

NORTHERN IRELAND

LEGAL QUARTERLY

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HUMAN RIGHTS AND CITIZENSHIP*

*The Rt Hon Sir John Laws, Lord Justice of Appeal,
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I propose to use my paper today to argue for a position which some will think self-evident. Others may think there is some truth in it, but regard it with a good deal of circumspection. What I have to say will be unsatisfactory, because it will leave unanswered questions, and for that I apologise in advance. The argument is that you cannot have a stable and vigorous jurisprudence of individual rights, that is, of rights enjoyed by the citizen against the State, without an equally vigorous jurisprudence of individual duties, that is, of duties owed by the citizen to the State. I have previously¹ been at pains to argue that rights are a poor basis for inter-personal morals, whose foundation is rather the concept of duty; and that rights should primarily be seen as a *legal* rather than a *moral* construct. In what I have to say here, I am not going to revisit that territory, which belongs in the field of moral philosophy more obviously than anywhere else. My theme here, rather, is to see where in terms of rights our law should be going. First I must establish some background.

After the vile tyrannies of the mid 20th century, constitutionalists, treaty-makers and others had to find a language in which to express the idealism of “never-again”: the determination of civilized nations to repudiate altogether the malign usurpation of government which Hitler and Stalin had perpetrated. The language they found was the language of rights: the European Convention on Human Rights, the International Covenant, the Refugee Convention, and other texts. And the language of rights has permeated the national legal systems and constitutions of such civilized nations themselves. The incorporation of the Convention is the present apex of this process in the law of the United Kingdom. I do not of course suggest that the establishment of rights in our constitutional firmament has been no more than a matter of language: obviously not. But the word is often father of the act. We have become accustomed to speaking of constitutional positions in terms of rights, and our concrete expectations have been adjusted accordingly. In particular there is, I think, a perception, not always recognized, but still very powerfully present, that the relation between people and State is that the people have rights against the State, and the State has duties towards the people, and that is pretty well the whole of it.

I think this perception is wrong and dangerous. It is wrong because it implies a view of the individual as owing duties at most upon an individual level – to his wife and his children and his friends – and not to the community at large. It is dangerous because it leads in the end to the people becoming the mob, more and more demanding their fill of rights; and eventually their very sense of duty to other individuals will struggle to

* This article is a revised version of the opening address delivered at the joint Bar of Northern Ireland and Bar of England and Wales Human Rights Conference in Belfast on 27th September 2003.

¹ ‘Beyond Rights’ (2003) *OJLS* 265.

survive their greed against the State. It leads also to governments becoming more and more desperate and cynical, more and more inclined to despise the people they are supposed to serve. Here is Machiavelli²:

“. . . a prudent ruler cannot, and should not, honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist. If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.”

Compare Pericles' funeral speech for the Athenian dead early in the Peloponnesian War, as Thucydides fashioned it³:

“Our public men have, besides politics, their private affairs to attend to, and our ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters. Unlike any other nation, we regard the man who takes no part in these duties not as unambitious but as useless. We are able to ponder and judge affairs accurately, and instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.”

A constitution whose central perception of the relation between people and State is that the people have rights against the State, and the State has duties towards the people, and that is pretty well the whole of it, is unstable, weak, and liable to be corrupted, as the rulers or governors come to share in the urgent selfishness of the governed.

In my opinion we are at an immature stage in the development of a free and liberal constitution. We will only reach a kind of maturity when we come to recognize – as our law must recognize – that the citizen owes duties to the State no less than the State to the citizen. Not merely duties of good behaviour to his neighbour; duties to the community at large, represented, not by the government, but by the State. The distinction here between government and State is critical to my position, and I will return to it shortly. First, however, let me introduce Sir Kenneth Dover, one of our finest classical scholars of the last fifty years or so⁴, who said this:

“As states grow larger and their structure and way of life increase in complexity at a rate faster than we can adjust to, individuals, associations and areas resist integration even to the point of treating ‘I have a right to. . .’ as a synonym of ‘I would like. . .’. The Greek did not regard himself as having more rights at any given time than the laws of the city into which he was born gave him at that time; these rights could be reduced, for the community was sovereign, and no rights were inalienable. The idea that parents have a right to educate (or fail to educate) their children in whatever way they please, or

² *The Prince* (1961, tr George Bull), pp. 99-100.

³ Thucydides, *Peloponnesian War*, 2.40. I took this translation (which I have adapted) from the excellent *Perseus* website <<http://www.perseus.tufts.edu/Texts.html>>. But note that the website does not identify the translator.

⁴ *Greek Popular Morality* (1974) pp 157-158.

that the individual has a right to take drugs which may adversely affect his health and so diminish his usefulness, or a right to take up the time of doctors and nurses in consequence of not wearing a seat-belt, would have seemed to a Greek too laughable to be discussed. No Greek community would have recognized 'conscientious objection' to war, or to anything else."

I do not suggest that this model of State supremacy can or should be translated lock, stock and barrel into our own constitutional framework. While we would agree that the community – in the United Kingdom, the Queen in Parliament – is sovereign, we would not, I think, accept that no rights are inalienable: we would say at least that even though the sovereign Parliament possesses the theoretical power to abrogate any right, there is a category of fundamental rights which could only be abrogated by a Parliament which turned its back on democratic values. We would certainly regard as alien to any desirable constitutional arrangements for today what was said by Jacob Burckhardt, the great nineteenth century historian of Greek culture⁵:

"Culture [in ancient Greece] was to a high degree determined and dominated by the State, both in the positive and in the negative sense, since it demanded first and foremost of every man that he should be a citizen. Every individual felt that the polis lived in him. This supremacy of the polis, however, is fundamentally different from the supreme power of the modern State, which seeks only to keep its material hold on every individual, while the polis required of every man that he should serve it, and hence intervened in many concerns which are now left to individual and private judgment."

These perceptions from the ancient world illustrate in striking fashion a view of rights much more restricted than our modern full-blown perceptions. Now, it is a backdrop to my thesis that the conception of a duty to the State should no longer be burdened or corrupted by nightmare visions of secret police, brainwashing, or any of the apparatus of totalitarianism. Those horrors are both the conditions and the consequences of something quite different from a duty to the State, and that is, a duty to the government. In a free society the citizen as citizen owes no duty whatsoever to the government. On the face of it the civil servant owes such a duty, and it is a highly honourable duty, freely undertaken, not imposed. But the civil servant would not accept that his duty is to the government *simpliciter*. His duty, of course, is to the Queen's ministers of whatever political colour. Ultimately it is a duty to the State over and above the government. It is a duty which can only be understood in the context of a democratic constitution in which the government may and does change according to the dictates of the ballot-box.

We may ask, what is the true importance of rights, that is, rights in the form of enforceable laws. I think there are two dimensions to it. The first is that

⁵ Quoted in O. Murray's 'Introduction' to his edition of Burckhardt's, *The Greeks and Greek Civilisation* (1998) p xxxvi.

rights minimize the possibility of arbitrary and capricious government. The second is that they maximize the possibility of individual freedom of thought and action. This second value, individual freedom, is diminished in Dover's picture of the Greeks. It is the first of these two values, the avoidance of arbitrary and capricious government that is the primary response to the horrors of tyranny. And the danger of our present constitutional immaturity is that the second value, individual freedom, should so far overtake the common good that the common good is itself corrupted to become nothing more nor better than the provider of the mob's demands: Juvenal's bread and circuses⁶.

Now a duty to the State, whose acceptance is the antidote to Juvenal's dismal vision, is quite distinct not only from a duty to the government, but also from the duties we would all accept to other individuals: to family, friends, neighbours, fellow-workers. These duties are the stuff of inter-personal morals. But the duty to the State is a duty to the community at large. In part it may be fulfilled by charitable works, activities having nothing directly to do with the apparatus of the State. But the paradigm of a duty to the community, or at least a central instance of it, consists in obligations towards interests which are largely, sometimes entirely, in one form or other in the hands of the State. There are laws which obviously enough exemplify the citizen's duty to the State. The laws requiring payment of taxes are the plainest instance. A little while ago I saw a report in the press of a survey or opinion poll suggesting that a third of the adult population thought it legitimate to cheat the taxman. The restrictions imposed by the planning laws are another instance; and so are smaller things, like fines for illegal parking or dropping litter. I wonder how many people, who would have a bad conscience on some point of purely personal misconduct, would think nothing of putting up a back extension to their house without telling the council, disobeying the traffic laws if they would get away with it, or a dozen other laws, great and small, whose shared characteristic is that they are there for the general good and do not in the particular case seem to have much to do with the interests or well being of your mother, brother or best friend.

We may draw some conclusions from these reflections. First, my argument is not only that disobedience of these laws is morally contemptible, though that is certainly so. It is rather that the acceptance by society of duties to the State, and their transformation into law, is itself a condition of rights against the State, and their transformation into law. This is so, first and foremost, because the ideal that all the citizens enjoy such rights can only be fulfilled if the rights of each are curtailed to make room for the rights of everyone else; and that can only be done, in a community whose inhabitants are not angels, by the imposition of laws which force the citizen to recognize the community interest. This is reflected in the text of the European Convention on Human Rights and the Convention jurisprudence, and also in the common law. But this is a regime which will only possess a secure and tranquil existence if the people generally recognize the need of it; and I gravely doubt whether, generally, they do.

As for the Convention's text, the clearest instance is perhaps to be found in the second paragraph of each of Articles 8 – 11, which of course confer what

⁶ *Satires*, x, 80.

are sometimes rather broadly referred to as the political rights: the right to respect for home and private life, freedom of expression and religion and so forth. As is well known, the second paragraph in each case permits (I summarise) curtailment of the right on public interest grounds subject to the principle of proportionality. Thus the Convention text recognizes the need to draw a balance between the rights of the individual and the interests of the community. And this, as I have indicated, is reflected in the Strasbourg jurisprudence: I will refer only to the oft-repeated dictum from *Sporrong*⁷:

“ . . . the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is inherent in the whole of the Convention . . . ”

The common law reveals a like balance. In private law, inhibitions of individual rights imposed by force of the general community interest are for example to be found in the defences to a claim for defamation, in the public interest restrictions on the freedom of contract, and in the limitations (though they are far from a brightline rule) which the law of negligence places upon the scope of the notion of duty of care, and in other areas. In public law, the balance is struck by the extent to which judicial review remains remote from the case’s factual merits: this reflects the political imperative that government must be left to govern, so long as it does not transgress the law, and government in the interests of all will inevitably mean curtailments of the individual’s freedom of action.

There is a practical agenda here, for the improvement of our human rights jurisprudence. All too often there is, even three years on after the coming into force of the Human Rights Act, still something of a tendency for human rights points taken in litigation to be treated as an alien “add-on”, something strange to the common law, a different blood group; and sometimes as a last ditch, to be appealed to if all else fails. The consequence is that the human rights argument is likely to suffer from an artificial rigidity: if the general law gives you nothing, the European Convention on Human Rights may still give you something, but it is likely to be something farther away from the unruly merits of the case – some strict rule of which you may take advantage even if it goes against the merits.

This is very undesirable. The Convention and the common law have to march together, both recognising the balance to be struck between individual rights and public interest. We have to treat the Convention rights as lying upon a *continuum* with the common law. This is made good by the very balance between the rights of the individual and the interests of the community, recognised alike in Strasbourg and the United Kingdom, which I have just described. I hope it is not overly controversial to suggest that the Human Rights Act is a constitutional statute, in the sense I ventured to put forward in *Thoburn*, where I said⁸:

“ . . . a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general,

⁷ *Sporrong and Lonroth v Sweden* (1982) 5 EHRR 35, 52 (para 69).

⁸ *Thoburn v Sunderland City Council* [2002] 3 WLR 247, 281.

overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b).”

The Human Rights Act, plainly, falls into both of these categories, (a) and (b). And if it is right to regard it as a constitutional statute, then its provisions are at the centre of our perception of the relation between citizen and State: since a constitution, as I would have the term understood, consists in that set of laws, or laws and conventions, which in a sovereign State define the relationship between the ruler and the ruled. The Convention rights are within this class. Thus they are part of our constitution. They cannot, then, be regarded as an alien “add-on”, separate and apart from the common law which, as the very source of the legislative power, is the constitution’s cornerstone: at least the Convention rights cannot be so regarded without our suffering from what could only be described as a form of legal and political schizophrenia. No doubt a constitution may play different tunes, but they need to be written in the same key.

The next conclusion I would draw recalls the separation of government from State, about which I have already had something to say. This separation is a condition of any acceptable theory of the citizen’s duty to the State; the notion of the citizen’s duty to the *government* is a slippery slope to tyranny. But this same separation is therefore a condition of the citizen’s rights, since as I have argued the acceptance by society of duties to the State, and their transformation into law, is itself a condition of rights against the State, and their transformation into law.

In consequence, if we are to have a viable, healthy rights jurisprudence, recognising that a jurisprudence of duties to the State is a condition of such a thing, we will find that we need to have a coherent theory of the State as something separate from government. The idea of rights implies such a theory. What would this theory amount to?

This is a bigger question than can sensibly be answered in a short talk at the beginning of a one-day conference. But I will suggest some ideas for further reflection. First, as I have foreshadowed, the State in this context is to be taken as the embodiment of the community, including therefore the community’s unpopular minorities and more inconvenient elements: the *whole* community. Here the State’s symbols and traditions are important to give concrete form to an entity whose *servant* is the government. But secondly, the government’s subservience to the law is critical to its separation from the State: it is not the State; if it were, there would be no place for a law above it, which it is required to obey.

Any deeper discussion of theories of the State would involve questions of nationhood, national identity, the focus of the citizens’ loyalties, and matters of that kind. This is not the occasion for any extended reflection upon such matters. I merely say that the elaboration of a sound theory of rights, through the need to elaborate a theory of the State, necessarily confronts us, in the end, with these challenges.

Our social tranquillity will be fragile, and increasingly so, unless and until we can accept and do so comfortably that duties to the State must march with rights against the State. But it is not merely a matter of social tranquillity.

We have the good fortune to live in a State where public power is conducted subject to the rule of law. It is a function of the rule of law that our governors hold their power on trust for the people. The principle of the common law is that for the citizen, everything that is not forbidden is allowed; but for the public official, from the highest to the lowest, everything that is not allowed is forbidden. By this principle the freedoms of our people enjoy substantial guarantees. By the same principle the law subjects every act of public power to a strict requirement that it be justified in law. If the beneficiaries of this enlightened state of affairs look to the State only for their rights, or – worse – only for the handouts of Juvenal’s bread and circuses, at length as I have suggested our governors may struggle to keep the whole of their democratic conscience. At length we may get increasingly repressive laws, as the legislature perceives, with whatever reluctance, that the citizen is unrestrained: he is only prepared to look after himself and his own, and not his fellow citizens. There are ominous signs around us. Very low election turnouts. Cavalier statements of an intention to break a law, a democratically made law, because it is costly or difficult to fulfil. Reactions to difficult social problems – reactions which have more to do with “Not in my Back Yard” than with the duties of good citizenship.

These are random reflections: now you may get down to the real business of the Conference.

RIGHTS FOR COHABITEES – WHO SHOULD QUALIFY?

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The recent Irish census figures reflect a shift, apparent in many other jurisdictions, away from marriage as the basis of the family unit. In 2002 cohabiting couples made up 8.4% of all family units compared to 3.9% in 1996.¹ Many jurisdictions have already introduced legislation improving the rights of cohabittees so that their legal position is equated with or at least brought closer to that of a married couple. Other jurisdictions, including England and Ireland, are in the process of examining how this area of the law could be reformed.² The purpose of this paper is not to discuss directly the rights and obligations which such legislation should confer on cohabittees but to illustrate the difficulties faced by the Irish legislature in attempting to identify a “qualifying cohabitee” for the purposes of such a scheme.

The term “cohabittees” is frequently used to describe same-sex and opposite-sex couples who are not married to each other and are living together in a long-term sexual relationship. However, the term can also be used more broadly to include persons who are living together in more temporary sexual relationships as well as those who are living together in relationships which do not involve a sexual element such as interdependent friends or siblings or carer-type arrangements. The tendency, when using this term in a legal context, is not to include those involved in commercial agreements such as those who are living together as lodgers, boarders or in the context of an employment relationship. In jurisdictions where the legal position of cohabittees is recognised, the parties do not access the rights available by simply living together. They are required to satisfy other criteria before they qualify as “cohabittees” for the purposes of the scheme. The approaches taken by these jurisdictions in identifying which cohabittees qualify can be broadly divided into the registration approach, the presumptive approach, the contractual approach and the proprietary approach.

The registration approach can be described as a formal, opt-in scheme of legal regulation. Cohabittees can only avail of the protection conferred by the scheme if they have registered their relationship. Under the presumptive approach, it is not necessary to register the relationship to be covered by the scheme. Cohabittees have access to the rights conferred if they can prove that they have been living together in circumstances resembling marriage for the requisite period of time. The minimum required period of cohabitation varies between jurisdictions. It is worth noting that under both the

¹ In 2002, 77,600 family units consisted of cohabiting couples compared to 31,300 in 1996 – see Census 2002, *Principal Demographic Results* at 20, 21.

² The Law Commission of England and Wales has published *Sharing Homes: A Discussion Paper* (July 2002) Law Com No 278 and the Government of England and Wales has recently published a consultation paper, *Civil Partnership – A Framework for the Legal Recognition of Same-Sex Couples* (June 2003). It is anticipated that the Irish Law Reform Commission will publish a consultation paper on the *Rights and Duties of Cohabittees* in the near future.

registration and the presumptive approaches, an applicant, who has proved that he or she qualifies as a cohabitee, is not guaranteed relief. The court is generally bound to take into account a number of discretionary factors in deciding what order, if any, to make.³ The registration and the presumptive approaches frequently incorporate aspects of the contractual approach. The contractual approach permits the court to enforce cohabitation and termination agreements whereby cohabitees attempt to agree privately on their respective rights and obligations in the event of the breakdown of the relationship. Under the proprietary approach the court recognises that certain contributions to the acquisition of property made by the non-legal owner are capable of generating a beneficial interest in that property.⁴

Defining a “qualifying cohabitee” is a task which must be faced by any legislature considering this area of law reform.⁵ Deech notes that “it may be that one can never satisfactorily and exhaustively define cohabitation.”⁶ There will always be a demand for justice for those unions which do not fall within the definition of legally recognised cohabitation. She gives the example of a scheme which confers rights on couples who satisfy the requirement of having lived together for one year and points out that the rejected partner of the nine-month union would feel harshly treated.⁷ Although it would be difficult to devise a set of qualifying criteria which would be sufficiently inclusive to keep everybody happy, it is submitted that, with some effort, it is possible to devise a scheme which targets those who are most in need of recognition and protection. It is also important to bear in mind that the qualifying criteria need not remain static. Other jurisdictions

³ For example, in New South Wales when the court is considering an application for a property adjustment order by a qualifying cohabitee, s 20 of the Property (Relationships) Act 1984 directs the court to have regard to “(a) the financial and non financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and (b) the contributions, including the contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family”

⁴ It is interesting to note that under the proprietary approach there is currently no requirement that the parties live together before a beneficial interest will be recognised.

⁵ The Law Commission of England and Wales in its discussion paper on *Sharing Homes*, *supra* n 2, identified a need for the law to recognise and to respond to the increasing diversity of living arrangements and recommended that further consideration should be given to the registration and the presumptive approaches. These approaches were described as focusing on the nature of the parties’ relationship and thus broadly based on “status.” While the Law Commission pointed out that any status would have to be clearly and readily identifiable, it went on to state that the definition of such status involved broad questions of social policy which fell outside the present project and which were in any event more appropriate for political debate and decision, rather than for a law reform body – see Part V.

⁶ Deech, “The Case against Legal Recognition of Cohabitation” (1980) 29 *ICLQ* 480 at 482.

⁷ *Ibid.*

have demonstrated that the scope of the scheme can easily be expanded to include other beneficiaries as societal attitudes develop and change.⁸

The task of identifying who the most important targets of the scheme should be is complicated by the fact that cohabitation legislation is expected to satisfy a wide range of very different agendas: the eradication of discrimination on the basis of sexual orientation; the protection of vulnerable family members; the recognition of contributions towards the welfare of the family such as housework or caring for older relatives or young children; the recognition of interdependent platonic relationships, the encouragement of long-term exclusive relationships and the recognition of the right of cohabittees to privately order their own affairs. It has been argued that the scheme should not result in a situation where obligations are foisted on couples who may have deliberately chosen not to get married to avoid such a result and also that the qualifying criteria should be easily proved. No single approach can achieve all of these aims. This paper discusses the extent to which each approach attains these aims and attempts to devise a set of criteria which allows the most deserving cohabittees to qualify for protection.

The Registration Approach

The jurisdictions which adopt the registered partnership approach to the issue of cohabittees include Denmark, Norway, Sweden, Finland, Iceland, the Netherlands, Germany, certain municipalities in the USA and Canada and the Spanish regions of Catalonia and Aragon. England and Wales, with the exception of a recent prolonged flirt with the feasibility of an amended proprietary approach,⁹ currently seem to be fixated on a registration approach. Jane Griffiths' Relationships (Civil Registration) Bill¹⁰ and Lord Lester's Civil Registration Bill¹¹ were recently debated in Parliament and in June 2003 the Government published a consultation paper proposing an alternative civil partnership scheme.¹²

The advantages of a registration approach are obvious. Firstly, as a formal opt-in scheme, it neatly avoids a situation where obligations are foisted on couples who decided not to get married in order to avoid those obligations. Secondly, the qualifying criterion is easy to prove – the partnership is either registered or it is not. The registration approach avoids the difficulties of proof inherent in the presumptive approach. The main reason however, why the registration approach appears to be so popular is that it permits same-sex couples to formalise their relationships and receive the benefits of marriage. It would seem, therefore, to achieve the twin goals of eradicating discrimination against same-sex couples and encouraging long-term

⁸ Although the original New South Wales *De Facto Relationships Act* 1984 only permitted claims by opposite-sex couples, in 1999 the legislation was expanded so that under the renamed *Property (Relationships) Act* 1999 claims by same-sex couples and those living together where one provides the other with domestic support or personal care are also permitted.

⁹ The amended proprietary approach was investigated and rejected as unworkable in the Law Commission's discussion paper on *Sharing Homes*, *supra* n 2.

¹⁰ Bill 36, 2001–02.

¹¹ HL Bill 41, 2001–02.

¹² *Supra* n 2.

committed relationships amongst the same-sex population. Registration offers governments a substitute for gay marriage in a climate where there may be a fear that its introduction could “result in a major backlash from the political right and the fundamentalist and evangelical religious lobbies.”¹³ The consultation paper published by the Government for England and Wales refers to a recent survey¹⁴ which found that marriage increases a person’s life satisfaction and happiness by an amount equivalent to an additional annual income of £72,000. It was argued that civil partnership would therefore provide similar social and psychological benefits to same-sex couples equivalent to an increase in collective annual income of £6.1 billion to £62.2 billion depending on the take-up.

Most jurisdictions which operate a registration approach and the most recent proposals by the Government for England and Wales only permit same-sex couples to register their relationships.¹⁵ The reason for the restriction is that opposite-sex couples already have the right to formalise their relationship through marriage. Although in its proposals, the Government for England and Wales acknowledged that some opposite-sex unmarried couples could be in a vulnerable position following the breakdown of the relationship, it was keen to differentiate them from the same-sex couples who want to formalise their relationship and cannot. The government stated that it did not believe that the solution for those vulnerable opposite-sex couples was to offer them another way of entering into an equally formal kind of legal commitment to each other.¹⁶

Under Lord Lester’s Civil Partnerships Bill and Jane Griffith’s Relationships (Civil Registration) Bill registration was to be open to both opposite and same-sex couples. In the Netherlands, registration has proved quite popular amongst opposite-sex couples.¹⁷ Jurisdictions which permit opposite-sex couples to register their partnership may be attempting to cater for those who are ideologically opposed to marriage. Forder notes however that:

¹³ Bowley, “A Too Fragile Social Fabric?” (1995) 145 *NLJ* 1883. The Netherlands would appear to be exceptional in permitting same-sex couples the option of registered partnership and also marriage since 2001. Germany has also introduced a form of gay marriage. The consultation paper on civil partnership published by the Government of England and Wales specifically refers to the fact that it is a matter of public record that the Government has no plans to introduce same-sex marriage – *supra* n 2, at para 1.3.

¹⁴ The Cabinet Office Life Satisfaction Survey available from <www.strategy.gov.uk/2001/futures/attachments/ls/paper.pdf>.

¹⁵ In Denmark, Norway, Finland, Sweden, Iceland and Germany registration is only permissible in the case of same-sex couples while in the Netherlands registration is permissible in the case of both same-sex and opposite-sex couples. Of the municipalities in the USA which have domestic partnership registers, five of them allow only same-sex couples to register while thirty-five of them allow both same-sex and opposite-sex couples to register.

¹⁶ *Supra* n 2, at para 2.8.

¹⁷ Of the 4,237 registrations which took place in the eleven months from January to November 1998, 1,353 (one-third) were between a man and a woman – Scherf, *Registered Partnership in the Netherlands, A Quick Scan*. WODC, The Hague, March 1999.

“the advantages to opposite-sex couples of entering partnership are obscure. The institution of partnership carries mostly the same rights and obligations as marriage. If opposite-sex couples are hoping to escape the symbolism of marriage it is difficult to appreciate that such is achieved by entering into an institutions which seeks to copy it.”¹⁸

Alternatively, making registration available to opposite-sex couples may be designed to avoid the ghetto effect of a law which only applies to same-sex couples. It could be argued that allowing opposite-sex couples to avail of the same status would be of symbolic value to same-sex couples.

It is debatable whether the registration approach achieves its primary goal of eradicating discrimination against same-sex couples who wish to have their relationships recognised by the State. In Australia, the Gay and Lesbian Rights Lobby have repeatedly expressed concerns about registration arguing that while it purports to give legitimacy to relationships, it would in fact establish a hierarchy of legally recognised relationships and be seen as a second best option, i.e. it would be viewed less favourably than marriage.¹⁹

The most convincing indicator that the registration approach fails to meet its main objective is the fact that very few couples tend to register their partnerships. The consultation paper published by the Government of England and Wales puts forward two alternative take-up scenarios. The high take-up scenario was optimistically based on the marriage rate projections produced by the Government Actuary’s Department and assumes that by 2050 the civil partnership rate among the same-sex population would be the same as the marriage rate among the opposite-sex population, i.e. 33%. The low take-up rate was based more realistically on the average rate of take-up for such schemes in Denmark, Sweden, Norway and the Netherlands. This evidence makes it reasonable to assume that the rate of civil partnership registration in the same-sex population is more likely to be 10% of the marriage rate i.e. about 3.3%.²⁰ The most likely reason for the low take-up is the reticence of same-sex couples to make a public affirmation of their sexual orientation. Inglis notes that in most societies:

“gay men and lesbians are exposed to physical assault, verbal abuse and discrimination . . . It would be wrong therefore to make rights (for cohabitants) dependent upon a public declaration about sexuality.”²¹

The Government of England and Wales acknowledged that some same-sex couples may want the fact of their registration to remain private for fear of homophobic attacks but felt that a public register was more appropriate where registration confers rights and responsibilities that flow between the couple and the state and between the couple and third parties such as employers. It pointed out that the implementation of the proposals in the Government’s White Paper on Civil Registration: Vital Change would

¹⁸ Forder, “European Models of Domestic Partnership Laws: The Field of Choice” (2000) 17 *Can J Fam L* 371.

¹⁹ Gay and Lesbian Rights Lobby, *The Bride Wore Pink* (2nd ed, 1994) ch 8.3.

²⁰ *Supra* n 2, Annex A(1).

²¹ Inglis, “We are family (after all) – Inclusive Family Law” (2001) 31 *Fam LJ* 895.

restrict the public's access to certain information, for example, addresses and occupations. If civil partnership registration was delivered by the local registration service, the public record of such events would be subject to the same arrangements.²² It remains to be seen if these safeguards will be sufficient to encourage a higher take-up amongst the same-sex community.

The main disadvantage with the registration approach stems from the fact that only joint applications are generally permissible.²³ Therefore, even if you do permit opposite-sex couples to register their relationship, it fails to protect many vulnerable cohabitees. It fails to protect the cohabitee who is involved in a relationship with someone who for financial or ideological reasons does not wish to formalise their relationship by marriage or registration. The need for a change in the law to protect the financially vulnerable partner in a non-marital relationship was highlighted as long ago as the decision in *Burns v Burns*.²⁴ The registration approach also fails to cater for the couple who, through inertia or ignorance of how the law treats their status, fail to register. Although common law marriage has been unknown in English law for nearly 250 years, a widespread faith in this non-existent legal status has led to collective inertia so far as the protection of legal rights is concerned: if people think that the law will look after them, then they will not do anything to look after themselves. It is interesting that the proposals by the Government for England and Wales make no reference to the fact that jurisdictions which restrict registration to same-sex couples generally extend certain other rights to opposite-sex couples or to same-sex couples who fail to register. A safety-net is in place creating tiers of rights. The Swedish Cohabitees Joint Homes Act 1987 and the Norwegian Right to a Common Residence and Household Chattels Act 1992 provide cohabitees who have not registered their relationship with certain rights in relation to the family home on the termination of the relationship by death or otherwise. In Denmark such cohabitees have a right to apply to the court for compensation from the partner who owns the majority of the assets. The Law Society for England and Wales in its recent proposals regarding reform of the law on cohabitation recommended the introduction of a registration system which would be limited to same-sex couples but also recommended that all couples should be permitted access to certain rights available under a presumptive approach.²⁵ The Law Commission of England and Wales in its recent discussion paper acknowledged that the legal recognition of registered partnerships would have a relatively limited impact and recommended consideration of the presumptive approach.²⁶

Although it is not the norm, the registration approach can cater for those cohabitees, usually relatives, who are involved in platonic interdependent or caring relationships. Currently, most registered partnership systems prohibit the registration of a relationship between relatives. The Civil Partnership proposals for England and Wales reflect this trend prohibiting people from

²² *Supra* n 2, paras 4.13 – 4.17.

²³ Panama, Guatemala and Cuba seem to be exceptional in this regard in permitting only one partner to apply for registration of a 'union de hecho.'

²⁴ [1984] Ch 317.

²⁵ Law Society for England and Wales, *Cohabitation – The case for Clear Law* (July 2002).

²⁶ *Supra* n 2, at para 5.45.

registering a partnership if they are related by close blood or half-blood ties, adoption or degrees of affinity. The Catalan Mutual Assistance Act passed on 16 December 1998 allows persons who are involved in a relationship of mutual assistance or involving the care of the elderly to execute a notarial deed which gives them certain entitlements where one party dies or the union terminates. It is submitted that the need for this kind of legislation in Ireland is questionable. The myth of common law marriage does not exist amongst interdependent siblings or friends. They are under no illusions concerning the status of their relationship and do not in general need the protection of the law. While those caring for elderly relatives are perhaps slightly more vulnerable, any inadequacies in the current state of the law could be dealt with through reform of the social welfare system²⁷ and succession law.²⁸

All registered partnership schemes seem preoccupied with the encouragement of exclusive relationships. A person who is already in a registered partnership or who is married cannot register their new relationship until the previous relationship has been dissolved. The Government of England and Wales in its consultation paper explained the restriction as being designed to protect people from unwarily entering into relationships that are not exclusive and to prevent registered partners from finding themselves subject to various sets of competing legal obligations.²⁹ It would be difficult to justify the existence of bigamy laws and at the same time to tolerate contemporaneous registered partnerships and so it seems that this approach can only comfortably cater for cohabitees who are unmarried or who are not currently in a registered partnership. The arguments in favour and against protecting the rights of a cohabitee who is in a relationship with a person who has not yet divorced his or her spouse will be dealt with in the context of examining the presumptive approach.³⁰

The Presumptive Approach

Australia, New Zealand and Canada have led the way in relation to the presumptive approach. The main advantage of this approach is that the couple do not have to register their relationship to benefit from the scheme. It therefore protects the most vulnerable cohabitees: those who are in a weaker bargaining position and so may not be in a position to insist on marriage or registration or those who assume they have rights or drift along in a relationship without thinking of the consequences. It may also be more effective in eradicating discrimination against same-sex couples in that it

²⁷ The carer's allowance and the carer's benefit currently available are considered to be completely inadequate. Both could be increased substantially.

²⁸ The Succession Act 1965 could be amended to permit an application for provision to be made out of a deceased person's estate where the applicant provided domestic care or support for the deceased for a certain length of time before his/her death for which they will not be properly compensated if the order is not made.

²⁹ *Supra* n 2, at paras 3.3 – 3.5.

³⁰ This paper does not discuss the less contentious requirements that both parties are of an age at which they can legally marry and that at least one of them is domiciled in the relevant jurisdiction or at least habitually resident there before they can register their relationship. Similar requirements also apply in order to access the rights available under the presumptive approach.

does not require them to make a public affirmation of their sexuality. One disadvantage is its potential for imposing obligations on a couple who may have decided not to marry to avoid such a result. Couples who do not wish to be governed by a presumptive regime are generally permitted to opt out by making their own cohabitation or termination agreements which will be enforced by the courts provided that the agreement was freely entered into and certain other procedural matters are complied with. The danger that couples are not of aware of the need to opt out of the scheme could, it is submitted, be minimised by a widespread publicity campaign.

The main disadvantage is that the qualifying criteria are not as straightforward as under the registration approach. Couples must generally prove that they were living together in a ‘marriage-like’ or a ‘*de facto*’ relationship for the requisite period of time. In New South Wales, section 4(2) of the Property (Relationships) Act 1984 provides a list of factors which the court is required to consider in determining whether two persons are in a *de facto* relationship:

- the duration of the relationship;
- the nature and extent of the common residence;
- whether or not a sexual relationship existed;
- the degree of financial dependence or interdependence and any arrangements for financial support between or by the parties;
- the ownership, use and acquisition of property;
- the care and support of children;
- the performance of household duties;
- the degree of mutual commitment and mutual support; and
- the reputation and public aspects of the relationship.³¹

These factors indicate the intrusive scrutiny that a relationship has to undergo before a claim can proceed. It is worth noting that courts are not in general unused to applying similar criteria to establish whether a couple are cohabiting or living apart in the area of social welfare law or divorce.³²

³¹ Section 4(3) of the Property (Relationships) Act 1984 provides that “no finding in respect of any of the matters mentioned in subsection 2(a)(i) or in respect of any combination of them, is to be regarded as necessary for the existence of a *de facto* relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.”

³² See *Foley v Minister for Social Welfare* [1989] ILRM 169 where Gannon J considered the meaning of the phrase “cohabiting as man and wife” for the purposes of social welfare law. Generally, a determination of cohabitation is made by a social welfare tribunal using guidelines issued by the Department for Social, Community and Family Affairs which include factors such as whether the individuals reside in the same house and household, whether they represent themselves to the outside world as husband and wife, the stability of their relationship and the existence of a sexual relationship between them. The ‘living apart’ caselaw in the area of judicial separation and divorce shows the courts

The second prerequisite is proof of cohabitation for a minimum period of time. The length of time varies from jurisdiction to jurisdiction. The disparity of approach seems very arbitrary. Some would argue that there should not be a minimum cohabitation period.³³ Others go even further and maintain that there should not be any cohabitation requirement. Gay lobbyists argue that many couples do not live together for fear of a homophobic reaction.³⁴ Not requiring a minimum cohabitation period would make the ambit of the legislation extremely broad but it is very important that the scheme makes adequate exceptions for certain applicants who cannot prove they lived with their partners for the requisite period of time. In New South Wales the Property (Relationships) Act 1984 recognises three exceptions to the minimum cohabitation requirement of two years. A couple may apply for relief even if they have not lived together for two years: if they have a child together; if the applicant has made substantial contributions for which she would not be adequately compensated if the order were not made; or if the applicant has the care and control of a child of the respondent. In these circumstances the court must also be satisfied that the failure to make the order would result in serious injustice to the applicant.³⁵

Although the original New South Wales *de facto* relationship legislation³⁶ only permitted claims by opposite-sex *de facto* partners, the legislation was amended in 1999 so that claims can currently be made by persons in a “domestic relationship.” A domestic relationship consists of either a “*de facto* relationship,” which includes both opposite and same-sex cohabiting couples, or a “close personal relationship” which is defined as a relationship between two adults whether or not related by family, who are living together where one provides that other with domestic support or personal care.³⁷ The Standing Committee on Social Issues has since recommended that the definition of a “close personal relationship” should be broadened to encompass a wider range of interdependent personal relationships which do

grappling with the issue of when a married couple cease to live in the same household – see *McA v McA* [2000] 2 ILRM 48.

³³ “Whether or not there was in existence a *de facto* relationship between parties to the application should be a question of fact to be answered by a court in the individual case and it is submitted that the issue should not be determined merely by establishing that the parties cohabited for the statutorily prescribed period”– Sheehan, “‘Til Death do us part?': The rights of Cohabitees – Is statutory reform the answer? Part II – Legislative Intervention – The Australian Approach.” [2001] 1 *IJFL* 12.

³⁴ See, for example, Hayley Katzen’s seminar paper at “A Discussion Forum on Relationships and the Law” (Sydney, 7 July 2000). This argument is also particularly strong in the case of carer type arrangements which may exist where the parties do not live together.

³⁵ The Law Society for England and Wales in its proposals has suggested that remedies should be limited to cohabitees who have cohabited for a continuous period of two years or more or who have cohabited and have a relevant child together. The Society took the view that if the parties are living together and have a child this is proof of commitment to the relationship, regardless of the length of time that the parties have lived together – *supra* n 25, at para 57.

³⁶ The *De Facto* Relationships Act 1984.

³⁷ Section 5(1)(b) of the Property (Relationships) Act 1984.

not involve an element of care.³⁸ It also recommended that those in a close personal relationship would not be required to cohabit. Cohabitation would be just one of a number of factors which would be considered in deciding whether a close personal relationship exists. As has already been mentioned in the context of the registration approach, the need for such an inclusive approach in Ireland, at the moment, is questionable.

Another advantage of the presumptive approach is that, although it is not the norm, it is capable of extending protection to a person who is living with someone who is separated but still married but to his/her former partner. For example, the Property (Relationships) Act 1984 does not restrict access to cohabitees who are unmarried. It could be argued that a scheme which restricts access to cohabitees who are unmarried is necessary to promote exclusive relationships and to prevent situations arising where there may be competing claims between a spouse and a cohabitee. It could be argued that in Ireland such a restriction is especially necessary because of Article 41.1.1 of the Constitution which imposes on our courts the duty to guard with special care the institution of marriage and to protect it against attack. However, limiting the scheme in this way would leave a substantial number of cohabitees in a very vulnerable position. The 2002 Irish census figures reveal that about one-quarter of cohabiting couples without children were unions in which one or both partners were divorced or separated while 41.2% of the cohabiting couples with children were in unions in which one or both partners were divorced or separated. Unfortunately, the statistics do not identify how many of these partners were separated but had not, as yet, obtained a divorce. It seems reasonable to assume, considering the low divorce rate in Ireland, that the majority were not, as yet, divorced.³⁹ There are many reasons why the separated party may not have applied for a divorce. Firstly, couples who wish to obtain a divorce must be able to prove, at the date of the institution of proceedings, that they have been living apart for a period of, or periods amounting to, at least four years during the previous five years.⁴⁰ In other jurisdictions it is much easier for couples to get a divorce which means that restricting access to cohabitation rights to single couples is not quite as harsh. Secondly, there is the cost in terms of time and money involved. Thirdly, there may be a reluctance to disturb the status quo and the feeling that an application will leave the financially stronger party open to being ‘fleeced.’ None of these reasons justify excluding the cohabitee living with a married but separated person from the scheme.

The strongest argument which can be made against allowing access to the scheme to a cohabitee who is living with someone who is still married to a former partner is that an order made in favour of such a cohabitee will reduce

³⁸ “Domestic Relationships: Issues for Reform – Inquiry into *De Facto* Relationships Legislation”, Report No 20, December 1999.

³⁹ Although the number of divorces obtained over the last few years has been steadily increasing, the figures are still relatively low. Up until 31st December 2001 a total of 12,051 divorce orders were granted in Ireland – see the Courts Service, “Family Law Statistics Bulletin on Judicial Separation, Divorce and Nullity” Vol 1, Issue 1, December 2002. See also Census 2002, *Principal Demographic Results* at 18.

⁴⁰ Section 5(1)(a) of the Family Law (Divorce) Act 1996.

the property available for distribution when the spouse applies for a divorce. The New South Wales Property (Relationships) Act 1984 provides the court, when hearing a claim from a cohabitee, with the power to adjourn proceedings to allow the Family Court to decide the spouse's claim.⁴¹ It is submitted that it would be possible to include a cohabitee who is living with someone who is still married within the scope of the scheme and at the same time respect the rights of spouses. The rights of the spouse would, it is submitted, be adequately protected if there was a requirement to make any spouse of the cohabitee a notice party to any proceedings brought by a qualifying cohabitee. If, within a reasonable period of time following receipt of the notice, the spouse applies for a divorce, the court would be required to stay proceedings between the cohabitees until the divorce proceedings had been dealt with. These provisions would ensure that the spouse gets 'the first bite of the cherry.' However, as has already been mentioned, inertia is not the only reason why couples fail to divorce. The couple may not have lived apart for the requisite period of time. Serving notice on a spouse in this situation will not protect her rights as she will not be in a position to apply for a divorce. Such difficulties could be avoided by making the required minimum period of cohabitation for the purposes of accessing the presumptive scheme the same length as the minimum period which a couple are required to live apart before one of them can apply for a divorce. This would mean that a married person could not become involved in a qualifying relationship under the presumptive scheme unless he or his spouse was also in a position to apply for a divorce.

The Contractual Approach

A contractual approach involves the enforcement of cohabitation and termination agreements. Termination agreements are entered into by a couple to organise their financial affairs and other matters if they are thinking of separating or have already separated.⁴² A cohabitation agreement can be defined as an agreement to cohabit and to provide for the parties' rights and the division of assets in the event of a breakdown of the relationship. If a couple merely wish to set out their respective beneficial interests in the family home and their rights and obligations in relation to that property they may simply execute a declaration of trust.⁴³ A cohabitation agreement is more extensive and:

⁴¹ Section 22(1) of the Property (Relationships) Act 1984. Note that s 61(b) of the Wills Probate and Administration Act 1898 (as amended) which sets out the New South Wales intestacy rules contains detailed provisions to deal with competing claims between the spouse and the cohabitee. It provides that if the intestate dies leaving a spouse and a cohabitee, the cohabitee takes the share of the spouse if the intestate and the cohabitee were living together for at least two years prior to the death and during that time the intestate did not live with the spouse. In any other case, the spouse takes the share.

⁴² If the couple were married it would be referred to as a separation agreement.

⁴³ The Law Commission for England and Wales in paras 2.42–2.52 of *Sharing Homes*, *supra* n 2, emphasised how important it was that a couple who intend to live together make express provision for their mutual rights and obligations in the shared property in a declaration of trust. See also the dicta of Ward LJ in *Carlton v Goodman* [2002] EWCA Civ 545 at para 44.

“may deal with other issues which are likely to arise during the parties’ relationship, some financial (such as responsibility for the upkeep of the house), others not (such as the performance of domestic tasks, the sharing of child care, the frequency of holidays, even the regularity of sexual intimacy).”⁴⁴

In many jurisdictions there has been a question mark over the legality of cohabitation agreements. Unless very clear language is used, the court may question whether the parties intended to create legal relations. If the contract is not made by deed, it will be unenforceable unless it is supported by consideration.⁴⁵

The most controversial issue however has been the tendency, especially, in older decisions,⁴⁶ to set aside such agreements as being contrary to public policy. In a recent High Court case, *Ennis v Butterly*,⁴⁷ Kelly J dismissed a claim based on the breach of a cohabitation contract. He held that such contracts were unenforceable because they were contrary to the public policy of the State as expressed in our Constitution and the common law. He was of the view that to enforce a contract of this nature would be to give it a similar status in law to that enjoyed by a marriage contract. This would be to disregard Article 41.1.1 of the Constitution where the State pledges to “guard with special care the institution of marriage on which the family is founded, and protect it from attack.” Mee disagrees with Kelly J’s approach and notes the constitutional and legislative protections which are triggered by entering into a marriage contract but which are not available to those who enter into a cohabitation contract.⁴⁸ Kelly J attempts to back up his constitutional argument by referring to the fact that there has not as yet been an attempt by the legislature to substantially enhance the legal position of cohabitees. He states that “this absence of intervention on the part of the legislature suggests to me that it accepts that it would be contrary to public policy, as enunciated by the Constitution, to confer legal rights akin to those who are married.” However, certain rights for cohabitees have been introduced by that legislature⁴⁹ which would seem to considerably weaken this line of argument. Also, Kelly J fails to consider that the legislature may not have gone further in conferring rights on cohabitees, not because it accepted that it was unconstitutional to do so, but because up until recently the extent of cohabitation in this country seemed to lag behind the trend elsewhere. The demand for more rights for cohabitees may not have been sufficiently strong. In any event, other caselaw would seem to indicate that the constitutional

⁴⁴ Bridge, “Private Ordering: Sharing Homes and the Role of Contractual Regulation” delivered at the Annual Seminar of the Centre for the Study of Family Law and Social Policy, University of Staffordshire, 1st February 2003.

⁴⁵ See Pawlowski, “Cohabitation Contracts – Are They Legal?” (1996) 146 *NLJ* 1125 for a discussion of the problems with enforcing cohabitation agreements.

⁴⁶ See for example *Walker v Perkins* (1764) 1 Wm Bl 517 and *Beaumont v Reeve* (1846) 8 QB 483.

⁴⁷ [1996] 2 IR 248.

⁴⁸ Mee, “Contract Law – Public Policy for the New Millennium” (1997) 19 *DULJ* 149 at 156.

⁴⁹ Section 3 and s 4 of the Domestic Violence Act 1996 permit cohabiting couples to obtain barring or safety orders and s 151 of the Finance Act 2000 exempts cohabitees from capital acquisitions tax in respect of an inheritance or gift of property which comprises their principal private residence.

protection afforded to the institution of marriage does not prevent certain rights and protections being introduced for cohabitants, it just prevents such couples being treated more favourably than a married couple. In *Murphy v Attorney General*⁵⁰ the Supreme Court held that a married couple, each of whom was working could not be taxed more severely in terms of tax bands and tax allowances, than two single persons living together. In *Hyland v Minister for Social Welfare*⁵¹ the Supreme Court held that a married couple could not be paid less social welfare benefit or assistance than a cohabiting couple. Therefore, legislation which increases the rights of cohabitants to bring them closer to the position of a married couple is permissible as it does not result in the married couple being treated less favourably. Also, it should be noted that although currently non-marital families have no constitutional protection⁵² it is unlikely that this will remain the position for very long.⁵³

Kelly J also bases his decision on the fact that the cohabitation agreements are contrary to public policy at common law. His discussion of the case law on this point is completely inadequate. He mentions *Beaumont v Reeve*⁵⁴ although he is at pains to stress that this decision can only be regarded as representing public policy in England in 1846. He notes that cohabitation agreements would be enforceable in California due to the decision in *Marvin v Marvin* where the Californian Supreme Court held that “express contracts between non-marital partners should be enforced except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.”⁵⁵ However, his discussion of the Marvin decision is purely for the purposes of pointing out a divergence of approach between the State courts in relation to the enforceability of implied cohabitation contracts. The most startling aspect of the judgment of Kelly J is his failure to make any mention of Irish society’s increased acceptance of cohabitants. A line of authority based on public policy must, given the very nature of public policy, be susceptible to development and change. As Bowen LJ noted in *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt*⁵⁶ “rules which rest upon the foundations of public policy, not being rules which belong to the fixed or

⁵⁰ [1982] IR 241.

⁵¹ [1989] IR 624.

⁵² See *State (Nicolaou) v An Bord Uchtala* [1996] IR 567, *G v An Bord Uchtala* [1980] IR 32, *JK v VW* [1990] 2 IR 437 and *WO’R v EH & An Bord Uchtala*, Supreme Court, unrep, July 1996.

⁵³ See the calls for a constitutional amendment to guarantee protection to the family not based on marriage in the *Report of the Constitution Review Group* (Dublin Stationary Office, May 1996) p 331. Also, the adoption of the European Convention on Human Rights by Ireland (operative since 31st December 2003) will have implications in this area because of the decision of the Court of Human Rights in *Keegan v Ireland* (1994) 18 EHRR 342 where it was held that the notion of family which is protected under Article 8 of the European Convention on Human Rights is not confined exclusively to marriage-based relationships and may encompass other *de facto* family ties, where the parties are living together outside of marriage.

⁵⁴ *Supra* n 46.

⁵⁵ (1976) 18 Cal (3d) 660 at 665, *per* Tobringer J.

⁵⁶ [1893] 1 Ch 630.

customary law, are capable, on proper occasion, of expansion or modification.”⁵⁷

Bearing in mind all of these considerations it is submitted that *Ennis v Butterly* is not as large an obstacle to the enforcement of cohabitation contracts as it may first appear.

It is interesting to note that as far back as 1988 the Committee of Ministers of the Council of Europe adopted a recommendation that national governments should take steps:

“to ensure that contracts relating to property between persons living together as an unmarried couple, or which regulate matters concerning their property either during their relationship or when their relationship has ceased, should not be considered invalid solely because they have been concluded under these conditions.”⁵⁸

One advantage of a contractual approach to the difficulties faced by cohabitees is that the only pre-requisite to enforcing the rights conferred by the contract is compliance with certain procedural safeguards designed to ensure that the weaker party is not exploited. The parties are not required to prove that they are living in a *de facto* relationship, that they are interdependent or that one is providing the other with domestic support or personal care. This approach is therefore capable of extending a certain amount of protection to those involved in a very broad range of relationships. The New South Wales Law Reform Commission has listed certain other advantages of cohabitation contracts (referred to as “domestic relationship agreements”) and termination agreements. They enable parties to:

- plan their future financial affairs with some degree of certainty;
- avoid the costs, time and emotional trauma of a court imposed decision;
- keep their personal affairs private, rather than airing them publicly in open court proceedings; and
- tailor the agreement to best suit their particular circumstances.⁵⁹

Other points which are frequently made about such agreements are as follows:

“Parties are more likely to be satisfied with agreements they negotiate themselves and are therefore more likely to comply with agreements made voluntarily. Some critics have argued that many of the perceived benefits of legally binding agreements are not realistic. For example, rather than reduce litigation, agreements may create more disputes, as parties argue over the validity of the agreement and the interpretation

⁵⁷ *Ibid*, at 661.

⁵⁸ Recommendation (88) 3, adopted on 7th March 1988.

⁵⁹ Discussion Paper 44 (2002) – Review of the Property (Relationships) Act 1984 (NSW) Law Reform Commission Publications at para 4.20.

of terms. They also point out that people may not have the means to bring a case challenging the validity of the agreement.”⁶⁰

The main criticism that is made of these types of agreements is that there is a large risk that the court will set them aside for duress, undue influence, unconscionability or misrepresentation. Frequently, the parties will not have equal bargaining power. It is submitted that the risk of such agreements being rendered unenforceable on these grounds could be reduced substantially if procedural safeguards were put in place to ensure that both parties fully understand and consent to the agreement. For example, in New South Wales the Property Relationships Act 1984 requires certain conditions to be satisfied in order for a cohabitation agreement or a termination agreement to be binding. Section 47(1) provides that both parties must obtain independent legal advice and the agreement must be accompanied by a certificate from a solicitor which certifies that he advised the party independently of the other as to the effect the agreement would have on his/her rights, whether it was to his/her advantage, whether it was prudent to sign it and whether it seemed fair and reasonable. If these conditions are not satisfied the court may however still have regard to the agreement when making an order if it is satisfied that the agreement was fully understood and freely entered into. This leads us on to another advantage of cohabitation agreements. Even cohabitation agreements which do not satisfy all necessary conditions to make them binding can be a useful tool if there is a dispute, as they can be used as evidence of what the parties intended with respect to their financial affairs. They can also be a useful register of the parties’ assets and liabilities, so long as those assets and liabilities are fully disclosed.⁶¹

Where, in spite of compliance with the safeguards, inequality of bargaining power exists, there may be circumstances justifying the court in setting aside the agreement under the common law. The court may be able to set aside the contract for duress, undue influence, unconscionability and misrepresentation. Also, provisions in relation to custody, access and maintenance of children will not be binding as these matters are generally within the exclusive jurisdiction of the courts. In New South Wales, even if the procedural safeguards have been complied with, the court has a residual power to set aside or vary a cohabitation agreement where it is of the view that the circumstances between the parties have so changed since the agreement was made that to enforce it would lead to serious injustice.⁶²

The Law Society for England and Wales has argued against giving legal force to cohabitation contracts and has pointed out that it would seem illogical to allow cohabitants to make enforceable cohabitation contracts when married couples cannot make enforceable prenuptial contracts. It seems fairer that the two groups should be treated alike.⁶³ If cohabitation

⁶⁰ *Ibid*, at paras 4.36–4.37.

⁶¹ *Ibid*, at paras 4.13–4.14.

⁶² Section 49 of the Property (Relationships) Act 1984.

⁶³ *Supra* n 25, at paras 161–162. It is interesting to note that the Law Society appears to have changed its opinion in this respect as in 1999 the Family Law Committee of the Law Society for England and Wales recommended the introduction of legislation to make cohabitation contracts between unmarried

agreements and termination agreements were enforceable it could be argued that a discrepancy between the treatment of such contracts between cohabitees and their treatment when entered into between spouses would be introduced, with the contractual freedom of cohabitees being afforded more recognition.

Pre-nuptial agreements have traditionally been regarded as unenforceable because they anticipate the future demise of the marriage and so are contrary to the common good and public policy.⁶⁴ With the introduction of divorce in Ireland, it could be argued that since it is now legally permissible to dissolve a marriage, an agreement which envisages its possible dissolution can no longer be regarded as contrary to public policy and so should be enforceable. The difficulty, however, is that divorce is only constitutionally permissible in Ireland in circumstances where proper provision can be made for the spouses and for any children of either or both of them.⁶⁵ Section 14 of the Family Law (Divorce) Act 1996 makes an express reference to the power of the court to grant a property adjustment order providing, *inter alia*, for “the variation for the benefit of either of the spouses and of any dependent member of the family . . . of any ante-nuptial or post-nuptial settlement made on the spouses.” While these provisions do inhibit the individual rights of two parties to contract freely, they were designed with the best interests of the family as a whole at heart and they ensure, in particular, that the vulnerable members of the family are adequately protected on divorce. It is submitted that where a pre-nuptial agreement succeeds in making proper provision for the dependant spouse or family there should be no legal difficulty in making ancillary orders which reflect its provisions. Although “the terms of any pre-nuptial agreement” are not specifically mentioned in section 20 of the 1996 Act as one of the discretionary factors which the court must have regard to in deciding what ancillary orders should be made, the list of discretionary factors is not exhaustive and the court is directed to have regard to all the circumstances.

Separation agreements appear to have a slightly more elevated status in Irish family law and it could be argued that this is justified given that such an agreement is designed to take into account the circumstances as they exist at the date of the separation. It will therefore be more recent than a pre-nuptial agreement and, as such, the circumstances of the parties are less likely to have changed significantly and so its terms are more likely to be fair. Separation agreements are enforceable except in so far as their terms relate to the custody and access to a child where the provision is contrary to the child’s welfare or where they seek to prevent a spouse from applying for

couples enforceable – see “Cohabitation: Proposals for Reform of the Law,” Family Law Committee of the Law Society (September 1999) paras 70 *et seq.* The Law Society advocated a number of procedural safeguards, including requirements that full financial disclosure by both parties should have taken place and that each party should have received independent legal advice before signing the agreement.

⁶⁴ See *Re Hope Johnstone; Hope Johnstone v Hope Johnstone* [1904] 1 Ch 470 and *Marlborough v Marlborough* [1901] 1 Ch 165.

⁶⁵ Article 41.3.2 (iii). A very similar condition is also set out in s 5(c) of the Family Law (Divorce) Act 1996. See Crowley, “Pre-Nuptial Agreements – Have They Any Place in Irish Family Law” [2002] 1 *IJFL* 3.

maintenance. If the spouses obtain a divorce, the court in deciding to make ancillary orders is required to have regard to the terms of any separation agreement which was entered into between the spouses and is still in force.⁶⁶ If the court is satisfied that the terms of the agreement ensure proper provision for the spouses and any dependent child of the family⁶⁷ then it may deem it unnecessary to make any ancillary orders or it may make ancillary orders reflecting the terms of the agreement. If the court is satisfied that the terms of the separation agreement do not make such proper provision, it may order new ancillary arrangements. In this situation, the court is required to determine whether it would be in the interests of justice, having regard to the circumstances of the particular case, to order ancillary relief which is at variance with previously agreed arrangements.⁶⁸

It would appear that the New South Wales rules governing the enforceability of termination agreements seem to confer the courts with less scope to set aside or vary the terms of such agreements. The court may only set aside or vary the terms of cohabitation agreements where it is of the view that the circumstances between the parties have so changed since the agreement was made, that to enforce it would lead to serious injustice. Termination agreements will be fully enforced by the courts unless the procedural prerequisites are not complied with. In contrast, the Irish courts when granting a divorce are constitutionally obliged to ensure that proper provision is made for spouses and dependent children, and can therefore ignore a separation agreement unless this would cause injustice.

In summary, a scheme which enforces cohabitation and termination agreements would seem to result in more recognition being given to the contractual freedom of cohabitants. However this would seem to be unavoidable as the Constitution requires the retention of the current judicial powers to intervene where necessary to protect the marital family in the context of a divorce.⁶⁹

It could be argued that the only reform which is necessary is legislative clarification of the fact that cohabitation agreements and termination agreements will be recognised and enforced by the courts. It could be maintained that there is no need to introduce a legislative scheme, registered

⁶⁶ Section 20(3) of the Family Law (Divorce) Act 1996. See *K(M) v P(J)(or se. K (s))* SC unrep 6th November 2001.

⁶⁷ See Article 41.3.2 of the Constitution and s 5(1)(c) of the Family Law (Divorce) Act 1996.

⁶⁸ Section 20(5) of the Family Law (Divorce) Act 1996.

⁶⁹ See also Cretney, "Private Ordering or Not? How far can we go: Private Ordering and Divorce" delivered at the annual seminar at the Centre for the Study of the Family, Law and Policy, Staffordshire University, 1st February 2003. It is perhaps worth noting in this context that the limited recognition afforded to separation agreements in applications for ancillary relief on the grant of a judicial separation/divorce has been identified as a flaw in the legislation which prevents "couples resolving the financial and proprietary consequences of marital breakdown on a 'full and final' or 'clean break' settlement basis and ...preserves an open gate to adversarial court proceedings, irrespective of what a couple agree"- Shatter, *Family Law* (4th ed, 1997) para 7.76.3. It could be argued that this 'flaw' should not be replicated in the context of the provisions applicable to cohabitants.

or presumptive, to protect cohabitees; that a contractual approach will provide sufficient protection. It is clear however, that the enforcement of cohabitation and termination agreements will only protect a minority of couples. People are less likely to enter into a cohabitation agreement, which involves the hammering out of numerous issues, than they are to register their relationship. Cohabitation agreements are often perceived as unromantic. The New South Wales Law Reform Commission found little evidence documenting how often cohabitation agreements are entered into, but what little there was, suggests that few cohabiting couples make cohabitation agreements.⁷⁰

It is submitted that cohabitation and termination agreements have an important role to play in any regime which gives increased protection to cohabitees. The major disadvantage of a system limited to private regulation between the parties themselves is that if no agreement is made or the agreement made is set aside due to undue influence or duress, the parties are left with no legal protection. It is clear therefore that a contractual approach should only play a subsidiary role within a comprehensive scheme of protection. Both registered and presumptive cohabitation regimes usually permit the enforcement of private cohabitation agreements or termination agreements regarding the couples' mutual rights and obligations. These agreements operate in priority to the court's jurisdiction to adjudicate disputes between qualifying cohabitees. Therefore, where the agreement is not binding or no agreement was entered into, the financially weaker cohabitee is still entitled to the protection of the law.

The Proprietary Approach

Australia, Canada and New Zealand relied solely on a proprietary approach to the issue of cohabitees until legislative schemes for the protection of cohabitees were introduced.⁷¹ In England and Ireland the only possible remedies available to a cohabitee on the breakdown of the relationship continue to be proprietary ones: the trust and the doctrine of proprietary estoppel. In Ireland, these are also the only remedies available where a cohabitee dies intestate or without making adequate provision for the surviving cohabitee in his or her will.⁷²

Although the doctrine of proprietary estoppel has the potential to provide a remedy in circumstances where an interest would not be generated under the

⁷⁰ *Supra* n 59, at para 4.13.

⁷¹ Australia, Canada and New Zealand use the concepts of unconscionability, unjust enrichment and reasonable expectations respectively in order to justify the imposition of a constructive trust where there is a dispute over the ownership of a shared home. These more flexible approaches permit the courts to recognise that non-financial contributions such as work in the family home may give rise to an interest under the constructive trust but they also tend to lead to greater uncertainty and unpredictability – see Mee, *The Property Rights of Cohabitees* (1999).

⁷² In England and Wales a cohabitee may qualify as a person who can apply for family provision under s 1(1)(ba)(a) or s 1(1)(ba)(e) of the Inheritance (Provision for Family and Dependents) Act 1975. Under s 2 of the 1975 Act the court is permitted to modify either the will of the deceased or the rules of distribution on intestacy if it is satisfied that reasonable financial provision has not been made for the applicant.

purchase money resulting trust (for example, where the claimant carries out work in the home⁷³ or makes improvements to the property),⁷⁴ it is generally regarded as ill-equipped to provide a solution in the case of cohabittees. This is because of the tendency in an intimate relationship to avoid discussion of separate property rights which means that a claimant will have difficulty proving that there was a representation by the defendant that the claimant would be entitled to some interest in the disputed property. Also, judicial assumptions concerning appropriate gender roles in these relationships may make it difficult for a claimant to prove that the detriment was incurred in reliance upon the relevant representation.⁷⁵

In Ireland disputes between cohabittees over the ownership of the family home are sometimes resolved using the purchase money resulting trust.⁷⁶ The caselaw clearly establishes that unless there is an express or an implied agreement to the contrary, a direct or indirect contribution to the purchase price of a property will generate a beneficial interest in the property on the part of the contributor proportionate to the extent of the contribution.⁷⁷ This approach focuses solely on the fact of a contribution to the purchase price of property. The relationship between the parties or even the fact of cohabitation seem to be completely irrelevant.⁷⁸ The disadvantages associated with the purchase money resulting trust doctrine are well documented. The main criticism is that although unpaid work in the legal owner's business while the mortgage is being repaid is regarded as an indirect contribution to the purchase price capable of generating a beneficial interest,⁷⁹ unpaid work in the family home is not regarded in the same light.⁸⁰

⁷³ In *Greasly v Cooke* [1980] 1 WLR 1306 the claimant had, as a young woman, entered the household as a maid. Over the years, her position changed and she became the lover of one of the sons of the family. For many years she worked in the home and took care of her lover's mentally disabled sister. She was assured on a number of occasions that she would be allowed to remain living in the house for the rest of her life. When her lover died without making provision for her in his will, the Court of Appeal held that she had acted to her detriment by continuing to care for the family and failing to take steps to obtain alternative employment. An estoppel arose in her favour and she was permitted to live rent free in the house for as long as she wished to do so.

⁷⁴ In *Pascoe v Turner* [1979] 2 All ER 945 the man left the home which belonged to him after a relationship lasting eight years, repeatedly telling the woman that the house and its contents belonged to her, although no action was taken to formalise the position. In reliance on his statements and with his knowledge, she spent a considerable amount of her savings on redecoration, improvements and repairs. In subsequent possession proceedings brought by the man it was held that proprietary estoppel was established and the court ordered that the house be transferred into her name.

⁷⁵ See Mee, *supra* n 71, p 102.

⁷⁶ See *McGill v S* [1979] IR 283 and *Power v Conroy* [1980] ILRM 31.

⁷⁷ See *C v C* [1976] IR 254 and *McC v McC* [1986] ILRM 1.

⁷⁸ Gannon J in *McGill v S* [1979] IR 283 referred with approval to the dictum of Lowry J in *McFarlane v McFarlane* [1972] NI 59 at 78, which pointed out that the claims of a wife depended "not on her deserts as a wife but on legal principles which are equally applicable between strangers." Note however that the presumption of advancement may apply in the case of a married couple.

⁷⁹ See *EN v RN* [1992] 2 IR 116 where the wife managed bed-sitter flats into which part of the house had been converted.

In addition, paying for improvements to the property in cash will not generate a beneficial interest⁸¹ but repaying a mortgage obtained for such a purpose will generate a beneficial interest.⁸² An impractical effect of the proportionate interest principle is that it requires a couple to keep track of their contributions. The common intention constructive trust which is the device preferred by the English courts to resolve the same problems has also received its fair share of criticism. To establish an interest under this device the courts must be satisfied that an express or implied common intention existed between the parties that the claimant was to get a share and that the claimant relied on this intention and suffered a detriment as a result.⁸³ The search for a common intention between the parties concerning the beneficial ownership of the home is frequently criticised because in reality couples rarely discuss such issues.⁸⁴ The main disadvantage with the English approach is that there seems to be some confusion over whether the courts will imply a common intention to share the beneficial ownership where the contribution to the purchase price is indirect.⁸⁵ The extent of the beneficial interest depends not on the amount of contributions but on the common intention between the parties as to how the beneficial interest was to be shared and there has also been some criticism of the arbitrary results which this method of quantification can lead to.⁸⁶ A disadvantage common to both the purchase money resulting trust and the common intention constructive trust is that post acquisition contributions will not generate an interest in the property.

The Law Commission of England and Wales in its discussion paper on Sharing Homes⁸⁷ attempted to devise a scheme which would deal with the problems of home-sharers but which would not suffer from the disadvantages associated with the common intention constructive trust.

⁸⁰ See *BL v ML* [1992] 2 IR 77 where the Supreme Court refused to award a beneficial interest to the wife on the basis of her redecoration and refurbishment of the family home.

⁸¹ *W v W* [1981] ILRM 202, *NAD v TD* [1985] 5 ILRM 153.

⁸² See *EN v RN* [1992] 2 IR 116. This anomaly was pointed out by Mee in “Trusts of the Family Home: The Irish Experience” [1993] *Conv* 359 at 363.

⁸³ *Per* Lord Diplock in *Gissing v Gissing* [1971] AC 886.

⁸⁴ See Gardner, “Rethinking Family Property” (1993) 109 *LQR* 263 at 265 and Glover & Todd “The Myth of Common Intention” (1996) 16 *LS* 325.

⁸⁵ According to Lord Bridge in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 a common intention will only be inferred where there is a direct financial contribution to the purchase price of the property by means of an initial capital payment or payment of mortgage instalments. He felt that “it is at least extremely doubtful whether anything less will do” – *ibid*, at 133. However in *Le Foe v Le Foe* [2001] 2 FLR 970 the court awarded the wife a beneficial interest on the basis of her indirect contribution where no direct contributions had been made and no express common intention could be identified.

⁸⁶ The Law Commission, *supra* n 2, at paras 2.83–2.87, has contrasted the result reached in *Midland Bank Plc v Cooke* [1995] 4 All ER 562 with that reached in *Drake v Whipp* [1996] 1 FLR 826. In the former case Mrs Cooke, whose financial contribution to acquisition of the property amounted to 6.47% of the total cost, received a half share in the equity while in the latter case Mrs Drake, who made a financial contribution amounting to 19.4% of the total expenditure on the property, received only a third share in the equity.

⁸⁷ *Supra* n 2.

Property would come within the scope of the scheme where it constituted a shared home and one person had a legal or beneficial interest in it. The scheme would not apply where there was a valid express arrangement dealing with the beneficial ownership of the property. The Commission wished, in so far as possible, to pay no regard to the nature of the relationship between the persons who were sharing the home. It was of the opinion that such an approach was central to a property-based scheme in which contributions were to be objectively assessed. However, minors and people who were sharing a home as part of a commercial arrangement, such as boarders or lodgers, were to be excluded from the scheme. Under the scheme a relevant contribution by a home-sharer would give rise to a presumption of a beneficial interest proportionate to the amount of the contribution and this interest would arise at the date the contribution was made. The relevant contributions would include both direct and indirect financial contributions to the acquisition, retention or improvement of the shared home. The Commission also proposed that post-acquisition contributions and home-making and caring contributions would be capable of generating an interest under the scheme but the court would not have regard to non-financial contributions unless the parties could prove that they shared a house for a minimum of two years. In assessing the economic value of the contributions made by each party the courts would be directed to take a broad brush approach which would neither be arbitrary or over precise. A deduction could be made for any countervailing benefits e.g. free accommodation received by the claimant.

One advantage of the scheme examined by the Law Commission was its broad scope. Only minors and those who were home sharing as part of a commercial relationship would be excluded. It provided a remedy for friends or siblings who had made contributions as part of a platonic interdependent home-sharing arrangement. It also allowed for the recognition of contributions to the welfare of the family such as housework or caring for children or elderly relatives. In spite of its apparent broad scope the Commission acknowledged however that the scheme would still exclude certain people who seemed deserving, for example carers who were not living with the elderly person they were caring for. In order to qualify for protection under the scheme the home must be shared, one party must have a legal and beneficial interest in it and a relevant contribution must have been made. In the case of a claim based on non-financial contributions the additional criterion of proving that the parties had been sharing the home for a minimum period of two years must be satisfied. Not having to prove the existence of a *de facto* relationship between the parties means that the qualifying criteria under the proprietary approach are considerably easier to prove than under the presumptive approach.

Using two worked examples the Commission concluded that it was not possible to devise a statutory scheme for the determination of shares in the shared home which would operate fairly and evenly across all the diverse circumstances which are now to be encountered. The first example concerned a couple in their sixties whose son, aged 22, comes to live with them having dropped out of college. He lives there for ten years, during which he does not make any financial contribution towards the acquisition of the home as the mortgage has already been paid off. However, he does make significant contributions to the household budget and pays for some

improvements to the home and helps his parents with their shopping and around the home. He does not pay anything by way of board and lodging. The second example concerned a man who is the owner of a house over which there is a mortgage. His partner who is expecting his child, comes to live with him and they live together for ten years. She makes no direct financial contribution to the house but during that time she assumes primary responsibility for the day-to-day care of their child and does almost all of the necessary housework. The Commission was of the opinion that the scheme did not allow any flexibility to take account of the different nature of the relationship between the parties in the two different situations. For example, it seemed fair to make a deduction for the countervailing benefit received by the son in living rent free in the house but not for the partner. The conclusion reached was that, in determining which person should be able to claim beneficial entitlement under the scheme, the nature of the relationship between the legal owner and the claimant would be impossible to disregard. Indeed, it is the nature of that relationship which would dictate the answer to the problem.

The second major difficulty with the proprietary approach is that only one remedy is available – a beneficial interest in the shared home. If the home is rented the vulnerable cohabitee is left ‘high and dry.’ The presumptive and registration approaches generally allow a qualifying cohabitee access to a wide range of ancillary relief such as maintenance orders and property adjustment orders on the breakdown of the relationship or succession rights on the death of the other cohabitee. Such remedies will frequently be more appropriate than a beneficial interest in the family home. Also, under the proprietary approach the court may only take into account relevant contributions in assessing the level of the beneficial interest, but under the presumptive and registration approaches, in deciding whether to grant relief or its extent, the court may be permitted to take a number of other relevant factors into account – for example, the present and future income and earning capacity of both cohabitees; the financial needs, obligations and responsibilities which each of the cohabitees has or is likely to have in the future; and the effect which the relationship has had on the claimant’s future earning capacity.

Despite these difficulties it is submitted that an improved proprietary approach has a role to play within the context of a presumptive scheme which also allows qualifying cohabitees access to other rights, such as ancillary orders on the breakdown of the relationship and succession rights on the death of the other cohabitee. The English experience demonstrates that it may be more workable to restrict access to the improved proprietary scheme to a narrower range of homesharers. Contributions which are not recognised under the current law, such as contributions to the welfare of the family or to the improvement of the property, made by spouses or cohabitees who qualify under the presumptive approach would generate a beneficial interest in the family home. Countervailing benefits could be ignored as platonic interdependent or carer type relationships would not be included within the scope of such a scheme. Such a legislative change would only amount to a slight doctrinal extension of the existing law on the purchase money resulting trust. It would eliminate the anomalies in relation to the treatment of improvements to property and the current judicial discriminatory treatment of ‘female type’ contributions. Allowing post

acquisition contributions to generate a beneficial interest would, it is submitted, be stretching the “purchase” money resulting trust too far. Such contributions are not in reality contributions to the acquisition of the home but are contributions to the couple’s joint lives and it would be more appropriate to consider them in the context of obtaining ancillary relief on the breakdown of the relationship.

The advantage of acquiring a beneficial interest under the purchase money resulting trust is that it accrues at the moment of the contribution and not at the moment of a court order. Therefore, it has the potential to bind a third party where the legal owner attempts to sell or mortgage the property without the knowledge or consent of the other cohabitee. It would also be useful in the event of the legal owner being declared bankrupt as the beneficial interest in the property would not form part of the bankrupt’s estate. A qualifying cohabitee who has made a recognised contribution may be able to prevent the registration of a judgment mortgage against any beneficial interest he/she has in the family home and if one has already been registered, the cohabitee may succeed in preventing any steps being taken by the judgment mortgagee to sell it.⁸⁸

A criticism which is frequently made of an approach which recognises a contribution in the form of work in the home is the difficulty in assessing its value. Those involved in the cleaning or child care business do not seem to have any problems in assessing the value of their work so it is unclear why the courts should have excessive difficulties. One inconvenience of the approach is the requirement to keep track of contributions under the proportionate interest principle. Obviously keeping track of contributions is a difficulty but the only way to get around such a requirement would be to impose on spouses or qualifying cohabitees an automatic beneficial joint tenancy or a presumption of a beneficial joint tenancy over the family home. Such an approach has the advantages of certainty and would reduce the need for litigation in this area. Such a change was attempted in Ireland in the Matrimonial Home Bill 1993 which was struck down as unconstitutional in that it infringed the authority of the family to make decisions concerning ownership of property.⁸⁹ Recent Northern Irish proposals in relation to matrimonial property have made such an approach topical again.⁹⁰ It is

⁸⁸ Where a judgment mortgage is being registered against the family home, recognising the new types of contributions will also provide additional protection to spouses as s 3 of the Family Home Protection Act 1976 does not apply in such circumstances. See *Containercare (Irl) Limited v Wycherley* [1982] IR 143.

⁸⁹ *In the matter of Article 26 of the Constitution and in the matter of the Matrimonial Home Bill 1993* [1994] 1 ILRM 241

⁹⁰ Law Reform Advisory Committee for Northern Ireland, *Matrimonial Property* LRAC No 8 (2000). These proposals involve the introduction of legislation which would provide that a presumption of a beneficial joint tenancy would apply in relation to the joint residence of spouses and qualifying cohabitants. In order to qualify, cohabitees would be required to have been living together for at least two years in the previous three years or have a child as a result of the relationship. The presumption of a beneficial joint tenancy over the joint residence would be triggered where the spouses or qualifying cohabitees are living together and one transferred the property to the other, or one transferred it to both of them or where one purchased it or both of them purchased it unless the parties expressly agreed otherwise in writing.

submitted that such an approach is over-inclusive in failing to take into account the manner in which the property was acquired and the contributions made by both spouses to its acquisition. Also, it seems reasonable to suggest that the impetus for such a radical change in the law is simply not in existence in Irish society, especially given the almost paranoid concern of the Irish with property rights in general. It is perhaps worth noting that the Law Commission for England and Wales in their initial reports in 1971, 1973 and 1978 recommended statutory co-ownership for spouses in relation to the matrimonial home⁹¹ but in its 1988 report⁹² the Commission restricted its proposals to personal property as it was of the opinion that extending joint ownership to the family home would be controversial and might attract inappropriate opposition. Hale comments that:

“The Commission’s 1973 proposals for automatic joint ownership of the matrimonial home might have caught the same tide of public opinion which led to the Sex Discrimination Act 1975 and the Domestic Violence and Matrimonial Proceedings Act 1976. But by the time that the Commission’s conveyancers had worked out a solution which satisfied them that tide had been missed . . . Continued examination and reform of the discretionary remedies on marital or family breakdown is more likely to bear fruit than attempts to introduce new rules of substantive law which will affect [the] whole population – especially in the property law area.”⁹³

One of the main reasons for the introduction of legislation which provides for the automatic imposition of joint beneficial ownership over the family home is that it reflects a sharing ideology of marriage. Many would argue that a more individualist ideology currently exists in relation to marriage and cohabitation and this ideology is best reflected by the separate property system.⁹⁴ Relationships are no longer viewed as being for life. Many people are coming to a relationship later in life and may have substantial income to invest in property and would be appalled by the automatic imposition of a beneficial joint tenancy on the acquisition of a family home.

CONCLUSION

When devising the qualifying criteria which cohabitees must satisfy in order to access a scheme conferring improved rights an attempt must be made to target those most in need of protection. Currently society’s sympathies seem to rest primarily with the cohabitee in a long-term same-sex relationship and the cohabitee in a long-term opposite-sex relationship who has sacrificed his /her earning capacity to look after the children of the relationship. Despite

⁹¹ *Family Property Law* (1971) Law Com No 42; *First Report on Family Property: A New Approach* (1973) Law Com No 52; *Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods* (1978) Law Com No 86.

⁹² *Family Law, Matrimonial Property* (1988) Law Com No 175.

⁹³ Hale, “Family Law Reform: Wither or Whither” (1995) *CLP* 217 at 228–229.

⁹⁴ See Glendon, “Is There a Future for Separate Property?” (1974) 8 *Fam LQ* 315 and Oldham, “Is the Concept of Marital Property Outdated?” (1983–1984) 22 *JFL* 263.

the difficulties in proving the existence of a *de facto* relationship, it is submitted that the flexibility of the presumptive approach and its capacity to protect the most vulnerable makes it superior to the registration approach. The low take-up rate amongst the same-sex population in jurisdictions which operate a registration approach indicates that such an approach is not as successful at targeting this group of cohabitants as legislatures anticipated. If the contractual approach and the improved proprietary approach were incorporated into the presumptive approach it would be possible to satisfy many of the agendas, mentioned at the beginning of this paper, which underlie the demand for reform of the law in this area. Where a valid cohabitation or termination agreement complying with certain procedural safeguards is in existence this would govern the rights of the parties. In the absence of such an agreement or where the agreement has been set aside, a cohabitee would access the rights available under the scheme if he/she can prove that he/she lived in a *de facto* (opposite-sex or same sex) relationship for a period or periods amounting to four years during the previous five years. The judiciary would have the power to dispense with the need to satisfy the minimum cohabitation requirement in certain circumstances where the interests of justice required it. In order to acquire a beneficial interest in the family home under the improved proprietary approach, a cohabitee who qualifies under the presumptive approach would also have to prove that he/she made a contribution to its acquisition in the form of work in the home or paying for improvements. Access to the scheme would not be restricted to unmarried cohabitants but where a spouse is involved, the applicant would be required to make the spouse a notice party to the proceedings between the cohabitants. If this gave rise to an application by the spouse for a divorce, the proceedings between the cohabitants would have to be stayed pending the resolution of the divorce proceedings. Those involved in platonic interdependent and carer type relationships would not qualify as cohabitants for the purposes of accessing the rights available under the scheme. However, as the parties to a cohabitation or termination agreement would not be required to prove the existence of a *de facto* relationship or cohabitation for a minimum period in order to enforce the agreement, those involved in these types of relationships would at least be permitted to privately order their affairs.⁹⁵

⁹⁵ As has already been mentioned, it would also be possible to cater for those in carer type arrangements by increasing the carer's allowance/benefit and by amending the Succession Act 1965 – see *supra* n 27 and n 28.

BLACK, WHITE OR GREY? - THE CASE OF THE DOUBTFUL TITLE

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The investigation of title carried out on behalf of a purchaser of real property will frequently discover something in the vendor's title that is less than perfect. Often the difficulty will be overcome, by the vendor producing a missing document, or by a third party agreeing to join in the assurance to the purchaser to make good any interest which the purchaser thinks may be outstanding. If however the difficulty cannot be resolved, and the vendor wants to force the contract through, litigation is likely. That litigation may take the form of an action for specific performance by the vendor, or summary proceedings under the Vendor and Purchaser Act.¹ Either way, if the vendor is to succeed he will have to show his title is good. It might be thought that if the court is not satisfied that the title is good, it must be bad. Simplicity however has never been the most notable feature of property law. Just as things may be neither black nor white, so there is a grey area in the context of the title to land, which conveyancers know as the doubtful title. What is meant is that the vendor may be able to transfer the property he has contracted to sell (in other words, his title may be good), or alternatively he may not (his title may be bad). The matter is in doubt. That doubt may arise for a number of reasons, but whatever the cause may be, there is a question mark over the vendor's ability to convey the property to the purchaser, and the purchaser's ability to enjoy the property in the future without some claim being successfully asserted by a third party against it. Of course, if it is clear that the vendor *cannot* transfer the land he has contracted to, the title is not doubtful, but simply bad.

The courts' approach to cases where the title has been found to be doubtful has been far from consistent. Differences can be seen between what took place in the Courts of Law and in the Court of Chancery, and even in the latter, differences can be found between those judges such as Lord Eldon and Lord Romilly who thought it the business of the court in cases where the title was doubtful that the doubt should be resolved one way or the other, and the title accordingly declared good or bad, and others who give the impression of washing their hands of the problem once it had been shown to exist, leaving it to others to resolve the matter. This note is an account of the oscillations of the pendulum in cases where a doubt as to the vendor's title has been shown to exist.

Suits In Chancery

In cases in which a vendor finds that his purchaser disputes the title offered, the vendor has to choose whether or not he wants to enforce the contract. If he does, the remedy sought will be specific performance. The practice of the Court of Chancery was that where specific performance was sought, the purchaser had the right to have the title referred to a Master to see if a good

¹ Vendor and Purchaser Act 1874, s 9.

title could be made by the vendor. As Lord Eldon explained, if the vendor chose not to rely on his right to damages at law, but to seek the aid of the Court of Chancery, the purchaser was entitled not only to have such a title as the abstract revealed, but in consideration of the relief sought beyond the law, to have an assurance about the nature of his title, such as he could not have elsewhere.² Where the title was reported to be good, and assuming there to be no other factors which might influence the court to refuse relief in the exercise or its discretion, the vendor could reasonably expect an order for specific performance to be made: where the title was found to be bad, relief would naturally be refused. The position is both logical and straightforward. Unfortunately, the matter turned out not to be that simple. Although there were judges who took the view that a title was either good or bad, and there was no room for any intermediate position,³ this view did not prevail.⁴ The courts came to recognise what was described as a doubtful title: one in other words which might be good or might be bad, according perhaps to the construction to be put upon an instrument upon which the title depended, or to what the law applicable to the case was.

Doubtful Titles

What is meant by a doubtful title needs to be defined at the outset. The problem is that just as there are bad titles and bad titles,⁵ so there are doubts and there are doubts. The question for the court is what is the value of the objection?⁶ As Kindersley V-C put it in *Heseltine v Simmons*:⁷ “there was no more difficult question to answer than this: what degree of doubt do you entertain? Is your mind free from doubt? Is it slight? Is it strong, and if so, is it very strong?”

Degrees of doubt

The quality of title required by the Court of Chancery in suits for specific performance was not perfection: blemishes would be accepted. The purchaser was entitled to a marketable title rather than a perfect one.⁸ This only shifts the question however from being what is a doubtful title, to what is a marketable title? The view expressed by Turner V-C in *Pyrke v Waddingham*,⁹ that a marketable title is one which can at all times and in all circumstances be forced on an unwilling purchaser, has been approved both

² *Jenkins v Hiles* (1802) 6 Ves Jr 646.

³ This was certainly the preference of Lord Eldon LC recalling in *Vancouver v Bliss* (1805) 11 Ves Jr 458 a period when it was the office of the court to decide whether the title was good or bad. See also the reference in *Sloper v Fish* (1813) 2 V & B 145 to the argument that there was no such thing as a doubtful title, and the statement in *Elliott v Pott* (1821) 3 Bli 134 that Eyre B was of opinion that there was no such thing as uncertainty in the law.

⁴ For criticism of the view, as being blind to the facts that the courts were fallible, and that any decision reached would not bind third parties, see *In re Edgerley & Hotrum* (1913) 11 DLR 783.

⁵ *Re Scott & Alvarez's Contract* [1895] 2 Ch 603 (Lindley LJ).

⁶ *Grove v Bastard* (1848) 2 Ph 619 (Cottenham LC).
(1858) 6 WR 268.

⁸ *Blosse v Clanmorris* (1821) 3 Bli 62.

⁹ (1852) 10 Hare 1.

in England¹⁰ and Australia¹¹ but does not give much assistance as to what type of title meets that criterion. More assistance perhaps is to be found in *In re Spollon & Long's Contract*¹² in which Luxmoore J considered a marketable title as one which would enable the purchaser to sell the property without the need for special conditions of sale restricting investigation by any later purchaser.¹³

On the basis that a purchaser is entitled to a marketable title rather than a perfect one, two questions arise: what is the threshold which determines whether a title which is less than perfect nonetheless constitutes a title which would be forced on an unwilling purchaser; and secondly, who is to be the judge of that? So far as the first question is concerned, a preliminary point may be made that in the situation under consideration the courts are dealing with an *unwilling* purchaser. In addition to the various classifications of title that have already been mentioned (good, bad, marketable and doubtful) the courts have identified the “good holding title”. By this is meant a title which a *willing* purchaser might reasonably be advised to accept, but which the court will not force on a reluctant purchaser.¹⁴ In *Re Scott & Alvarez's Contract*¹⁵ Lindley LJ described such titles as bad from a conveyancer's point of view but good from a business man's. The point is that the risk might be acceptable to someone wishing to proceed with the contract, but that in setting the standard for determining whether the title should be forced on a purchaser the courts have done so with someone else in mind. On this basis, any risk to which the purchaser is exposed if the title is forced on him is a risk he has not voluntarily accepted. Understandably therefore the court will not force the title on the purchaser if the title is doubtful. Proceeding on that footing, a title will be a doubtful title if the degree of doubt is sufficiently serious to reach a certain standard. Titles will be doubtful if that standard is attained or that threshold of doubt is crossed. This standard or threshold has been described by the courts in different ways. Thus the threshold which must be crossed for a title to be a doubtful title has been expressed in some cases to be one where there is a “real” doubt;¹⁶ in others judges have said there must be a “reasonable” doubt,¹⁷ a “reasonable and fair” doubt,¹⁸ a “grave and reasonable” doubt,¹⁹ or a “considerable, rational”

¹⁰ *Barclays Bank plc v Weeks Legg & Dean* [1998] 3 All ER 213.

¹¹ *Pemberton Australia Pty Ltd v CPS Services Pty Ltd* 1990 NSW LEXIS 10619. See also *Carnana v Duca Community Credit Union Ltd* (1994) 20 OR (3d) 563 (Ontario).

¹² [1936] Ch 713.

¹³ See also *Williams v Scott* [1900] AC 499.

¹⁴ *Barclays Bank plc v Weeks Legg & Dean* [1998] 3 All ER 213 (Millett LJ).

¹⁵ [1895] 2 Ch 603.

¹⁶ *Playford v Hoare* (1829) 3 Y & J 175; *In re Reilly & Brady's Contract* [1910] 1 IR 258.

¹⁷ *Emery v Grocock* (1821) 6 Madd 54; *Prosser v Watts* (1821) 6 Madd 59; *Collard v Sampson* (1853) 4 De G M & G 224; *McCullough v Gregory* (1856) 3 K & J 12; *Heseltine v Simmons* (1858) 6 WR 268; *Hamilton v Buckmaster* (1866) LR 3 Eq 323; *MEPC Ltd v Christian-Edwards* [1979] 3 All ER 752; *Magennis v Fallon* (1828) 2 Moll 561.

¹⁸ *Lord Braybroke v Inskip* (1803) 8 Ves Jr 417; *Falkner v The Equitable Reversionary Society* (1858) 4 Drew 352.

¹⁹ *Earl of Lincoln v Arcedeckne* (1844) 1 Coll 98.

doubt.²⁰ While the lack or uniformity in the terminology used is unfortunate, it is unlikely that there is any difference in what is intended. Whatever expression is used, there must be a sufficient doubt to render the title one which the court feels should not be forced on the purchaser.²¹ More assistance as to what degree of doubt this signifies may perhaps be found in cases which have identified this degree of doubt with the danger of the purchaser being involved in litigation to defend his title should it be forced on him by the court.²² If the court thinks there is a “reasonable decent probability of litigation”,²³ then the title is not one in respect of which the court should order specific performance. Where the risk to the purchaser is less than that, the vendor can expect an order for specific performance to be made. Just as the courts have used different expressions to characterise the degree of doubt required to make a title a doubtful title, so different expressions have been employed to characterise the degree of risk which will yet allow the court to order specific performance: where the risk is “theoretical”,²⁴ “theoretical or fanciful”,²⁵ “fanciful or idle”,²⁶ “purely imaginary”,²⁷ “shadowy or frivolous”,²⁸ “so remote or so shadowy as to be one to which no serious attention need be paid”,²⁹ “non-existent”,

²⁰ *Stayplton v Scott* (1809) 16 Ves Jr 272.

²¹ It has been said that the court must govern itself by a moral certainty, there being no such thing as a mathematical certainty of a good title (*Lydall v Weston* (1739) 2 Atk 19 (Lord Loughborough LC)) though this was explained to mean only that a title cannot be proved by means of reasoning but only with the help of evidence (*Hutchinson v Morritt* (1839) 3 Y & C Ex 547 (Alderson B)). Lord Eldon once memorably remarked that the cases had gone as far almost to suppose the title would not be good unless the court was willing to spend £95,000 of its own money on the title (*Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559). The comment of Alderson B in *Hutchinson v Morritt* that these sort of apothegms get a great deal more weight than they deserve should be noted. In cases where the title depends on a matter of fact, it has been said that if a judge would be under a duty to give a direction in favour of the jury presuming the fact, the title is beyond reasonable doubt, whereas if the judge were bound to leave it to the jury to pronounce on the effect of the evidence, the title is too doubtful to conclude a purchaser: *Emery v Grocock* (1821) 6 Madd 54 (Leach V-C), approved in *MEPC Ltd v Christian-Edwards* [1978] 3 All ER 795, though in the latter case on appeal to the House of Lords ([1979] 3 All ER 752), Lord Russell doubted whether the case could be brought within the principle as so enunciated.

²² See also *Price v Strange* (1820) 6 Madd 159, where it is said the purchaser will not be compelled to take a title which he can only obtain in possession by litigation and judicial decision.

²³ *Cattell v Corral* (1840) 4 Y & C Ex 228; *In re New Land Development Association and Gray* [1892] 2 Ch 138; *In re Marshall & Salt's Contract* [1900] 2 Ch 202; *Darvell v Basildon Development Corpn* (1969) 211 EG 33; *In re Walker & Elgee's Contract* (1918) 53 ILTR 22; *Re Pigott & Kern* (1913) 12 DLR 838; *EPC Industries Ltd v Union Electric Supply Co Ltd* (1985) unrep (Newfoundland SC); *Carnana v Duca Community Credit Union Ltd* (1994) 20 OR (3d) 563.

²⁴ *In re Heaysman & Tweedy's Contract* (1893) 69 LT 89; *In re Summerson* [1900] 1 Ch 112; *Free Focus Ltd v Fels China Ltd* 1989-2 HKC 568.

²⁵ *Coastland Properties Pte Ltd v Ho San Kong Hoey* 1998-3 SLR 147.

²⁶ *Lion Will Investment Ltd v Triple Will Ltd* 1992-2 HKC 430.

²⁷ *Mogridge v Clapp* [1892] 3 Ch 382.

²⁸ *Heseltine v Simmons* (1858) 6 WR 268.

²⁹ *Manning v Turner* [1956] 3 All ER 641; *Barclays Bank plc v Weeks Legg & Dean* [1998] 3 All ER 213.

“ridiculous”, or such that the case “would be laughed out of court”,³⁰ then the title is not doubtful and the vendor can expect specific performance to be ordered.³¹ Perhaps the clearest enunciation of the test applicable is that by Lord Russell in *MEPC Ltd v Christian-Edwards*³² viz, that if the facts and circumstances of the case are so compelling to the mind of the court that the court concludes beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of the incumbrance, the court should declare in favour of the title shown.

The second of the two questions mentioned earlier is who is to judge whether the doubt is sufficient to be a reasonable doubt? Beauty is in the eye of the beholder, and a doubt will be a reasonable doubt according to the diffidence of the conveyancer concerned.³³ Cautious practitioners, with one eye perhaps on their insurance policy, may consider titles doubtful where others may find something which is not perfect, but which they see as giving rise to no real concern as to the safety of the title to the purchaser. On the assumption that the purchaser wants to proceed with the purchase and is not raising doubts simply as a means of getting out of the contract,³⁴ any queries he has will be reasonable ones in his own mind (or that of his solicitor). The simple answer of course, as Lord Russell pointed out, is that the doubt must be a reasonable one in the mind of the judge who is called on to consider the title and the doubt raised by the purchaser. That unfortunately puts the matter little forward, as the authorities appear to show some judges more cautious than others in their approach to questions of this sort.³⁵ In some of the cases judges have taken the view that their own opinion should be taken to be right,³⁶ while in others judges have considered doubts reasonable because other judges could take different views.³⁷ The matter is particularly obvious in cases where an appeal is made against an order either that the contract be specifically performed or a refusal of such an order. If the appellate court

³⁰ *Yook Lu Fong v Lau Po Ching* 2002-2 HKC 657.

³¹ For cases in which the risk was considered sufficient that specific performance was refused, see *Lowes v Lush* (1808) 14 Ves Jr 547; *Franklin v Lord Brownlow* (1808) 14 Ves Jr 500; *In re New Land Development Association & Gray* [1892] 2 Ch 138; *Re Poppleton & Jones' Contract* (1896) 74 LT 582 (all involving the threat of a claim by a trustee in bankruptcy); *Re Hollis' Hospital Trustees & Hague's Contract* [1899] 2 Ch 540; *In re Marshall & Salt's Contract* [1900] 2 Ch 202; *Re Pigott & Kern* (1913) 12 DLR 838 (for subsequent history see *Pigott v Bell* (1913) 5 OWN 314; *McNivin v Pigott* (1914) 19 DLR 846; (1914) 22 DLR 141; (1915) 22 DLR 147); *EPC Industries Ltd v Union Electric Supply Co Ltd* (1985) unrep (Newfoundland SC). For cases falling the other side of the line, see *Cattell v Corral* (1840) 4 Y & C Ex 228; *Mogridge v Clapp* [1892] 3 Ch 382; *Re Heysman & Tweedy's Contract* (1893) 67 LT 89; *Re Calcott & Elvin's Contract* (1898) 67 LT 327; *In re Summerson* [1900] 1 Ch 112; *Hepworth v Pickles* [1900] 1 Ch 108.

³² [1979] 3 All ER 752.

³³ See the comments of Lord Romilly MR in *Mullings v Trinder* (1870) LR 10 Eq 449.

³⁴ See *Lo Tai Yam v Hu Mu Simon* 1997-3 HKC 23.

³⁵ A point recognised in *Lamb v Allison* (1890) 11 NSW 23.

³⁶ See *Bell v Holtby* (1873) LR 15 Eq 178 (Malins V-C).

³⁷ *Eg Rogers v Waterhouse* (1858) 4 Drew 329 (Kindersley V-C); *Cook v Dawson* (1861) 3 De G F & J 127; *Sykes v Sheard* (1863) 12 WR 117 (Turner LJ); *In re Thackwray & Young's Contract* (1888) 40 Ch D 34 (Chitty J).

takes a different view to that of the trial judge, is there not by definition a case where the title is doubtful? In some of the authorities appeal judges have refused to interfere with the order appealed against unless of the view that the judge who made the order was clearly wrong, suggesting that the order should be upheld even though the appeal judge would not have made the same order had he been the trial judge. The problem with this approach however was made clear in *Sheppard v Doolan*³⁸ in which Sugden LC explained that it effectively disregarded the appeal structure which had been established and made the view of the lower court determinative of the issue.

Sources of doubt

Doubts which render titles doubtful ones may arise in different ways.³⁹ The courts have identified a number of sources of doubt in such cases. There may be a doubt because the law itself is in doubt, for example where the validity of a title depends on a point of law and there are conflicting decisions of the courts on the point. Secondly, there may be a doubt because although the law may be certain, its application in the circumstances of the case is not. A possible cause is where the title depends on construction of an instrument and there is more than one construction of the instrument possible. In most of the cases falling into this category the property in question has been devised by will, and the doubt has arisen because of the possibility that the will could be construed so that another party could have become entitled to it. Wills are by not means however the only case where titles have been considered doubtful because the matter turns on construction: the problem may arise in the case of any private instrument or a statutory provision. Finally, the doubt may arise because the title depends on certain facts and those facts are in doubt, as for example where the property had many years earlier been agreed for sale to a third party, and it was doubtful as to what had happened thereafter,⁴⁰ or where the title depends on whether or not someone was affected by notice of some act or instrument.⁴¹ In all these cases where a doubt arises on the title, it is of course possible for the vendor to preclude the purchaser from raising the doubt by appropriately drafted conditions of sale in the contract between the parties.⁴² So long as the vendor fulfils his duty of disclosure and the condition is not misleading, the vendor should be able to obtain specific performance notwithstanding the problem with the title.⁴³

³⁸ (1842) 3 Dr & War 1.

³⁹ See *Howarth v Smith* (1833) 6 Sim 161.

⁴⁰ *MEPC Ltd v Christian-Edwards* [1979] 3 All ER 752.

⁴¹ *Freer v Hesse* (1853) 4 De G M & G 495; *Nottingham Patent Brick & Tile Co v Butler* (1886) 16 QBD 778; *In re Handman & Wilcox's Contract* [1902] 1 Ch 599. Note however the view of Lord Romilly MR in *Mullings v Trinder* (1870) LR 10 Eq 449 that where the facts on which the title depends are in doubt specific performance is refused not because the title is doubtful, but because the vendor has failed in his obligation to prove his title is good.

⁴² See *Best v Hamand* (1879) 12 Ch D 1.

⁴³ *Becker v Partridge* [1966] 2 All ER 266. The extent of the principle can be seen in cases in which the court has ordered specific performance of contracts containing provisions precluding the purchaser from making any requisition as to the title of the vendor: see *Duke v Barnett* (1846) 2 Coll 337; *Hume v Bentley* (1852) 5 De G & Sm 520; *Hume v Pollock* (1866) LR 1 Ch 379.

Possible Courses Of Action

Having recognised the existence of a category of title known as a doubtful title the question was what should be done by the court in cases where the court was asked by the vendor for an order for specific performance of a contract for the sale of land the title of which was doubtful. Several possible courses of action were open to the court in such cases.

Declare title good or bad

The first possible course was to avoid the problem altogether by declaring that the title was not doubtful at all, but either good or bad. Such course could logically take place only on appeal, as in the situation under consideration we are supposing a title considered doubtful by the trial judge.

Resolve the doubt

A second possible course of action was to resolve the doubt and declare the title good or bad. The difference between this and the previous alternative is that here the court recognises that the title is doubtful, but then disposes of the doubt. As we will see, for a considerable period the Court of Chancery refused to adopt this course. A number of reasons for not resolving the doubt, but instead, for simply refusing to make an order for specific performance, have been mentioned in the authorities. First, and perhaps most significantly, any decision made by the court would be binding on the parties to the suit only (the vendor and purchaser) and would not preclude any third party from showing at a later date that the title was in fact bad.⁴⁴ Thus in a case depending on the construction of a will, any determination in favour of the vendor would not guarantee safety for the purchaser should any third party later be able to show that on the true construction of the will the property had not passed to the vendor or his predecessors in title. A second reason for the court refusing to resolve the point was related to this: the court would be deciding a point in the absence of argument from parties potentially interested in the result.⁴⁵ A third reason for refusing to determine the point was that should any litigation ensue after the title had been forced on the purchaser, the purchaser might lack knowledge of facts relevant to determining whether the title was good or bad, and so be unable effectively to defend any action brought by a third party.⁴⁶ The same reasoning applied

⁴⁴ *Cooper v Denne* (1792) 4 Bro CC 80; *Jenkins v Harries* (1819) 6 Sim 168; *Macdonald v Walker* (1851) 14 Beav 556; *Pyrke v Waddingham* (1852) 10 Hare 1; *Osborne to Rowlett* (1880) 13 Ch D 774. In cases where the third party is before the court the problem may be solved: see *Darvell v Basildon Development Corpn* (1969) 211 EG 33; *Valoutin Pty Ltd v Furst* [1998] 339 FCA; *Yook Lu Fong v Lau Po Ching* 2002-2 HKC 657. In *Wilson v Thomas* [1958] 1 All ER 871 the possibility of a representation order is suggested as a means whereby the court could proceed to resolve the doubt in the proceedings between the vendor and the purchaser where some but not all of those who could assert a claim against the property are before the court.

⁴⁵ *Green v Pulsford* (1839) 2 Beav 70; *Glass v Richardson* (1852) 9 Hare 698; *Poole v Coates* (1842) 2 Dr & War 493.

⁴⁶ *Hartley v Smith* (1819) Buck 368; *Emery v Grocock* (1821) 6 Madd 54; *Howarth v Smith* (1833) 6 Sim 161; *Pyrke v Waddingham* (1852) 10 Hare 1; *Nottingham Patent Brick & Tile Co v Butler* (1881) 16 QBD 778; *In re Douglas & Powell's*

to the proceedings between the vendor and the purchaser: the purchaser was unlikely to have the information necessary to counter the vendor's case, where this depended on matters of fact, or the means of acquiring it.⁴⁷ Other reasons expressed in some of the authorities for adopting the practice of refusing to order specific performance where the title was in doubt are that the court was reluctant to force a title on the purchaser which the court could not warrant⁴⁸ and when it had no means of indemnifying the purchaser should it later turn out that the title was bad.⁴⁹ Finally, in *Fildes v Hooker*⁵⁰ Grant MR considered it would be unreasonable to order the purchaser to perform the contract while at the same time not ensuring that the vendor was in a position to perform his side of the bargain by transferring title to the property.

Refuse specific performance

The course which was for a long time adopted by the court in suits for specific performance where the title was doubtful was for the court to refuse to make the order, and thereby to leave the vendor to whatever remedy he could obtain in the Courts of Law should the purchaser refuse to complete the contract.⁵¹ Refusal of an order for specific performance did not avoid the contract, and the vendor could forfeit the deposit or seek damages if the purchaser refused to complete,⁵² unless the purchaser could show some right to terminate the contract. The reasons for adopting this course were those identified above. The principle that a purchaser was not obliged to buy a law suit was articulated from time to time in support of the practice. By definition, the title was doubtful because there was more than one possible way of looking at it. Some might think the title sound, others might not. In refusing to determine the point, the court was stating its acceptance of the position, rather than asserting its own ability to resolve the doubt, certainly at least in the absence of argument from third parties who might be interested. In some cases where the court considered the title was doubtful, and so refused specific performance, judges refused to state their own views as to

Contract [1902] 2 Ch 296; *In re Handman & Wilcox's Contract* [1902] 1 Ch 599. See also *Wilson v Thomas* [1958] 1 All ER 871.

⁴⁷ See *Wilson v Thomas* [1958] 1 All ER 871.

⁴⁸ *Lowes v Lush* (1808) 14 Ves Jr 547.

⁴⁹ *Sheffield v Lord Musgrave* (1795) 2 Ves Jr 526; *Pyrke v Waddingham* (1852) 10 Hare 1.

⁵⁰ (1817) 2 Mer 424.

⁵¹ The authority cited by Williams (*Williams, Law of Vendor and Purchaser* (3rd ed, 1922, p 1036) for the proposition that where specific performance is refused because the title is doubtful the vendor may pursue remedies at law is *Cooper v Denne* (1792) 1 Ves Jr 565. The case was however settled after specific performance was refused, and the dictum upon which reliance seems to be placed does not appear in the other report of the case (4 Bro CC 80). Nonetheless, the principle that where specific performance is refused in the exercise of the court's discretion the plaintiff may proceed at law is established by the authorities cited in the footnote following.

⁵² See *Beere v Fleming* (1862) 13 ICLR 506; *Mortlock v Buller* (1804) 10 Ves Jr 292; *Wedgwood v Adams* (1844) 8 Beav 103; *Webster v Cecil* (1861) 30 Beav 62.

the title,⁵³ while in others judges made it known that they thought the title might be sound.⁵⁴

Await decision elsewhere

Finally, in some cases it was possible for the court to avoid making a determination in the suit for specific performance until the doubt was resolved elsewhere. Thus we find the court sending a case to the Courts of Law for a certificate on facts presented to them.⁵⁵ The value of such certificate however was evidential only, and doubts might remain when the matter came back to the Court of Chancery so that specific performance could still be refused.⁵⁶ In one case the court adjourned the suit to see if any action was brought by a third party which would effectively determine whether the title was good or bad, thereby avoiding any difficulties in making or refusing an order for specific performance.⁵⁷ In another case a suit was adjourned to await the result of rectification proceedings which would have a similar effect.⁵⁸ Finally, in some cases where the doubt arose because of construction of a will, the practice of adjourning the suit to allow a summons to be taken out in which the true construction of the will would be determined between the parties possibly interested under the will was adopted.⁵⁹

The Practice Of The Court

Changes in approach

The course of action adopted by the Court of Chancery in suits for specific performance varied. Originally, the practice of the Court was to declare the title either good or bad, and grant or refuse specific performance accordingly. A party dissatisfied with the decision was left to appeal to the House of Lords, and while a decision of the Lords would not be conclusive, in that third parties would not be bound by it, the decision was considered in

⁵³ See *eg Wilcox v Bellaers* (1823) T & R 491; *Cowgill v Lord Oxmantown* (1839) 3 Y & C Ex 369.

⁵⁴ See *eg Pyrke v Waddingham* (1852) 10 Hare 1; *Rogers v Waterhouse* (1858) 4 Drew 329; *Collier v McBean* (1865) LR 1 Ch 81; *In re Bramwell's Contract* [1969] 1 WLR 1659; *Magenis v Fallon* (1828) 2 Moll 561; *Stewart v Marquis of Conyngham* (1849) 1 Ir Ch R 534. See also *Rose v Calland* (1800) 5 Ves Jr 186, Lord Loughborough LC refusing specific performance because of a decision of the Court of Exchequer, though he thought the decision questionable.

⁵⁵ *Sheffield v Lord Musgrave* (1795) 2 Ves Jr 526; *Trent v Hanning* (1805) 10 Ves Jr 495; *Husker v Sutton* (1826) 2 Sim & St 513; *Sheppard v Doolan* (1842) 3 Dr & War 1.

⁵⁶ *Sheffield v Lord Musgrave* (1795) 2 Ves Jr 526.

⁵⁷ *George v Thomas* (1904) 90 LT 505.

⁵⁸ *Bentley v Craven* (1853) 17 Beav 204.

⁵⁹ *In re Nichols & Von Joel's Contract* [1910] 1 Ch 43; *In re Hogan & Marnell's Contract* [1919] 1 IR 422. See also *Cameron v Hull* (1913) 9 DLR 843. For an earlier instance of the court adopting a similar practice see *Grove v Bastard* (1848) 2 Ph 619 in which the suit was stood over to allow the validity of the will to be established between the vendor and the heir of the testator, the court holding *Green v Pulsford* (1839) 2 Beav 70 as authority for the proposition that the court would do so before requiring the purchaser to accept the title.

practice a sufficient warranty of the title to be relied on.⁶⁰ This practice changed however during the course of the eighteenth century, and for the next hundred years or so it became the practice that the Court would refuse to order specific performance in cases where the title was considered doubtful, and instead would leave the parties to their remedies at law. According to Lord Eldon, the change in practice was heralded by *Shaplend v Smith*,⁶¹ though it seems in fact to have begun before then. In *Sloper v Fish*⁶² Grant MR said the practice could be traced back to Jekyll MR's time, *Marlow v Smith*⁶³ being a case in point. Again, in *Mitchell v Neale*⁶⁴ specific performance was refused by Lord Hardwicke, the Lord Chancellor saying that he was dealing with the case "of a purchaser of an estate, whom no court of justice will compel to accept upon any doubtful title."

The new practice of refusing specific performance in cases where the title was doubtful was criticised by Lord Eldon,⁶⁵ who reluctantly came however to accept it, and the practice continued apparently quietly⁶⁶ until the middle of the nineteenth century when Romilly MR signalled a different approach to cases where title was doubtful. This approach was at notable variance with that of Sir George James Turner, initially Vice-Chancellor and later Lord Justice of the Court of Appeal in Chancery.⁶⁷ The views of the Vice-

⁶⁰ See the explanation by Lord Eldon LC in *Vancouver v Bliss* (1805) 11 Ves Jr 458 and *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559.

⁶¹ (1780) 1 Bro CC 75. The proceedings involved consideration of exceptions to a report by a Master in favour of the title, and the case was initially heard by Eyre B (on behalf of the Lord Chancellor) and Masters Holford and Hett. The cause was stood over and reheard by Lord Thurlow LC in view of the disagreement between Eyre B and Master Holford (who were in favour of the title) on the one hand and Master Hett on the other. Lord Thurlow LC agreed with Master Hett but said that if the title were doubtful, specific performance would not be ordered. In *Elliott v Pott* (1821) 3 Bli 134 it is said that Eyre B was "a good deal shocked" by the decision, being of opinion that there was no such thing as uncertainty in the law. Vesey reports him in *Cooper v Denne* (1792) 1 Ves Jr 565 as saying the decision was liable to criticism, though the principle that the court should not enforce a doubtful title is affirmed.

⁶² (1813) 2 V & B 145.

⁶³ (1723) 2 P Wms 198.

⁶⁴ (1755) 2 Ves 679.

⁶⁵ See *Vancouver v Bliss* (1805) 11 Ves Jr 458; *Stapylton v Scott* (1809) 16 Ves Jr 272; *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559. See also comments in *Colmore v Tyndall* (1827) 2 Y & J 605 and *Magennis v Fallon* (1828) 2 Moll 561.

⁶⁶ In *Biscoe v Perkins* (1813) 1 V & B 485 Lord Eldon ordered specific performance, saying that that he would compel the purchaser to take the title unless the purchaser reversed the Lord Chancellor's opinion (by an appeal to the House of Lords), this being the former practice. See also *Biscoe v Wilks* (1817) 3 Mer 456. The attempt to reintroduce the old practice did not succeed, and the courts continued to refuse to order specific performance where the title was doubtful.

⁶⁷ The Court of Appeal in Chancery was established in 1851 to hear *inter alia* appeals against decisions of the Master of the Rolls. As such, the opportunity arose for the differing approaches of Lord Romilly MR and Turner LJ to come into conflict. As might be expected, the more cautious approach of Turner LJ (sitting with Knight Bruce LJ, another former Vice-Chancellor) was unlikely to mean that decisions in which the Master of the Rolls had refused specific performance would be reversed. Where specific performance had been ordered by

Chancellor, expressed in *Pyrke v Waddingham*⁶⁸ and maintained by him after his appointment as Lord Justice,⁶⁹ were, in summary, that it was the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons might be; and that even though the court was of opinion in favour of the title, it did not follow that specific performance should be granted, bearing in mind that the remedy was discretionary and that there was no means of binding third parties or of indemnifying the purchaser should the court's view turn out not to be correct. Where the doubt concerning the title arose as to a matter of law, the court had to consider whether the point was settled or not, granting specific performance in the one case and refusing it in the other. In construction cases, if the court was in doubt as to the construction, specific performance should be refused, even though the court leaned in favour of the title. In cases where the point depended on extrinsic evidence which neither the purchaser nor the court had the means of investigating, specific performance was to be refused.

The difference in approach of Romilly MR, referred to above, in cases where the title was questionable can be seen in *Wrigley v Sykes*⁷⁰ and *Spencer v Topham*,⁷¹ but is more explicit in *Bull v Hutchens*⁷² in which the Master of the Rolls said that Turner V-C had not intended his observations in *Pyrke v Waddingham* to extend so far as to lay down that whenever there was a reasonable doubt as to the validity of an objection the purchaser should not be compelled to accept the title, and that it was an imputation on the court to say that it was incompetent to declare the law on a point of law fully and adversely argued before it. The Master of the Rolls had, he said, repeatedly expressed his view that it was the duty of the court to decide questions of law which arose in determining the validity of titles, and though this view was later qualified in *Burnell v Firth*,⁷³ it was restated by Lord Romilly (as he had by then become) in *Mullings v Trinder*.⁷⁴ Ironically, the title upon which the doubt arose in the case was the same title as had been the subject of *Pyrke v Waddingham*. In contrast to the decision of Turner V-C, Lord Romilly ordered specific performance, expressing agreement with the principles enunciated by Turner V-C in *Pyrke v Waddingham*, and saying that the only point on which he disagreed with the Vice-Chancellor was in the application of those principles in the case. In that application, the more robust approach of Lord Romilly is apparent. Whereas Turner V-C had refused specific performance on the basis that, although he considered the title good, others might take a different view, Lord Romilly said he did not think any sensible

the Master of the Rolls, the position could have been different. *Rede v Oakes* (1864) 4 De G J & S 505 is an instance where a decree of specific performance made by Lord Romilly MR was reversed by Turner and Knight Bruce LJJ on the ground that the title was doubtful.

⁶⁸ (1852) 10 Hare 1. See also *Glass v Richardson* (1852) 9 Hare 698.

⁶⁹ *Collard v Sampson* (1853) 4 De G M & G 224; *Freer v Hesse* (1853) 4 De G M & G 495; *Cook v Dawson* (1861) 3 De G F & J 127; *Sykes v Sheard* (1863) 12 WR 117; *Collier v McBean* (1865) LR 1 Ch 81.

⁷⁰ (1856) 21 Beav 337.

⁷¹ (1856) 22 Beav 573.

⁷² (1863) 32 Beav 615.

⁷³ (1867) 15 WR 546.

⁷⁴ (1870) LR 10 Eq 449.

man would differ from him in the conclusion to which he had come, and was prepared to act on the basis of his own opinion.

Mullings v Trinder was decided not long after Turner LJ's departure from the Bench, and the views of his successors in the Court of Appeal in Chancery were more in keeping with those of Lord Romilly than of their predecessor. The difference of view between the new Lord Justices and Turner LJ is apparent in *Beioley v Carter*⁷⁵ and *Alexander v Mills*,⁷⁶ in both of which, ironically, the decision of Lord Romilly MR not to order specific performance, on the ground that the title was bad or doubtful, was overturned by the Court of Appeal in Chancery. The former case is notable for the reliance expressed by both Selwyn and Giffard LJJ on the Irish case of *Sheppard v Doolan*⁷⁷ to show that the appellate court should determine the issue notwithstanding the decision of the court whose judgment was appealed, in contrast to the approach of Turner LJ as evidenced in a number of cases.⁷⁸ The approach henceforth adopted in cases where title was doubtful was stated by James LJ in *Alexander v Mills*. While recognising that there could be cases in which a question of law was so doubtful that a court would not on its own view compel a purchaser to accept a title, James LJ said that as a general and almost universal rule, the court was bound as much as between vendor and purchaser as in every other case to determine what the law was and to take that to be the law which it so determined. Echoing the views expressed in *Beioley v Carter*, James LJ went on to say that the court could not escape from the duty to determine what the law was by saying that the decision of the court appealed against showed that any contrary view meant that the law was doubtful and the title should not be forced on a purchaser. Lest there were any doubt that a new era had arrived, in which the court was bound to decide issues of doubt, Malins V-C said in *Bell v Holtby*⁷⁹ that the notion about doubtful titles not being forced on purchasers had disappeared.⁸⁰ It was, he considered, settled that where doubtful cases of construction arose, whether of an Act of Parliament or an instrument such as a will, it was the duty of the court to remove that doubt by deciding it; and instead of feeling a doubt whether other judges at other times might think in the same way as the court, it was the duty of the court to assume that the decision arrived at would be followed, and that the view seen by the court now as correct would so be seen in the future.

⁷⁵ (1869) LR 4 Ch 230.

⁷⁶ (1870) LR 6 Ch 124.

⁷⁷ (1842) 3 Dr & War 1.

⁷⁸ *Cook v Dawson* (1861) 3 De G F & J 127; *Sykes v Sheard* (1863) 12 WR 117; *Collier v McBean* (1865) LR 1 Ch 81.

⁷⁹ (1873) LR 15 Eq 178.

⁸⁰ See also *Forster v Abraham* (1874) LR 17 Eq 351, Jessel MR saying that it was the duty of the court to give an opinion whether the title was good or bad. In *Collier v Walters* (1873) LR 17 Eq 252 the Master of the Rolls considered that decisions such as *Collier v McBean* (1865) LR 1 Ch 81 had been overruled by *Alexander v Mills*. Contrast however *Palmer v Locke* (1881) 18 Ch D 381 in which the question whether *Alexander v Mills* had overruled earlier authorities was left open by Lord Selborne LC, the Lord Chancellor going on to say that he did not understand the doctrine as set out in *Pyrke v Waddingham* had been displaced by later authorities.

No more doubtful titles?

The new practice of resolving doubts can be seen clearly in a number of instances. *In re Carter & Kenderdine's Contract*⁸¹ illustrates the point well because of the differing approaches of the trial judge and the Court of Appeal.⁸² The title was doubtful because of the existence of conflicting authorities on a point of law. At first instance North J dismissed the vendor's summons for a declaration that the title was good, saying that he could not follow both authorities, and in the circumstances he could not force the title on the purchaser. The Court of Appeal took a different view, overruling one of the authorities and declaring the title good, and requiring the purchaser to pay the costs for good measure. A similar situation arose in *In re Thompson and McWilliams Contract*,⁸³ where, again, the court declared the title good despite conflicting authority.⁸⁴

The views expressed in *Alexander v Mills* as to the duty of the court to resolve doubts had been limited to determining points of law. James LJ had considered that the exceptional cases in which the court would not resolve the doubt would relate chiefly to issues of construction of ill-expressed instruments. As we have seen, Malins V-C considered that the duty to resolve doubts extended even to these. Resolution of doubts arising on construction of some instrument on which the title depended did later take place. Not long after *Alexander v Mills* was decided, James LJ forced a title depending on construction of a will on a purchaser, though Wickens V-C, against whose decision the appeal was brought, had refused specific performance.⁸⁵ Similarly, in *In re Reilly & Brady's Contract*⁸⁶ Meredith MR construed a will, saying that by so doing he was fulfilling the duty cast on him by *Alexander v Mills*, and went on to hold the title good. Again, in *Johnson v Clarke*⁸⁷ the court determined the construction of a document which had created either a tenancy for life or a periodic tenancy in a third party, and went on to order specific performance.⁸⁸

Not only have the courts resolved doubts where the doubt arose on construction of some instrument on which the title depended, they have also gone beyond what James LJ envisaged by resolving questions where the doubt arises as to facts, notwithstanding that one reason why the court adopted the practice of refusing to order specific performance was that the purchaser might lack knowledge of the facts on which the title depended.⁸⁹

⁸¹ [1897] 1 Ch 776.

⁸² See also *In re Tanqueray-Williams & Landau's Contract* (1881) 20 Ch D 465.

⁸³ [1896] 1 IR 356.

⁸⁴ See also *Osborne to Rowlett* (1880) 13 Ch D 774.

⁸⁵ *Radford v Willis* (1871) LR 7 Ch 7.

⁸⁶ [1910] 1 IR 258.

⁸⁷ [1928] 1 Ch 847.

⁸⁸ See also *In re Courcier & Harrold's Contract* [1923] 1 Ch 565.

⁸⁹ The proposition that a purchaser could not be required to accept a title depending on a matter of fact had been rejected in *Smith v Death* (1820) 5 Madd 371 by Leach V-C who considered that while a purchaser could not be required to accept a title depending on a matter of fact which was incapable of satisfactory proof, one which was dependent on a fact which was capable of such proof and had been proved could be forced on a purchaser.

Two cases may be noted. In *MEPC Ltd v Christian-Edwards*⁹⁰ the doubt arose because some sixty years before the question of title arose between vendor and purchaser there had been a contract for sale of the land to a third party. It was unclear what had taken place thereafter. Notwithstanding that the doubt arose as to matters of fact which had taken place after the contract had been entered, the House of Lords held that the title was safe for the purchaser to accept, on the grounds that abandonment of the earlier contract could be presumed, and that at such a distance of time specific performance of the contract would not be ordered. A similar resolution of doubt arising because of facts had taken place much earlier in *Kenna v Ritchie*.⁹¹ In that case the vendor's predecessor in title had entered a covenant not to allow an excess of water to pass from his land through a culvert on land of a third party. The purchaser entered a contract to purchase part of the land to which the covenant related, and the covenant would appear as a burden on the certificate of title the purchaser would receive. The court held nonetheless that this did not constitute a valid objection by the purchaser to the title, as because of the physical characteristics of the land the purchaser had agreed to buy, the covenant would not affect him. According to A'Beckett J, the title was one which showed a flaw until that flaw was negated by proof of disputable facts, and that in such a case the court would, in an action between vendor and purchaser, examine the facts and come to a conclusion which would be binding on the purchaser although it would not be binding on third parties who might be interested in disputing the facts or establishing a view opposed to that which the court adopted.

Thus from a position where the Court of Chancery would refuse to order specific performance where a doubt existed, the pendulum had swung by the beginning of the twentieth century to one described by Lord Cozens-Hardy MR in *Smith v Colbourne*.⁹² The courts in modern times, he said, had not listened with favour to the defence that title was too doubtful to be forced on a purchaser and it was the duty of the court, unless in very exceptional circumstances, to decide the rights between vendor and purchaser, even though a third party would not be bound by the decision.

Costs

The award of costs lies in the discretion of the court. Usually the court will make an order for costs in favour of the party who is successful in the action. While the award of costs to the vendor in cases where the vendor is successful in a suit for specific performance is unobjectionable where the title is beyond doubt, it is less obvious that the purchaser should pay the costs of the vendor in a case where the court makes an order in favour of the vendor only after resolving a doubt in the vendor's favour. In this situation there is a doubt at the time the parties entered the contract, and it is not until the court resolves that doubt that the vendor can enforce the contract. The same reasoning applies if the doubt is resolved against the vendor and the title declared bad. Should the unsuccessful party pay the costs of the other party in such circumstances? It seems that notwithstanding the existence of a reasonable doubt on the title, if the court resolves the doubt in favour of the

⁹⁰ [1979] 3 All ER 752.

⁹¹ [1907] VLR 386.

⁹² [1914] 2 Ch 533.

vendor costs will, as a rule, be awarded to the vendor, the reason being to make it plain that the title is sound,⁹³ though it seems harsh that the purchaser is in effect being penalised for having a doubt which was, until resolved, a reasonable one. Most of the cases in which costs have not followed the order have been ones in which the court has disapproved of the conduct of the vendor in not taking steps to clear his title before the proceedings were brought.⁹⁴

Not dead yet

All is not however plain sailing. Modern cases can be found in which the courts have refused to determine the doubt one way or the other, and have adopted the previous practice of refusing specific performance where the title is doubtful, some judges making their preference for that practice known.⁹⁵ In notable contrast to those instances mentioned above in which courts faced with conflicting authority chose one to the exclusion of the other and declared the title good is *In re Thackwray and Young's Contract*,⁹⁶ in which, though the doubt arose as to a point of law, the court considered its own opinion on the point insufficiently strong to justify its forcing the title on the purchaser.

The case identified by James LJ in *Alexander v Mills* as likely to be one in which the court would not resolve a doubt arising on the vendor's title was one of construction of an ill-expressed instrument. In *In Re Nichols and Von Joel's Contract*,⁹⁷ where the instrument whose construction was in doubt was a will, the court considered that where a simple means of resolving matters of construction existed, it would not be right to determine the matter in the proceedings between the vendor and the purchaser, but rather the proper course would be to adjourn the proceedings to allow a construction summons

⁹³ *Hall v May* (1857) 3 K & J 585; *Micholls v Corbett* (1865) 34 Beav 376 (Romilly MR saying that he would give the purchaser as good a title as he possibly could, by making him pay the costs); *Hood v Lord Barrington* (1868) LR 3 Eq 218; *Osborne to Rowlett* (1880) 13 Ch D 774 (though in the circumstances no award was made); *In re Carter & Kenderdine's Contract* [1897] 1 Ch 776. In *Woods v Hyde* (1862) 10 WR 339 there is the somewhat unusual situation of a purchaser against whom a decree was made asking for the decree to be made with costs, Sir Hugh Cairns QC saying that "It would be a great blot on our title if we were not made to pay the costs." For cases in which specific performance was ordered, but without costs, see *Radford v Willis* (1871) LR 7 Ch 7; *Cruikshank v Duffin* (1872) LR 13 Eq 555; *Osborne to Rowlett* (1880) 13 Ch D 774; *Poole v Coates* (1842) 2 Dr & War 493; *Sheppard v Doolan* (1842) 3 Dr & War 1; *Kenna v Ritchie* [1907] VLR 386. See also *In re Hogan & Marnell's Contract* [1919] 1 IR 422 where the purchaser was awarded costs where the case was adjourned to allow a construction summons to determine the doubt arising from a will.

⁹⁴ *In re Nichols & Von Joel's Contract* [1910] 1 Ch 43; *Johnson v Clarke* [1928] 1 Ch 847. See also *Horton v Kurzke* [1971] 2 All ER 577 and *Lion Will Investment Ltd v Triple Will Ltd* 1992-2 HKC 430.

⁹⁵ *Osborne to Rowlett* (1880) 13 Ch D 774 (Jessel MR); *Johnson v Clarke* [1928] 1 Ch 847 (Maugham J). The view of Lord Selborne LC in *Palmer v Locke* (1881) 18 Ch D 381 that the doctrine explained in *Pyrke v Waddingham* had not been displaced by later authorities has already been noted.

⁹⁶ (1888) 40 Ch D 34. See also *Re Hollis Hospital Trustees and Hague's Contract* [1899] 2 Ch 540.

⁹⁷ [1910] 1 Ch 43.

to be taken out.⁹⁸ Should the vendor decline the offer to adopt this course, he could expect that specific performance would be refused.⁹⁹ In contrast to the view of Malins V-C in *Bell v Holtby* that the notion about doubtful titles had disappeared, Cozens-Hardy MR in *In Re Nichols and Von Joel's Contract* thought that the old rule was still in force, and ought arguably to be more readily adopted than it had formerly been. In other cases involving construction, the court has refused specific performance on the ground the court harboured sufficient doubt as to alternative constructions being possible.¹⁰⁰

Cases where the matter in doubt involves some disputable question of fact, or of mixed law and fact,¹⁰¹ have been the most common situations where the court, notwithstanding the duty stated in *Alexander v Mills* to resolve doubts, has refused to order specific performance.¹⁰² In *Nottingham Patent Brick & Tile Co v Butler*¹⁰³ the question was whether the vendor had notice of a restrictive covenant or not when he purchased the property. In *In re Handman & Wilcox's Contract*¹⁰⁴ the question was whether the vendor had notice of circumstances possibly allowing a lease made under the Settled Land Acts to be impeached. In both cases the court held the title could not be forced on the purchaser, Cozens-Hardy LJ saying in the latter that while he would not hesitate to force on a purchaser a title depending on construction of a statute, even though his view differed from that of the court below, different considerations applied when the title depended on proof of a fact such as notice or the absence of it. Other cases in which the court has refused to force the title on the purchaser because of a doubt arising on the facts have involved questions as to whether the refusal of consent of the lessor to an assignment was unreasonable or not,¹⁰⁵ and where the vendor had acquired trust property and the doubt arose from the rule preventing a trustee purchasing trust property.¹⁰⁶

⁹⁸ It was the absence of a similar means of resolving the doubt that forced Maugham J to determine the construction of an instrument in *Johnson v Clarke* [1928] 1 Ch 847.

⁹⁹ The same course was adopted in *Wilson v Thomas* [1958] 1 All ER 871, though Roxburgh J thought that if the matter were one of construction not involving extrinsic evidence and not being very difficult, it might not be necessary to take this course. The difficulty of the purchaser being able to discover sufficient information about the circumstances of the devise in the testator's will persuaded Roxburgh J that the matter could not be dealt with in proceedings between the vendor and the purchaser.

¹⁰⁰ *Power v Barrett* (1887) 19 LR Ir 450. See also *In re Roe & Eddy's Contract* [1933] VLR 427 and *Liu Kiu Leung v Tsang Mi Ling* [2000] 422 HKCU 1.

¹⁰¹ In *Wilson v Thomas* [1958] 1 All ER 871 Roxburgh J was not disposed to treat mixed questions of law and fact as questions of law so as to be ones which it was the duty of the court to resolve, applying the principles in *Alexander v Mills*.

¹⁰² See *In re New Land Development Association & Gray* [1892] 2 Ch 138, followed in *Re Poppleton & Jones' Contract* (1896) 74 LT 582. See also *In re Douglas & Powell's Contract* [1902] 2 Ch 296.

¹⁰³ (1886) 16 QBD 778.

¹⁰⁴ [1902] 1 Ch 599.

¹⁰⁵ *In re Marshall & Salt's Contract* [1900] 2 Ch 202.

¹⁰⁶ *Williams v Scott* [1900] AC 499. Compare however *Spencer v Topham* (1856) 22 Beav 573 and *Darvell v Basildon Development Corpn* (1969) 211 EG 33 in which the court held the title good in similar circumstances.

Actions At Law

Most of the developments concerning doubtful titles took place in the Court of Chancery, due to the especial remedy of specific performance available there. It should not be overlooked however that the Courts of Law were frequently involved in determining whether titles were good or bad. Commonly the action was one where a purchaser sought the return of his deposit, but actions by vendors who sought monetary relief rather than specific performance were of course brought also. The practice of the Courts of Law in cases where the title was doubtful developed to some extent with reference to what was happening in the Court of Chancery. The one significant difference of course was that the Courts of Law did not possess the discretion exercised by the Court of Chancery in granting or refusing relief.¹⁰⁷

As in the Court of Chancery, the practice of the Courts of Law when faced with a title which was doubtful was not consistent. Early cases can be found showing an approach not dissimilar to that adopted for a long time in the Court of Chancery. In *Hartley v Pehall*¹⁰⁸ the vendor was unsuccessful in an action of assumpsit against the purchaser as the doubt (whether the purchaser would be bound by a covenant) meant that the vendor had not shown his title was good. This was sufficient for the court to decide the case, without the court resolving the doubt. In other cases,¹⁰⁹ purchasers were able to recover their deposits on the ground that the court would not require them to take a title which was in doubt, the courts referring in two of these¹¹⁰ to the practice of the Court of Chancery in suits for specific performance. Other authorities however show that in actions at law the court would hold the title either good or bad.¹¹¹ That such was the duty of the Courts of Law was the understanding of Lord Blackburn,¹¹² and is what took place in both *Romilly v James*¹¹³ and *Boyman v Gutch*,¹¹⁴ Gibbs CJ in the former rejecting the argument that the purchaser was entitled to the return of his deposit if a doubt was cast on the title, pointing to the difference between the situation in the Court of Chancery and that in the Courts of Law, and Tindal CJ in the latter saying that the court was not a court of Equity where the vendor was seeking specific performance. Later however the pendulum appears to have swung back, and the practice of the Court of Chancery was seen as relevant by the Courts of Law, not in the exercise of any discretion, for there was none to exercise, but in determining the standard by which a title would be considered good or bad in the Courts of Law. It was the view of Pollock CB in *Jeakes v White*¹¹⁵ that where a question arose as to the meaning of a good

¹⁰⁷ *Oxenden v Skinner* (1798) 4 Gw 1513.

¹⁰⁸ (1792) Peake 178.

¹⁰⁹ *Elliot v Edwards* (1802) 3 Bos & Pul 181; *Barnwell v Harris* (1809) 1 Taunt 430; *Wilde v Fort* (1812) 4 Taunt 334; *Curling v Shuttleworth* (1829) 6 Bing 121. According to Alderson J in *Boyman v Gutch* (1831) 7 Bing 379 *Curling v Shuttleworth* had been doubted by the King's Bench.

¹¹⁰ *Elliot v Edwards*; *Barnwell v Harris*.

¹¹¹ *Romilly v James* (1815) 6 Taunt 263; *Boyman v Gutch* (1831) 7 Bing 379.

¹¹² *Stevens v Austen* (1861) 3 El & El 685.

¹¹³ (1815) 6 Taunt 263.

¹¹⁴ (1831) 7 Bing 379.

¹¹⁵ (1851) 6 Ex 873.

and sufficient title, there had to be such a title as would be adopted by the Court of Chancery as a sufficient ground for compelling specific performance, so that where in an action by a lender for the costs of investigating a borrower's title, the title was found not to be such as would have been enforced by an order for specific performance, the lender was entitled to succeed. In *Simmons v Heseltine*,¹¹⁶ an action was brought by a purchaser for the return of his deposit, following the refusal of the Vice-Chancellor to order specific performance of the contract at the suit of the vendor on the ground that title was doubtful.¹¹⁷ The action was successful, Cockburn CJ saying that he agreed in thinking that where title was dependent on a question of fact which it was impossible to regard as reasonably certain, the title could not be regarded as a good and sufficient title: to hold otherwise would, he said, be requiring the purchaser to elect between losing his deposit and purchasing a law suit.

The continuing need to distinguish between the practice of the Courts of Law and that of the Court of Chancery can be seen in a recent decision of the Federal Court of Australia. In *Valoutin Pty Ltd v Furst*¹¹⁸ a purchaser sought a declaration he had lawfully rescinded the contract and the return of his deposit, on the ground that the title was bad or doubtful. Finkelstein J, finding in favour of the vendor, said that the purchaser's action was an action at law, and the rights of the parties had to be determined by the principles applicable at law rather than the principles relating to doubtful titles in suits for specific performance. Even had the action been one for specific performance, the situation was not such as would have prevented the court from compelling the purchaser to accept it: the third party who might possibly have disputed the purchaser's title was before the court and all relevant facts had been ascertained, so that two of the reasons why specific performance had been refused in cases where the title was doubtful were not relevant.

Registered Titles

In the Brave New World of registration of title, the scope for doubtful titles should be much reduced. The legislation is supposed, after all, to provide a guarantee of title. Section 11 of the Land Registration Act (NI) 1970 provides that the register of title is conclusive evidence of the titles shown, and that the title of the registered owner is not, in the absence of actual fraud, affected by his having notice of any deed, document or matter relating to the title. Where someone is registered as full owner of a freehold estate with an absolute title, he becomes owner of that estate whether or not it was vested in him before then.¹¹⁹ What has been called the "statutory magic" works also in the case of someone registered as full owner of a leasehold estate with an absolute title,¹²⁰ and, to a lesser extent, in cases where someone is registered with one of the other classes of title possible under the Act.¹²¹ No doubts should therefore arise as to whether such registered owners have the estates

¹¹⁶ (1858) 5 CB NS 554.

¹¹⁷ *Heseltine v Simmons* (1858) 6 WR 268.

¹¹⁸ [1989] 339 FCA.

¹¹⁹ Land Registration Act (NI) 1970, s 15(1).

¹²⁰ *Ibid*, s20(1).

¹²¹ See *ibid*, ss 16-18, 21-23.

mentioned. That does not mean however that there is no scope for doubts to arise in a sale of the land concerned. Doubts could arise as to whether the title of the registered owner remains in existence or has been extinguished by the adverse possession of the land by some third party;¹²² or because some third party asserts that the register contains errors and the possibility exists that the register could be rectified.¹²³ Further, if the courts extend the concept of “title” to include matters such as planning and building control,¹²⁴ the opportunities for doubts to arise will remain notwithstanding that the title in the traditional sense is registered and guaranteed. The possibility of the court declaring the title of the vendor doubtful in an action for specific performance by the vendor will therefore remain even when registration of title has been completed, albeit that the number of instances in which this will take place should be fewer.

CONCLUSION

The view that a title is either good or bad, and there should be no such thing as a doubtful title, undoubtedly has an appeal to it, apart from the obvious attraction of simplicity. If a court is asked to determine whether the vendor is entitled to specific performance of a contract, it seems reasonable that it should say either that the title is good, and the vendor is entitled to the order sought, or that it is bad, and he is not. Any intermediate position, in which the vendor is refused specific performance because the title is said to be doubtful, appears on the one hand to be avoiding the issue, and on the other to be creating the uncertainty which it is agreed should be avoided in this area.¹²⁵ Insofar as the doubt arises as to a matter of law, it can rarely, if ever, be justifiable that the court should say, “This is what we think the law is, but others may take a different view, so we will not order specific performance”. That seems to be an unwarrantable abnegation of the responsibility of the court. If one of the parties thinks the decision of the court is wrong, it can be appealed. The parties are however entitled to a decision one way or the other. Refusal of specific performance on the ground that the title is doubtful is of course a decision, but it is not one which determines the real issue between the parties.¹²⁶ Where the doubt arises as to a matter of construction, or as to a matter of fact, the argument in favour of the court declaring the title good or bad is not as strong. The fact that third parties with an interest potentially adverse to the title are not before the court means that the court

¹²² See *ibid*, s 53.

¹²³ *Ibid*, s 69.

¹²⁴ See *Gosling v Anderson* (1971) 20 EG 1117; *Watkin v Wilson* [1985] 1 NZLR 666; *Pemberton Australia Pty Ltd v CPS Services Pty Ltd* 1990 NSW LEXIS 10619; *Davies-Smith v Superoo Pty Ltd* 1994 TAS LEXIS 2164; *Grand River Ltd v Asie Marketing Ltd* [1990] 1 HKLR 297; *Active Keen Industries Ltd v Fok Chi Keong* 1994-2 HKC 67; *Lui Kwok Wai v Chan Yiu Hing* 1995-1 HKC 197; *NG King Wai Terence v Qing Yuan Enterprises Ltd* 1998 2213 HKCU 1; *Chi Kit Company Ltd v Lucky Health International Enterprise Ltd* [2000] 521 HKCU 1.

¹²⁵ *Mullings v Trinder* (1870) LR 10 Eq 449; *Mogridge v Clapp* [1892] 3 Ch 382.

¹²⁶ Note that in some cases the court was called on to determine the real issue between the parties rather than simply whether specific performance should be ordered, the title being doubtful: see *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v Sutton* (1860) 27 Beav 651; *In re Huish's Charity* (1870) LR 10 Eq 5; *Wise v Piper* (1880) 13 Ch D 848.

will be putting the purchaser at risk if it declares the title good, and later those third parties, not bound by the court's decision, can show another court that their interests are valid and take precedence over that of the purchaser. Two points need however to be considered: first, the extent to which it is likely that someone else, such as another court or the Registrar of Titles, would reach a conclusion on the title at variance with that of the court now considering the matter; and secondly, the extent to which a purchaser is entitled to be assured that he is safe from risk before being ordered to take a title from the vendor.

The first of these issues is the easier to deal with. The question whether the Chief Land Registrar would be bound to take the same view of the title as the court was raised in *MEPC Ltd v Christian-Edwards*, the land being in an area of compulsory registration. At first instance¹²⁷ Goulding J dismissed the suggestion that a declaration by the court that a sufficient title had been adduced would be of practically conclusive value to the purchaser as a protection against any future claim by saying "That is a siren song to which I can only properly stop my ears." In the House of Lords, however,¹²⁸ Lord Russell thought it inconceivable that in a case where a vendor has been held by the Court of Appeal or the House of Lords to have shown a good marketable title the Chief Land Registrar should hold that the vendor had shown something less. That must surely be correct, but it does not deal with the possibility that additional information is made available to whoever is later considering the title which is relevant to the title. It is also apparent from the cases in which appeals have been allowed that different judges may hold different views of the same title. Of the decision of the Lords in *MEPC Ltd v Christian-Edwards* (that there was no reasonable doubt that the purchaser would be safe, there being no prospect that the court would order specific performance of a contract made in 1912 with a third party) *Emmet and Farrand* say that practitioners may not find it an entirely satisfactory one on which to rely in similar cases of doubtful incumbrances, and go on to opine that solicitors should continue to raise requisitions as to doubtful incumbrances, but must then advise their clients to rely on their experience and their insurers as to the likelihood of enforcement.¹²⁹ That leads to the second issue: whether specific performance should be ordered if in doing so the purchaser would be put at risk. Where it is possible for the vendor to undertake proceedings with third parties so as to determine the issue causing the doubt on the vendor's title, there is no need for the purchaser to have to rely on safeguards mentioned by *Emmet and Farrand* for protection. A means exists for getting rid of the doubt altogether. Where the doubt arises on construction of a will, there is nothing to prevent the vendor taking out a summons to determine the effect of the testator's disposition. In other situations a different means of resolving the doubt may exist which will have the same the effect of negating any risk from a third party. If so, why should the vendor be able to test the title in proceedings with the purchaser rather than with the third party? In *Horton v Kurzke*¹³⁰ Goff J held that a vendor,

¹²⁷ [1978] 1 All ER 295, 303.

¹²⁸ [1979] 3 All ER 752.

¹²⁹ *Emmet and Farrand on Title* (19th edn) para 7.034.

¹³⁰ [1971] 2 All ER 577. See also *Coastland Properties Pte Ltd v Ho Sang Kong Hoey* 1998-3 SLR 147.

who chose to serve notice to complete on a purchaser who had raised objections to the title because of the existence of a claim by a third party as to grazing rights, was not entitled to do so: it was the vendor's duty to clear her title either by a vendor and purchaser summons or by awaiting the outcome of arbitration proceedings which were pending, and having failed to do so, she could not rely on the provisions of the contract allowing for service of the notice. Where a procedure exists therefore for the vendor to clear his title, there is no room for a doubtful title: that procedure ensures that the title will either be good or bad. The difficulty with such a view is that there will be cases where there is no simple means of disposing of the doubt between the vendor and a third party. In cases not involving construction of a will, or where arbitration with the third party is not a possibility, must the vendor institute proceedings against the third party for a declaration the defendant has no claim? Or would the vendor providing an insurance policy to cover the risk be sufficient?¹³¹

The cases on doubtful titles reveal two unsatisfactory aspects to the law governing the relations between vendor and purchaser. The first is the practice whereby the court in proceedings for specific performance by a vendor may refuse the order sought because the title is in doubt, failing to determine the real issue between the parties, namely, whether the vendor's title is good or bad. That failing seems largely to have been consigned to history, though the possibility of "exceptional cases" is preserved in some of the authorities so that there may yet be vendors who find that they are left to their remedies at law following a refusal by the court to make an order for specific performance on the ground that the title is doubtful. The other unsatisfactory aspect to the law in this area is still with us and concerns the assessment of the risk to the purchaser where some problem with the title has come to light. The cases show that among the judges the same title can be seen either as doubtful or as disclosing no reasonable doubt. There is no objective means by which doubt can be measured. It may be possible to identify doubts so irrational that all bar the purchaser raising them can see that the risk is non-existent or realistically so, and at the other end of the scale to agree that the doubt identified is one which is bound or almost certain to expose the purchaser to litigation with a third party. It may also be possible to say that the line between the two extremes is drawn where the doubt is reasonable. It may even be possible to agree with the view that matters would be improved "if those instructed to act for purchasers could be brought to realise that they would serve their clients better by exercising their common sense rather than by exhibiting their zealotry" and that "the time has come . . . to put an end to the practice of magnifying difficulties which are really non-existent, a practice which frequently operates to keep apart a

¹³¹ See *Manning v Turner* [1956] 3 All ER 641; *Lion Will Investment Ltd v Triple Will Ltd* 1992-2 HKC 430. The practice of the court has usually been that purchasers would not be required to accept an indemnity from the vendor in suits for specific performance: see *Balmanno v Lumley* (1813) 1 V & B 224; *Paton v Brebner* (1819) 1 Bli 42; *Ridgway v Gray* (1849) 1 Mac & G 109; *Re Heaysman & Tweedy's Contract* (1893) 69 LT 89; *In re Weston & Thomas' Contract* [1907] 1 Ch 244. See however also *Halsey v Grant* (1806) 13 Ves Jr 73; *Horniblow v Shirley* (1806) 13 Ves Jr 81; *Milligan v Cooke* (1808) 16 Ves Jr 1.

vendor and purchaser themselves eager to conclude their bargain".¹³² The difficulty is that different minds may take different views of the same doubt, so how is a purchaser, or in reality his solicitor, to know without going to court whether the court will share his concerns or dismiss them as theoretical, fanciful, ridiculous or whatever other epithet the court chooses to signify they fall short of reasonable? One thing, it is suggested, *is* beyond reasonable doubt: faced with the choice between advising a purchaser not to proceed until the court has pronounced the title is safe notwithstanding the doubt, and risking an action for negligence if the purchaser is advised the doubt can be disregarded, many practitioners will prefer the former option.

¹³² *Active Keen Industries Ltd v Fok Chi Keong* 1994-2 HKC 67.

“*O TEMPORA, O MORES*”

The Honourable Mr Justice Gillen

*The Daniel O’Connell Lecture**

Bishop, Lord Chief Justice, Lady Carswell, College President, my Lords, ladies and gentlemen, may I say at the outset that I address you tonight acutely conscious of the privilege that I have been afforded and of the honour that you have bestowed by inviting me to give this the sixth annual Daniel O’Connell lecture. I have a number of reasons for saying that. First because of the distinction of those who have previously given this lecture. Secondly because it is taking place in the setting of this prestigious and historic school whose alumni have contributed so handsomely to the fabric of the community of which we are all part. Thirdly however, it is because even as a schoolboy studying Irish history, O’Connell was an object of fascination for me both as a politician and as a lawyer. One of the joys of being asked to give this lecture has been that it has given me good cause to escape the drolleries of life as a High Court judge and on one or two rainy windswept afternoons to have revisited, in the cloistered surroundings of the Linenhall Library in Belfast, the life of a boyhood hero. Arguably the most influential figure in modern Irish history, a figure of true European stature, his political career has always seemed enigmatic and perplexing.

Here was a man who whilst possessed of very human frailties wore with justice and dignity the trappings of greatness. Of course as a lawyer he was by far the most formidable Irish barrister of the age. His unparalleled success in court made him a legend in his own lifetime. One historian, extolling the virtues of his performance in court said:

“Within the folk tradition O’Connell is never forced to concede victory to his own or to the people’s traditional foes in court – the oppressive magistrate, the treacherous Englishman, the perjuring peeler, the religious bigot or the grasping merchant”.

I have to say that brings back old memories of a typical day in Belfast Petty Sessions.

The more one reads of him however, the more it becomes clear that it is impossible to separate this great man from the circumstances in which he was born and the state of the country in which he passed his life. The year of Daniel O’Connell’s birth, 6th August 1775, coincided with the outbreak of the successful American revolutionary war; three years later came the first Catholic Relief Act; when he was seven Ireland achieved legislative independence; and three weeks before his fourteenth birthday the fall of the Bastille was the signal that the old regimes were not necessarily permanent. Oppressive laws and the circumstances that created them were eventually to lead to the rise of modern democracy in Ireland. Yet many, including the

* Delivered at St Malachy’s College, Belfast on 28 November 2003.

lowest, believed these iniquitous laws and inequalities were essential to preserve peace and order.

In truth, they accorded with the underlying social norms of the era. In Ireland, Parliament, the courts, and the law did little to protect the Irish Catholic peasantry, and they were treated in much the same way that the peasants throughout Europe had been viewed with contempt. Over the centuries little had changed. Peace and good order justified all. Social norms were oblivious to many of society's victims. The peasants painted by Brueghel – stooped, gnarled and snaggle-toothed – looked much the same as those of Van Gogh three hundred years later.

Without doubt the nature of the injustice and the iniquitous laws against which O'Connell railed have passed away. Time has moved on, new realities have developed hand in glove with new laws. But the lessons of O'Connell's times still serve as a cautionary reminder that basic human rights and the rule of law are fragile plants that need constant tending. Shrill voices still need to be raised. A measure of any developed society is how it protects its weakest and most passive members. No less than in O'Connell's Ireland we must pause from time to time to reflect on whether our democracy and the rule of law meets that exacting standard in a time of shifting social morals and emerging human rights. Hence I have borrowed from Cicero the title of my address this evening "*O Tempora, O Mores*".

It is a widely held view that the central protection of the citizen today and the cornerstone of orthodox Westminster constitutional theory, is that Parliament is sovereign. The franchise has now been extended to everyone irrespective of gender, class, creed or religion over the age of eighteen years subject to some exceptions. Notionally therefore in a liberal democracy every voter has the right to make an input to all of our laws and they are the product of careful scrutiny by a widely elected truly representative deliberative body.

“The jurisprudential paradigm of our constitution, confirmed by the political settlement of 1688 and accepted as valid by officials and citizens today, is that Parliament has substantially unlimited legislative powers and no person or body can dispute the legal validity of its enactments. This rule is the foundation of legal reasoning and enables identification of laws without moral reasoning. Within this paradigm it is illegitimate for judges to use principles of political morality to undermine the authority of Parliament.”¹

Like everyone else judges therefore must be obedient to the will of Parliament as expressed in its enactments. Again and again the courts at the highest level have emphasised this. Lord Scarman said in 1980²:

“The judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires – if the result be unjust but inevitable the judge may say so, and invite Parliament to reconsider its provisions. But he must not

¹ “Judicial Supremacy and the Rule of Law” Richard Elkins [2003] 119 *LQR* January.

² *Duport Steels Limited v Sirs* [1980]. 1 All E.R. 529.

deny the statute. Unpalatable statute law may not be disregarded or rejected merely because it is unpalatable . . . For if the people in Parliament come to think that the judicial power is to be confined by nothing other than the judge’s sense of what is right . . . confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application.”

Parliament is thus the place of debate where the social norms that inform the political process have to be discussed and distilled into approved laws. The oath that I took as a judge was to act without fear or favour, affection or ill-will but in doing so I would do “right . . . after the laws and usages of the realm.”

However the fact of the matter is that, until recently, Parliament was free to restrict any of our liberties and deny our rights for any reason it saw fit and indeed often did so provided that it clearly authorised the restriction by law. Our liberties were negative freedoms existing as Hobbes said “in the silence of the law” and guaranteed only unless Parliament decided otherwise. The common law has no tool with which to consider infringements of liberty where clear and unambiguous legislation interferes with it. In such a case we are reliant on the Government to protect our freedoms but the question arises as to whether even liberal democratic governments can always be trusted to do so. Is it realistic to expect Parliament and the politicians therein to have the capacity or the will to protect silent, weak or unpopular minorities and risk the wrath of the tabloids and perhaps the chances of re-election? Children whose voices are not heard, women who remain silent, men who do not conform are but a few of the groups in our society who tend to be overlooked or even brushed aside, in the onward rush of benevolent democracy. A famous US judge once declared:

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest danger to liberty lurks in insidious encroachment by men of zeal, well-meaning but without understanding.”³

The dangers dwell in times where as Yeats described it, “the best lack conviction whilst the worst are full of passionate intensity”. The French philosopher Diderot said “the public does not always know how to desire the truth”.

These criticisms of the limitation of negative liberties were well rehearsed in the literature leading up to the introduction of the Human Rights Act. The Government recognised in the United Kingdom context that the common law alone could not meet the demands of the modern age and in particular the demands of the international obligations in Europe. The UK was on a number of occasions found wanting by the European Court of Human Rights and our own courts had no power to make comparable findings.

³ *Olmstead v United States* 48 S Ct 564.

Accordingly the introduction of the Human Rights Act 1998 brought about significant change. A member of the public can now for the first time go before the courts to secure a remedy based on a human right and judges have the power to declare legislation incompatible with the European Convention on Human Rights. It has therefore heralded a highly significant development in the role of the courts which can now change from enforcing public duties to protecting public rights.

However although the Human Rights Act has considerably strengthened the protection of the individual from State interference with specified rights and interests, the Act does not defend liberty itself.⁴ Whilst human rights techniques are a useful tool in protecting particular rights or freedoms, they are of little use in challenging restrictions and liberty which do not engage those specific protected rights under the Convention or where those whose rights have been taken away have not been heard or are ignored.

Two years ago the serried ranks of parliamentary democracy, the rule of law and the European Convention on Human Rights seemed to have rather little to offer Victoria Climbié, the little eight year old girl who had died at the hands of her parents after years of unspeakable neglect and abuse by them and persistent, scarcely comprehensible, professional failure to heed her plight.

I recently spent an uncomfortable part of a weekend reading the report of the inquiry into her death by Lord Laming from cover to cover. The horror of what happened to this child was captured by counsel in the inquiry Neil Graham QC who related:

“The food would be cold and would be given to her in a piece of plastic while she was tied up in the bath. She would eat it like a dog, pushing her face to the plate. Except of course that a dog is not usually tied up in a plastic bag of excrement. To say that Kouao and Manning treated Victoria like a dog would be wholly unfair; she was treated worse than a dog.”

This child was not hidden away but, along the way to her eventual death, was known to no less than two housing authorities, four social services departments, two child protection teams of the Metropolitan Police Services, a specialist centre managed by the NSPCC and she was admitted to two different hospitals because of suspected deliberate harm. She had 128 injuries. It is a sobering thought to recall that there have apparently been seventy previous public inquiries into severe child abuse in Britain since 1945 and still the same refrains emerge.

Virtually every day in the family court in which I sit, I witness children who, to the objective observer, might seem to be without rights. Born into a life of relentless misery, forgotten in care, robbed of their childhood and exposed to acts of pitiless cruelty where mothers and fathers, themselves often the helpless victims of a similar past, drift in and out of their children's existence as their own lives ebb and flow. Social services, particularly child care services, who are undermanned, under-trained, and under-resourced strive to

⁴ “A Right to Freedom?” John Wadham and Rachel Taylor (2003) *EHRLR*, 473.

perform a Herculean task to save these children whilst society seems oblivious to their plight or to their rights.

When democracies are stirred, governments, under pressure to take decisive and rapid action from the vociferous majority, invariably rapidly respond with measures that may limit even fundamental and cherished freedoms of individuals or groups in order to quell the national hysteria. Following September 11 2001 we have seen in the United Kingdom the introduction of draconian legislation, namely the Anti-Terrorism Act, authorising the detention of terrorist suspects for indefinite periods without charge. The USA detains without charge or prospect of trial well over six hundred people from forty two different nationalities in Guantanamo Bay. Withholding the benefits of the Geneva Convention, their cases will be heard before a military commission at some unspecified time in the future where they will not have free access to lawyers of choice, a right of appeal to an independent civilian court or a full knowledge of the charges against them. I emphasise that I make no judgment on whether these steps are justified under international law. A nation under threat must protect itself. I merely set the scene and invite the narrative. I use it simply to inform the debate as to whether typically parliamentary democracy is often selective about those it chooses to defend and those it chooses to abandon, about those whose rights are promoted and those whose rights are denied.

The key to that choice often lies in the dark recesses of our society. Formal laws no doubt are standard setting norms, regulatory and/or sanctioning in nature. However if there also exists, as I believe there does in our society, an “operative” parallel set of social norms, that are in some instances a more potent force, and which have legitimacy and validity in the eyes of at least a large proportion of the community, usually the strong and the powerful, then that can become the driving force behind a culture that serves to undermine the rule of law, determines selectively those who shall benefit from the law, and flaws a just society. It is the Joycean question of how far you can walk away from something culturally imprinted on us so deeply.

Recently I had the privilege to be part of a judicial delegation to Pakistan. Whilst there I became friendly with a High Court judge from Islamabad and late one evening we discussed in some detail the issue of forced marriage in Muslim countries. He had recently presided over a trial where a man had been convicted of the murder of his daughter, son-in-law and grandson because they had broken tradition and married outside their family. He explained to me that no country could have more explicit or detailed legislation against forced marriage than Pakistan and no religion regards forced marriage as more anathema to its basic tenets than Islam. Yet forced marriage, itself a contradiction in terms, continues to prevail in certain areas simply because it has become a social norm based on historical, religious, and customary norms to which the status and validity of law have been given.

In our own society, there are many similarities between the needs of victims of forced marriage and those of domestic violence and child abuse. In the course of my duties as a family judge, I tremble at the realisation that in this civilised society where the rule of law operates on such a sophisticated level, we seem to tolerate in the domestic setting behaviour characterised by unspeakable violence where children and adults are irreparably damaged by

exposure to it. A recent publication by the Government on domestic violence in Northern Ireland⁵ revealed statistics that constitute a stain on the conscience of our society. In Northern Ireland on average about six people are killed by a current or former partner each year. In England and Wales on average one hundred and twenty women and thirty men are killed every year by a current or former partner. In Northern Ireland on average two women are seriously assaulted by a male partner every day. Across the United Kingdom, at least one child will die each week as a result of an adult's cruelty. As many as one in four women and one in six men will be a victim of domestic violence at some point in their lives. A quarter of all recorded rape victims are children. Research indicates that at least eleven thousand children here are presently living with domestic violence. It occurs right across society regardless of age, gender, race, religion, sexuality, wealth and geography. About 90% of reported cases are perpetrated by men against women, but women too can be guilty of an offence against a partner. The Police Service of Northern Ireland respond to over fourteen thousand domestic incidents each year and more than half of these involve physical violence. It has the highest rate of repeat victimisation of any crime. These figures probably reflect but a fraction of the real picture. Many victims do not go to the police and do not disclose the violence to their general practitioner. The effect of family violence on children has traditionally not been widely recognised. It passes understanding that until comparatively recently it was widely assumed that unless directly involved, for instance by being injured, children were not seriously affected by violence or threats of violence between parents. It has become all too clear that domestic violence, whether experienced by the child as an observer hearing or witnessing the violence, or as a direct victim, is likely to affect their emotional, physiological, physical and sexual development perhaps irreparably⁶. I recently heard a case where a little girl of five had been so traumatised by constant exposure to drunken attacks of her father on her mother, followed inevitably by cuddles to quell her distress, that she now rejected hysterically any show of warmth or touch from her foster parents, conditioned as she was to the belief that this was but a prelude to another violent outburst. The reality of living with violent family relationships may result in some children re-enacting the behaviours they have been exposed to when they establish their own adolescent and adult relationships, thus perpetrating the cycle of maladaptive behaviour and ever widening the circle of victims, especially children.

Perhaps the most chilling aspect of the Government Paper was that it disclosed that research shows that one in five men and one in ten women amongst the young think that violence towards a partner is acceptable in some situations, for instance if the woman has been unfaithful. Despite the fact that domestic violence accounts for about a third of all recorded violent crime here, it clearly inhabits a place in the hierarchy of acceptable norms based on the myths that victims provoke violence, deliberately choose violent partners or is essentially a private matter acceptable in certain domestic situations. The knock on effect of this is that research to date

⁵ "Tackling Violence at Home. The Government's Proposals on Domestic Violence in Northern Ireland." October 2003.

⁶ *Re L* (2000) 2 FLR 334

suggests that prosecutions are entirely victim led and that even in the very serious cases, the wishes of the victim not to proceed can be crucial in the decision not to charge. The search for unflinching victim participation ignores the reality that victim withdrawal from the prosecution is typically a rational choice made within considerable situational constraints and is a decision often shaped by the abusers’ controlling behaviours. Well founded concerns for their personal safety, fear of the economic costs of separation, financial dependence on the violent partner, a determination to remain in the relationship for the sake of the children and a desire to see their violent partner treated rather than punished may appear to be all perfectly rational reasons why the victims should withdraw. Forcing the woman to participate holds her responsible for stopping the abuse and disempowers her from responding to the abusive relationship on her own⁷. Equally importantly, I am concerned that the failure to bring these perpetrators within the rule of law serves not only to undermine public confidence in the justice system and render victims helpless but perpetuates in the eyes of the community a parallel social norm which gathers legitimacy from the failure to question it. The most important initial step is the deconstruction of this social norm, challenging it and questioning its very legitimacy. We must consider a move towards the concept of the victimless prosecution where a process of thorough investigation obtaining independent and objective evidence coupled with strengthening of the law to protect women from abusive husbands or boyfriends is crucial. One uplifting thread in this gripping sorrow is that the Government does appear to be moving positively and creatively to embrace proposals which hopefully will afford all victims appropriate protection and justice. To some extent Northern Ireland leads the way in that, unlike in England and Wales, our Family Homes and Domestic Violence (NI) Order 1998 makes a breach of a non-molestation order or an occupation order an arrestable offence. If a perpetrator molests the victim or breaches an exclusion zone he or she will face imprisonment up to three months. Similar legislation is now proposed to be introduced in England and Wales along with proposals for example to grant women anonymity when they bring domestic violence complaints to the court and, more controversially, powers to permit a judge to impose a restraining order on a defendant even after he has been acquitted in circumstances where a judge considers the wife or children still require protection.

Our courts must be seen to be unbending in the severity of sentences passed on perpetrators with an emphasis on deterrence of offenders and protection of all the victims – the abused wife, the observing child and the inevitable subsequent victim. It has been remarkable and indeed gratifying to note how a forceful implementation of the law has completely altered public attitudes toward drunken driving so that it no longer receives dinner party sympathy or macho approval. We must now catch the passing moment and bring about a similar shift in the cultural climate in relation to domestic violence if we are to rid this community of one of the greatest current blights on our right to call this a just society.

⁷ “Prosecuting domestic violence without victim participation”, Louise Ellison [2002] *Modern Law Review* 834 at p 849.

However, children are victims not only in the context of abused mothers but also in the context of missing fathers. It is widely recognised that children who maintain their relationship with both parents after separation are healthier, better adjusted and more successful in school. They grow up to become better parents themselves. Sadly however, I fear that for all too long the social norm in our culture that women are necessarily better than men in looking after children has in some cases served to bedevil the lives of separated parents and their children and may have influenced the implementation of the law. The gathering momentum of fathers' rights groups asserting that courts allegedly handle child contact cases in a mother-biased fashion coupled with an alleged failure to enforce contact orders when flouted by mothers, is now a burning issue. Radical fathers' groups threatening civil disobedience and harassment of the judiciary unhappily serve only to set back the need to address a genuine problem. The caped crusaders who scaled the Royal Courts of Justice in London dressed as Batman and Robin diminished an issue which has the right to be heard. The fact of the matter is, that it is only in the rarest of cases that the courts refuse contact to a father, and this is usually in circumstances where there have been proven allegations of domestic violence or harassment of the mother and children. Certainly where that is a factor, the courts here in Northern Ireland strive to prioritise that issue, rigorously identifying the guilty, vindicating the falsely accused and offering the victim and children proper support. The real problem however lies with fathers, who whilst not denied contact in court, in fact rarely or never see their children. One estimate is that in 67% of cases children see their fathers less than once a fortnight. Understandably many of these fathers harbour a smouldering sense of injustice. Clearly the courts are not the only factor coming between separated fathers and their children, given that most families settle residence arrangements without recourse to law. Poverty, inadequate housing, lack of experience in caring for children, lack of knowledge of health and family services also contribute. Missing fathers include young men, often unemployed and feckless, given up as a lost cause by the child's mother, her parents and family services. However, there are a number of fathers desperate to see their children but who are prevented from doing so because the acrimony of the split makes any court order potentially unenforceable. The real victim of all this is the child. Perhaps the time has come to revisit the rights of fathers and children, and to reassess the central role that men have in their children's lives even when father and child are strangers. I recently read of a poignant extract from an 11 year old boy to his father which encapsulates the whole sad problem:

“Dear Father

I don't say Dear Dad because you have not been a dad to me have you? I haven't introduced myself yet. My name is Daniel. You might not remember my mother but I think about you all the time.”

In England and Wales they are now looking at early intervention schemes based on a model that has been developed in the USA in the 1990s and has been successfully used in Norway, Denmark, Canada and is currently being tried in Australia. Under this scheme, once the issue of contact is raised, parents immediately receive an information pack that gives them a clear idea of the State's expectations. Unless there is cause for concern, such as

domestic violence, the non resident parent will usually be granted immediate access of alternate weekends and one evening a week. Parents are also directed towards compulsory mediation and parenting classes which help them make the transition. Separating parents are required to come up with a parenting plan covering everything from holidays to schoolwork and pocket money which helps them anticipate potential areas of conflict. Mediation works to optimal effect because everyone knows what the courts are going to offer. There is also a package of support services, including high conflict parenting classes, retraining for unemployed parents and drug rehabilitation programmes. The difficult cases involving allegations of abuse or domestic violence are dealt with by a rapid investigation which may or may not result in qualified access. The anecdotal evidence is that these schemes are being used throughout the United States with dramatic results. It is reported that in California 60% fewer cases now reach the courts and attending parenting classes is now the norm. It has received the *imprimatur* of senior members of the judiciary in England and Wales and in particular Mrs Justice Bracewell has said that it would be incomprehensible if the pilot project, modelled on the one that has run in Florida for ten years, did not receive official sanction. I trust that such thinking heralds a reassessment of antiquated social norms which in many cases have carried the *imprimatur* of old-fashioned and dangerous thinking.

The sad fact is, that in some respects, children emerge as forgotten victims in our society and our legal system. We have an enlightened and widely welcomed Children Order (Northern Ireland) 1995 which strives to be more compliant with the demands of international conventions such as the United Nations Convention on the Rights of the Child and the European Convention on Human Rights than previous children’s legislation has ever been. The changes emphasise the importance of the involvement of parents and children in decisions that affected them. A cornerstone of the legislation is the preference for agreement between the parties unless the facts of the case and the needs of the children dictate it otherwise. But is it enough to protect children? Do we painfully subscribe to a social norm that operates on a basis of “out of sight, out of mind”. There are thousands of children in care in Northern Ireland, 60,000 children in care in England alone, an increase of 22% since 1994. I am informed that just 4% get five A-C GCSE grades compared with half of children from family homes. More than half of all such children in care reach sixteen with no qualifications and only 1% go to university. The chilling fact is that these children are entirely blameless for their plight; Department of Health research showing that 90% of them are in care because of abuse, parental neglect or other welfare concerns. Day after day, I and other family judges make care orders in the case of such children. Thereafter, I have little or no power to deal with them. The fate of these children and their unconditional right to grow up to be a fulfilled adult thereafter is, I fear, a forgotten concern buried beneath a plethora of apparently more pressing concerns that capture the attention of the chattering classes.

The areas where children in our society are potential victims whose rights are not raised by the shrill voices in our society do not end there. The smacking of children is something that demands our attention. Since Sweden banned smacking a decade ago, child deaths at the hands of parents have fallen to zero. In Great Britain they run at one per week. Smacking has been banned

in twelve European countries in the past thirty years. Should we be examining our law that permits parents to use “reasonable chastisement”? In September 2002 the monitoring body for the United Nations Convention on the Rights of the child examined the United Kingdom’s government’s report on progress made in implementing the Convention. The bulk of this report is taken up with identifying and analysing the alleged shortcomings of government in delivering on children’s rights and with making recommendations that, taken together, form the basis for a strategy and a comprehensive action plan on children’s rights. The continued use of physical punishment within the context of private schools in Northern Ireland was specifically highlighted by the Committee. It expressed “deep regret” that the UK government continues to retain the defence of “reasonable chastisement” and noted that physical punishment still has not been outlawed within families or in all forms of daycare including childminding. The Committee noted that any steps by government to limit rather than remove the “reasonable chastisement” defence would not comply with the

“principles and provisions of the Convention . . . since they constitute a serious violation of the dignity of the child”.⁸

The Committee recommended that the government

“with urgency adopt legislation . . . to remove the reasonable chastisement defence and prohibit all corporal punishment in the family and in other contexts not covered by existing legislation.”

I do not pretend to know the answer on this issue nor do I express any view one way or the other. However, what does concern me is that a perfectly rational debate about a child’s rights to be protected from assault on the one hand, and on the other, the right of parents to discipline children in a modern society, is stifled by undue reliance on an ingrained outdated social norm based purely on the adage of “spare the rod and spoil the child” which is impervious to legal restraint or international conventions.

The UN Convention on the Rights of the Child is the most highly ratified international human rights treaty in the world. It applies to all children and the UK government has ratified the Convention in December 1991. In doing so the government committed itself to a set of non negotiable and legally binding minimum standards and obligations in respect of all aspects of children’s lives. Under Article 12:

“State’s parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly,

⁸ The UK Joint Committee on Human Rights 10th Report on the United Nations Convention on the Rights of the Child.

or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The Children (Northern Ireland) Order 1995 enshrines the necessity to give due weight to the views of the child and the Northern Ireland Guardian Ad Litem Agency has been established. But is that the reality of the court system? Are we at times in danger of being locked in a time warp where the notion of protecting children implied that decisions affecting them will be taken by others irrespective of what domestic statutes or international conventions say? Whilst Guardians Ad Litem are appointed by the courts and have enabled children to be independently represented in public law cases, for example, where there is an application for a child to be brought into care or freed for adoption, yet in private law cases, for example, acrimonious contact issues between parents, representation for children is rarely afforded and their voices often muted. Even in the public system vulnerable groups of children such as the homeless, those in care and those with disabilities require particular consultation processes by those specially and properly trained to do so if they are adequately to participate in a determination of their future. When teenage children are the subject of the proceedings we often overlook the basic principle of enquiring whether it might be in their interests to actually attend the hearing. My enduring concern is that in a legal system, which is the envy of the world in many instances, the most vulnerable in our society, namely children, are sometimes not allowed to be seen or heard although they may have much to say and are entitled to observe the justice that determines their future. If we are to make progress we must increasingly consider the concept of rights which visualises that children will either take their own decisions or at least have a strong say in matters affecting them.⁹ We must be wary lest compassion for children shades into unthinking condescension. A system that potentially renders children passive in their dependency and where speaking out threatens the ethos of failure in which so many other children have become compliant must now be the subject of review. In our court system children need a voice, someone who is able to listen to anything they wish to say and tell them what they need to know¹⁰.

I often hear it said that one of the primary victims of our society and our evolving legal system is the concept of the traditional family. The question is posed, how can a family policy support marriage and strengthen traditional families whilst, at the same time, professing to acknowledge the social changes that have occurred both in family patterns and in the nature of intimate commitments?¹¹ Does respect for the increasing number of families that depart, in significant ways, from the old nuclear norm sit uneasily with a veneration of traditional arrangements? The notion of the family in crisis is a strong one. Let me illustrate the change. Some 20 years ago a senior judge in the Court of Appeal in England drew a clear distinction between years of cohabitation and years of marriage.¹² Specifically relying on public opinion at the time he said:

⁹ Bainham, A. (2002) 32 *Family Law* 279.

¹⁰ *Re A* [2001] 1 FLR 715.

¹¹ (2002) 12 *CFLQ* 135.

¹² Eveleigh LJ – *Foley v Foley* [1981] 2 FLR 215.

“In a great majority of cases, public opinion would readily recognise a stronger claim founded upon years of marriage than upon years of co-habitation.”

In contrast more recently a judge said:¹³

“The law is not moribund but must move to reflect changing social values. I cannot imagine anyone nowadays seriously stigmatising pre-marital co-habitation as ‘living in sin’ or lacking the quality of emotional commitment assumed in marriage. Thus, in my judgment, where a relationship moves seamlessly from co-habitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand if it found that the pre-marital co-habitation was on the basis of a trial period to see if there was any basis for later marriage then I would be of the view that it would not be right to include it as part of the ‘duration of the marriage’.”

I think it can be plausibly argued that the concept of family is not declining in the law but is changing in ways that are entirely consistent with the whole trajectory of historical evolution. The challenges inherent in society have fundamentally altered the accepted set perspectives of the law and how legislation is interpreted. Currently the law is in the throes of coming to terms with social reality and shifting focuses. Recently a seminal decision¹⁴ found that as between husband and wife on the dissolution of marriage a financial award must now measure up to the yardstick of real equality. Striding on from that initial step the courts have analysed and considered the different contribution that each spouse makes to the family welfare resulting in equal division for equal contribution. Equality of division as a yardstick of fairness is now to the fore as the means of balancing different contributions to a marriage. Gone are the days when the traditional approach of a wife receiving one third of the assets and one third of the income were regarded as proper justice. Gender discrimination against women in matrimonial resolution reflected for years the discriminatory view that society took of women. They faced the difficulty of finding a proper value for their contribution to the household in a world that attributed worth on the basis of market value. The generally low level of value attributed to domestic work and comparatively lower levels of wages paid to women for work done in the public sphere meant, and indeed still means, that woman cannot make the same financially tangible contribution to family wealth in many instances as their male counterpart. The courts are now unwilling to consider the process of weighing the spouses’ contributions other than on the basis that the contributions are of the same value rather than of the same type and consequently must be rewarded with the same share of family assets. We are attempting to destabilise existing gender stereotypes responding to the realities of the division of labour and individual marriages. In doing so of course we must be careful not to reinforce the aberrant norm that women are the principal care giver for a family and, to the detriment of men as

¹³ *GW v RW* [2003] 2 FLR 120.

¹⁴ *White v White* (2001) 1 AC 596

fathers, thereby revive the very gender stereotype that we seek now to challenge.

If the guidelines informing the application of judicial discretion in family law are to be derived from current values about family life which the court considers would be widely accepted in the community, what then of the fact that marriage rates continue to decline whilst co-habitation rates increase? There is an increasing diversity in the nature of family formation.

Perhaps if we are to ensure that we are not creating new victims in our society, we must stand back and at least debate whether family law, broadly defined, as it now exists does reflect and respond to the reality of domestic living arrangements in modern society. Should our family law be underpinned by broader human rights considerations? Are we being forced to wrap old laws around new problems? In New Zealand legislative reforms have ushered in the unified approach to property divisions for married and unmarried couples. The rules also apply to same sex couples and widowed parties. Co-habitants are gradually receiving some piecemeal concessions as the law develops, but is it likely the wider recommendations will receive requisite appropriate support unless the qualifying co-habitants are restricted to those who satisfy the marriage model? Those of us who are strong proponents of the institution of marriage must not be afraid to ask whether there may not be a plausible case for introducing a legal commitment between people who are unable to marry, particularly where we are legislatively moving towards an era when gay and lesbian couples can adopt children but stopping short of giving these relationships a proper legal status. Dame Elizabeth Butler-Sloss, the President of the Family Division recently highlighted couples who could not marry but had no recourse to a system of law that would protect them if they formed “partnerships sometime lifelong, which in their turn create a family structure”. Already the Government is proposing legislation to address the issue. I do not pretend to have the solution to these issues, but if we are to live in a civilised society where the rule of law is relevant to all our citizens, these are matters that warrant our attention in the spirit of growing awareness of the social angst occasioned to many.

Let me conclude by saying I have a seared conviction that showing the wound is a way of tending to it. Oliver Wendell Holmes said:

“The great thing in the world is not so much where we stand,
as in what direction we are moving.”

I hope we are moving in the right direction. No thinking person could suggest that the measure of discrimination, prejudice, and abuse of human rights that existed in O’Connell’s time exists today. Time and our sense of moral responsibility have moved on. But we must not blind ourselves to the frailties in the institutions that protect us and the confines of the rule of law that we observe. Reason, not emotion, must colour the thread of the court’s approach at a time when basic assumptions may be shifting and we are addressing the specific agenda of the moment. If our freedoms are to be preserved and the rule of law enhanced, then we must recognise that no tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civilised society generally expressed through the law. Law is part of the human odyssey and achievement. It is a dynamic process but it has to be in tune

with the ever changing needs and values of a society, failing which, individuals suffer, victims emerge and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including judge made law, has to play its role in changing social morals where it is appropriate. Any other response to social norms that offend against the fundamentals of the civil society may amount to appeasement or endorsement. With typical lawyer-like hyperbole, may I conclude by quoting to you from one of the most brilliant of O'Connell's speeches which he made in the course of a famous libel case when he acted on behalf of John Magee the proprietor of the Dublin Evening Post. He concluded his peroration to the jury with the following words:

“If amongst you there be cherished one ray of pure religion, if amongst you there glow a single spark of liberty, if I have alarmed religion or aroused the spirit of freedom in one breast amongst you my client is safe and his country is served.”

The sad footnote to this case is that Mr Magee was not safe. He was found guilty and sentenced to two years imprisonment along with a massive fine. O'Connell encountered the failure often meted out to the messenger. If I have failed tonight, I shall be in good company.

COMMENTS AND NOTES

INFERRING INTENTION

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INTRODUCTION

It is with some trepidation that one finds another appellate decision on the vexed issue of inferring intention in the law of murder. This trepidation is brought about in part by sheer fatigue for we have been here many times before.¹ However the wariness is also justified as there are significant philosophical issues that need to be addressed by the courts despite the fact that the underlying issue can be stated with some degree of clarity: in what situations can the jury infer that a defendant must have intended to kill his victim even though killing the victim was not his primary purpose?² This is a crucial determination as the law of England and Wales, along with the law of Northern Ireland, specifies that intention is the only form of *mens rea* that will suffice for murder. Recklessness, however extreme, is not sufficient for murder, though gross recklessness can satisfy the *mens rea* for manslaughter.³ Other jurisdictions, such as Scotland, have largely avoided the problem⁴ by expanding the *mens rea* for murder to include extreme forms of recklessness.⁵ Recently the Irish Law Reform Commission has gone down this route by suggesting that the *mens rea* for murder include reckless killing manifesting an extreme indifference to human life.⁶

¹ See in particular *DPP v Smith* [1961] AC 290; *Hyam v DPP* [1975] AC 55; *R v Moloney* [1985] AC 905; *R v Hancock*, *R v Shankland* [1986] 1 AC 455; *R v Nedrick* [1986] 3 All ER 1; *R v Walker and Hayles* (1990) 90 Cr App R 226; *R v Scalley* [1995] *Crim LR* 504; *R v Woollin* [1998] 4 All ER 103; and *Re A (Children) (Conjoined Twins: Surgical Separation)* [2004] 4 All ER 961. The secondary literature is vast.

² For a recent overview of the philosophical debate see Kaveny, "Inferring Intention from Foresight" (2004) 120 *LQR* 81.

³ *R v Adomako* [1995] 1 AC 171. See comment by Gardner, "Manslaughter by Gross Negligence" (1995) 111 *LQR* 22; Leigh, "Liability for Inadvertence: A Lordly Legacy?" (1995) 58(4) *MLR* 457; Oliphant, "Manslaughter: Recklessness or Gross Negligence?" (1995) 6 *King's College Law Journal* 149; Stannard, "From Andrews to Seymour and back again" (1996) 47(1) *NILQ* 1; and Virgo, "Reconstructing Manslaughter on Defective Foundations" (1995) 54(1) *CLJ* 14.

⁴ See Christie, *Introduction to Scots Criminal Law* (2003), p 43.

⁵ *Drury v HM Advocate* 2001 SLT 1013. See further Jones, "The Scottish Law of Murder" (1989) 105 *LQR* 516; and Christie, "The Coherence of Scots Criminal Law: some aspects of *Drury v MH Advocate*" [2002] 6 *Juridical Review* 273. A useful comparative survey is provided by Newman, "Reforming the mental element of murder" (1995) 5(2) *Irish Criminal Law Journal* 194.

⁶ Law Reform Commission, *Consultation Paper On Homicide: The Mental Element of Murder* (2001), para 4.075. Para 6.06 states that '[a] person acts recklessly with

The situations that have concerned the courts in those jurisdictions which require intention to be found have typically involved individuals engaging in objectively highly dangerous conduct, such as throwing concrete slabs from a motorway bridge⁷ or setting fire to an occupied house at night,⁸ where the defendant claimed that his primary purpose was something other than to kill. From the jury's perspective the only way of verifying the defendant's intention, and hence his guilt or innocence, is to infer his intention from his actions. So that whilst the jury are being asked to make a subjective determination as to whether the defendant intended to kill, that determination has largely to be made on an objective assessment of the defendant's actions. Not unsurprisingly juries have sought guidance on the circumstances in which they can infer intention and, again perhaps unsurprisingly, the courts have either been reluctant to provide this advice or have provided the kind of advice that required further refinement in subsequent appellate judgments.

For once though, the judgment in *R v Matthews and Alleyne*⁹ is to be welcomed. For reasons that we expand on below, we believe that the Court of Appeal has taken vital remedial action to correct previous misinterpretations of the leading House of Lords' judgment. What is decided can be summarised comparatively briefly but its significance is real, both for the substantive criminal law and for the law of evidence.

The Facts

In *Matthews and Alleyne*¹⁰ the appellants had been convicted, along with another individual named Dawkins, of robbing, kidnapping and subsequently murdering a young man called Jonathan Coles who had been out celebrating a friend's birthday in Milton Keynes. Another individual, Canepe, was acquitted of robbery and murder but had pleaded guilty to manslaughter. Jonathan Coles was initially assaulted outside a nightclub by Alleyne and Dawkins. They stole his wallet which contained a bank card. Matthews and Alleyne were later caught on CCTV attempting unsuccessfully to withdraw money with the card from a cash machine. According to Rix L.J. this lack of success "made them angry".¹¹ Jonathan Cole meanwhile, who had become separated from his companions and who had lost his glasses, was attempting to flag down passing cars either for assistance or for a lift. The defendants drove past and forced Jonathan into the car. At trial the appellants argued that they played no further part in the proceedings but were clearly not believed by the jury. The other two defendants provided a detailed account

respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation'. See comment by Chief Justice Keane, "Murder: the mental element" (2002) 53(1) *NILQ* 1; and Bacik, "If it ain't broke – a critical view of the Law Reform Commission Consultation Paper on Homicide: the mental element in murder" (2002) 12(1) *Irish Criminal Law Journal* 6.

⁷ As in *R v Hancock, R v Shankland* [1986] 1 AC 455.

⁸ As in *Hyam v DPP* [1975] AC 55 and *R v Nedrick* [1986] 3 All ER 1.

⁹ [2003] WL 117062.

¹⁰ [2003] WL 117062.

¹¹ At p 2.

of what happened subsequently to Jonathan that clearly implicated Matthews and Alleyne. Although one of Matthews' grounds of appeal was that he had no case to answer, this was, according to Rix L.J. "rather half-hearted"¹² with the result that the appellants had to accept the version of events presented by Dawkins and Canepe at the trial.

According to them, Jonathan had been driven to Tyringham Bridge, after Matthews had ominously suggested that Jonathan be taken swimming. Canepe stayed in the car whilst the other three took Jonathan to the crown of the bridge. Despite protestations from Jonathan that he could not swim, the appellants placed Jonathan over the crown of the bridge. He struggled to cling to the bridge and lost his grip after Matthews hit him on the back of his hand. He fell 25 feet into the river which was 64 feet wide at that point. The appellants ignored his cries for help and left him to drown. The relevant issues at trial and the grounds for appeal are outlined in the next section.

Intention and The Substantive Criminal Law

The basic requirements of murder are the absence of a defence, that a person causes death by an unlawful act or omission (this is the *actus reus* element of the offence) and that the person also has the necessary mental element (the *mens rea*).¹³ In murder the *mens rea* is "malice aforethought", which does not of necessity imply premeditation or malice as those terms are usually understood. Malice aforethought consists not only of an intention to kill (or cause grievous bodily harm). A result may also be said to be intended, in certain circumstances, if the actor foresees with virtual certainty that one of the consequences of what he does will be that someone may be killed, even though it is not his intention or purpose¹⁴ to cause that consequence.¹⁵ This additional element considerably widens the scope of "direct" intention to include what has been called "indirect" or "oblique" intention.¹⁶

In cases of "direct" intention, where it can adequately be proved that the defendant intended to kill, no problems arise, but the courts have been struggling to deal with "indirect" intention since *DPP v Smith* in 1961.¹⁷ That case was followed by a number of attempts at clarification: *Hyam*,¹⁸ *Moloney*,¹⁹ *Hancock and Shankland*,²⁰ *Nedrick*,²¹ *Walker and Hayles*,²²

¹² At p 3.

¹³ Labelled a "rough and ready...analytical tool" by Ashworth, *Principles of Criminal Law* (2003), p 96. See also Smith, "On Actus Reus and Mens Rea" in Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Smith* (1978), p 96.

¹⁴ While the ordinary meaning of intention might well be defined in terms of aim or purpose, the element of foresight introduces a distinction between the meaning of intention and purpose. See Norrie, *Crime, Reason and History* (2001), p 47.

¹⁵ *R v Woollin* [1998] 4 All ER 103.

¹⁶ Commonly used to describe the foresight element, for example, by Williams, "Oblique Intention" (1987) *CLJ* 417, and by Norrie, "Oblique Intention and Legal Politics" [1989] *Crim LR* 793.

¹⁷ [1961] AC 290.

¹⁸ [1975] AC 55.

¹⁹ [1985] AC 905.

²⁰ [1986] 1 AC 455.

²¹ [1986] 3 All ER 1.

*Scalley*²³ and *Woollin*.²⁴ *Matthews and Alleyne*²⁵ is the latest in this long line of authorities and, significantly, would appear to resolve the long-overdue dispute over the status of “indirect” intention following the misinterpretation of Lord Lane’s classic *Nedrick* direction in both *Woollin* and *Re A (Children)*.²⁶

In *Nedrick*, Lord Lane said that:

“ . . . the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.”²⁷

This test confirms that foresight, even of virtual certainty, does *not* constitute intention;²⁸ to the contrary, it simply allows the jury to *infer* intention. The test was approved in *Woollin*²⁹ and indeed it was hoped that the problem with the meaning of intention in the so-called “foresight” cases had been resolved by the House in that case, but this was not so.³⁰ In *Woollin*, Lord Steyn followed the direction Lord Lane gave in *Nedrick* but then contradicted its clear meaning by claiming that “the effect of the critical direction is that a result foreseen as virtually certain *is* an intended result”.³¹

If we look back at Lord Lane’s direction, we can see that it does not say that the jury *must* find intention, it merely confirms that they *may* do so.³² As Norrie confirms:

“The use of the word ‘entitled’ . . . suggests that the jury may . . . identify intention, but, alternatively may not do so. ‘Entitled’ is permissive rather than obligatory. . . .”³³

²² (1990) 90 Cr.App.R. 226.

²³ [1995] *Crim LR* 504.

²⁴ [1998] 4 All ER 103.

²⁵ [2003] WL 117062.

²⁶ [2000] 4 All ER 961.

²⁷ *Per* Lord Lane [1986] 3 All ER 1 at 3-4.

²⁸ Lacey comments that Lord Lane “stops short of positively defining intention”; see Lacey, “A Clear Concept of Intention: Elusive or Illusory?” (1993) 56 *MLR* 621, p 635, in n 54.

²⁹ Subject to substituting the word “infer” with “find”.

³⁰ See Norrie, “After *Woollin*” [1999] *Crim LR* 532; and Wilson, “Doctrinal Rationality After *Woollin*” (1999) 62 *MLR* 448. Smith, while conceding that the case has left ambiguity in so far as the jury are not bound to find intention, still felt that a result foreseen as a virtual certainty should be deemed to be an intended result in his commentary on *Woollin* [1998] *Crim LR* 890 at 891. The Court of Appeal in *Matthews and Alleyne* disagreed with Smith’s view at 10.

³¹ *Per* Lord Steyn [1998] 3 All ER 103 at 110 (emphasis added).

³² Williams, “The Principle of Double Effect and Terminal Sedation” [2001] 9(1) *Medical Law Review* 41, p 43. See also Wilson, *op cit* n 30 at 456: ‘Juries are entitled to find intention where there is foresight of virtual certainty, which is not the same as being bound to.’

³³ Norrie, *op cit*, n 30 at 537. Also in agreement on this point are Ashworth, *op cit*, n 13 at 177; and Smith, *op cit*, n 30 at 891. The point is conceded by Smith and Hogan, *Criminal Law* (2002), p 72.

Wilson also reminds us that the critical direction is set out in the conditional negative:

“[It] does not say ‘you must find intention if the defendant foresaw the consequences as certain’; rather it says, ‘do not find intention unless the defendant . . . foresaw the consequence as certain.’”³⁴

The fallacy is perpetuated in *Re A (Children)*³⁵ where both Lord Justice Ward and Lord Justice Brooke in the Court of Appeal, although approving and ostensibly applying Lord Lane’s direction in *Nedrick*, misinterpreted the *mens rea* element of murder by holding that death is intended where it is foreseen as a virtual certainty; no mention is made of the direction that the jury is “entitled to find”.³⁶ Similarly in *Matthews and Alleyne*³⁷ the judge at first instance, claiming to follow the *Nedrick/Woollin* direction, said that:

“With regard to proving ‘an intent to kill’ the prosecution will only succeed in proving this intent either:

- (i) By making sure that this specific intention was actually in the mind/s of the defendants, or
- (ii) (a) By making sure that Jonathan Cole’s death was a virtual certainty (barring some attempt to save him), and (b) The defendant . . . appreciated . . . that this was the case, and he had no intention of saving him, and knew or realised that the others did not intend to save him either.”³⁸

Matthews and Alleyne’s main ground of appeal was that the above was a misdirection which made the convictions unsafe.³⁹ This argument relied on two separate points. Firstly that alternatives (i) and (ii) might lead the jury to think that they could convict of murder on alternative (ii) even if they rejected (i) and, secondly, that alternative (ii) was presented as a substantive rule of law rather than as a rule of evidence.

The second point is more important and will be dealt with first. In response to Counsel’s submission that Lord Steyn’s comment in *Woollin*⁴⁰ moved the House of Lords “away from a rule of evidence to a rule of substantive law”, Rix L.J. held that:

“[In] our judgment . . . the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty . . . we do not regard *Woollin* as yet reaching or laying down a substantive rule of law.”⁴¹

³⁴ Wilson, *op cit*, n 30 at 455.

³⁵ [2000] 4 All ER 961.

³⁶ See McEwan, “Conjoined Twins: Murder or Mercy?” (2001) *Bracton Law Journal* 7 at 13.

³⁷ [2003] WL 117062.

³⁸ *Ibid* at 6.

³⁹ This was based on “lurking doubts”.

⁴⁰ That “the effect of the critical direction is that a result foreseen as virtually certain is an intended result” see text to n 31 *ante*.

⁴¹ [2003] WL 117062 at 10. In addition, at 9, Rix L.J. noted that Lord Lane in *Nedrick* “continued to think of his direction as being in the realm of a rule of evidence not of substantive law”.

The Court of Appeal felt that the judge had gone too far in his interpretation of the direction but that this did not render the verdict unsafe because where all that is required is an appreciation of virtual certainty of death there was “very little to choose between a rule of evidence and one of substantive law”.⁴² Moreover, the “irresistible nature of the inference or finding of intent to kill” was highlighted by the fact that the defendants had no intention of saving the victim from drowning. In the court’s view it was therefore perfectly natural that the jury would find that the defendants intended him to die.⁴³ In other words, the fact that the defendants omitted to do anything to rescue Jonathan reinforced their virtual certainty that he would drown and made it inevitable that in this case their virtual certainty would be construed as intention.

This reference to the defendants’ omission to rescue the victim from drowning raises an interesting point for debate. In order to avoid placing an “intolerable” burden on people who would otherwise be liable without limit,⁴⁴ there is no general liability for omissions.⁴⁵ Before an omission can be culpable, there must be a duty to act.⁴⁶ Liability only arises where the parties stand in such a relationship to each other that duty or obligation is imposed.⁴⁷ An example of such a duty would be a doctor’s duty of care towards a patient. A common law duty can also arise in murder (and in manslaughter), for example, where a parent has a duty to care for a child.⁴⁸ More importantly, however, a duty can arise where a person simply accepts responsibility for another.⁴⁹

⁴² *Ibid* at 10. The Court of Appeal also commented that this was “probably” the reason for Lord Steyn’s interpretation of the *Nedrick* direction.

⁴³ *Ibid* at 11.

⁴⁴ Glover, *Causing Death and Saving Lives* (1986), pp 93-94.

⁴⁵ Although the *Shorter Oxford English Dictionary* defines an omission as the “non-performance or neglect of an action or duty”, there is considerable theoretical debate surrounding the concept. For example, Fletcher has distinguished between two types of omission – a breach of a duty to act and a failure to intervene; see Fletcher, “Ethics and Euthanasia” in Williams (ed), *To Live and to Die: When, Why and How?* (1973), p 121.

⁴⁶ Williams, “Criminal Omissions – The Conventional View” (1991) 107 *LQR* 86 at 86. The duty requirement has been described as a device which, very much like causal inquiry, “narrows [a] field of liability” which would otherwise be too wide; Fletcher, “Prolonging Life: Some Legal Considerations” in Downing (ed), *Euthanasia and the Right to Death* (1969), p 80. See also Norrie, *op cit*, n 14 at 134.

⁴⁷ “It is the nature of the relationship that is crucial in determining responsibility”; Fincham and Jaspars, “Attribution of Responsibility” in Berkowicz (ed), *Advances in Experimental Social Psychology* (1980), p 98.

⁴⁸ *R v Gibbons and Proctor* (1918) 13 Cr.App.R. 134.

⁴⁹ *R v Stone and Dobinson* [1977] QB 354. The case was decided on the basis of involuntary manslaughter and sets out a test based on recklessness. Since the case of *R v Adomako* [1995] 1 AC 171 the test has been altered to one of gross negligence. Sometimes a duty may extend to someone who is unrelated. For example, the Court of Appeal held that a duty may arise where a close friend of a drug addict had provided him with a fatal dose and had stayed with the victim until he died; *R v Sinclair* [1998] *NLJ* 1353. However, in *R v Khan* [1998] *Crim LR* 830 it was felt that expecting a drug dealer to summon help for one of his customers would be to extend the duty too widely.

In *Matthews and Alleyne*, the defendants submitted that the judge placed too much emphasis on their failure to rescue the victim. Rix L.J. said, however, that “it was a striking feature of the case, relevant to the question of intent”.⁵⁰ Certainly the implication is that, by kidnapping Jonathan Coles and throwing him into the river from a high bridge in the dark, without his glasses and as a non-swimmer, the defendants were responsible for his safety and indeed his life. Having thrown him in the river, their duty was clearly to rescue him from drowning. Indeed, Fletcher has defined a “duty” in this type of situation as a “vehicle by which we select those relationships that require people to intervene to prevent the death of others”.⁵¹ In this case the decision not to intervene made just as much difference to the victim’s fate as throwing him in the river⁵² and, as Ashworth suggests in his commentary on the case, the defendants may even have been found guilty if they were virtually certain that Jonathan would drown but made no effort to prevent that from happening.⁵³

Rix L.J. then proceeded to dispose of the remaining grounds of appeal. As to the first part of the main ground of appeal,⁵⁴ he concluded that the jury could not possibly have misunderstood the way the judge worded the direction bearing in mind that point (i) was the Crown’s primary case and that point (ii) was their “fall-back” position.

Finally, Rix L.J. considered the allegation that the verdicts were unsafe on grounds of “lurking doubt”. Despite the evidence of the other two defendants to the contrary, both Matthews and Alleyne claimed that they were not present during the events that led to Jonathan Coles’ death. Part of their allegation of “lurking doubt” was thus that the jury may have seen them as lacking in credibility because they had lied and given false alibis. In dismissing the appeal, Rix L.J. held that there was no “lurking doubt” which rendered the verdicts unsafe and himself found it “[hard] to think that they had any credibility at all”.⁵⁵

CONCLUSION

Underlying much of the confusion in this area has been a failure to distinguish between issues relating to the substantive criminal law and issues relating to the law of evidence. This might seem strange for one would think that it would be easy to distinguish between the two, after all the substantive criminal law could be summarised as the law which determines what is, or is not, a crime. To paraphrase Fletcher, the substantive rules establish “guilt in principle” whereas procedural rules determine whether an individual is

⁵⁰ [2003] WL 117062 at 12.

⁵¹ Fletcher, *Rethinking Criminal Law* (1978), p 372.

⁵² Harris deals with this in the context of acts and omissions in medical treatment; Harris, *The Value of Life* (1985), p 31.

⁵³ Ashworth, “Commentary on *R v Matthews and Alleyne*” [2003] *Crim LR* 553 at 555. For more on liability for omissions see Ashworth, “The Scope of Criminal Liability for Omissions” (1989) 105 *LQR* 424; Hughes, “Criminal Omissions” (1958) 67 *Yale LJ* 590; Smith, “Liability for Omissions in Criminal Law” (1984) 4 *Legal Studies* 88; and Williams, *op cit*, n 46.

⁵⁴ That alternatives (i) and (ii) might lead a jury to think that they could convict of murder on alternative (ii) even if they rejected (i), see text following n 39 *ante*.

⁵⁵ [2003] WL 117062 at 13.

“guilty in fact”.⁵⁶ Yet, despite the fact that an intention to kill (or cause grievous bodily harm) remained the *mens rea* for murder throughout the period, there was confusion in the case law about whether foresight of virtual certainty was a rule of substance or procedure. In effect if the jury were *required* to find intention if there was foresight of virtual certainty – as would appear to have been the effect of Lord Steyn’s judgment in *Woollin* – then it would have become a rule of the substantive criminal law: if the defendant saw death as a virtual certain consequence of his actions then he has satisfied the *mens rea* for murder.

In verifying that the *Nedrick / Woollin* direction is a rule of evidence, and not one of substantive criminal law, the Court of Appeal in *Matthews and Alleyne* has upheld the jury’s right to decide if they think foresight of virtual certainty can be equated with intention or not on a case by case basis. The jury can thus, quite properly, use the direction as a “get out clause whereby they may decide that although the defendant foresaw death as virtually certain, he or she did not intend it”.⁵⁷ However, while it can be said that the case has defined the *status* of the direction on intention, it has not defined the concept of intention itself.⁵⁸ It remains the case that judges simply give advice as to how intention can be found; they do not say what it actually means.⁵⁹ Thus, in the absence of a definition and while attempts to codify provisions relating to intention remain unimplemented,⁶⁰ the conversion of foresight into intention remains in the jury’s hands.⁶¹ This is surely correct as s.8 of the Criminal Justice Act 1967 states that:

“A court or jury in determining whether a person has committed an offence –

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

Clearly the jury should be at liberty to draw whatever inferences they see fit from the available evidence in determining whether or not the defendant

⁵⁶ Fletcher, *Basic Concepts of Criminal Law* (1998), p 7.

⁵⁷ McEwan, *op cit*, n 36 at 13. See also Wilson, *op cit*, n 30 at 456 on this point. This is what Ashworth calls “moral elbow-room” in his textbook, *op cit*, n 13 at 179. In his commentary on the case he notes that the consequence of this is that some kinds of case can slip through a “door which has been left ajar”; *op cit*, n 53 at 554-555.

⁵⁸ Note Ashworth’s comment that “the courts do not adhere to a single definition” anyway and that the reason for this is so that they can diverge from the “standard definition” in certain circumstances; Ashworth, *op cit*, n 13 at 177-178.

⁵⁹ See Griew, “States of Mind, Presumptions and Inferences” in Smith (ed), *Essays in Honour of J. C. Smith* (1987), p 82.

⁶⁰ See, for example, Law Commission No 177 clause 18(b)(ii); House of Lords Select Committee on Murder and Life Imprisonment; Law Commission Consultation Paper No 122.

⁶¹ See, for example, Norrie who comments that even though intention is “perhaps the core concept [it] remains obscure and mystifying”, *op cit*, n 14 at 37; and Lacey who believes that “a valid concept of intention is. . . illusory”, *op cit*, n 28 at 642.

intended to kill. Ordinarily, if a juror believes that the defendant saw death as a virtual certainty of his actions then the juror will draw an inference that death was intended. However *Matthews and Alleyne* leaves open the possibility that a juror will not see it as proper to infer intention even if the available evidence suggests that death was a virtually certain consequence of the defendant's actions.⁶² We welcome the case as an important decision on the status of the current direction on intention for what is, after all, one of the most serious of offences and applaud the Court of Appeal for correctly maintaining the distinction between matters of substance and matters of evidence.

⁶² See the sources at, *op cit*, n 57. For example, in so called "mercy" killings, where the jury is sympathetic towards the defendant, the jury could return a "perverse" verdict. For further discussion see Schopp, *Justifications, Defences and Just Convictions* (1989) and Williams, "Provocation and Mercy Killing" (2001) 65(2) *Journal of Criminal Law* 149.

HONOUR KILLINGS: ISLAMIC AND HUMAN RIGHTS PERSPECTIVES

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The issue of honour killing has become very acute in the Muslim countries/Asia in general and has got the attention of media and human rights groups in Pakistan in particular. This comment traces the origin of the notion of honour killing using Pakistan as case study. It also looks at the causes and abuses of the honour killing tradition and explores the Islamic as well as the legal dimension of this endemic issue in Pakistan. In addition, the Islamic law and human rights law positions will be considered and compared, to see whether or not both are compatible. The issue whether the tradition of honour killing is grounded in religion or culture will be looked at as well, together with the question of whether it is Islamic law or public perception of honour and shame, which need change.

Killing in the name of honour has plagued Pakistani society for decades and has markedly increased in recent years. The incidents of honour killing take place in all social strata, but it is the uneducated men and women in less developed rural areas who are the most likely victims. Many cases of honour killing go unnoticed and unreported, and the perpetrators unpunished. The victims include men and women of all ages. However, the majority of victims are young and unmarried individuals. Women victims outnumber men since men are able to escape the wrath of an aggrieved family by fleeing to other parts of the country or finding sanctuary with neighbouring tribes; women, in contrast, have no refuge to resort to. The Human Rights Commission of Pakistan (HRCP) notes:

“Data collected by the HRCP indicated that there had been at least 379 cases of Karo Kari in Sindh during the first 10 months of 2001. Of the victims included 226 women, 151 men and two children. It was believed that the total number killed could be far higher, with some deaths remaining undocumented.”¹

The fate of women did not change in 2002 either. HRCP's 2002 annual report (released April 2003) states that 376 women were killed in Sindh, 278 in Punjab and 844 in North West Frontier Province in the name of honour.²

The notion of honour killing is neither confined to Muslim societies nor to Pakistan; rather it is an international women's human rights issue. Recently the *Guardian* (UK) reported: '[t]wo cousins were jailed for life yesterday for the murder of 21-year old Muslim bride who was stabbed to death in a

* Many thanks to Prof. Stephen Livingstone, Prof. Yvonne Galligan, Prof. Melvin J. Dubnick and Dr Gordon Anthony for their valuable comments and editing.

¹ HRCP, 'State of Human Rights in 2001' p 213.

² *Ibid.* 'State of Human Rights in 2002, p 247.

wedding day honour killing.³ The two cousins were angry at her (Sahjida Bibi) marriage with a divorcee and non-blood relative.

The BBC reported in September 2003 that, '[h]onour killing father begins sentence' in UK⁴ when an Iraqi Kurdish father slit 16-year-old daughter's (Heshu) throat in an honour killing after she embraced Western culture and began dating a Christian boyfriend. 'A young Sikh pregnant woman who had fled to London from Glasgow after marrying a person whom her family disapproved of, was allegedly killed a year ago, with a sword.'⁵ Nottingham crown court sentenced a woman and her grown up son to life imprisonment for murdering the woman's daughter for allegedly having a sexual relationship outside marriage.⁶ Kalpana Sharma notes: '[t]he Shirkat Gah report on 'honour killing' is about Pakistan. But there are many parallels in India too.'⁷ Three brothers axed two sisters for honour killing in Amman, reports BBC.⁸

What is Honour Killing?

The concept of honour killing in Pakistan is considered originally to be a Pushtoon-Baluch tradition, but the incidence of honour killings is far higher in the Sindh Province as well as Punjab (more specifically, the southern part of Punjab).⁹ The tradition is known as *Karo Kari* and *Siakari*. Both carry the same meanings. *Karo* literally means 'black man' and *Kari* 'black woman' in Sindh and *Siakari* is a different name used in regions like Baluchistan. According to common parlance, 'black man' and 'black woman' designate those who are guilty or suspected to have entered into illicit sexual relationships thereby defiling family/clan honour. The Supreme Court of Pakistan has defined '*Kala and Kali*' as 'adulterer and adulteress' respectively.¹⁰ The BBC referred to honour killing as the 'practice of women being killed by male relatives to redeem the family name'.¹¹ The reason of dishonouring a family name may not be illicit relation solely; it could be marriage and its dissolution against the wishes of parents as well. The recent killings of two young girls Sahjida and Hesue are notable examples. Amnesty International states:

"They are killed for supposed 'illicit' relationships, for marrying men of their choice, for divorcing abusive husbands.

³ The *Guardian* 'Cousins given life for bride killing' October 21, 2003.

⁴ BBC NEWS online version, 30/9/03. The story is also reported in *The Telegraph*, London on 30/9/03.

⁵ Vijay Dutt, 'National debate rages on honour killing' *Hindustan Times.com/UK*. October 7, 2003.

⁶ Amnesty International, 'Honour Killing of Girls and Women in Pakistan' September 22, 1999. ASA 33/018/1999.

⁷ Kalpana Sharma, 'No honour in these killings' *The Hindu* 3/11/02 (internet version).

⁸ BBC NEWS World edition, 10 September 2003 (internet edition).

⁹ Punjab, Sindh, Baluchistan and NWFP (North West Frontier Province) are the four provinces of Pakistan.

¹⁰ PLD 1977, Supreme Court, 153.

¹¹ See, BBC NEWS, *supra*.

They are even murdered by their kin if they are raped as they are thereby deemed to have brought shame on their family.”¹²

Honour Killing as Social Perception

In theory the relevant code of honour is equally applied to both men and women. In practice, however, the standard of honour and chastity is not applied evenly to men and women. Many men have extra marital ties that go unpunished. Cases of homosexuality are common in most parts of the country and are ignored, even tolerated.¹³ On the contrary, a woman can lose her life on the slightest suspicion of infidelity/unchastity. This is evident from the findings of HRCP and the wide difference between numbers of men and women killed. The woman is regarded as the repository of family honour and a simple allegation or rumour of sexual involvement outside marriage suffices for dishonouring the name of family. The only way of redeeming family honour is to murder the *Karo* and *Kari*, and for that mere suspicion of sexual relation suffices to warrant the killing. HRCP claims that of the total 722 cases of murder in which the victims were women ‘illicit relations’ had been mentioned as a possible motive for the murder in 204 of these cases.¹⁴ None of the accused (*Karo* and *Kari*) is furnished an opportunity to respond to the allegation. The truth of the allegation is immaterial. It is the public perception that matters.

A number of women are killed because they wish to marry someone against the wishes of their family. The parents and family in rural and tribal communities usually arrange marriages for their women even if the prospective husband and wife apparently do not like each other and the parents and family know this. Parents have to give formal permission and play the role of organisers. The women choosing spouses for themselves are sometime abducted and never heard of again without any police action being taken. Marrying a person of choice and seeking divorce without overt consent of the family is believed defiance of the honour scheme of man. Several women who have sought divorces through courts are injured or killed. Samia Sarwar, a young lady wanted to get divorce from her abusive and violent husband but her parents were against the dissolution of marriage. She left her house and took refuge in another province and contacted human rights lawyer to help but was shot dead in her counsel’s office in April 1999.¹⁵ Women victims of rape are also murdered irrespective of the fact that they have not consented to the act. The perception is that a woman raped shames the family and the community. Arbab Khatoon, who was raped by three men, lodged a complaint with police of what has happened to her. She was murdered seven hours after reporting to the police by her family for bringing dishonour to the family by going to the police and making it public.¹⁶

The perpetrators act under the so-called common notion of honour and societal pressure. The husbands, father, brothers and other close family

¹² See, AI report *supra*, p 1.

¹³ *Ibid.*

¹⁴ HRCP, ‘State of Human Rights in 2001’ p 213.

¹⁵ See, AI report, *supra*.

¹⁶ *Ibid.*

members take the onus of avenging the violators of their honour. Mehvish, an adult daughter of a former provincial Minister of NWFP, fell in love with the family's driver and escaped with him in 2001. She was found by her highly influential family and allegedly gunned down by her uncle and buried in an unmarked grave.¹⁷ This reflects that marriage and fidelity are not matters between husband and wife alone. It is matter of honour for the entire family and even tribes can become involved in some cases. This makes the life of woman dependent on the observance of social norms and mores in societal set up. The case of Rifit Afridi is notable instance. Rifit, a young girl from Pushtoon family, wanted to marry Khanwar Ahsan, a man who was not from her tribe and ethnic group. Her parents opposed the marriage and she left home and married Ahsan. They were showered with bullets causing serious injury when going to court for protection. They left Pakistan to seek asylum abroad to secure their life.¹⁸

Wider society often accepts the concept of honour and these killings are not regarded as crimes/offences. It is legitimate and appropriate punishment for those who go against the commonly perceived honour scheme and traditions. Those who kill *Karo* and *Kari* are called *ghairatmand* (possessing honour and brave) and there is no grief in the family. This is more a social and religious duty than an offence. Society supports the act lending legitimacy and continuity to the practice. The victims are condemned and dishonoured for good even after death. In some areas they are buried in places separate than others, and prayers are not offered for their salvation on the traditional religious days. An eyewitness of Samia's murder scene reported that her mother walked away 'cool and collected . . . from the murder of her daughter as though the woman slumped in her own blood was a stranger'.¹⁹

Very few cases of honour killings are reported to the police as murder cases. The police do not take cognisance of the offence of the incident despite it being an arrestable offence, for it is perceived as a private and family affair. In honour killings, provocation is often taken by the courts as mitigating circumstances, and the courts tend not to impose harsh penalties on the perpetrators. Lenient sentencing is thus also one of the reasons for the continual honour killing. Speakers at a seminar in Peshawar organised by Non Governmental Organisations and United Nations Development Programme in 2001 'pointed out that most of the accused in cases involving killing for honour were acquitted by courts due to insufficient evidence and defective investigations'.²⁰ Police and court officials hail from the same social setting and tend to share the perceptions of honour and morality of the litigant. Low education and social and state apathy play major roles in the continuity of honour killings. When human rights activists and organizations intervene, they are threatened and accused of misleading the women, disrupting the social fabric and damaging Islamic values. The killers are the protagonists of upholding the customs and traditions of the society.

¹⁷ HRCP, 'State of Human Rights 2001', p 214.

¹⁸ Human Rights Watch World Report 1999: Pakistan.

¹⁹ See, AI's report, *supra*.

²⁰ HRCP, 'State of Human Rights in 2001', p 215.

Abuses of Abuse

Honour killing scheme/notion is abused in several ways. It does not mean that it has legitimate form as well. What is suggested here is that large segment of society perceive it as the right course to adopt to protect family honour when defiled or threatened. The law before 1990 also used to give concession in sentencing on the basis of 'grave and sudden provocation', which was considered as mitigating circumstance in these cases. In the Pakistani society there is a custom of paying compensation (blood money) to the family whose honour has been damaged in case the alleged *Karo* has either escaped killing or wants to compromise the matter sparing his life. The compensation could be in the form of giving woman in marriage to the aggrieved family or money or land but giving woman as form of compensation is very popular and/ or the only acceptable form in some regions.

Some tribes have subverted this custom. They kill women of their families on the pretext of protecting honour of the family hoping to obtain the rewards offered to the aggrieved family. The unscrupulous design may be to get into marriage a woman of another family who is otherwise difficult to get, to make money or acquire land in certain cases or to get lenient sentencing if the matter ends up in the court. HRCP reported that in many cases a woman was declared '*Kari*' . . . to settle monetary disputes or property issues'.²¹ It seems that honour code is used as an excuse to promote and protect vested interests. The absurdity of the notion of honour killing comes out when *Karo* and *Kari* become 'white' (clean) after the issue is compounded and compensation, in whatever form, is paid.

Islam and Honour Killing

Many people assume that the practice of honour killing is based on the tenets of Islam. This view is erroneous and has nothing to do with the teachings of Islam. Islam provides strict evidential prerequisites for punishing the adulterous: testimony of four witnesses before the *Qazi* (Judge in Islamic state) and the man and woman are given an opportunity of leading evidence to prove themselves innocent. The Koran declares: "If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them . . ." (4:15).²² Those who fail to produce the required evidence, they should be punished. The Koran clearly says: "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) – flog them with eighty strips and reject their evidence ever after" (24:4).²³ These two verses of the Koran manifest that no one could take the law into one's own hands since it is against the grain of the criminal justice system of Islam. The only way allowed to take life by the Koran is according to law. The Koran commands: "whether open or secret; take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom" (6:151). Islam is the state religion of Pakistan and the Koran is the

²¹ HRCP, 'State of Human Rights in 2001', p 215.

²² A. Yousaf Ali, *The Meaning of the Holy Qur'an*, (Amana Corporation, Maryland, USA, 1991) p 189.

²³ *Ibid*, p 866.

supreme law and this is why the Constitution of Pakistan also stipulates security of the person²⁴ and that every one should be dealt with in accordance with law.²⁵

Amnesty International in 1999 asked the Council of Islamic Ideology²⁶ for its view on whether or not ‘honour’ killings are lawful according to Islam. It replied in its letter of 22 April 2000 that the Council had, in its 139th session on 6-7 December 1999, decided as follows:

“Although sexual immorality is one of the major sins according to Islam for which Islam has prescribed very severe punishment, nobody is allowed to take the law in his hands. Wilful homicide, whatsoever be the motive, is a culpable act tantamount to *qatl-e-amd* [murder] liable to *qisas* [equal punishment for the injury suffered based on the principle of an eye for an eye and a tooth for a tooth]. The Council for its opinion relied on an authentic *hadith* reported by Muslim, according to which a companion, Hazrat Saad Bin Ubadah, asked the Prophet (P.B.U.H. [peace be upon him]): if a person finds a man with his wife, shall it be lawful for him to kill that man? The Prophet (P.B.U.H.) replied: ‘No’. In another hadith on the same subject, Hazrat Saad Bin Ubadah asked the Prophet (P.B.U.H.): If I find a man with my wife should I wait till I bring forth four witnesses? The Prophet (P.B.U.H.) said: ‘Yes’.”²⁷

The Supreme Court of Pakistan has made a reference to the case of Owamer Ijlani brought before the Prophet Muhammad who suspected his wife of having an illicit relationship. The Prophet, instead of telling him to punish or divorce his wife, asked him to produce four witnesses to support his accusation otherwise he would be punished under *qazf* (false accusation) according to the Koran.²⁸

The Islamic criminal justice system has no room for either doubt or suspicion. It underscores the observance of certain procedures and a minimum standard of proof furnishing several guarantees to the accused. The High Court in Pakistan remarked:

“It is another fundamental principle of Muslim Law that in order to inflict *hadd* or *tazir*²⁹ the evidence shall be proved beyond any reasonable doubt. It is therefore, a fundamental rule of Islam that doubt cannot be the basis for punishment but provides a ground to pardon.”³⁰

²⁴ Art 9.

²⁵ Art 4.

²⁶ This is constitutional body responsible for advising the government whether or not a particular law is Islamic. It also has to make recommendations for bringing the existing in conformity with Islamic teachings.

²⁷ Pakistan Insufficient protection of Women, AI Index: ASA 33/006/2002.

²⁸ 2000 SCMR 406.

²⁹ *Hadd* is punishment fixed either by the Koran or the *Sunnah* whereas *tazir* is the punishment where the court has discretion regarding the amount of punishment to be given in a given case.

³⁰ PLD Quetta 1995, p 83.

The Federal Shariat Court of Pakistan rejected the presumption that a male and female living in the same room must have committed *Zina*.³¹ In another case the Shariat Court ruled that living together might cause suspicion, which is not enough for the conviction of *Zina*.³²

Honour Killing and the Law in Pakistan

Killing in the name of honour became the focal point of national as well as international discussion in early nineties. All concerned, including people belonging to judiciary, agree on one point, namely that lenient sentencing by the courts is one of the major reasons for the persistence of honour killing. There are two distinct stages in the development of the relevant provisions in Pakistan's legal system: the periods of colonial law (1947-90) and Islamic law (introduced in 1990).

(a) Colonial Law (1947-90)

It has been a long standing tradition for trial and superior courts to award lesser punishment to those accused of killing in the name of honour taking the plea of 'grave and sudden provocation' and 'protecting the honour' of family. A murder committed under the heat of 'sudden and grave provocation' and 'loss of self-control' was considered manslaughter, not murder under the colonial law, which Pakistan inherited. This concept of diminished liability was contained in exception 1 to section 300 of the Pakistan Penal Code, 1860.³³ The repealed section reads: "culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation. . . ." Commenting on exceptions to section 300, Justice Aftab Hussian says: "the first exception is where death is caused when the offender was deprived of self control by grave or sudden provocation or by mistake or accident."³⁴ In the case of *Kamal v The State*³⁵ the husband killed his wife and her paramour on the spot, having seen them in a compromising position. He presented himself to the police stating that the man killed was not related to him and seeing him in my house having sex with my wife "I lost control of myself and shot them on vital parts resulting into their death. They were 'Kala Kali' and I have done nothing wrong but defended the honour of my self and family."³⁶ The trial court sentenced him to life imprisonment. The accused appealed to High Court, which upheld the conviction. He appealed to the Supreme Court, which ruled by majority that the case of the accused fell within the purview of exception 1 of section 300 and the accused was awarded lesser punishment accordingly. The court observed:

"As the appellant case falls under the first exception to section 300 P. P. C., it means that he killed his wife and her paramour "whilst deprived of the power of self-control". Therefore, the sentence of transportation is excessive, because transportation

³¹ PLD 1983 FSC 497.

³² PLD 1983 FSC 522.

³³ Pakistan came into being in August 1947 adopting the colonial penal code made in 1860.

³⁴ PLD 1980, Federal Shariat Court, p 1.

³⁵ PLD 1977 SC 153.

³⁶ *Ibid.*

is one of two possible sentences for a conviction under section 302 P. P. C.”³⁷

In 1980, the colonial concept of offences related to murder and ‘hurt to human body’ (composed by Lord McCauley’s Commission in 1860) was declared contrary to the principles of the Islamic criminal justice system. The Shariat Bench of NWFP High Court held in the case of *Gul Hassan Khan v Government of Pakistan and Another*³⁸ that the concept of ‘grave and sudden provocation’ has no place in the Islamic criminal justice system. The Federal Shariat Court in the case of *Mohammed Riaz*³⁹ endorsed the view of NWFP High Court. Later, the case of *Gul Hassan Khan* came before the Shariat Appellate Bench of the Supreme Court of Pakistan which very precisely laid down that ‘[p]rovisions of Ss 299 to 338, Penal Code which deal with offences against human body are repugnant to the [i]njuncts of Islam . . .’ and recommended amendment.⁴⁰ The Government of Pakistan accordingly amended the said sections in 1990 in order to bring them in line with the principles of Islamic criminal justice system.

(b) Islamic Law Post 1990

The amended law based on the tenets of Islam has discarded the notion of sudden and grave provocation serving as mitigating circumstances resulting into lesser penalties for the accused. Amended section 300 of Pakistan Penal Code defining *qatl-e-amd* (deliberate murder) reads:

“Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, or by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-I-amd*.”

The amended section does not provide an exception to the offence of *qatl-i-amd* committed on the ground of ‘grave and sudden provocation’. The High Court in Baluchistan ruled: ‘section 300 as amended does not provide any exception in offence of *qatl-i-amd* if committed due to grave and sudden provocation’.⁴¹ The Punjab High Court observed: ‘Injunction of Islam in the form of *Ahadeeth*⁴² relating to [*qatl*] [murder] on account of [*Ghairat*]⁴³ does not find any reflection in the specific provisions relating to [*qatl*] which now stands incorporated in the Pakistan Penal Code.’⁴⁴

According to amended law, *Qatl-i-amd* has three categories: 1) *qatl-i-amd* punishable with death as *qisas*,⁴⁵ 2) *qatl-i-amd* punishable with death or life imprisonment as *tazir*, and 3) *qatl-i-amd* punishable with imprisonment of

³⁷ *Ibid*, p 153.

³⁸ PLD 1980 Peshawar, p 1.

³⁹ PLD 1980 FSC 1.

⁴⁰ PLD 1989 SC 633. All these provisions deal with murder hurt and related matters.

⁴¹ PLD Quetta 1995, p 83.

⁴² What the Prophet Muhammad said, did or approved by remaining silent. *Hadith* is the second source of Islamic law after the Koran.

⁴³ A general term used for bravery and honour.

⁴⁴ PLD 1994 Lahore 392.

⁴⁵ *Qisas* means retaliation, an eye for an eye and a tooth for a tooth.

either description for term which may extend to twenty five years where the punishment of *qisas* is not applicable according to injunctions of Islam.⁴⁶

Inconsistent Application of the Amended Law

Despite the amendment in the Pakistan Penal Code and the clear position of Islamic law on the issue of honour killing, the superior courts apply the law inconsistently and award lenient sentences even now to those accused of honour killing. These judgments are based on the exception annexed to the old definition of murder contained in the repealed section 300 of the Penal Code. The case reported as *National Law Reporter 1999 Criminal 11* is the most recent case in point. In this case the accused had killed his daughter and her paramour on the basis of *Siakari*. The dictum laid down in the judgment reads:

“Murder committed after being overpowered by a wave of family honour and *Ghairat* would be no offence. The conviction against a father for killing his daughter and her paramour after seeing them in compromising position is set aside.”⁴⁷

Similarly, in another case the court made the following observation:

“In the instant case, the deceased entered into the house of the accused without his permission and at the dead of night and while the deceased was violating the honour of his wife, he surprised him, picked up his *chadar* [long piece of cloth usually carried by men to cover themselves from rain, hot sun, cold etc.] which was lying nearby and put it around his neck to expel him out of the room and the deceased died of asphyxia. *The appellant could do it. He had to stop him. He therefore, had committed no offence. He was left with no other course.*” [emphasis added].⁴⁸

The Supreme Court of Pakistan overturned the ruling in the above case stating that ‘it was not right to hold that the accused had committed no offence and was not liable to any punishment’.⁴⁹ The court said about the trial court’s conviction of the accused “the learned trial judge assumed, and assumed wrongly, that that section [old 300] was still on the statute book; in fact, that section had been repealed on the 5th of September, 1990.”⁵⁰

The case of *Ali Mohammed*⁵¹ is a celebrated instance of honour killing. In this case the husband killed his wife and a man on the allegation of having sex. The court acquitted the accused with the following observations: “[*qatl-i-amd* liable to [*qisas* takes place only when the person murdered is not liable to be murdered and is *Masoom-ud-Daman* (innocent)”. This is the correct Islamic viewpoint on how murder is to be punished with death as *qisas*. The court also observed that the ‘accused as custodian of honour of

⁴⁶ See section 302 of Pakistan Penal Code.

⁴⁷ NLR 1999 Criminal 11.

⁴⁸ 1993 P CR L J 564

⁴⁹ PLD 1996 SC 274.

⁵⁰ *Ibid.*

⁵¹ 1993, Pakistan Criminal Law Journal, p 557.

his wife had the right to kill the deceased while he was engaged in a sex act with his wife and he had not earned liability of [*q*]isas or [*t*]azir or even [*d*]iyat.’ This view is contrary to the principles of Islam and the rule laid down in the case of *Gul Hassan Khan*. The correct legal position is that when the accused proved beyond reasonable doubt the allegation of *zina*, then he will be exempted from death sentence as *qisas* but will still be subject to *tazir* punishment for taking the law into his hand. For instance, if a husband is provoked by seeing his wife having sex with another man and kills them on the spot, but he later takes in trial the plea of ‘grave and sudden provocation’, that person will not be sentenced to death as *qisas* if he establishes the fact that he had murdered the adulterers for committing *zina* carrying the death penalty. In that case he will be punished under *tazir*, as he is guilty of committing the offence against state by taking the law into his own hands. In case the accused defaults by providing the threshold proof provided in Islamic law, then he is subject to *qisas* for murder taking the law into his own hands. The lesser penalty is not for the reason that he had acted under ‘grave and sudden provocation’ and ‘loss of self control’ but because he killed the persons involved in an action carrying death punishment and he established the guilt of the deceased beyond reasonable ground.

Honour killing became the subject of intense debate in the year 2000 and gripped the attention of all and sundry due to increased incidence and some appalling incidents. The seven-member Bench of the Supreme Court took notice of it in the case of *Abdul Zahir* while explaining the scope of grave and sudden provocation. The Supreme Court ruled:

“All cases of grave and sudden provocation would not *ipso facto* fall within the purview of S 302 (c), P. P. C. particularly those of *qatl-i-amd* of wife, sister or other very close female relatives at the hands of males on the allegation of *Siakari*”.⁵²

The court also affirmed the precedent laid down in the case of *Gul Hassan Khan*. The ruling holds the field and is binding on all courts according to article 189 of the constitution of Pakistan.

International Human Rights Law

The right to life⁵³ and immunity from torture, cruel and inhuman treatment,⁵⁴ equal protection and equality before law⁵⁵ and the right to fair trial⁵⁶ contained in international human rights instruments have undisputedly acquired the status of customary international law. Pakistan had ratified the Convention on the Elimination of All Forms of Discrimination Against Women in 1996, which stipulates that states who are party to the Convention shall take all appropriate measures, including legislation, abolishing/amending existing laws, regulations, customs and practices

⁵² 2000 SCMR 406.

⁵³ Universal Declaration of Human Rights, 1948, art 3.

⁵⁴ *Ibid*, Art 5. Similar provisions are arts 5 and 7 of the UN Covenant on Civil and Political Rights, 1966. Art 9 guarantees the security of person.

⁵⁵ UDHR, art 7.

⁵⁶ *Ibid*, Art 10.

constituting discrimination against women.⁵⁷ The foundation of the ‘equality doctrine’ was laid down in the UN Charter and formulated into legally binding instruments later on known as the International Bill of Rights. The realisation of this principle is one of the prime goals of the United Nations. The Preamble to the Charter declares that its objective is:

“To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”

Furthermore, Article 1 proclaims that one of the purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all ‘without distinction as to race, sex, language or religion.’

Other references in the Charter to non-discrimination on the basis of sex are in articles 13, 55(c) and 76 (c). Article 13(b) declares that studies shall be initiated

“promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

The principle of non-discrimination on the basis of sex is also reaffirmed in articles 55(c) and 76 (c). The member states ‘pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in article 55.’⁵⁸ ‘The Charter is the foundational treaty of contemporary international law and prevails over all other international obligations.’⁵⁹ Article 103 of the Charter imposes the same obligations on the contracting parties.

CONCLUSION

From what has been said above, two points could be drawn in conclusion; firstly, that honour killing has no foundation in the religion of Islam and the constitution and penal law of Pakistan. It is grounded in Muslim culture but not Islam or Islamic law. It is ignorance of Islam, law and cultural biases that persuade people to take the law into their own hands and courts to misinterpret the law in the cases of honour killing. Secondly, usually there is a gap between the ideal Koranic law (what is contained in the Koran) and state practised statutory Islamic law but in the case of honour killing, there is no such gap and the prevalent law is in perfect match with the Koran and international human rights standards. Despite this legal reality, the honour killing industry goes unabated with many women losing their lives everyday. Pakistan is under Islamic, constitutional and international obligations to end the honour killing industry and its parallel tribal justice system but unfortunately, the government takes no action. HRCP, quoting Amnesty

⁵⁷ Convention on the Elimination of All Forms of Discrimination against Women, 1979. Art 5.

⁵⁸ United Nations Charter, 1945.

⁵⁹ Courtney W. Howland, ‘Women and Religious Fundamentalism’ in K. D. Askin and D. M. Koeing (eds) *Women and International Human Rights Law* Vol 1 (Ardsey, NY: Transitional Publishers 1999).

International, reports⁶⁰ that there had been little action to prevent such crimes (honour killing), even though they were recognised under the law as murder.

⁶⁰ See, HRCP's annual report 2002, *supra*.