be found even earlier still, see MacCormick, "Legal Reasoning" (n. 3 above), p. 39 and p. 106.

35 MacCormick, *Rhetoric* (n. 3 above), p. 190.

This is surely manifest good sense; after all, as the entire cinema knows, it is easy to smell a rat in *The Manchurian Candidate*, once all platoon members dutifully intone that "(Sergeant) Raymond Shaw is the kindest, bravest, warmest most wonderful human being I've ever met in my whole life."[36] And it is no less good sense in the legal arena – where in many applications, for example, witness statements at the scene, some inconsistency and confusion squares with the nature of unusual or extreme events seen quickly, in panic or anxiety. So some inconsistency, at least, might add to the coherence of a particular type of testimony.[37] However, in a footnote worth recording in full, MacCormick then retreats from the position that seems naturally presaged (or even implied) in his foregoing remarks – that consistency is *not* necessary for coherence – writing:

> Lamber M M Royakkers criticizes me for "deny[ing] the connection between consistency and coherence" . . . For avoidance of doubt, I should confirm that perfect coherence would require the elimination of all inconsistency, but some inconsistency is compatible with relative coherence, and it is one's grasp of relative coherence that in turn furnishes the ability to detect the inconsistencies that can and should be eliminated.[38]

MacCormick thereby accepts that the elimination of all inconsistency is a precondition for perfect coherence; which is to say that perfect coherence requires perfect consistency. Similarly, some inconsistency is compatible with relative, that is some, coherence. So while MacCormick stops short of stipulating expressly that consistency is a necessary requirement for coherence, he accedes to this relation at least with regard to "perfect" coherence. But there is no need for MacCormick to confirm even this relation, and good reason that he shouldn't, as it doesn't even fit his own example.

Three

MacCormick's example reminds us that sometimes, at least, some inconsistency improves the coherence of a story.[39] Perhaps this can only apply to certain types of story (for example, narratives related in testimony at trial) and not to others (for example, fairy tales), but its prospect is enough to deny the global conclusion that perfect coherence always requires "the elimination of all inconsistency". Instead, it is correct only to say that some types of story (fairy tales, say) require the elimination of all inconsistency for their coherence, whereas others do not (for instance, witness statements at the scene; the victim's testimony at trial). This is far from the slight distinction that it first appears, for the relation between coherence and consistency thereby becomes contingent rather than necessary. Flatly, whether consistency (in the sense of the absence of contradiction) is required for the coherence of some object turns out to be contingent *upon the sort of object* that is in question.

In fact, a moment's reflection is enough to put in doubt the perceived conceptual relation between coherence and consistency. The task is to find some case, any case, in which coherence is impeded by consistency or, indeed, depends positively upon some

36 *The Manchurian Candidate*, J Frankenheimer (dir.), MGM (USA 1962).

37 I anticipate an immediate and obvious complaint here: previously, we had in mind the coherence of witness testimony with regard to something like its consistency, etc taken as a whole; now, it appears, we are considering the coherence of witness testimony with regard to something like "our natural expectations of truthful testimony in particular cases". This, however, demonstrates precisely the point I aim to make. Thus, it is plain – indeed, axiomatic – that, with regard to the former context, consistency is a necessary feature, but it is equally plain, with regard to the latter, that, regarding our expectations of non-concocted witness testimony at the scene (at some scenes), it isn't. So consistency is necessary for the coherence of some objects, but not others. For the profound implications of this, see section Three below.

38 MacCormick, *Rhetoric* (n. 3 above), p. 190, n. 3.

39 For my caveat, see n. 37 above.

inconsistency. It is worth noting, then, that all paradoxes depend upon the presence of some internal contradiction for their coherence; or again, that any argument between two disputants depends upon some contradiction for its coherence; and plainly, inconsistency is a necessary feature for the coherence of any set of contradictory propositions. What is more, the dramatic coherence of most fictional courtroom narratives (and real ones as well) depends upon at least some flat contradiction. It will naturally be objected that this is all smoke and mirrors: the reason why coherence depends in these cases upon the presence of *inconsistency* is due entirely to the nature of the (rather obscure) objects in question (for example, dramatic coherence). But then, that just demonstrates the point; it isn't that consistency is necessary *for coherence*, it's that consistency is necessary for the coherence of *some* (perhaps many) *objects* – and an impediment to the coherence of others. Moreover, the objects in question do not have to be obscure; there is nothing obscure about MacCormick's own example drawing on the testimony of witnesses.

Of course, it is open to those advocating consistency as a necessary requirement for coherence to attest that this is what they meant all along: when they aimed to elucidate coherence they really intended the coherence *of* a state's constitutional provisions, or the coherence *of* a legal normative order, or the coherence *of* elements led in inductive reason by counsel, suggesting to members of a jury what really happened on the night in question. But this is nowhere made apparent in the literature, and it is doubtful that it has in fact been noticed. Thus, examples such as that of MacCormick's witnesses are taken to present obstacles to the orthodox position, to be read down, awkwardly, into the standard view – where in fact they could easily be distinguished on the simple ground that they concern different objects.[40] More boldly, it might even be said that the perceived slipperiness and elusiveness of coherence itself is also accounted for just by the oversight in question.

Let's first be clear about the oversight: my argument, in formal terms, is that accounts of coherence routinely confuse the intension of the concept with one or more of its many extensions. Thus, theorists have tried to flush out necessary features of coherence by reflecting, consciously or otherwise, on what is required for the coherence of some *object* or *set of objects*. Because many of the legal theorists addressing coherence quite naturally have in mind legal reasoning or a legal normative order when bringing coherence into view, consistency is turned up as a necessary feature *of coherence*, just because it is a necessary feature *of these objects*. This is an easy mistake to make, but it has profound consequences. Consider the same method applied to the concept of completeness: one might reflect on motor-car completeness (on a production-line, say) and then draw the conclusion that "motorised" was part of the meaning of complete. Or one might take "reaching the summit" as part of the meaning of conquest – just where one has in mind mountain climbing. And of course, completeness and conquest would then seem complex and elusive when enquiry ranged over the completeness of crosswords (no motor) or the Norman Conquest of England (no mountainous ascent). In fact, the meaning of

40 Thus, MacCormick goes on to note that narrative coherence "requires that there be no inexplicable logical inconsistencies between any of its factual elements", and adds in a footnote: "The idea of an inexplicable inconsistency depends on the thought that a degree of inconsistency between witnesses or even in a single person's accounts of past events is to be expected, because memory and perception, especially in relation to traumatic events, are imperfectly reliable. Some mistakes or elements of vagueness may thus make a story more plausible, because they arouse less a suspicion that they have been 'cooked up' after the event. But after discounting explicable inconsistencies, what remains must be non-contradictory and satisfactorily coherent in what remains after the discounted elements are dropped out."; MacCormick, *Rhetoric* (n. 3 above), p. 226 and n. 13 on the same page. So MacCormick distinguishes the awkward case of witness inconsistency by adding a further test of explicable and inexplicable contradiction – but this still leaves some witness inconsistency (the explicable parts) fully compatible with coherence, explicability merely being invoked as a further test of truth or mendacity.

coherence no more depends upon consistency than completeness depends upon being motorised, even though *some* objects will only be complete where they possess a motor, and *some* objects will only be coherent where they are also consistent. Rather, as should now be horribly clear, a motor is necessary for a complete motor car simply because motors are necessary features of *motor cars* (no motor car could be complete without one), and, similarly, no inductive argument pressed into service by counsel could be coherent if it contained contradiction . . . because consistency is a necessary requirement of *such reasoning*. Because inductive reason demands consistency, it follows rather obviously that coherent inductive reason demands consistency – but it would plainly be a terrible mistake to conclude from this that whatever is coherent must be consistent.

Thus, the spectre looms of a conceptual and practical train wreck, in which exhortations to coherence are delivered in increasing number, with each new invocation of coherence adding to the perceived slipperiness of the concept in question. For, just as e.g. coherent inductive reason depends certainly upon consistency, it also depends upon the presence of a conclusion, some premises, etc, and these further features of coherent inductive reason immediately make coherence appear elusive and contested when investigating other applications of coherence, even within the legal sphere alone. So we might find that the coherence of a statute has nothing whatever to do with the presence of a conclusion, or the coherence of witness testimony has little to do with the presence of legally authoritative norms, and so on, thereby leading inexorably to the view that a general account of coherence is slippery at best, if not impossible at worst, and causing the literature to retreat into ever more timid accounts of coherence, restricted to ever more diminutive pockets of application.

This, then, is the spectre. The train wreck I have in mind takes the preoccupation with consistency to be pivotal, just because the requirement of consistency compasses sufficient numbers of *objects*-that-cohere in law that the oversight in question can be maintained. So the differences imputed to coherence that in fact arise from straightforward distinctions between objects are understood, instead, as local disputes about what "something more" must be added to consistency for a (cautiously restricted) account of coherence itself. And objects that don't fit the modality at all (such as MacCormick's witness example) are to be read down into conformity with the relation, or can be excluded as aberration, or can quietly be forgotten altogether. This picture is so striking – and unlikely – that I need to provide some further evidence for it here, though my account can be tested most effectively simply by investigating its explanatory force in any of the invocations of coherence across the considerable range of its use in law. Therefore, I will restrict my demonstration in this section to the examination of one piece of writing that remains principally conceptual in form, reserving for the concluding section the examination of a commentary concerning coherence in relation to more substantive legal matters.

First, then, I will investigate Ken Kress's chapter entry, "Coherence", in *A Companion to Philosophy of Law and Legal Theory*.[41] The choice of this piece is motivated precisely because of its clarity and simplicity, which is in part due to the introductory and explanatory context in which it appears. I am going to consider in detail just a few paragraphs from the chapter, taken from the part around and including Kress's section "What coherence is". There he notes:

> To understand coherence in law, techniques thought to promote coherence, or properties or states thought to be aspects of, explanations of, or to be necessary or sufficient for coherence, will be examined. The discussion will focus on justificatory coherence within normative theory, particularly ethics and law,

41 Kress, "Coherence" (n. 3 above).

> although concepts more appropriate to the theory of knowledge will be discussed in passing. The primary aim throughout is to serve as background for the later taxonomy of coherence in normative theory, although much of what is said here applies more generally.[42]

In Kress's approach it is immediately possible to perceive the same structure deployed throughout the literature in attempts to state what coherence is. So, to understand coherence in a particular context (here, in law in general), Kress sensibly considers that he should examine aspects of, explanations of, and necessary and sufficient conditions for, coherence. But he then informs us that this project will, in turn, focus on "justificatory coherence within normative theory, particularly ethics and law, although . . . theory of knowledge will be discussed in passing". Kress is astute in observing that his comments on coherence thereafter will have a range limited in this way, but his format is nonetheless prone to the methodological problems set out above, and its adoption already presages his conclusion about coherence in the next section:

> From here on, the discussion is limited to coherence in moral, legal, and political theory, and would not necessarily apply to coherence theories of knowledge or truth. The remarks that follow are not intended to be a complete and final definition of coherence in normative theory. Coherence is much too difficult a concept for that. There is a range of conceptions of coherence, not just one. What is offered here is a first approximation of a taxonomy of conceptions of coherence.[43]

Again, Kress's observations just fall out naturally under his methodological premise, that coherence itself can be sought safely through the examination of objects that cohere. To nail down the point, Kress's cautious and methodologically reserved approach is unworkable from the outset, for the only sure way of distinguishing "necessary and sufficient" features of coherence from other features of the few objects in question is to have a secure idea of coherence in the first place. In the absence of such an understanding, enquiry is condemned to peer with ever-increasing attentiveness into the detail of the cohering objects in question, with no idea of the point at which abstracting coherence might stop. So, under this method the risk is always that coherence will prove immune from "final definition" as "too difficult a concept", and that conceptions will proliferate – co-extensively, in fact, with the variety of instantiations of it that are surveyed in its investigation. Naturally enough, this then forces Kress to fall back on a "taxonomy of conceptions of coherence" as the way out of the resulting morass. Thus Kress's treatment exhibits all the characteristics of the oversight I pick out, referring cautiously to the coherence of (some) objects in accounting for coherence itself, and then retreating into a "range of conceptions of coherence, not just one", in response to the difficulty thereby perceived in the central concept.

Reflecting the orthodox view, consistency is one of three "possible necessary requirements for coherence"[44] considered under Kress's approach, and is indeed found to be necessary for coherence. He writes:

> *Consistency* at a time is necessary *in theory* for normative coherence, but it is not sufficient for it. By normative coherence is meant a coherence theory in a normative area where the coherence requirements do substantial justificatory work. Consistency over time is not necessary for a coherence theory such as

42 Kress, "Coherence" (n. 3 above), pp. 539–40.

43 Ibid., p. 543.

44 Ibid., p. 540.

> Dworkin's, which permits – indeed requires – change over time. Insofar as common-law adjudication is one of the features to be explained by coherence, the theory should not demand consistency or coherence amongst the principles of the theory at different times, but only a coherent path of movement over time (Kress, 1985). Finally, although consistency at a time is necessary in theory, or metaphysically, for coherence, it is not necessarily required in practice. Although we aim for consistency in the long run, modest scepticism may recommend that we do better day-to-day if we retain some inconsistencies until we are able to resolve them satisfactorily, rather than force consistency via *ad hoc* solutions. Given the difficulty of developing consistent, coherent, and complete theories and the value of experimentation, especially in a federal system, consistency (and coherence) are arguably less desirable and necessary in practice than as a regulative ideal (Sayre-McCord, 1985) . . .[45]

Kress appears to draw two conclusions about consistency in this paragraph, writing that "although consistency at a time is necessary in theory, or metaphysically, for coherence, it is not necessarily required in practice". However, these conclusions do not and cannot attach in the relevant way to the core concept itself, just because the investigation from which they are drawn once again analyses a thing-that-coheres (in this instance "normative coherence", which Kress informs us is "a coherence theory in a normative area"). The consequence is that even Kress's local and circumspect conclusions about coherence derive from features contingent to coherence itself, but which inhere in the particular object that he has in mind when bringing coherence into view. His treatment thereby becomes an inquiry into what features are necessary to a coherence theory in a normative area, and looked at this way, he produces the conclusion that consistency is not a necessary feature of the object in practice, though it is metaphysically. Indeed, it is worth noting that if Kress's conclusions *were* held determinedly to attach to coherence itself, an absurdity results, in which consistency is found to be both necessary for coherence, and not necessary for it. Once it is seen that the enquiry is really into the conditions for the coherence of two different *objects* (normative coherence in theory; normative coherence in practice) then the contradiction simply falls away: there is no difficulty in supposing that consistency might be necessary for some objects but not others. In short, if it turns out that consistency is a requirement for the coherence of ideal normative theory, then what has been uncovered is, prima facie, something about ideal normative theory, not the nature of coherence. Similarly, if it also turns out that consistency is *not* necessary for the coherence of normative practice, then, prima facie, this appears to record something about the nature of normative practice, not about the core concept in question. This presents a significant problem because, under Kress's analysis, "the most important differences between normative coherence theories" arise because of differences over "what coherence itself means".[46] It follows that Kress's attempt to distinguish such theories through coherence is misplaced, and, indeed, his own enquiry into coherence simply reverts back to differences that are exhibited *otherwise* amongst the set of objects in question.

In the preceding analysis the cautious use of "prima facie" is warranted because something *is* uncovered about the nature of coherence if it is shown that any single object can be coherent whilst being inconsistent, for this shows that consistency is not necessary for coherence. So, if Kress can show that normative practice need not be consistent and yet remain coherent, then he would have a strong case for the rejection of consistency as a necessary characteristic of coherence simple. Kress does not point us to this potential in his

45 Kress, "Coherence" (n. 3 above), p. 540.

46 Ibid., p. 537 (quoted on pp. 397–8 above).

method, drawing a more circumspect conclusion about coherence (and its relation to consistency) that attaches just to the instance of it in question (ideal normative coherence; normative coherence in practice), and this circumspection is once again a problem attributable to the persistent idea that coherence is to be understood and pursued through, and thus *limited to*, things-that-cohere.

I have tried to show that Kress's account of coherence (and thus of coherence in law), succumbs to the methodological oversight I pick out. I have also attempted to show, at least in Kress's account, that the oversight causes unnecessary circumspection (in drawing modal conclusions), unnecessary circumlocution (in acceding to a taxonomy of coherences), and leads finally to conceptual frustration, in perceiving coherence to be too difficult for simple elucidation. In fact, none of these things are attributable to coherence itself, but have everything to do with the method pressed into service in its investigation.

What, then, of coherence itself? Once freed from consistency, a simple, general and clear account of coherence *can* be provided, as might be anticipated by the intuitive grasp of the concept we all employ in its everyday use. In short, coherence seems to mean, and indeed could only usefully mean, "sticking together". Happily, understanding coherence this way is consistent with the etymology of "*co-*" (together), plus "*haerere*" (to stick), and is, in any case, the single feature uniformly recorded of the concept in dictionary definition (though dictionaries typically provide a variety of further features claimed to inhere in the notion). So, on my simple account, if an argument is said to cohere, then what is proposed is that it sticks together. If a sentence coheres, then it, too, sticks together. Similarly, if one statute coheres with another, then they stick together. Exactly *how* these or any other objects stick together, if indeed they do, is then a separate matter and one that depends, rather obviously, on various properties or qualities of the particular objects in question. So, whatever it is that causes light waves to cohere, where they do,[47] is likely to be very different from the factors involved in the coherence of a pair of sentences, this differing in turn from the set of factors determining whether an argument is coherent, and so on.

Of course, more could be said about coherence as sticking together, but perhaps only one thing is necessary here, as the account is offered just as a supplement to the principal analysis, without prejudice to the methodological criticism I propose above. It might be thought that "sticking together" pares the meaning of coherence down so far that the concept loses all practical import. This is not the case at all; in fact, coherence understood this way remains a seriously robust and useful concept, the natural adjunct to other similarly useful concepts such as adherence and inherence. Thus, just where adherence means "sticking to" (and inherence means "sticking in") so coherence indicates a relation of symmetrical sticking – of mutual or reciprocal adherence. In fact, the impulse to attach this solid relation to some further feature or features found in its use undoes the usefulness of the concept in the way indicated in the foregoing discussion. It is to this latter feature that analysis now returns, taking as the subject of the last section the implication of the preceding commentary in substantive application in the legal sphere.

Four

To the preceding commentary could be retorted a resounding "So what?". People offering accounts of coherence in law do so to explicate something about the nature of law, or to urge more coherence in a particular legal field, or in a particular legal method, so it should matter little that the coherence in question is actually coherence in evidential reasoning, or

47 See, e.g. L Mandel. and E Wolf, *Optical Coherence and Quantum Optics* (Cambridge: CUP, 1995): light waves exhibit coherence where these waves are in perfect phase relation with each other.

the coherence of private law, or whatever. This is a fair point; much (and perhaps most) writing on coherence in law will be immune from criticism in just this way. But the immunity is bought at a considerable price, deflating the utility of coherence to a point which is difficult to reconcile with the expansive body of coherence literature now in play. If exhortations to greater narrative coherence at trial really deflate to questions of what narrative is, or what narrative-at-trial amounts to, or to what works best at trial, then the reasons for the intercession of coherence begin to look shaky indeed. The difficulty is that coherence just seems redundant; it's everywhere you look, but when you look really hard, it just melts away. Worse, the invocation to coherence seems to promise much more, and so there may be real currency in the idea that it seems to do so much precisely because it is understood so little. I am just going to focus on the redundancy of coherence in what follows, taking an example used by MacCormick "to give ample illustration of the force of narrative coherence".[48]

The example is taken from the Sherlock Holmes case of the dog that did not bark,[49] and bears on substantive legal matters such as reasoning to a conclusion from circumstantial evidence alone, or to the methods that might profitably – and justifiably – be employed by police and other services in the field of criminal investigation. Of the story itself, MacCormick writes:

> The case of the dog that did not bark in the night is in point. A valuable race horse has been taken from the stable by night. The trainer has been found dead on the Downs nearby. A suspicious-looking stranger has been picked up by the police and held on a murder charge. But Sherlock Holmes elicits from reliable witnesses the information that they did not hear the stables' dog barking by night. "The dog did not bark" and "a stranger took the horse" are not mutually contradictory. Yet if, as a generalization, dogs bark at strangers, then, under this common-sense principle, the dog's not barking becomes incompatible with a stranger's taking the horse, unless there is some further explanation, or some relevant exception to the common-sense generalization.[50]

MacCormick takes narrative coherence (here as elsewhere) to provide "a test as to the truth or probable truth of propositions about unperceived things and events", concluding that "Such a test justifies beliefs."[51] My analysis suggests that the role coherence plays here is much more diminutive that it appears.

Bluntly, *coherence* furnishes no test at all in the story in question, for the police reasoning to the suspicious stranger is manifestly coherent, though simple-minded – as is typical in the Holmes stories taken here and as a whole ("sudden unusual happening" and "new suspicious-looking stranger" fit quite well together, just as they stand). Nor is it coherence that leads Holmes to his more justified conclusion; instead it is just that he asks a further question, and the response to *this* creates a new narrative element – that is, creates a new story. Perhaps the police explanation does not cohere with the new set of narrative

48 MacCormick, *Rhetoric* (n. 3 above), p. 225 n. 12.

49 A Conan Doyle, "Silver Blaze" in *The Memoirs of Sherlock Holmes* (1892).

50 MacCormick, *Rhetoric* (n. 3 above), p. 225, n. 12.

51 Ibid., both quotations at p. 226. MacCormick says much more about narrative coherence than this, and in particular asserts that it may only weakly justify conclusions, but it has justificatory force all the same.

elements (it doesn't), but this indicates nothing about the coherence – or even relative coherence – of the police's former reasoning. Indeed, a super-detective might be imagined who goes further still than Holmes, and who elicits the information from reliable witnesses that the dog had been to the vet that day, and in consequence of medication could not hear a thing (and so on – the police perhaps turning out to have got the right man all along). So it cannot be coherence that determines between the police's explanation and that of Holmes, as both are highly coherent as they stand, but it's obvious to all of us that Holmes's provides the better story: there's not much literary mileage, presumably, in *The Collected Cases of Inspector Lestrade*.[52]

In short, there are two coherent objects in question in the Holmes story, one of which is plainly to be preferred, narratively speaking. What prises the explanations apart is our preference for some narratives over others, not coherence at all. We can put this in terms of coherence (as we can with almost anything)[53] but not much is added; the matter of determining narrative coherence still turns out to be a matter of determining which of two rivals strikes us as the better narrative. Prima facie, then, it would seem better to strike coherence out altogether and deal direct with narrative itself, particularly in light of the frustration and doubt so evidently caused by the former concept. Indeed, a pragmatist (or practitioner) would be advised, when considering the literature as a whole, to test coherence in any putative application, by putting a line through it and then reflecting on what has actually been lost. Plainly, a thorough inspection of the literature cannot be offered here, and doubtless many applications of coherence in law remain robust and sensible once they are investigated in this way – but some, however, will not. This alone should provide reason for serious prudence in deliberating the application of the concept.

Whatever is found about the utility of coherence in legal application, I aim at least to have shown that the frustration concerning coherence itself is unwarranted; coherence is much simpler (and actually then, more useful) than is routinely supposed. It is telling indeed that even where coherence is pursued cautiously, restricted only to particular spheres, no attempt is made to deliberate how features of such localised coherence are to be untangled from features of the context otherwise – though this might be expected in opening methodological treatment. In short, evidence of the oversight in question appears everywhere. Once freed of consistency and other characteristics wrongly imputed to it, coherence becomes available for properly general use, understood sufficiently clearly to allow the benefits of its application to be weighed appropriately. And, hopefully, these clarifications go some way towards furnishing an account of coherence that the troops *can* use in the field.

52 Inspector Lestrade is a fictional police officer from Scotland Yard, who appears in several of the Holmes stories, acting as a bluff, pragmatic foil to Holmes's incisive and creative reason. (In fact, the author M J Trow has written a series of novels with Lestrade as the main character, but in these it turns out that the prosaic inspector is a more acute and subtle figure than allowed for by Conan Doyle.)

53 Here, for example, we might (again) deploy "dramatic coherence"; see p. 402–3 above.

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Lost in translation: Ireland and the Patten Report

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Abstract

Police accountability structures in the Republic of Ireland have recently undergone fundamental reform in response to international developments and domestic scandals. During the debates as to what shape new measures should take, numerous commentators called for implementation of the Patten Report. This article will evaluate the role which the Patten Report played in the reform debates. It will be argued that by interpreting that report as recommending a series of new mechanisms, rather than reflecting on the theoretical underpinnings, the value which it has for other jurisdictions has become lost in translation. By analysing the reforms which were introduced in Ireland from the theoretical framework in Patten, the deficiencies of the new system in the Republic will be highlighted. Through this case study, the potential value of the Patten Report for other jurisdictions, in providing a theoretically sound blueprint for accountability reform, will be elaborated.

The problem of police accountability

The complexities of police accountability are well rehearsed elsewhere.[1] Why accountability is an issue, to whom should the police be accountable, and how accountability should be achieved, are questions which have been asked time and again across all jurisdictions. In a democratic state, where the people have ceded power to the government, there is an entitlement to hold the government and its various institutions to account for the use of that power. With a public police force, the concern centres on the powers which are afforded to the police in order to maintain public order and investigate crime, and in particular the discretionary nature of those powers. The potential for abuse is high, and the impact of abuse for individual citizens can involve serious breaches of their human rights. Accountability has had periods of topicality in most jurisdictions.[2] It consumed media and political debates in the USA in the 1960s; Canada, Australia and the

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1 See, generally, G Marshall, "Police accountability revisited' in D Butler and A H Halsey (eds), *Policy and Politics* (Basingstoke: Macmillan, 1978); M Brogden, T Jefferson and S Walklate, *Introducing Police Work* (London: Harper Collins, 1988); T Jefferson and R Grimshaw, *Controlling the Constable* (London: Muller, 1984); R Reiner, *The Politics of the Police* (New York: St Martin's Press, 1985); P Scraton, *The State of the Police* (Dover, NH: Pluto Press, 1985); L Lustgarten, *The Governance of the Police* (London: Sweet & Maxwell, 1986); P Day and R Klein, *Accountabilities: Five Public Services* (London: Tavistock, 1987).

2 R Reiner and S Spencer, *Accountable Policing: Effectiveness, empowerment and equity* (London: Institute for Public Policy Research, 1993) p. 74.

UK in the 1980s;[3] transitional societies such as Northern Ireland and South Africa in the 1990s;[4] and in the last number of years it has reached heightened levels of discussion in Ireland.[5] In most of these jurisdictions it arises as a result of a serious scandal, affecting the reaction as it has become politicised.[6]

And yet with universal agreement on the need to hold police to account, how this should be achieved is highly contested. At the heart of this debate is what is meant by the term accountability because, dependent on what accountability is intended to achieve, the mechanisms employed will differ substantially.[7] Debates have centred on whether accountability entails making the police explain their actions, or more proactively, whether it actually involves some control of the force.[8] Day and Klein have suggested that the term accountability can cover a range of meanings, including "answerability, responsiveness, openness, efficient estate management, not to mention participation and obedience to external laws".[9] In this position, control is not a direct element of accountability but "is the necessary (if not sufficient) condition for its exercise".[10] Control then, is not the function of accountability mechanisms. Bowling and Foster contend that accountability: ". . . involves a duty to account for actions taken, to explain them, and for the police to be cooperative with an external, independent authority and ultimately with the wider community".[11]

This emphasis on community cooperation moves towards a situation where the views of bodies external to the police have a role in the decisions taken by the force. There is still no suggestion as to what should happen where there is general dissatisfaction for the explanation provided, making this definition incomplete. Bayley has defined an accountable police force as: ". . . one whose actions, severally and collectively, are

3 See, generally, J Chan, "Changing police culture" (1996) 36(1) *British Journal of Criminology* 109; J Fleming and G Lafferty, "New management techniques and restructuring for accountability in Australian police organisations" (2000) 23(2) *PIJPSM* 154; D Currie, W DeKeseredy and B MacClean, "Reconstituting social order and social control: police accountability in Canada" (1990) 2(9) *Critical Criminology* 29; Lustgarten, *The Governance of the Police* (n. 1 above); E McLaughlin, "The democratic deficit: European Union and the accountability of the British police" (1992) 32(4) *British Journal of Criminology* 473; D H Bayley, *Patterns of Policing* (New Brunswick: Rutgers UP, 1990); L Johnston, "Controlling the police" (1987) 3(1) *Policing* 48; Jefferson and Grimshaw, *Controlling the Constable* (n. 1 above).

4 G Ellison and J Smith "Bad apples or rotten barrel? Policing in Northern Ireland" in O Marenin (ed.), *Policing Change, Changing Police: International perspectives* (New York: Garland Publishing Inc, 1996); A Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (Culompton: Willan, 2006); C Shearing, "Reinventing policing: police as governance" in O Marenin (ed.), *Policing Change, Changing Police: International perspectives* (New York: Garland Publishing Inc, 1996).

5 J Connolly, "Policing Ireland: past, present and future" in P O'Mahony (ed.), *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002); D Walsh, "The proposed Garda Síochána Ombudsman Commission: a critique" (2004) 14(1) *ICLJ* 2; B Vaughan, "A new system of police accountability" (2005) 15(3) *ICLJ* 18; V Conway, "An Garda Síochána Act 2005: breaking down the thick blue wall?" (2005) 23 *ILT* 297; B Vaughan and S Kilcommins, "The Europeanization of human rights: an obstacle to authoritarian policing in ireland?" (2007) 4 *EJC* 437.

6 For a discussion of the drivers of police reform see P Stenning and C Shearing "Reforming police: opportunities, drivers and challenges" (2005) 38(2) *Australian and New Zealand Journal of Criminology* 167.

7 Chan, "Changing police culture" (n. 3 above).

8 Marshall, "Police accountability revisited (n. 1 above); Brogden et al., *Introducing Police Work* (n. 1 above); Jefferson and Grimshaw, *Controlling the Constable* (n. 1 above); Reiner, *The Politics of the Police* (n. 1 above); B Bowling and J Foster, "Policing and the police" in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: OUP, 2007).

9 Day and Klein (n. 1 above), p. 109

10 Ibid., p. 114.

11 Bowling and Foster, "Policing the police" (n. 8 above), p. 1015.

congruent with the values of the community in which it works and responsive to the discrepancies when they are pointed out".[12]

This definition seems to overcome this problem to an extent, although it only tells what an accountable force should look like, and not how it is to be achieved.

On the other hand Lustgarten, in his seminal work, *The Governance of Police*,[13] linked accountability directly with control. For him, it centres on how political institutions manage to govern the police and so accountability (or control) is achieved through the tripartite system, in the work of the police authorities and the Home Secretary with the Chief Constable.[14] Many respected commentators agreed. Reiner and Spencer argued that controlling police actions was "the fundamental problem".[15] Even the title of Jefferson and Grimshaw's book, *Controlling the Constable*,[16] indicates the centrality of control. They believe "accountability concerns the institutional arrangements designed to ensure the obligations of the police are upheld".[17] Explanations for behaviour have a limited function in this model, as resort to them means that attempts to control the police have failed.

This bifurcation was identified by Marshall, who demarcated two competing forms of accountability – the "subordinate and obedient" model and the "explanatory and cooperative" model.[18] He saw subordinate and obedient accountability as a "mode in which the supervisor's responsibility is typically accompanied by administrative control and the ability to direct and veto".[19] Explanatory and co-operative accountability was a new mode he recommended, which "rests not on an ability to issue orders but on the capacity to require information, answers and reasons that can then be analysed and debated in Parliament and in the press".[20] As to whether one should be preferred, there are problems with each.[21] In terms of explanatory accountability, it can be questioned how asking the police to tell stories about their use of powers is going to achieve accountability. And critics of the control mode argue that it will be ineffective because of cultural resistance and the gap between policy and practice. Chan[22] contends that they need not be viewed quite so exclusively and that they arguably have the same ultimate goal in mind: the legitimating of powers conferred on the police. Indeed, it is submitted, that for a system of accountability to be effective then it should aim to govern the police and secure explanations. At the very least, prior to engaging in a process of reform, a state should consider what accountability should achieve within the particular context. Without a clear vision as to their purpose, reforms cannot make a police force accountable for the powers which it uses, both at an individual and an institutional level. It would be like building a house without foundations – you might erect a structure, but it won't stay that way for very long.

Northern Ireland is one jurisdiction which did take such a considered approach in the reform of police accountability. The *Report of the Independent Police Commission in Northern*

12 D H Bayley, "Accountability and control of the police: lessons from Britain" in T Bennett (ed.), *The Future of Policing: Papers presented to 15th Cropwood Round Table Conference* (Cambridge: Institute of Criminology, 1983), p. 36.

13 Lustgarten, *The Governance of the Police* (n. 1 above).

14 Ibid., p. 113.

15 Reiner and Spencer, *Accountable Policing* (n. 2 above), p. 170.

16 Jefferson and Grimshaw, *Controling the Constable* (n. 1 above).

17 Ibid., p. 10.

18 Marshall, "Police accountability revisited" (n. 1 above), p. 61.

19 Ibid.

20 Ibid., p. 62.

21 See Lustgarten, *The Governance of the Police* (n. 1 above) and Brogden et al., *Introducing Police Work* (n. 1 above).

22 Chan, "Changing police culture" (n. 3 above).

Ireland[23] led to, among other things, a fundamental overhaul of policing and police accountability in that jurisdiction, one of the most contested issues of the Peace Process. The change in police title from Royal Ulster Constabulary to Police Service of Northern Ireland, the establishment of the Office of the Police Ombudsman for Northern Ireland, the Policing Board, and the District Policing Partnership Boards were heralded by the proposing committee as "A New Beginning" for policing in Northern Ireland.[24] These changes have been seen by numerous commentators as an example of best practice, a blueprint for future changes in other countries.[25] Ellison describes it as "a useful template for the establishment of democratic policing internationally".[26] However, police reform should be jurisdictionally specific to accord with the variations and cultural differences which shape policing. It would be wrong to suggest that these mechanisms can be simply transposed into another context, without consideration of the social, cultural, political and financial factors which undeniably influence how the police utilise their powers, and how the public respond to the police. This is not to say however, that the Patten Report is not of relevance to other jurisdictions and this paper will suggest how it could be interpreted. By firstly examining the report, and the theoretical research which led to the specific reforms mentioned above, it will be argued that what Patten does provide is a conceptual background to the specific recommendations which can serve as a framework for reform in other jurisdictions. The paper will then consider what happens when a jurisdiction fails to engage with the general framework of accountability when undergoing reform, by analysing the recent experiences of the Republic of Ireland. There, the merits of policy transfer were acknowledged, and the recommendations of the Patten Report were argued by many to be the best way forward, but they advocated the specific bodies which had been suggested for Northern Ireland. It will be contended that had Ireland proceeded using the theoretical basis of the Patten Commission, rather than just adopting the structures, then it could have implemented a more holistic accountability system. As it is, Ireland never questioned what police accountability should mean for An Garda Síochána, the national police force. Instead, police accountability reform in Ireland has been piecemeal and kneejerk with the result that systemic problems have not been addressed, and the potential for further abuses has not been negated.

The Patten Commission: a framework for accountability

The Royal Ulster Constabulary was the police force of Northern Ireland from 1922 to 2001.[27] During the Northern Irish Conflict, the legitimacy of the RUC was particularly contested.[28] Its largely Protestant membership and association with the state made it unacceptable to many members of the Nationalist community. Throughout the Conflict the RUC was highly involved in violent exchanges, with many allegations of abuse of power, force and collusion being made.[29] One of the primary focuses of the Peace Process in the 1990s was to enhance the legitimacy of policing in Northern Ireland. The Patten Commission was established under the terms of the Belfast Agreement to bring policing in

23 C Patten, *Report of the Independent Police Commission in Northern Ireland* (London: HMSO, 1999).

24 C Shearing, "A new beginning for policing" (2000) 27(3) *Journal of Law and Society* 386.

25 G Ellison, "Police reform, political transition, and conflict resolution in Northern Ireland" (2007) 10 *Police Quarterly* 243.

26 Ibid., p. 244.

27 G Ellison and J Smyth, *The Crowned Harp* (London: Pluto Press, 2000)

28 J Smyth, "Symbolic power and police legitimacy: the Royal Ulster Constabulary" (2002) 38 *Crime, Law and Social Change* 295; Mulcahy, *Policing Northern Ireland* (n. 4 above).

29 A Mulcahy, "Policing history: the official discourse and organisational memory of the Royal Ulster Constabulary" (2000) 40 *British Journal of Criminology* p 68.

line with the stated commitment to use "peaceful and democratic means to resolve differences".[30] Beginning work in June 1998, the Patten Commission reviewed international policing literature and debates, received 2500 written submissions, petitions signed by thousands of individuals, and held meetings at which over 10,000 people attended.[31] The report made over 175 recommendations over nineteen identified thematic areas of policing – including governance, mandate, accountability, training, human rights, cultural symbolism, and recruitment – many of which have now been implemented.[32]

In relation to its work on accountability, the reflective approach which the Patten Commission took – combining literature review, community consultation and visits to police services internationally – enabled it to take an open-minded approach, exploring best-practice and other innovations, in an effort to explore what should be done to create an accountable police force. Only then did it turn to the problem of how this could be made to fit within Northern Ireland. In addressing the question of what accountability should achieve, the Patten Commission agreed with the work of Marshall and Chan that any police force should be held to account in both the controlling and explanatory senses.[33] With this as its goal, Patten identified five forms of accountability which together, it was hoped, would incorporate the twin elements and deliver a robust framework of accountability: these were democratic accountability, transparency, legal accountability, financial accountability and internal accountability. Working from this framework, the Patten Commission also asked in relation to any proposed reform the following five questions:

1. Does the proposal promote efficient and effective policing?
2. Will it deliver fair and impartial policing, free from partisan control?
3. Does it provide for accountability, both to the law and to the community?
4. Will it make the police more representative of the society they serve?
5. Does it protect and vindicate the human rights and dignity of all?

The tests for any proposal, while perhaps directed at particular concerns in the jurisdictional context, outline standards which any police force in a democratic state should aim to meet. Taking the five forms of accountability and applying these tests, the Patten Commission developed a new system of accountability for the police of Northern Ireland.

The nature of police powers, which the public cede for the protection of individual rights and the maintenance of order, demands that the public has some democratic means of holding the police to account. This ensures that all policing is by consent, thus enhancing its legitimacy. Democratic accountability performs both controlling and explanatory functions by enabling the public to inform the police as to the type of service it wishes to be delivered and to then hold the police to account for that service.[34] In the UK, democratic accountability is supposed to be achieved through the Police Authority, under the tripartite structure implemented by the Police Act 1964. This divides governance duties between the

30 "The participants believe it essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and cooperative criminal justice system, which conforms with human rights norms."; Patten, *Report* (n. 23 above), p. 26.

31 Ibid.

32 Ellison, "Police reform" (n. 25 above).

33 Patten, *Report* (n. 23 above), p. 22.

34 Ibid.; I Loader, "Democracy, justice and the limits of policing: rethinking police accountability" (1994) 3 *Social and Legal Studies* 521.

Chief Constable, the Policing Authority and the Home Secretary, though the roles of each are vague and uncertain, leaving the reality of police governance particularly unclear.[35]

The Patten Commission, in its review of the pre-existing position in Northern Ireland, determined that the Police Authority meant "the public have not been able to hold the police accountable through their democratically elected representatives".[36] They took issue with the process of appointment to the authority, but, more than anything, the involvement of British politicians ensured that the public did not, through *its* representatives, make the RUC subordinate in the sense that Marshall would have advocated. Instead, the Patten Commission recommended the establishment of a Policing Board,[37] comprised of nineteen members; ten coming directly from the elected assembly, and the other nine independent members stemming from a variety of backgrounds and expertise. The term "operational independence" which had prevented control from being exercised was replaced with the term "operational responsibility", which they felt more closely reflected the requirements of an accountable police service. To this end the Policing Board was given the power to demand explanations for operational decisions from the chief constable. Additionally, the Patten Commission recommended a further democratic body, in the form of District Policing Partnership Boards, which through decentralisation would encourage engagement and discussion between policing districts and their immediate communities.

Transparency is achieved primarily through the public dissemination of information on policing, in a proactive, rather than a reactive manner. Dissemination will, for most police forces, require a fundamental change of culture. The natural inclination is for police forces to be "defensive, reactive and cautious" in providing information but, for real transparency, police must adopt a culture of openness: "People need to know and understand what their police are doing and why . . . Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing."[38]

In the Northern Irish context, it was envisaged by the Patten Commission that both the Policing Board and the District Policing Partnership Boards would meet in public once a month. But more than this, the concept should be infused into policing that unless it is in the public interest not to disclose something then all information about policing should be available to the public. As the Patten Commission described, "transparency is not a discrete issue but part and parcel of a more accountable, more community-based and more rights-based approach to policing".[39]

35 Marshall, "Police accountability revisited" (n. 1 above); Lustgarten, *The Governance of the Police* (n. 1 above); R Reiner "Policing a postmodern society" (1992) 55(6) *MLR* 761; Reiner and Spencer, *Accountable Policing* (n. 2 above); T Jones, T Newburn and D J Smith, *Democracy and Policing* (London: Policy Studies Institute, 1994); D Dixon, "Legal regulation and policing practice" (1992) 1 *Social and Legal Studies* 515; S Walker, *The New World of Police Accountability* (Thousand Oaks: Sage, 2005) I Loader "Plural policing and democratic governance" (2000) 9(3) *Social and Legal Studies* 323; M Kempa, "Tracing the diffusion of policing governance models from the British Isles and back again: some directions for democratic reform in troubled times" (2007) 8(2) *Police Practice and Research* 107.

36 Patten, *Report* (n. 23 above), para. 5.5.

37 Note that throughout, Patten refers to policing rather than the police, preferring a more inclusive and realistic approach to these issues in Northern Ireland. The responsibilities of such a board would be to set objectives and priorities for policing, adopt a policing strategy reflecting those objectives and priorities, adopt an annual policing plan, and negotiate the budget with government. It would monitor police spending and performance against the annual plan and the long-term strategy. It should assess public satisfaction and complaints as well as having responsibility for senior appointments.

38 Patten, *Report* (n. 23 above), para. 5.14.

39 Ibid., para. 6.38.

The legal aspect is often seen as the most obvious face of police accountability, and police forces have often argued that they should be accountable to the law and the law alone,[40] as it is from the law that they receive their powers. Current thinking, as embodied by the work of the Patten Commission, sees this as just one aspect of a broader, holistic framework of accountability.[41] It is most obviously achieved through complaints systems, although civil and criminal actions against officers also have a role. Complaints systems are charged with a difficult task; not only are they expected to secure police accountability, but they are also very definitely linked to public confidence in the police. The Patten Commission called for the full implementation of the *Hayes Report*, which had advocated the establishment of a Police Ombudsman's Office to take over the handling of complaints from the public. This Office came into being in 2000 and, unlike many other such models, it is entirely independent and, most importantly, it investigates all complaints against the police itself and can initiate investigations of its own accord. The office has also worked hard to promote its work and publicise its findings and research would indicate that it is perceived to be legitimate in the eyes of the public.[42]

Also included in legal accountability could be civil and criminal actions against a police force which equally seek to hold police officers accountable to the law. Indeed, the complaints mechanism, if independently operated, can often be a means of a case being sent to the Director of Public Prosecutions.[43] While Patten was adamant that where criminal activity had occurred it should be criminally investigated, the Patten Commission did not feel that civil actions should be a feature of an effective system of accountability. If both control and explanation are being achieved through state mechanisms then there should be limited recourse to civil actions.

Policing is an expensive business and the public is entitled to question how its money, generated through taxes, is being spent. This was an area which the Patten Commission felt required general enhancement with more developed systems of audit and planning. This is also an area which could be considered a controlling form of accountability. Financial accountability has become a predominant feature in discussions of policing in the UK, since the "managerial turn" in British politics.[44]

Finally, the Patten Commission felt that the work done internally is "critically important" and many instances of police misconduct and public disquiet could be avoided if internal accountability was strengthened. While internal systems inherently concern disciplinary procedures, they do also involve management. Clarity as to the role of each individual within the system is vital as well as an appraisal system, ensuring appropriate understanding of and training for the role. The Patten Commission even recommended that such a system should form part of the promotion and selection process. Related to this issue is the need for greater flexibility in the dismissal processes within police forces. The Patten Commission pointed to the difficulties faced by forces in the UK in dealing with "ineffective or incompetent" officers in the past and supported moves which sought to ease this process.

This framework, combining five different forms of accountability, is thorough and well rounded. It provides for both the controlling of police activity – through developed internal mechanisms, financial constraints, and the knowledge that actions will be public and

40 As per Lord Denning in *R* v *Blackburn* [1968] 2 QB 118 and R Mark, *Policing a Perplexed Society* (London: Allen & Unwin, 1977).

41 Vaughan, "A new system" (n. 5 above).

42 M Seneviratne "Policing the police in the United Kingdom" (2004) 14(4) *Policing and Society* 329.

43 G Smith, "Police complaints and criminal prosecutions" (2001) 64(3) *MLR* 372.

44 McLaughlin, "The democratic deficit" (n. 3 above); Loader, "Democracy, justice and the limits of policing" (n. 34 above); Smith, "Police complaints" (n. 43 above).

scrutinised – and the provision of explanations for policing decisions – through continuous interaction and answerability to politicians and the public, independent bodies that will investigate complaints, and an overarching framework of transparency. A variety of innovative mechanisms have been put in place to achieve these goals, which all contribute to this framework.

Importing Patten: the Irish debate

The Republic of Ireland is policed by one, national police force, An Garda Síochána.[45] Until 1986, police accountability in Ireland was secured either through the internal handling of complaints, or through the questioning of the Minister for Justice in Parliament.[46] A number of scandals in the early 1980s, legislation which enhanced the powers of the police, as well as developments in the UK, prompted reform and the Garda Síochána Complaints Board was established in 1986,[47] though the will for reform was weak. In the context of the Northern Irish Conflict, which was resulting in the deaths of members of An Garda Síochána for the first time in thirty years,[48] little impetus existed for critical evaluation of policing or rigorous accountability. This is reflected in the role of the new mechanism which handled citizen complaints about individual officers and nothing more. While the board which reviewed cases comprised members external to the police force, all investigations were conducted by police officers, and the system was significantly under-resourced.[49] Opposition to the Bill did not focus on its shortcomings. Rather it was argued that:

> Many Gardaí feel genuinely hurt that they, and their profession, should be held in such low esteem by the Government that they can no longer be trusted, can no longer be accorded the same rights and respect as all other public servants – not to mention the criminals. At a time when Gardaí are under siege from all sides the least they could have hoped for was that their own Minister for Justice would not add to the cacophony of abuse, but would instead do something to boost flagging morale . . . how more accountable are they going to have to become before the Government is satisfied?[50]

In practice, however, the Complaints Board was neither independent nor effective and, while numerous commentators continually called for reform, the public continually reported particularly high levels of confidence in the force throughout the life of the Complaints Board,[51] giving politicians little reason to legislate otherwise. In 2002, however, a Tribunal of Inquiry was established to investigate serious allegations of corruption and

45 Meaning "Guardians of the Peace".

46 D Walsh, *The Irish Police* (Dublin: Round Hall/Sweet & Maxwell, 1998).

47 Vaughan and Kilcommins, "The Europeanization of human rights" (n. 5 above).

48 In the fifteen years preceding this legislation, ten members of An Garda Síochána had been killed by members of paramilitary organisations, a sizeable number in a country which had not seen an officer killed for twenty-eight years before that.

49 On one occasion, the board was forced to suspend operations due to under-resourcing; *The Irish Times*, 16 December 1989.

50 Frank Prendergast, Dáil Debates, 20 March 1986, vol. 364, col. 2493.

51 Garda Public Attitude Surveys have placed public confidence in the national police at between 79–87% over the last six years: P Kennedy and C Browne, *Garda Public Attitudes Survey* (Templemore: GRU, 2007); P Kennedy and C Brown, *Garda Public Attitudes Survey* (Templemore: GRU, 2006); Garda Research Unit, *Garda Public Attitudes Survey* (Templemore: GRU, 2005); K Sarma and K O'Dwyer, *Garda Public Attitudes Survey* (Templemore: GRU, 2004); K Sarma, *Garda Public Attitudes Survey* (Templemore: GRU, 2003); Garda Research Unit, *Garda Public Attitudes Survey* (Templemore: GRU, 2002).

misconduct. The Morris Tribunal[52] in its damning reports has substantiated claims of widespread corruption in one policing district, which included officers planting "finds" of IRA bombs in order to gain promotion, the framing of two innocent men for murder, unlawful arrest, abuse of detainees and a pervading unwillingness to account for actions taken. These findings, together with continual calls from a number of bodies for reform[53] and the influence of the changes which had taken place throughout the UK in the preceding years, led to the passing of the Garda Síochána Act 2005, which instituted fundamental reforms in how accountability was to be achieved in Ireland. Further, the declining impact of the Northern Irish Conflict, through the successes of the Peace Process, negated to an extent the protection afforded to An Garda Síochána by the Government from external audit and control. Indeed, under the terms of the Good Friday Agreement, the Irish Government had made a commitment to enhance the protection of human rights in the country.[54] This had lead to the establishment of the Human Rights Commission and to the incorporation of the European Convention on Human Rights into domestic legislation. In this way, Vaughan and Kilcommins argue that "Human rights development acted like a magnet, pulling the institutions of the Republic along to the level reached in Northern Ireland"[55] and so developments in the North were inherently influential in the legislative debates in the South.

The Irish Government had expressed its intention to reform the accountability of An Garda Síochána in 2002. The Heads of the Bill were published in 2003 and the Act was passed in 2005. The Act represented the most substantial reform of the police force since its establishment in 1922, and the debate over this three-year period reflected this significance. The recommendations of the Patten Report featured prominently in that debate, particularly given the proximity in geography and time and the Government's

52 Morris Tribunal, *Reports of the Tribunal of Inquiry set up Pursuant to the Tribunal of Inquiry (Evidence) Acts 1921–2003 into Certain Gardaí in the Donegal Division*: Term of Reference (e): "Report on explosives 'finds' in Donegal" (2004); Terms of Reference (a) and (b): "Report of the investigation into the death of Richard Barron and extortion calls to Michael and Charlotte Peoples" (2005); Term of Reference (d): "Report on the circumstances surrounding the arrest and detention of Mark McConnell on 1 October 1998 and Michael Peoples on 6 May 1999" (2006); Term of Reference (g): "Report on the Garda investigation of an arson attack on property situated on the site of the telecommunications mast at Ardara, Co. Donegal in October and November of 1996" (2006); Term of Reference (i): "Report on the arrest and detention of seven persons at Burnfoot, Co. Donegal on 23 May 1998 and the investigation relating to same" (2006); Terms of Reference (b), (d), and (f): "Report on the detention of 'suspects' following the death of the late Richard Barron on 14 October 1996 and related detentions and issues" (2008); Term of Reference (h): "Report into allegations contained in documents received by Deputy Brendan Howlin on 25 June 2000 that two senior members of An Garda Síochána may have acted with impropriety" (2008); Term of Reference (c): "Report into allegations of harassment of the McBrearty family of Raphoe, Co. Donegal, and of relatives, associates and agents of that family by members of the Garda Síochána and subsequent to the death of Mr Barron including the issue and prosecution of summonses relating to offences alleged to have occurred between 28 October 1996 and 28 September 1998" (2008); and Term of Reference (j): "Report into the effectiveness of the Garda Síochána complaints inquiry process vis-à-vis the complaints made by Frank McBrearty Snr and his family between 1997 and 2001" (2008).

53 Walsh, "The proposed Garda Síochána Ombudsman Commission" (n. 5 above); Irish Human Rights Commission, *Proposal for a New Garda Complaints System* (Dublin: IHRC, 2002); European Committee for the Prevention of Torture, *Report to the Government of Ireland on the Visit to Ireland Carried out by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment* (Strasbourg: CPT, 1998); European Committee for the Prevention of Torture, *Report to the Government of Ireland on the Visit to Ireland Carried out by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment* (Strasbourgh: CPT, 2002); European Committee for the Prevention of Torture, *Report to the Government of Ireland on the Visit to Ireland 2–13 October 2006 Carried out by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment* (Strsabourg: CPT, 2007).

54 Vaughan and Kilcommins, "The Europeanization of human rights" (n. 5 above).

55 Ibid., p. 451.

involvement in the Peace Process. That it was a factor in the debate is unsurprising. What is important to analyse, however, is the way in which the report and its recommendations were presented in that debate, and how this influenced the reforms introduced.

Two opposition parties, Fine Gael and Labour, had actively called since 2000 for the establishment of a Garda Authority, county liaison committees and a Garda Ombudsman, concepts which were "unapologetically derived from much of the work of the Patten Commission".[56] In 2001, the Labour Party proposed a motion to Parliament for these reforms and in the debate clearly expressed its dedication to the principles of Patten: "Much of the Patten report recommendations set out best practices for policing that would be applicable in any modern society . . . We should not be afraid to borrow from the Patten report."[57]

This borrowing, however, was piecemeal in nature with no explanation as to why some of the 175 recommendations were deemed relevant to Ireland and some were not. Certainly, the measures they call for would incorporate both explanatory and controlling elements of accountability but, for instance, the core recommendations of Patten in relation to internal accountability are ignored. It is instead recommended that the disciplining of senior officers be assigned to the new Garda Authority, a suggestion which had no basis in the Patten Report. A year later, the Irish Human Rights Commission published *A Proposal for a New Garda Complaints System* which, in making specific reference to the Patten Report, called for the establishment of an ombudsman and explored the possibility of a policing board. But the premise of the document was to reform the complaints system and not to evaluate police accountability as a whole. No mention is to be found of democratic or internal accountability. Transparency is mentioned but as a principle which should underpin the new complaints system. It seems incongruous that a group aiming to promote human rights in Ireland would focus on the explanatory mode of accountability rather than on controlling police behaviour (and the police's capacity to breach human rights) in the first place.

The Irish Council for Civil Liberties (ICCL) took the connection to Northern Ireland further in its policy paper, *Why Patten Should Apply Here and How this can be Achieved*, in which it called for a commitment to human rights, a more representative force, and the establishment of an Ombudsman Commission and a Policing Board. The ICCL stated that, in relation to citizen complaints, "there is no need for the Irish Government to 're-invent the wheel' on this issue",[58] yet in the same document the ICCL seeks reform in the areas of whistleblowers, police powers, interrogation of suspects, recording of interviews and access to lawyers while in custody, without mentioning the Patten Report. The implication is that the mechanisms required to make An Garda Síochána an accountable police force are different to what was required in Northern Ireland. This inherent contradiction continued to be apparent in the ICCL's submission on the government proposals for reform later that year in which the it contended that:

> The work carried out by the Patten Commission is the most comprehensive study of police structures ever undertaken in a common law legal system, and we believe that the recommendations contained in its report represent best international practice in policing.[59]

56 Labour Party, *Proposals for Legislation for a Garda Authority and Garda Ombudsman* (Dublin: Labour Party, 2000), p. 2.

57 Brendan Howlin, Dáil Debates, 10 April 2001, vol. 534, col. 606.

58 Irish Council for Civil Liberties, *Why Patten Should Apply Here and How This Can Be Achieved* (Dublin: ICCL, 2003), para. 3.12.

59 Irish Council for Civil Liberties, *Submission on Scheme of Garda Síochána Bill* (Dublin: ICCL, 2003), p. 4.

Connolly[60] reviewed the state of accountability within An Garda Síochána, looking at complaints, accountability to the courts and to politicians. In finding each lacking, he referred to the Patten Report and the "various mechanisms in that report which I think would be of great benefit in this jurisdiction".[61] He then discussed the impact of the Policing Board, the District Policing Partnership Boards and the Police Ombudsman, indicating that such mechanisms could enhance democratic accountability in Ireland. Again however, the emphasis is on the specific institutions and bodies recommended by the Patten Report rather than a dedication to the overarching principles enshrined in that document.

On the publication of the heads of the Garda Síochána Act, one newspaper was scathing in its criticism of the legislation for its failure to incorporate the Patten recommendations to a greater extent:

> The Taoiseach and his colleagues have been vocal and resolute supporters of the Patten reforms, designed to transform policing in the North. The work of the Patten Commission is a ready-made blueprint for a new era of policing here . . . Why does McDowell [the Minister for Justice responsible for the legislation] consider it to be right for the people of the North, but inappropriate for those on this part of the island?[62]

The answers given to this question were various; they are two different jurisdictions, policing in the North is far more contentious, the Gardaí have always maintained high levels of public support, Ireland is a bigger jurisdiction, and so on.[63] These are certainly all true and are perhaps valid reasons for arguing that Ireland should not implement the same mechanisms as were implemented in the North. The problem with this debate is that at no point was the suggestion made that Ireland should adopt from Patten the strong theoretical framework, as amended for practical implementation in Ireland. Each of these critics focused on the possibility of reproducing the specific institutions recommended by Patten for Northern Ireland, rather than adopting the theoretical approach which would involve determining what police accountability should achieve and what areas need to be reformed in order to do that. Each of the individuals and bodies mentioned above argued for the implementation of the Patten Report, but then proceeded to cherry-pick certain recommendations as suitable for Ireland. None of these engage with the question of what accountability should achieve. None mentioned internal or financial accountability and only Connolly discusses democratic accountability. There was no framework or overarching scheme to any of these analyses. At the very least, the five tests which Patten had adopted as its benchmark could have been utilised by the opposition and interested parties to critique government proposals.

In presenting this Bill to the Houses of Parliament, the Minister for Justice outlined the Government's position in respect of it. He stated that it "contains the most comprehensive and, I believe, the most important, legislative proposals on policing ever to come before the House".[64] He expressed a need to learn from developments in Northern Ireland and, indeed, used much of the language from the Patten Report: "operational responsibility", "financial responsibility", "democratic accountability", "open and transparent". The influence of Patten was apparent but the Minister for Justice's statement that the twin objectives of the Bill were to reform management structures and to implement a new

60 Johnny Connolly, "Do We Need Patten Type Reforms in the Republic", speech at James Connolly Education Trust, 24 October 2008, http://www.iol.ie/~sob/jcet/2000-10-24-jc.html (accessed 17 November 2008).

61 Ibid., p. 7.

62 *The Sunday Business Post*, 3 August 2003.

63 Michael McDowell, Seanád Debates, 2 March 2004, vol. 175, col. 1310.

64 Ibid.

complaints mechanism make it clear that the theoretical framework of Patten became lost in translation. The debate on police reform in Ireland never engaged with such concepts. The Act of 2005 implemented a great number of reforms and new institutions including an Ombudsman Commission, Joint Policing Committees, a Garda Inspectorate, a duty to account, new financial responsibility arrangements, a new Promotions Board and a Whistleblowers' Charter. So how is accountability achieved now?

Prior to the 2005 Act, democratic accountability in Ireland was achieved solely through the Minister for Justice who answered questions on policing in the state to both the Dáil and the Senate.[65] The Minister for Justice was only in control of finance and internal regulations, and not responsible for of the direction and control of the force which rested with the Garda Commissioner, with the result that the Minister for Justice could only serve as a conduit for information provided by the Garda Commissioner.[66] Further, Walsh's shows that, despite the Houses of Parliament being the sole arena of democratic accountability, there was limited criticism of An Garda Síochána expressed there.[67] The opposition feared political backlash given the popularity of An Garda Síochána and the Government was slow to criticise the Garda Commissioner whom it appoints and works closely with. As one minister stated:

> While people in this House and people in the media may have freedom to criticise, the Government of the day should not criticise the Garda Síochána . . . it is obscene that the Government and the Minister responsible should be the first to lead the charge in the criticism of the Garda Síochána.[68]

Comments like this led Walsh to conclude the role of the Minister of Justice "could be interpreted as being designed to protect the Garda against the full rigours of democratic accountability".[69] Democratic accountability was not providing a mechanism whereby the public could "be able to satisfy itself that it is getting value for money from the police force and that the substantial legal and moral authority entrusted to the force is not being abused".[70]

In spite of this it did not feature in the reform debates, beyond addressing specific issues raised by the Morris Tribunal, though the 2005 Act did introduce a number of measures of relevance. The relationship between the Minister for Justice and the Garda Commissioner is clarified somewhat with the former now approving the annual policing plan, and three-year policing strategy. The Garda Commissioner is also now under a duty to account to the Minister for Justice and to provide any information requested by that minister.[71] The Minister for Justice can also order the establishment of an inquiry to investigate any matter of administration, practice or procedure of the force as he or she sees fit. Government, thereby, has a much stronger role in policing policy and accountability. Nonetheless, this reformulation continues the arrangement of democratic accountability being located within this one relationship. The problem lies in the driving force behind this reform. It was not an effort to create the most robust structures but a reaction to one incident in the run-up to the establishment of the Morris Tribunal in which the Garda Commissioner failed to

65 Connolly, "Do We Need Patten Type Reforms" (n. 60 above).

66 Walsh, "The proposed Garda Síochána Ombudsman Commission" (n. 5 above), pp. 376–97.

67 D Walsh, *The Irish Police* (Dublin: Round Hall/Sweet & Maxwell, 1998).

68 Michael Noonan, Dáil Debates, 10 November 1987, vol. 375, col. 227.

69 Walsh, "The proposed Garda Síochána Ombudsman Commission" (n. 5 above), p. 402.

70 Ibid., p. 367.

71 Garda Síochána Act 2005, ss 20–5.

provide the Minister for Justice with the findings of an internal inquiry.[72] This is perhaps a prime example of an exposed defect which was responded to in an enthusiastic manner, but without stepping back to assess the overall nature of the problem revealed. Had this been done, it might have been seen that the reliance on this relationship to deliver democratic accountability is inherently weak, and rather than reforming it, a different model of democratic accountability should be preferred. The problem lies with the questioning of the Minister for Justice through the parliamentary process and, in fact, it could be argued that, having approved policing plans, the Minister for Justice will now have a greater political interest in the position of An Garda Síochána. Questions from the opposition on garda operations may now become encased in party politics, further diminishing their capacity for achieving accountability.

The opposition calls for a Garda Authority may appear as a solution to this dilemma, although Kempa has urged caution in this regard, indicating that "it is a universally held view in academia that Police Authorities have never lived up to their promise as agencies that would achieve the 'democratization' of policing".[73] That said, Kempa proceeds to argue that developments in Northern Ireland, with the replacement of the Police Authority with a Policing Board, are "radically" transferring power from government to the community. What is certain in the Irish context is that Joint Policing Committees (JPCs),[74] forums for consultation, discussion and recommendations on policing matters affecting the local authority's administrative area, cannot perform that function. The explanatory memorandum to the Bill clearly stated that JPCs could make recommendations to the Gardaí but in no way was the force formally accountable to them. Each must hold at least one public meeting a year, but it is difficult to imagine that one meeting a year can lead to real and effective consultation between the community and the police. The Northern Irish counterparts, the District Policing Partnership Boards, meet six times a year, which seems a viable way of forming solid communication and relationships between those involved. The issues which the public have in relation to the policing of their communities are likely to change with relative frequency and if the JPC is not meeting regularly, and not addressing each of these issues, then it will be ineffective and become the "lame-duck" in the eyes of the public which Kempa described.

The JPCs are supposed to achieve greater transparency, but just one annual meeting is hardly sufficient to achieve this aim. Even now, it is difficult to find information about the existing JPCs under the pilot scheme. Some of the JPCs, most particularly those in Dublin, have published detailed information on their council websites. Dublin City Council, for instance, has available on its website the guidelines, committee membership details, the minutes of meetings held, an annual report, and a workshop report.[75] This is most certainly the exception, unfortunately, and for cities such as Limerick, Cork and Galway there is no information to be found online. If interested citizens cannot find out how to participate, what hope have these committees of creating real dialogue and engagement? It may well be

72 In 2005, the Minister for Justice, who had been Attorney General at the time of the Carty Inquiry, explained: "Unfortunately, it was the case at the time, doubtless in good faith, that there was a doctrine that the Garda Síochána was in privity with the Director of Public Prosecutions and that it was open to senior Gardaí in consultation with the Office of the Director of Public Prosecutions to decide what the then Minister, Deputy O'Donoghue and myself could see in respect of the investigations being carried out in Donegal."; Michael McDowell, Dáil Eireann, 17 June 2005, vol. 604, col. 519.

73 Kempa, "Tracing the diffusion" (n. 35 above), p. 114.

74 Still in the pilot phase, JPCs have been established in 29 of the 114 local authority areas. A review is currently being held and the guidelines indicate that JPCs will be rolled out in every local authority area subsequently.

75 For details of this JPC, plus those reports visit: http://www.dublincity.ie/yourcouncil/localareaservices/centralarea/pages/jointpolicingcommittee.aspx (accessed 24 November 2008).

the case that transparency increases through the information published by the Ombudsman Commission and the Garda Inspectorate, but then this is not derived from the police force itself. Even if the Minister for Justice has greater access to operational decisions, it does not follow that this information will enter the public domain. Little emphasis has been placed on making An Garda Síochána transparent in the proactive way which Patten had envisaged.

The Garda Síochána Ombudsman Commission was established by the Garda Síochána Act 2005 and began its work in May 2007. As the new mechanism for handling complaints, it replaces the Garda Síochána Complaints Board. It is a three-person commission, in spite of arguments favouring the single-person structure in Northern Ireland. Appointments are made by the President, on the nomination of the Government: a missed opportunity to establish an independent appointments panel which would give the Ombudsman Commission complete independence from political interference.[76] The Ombudsman Commission has already proven itself willing to accept complaints beyond the legally specified time limits,[77] but it remains the case that, if the subject of the complaint is no longer a member or retires or resigns after the complaint is made, then it is inadmissible

Under the legislation, complaints may be dealt with by way of informal resolution, investigations conducted by Gardaí (supervised or unsupervised) or the Ombudsman Commission will conduct its own investigation. Investigating officers have all the powers, immunities, privileges, and duties of a member of An Garda Síochána and may conduct a search of a station where the Ombudsman Commission permits it. The commission may initiate complaints[78] and the Garda Commissioner must refer any matter involving conduct of a member for investigation if it resulted in death or serious harm. Further the Minister for Justice may direct the Ombudsman Commission to examine the practice, policy and procedure of the Gardaí.

In the first year of operation, the Ombudsman Commission received 2905 complaints and 294 referrals from the Garda Commissioner,[79] nearly three times the number of complaints received by the Garda Síochána Complaints Board in its final year of operation.[80] Most likely this rise is due to the publicity surrounding the creation of the new office, perceived to have greater independence, and a greater willingness on the part of the public to make complaints against An Garda Síochána, rather than any dramatic increase in the rates of misconduct. Indeed, an Ipsos–MORI survey found that 84 per cent of people believe that the Ombudsman Commission will have a positive impact on people's willingness to complain.[81] Of those complaints from the public which result in an investigation, almost half are still being investigated by the Gardaí and only 10 per cent of those are being supervised by the Ombudsman Commission. Effectively, in these instances, they are being investigated as internal, disciplinary matters. What these numbers also show is that the Ombudsman Commission is at this early point focusing its resources on the most serious investigations, evidenced by the fact that 55 per cent of all investigations concern conduct appearing to involve an offence. These are effectively the only investigations being conducted by the Ombudsman Commission. The main reason for this is under-resourcing. The Ombudsman Commission has yet to reach its full complement of staff. At the end of

76 Irish Human Rights Commission, *Observations on the Garda Bill* (Dublin: IHRC, 2004).

77 Complaints must be made within six months although the Ombudsman Commission may extend the time if it feels it is justified, as it has already proven itself willing to do in relation to the fatal shooting of two armed raiders in Lusk, Co. Dublin (*The Irish Times*, 2 October 2007).

78 And must do so where it believes the conduct of an officer has resulted in death or serious harm.

79 Garda Síochána Ombudsman Commission, *Annual Report* (Dublin: GSOC, 2008).

80 Garda Síochána Complaints Board, *Annual Report* (Dublin: GSCB, 2006).

81 GSOC, *Annual Report* (n. 79 above).

2007 the staff levels of the Ombudsman Commissioner were at 75, though there is the potential for 101.[82] Even with the full complement of staff, the Ombudsman Commission has expressed the belief that most cases will continue to be investigated by the Gardaí.[83] The Ombudsman Commission has not been adequately funded to perform its function, to the point where in its first two-year report it has requested the power to "leaseback" the investigation of criminal offences to An Garda Síochána under supervision. This is particularly worrying as it would further dilute the independence of the Ombudsman Commission in a climate where 83 per cent of people believe that it is independent.[84]

Criminal actions, another form of legal accountability, have been difficult to secure in relation to members of An Garda Síochána, as both the investigation process and juries tend to be more biased in favour towards members of the force. Indeed, one member of the Ombudsman Commission, Conor Brady, has stated that "the difficulty of getting convictions from a jury is clear . . . Juries are very reluctant. You saw it in the May Day protests, people were seen on television doing unspeakable things, and they were acquitted by a jury."[85] The capacity of criminal actions for achieving accountability is thereby severely limited. On the other hand, civil actions have taken on an increased role in the accountability of An Garda Síochána. This is for two core reasons; firstly, the weakness of the Garda Síochána Complaints Board made many look elsewhere for redress; and, secondly, it reflects a growing litigiousness in Irish society more generally. Civil actions can only have a limited role in terms of accountability, however, as the defendant will be the state or the Attorney General acting in his or her capacity of legal representative of the state, neither of whom can have any impact on Garda practice or policy. Information gathered from Dáil Debates reveals that from 1997 to April 2007 over €17 m has been paid out in claims against the Gardaí.[86] The payment of damages does not come from the general policing budget, but, instead, from funds over which the Garda Commissioner has no responsibility or accountability so, as a method of enhancing financial accountability, the payments will have little direct negative impact on the Gardaí.

The 2005 Act also includes provisions relating to the financial accountability of An Garda Síochána. The Garda Commissioner, as Accounting Officer, is answerable to the Public Accounts Committee for matters of spending. The Garda Commissioner is also required under the legislation to establish an Audit Committee within the force, to advise and report to the Minster for Justice on financial matters. This committee will be composed of a Deputy Commissioner and at least four other members, with the relevant skills, and who have never been members of An Garda Síochána. The Garda Commissioner is obliged to furnish the Audit Committee with all information relating to the finances of the force. It must meet four times a year and produce a report which is to be included in the Annual Report of the force, presented to Government. It is supposed to ensure effective, efficient and appropriate use of Garda resources though, as an internal body, issues of transparency will undoubtedly arise.

Internal accountability within An Garda Síochána is built around enforcing the Disciplinary Code, which has been amended regularly, most recently in 2007. Breach of the Regulations can result in sanctions ranging from being docked pay to demotion or even

82 Personal Communication, researcher Garda Síochána Ombudsman Commission, 7 October 2007. More up-to-date figures are not available.

83 Garda Síochána Ombudsman Commission, *Annual Report* (Dublin: GSOC, 2007).

84 GSOC, *Annual Report* (n. 77 above).

85 *The Irish Examiner*, 25 August 2006.

86 Michael McDowell, Minister for Justice, Dáil Eireann, 27 November 2002, vol. 558, col. 509; Dáil Eireann, 23 June 2005, vol. 605, col. 172; Dáil Eireann 04 April 2007, vol. 635, col. 752.

dismissal, as determined through informal resolution for minor breaches or an investigation for more serious matters. If a member resigns before proceedings against him or her are completed, then that member cannot be disciplined and, in practice, proceedings are halted due to retirement: this has been used by some as a method of avoiding disciplinary action. Walsh has argued "for tightening up the Regulations specifically to permit a disciplinary case to proceed against a member irrespective of his premature resignation",[87] but despite this being a serious issue in the wake of the Morris Tribunal, when many of those criticised resigned before proceedings could be initiated, the Government has not taken action, save to enhance the bureaucracy and legalism of existing mechanisms. The composition of the disciplinary board has also been altered to incorporate external membership. The Garda Commissioner is granted the power of summary dismissal in three specified instances, which is quite a departure from the previous arrangement. Further, the disciplinary regulations now include a duty to account, which, it is hoped, will overcome the problem of officers not explaining actions to senior members. Nonetheless, the procedure is becoming increasingly legalistic and unwieldy.

The Patten Commission saw internal accountability as being a much broader issue than disciplinary proceedings. It highlighted the need for dedicated focus on management, the need to ensure clarity as to job specifications, and the need for an appraisal system to identify individual and system problems. This did not form part of the initial legislative response of the Irish Government. Two reports in 2007 have drawn attention towards the need for reform of these areas.[88] The final report from the Advisory Group on Garda Management and Leadership Development emphasised, in terms of current changes in the force, that: "There should be performance measurement and appraisal at all levels and that proper arrangements are made for training and staff development to prepare them for their new or changed roles".[89]

Taking the corporate world as a sound guide for this area, the Advisory Group felt that in order to achieve the objectives outlined a number of things needed to be done as a matter of priority including clarifying the roles and responsibilities of those in the force and instituting performance evaluation measures.[90] The *Hayes Report* also recommended increased training and support for those in management roles, as well as acknowledgment of the different management needs where increasing numbers of recruits are entering the system with a primary degree. Much of this was reiterated by the Garda Inspectorate report published just months later which agreed that:

> The Garda HR Strategy must identify means to accelerate the advancement of highly talented people through the various ranks. Specific provision should be made to enable these personnel to acquire the experience, training, education and mentoring necessary to equip them to compete for promotion to the most senior posts in the organisation.[91]

The Association for Garda Sergeants and Inspectors has come out strongly against such a scheme, arguing that promotions of this nature are likely to revert the system to the nepotism which they have worked hard to remove.[92] A lack of faith in the promotions

87 Walsh, "The proposed Garda Síochána Ombudsman Commission" (n. 5 above), p. 250.

88 M Hayes, *Report of the Garda Síochána Act 2005 Implementation Review Group* (Dublin: Department of Justice, Equality and Law Reform, 2007); Garda Síochána Inspectorate, *Report on Senior Management Structures in an Garda Síochána* (Dublin: GSI, 2006).

89 Hayes, *Report* (n. 88 above), p. 7.

90 Ibid., p. 8.

91 Garda Síochána Inspectorate, *Report* (n. 88 above), p. 21.

92 Joe Dirwan, *The Irish Times*, 2 October 2007.

system of the Gardaí would be fatal for the achievement of internal accountability. All parties must work together for what is perceived by all to be a legitimate system in order for it to be successful and to prevent the development of widespread misconduct.

The state of accountability in An Garda Síochána post-reform

In many respects these reforms do cover the five aspects of accountability outlined by Patten and certainly do provide for both explanatory and controlling accountability. This, however, was not by design, as there was no coherent approach to reform. In fact, while the context of reform may have been the growth of human rights and developments in Northern Ireland, many of the specific reforms came as a direct response to the findings and recommendations of the Morris Tribunal. This tribunal had stressed that what had happened in the division in question was not due to a number of rotten apples in the barrel, nor could it be said to be an isolated event.[93] It was reflective of weaknesses in management structures, which failed to prevent abuses from occurring. In spite of this, the Garda Síochána Act 2005 seems largely directed at attending to specific problems which arose in the Donegal division, from an individualised, rather than institutionalised perspective. Arguably, it could not be denied in Northern Ireland that problems were endemic and institutionalised, whereas in the Republic this was not the case. Reform of accountability structures has, both now and in 1986, been dominated by scandal – the Kerry Babies case in the 1980s and the Morris Tribunal in this decade – giving it a reactionary nature. The result is a system of accountability which when analysed in view of this framework, is found to be seriously weak and flawed.

While ostensibly the Garda Síochána Act 2005 implemented many worthwhile and much needed reforms, the fundamental problem highlighted here is the failure to take a considered approach to what accountability should mean for An Garda Síochána. In proposing the legislation, the Government did not question the purpose of a system of accountability. Opposition parties, NGOs, interest groups and other commentators, all keen to stress the positive aspects of Patten, neglected that which made the Patten Report so important – its attempt to develop a holistic system of accountability.

As a result, Ireland now has a greatly reformed system of police accountability in place but with very real deficiencies. Democratic accountability, while now appearing to be enhanced through JPCs, is, in fact, worryingly weak. There needs to be greater public involvement in policing, as well as a more developed sense that the public is entitled to question the force. This links to the point made that An Garda Síochána has not adopted the approach to transparency advocated by the Patten Commission. There has been no attempt to make a cultural shift towards openness in a meaningful way. Internal accountability has been largely neglected in recent reforms and, as the first line of defence with the greatest capacity to prevent abuses from occurring, this is regrettable. Legal accountability has perhaps received the most substantial attention, but in a limited sense. All focus has been on the Ombudsman Commission but, as Vaughan argues, in a holistic system it would play a "vital" role but it would be "much more minor than that envisaged in the debate on police accountability hitherto".[94] No efforts have been made to address the inability of the criminal justice system to secure convictions against officers who have breached the law.

There remains potential for preventable abuses to occur within An Garda Síochána. This potential could have been substantially reduced had a coherent theoretical approach to reform been adopted. The Patten Commission offers one such approach. It could be of

93 Morris (2004) (n. 52 above), para. 6.05.

94 Vaughan, "A new system" (n. 5 above), p. 20.

great use to other jurisdictions seeking to reform policing and police accountability, but, as the Irish experience shows, cherry-picking from the recommendations of the report will not suffice. The way in which the Patten Report was presented in this debate as a series of new institutions, rather than a framework for accountability, is indicative of the overarching approach to reforming this area more generally. What the Government provided through the Garda Síochána Act 2005 is a similar checklist system of institutions and regulations, with no foundations in theory. Had Ireland adopted the Northern Irish approach, there would have been greater emphasis on democratic accountability and transparency. There may even have been a cultural mind-shift among legislators as to the role of accountability not just as a reaction or a defence but as a way of enhancing police legitimacy and policing by consent.