

**Unmarried Cohabitation and the Constructive Trust: An Exercise in
Flawed Equality**

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This thesis is submitted to fulfil the requirements of the degree of Doctor of Philosophy.

Declaration

I declare that this thesis is my own work, and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

Georgina May Collins

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It's "alright".

Abstract

Cohabitation has become increasingly widespread, yet the law refuses to recognise the consequences of the breakdown of such relationships. The inaction of Parliament has left it to the courts to distribute proprietary rights based upon the law of trusts. However, the focus on purely financial contributions, penalises those who are most vulnerable. The most problematic consequence of this is that the approach taken to cohabitation replicates gender inequalities which are prevalent throughout society. Attempts to achieve formal equality and those discourses which indicate such an approach, have done nothing to achieve any form of 'real' equality. Unmarried cohabitation serves as an example of the wider implications of inequality, and demonstrates the potential for an approach which recognises difference to change social reality both within the legal sphere and without.

Engaging in a desk-based inquiry which analyses case law and legislative proposals through a socio-historical lens allows for differing approaches to equality to be identified. Through this process, connections are drawn between the socio-legal construction of women, the rhetoric of the judiciary, and the equality approach adopted and implemented. This piece aims to demonstrate that formal equality is flawed. The law's continued focus on the concept merely replicates the gendered nature of resolving cohabitation disputes, thus undermining equality in practice. What is necessary is for difference to be recognised, adopting an approach which lies between substantive and formal equality. This would allow for the recognition and alleviation of the gender bias inherent in both society and the CICT regime.

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Chapter 1 - Introduction

1.1 Introduction

The perception that we have achieved gender equality has meant that the law frequently adopts a formal approach to equality, treating men and women the same. Despite this approach being admirable in theory, in practice the law's refusal to acknowledge socially constructed gender differences, and the impact of childbearing/rearing has on women, means that pre-existing inequalities are reinforced rather than addressed. This thesis examines the application of substantive/formal equality within the context of the common intention constructive trust (CICT), and its impact on women. The equality approaches adopted in relation to the CICT has fluctuated throughout its application which makes it a significant area for further enquiry. In order to view these developments in context, and in order to establish the links which exist between law and society, the development of the constructive trust is examined within its historical context.

In contrast to the legislation designed to promote fairness which applies to cases involving divorce/dissolution, there is no automatic protection for unmarried cohabiting couples on breakdown.¹ Despite the increasing frequency of such relationships, their legal rights remain unsatisfactory and centred on gendered property law principles.² In particular, the regime applicable in sole-ownership cases, in which the courts determine proprietary interest based on purely financial criteria, has historically left women without rights in their homes. In adopting a supposedly gender-neutral approach to

¹ See Matrimonial Causes Act 1973 and Civil Partnership Act 2004. That is not to say that the law concerning marriage/civil partnership is without critique. However, it is beyond the scope of this thesis to explore those issues.

² See [4.3],[5.7],[6.8] and [7.4].

contribution, attempting to adhere to a formal notion of equality, they have instead promoted and replicated the inequality found within legal and societal institutions.

Recent research has revealed that the UK has a “pro-equality majority”,³ with over 83% of people believing that there should be equality between men and women.⁴ Although progress has been made towards this aim, it is yet to be fully achieved. There have been a variety of methods employed in attempts to achieve equality.⁵ However, the primary focus on formal equality, treating men and women as if they were the same, has historically proven to be an inadequate tool in facilitating equality in practice. While the concept of gender equality has been embraced by law and society, inequalities persist because the principle of equality fails to acknowledge differences which exist in practice.

Within the context of unmarried cohabitation, despite women’s increased entry into the workplace, and the appearance of equality with men, there are still those who are unable to make significant financial contributions to the home, and in certain circumstances, are unable to make any at all.⁶ As such, the adoption of formal equality by the courts, rather than promoting equality of outcome, has instead placed women in a vulnerable position. In treating men and women as if they were the same, whilst adopting masculine norms to determine contributions, the courts ignore the ways in which women are treated differently within society.⁷ In refusing to acknowledge those differences which arise by virtue of sex and gender for women and those who perform

³ Fawcett Society., *Sex Equality: State of the Nation 2016* (London: Fawcett, 2016), 2.

⁴ *ibid.*, 5.

⁵ See Chapters 5-7.

⁶ *ibid.*

⁷ See Chapter 2.

a traditionally *feminine* role, the result of striving for equality instead leads to the perpetuation of those inequalities which already exist.⁸

Due to the gendered implications of the application of the CICT, it is clear that this is an issue inherently tied up with inequality. As such, the overarching aim of this thesis is to demonstrate the way in which differing forms of equality have been adopted within the case law. Through examining the consequences this can have on the outcome of such cases, it is contended that the purely formal approach to equality is inherently flawed. The in-depth analysis of cohabitation, here, acts as a case study for the nature of equality within society in its entirety, and the implications of the application of differing forms of equality on those considered *different*.

1.2 Methodology, Theoretical underpinnings and Definitions

This thesis is a desk-based inquiry that examines the judgments from a selection of CICT cases so as to test them against differing models of equality. This is done in order to identify the gendered impact of the application of formal/substantive equality. The cases that form the basis of the case analysis have been selected as they are representative of the cases found within traditional Land/Property Law textbooks.⁹ Such cases have been central to the development of the CICT, as without legislative footing, the CICT was borne of, and continues to be developed by, the common law.¹⁰ They have also featured heavily within the academic literature surrounding the subject.¹¹ The cases have not been selected on the basis of the level of the court, the

⁸ Sex here relates only to childbirth and breastfeeding: see [1.2.2]; [2.4].

⁹ See for example Dixon M., *Modern Land Law* (10th ed) (Oxford: Blackwell, 2018); Thompson M. & George M., *Thompson's Modern Land Law* (6th ed) (Oxford: OUP, 2017); McFarlane B., (et al) *Land Law* (Oxford: OUP, 2017); Gray K. & Gray S., *Elements of Land Law* (5th ed) (Oxford: Blackwell, 2008).

¹⁰ See Chapter 4.

¹¹ See for example the literature drawn on in [4.3].

outcome of the case, or the approach adopted by the court. This selection allows for the case law to be viewed and analysed within the appropriate historical context, through an equality lens.

1.2.1 Feminist Legal Theory

This thesis is theoretically informed by feminist legal theory. It is necessary to note that both feminism and feminist legal theory embody a number of distinct approaches, perspectives and concerns “that make sweeping generalizations difficult [sic]”.¹² However, it is possible to identify commonality between these diverse feminisms. Of central importance within the context of this thesis is the way in which feminist works provide “an analysis of women’s subordination for the purpose of figuring out how to change it”.¹³ Within a legal context, feminist legal theory focusses on “[h]ow gender has mattered to the development of the law and how men and women are differently affected by the power in law”.¹⁴

Chapters 5-7 of this this thesis trace the socio-legal and economic subordination of women with the intention of providing insight into which approaches have lessened the impact of this continued subordination within the context of the CICT. The masculinity of the law, and its role in replicating masculine norms brings with it a number of concerns about the treatment of women by the law.¹⁵ This is particularly problematic

¹² Fineman M. A., ‘Feminist Legal Theory’ (2005) 13(1) *Journal of Gender, Social Policy and the Law* 13, 13. For discussion of each of the four branches of feminist legal theory see Becker M., (et al) *Feminist Jurisprudence: Taking Women Seriously* (St Paul: West, 1994), 68-98. However, the distinction between equality/difference is the focus of this thesis: see Chapter 3.

¹³ Gordon L., ‘The Struggle for Reproductive Freedom: Three Stages of Feminism’ in Eisenstein Z. R., *Capitalist Patriarchy and the Case for Socialist Feminism* (New York: Monthly Review Press, 1979), 107.

¹⁴ Chamallas M., *Introduction to Feminist Legal Theory* (New York: Aspen Publishers, 2003), xix.

¹⁵ See for example Finley L., ‘Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning’ (1989) 64 *Notre Dame Law Review* 886; Green K., ‘Being Here – What a Woman Can Say About Land Law’ in (ed) Bottomley A., *Feminist Perspectives on The Foundational Subjects of*

when supposedly neutral criteria is applied without consideration of difference.¹⁶ As a result of this analysis, this thesis proposes that a blended approach of sameness and difference is the most effective way in which to ensure gender equality within this context.

Those who adopt a feminist legal theory perspective generally subscribe to the idea that the law has contributed, historically to the subordination of women, but that it has the potential to be reworked in order to change the way in which gender is perceived and the implications of such perceptions to be shifted in order for equality to progress. This thesis identifies the law as having contributed to the subordination of women, both specifically within the CICT, and within a wider legal context. It also identifies those instances where the law has, and could continue to be, reformed so as to alleviate the inequalities that it has been allowed to produce. Feminist legal theorists are “almost universally committed to a social constructionist stance”.¹⁷ That is, that gender/sex are not biologically determined, but rather are produced by culture. It is this understanding of gender/sex that is adopted within this thesis, which is explored in detail below.

1.2.2 The ‘Woman’ Problem¹⁸

The term ‘women’ is used within this thesis without subscribing to the view that they form a homogenous group. Indeed the diversity women as a ‘group’ possess in terms of class, race, sexuality, religion and the different treatment/experiences of women must be acknowledged. However, so as to analyse the patterns of gender inequality from the

Law (1996: London, Cavendish Publishing), 93. Lacey N., *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998), 2; Smart C., *Feminism and the Power of Law* (London: Routledge, 1989). See also [2.4.5].

¹⁶ The issue of faux-neutrality is analysed throughout this thesis.

¹⁷ Lacey (n15), 3.

¹⁸ See [2.4].

1960s onwards, the commonality of many women's experiences/treatment historically are discussed as distinct, from that of men generally speaking, as it is women who tend to be the subject of institutional and societal oppression and subordination. Adopting MacKinnon's approach, when speaking of the socio-legal treatment of women in this context is:

“not to invoke any abstract essence or homogeneous generic or ideal type, not to posit anything, far less a universal anything, but to refer to this diverse and pervasive concrete material reality of social meanings and practices”.¹⁹

The use of woman/women/femininity within this thesis allows for feminist concerns which arise from overlaps and indirect connections between women's diverse historical and cultural situations to be analysed and addressed.

In order to clarify this, I use the term women to denote gender as opposed to biological sex. This is described by Haslanger as:

“S is systematically subordinated along some dimension (economic, political, legal, social, etc.), and S is ‘marked’ as a target for this treatment by observed or imagined bodily features presumed to be evidence of a female's biological role in reproduction”.²⁰

The use of woman/women to denote gender rather than biological sex developed as a result of the feminist need to develop terminology in order to counteract sexist injustices; allowing discussion of ‘women’ without giving tacit credence to biological determinism or essentialism. This construction of gender is directly linked with the Butlerian notion of performativity, that:

¹⁹ MacKinnon C. A, ‘From Practice to Theory, or What is a White Woman Anyway?’ (1991) 4(13) *Yale Journal of Law and Feminism* 13, 16.

²⁰ Haslanger S., ‘Gender and Race: (What) Are They? (What) Do We Want Them To Be?’ (2000) 34(1) *Noûs* 31, 36 & 39. In this context S is used to refer to subject.

“Gender is not something one is, it is something one does; it is a sequence of acts, a doing rather than a being. And repeatedly engaging in ‘feminising’ and ‘masculinising’ acts congeals gender thereby making people falsely think of gender as something they naturally *are*”.²¹

Given that society has a tendency to socialize individuals based on their biological sex, those who are socially denoted as women, whether or not they individually define as such are included in this definition.²² Many of the ways in which women are perceived/treated as other or lesser, and which lead to a reduction in women’s ability to contribute are derived from how such assumptions have been enshrined within social institutions.

What ought to be noted however, is that those who are biologically female face the additional ‘burden’ of the reality/expectation of childbearing, which impacts their ability to earn despite attempts to regulate against this in the employment sphere.²³ As Eisenstein states “the biological definition of mother grasps only a small part of the meaning of motherhood in patriarchal society. Motherhood also involves the notion of woman as a caring, emotional, dependent being”.²⁴ As a result, the oppression resultant from motherhood is both due to the fact of childbearing in and of itself, but also the way in which society has shaped the construction of motherhood and the gendered assumptions therein. As such the gendered impact of the current law regulating the breakdown of cohabiting relationships has clear ties with issues of inequality within wider society. It is only by recognising the ways in which men and women are assumed

²¹ Butler J., *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 25.

²² See [2.4].

²³ See Chapters 5-7 and [3.3.4].

²⁴ Eisenstein Z. R., *The Radical Future of Liberal Feminism* (London: Longman, 1981), 16.

to adopt different roles, and the way in which society and institutions treat them differently, can any form of equality of outcome be achieved.

1.3 Societal Change: Cohabitation Context

Cohabitants are the fastest growing family form in Britain having more than doubled over the last ten years and that growth is set to accelerate, it is one of the most marked changes in the formation of families in recent years.²⁵ It has been predicted that the number of cohabiting couples would rise to 3.8 million by 2031.²⁶ That report was published in 2006, the latest figure of 3.3 million in 2016 indicates that such the previous estimate may be conservative.²⁷ Given the increasing levels of cohabiting couples, the inequality which results from the law in its current form has the capacity to impact a considerable number of individuals.

Though cohabitation encompasses a wide variety of living arrangements, the focus of this thesis is on cohabiting ‘couples’. There is no consistent definition of cohabitation as it relates to unmarried couples. As the Law Commission notes:

“in many parts of the current law, cohabitation is defined by analogy with marriage or civil partnership: two people who are neither married to each other nor civil partners but who are living together as husband and wife or as if they were civil partners”.²⁸

²⁵ See ONS., *Statistical Bulletin: Families and Households in the UK 2016* (4 November 2016), 4; Douglas G., Pearce J., & Woodward H., *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Cardiff: Cardiff University, 2007), 2.

²⁶ Law Commission., *Cohabitation: The Financial Consequences of Relationship Breakdown* (Consultation Paper No 179: 2006), 2.48.

²⁷ ONS, (n25), 2.

²⁸ Law Commission, (n26), 3.4.

Describing cohabiting couples as those living in a marriage-like relationship can be critiqued as reinforcing the misunderstandings related to common law marriage and for ignoring the fact that many couples cohabit due to their opposition to marriage. However, this definition allows for the necessary degree of specify regarding those who have/should have rights/obligations by virtue of the nature of their relationship. Therefore, as regards the use of the phrase ‘cohabiting couple’ in this thesis, this phrase is used to specifically denote unmarried cohabiting couples who are in ‘marriage-like’ relationships.

Cohabitation has made its transition from couples covertly ‘living in sin’ to an accepted family form.²⁹ The shape of the family in Britain is continually changing, and there has been a considerable shift in the last 50 years. The ‘traditional’ family, inseparable from marriage, based on the patriarchal division of the male breadwinner and female homemaker is no longer the sole family norm. Yet, despite the increasing diversity in family form, there remains a level of continuity in the gender roles ascribed to couples regardless of whether or not they are accurate/appropriate.³⁰ In addition to this, it is also the traditional notion of the family which the legal system repeatedly validates and attempts to reinforce/protect.³¹

²⁹ See Chapters 5-7. The Law Commission has acknowledged the “public acceptance of cohabitation”: Law Commission., *Intestacy and Family Provision Claims on Death Executive Summary* (Law Com 331, 2011), 33. Research also indicated that 67% of respondents agreed that it was “all right for a couple to live together without intending to get married” Barlow A., (at al) ‘Just a Piece of Paper? Marriage and Cohabitation’ in Park A., (et al.) (eds.) *British Social Attitudes: the 18th Report* (2001), table 2.2.

³⁰ McRae S., *Changing Britain: Families and Households in the 1990s* (Oxford: Oxford University Press, 1999), 26 – 28.

³¹ See Chapters 3, and 5-7.

1.4 The Consequences of Embracing ‘Equality’

The overarching concern which arises from the current position of cohabitants explored within this thesis, is that it mirrors gender inequality elsewhere in society. It provides a detailed examination of the way in which different forms of equality manifest within socio-legal structures, and the consequences of adopting a formal approach which is out of sync with the lived experience of women. In particular, the focus on purely financial contributions penalises those who are most vulnerable. This can be seen most clearly within the context of ‘sole-ownership’ cases.³² Sole-ownership cases are those in which only one party within the cohabiting relationship has contributed financially to the purchase price or mortgage instalments with regard to the property at the centre of the dispute, as this is the only form of contribution currently recognised by the law.³³ The antiquated law under *Lloyds Bank v Rosset* is still arguably binding in such cases and even where the approach of the courts seems progressive, the capacity for progress is undermined by the unwillingness for the courts to continue developing the CICT without the consent of Parliament.

The inadequacies of the law concerning the breakdown of cohabiting relationships is a gendered issue. Although this is discussed in detail in the subsequent chapters of this thesis, it is pertinent to provide an overview of the key points which ought to be acknowledged. First is the uneven distribution of labour in the home.³⁴ Although the socio-economic position of women has improved and the proportion of women entering the workplace has increased, it is still women who do the majority of unpaid labour

³² Identified in the law [4.2.1][4.2.3];[4.3.2] and in practice [5.7],[6.8] and [7.4].

³³ *Lloyds Bank v Rosset* [1991] 1 AC 107.

³⁴ See for example Crompton R. & Lyolette C., ‘Who does the Housework? The Division of Labour within the Home’ in Park A. (et al.), (eds), *British Social Attitudes: the 24th Report* (London: Sage, 2008) 52; Breen R. & Cooke L., ‘The Persistence of the Gendered Division of Domestic Labour’ (2005) 21(1) *European Sociological Review* 43.

even in dual-earner households. Further to this, the difference in the treatment of women within the public/private spheres remains. What needs to be emphasised is the importance of the relationship between one's placement in either sphere. It is not merely biological distinctions between men/women for example childbirth and breastfeeding, stereotypes which have become gender norms integrated into accepted discourses also have a role in positioning the feminine within the private sphere. As such the focus of this thesis is on gender and not purely biological sex.

Historically, the binary construction of male and female has been continually reflected by the courts.³⁵ Women were only able to secure their rights when the judiciary depicted them as victims, “reinforcing stereotypes of weakness”.³⁶ It has been stated that the “very subject of women is no longer understood in stable or abiding terms”.³⁷ However, that ought not to preclude us from recognising acts which have been gendered. As Beresford recognises “gender is not something a person *is*, rather it is something a person *does*”³⁸ a stance based in Butlerian thought. This thesis will go further in stating that in neglecting to recognise the difference between gendered behaviours, the courts, though now seemingly acting with equality in mind are in practice denying women proprietary rights by ignoring the inherent difference between *masculine* and *feminine* contributions. Emphasising difference can “reinforce a young woman's powerlessness by virtue of her age and gender”.³⁹ Yet, by disregarding them entirely the courts are instead making women vulnerable.

³⁵ A key example of this would be *Eves v Eves* [1975] EWCA Civ 3: see [4.3],[4.4] and [5.4.3].

³⁶ Posner R., *Law and Literature* (Cambridge: Harvard University Press, 1998), 349.

³⁷ Butler, (n21),1.

³⁸ Beresford S., ‘It’s not me, it’s you: law’s performance anxiety over gender identity and cohabitation’ (2012) 63(2) *Northern Ireland Law Quarterly* 187, 197. Emphasis original.

³⁹ Ewick P., ‘Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative’ (1995) 29 *Law & Society Review* 197, 207.

1.5 The Cost of Insecurity in the Home

The current legal regime also has consequences associated with a lack of security in the home. Insecurity in the family home can lead to issues of homelessness and additional demands on emergency accommodation and both government and charitable housing/welfare services. This is of particular note given the continuing public concerns relating to housing.⁴⁰ These concerns relate directly, though not exclusively, to the housing crisis, which is the term used to refer to a lack of suitable housing, the high price of property, increasing levels of homelessness, and the consequences of such an economic/social environment.⁴¹ The housing crisis, particularly the increased cost of housing and the housing shortage may have a causal connection to the increased levels of cohabitation in recent years.⁴²

The consequences of such insecurity are further exacerbated in circumstances where either minimal or no proprietary interest is found for the financially vulnerable party in the property concerned. The increased strain placed on Local Authorities, the welfare system and the charitable sector, due to the housing crisis (notwithstanding other

⁴⁰ See YouGov., *Tracker Surveys: Issues Facing Britain, 2014 and 2015* as cited in Shelter., *Addressing Our Housing Shortage: Engaging the Silent Majority* (London: Meeting Place Communications, 2015) in which housing has been ranked as a priority which lies above education, crime and pensions in all but 2 of the 25 waves surveyed.

⁴¹ See for example Neimietz K., *The housing crisis: a briefing* (IEA February 2016): <<https://iea.org.uk/wp-content/uploads/2016/07/IEA%20Housing%20Crisis%20Briefing%20Feb%202016.pdf>> accessed 20/01/18; Frontier Economics., *Assessing the social and economic impact of affordable housing investment* (September 2014): <www.frontier-economics.com/de/veroeffentlichungen/assessing-the-social-and-economic-impact-of-affordable-housing-investment/> accessed 20/01/2018; Osbourne H., *Home ownership in England at lowest level in 30 years as housing crisis grows* (2 August 2016): <www.theguardian.com/society/2016/aug/02/home-ownership-in-england-at-lowest-level-in-30-years-as-housing-crisis-grows> accessed 20/01/18.

⁴² Lord Hope notes at least within his judgment in *Stack v Dowden* [2007] UKHL 17 [2] that the aforementioned case is of “general public interest... as house prices rise and more people are living together without getting married or entering into a civil partnership” drawing together the link, though perhaps not causal, between the issues posed by inadequate cohabitation law, the rise in numbers of cohabitating couples and the housing crisis.

economic factors), means that those support systems in place where there is a risk of homelessness or an inability to obtain and/or sustain a home are under considerable pressure. This has serious consequences within the context of the breakdown of cohabiting relationships given that it is the financially vulnerable party within such cases that are left without interest in their homes, and as such are required to find a new home. This also means that such parties are, outside of their cohabiting relationships, more likely to require welfare assistance from the State. The risk of homelessness, or where some level of interest is found but the property is then sold, has consequences which go beyond the economic considerations noted above.

The emotionality of 'home' and the connection between home and identity, known as property and personhood, plays an important role in the experience of those who lose their home.⁴³ This has implications within the context of the breakdown of cohabiting relations given that the loss of the home has consequences tied to well-being and mental health both for the parties involved in the dispute and any dependants. Although this has not been subject to study within regard to the loss of home as a result of cohabitation proceedings, such impact has been measured in the context of repossession and displacement, and the lack of appropriate housing.⁴⁴ For example, Tsai's review of foreclosure and its implications on health showed that in the majority of cases

⁴³See for example Radin M. J., 'Property and Personhood' (1981-1982) 34 *Stan. L. Rev.* 957; Laster K. & O'Malley P., 'Sensitive New-age Laws: The Reassertion of Emotionality in Law' (1996) 24 *International Journal of the Sociology of Law* 2.

⁴⁴ Fullilove M. T., 'Psychiatric implications of displacement: contributions from the psychology of place' (1996) 153 *American Journal of Psychiatry* 1516; Communities Scotland., *The effects of social housing on health and wellbeing – initial findings from the SHARP study* (July 2006): <www.scotland.gov.uk/Resource/Doc/1125/0086317.pdf>, 69 accessed 20/01/18; Shepherd's Bush Housing Association., *Housing & Health Uncovered* (August 2003): <www.housinglin.org.uk/_library/Resources/Housing/Housing_advice/Housing__Health_Uncovered.pdf> accessed 20/01/18.

“foreclosure has adverse effects on health, mental health, and health behaviours”.⁴⁵ Notwithstanding the human cost of such loss, this also provides a secondary financial implication stemming from the loss of a home, and improper housing which relates to the NHS which has already been identified in connected with the housing crisis which has shown a link between inappropriate/lack of housing and negative effects on mental and physical health.⁴⁶

1.6 (In)flexible Judiciary?

Given the lack of legislative action in relation to the breakdown of cohabiting relationships, the need for judicial flexibility is a key consideration for the development of the law. The CICT has developed alongside historical shifts in legal and societal norms. However, it has often fell behind the standards set in other areas. The inability of the judiciary to keep up with social change is due in part to the difficulties associated with the common law being the method of ‘law making’/legal development. Due to the doctrine of precedent cases need to reach the highest courts, or be distinguished on the basis of law or fact, which is a rarity in such cases. Even once relevant cases make it to the higher courts, the judiciary are determined to avoid being seen to engage in ‘law making’ due to the adherence of the separation of powers. Evidence of such developments and the approaches adopted by the courts are analysed in full in Chapters 5-7.

As is discussed above, despite cohabitation law echoing the terms used within marital law, specifically relating to ‘fairness’ and the intentions of the parties, the lack of

⁴⁵ Tsai A. C., ‘Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual Aggregate, and Contextual Associations’ (2015) 10(4) *PLoS ONE* 1.

⁴⁶ Frontier Economics, (n41), 8.

flexibility afforded to the judiciary within the context of cohabitants leaves those who are unable to contribute to a property financially are left without adequate protection. The ability for judges in cases concerning the breakdown of marriage or civil partnerships judicial discretion used to make adjustments allows for non-financial contributions to be made more easily, as well as allowing more so for a consideration of future needs rather than past behaviour. Protection which would be beneficial for cohabitants, but one which requires the recognition of difference.

1.7 Conclusion

The key role of this research is the development of the debate surrounding gender equality and cohabitation. The constructive trust forms the basis of a case study which analyses the impact of equality/difference approaches on women, acknowledging the significance of the socio-legal, historical context in which these cases took place. Examining the CICT under an equality/difference lens contributes to the originality of this thesis. That is, that in order to facilitate equality in practice, both equality and difference need to be recognised. In acknowledging the importance of recognising difference within an equality framework, and demonstrating the impact that such an approach can have, this thesis also lays the foundations for future work on the subject of inequality.

There has been criticism, particularly from a feminist perspective, of the rhetoric which has been used within the CICT case law, particularly when speaking of women. Although the use of stereotypes, and at times the patronising tone adopted, is undesirable, it has achieved its ends - ensuring the proprietary rights of women who would otherwise have been denied them. The analysis of the law given in Chapter 4,

when taken alongside Chapters 5-7 which examine the case law in their socio-historical context demonstrates that in gaining equality, women in the modern cohabitation cases have given up their rights. In examining equality theory and its application to cohabitation law this thesis lays the foundations for further comparative analysis. In particular areas such as proprietary estoppel and mortgages would be well-fitting areas for examination. The equality approach considered in this thesis could have application beyond the scope of property law as it has the potential to be used to secure equality in practice through acknowledging and utilising both equality and difference.

The focus adopted within this thesis, is one which has not been a substantial focus within existing literature.⁴⁷ That is, that the approach adopted with regard to cohabitation replicates gender inequalities which are prevalent throughout society. Attempts to achieve formal equality and the rhetoric which indicates such an approach, have done nothing to achieve any form of ‘real’ equality. Cohabitation serves as an example of the wider implications of inequality, and demonstrates the potential for approach which recognises a middle way between equality and difference to invoke change within the legal sphere and without.

There has been considerable debate concerning equality, in both principle and practice. This thesis examines the weaknesses involved in the application of formal equality within the context of cohabitation. It is essential to note that the interaction between law and society requires that even where using cohabitation as a case study in order to show the implications of the misapplication of the principle of equality, that it is seen within a wider context. In examining the historical development of women’s rights within the

⁴⁷ The existing literature is predominantly examined within [3.3].

public and private spheres, both public and private, and the case law within that same period, a fuller understanding of the intricate web of interactions which determine how equality needs to be adapted to fit with social practice can be developed. In particular, the fact that it has been the dominant approach adopted by the legal system, formal equality fails those who need an equality based approach to be adopted the most. In examining equality as a concept, Chapter 3 identifies the differing forms of equality which have prevailed within academic sphere and attempts to reconcile the problems which have been identified where a substantive difference based approach is adopted.

Overall, this piece aims to demonstrate that formal equality is flawed. The law's continued focus on the concept a futile exercise, merely replicates the gendered nature of resolving cohabitation disputes while purportedly striving to secure it. What is necessary is for difference to be recognised, incorporating substantive equality into judicial discourse in order to overcome legal obstacles and societal discourses which currently prevent equality from being realised. This allows for the reality of relationships, the nature of contributions and the failings of the current approach to inform legal decisions, and that this would benefit those who are currently excluded from the protection of the law.

The following chapter examines the construction of society as a series of dichotomies which underpin the construction of equality and difference as an incompatible pairing. Chapter 3 provides the necessary analysis of equality and difference and in particular how the differing formulations of equality and difference impact women. Chapter 4 provides a detailed explanation and analysis of the legal history of the common law constructive trust and the law as it stands, introducing a number of the critiques which

have been waged against the legal regime. Chapters 5 to 7 examine the socio-legal history of cohabitation in England and Wales from the 1960s onwards, with a particular focus on the position of women. This is done within 20year frames, each of which mirrors a particular form of equality, set alongside a detailed analysis of the case law. Finally, Chapter 8 presents the conclusions which have arisen out of this thesis.

Chapter 2 - Liberal Theory: Illiberal Outcomes

2.1 Introduction

This chapter seeks to establish the theoretical framework on which the subsequent chapters are based. It begins with an account of the development of the public/private dichotomy and individualism. These form two central barriers to the attainment of demonstrable equality in practice. The public/private dichotomy is one of a number of homologous distinctions which constitute the liberal approach to thinking about the social world which gives rise to a number of additional bifurcated categories.¹ This chapter focusses on nature/culture, male/female and sex/gender which taken alongside the substantive/formal equality approach discussed in the following chapter, makes it clear that the liberal framework on which socio-legal structures and discourses have been built is imbued with inequality.²

The chapter continues with an in-depth critique of the implications of the aforementioned dichotomies in practice. This provides evidence to the effect that though “dualism between public and private spheres...[which] has been identified as a key feature of Western, liberal thought”,³ is also one of the primary methods through which gender inequality is maintained. When combined with a construction of individualism which denies women ‘identity’ within the liberal construction of society, those who are viewed as different are without access to the formal universal right to equality as applicable to the public realm.

¹ Kennedy D., ‘The Stages of the Decline of the Public/Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 1349, 1349.

² Equality is a thread which runs throughout this chapter as the liberal formulation of society has given rise to the conceptualisation of equality applied in practice. However, the full analysis of equality is located in Chapter 3.

³ Chinkin C., ‘A Critique of the Public/Private Dimension’ (1999) 10(2) *European Journal of International Law* 387, 387.

2.1.1 Historical Foundations

Separate spheres ideology can be traced back to the Aristotelian distinction between the public *polis* and private *oikos*.⁴ However, the modern understanding of the public/private divide, and the liberal principles derived from it stem from Lockean social contract theory which forms the basis of this chapter. During the C16/17th, the encroaching powers of the monarchy, and later the state, reinforced the *necessity* of the distinct public/private realms from a liberal perspective.⁵ This section of the chapter will detail the theoretical development of the division, providing the necessary insight into the construction of individuals and society. This informs the later in-depth analysis of the public/private distinction and the additional dichotomies which have stemmed from this division.⁶

Social Contract Theory

In the *Second Treatise*, Locke utilises the “mythical story of social contract theory”⁷ to support his conception of the limited state, underpinned by the public/private divide. This ‘story’ depicted man’s movement from the state of nature, to civil society governed by the state. The state of nature was defined by independent freedom and equality, in which the first society was formed between man and woman.⁸ As developing social

⁴ Nevett L. C., *House and Society in the Ancient Greek World* (Cambridge: Cambridge University Press, 2001), 7. The *Oikos* equating to the home/family, the private realm. The *Polis* being the community/state constructed of free individuals, the public sphere. For more on the emergence of the spheres: see Burger T., & Lawrence F., (trans) Habermas J., *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: The MIT Press, 1991); Roy J., ‘*Polis and Oikos* in Classical Athens’ (1999) 46(1) *Greece & Rome* 1.

⁵ See Horwitz M. J., ‘The History of the Public/Private Distinction’ [1982] 130 *University of Pennsylvania Law Review* 1423, 1423.

⁶ This analysis forming the basis of Chapter 3.

⁷ Romany C., ‘State Responsibility Goes Private: A Feminist Critique of the Public Private Distinction in International Human Rights Law’ in Cook R. J., (ed) *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), 91.

⁸ Known as conjugal society, which also included children and servants. Laslett P., (ed) Locke J., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), Second Treatise, 77.

connections expanded to create a common society, man's relationship with the law of nature was destabilized resulting in possible conflict.⁹ As a result, the 'rational' society consented to the formation of a civil government, thus making the transition into civil/political society.¹⁰

With the development of the state, the distinction between paternal and political power emerged. In its public role, the state acts as the neutral adjudicator in order to avoid the issues arising from individual bias when 'judging one's own case'. Individuals relinquished some of their natural rights, securing the state's role in the "preservation of property",¹¹ passing law, punishing breaches of the law, and settling disputes. In contrast the family/domestic realm were constructed as paradigmatically private, and free from the intervention of the state. This avoided undermining the freedom and equality of all men in the state of nature, providing a subjective 'space' in which individualism could flourish.¹²

The domestic sphere was seen as a place of little conflict, thus negating the need for state intervention. Where "different understandings... [or] different wills" arose between man and wife as *joint* heads of the household, the power to make the final decision resided in the "abler and stronger"¹³ husband. These restrictions placed on the

⁹ Arising as a result of the introduction of commerce, an expanding population and the scarcity of goods. Dienstag J.F., *Dancing in Chains: Narrative and Memory in Political Theory* (Stanford, Stanford University Press, 1997), 58–9.

¹⁰ Laslett P., (n8), 13. Rationality is discussed in detail in [2.1.2].

¹¹ *ibid*, 123-6. It should be noted that for Locke property included life, liberty and estates. The rights which were relinquished were done so on the basis that the state ought to act to the benefit of civil society, which would be undermined were individuals still able to apply the law of nature as they saw fit, imbued with individual bias as noted above. The 'neutrality' of the state as an adjudicator and otherwise is a thread which runs throughout this chapter but is addressed specifically in [2.5.5].

¹² *ibid*, 122. See also [2.1.2].

¹³ *ibid*, 82. See [2.4.5] on the gendered construction of the domestic sphere in Locke's theory. It is also considered in Chapter Four and can be identified in Chapters 5-7.

state sought to prevent the use of arbitrary power. Instead they were to act “for the good of the people”¹⁴ in the public domain and their intervention into the private was perceived as “dangerous and unnatural”.¹⁵ Such restrictions were seen to negate the capacity for tyrannous rule which patriarchalism facilitated.¹⁶ The domestic realm was subject to paternal (patriarchal) rule, and political/civil society were regulated by political power of the state, thus forming the foundations for the modern distinction between public/private.

The Public/Private ‘Revolution’

The societal shift caused by the industrial revolution saw the Lockean public/private divide re-posed as market/home, which simultaneously glorified and devalued the latter.¹⁷ The rise of capitalism led to the emergence of the conflated “economic man”¹⁸ and the cult of domesticity. This reworked the division “to suit the interest of a ruling, property owning male elite”.¹⁹ The home was to be supported by wives and mothers in order that the husband could actively (and successfully) participate within the market.²⁰ However, the depiction of “imprisoned white, middle-class women in the spatially

¹⁴ *ibid*, 135.

¹⁵ Horwitz (n5), 1426.

¹⁶ Locke’s *Two Treatises* was written to counter the support for the absolutist monarchy espoused in Filmerian patriarchalism which supported the unrestrained power of the state and the inequality which resulted from it: Filmer R., *Patriarcha; or the Natural Power of Kings* (1680), as discussed in Sommerville J. P., (ed) *Filmer: ‘Patriarcha’ and Other Writings* (Cambridge: Cambridge University Press, 1991), 1-68.

¹⁷ Olsen F. E., ‘The Family and the Market: a Study of Ideology and Legal Reform’ (1983) 96 *Harvard Law Review* 1497, 1497 & 1499.

¹⁸ Jennings A., ‘Public or Private? Institutional Economics and Feminism’, in Ferber M., & Nelson J. A., (eds) *Beyond Economic Man: Feminist Theory and Economics* (Chicago: University of Chicago Press, 1993), 122.

¹⁹ Rose N., ‘Beyond the Public/Private Division: Law, Power and the Family’ (1987) 14(1) *Critical Legal Studies* 61, 64. It can be argued that under the Lockean construction of individualism discussed below, that the way in which the division served the interests of property owning men had foundations in prior formulations.

²⁰ See for example Hunt M., ‘Wife Beating, Domesticity and Women’s Independence in Eighteenth Century London’ (1992) 4 *Gender and History* 10, 27.

distinct private arena of their homes”,²¹ has never been a wholly accurate depiction of women, or the private sphere. Separate spheres ideology was prescriptive rather than descriptive of the lived reality of the majority of women, though that is not to say that it was without consequence.

The association between sex/gender roles and the separation of the spheres was crystallised in terms of the modern understanding of the public/private divide in this period suppressing women for the sake of maintaining the male market.²² As a result,

“the proper course of action for a wife was for her to minimize her connection to the world outside the nuclear family and devote herself entirely to creating a supportive home”.²³

Women’s biological capacity to bear children, and their *natural* capacity for nurture was used to legitimise their placement in the private sphere. The public/private distinction has, alongside other liberal principles served to reinforce the differences between men and women, while maintaining a guise of neutrality.²⁴ The construction of the home at this time, as a “haven in a heartless world”²⁵ secured the notion of the family home as a site of non-intervention, obscuring the links between work and home which remains a source of concern from various feminist perspectives.

²¹ Gardiner P., ‘Housing and Gender: Beyond the Public/Private Dichotomy’ in Dandekar H. C., *Shelter, Women and Development: First and Third World Perspectives* (Michigan: George Wahr, 1993), 66.

²² O’Donovan K., *Sexual Divisions in Law* (London: Weidenfeld & Nicholson, 1985), 11; Freeman M., ‘Towards a Critical Theory of Family Law’ (1985) 38 *Current Legal Problems* 153, 153.

²³ Hunt, (n20), 26.

²⁴ Linking to both biological determinism: see [2.3.2],[2.4] and gender inequality as discussed in Chapter 3. The way in which this has had an impact in practice is examined in the Chapters 5-7.

²⁵ Lasch C., *Haven in a Heartless World* (New York: Basic Books, 1977); Olsen ‘The Family’ (n17), 1504.

2.1.2 Individualism

Individualism is a principle feature of liberal theory which is underpinned by autonomy, and rationality.²⁶ Autonomy has traditionally been tied to the notion of the self-sufficient conception of the individual and the capacity for individuals to make and act on their own decisions.²⁷ Historically those who lacked reason or were economically dependent on others were excluded from participating in the public realm, and thus were deemed unequal.²⁸ Women formed part of this group, rendering the *neutral*, universal construction of the individual misleading and idealistic.²⁹

Individualism “denies difference by positing the self as a solid, self-sufficient unit, not defined by or in need of anything or anyone other than itself”.³⁰ Individuals are “abstracted”³¹ from their individual characteristics and circumstances and deemed deserving of political and legal equality on the basis of this ‘sameness’.³² This ‘sameness’ is premised on the rationality and autonomy of individuals, and has thus proved problematic for those traditionally excluded from the public sphere by virtue of their inability to meet this criteria.³³ Whilst founding equality on the basis of an

²⁶ Which has implications for gender equality as discussed in considerable detail in the Chapter Four as such it will only be discussed here summarily in order for the links to liberal theory and the current equality/difference debate to be properly established within the context of the public/private divide and individualism.

²⁷ On Autonomy: see [2.5.3].

²⁸ Minnow M., *Making All the Difference: Inclusion, Exclusion, and American Law* (London: Cornell University Press, 1990), 124.

²⁹ And with it the notion of universal equality as discussed in Chapter 3.

³⁰ Young I.M., ‘The Ideal of Community and the Politics of Difference’ (1986) 12(1) *Social Theory and Practice* 1, 7. Individualism stems from Locke’s social contract theory, and was crystallised in the C18/19th when the division was reposed as home/market.

³¹ Bacchi C., *Same Difference: Feminism and Sexual Difference* (London: Allen & Unwin, 1990), xv.

³² Universal individualism underpins formal equality and it is often used as a justification for gender inequality within both spheres: see generally O’Donovan K. & Szyszczak E., *Equality and Sex Discrimination Law* (Oxford: Basil Blackwell, 1988). Formal equality and the gendered implications of its application is discussed in theory within Chapter 3 and can be seen in practice within Chapters 5-7.

³³ Rationality having been traditionally associated with men.

individualism which denies difference is theoretically possible, when applied it acts to oppress those designated as ‘other’.³⁴

The hierarchical gendered nature of the dichotomy drawn between public/private, and the historical exclusion of women from the public sphere, rendering them non-individuals, has made the unequal status of women an inevitable consequence of classic liberal theory.³⁵ The division works to “obscure... the subjection of women to men within an apparently universal, egalitarian, and individualist order”.³⁶ It is a deceptive tool which seeks to reinforce women’s inferior position in the private realm and support the *natural* exclusion of women from the public. Despite individualism being presented as universal, the “criteria governing civil society are actually those associated with the liberal conception of the male individual, a conception which is presented as that of *the* individual”.³⁷ If individualism “is freedom from the dependence on the wills of others”,³⁸ then it is the antithesis of women’s historical experience and traditionally *appropriate* role, the dependent wife and mother.³⁹

2.2 Public/Private

The public/private division can be categorised in a number of distinct, yet interrelated ways. At the most simplistic level public/private have been viewed as distinct, opposing

³⁴ The distinction between theories of sameness and the application of these neutral principles in practice is discussed in detail in Chapter 3. It is also seen in practice within Chapters 5-7.

³⁵ On the gendered nature of the dichotomy: see [2.4.5]. The classic liberal construction of individualism can still be seen have an impact on the position of women in the public and private spheres as discussed in Chapters 3, 5-7.

³⁶ Pateman C., ‘Feminist Critiques of the Public/Private Dichotomy’ in Phillips A., *Feminism and Equality* (Oxford: Basil Blackwell, 1987), 157.

³⁷ Pateman C., *The Disorder of Women: Democracy, Feminism, and Political Theory* (Cambridge: Polity Press, 1989), 122.

³⁸ MacPherson C. B., *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1962), 263.

³⁹ Women’s position in society, particularly the ways in which they have been rendered dependent on men is analysed in detail in Chapters 5-7.

pairs, using one to define the other, that which is public is not private and vice versa.⁴⁰ However, it becomes increasingly clear that it is a “binary opposition that is used to subsume a wide range of other important distinctions and that attempts...to dichotomize the social universe in a comprehensive and sharply demarcated way”.⁴¹ This demarcation is used as an organising principle which supposedly requires that an individual’s presence in one sphere, precludes their presence in the other, which has been exposed as a gendered divide.

2.2.1 All-encompassing Public/Quintessentially Private Home

The distinction between paternal and political power is generally conceptualised as the distinction between the private domestic sphere of the family and home, and the public sphere being made up of all of that which is not ‘domestic’. It embodies all “matters that concern the nation at large – law, economy and politics... and operates on rules that are laid down by mutual consent of ‘all’ people”.⁴² This includes the market, civil society, politics and the state. In contrast, the family is the paragon of the private sphere and provides a site free from the regulation/intervention of the state.⁴³

2.2.2 Society and the State

The second key distinction between public/private derived from liberal theory is that between the state, and individuals within civil society. Within this context, society and the individual are both seen as private when contrasted with the public state. Civil

⁴⁰ See Blunt A., & Robyn Dowling R., *Home* (London: Taylor & Francis, 2006), 27.

⁴¹ Weintraub J., ‘The Theory and Politics of the Public/Private Distinction’ in Weintraub J., & Kumar K., (eds) *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago: University of Chicago Press, 1997), 1.

⁴² Simon-Kumar R., ‘Negotiating Emancipation’ (2004) 6(3) *Journal of Politics* 485, 488

⁴³ Lacey N., ‘Theory into Practice? Pornography and the Public/Private Dichotomy’ (1993) 20(1) *Journal of Law and Society* 93, 94.

society, though in itself private, also contains the domestic realm under this construction. Here, the domestic is a location in which natural subordination is placed in contrast to the civil realm of free individualism, which has clear links with the distinction drawn between the domestic and civil society in Locke's construction of the spheres. The positioning of both civil society and the domestic as private arises from the centrality of the notion that "the role of the state should be strictly limited, with the market governing relations other than family relations in civil society".⁴⁴

2.2.3 Civil society, Public or Private?

Civil society, despite forming part of the public under the first construction, is questionably private in the latter. In traditional liberal thought, the nature of civil society is constructed as "sphere of private interest, private enterprise and private individuals".⁴⁵ It is the space in which individuals can access their rights without undue interference from the state. However, the simultaneous inclusion and exclusion of the domestic within civil society has made it a site of contention. As Pateman notes, "civil society is divided into two spheres, but attention is directed to one sphere only... public sphere of civil freedom. The other private, sphere is not seen as politically relevant".⁴⁶ As such, the private realm of individuals within civil society is contrasted with the apolitical domestic realm, which is 'truly' private. The gendered construction of the spheres, has meant that civil society performs a dual function. It is private in contrast to the public state, as is necessary in order to secure the conditions necessary for

⁴⁴ *ibid.* This concept has underpinned the market individualism which was particularly popular in the 1970/80s under Thatcher: see Chapters 5-7.

⁴⁵ Pateman, *The Disorder of Women* (n37), 122.

⁴⁶ Pateman C., *The Sexual Contract* (Stanford: Stanford University Press, 1988), 3-4.

individualism to flourish, but remains public for those trapped in the private domain of the home. It is the masculine public in contrast to the *feminine* private.⁴⁷

2.3 Culture/Nature

Underpinning the discussion of the gendered construction of the public/private dichotomy is the distinction drawn between culture/nature which underlies the issue of biological determinism which attempts to justify the subordination of women as a natural consequence of womanhood. This determinism can be identified in Locke's positioning of women as inferior to their husband in the private sphere, and their exclusion from the public. Within the nature/culture dichotomy,

“culture becomes identified with as the creation and the world of men because women's biology and bodies place them closer to nature than men... women and the domestic sphere thus appear inferior to the cultural sphere and male activities, and women are seen as necessarily subordinate to men”.⁴⁸

This section provides an overview of the central elements of the nature/culture divide so as to illuminate the links between public/private and male/female as developed in the section that follows.

In placing culture in a hierarchically superior position to nature, and associating women and the private realm as closer to 'mother nature' the historic justification of women's *natural* subordination can be properly examined. As Ortner states, “since it is always culture's project to subsume and transcend nature, if woman is a part of nature, then culture would find it 'natural' to subordinate... her”.⁴⁹ The construction of

⁴⁷ The gendered nature of the spheres is analysed in detail at [2.4.5].

⁴⁸ Pateman, *The Disorder of Women* (n37), 125.

⁴⁹ Ortner S. B., 'Is Female to Male as Nature is to Culture?' (1972) 1(2) *Feminist Studies* 5, 9.

public/private, culture/nature and male/female forms a complex web of hierarchical oppositions which serve to maintain women's subordination in multifarious ways. The central justification for positioning women closer to nature results from their role in reproduction: birth and breast feeding *necessitated* their role as nurturer. Despite the development of formula milk, the availability of contraception, and increased control over when/whether to have children, the historical gender norms present prior to this persist.⁵⁰ The socially constructed notion of motherhood is too powerful a tool of oppression to be given up by those in power, performed for so long by those who are not, that it seems natural and beyond challenge.⁵¹

2.3.1 Biological Determinism

Biological determinism has formed the traditional explanation and justification for the almost universal subordination of women.⁵² The definition of biological determinism holds that

“there is something genetically inherent in the males of the species that makes them the naturally dominant sex; that ‘something’ is lacking in females, and, as a result, women are not only naturally subordinate but, in general, quite satisfied with their position”.⁵³

From this perspective, the subordinate status of women and their placement in the private sphere, stems from their *innate femininity*, linked to their biological

⁵⁰ As can be seen in Chapters 5-7.

⁵¹ It is for this reason that maternity has become a central element of the equality/difference debate as explored in Chapter 3.

⁵² Biological determinism is an essentialist theory which relies on the shared biology of all women to provide an explanation (and even to support) the oppression of all women.

⁵³ Ortner, (n49), 9. This association made between women and ‘lack’ is discussed in depth within psychoanalytic theory: see for example Gallagher C., (Trans) *The Seminar or Jacques Lacan: Book VI: Desire and its Interpretation, 1958-1959* (London: Karnac, 2002). For an overview of feminism and psychoanalysis: see Brennan T., (ed) *Between Feminism and Psychoanalysis* (London: Routledge, 1993).

categorisation as female.⁵⁴ However, this view of sex/gender fails to account for the role of context and culture in identity formation.⁵⁵

Women's biological difference has been used to explain the oppression of women, which in fact stems from societal structures, discourse and policy; promulgated by and for the benefit of the male elite. It is the "unequal power relations [between men and women which have] turned biological differences into socially constructed, substantive gender inequalities".⁵⁶ The association between biological determinism and 'difference' has meant that the recognition of the latter has proved problematic, particularly from a liberal feminist perspective which has in turn impacted gender equality.⁵⁷

There is strong opposition to the idea that there is a 'female' experience. The homogeneity of 'woman' is problematic as it ignores the many intersecting elements of difference which contribute to an individual's identity. "Yet, it is also true that there exist certain practices most women recognise and all kinds of women report".⁵⁸ A rejection of biological determinism acknowledges that the biological explanations for social roles and the domination which these have facilitated and protected is socially constructed. As Ortner notes, that is not to say that

⁵⁴ The distinction drawn between sex and gender: see [2.4] and [1.2]. The subordination of women by virtue of their *nature* has clear links to the positioning of women in the private sphere in Lockean liberal theory (both in its classic formulation and as it developed within the industrial revolution): see [2.1],[2.2].

⁵⁵ Such an account considers gender and sex as inextricably linked, presenting women as a homogenous group, uninformed by context, culture, class, race. This is discussed in additional detail in [2.4.1]

⁵⁶ Sarvasy W., 'Beyond the Difference versus Equality Debate: Post-suffrage Feminism, Citizenship, and The Quest for a Feminist Welfare State' (1992) 17(2) *Signs* 329, 330. It is this socially constructed notion of gender which is adopted in this thesis, as discussed in [1.2.2].

⁵⁷ The critique of the difference approach is discussed in detail Chapter 3.

⁵⁸ Smith S., 'Limitations to Equality: Gender Stereotypes and Social Change' (2014) 21(2) *Juncture* 144, 146.

“biological facts are irrelevant, nor that women and men are not different; but it is to say that these facts and differences only take on significance of superior/inferior within the framework of culturally defined value systems”.⁵⁹

The impact which biology has on women’s status and treatment in society, due to the way it has been constructed and reified by socio-legal structures/discourses needs to be recognised and adequately addressed.⁶⁰

2.4 Male/Female and Gender/Sex

Pateman argues that “the claim that the separation of the private and the public follows inevitably from the natural characteristics of the sexes” ought to be rejected.⁶¹ The essentialist biological determinism which conflates sex and gender has given rise to the perception that gender inequality is natural and private and as such outside the scope of the power of the state to resolve. In reality, the boundaries which define sex, gender and sexuality shift are subject to change, but have traditionally formed the “primary way of signifying power”.⁶² This section of the chapter examines the ways in which the binary presentation of both gender and sex interacts with the public/private, nature/culture distinctions, beginning with a brief explanation of terms.⁶³

⁵⁹ Ortner, (n49), 9. This issue is linked to the equality/difference debate which forms the basis of the Chapter Four.

⁶⁰ See Sayers J., *Biological Politics: Feminist and Anti-feminist Perspectives* (London: Tavistock, 1982), 124 in particular in relation to the need for feminist analysis in particular to acknowledge biological differences.

⁶¹ Pateman *The Disorder of Women* (n37), 121.

⁶² Scott J., ‘Gender: A useful Category of Historical Analysis’ (1986) *American Historical Review* 1053, 1067. Regarding the ways in which gender/sex/sexuality have shifted over time and within different contexts: see Halberstam J. J., *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York: New York University, 2005)

⁶³ A full description of the way in which gender/sex are used within the context of this thesis is established in [1.2]. However, it is pertinent here to set out in brief the definitions used, given that the way in which they have been incorporated into social and political discourse and structures makes them appear synonymous.

2.4.1 Gender as a Social Construct

Historically the term gender has been used to distinguish between masculine/feminine traits associated with biological males/females respectively.⁶⁴ The “gender=sex” equation, presenting biological sex as the determinant of gender, has formed the foundation for the social construction of specific traits attributed to either men or women.⁶⁵ The basic distinction between sex and gender is as follows:

“‘Sex’ is a word that refers to the biological differences between male and female: the visible difference in genitalia, the related difference in procreative function. ‘Gender’ however is a matter of culture: it refers to the social classification into ‘masculine’ and ‘feminine’”.⁶⁶

Gender consists of the socially constructed ‘traits’ which have, through social and familial structures and discourses, become associated with men/women. “Gender is not something a person *is*, rather it is something a person *does*”.⁶⁷ Understanding sex and gender in this way avoids the *inevitability* of inequality which results from an essentialist perspective. It holds that the historical placement of women in the private sphere has been due to the way in which society and the state have constructed women’s role and characteristics as incompatible with the public sphere of life.⁶⁸ It is the construction of women’s gender, and not as a result of their femininity and biological

⁶⁴ The use of male/female, gender/sex and such are discussed within [1.2], [2.3], [2.4]. See also Marecek, J., Crawford M., & Popp D., ‘On the Construction of Gender, Sex, and Sexualities’ in Eagly A. H. (et al) (eds), *The Psychology of Gender* (New York: Guilford Press, 2004), 192–216.

⁶⁵ Mitchell W., ‘Deconstructing Gender, Sex, and Sexuality as Applied to Identity’ (2002) 62(4) *The Humanist* 40, 40.

⁶⁶ Oakley A., *Sex, Gender and Society* (Aldershot: Gower Publishing Company, 1985), 16.

⁶⁷ Beresford S., ‘It’s Not Me it’s You: Law’s Performance Anxiety Over Gender Identity in Cohabitation Cases’ (2012) 63(2) *Northern Ireland Legal Quarterly* 187, 197. Adopting a Butlerian stance.

⁶⁸ As seen as a result of biological determinism and the association of the liberal individual with autonomy and rationality: see [2.3], [2.1.2].

capacity to bear children, which has been used in order to maintain women's position in the private.⁶⁹

2.4.2 Gender as Binary

Gender has traditionally been constructed as binary, men and women, who are presented as hierarchical opposites.⁷⁰ Treating gender as a dichotomy has been “an emergent feature of social situations: both as a result of and a rationale for various social arrangements, and as a means of legitimating one of the most fundamental divisions of society”.⁷¹ The way in which the state and society constructs gender, maintaining the position of women as lesser has clear implications for equality.⁷²

Firestone identifies the “origin of dualism... in biology itself – procreation”⁷³ this natural, biological difference is seen as the foundation for gender-based inequality. Yet, as Pateman states, “biology, in itself, is neither oppressive nor liberating... [it becomes] a source of subjection.... For women only because it has meaning within specific social relationships”.⁷⁴ For example, women's biological capacity to carry and nurse a child does not cause inequality, nor does it necessitate their placement in the private realm,

⁶⁹ As discussed in relation to biological determinism [2.3.1], acknowledging that gender is socially constructed does not require the rejection of any biological difference – particularly relating to pregnancy. See also Strauss D. A., ‘Biology, Difference, and Gender Discrimination’ (1992) 41 *DePaul Law Review* 1007, 1011. This is a notion which has also been accepted from a feminist perspective (though not universally): see for example Okin S. M., *Justice, Gender and the Family* (Basic Books: New York. 1989), 6-7; The societal perception and treatment of women regarding their ‘appropriate’ roles/behaviours and their capacity to give birth is examined in context Chapters 5-7.

⁷⁰ I acknowledge that there are also considerable issues relating to treating sex and gender as binary dichotomies, given the ways in which it has been treated as synonymous with gender and the way in which it precludes those who are intersex, or identify as transgender or non-binary/gender-fluid: see for example Fausto-Sterling A., *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000). However, the focus of this thesis required an in-depth examination of the gender dichotomy given its social construction and implications which does not afford sufficient space to discuss both in detail.

⁷¹ West C., & Zimmerman D. H., ‘Doing Gender’ (1987) 1(2) *Gender and Society* 125, 126.

⁷² As examined Chapters 5-7

⁷³ Firestone S., *The Dialectic of Sex* (New York: Bantam Books, 1972), 8.

⁷⁴ Pateman *The Disorder of Women* (n37), 126.

but the societal associations drawn from this are what proves to be problematic. It is those “values associated with maternity that have made motherhood one of the primary sources of women’s oppression”.⁷⁵ Maternity has become an excuse for the differing treatment of men and women, which though presenting as natural, is again, a product of societal construction.⁷⁶

The “presumption of a binary gender system implicitly retains the belief in a mimetic relation of gender to sex, whereby gender mirrors sex or is otherwise restricted by it”.⁷⁷ It assists in reifying the essentialist construction of sex and gender which treats gender as the social expression of biological sex, presenting the two as inherently connected. However, as gender has been used as an organising principle within society, it is necessary within this thesis, despite disagreeing with the legitimacy of the binary, to examine and discuss gender as a dichotomy.

2.4.3 Gender and Difference

The way in which gender is constructed as binary rests on the notion of difference. This difference has formed the basis of significant critique, particularly relating to equality.⁷⁸ Given that gender is socially constructed, the differences that the dichotomy entails are also socially constructed. As Lorber points out:

⁷⁵ Guerrina R., ‘Equality, Difference and Motherhood: the case for a feminist analysis of equal rights and maternity legislation’ (2001) 10(1) *Journal of Gender Studies* 33, 36.

⁷⁶ See Chapters 3, 5-7 of this thesis for a more in-depth exploration of the issue of maternity and how it has contributed to gender inequality.

⁷⁷ Butler J., *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 6.

⁷⁸ As discussed in Chapter 3.

“it does not matter what men and women actually do; it does not even matter if they do exactly the same thing. The social institution of gender insists only that what they do is perceived as different”.⁷⁹

The *necessity* of difference has been utilised in order to legitimate the natural inequality between men and women, and forms the foundation for positioning women in the home. Gender has been used as “a constitutive element of social relationships based on perceived differences between the sexes, and... a primary way of signifying relationships of power”,⁸⁰ it is the way in which power has become both gendered and institutionalised which draws together the connection between the public/private, male/female.

Despite the fictionality of a dichotomy of universally male or female traits, the impact that it has had is significant.

“As a process, gender creates the social differences that define ‘woman’ and ‘man’... As a structure, gender divides work in the home and in economic production, legitimates those in authority, and organises sexuality and emotional life”.⁸¹

Gender, in both of these conceptions entails the suppression of similarities for social purposes by social means.⁸² It is a tool used by the powerful, to create a social order which maintains their position. Even if theoretically men and women are the same, notwithstanding those differences associated with maternity, simply categorising an

⁷⁹ Lorber J., *Paradoxes of Gender* (New Haven: Yale University Press, 1994), 26.

⁸⁰ Scott, (n62), 1067.

⁸¹ Lorber (n79), 32-4.

⁸² Rubin G., ‘The Traffic in Women: Notes on the ‘political economy of sex’ in Reiter R., (ed) *Toward an Anthropology of Women* (New York: Monthly Review Press, 1975), 179.

individual as a woman or ‘girling’ a child has implications.⁸³ If we are described as male/female, masculine/feminine, then we perform this role/those who interact with us do so based on this supposition. For example, motherhood, despite being a biological rather than gender difference, is often applied to all women, regardless of their individual intentions concerning the decision to have children.⁸⁴ This stemmed from the inherent masculinity of the liberal, patriarchal society which, though slowly declining, still maintains male dominance and perpetuates the construction of women as other/lesser.

2.4.4 Deconstructing the Dichotomy

One of the suggestions for overcoming the issues related to the *causal* relationship between gender and sex has been to deconstruct the relationship between the terms.⁸⁵ The deconstruction of the relationship between gender and sex is desirable. However, deconstruction alone is not sufficient to rectify the issue of gender inequality. If gender and sex are to be taken as distinct, the implications of the public/private dichotomy remain unresolved.

The process of deconstruction is not instantaneous, and the gendered dichotomy has been ingrained into social and legal and structures. “Although sex roles are dynamic, they have become institutionalized... and thus difficult to change[sic]”.⁸⁶ Those who ascribe to a feminine role, regardless of their biological sex, remain subject to those

⁸³ Drawing on Butler’s notion of gender performativity: see Butler J., *Bodies that Matter* (New York: Routledge, 1993).

⁸⁴ An example of this in the context of employment can be seen in [5.2].

⁸⁵ See Whitworth S., *Feminism and International Relations: towards a political economy of gender in interstate institutions* (London: Macmillan, 1994), 20-1 as an example of a proponent of such a perspective.

⁸⁶ Lusk F.B., *Sex Roles and Personal Awareness* (Morristown: General Learning Press, 1978), 20.

norms associated with women; they continue to be excluded from the masculine public, and rendered invisible due to their placement in the private sphere. Those who are women by virtue of their sex and gender, then find themselves in a position of additional disadvantage, if they choose to have children.⁸⁷ What needs to be resolved is the way in which societal structures interact with gender which reinforce the position of women as subordinate.

2.4.5 Male as Public and Female as Private

The public/private division “mystifies” those processes by which women are persistently oppressed and has an integral role in “controlling women in their roles as wives and mothers”.⁸⁸ The way in which society/the family reinforce hierarchical patriarchal gender norms has, within the context of liberal theory, reinforced powerful position of men in the public and private.⁸⁹ The characterisation of the C18th/C19th ‘domestic woman’ epitomising the “the natural association between women and the private sphere, domesticity and leisure”,⁹⁰ has made them seem unfit for life in the masculine public sphere.

The public/private dichotomy and its gendered connotations is as Thornton notes, a

⁸⁷ The disadvantage referred to here is specific to the consequences that such a position has in relation to their ability to contribute financially to the family home. The implications of maternity on the position of women in society is examined in detail within Chapters 5-7.

⁸⁸ See for example Rose, (n19), 61, 65 & 66. An in-depth examination of the impact of the gendered construction of the spheres can be found at [2.5].

⁸⁹ See Hess B. B., ‘Beyond Dichotomy: Drawing Distinctions and Embracing Differences’ (1990) 5(1) *Sociological Forum* 75.

⁹⁰ Jones V., *Women in the Eighteenth Century: Constructions of Femininity* (London: Routledge, 1990), 5-6.

“conventional creation which serves a significant ideological purpose... a malleable political mechanism which can be effectively utilized to safeguard dominant interests under the guise of seeming neutrality and naturalness”.⁹¹

The construction of a masculine public, which excludes women on the basis of their *natural* femininity has been used by the state, and by individual men to justify inequality.⁹² The place of women within the private sphere of the home is made to seem natural, a result of their biological maternity, and a fitting choice to stay and nurture their children is made thereafter. Such a perspective neglects the limitations placed on autonomy through gender norms and state intervention, and contributes to the perception that sex and gender are linked.⁹³

2.5 Impact/Critique of the Convergence of Dichotomies

The following section focusses on the central critiques waged against the dichotomies outlined above. The central thread which runs through this critique is that the public/private dichotomy, and the associated liberal principles are gendered. The masculine construction of law and society as set out in this section forms the basis for the discussion of equality and difference in the subsequent chapter, and contributes to the theoretical framework which informs historical and case analysis in Chapters 5-7.

2.5.1 Contrast between theory and the law in practice

Despite the traditional conception of the liberal state as ‘limited’, the law, as one of the primary methods through which the state interacts with society, increasingly encroaches

⁹¹ Thornton M., ‘The Public/Private Dichotomy: Gendered and Discriminatory’ (1991) 18(4) *Journal of Law and Society* 448, 450-1.

⁹² The way in which these divisions have informed the equality/difference debate is discussed in detail within Chapter 3.

⁹³ Autonomy is discussed at [2.5.3].

in the private domain. As a result, “gender, sexuality and family life are not in reality ‘private’ but operate as arenas of intervention and management on the part of the state”.⁹⁴ The theoretical public/private divide is rendered illusory on examining the law in practice.⁹⁵

Though there are instances which warrant state intervention, the transgression of the state across this *boundary* is not without critique. As Thornton notes,

“Law is not only a powerful mechanism of social control by the state, but it is also a powerful conduit for the transmission and reproduction of the dominant ideology. Accordingly, law has been used to maintain a rigid line of demarcation between the two analytically distinct spheres of public and private”.⁹⁶

The gendered, hierarchical construction of public/private has meant that the law, far from performing the role of *neutral* arbiter, has instead had a role in replicating the construction of the private as feminine and the public as masculine, to the detriment of women.⁹⁷ The central method through which this is done is by upholding the principle of non-intervention.

2.5.2 Fictional Non-intervention and the Family

The free market and the private family are traditionally sites of non-intervention.⁹⁸

During the C19th the

⁹⁴ Murphy K., ‘Feminism and Political History’ (2010) 56(1) *Australian Journal of Politics and History* 21, 31.

⁹⁵ As can be identified in Chapters 5-7.

⁹⁶ Thornton M., ‘Feminist Jurisprudence: Illusion or Reality?’ (1989) *Australian Journal of Law and Society* 5, 5.

⁹⁷ As examined in detail in Chapters 5-7.

⁹⁸ Stemming from liberal theory as crystallised within the C18/19th discussed at [2.5.3]. The family rather than the market forms the primary focus of this thesis.

“family... and state... were perceived as largely independent of one another. The metaphor of separation captured an ethic or ideology of family privacy in which state intervention was the exception”.⁹⁹

However, it would be inaccurate to consider that the family has, in recent history, not been subject to state intervention. The state continues to intervene in domestic matters in numerous ways. These can be categorised as overt interventions such as legislation relating to marriage, divorce, custody, and covert methods of regulating the family such as through the tax and welfare systems.¹⁰⁰ An examination of state intervention within the private sphere demonstrates that “economic, administrative, and political – state institutions have a crucial and often *deliberate* impact on the conduct of family life”.¹⁰¹

Despite reinforcing the notion that the regulation of the private sphere is beyond its powers, the state

“has nevertheless been instrumental in shaping it and reinforcing the favoured family form through such governmental policies... which operate to encourage the continued dependency of women”.¹⁰²

On examination, it becomes clear that the construction of the domestic sphere as entirely free from state intervention is a mere fiction.¹⁰³ However, the ideological division is still often employed as a way by which the state simultaneously can shape the family, and avoid accruing responsibility for those negative acts which occur in the private sphere. A critique of both the “façade of privacy and free choice” needs to be engaged

⁹⁹ Fineman M. A., ‘What Place for Family Privacy?’ (1999) 67 *George Washington Law Review* 1207, 1207. The C18th and early C19th is considered the period in which the public/private divide was crystallised: see [2.1.1].

¹⁰⁰ The ways in which the state has interfered with the family is discussed below [2.5.3], but can also be seen in practice within Chapters 5-7.

¹⁰¹ Lacey N., *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998), 74. Emphasis added.

¹⁰² Thornton, (n96), 6.

¹⁰³ See [2.5.4].

in, in order to “reveal the hidden mechanisms of control and to expose the interests served”.¹⁰⁴

2.5.3 Autonomy and Intervention

The public/private dichotomy is constructed as necessary for individual privacy, underpinned by the central liberal principles of autonomy and state neutrality. Maintaining a private realm which allows individuals to fulfil their wants and needs free from the control or influence of the state secures privacy. State intrusions into the private are perceived as a limitation on privacy, restricting autonomy and therefore undermining individualism which would be inherently anti-liberal.¹⁰⁵ However, the extent to which a private sphere free from regulation is desirable is questionable.¹⁰⁶

Despite the theoretical issues which arise from the “paradox of individual autonomy and democratic society”,¹⁰⁷ such limitations have been accepted in the pursuit of the common good/the public will.¹⁰⁸ Therefore, this section focuses on the additional limitations placed on women’s autonomy, the non-neutrality of the state, and its power to divine the line between public/private and therefore the limits of its own intervention.¹⁰⁹ When such issues are combined with covert state action it becomes difficult to ensure that the state remains accountable, and obscures the gender inequality it legitimises.¹¹⁰

¹⁰⁴ Rose, (n19), 72.

¹⁰⁵ This sort of argument has been invoked in reaction to proposals for granting cohabitants some form of legislative protection. See Chapter 1 and [7.4].

¹⁰⁶ The dangers inherent in the construction of the domestic sphere as beyond the scope of state intervention is explored below [2.5.3].

¹⁰⁷ Brants C. H., ‘The State and the Nations Bedrooms’ in Aldridge P., & Brants C. H., *Personal Autonomy, The Private Sphere and Criminal Law: A Comparative Study* (Oxford: Hart, 2001), 120.

¹⁰⁸ The acceptance of such limitations can be seen in Locke’s *Social Contract* as discussed above [2.1].

¹⁰⁹ The limitations placed on women’s autonomy are discussed in detail below [2.5.3].

¹¹⁰ The implications of which are examined in Chapters 3, 5-7.

Choice/self-government

Autonomy can be understood as relating to individual choice or self-government, which requires minimal intervention by the state. Within traditional liberal theory autonomy is individualistic and bound-up with rationality, resulting in the exclusion of women.

McLean describes the line drawn between autonomy/intervention as follows:

“Private issues are those which should be essentially free from state control; public ones attract legitimate state interest. The right to have autonomous decisions respected, supported by the developing sphere of privacy, is the mark of a mature society, and serves to maximise the potential for human liberty”.¹¹¹

Despite the theoretical existence of this ‘line’ providing a private space without state intervention, so as to secure autonomy, there are countless examples of the state intervening into private matters.¹¹² This calls into question the legitimacy of the existence of a private sphere free from intervention and the purported autonomous action within this realm.

The Mythology of (Feminine) Autonomy

The centrality of the autonomous individual in liberal theory ignores way in which “every hour of every day, choices are implicitly made for us, by both private and public institutions”.¹¹³ As has been seen above there are already limitations placed on autonomy as a result of state intervention into the private. However, as a result of gender norms/socialization the choices of those who are not traditionally associated

¹¹¹ McLean S. A. M., *Autonomy, Consent and the Law* (London: Routledge, 2010), 2.

¹¹² Rhode D. L., ‘Feminist Critical Theories’ (1990) 42(3) *Stanford Law Review* 617, 628. Examples of which are identified in [2.5.4], and Chapters 5-7.

¹¹³ Sunstein C.R., *Why Nudge?: The Politics of Libertarian Paternalism* (New Haven: Yale University Press, 2014), 130.

with the rational autonomous individual, namely women, are further limited.¹¹⁴ This section goes on to analyse the ways in which women's autonomy has been additionally restricted.

The individualised notion of autonomy results from the liberal notion of 'rational' masculine individualism. The socialisation of women/girls and the gender norms associated with the feminine have developed in a way which constructs them as 'different' from the idealised independent, male individual.¹¹⁵ From a liberal perspective, autonomy was developed with little consideration of the "attributes of human subjects, such as emotional or relational interdependence and strong gender related socialization that bear heavily on the lives of women".¹¹⁶ Modern society's construction of autonomy has, imbedded within it, these masculine stereotypes. The "self-sufficient, independent and self-reliant"¹¹⁷ individual or family is seen to be autonomous, and this autonomy is given social and political value.

Autonomy is treated as the antithesis of dependency. Women's dependency has historically derived from their reliance on their husband's participation in the public sphere in order to obtain goods and resources due to their placement in the private as a caregiver preventing them from attaining them for themselves.¹¹⁸ This economic

¹¹⁴ See Meyers D., *Self, Society and Personal Choice* (New York: Columbia University Press, 1989), 152-5. Regarding the liberal construction of the individual: see [2.1.2].

¹¹⁵ The implications of the categorisation of women as different is explored in Chapter 3 and can be identified in practice in Chapters 5-7.

¹¹⁶ Abrams K., 'From Autonomy to Agency: Feminist Perspectives on Self Direction' (1999) 40(3) *William and Mary Law Review* 805, 818.

¹¹⁷ Code L., *What Can She Know? Feminist Theory and The Construction of Knowledge* (Ithaca: Cornell University Press, 1991), 67. The social and political value given to the self-sufficient family can be identified in the protections that such families are then afforded. The free market individualism favoured by the Conservative party in the 1970/80s is a key example of such an approach in a modern context. This is examined in full in Chapters 5-7.

¹¹⁸ See for example Fineman M. A., *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004). See also Friedman M., 'Autonomy, Social Disruption, and Women' in MacKenzie C. &

dependency within heteronormative role-specific marriages has meant the independence, autonomy and self-sufficiency of both individuals (men in the public sphere) and families once seemed like a realistic prospect. “Myths about independence and self-sufficiency were able to flourish and perpetuate themselves because dependency was hidden”.¹¹⁹ The dependency of women on their husbands for financial support, and in turn male dependence on women for unpaid labour and care was restricted to the private realm of the family, and so, rendered invisible.

This myth continued for a considerable time, as the public/private dichotomy supported the notion “that women’s needs must be met either through the market or within the family”.¹²⁰ The idealised self-sufficient breadwinner/housewife family form positioned women firmly within the home in order to support the autonomy of their husbands, and the family. In constructing women’s lives based on relationships (as wife and mother), their own individualism and autonomy was forfeited. The historical concerns raised in opposition to women’s movement into the public, were based on the notion that “desire for personal autonomy, especially among women, [if fulfilled] would threaten family stability”.¹²¹

The gender role(s) ascribed to women, and the socio-political pressure(s) relating to their position as mothers and wives has limited women’s individual autonomy for the sake of the family. The state’s manipulation of the tax/welfare/legal system to support

Stoljar N., (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 2000) which discusses self-sufficiency in relation to finance and care.

¹¹⁹ Fineman M.A., ‘Contract and Care’ (2001) 76(3) *Chicago-Kent Law Review* 1403, 1423.

¹²⁰ Slim B., *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (Cambridge: Cambridge University Press, 2000), 21.

¹²¹ Pleck E., *Domestic Tyranny: The Making of American Social Policy Against Family Violence from Colonial Times to the Present* (Chicago: University of Illinois Press, 1987), 9. Similar arguments were waged against women attempting to move more securely into the public domain or participate as equals particularly relating to maternity leave and pay, and equal pay. See Chapters 5-7.

traditional gender roles has worked to increase the expense (socially and financially) of choosing otherwise.¹²² As a result,

“much of what women appear to do freely is chosen in very limiting circumstances, where there are few choices left to us. Even where the circumstances present many choices, it is often the case that our knowledge, our ability to judge, and our desires have been so distorted and manipulated by social influences as to make a mockery of the idea that we choose freely”.¹²³

This has led to claims that women are incentivised through social structures to further their own oppression.¹²⁴ The state’s capacity to maintain the guise of free choice whilst manipulating the range/perception of such choices continues to limit women’s autonomy.

The Silencing of Women

Feminist constructions of autonomy often focus on “assuring women choice or decision in circumstances that are free from coercion and manipulation, rather than in the sense of aspiring to self-sufficiency”.¹²⁵ However, the capacity to utilise autonomy to its full potential hinges on the capacity for one’s voice to be heard. Despite the fact that the “ideal” of “the silent woman”¹²⁶ has fallen away, the limitations placed on ‘women’s voices’ remains. Male dominance (and violence) in the private home, and the

¹²² As seen in action within Chapters 5-7.

¹²³ Wendell S., ‘Oppression and Victimization: Choice and Responsibility’ in Bushnell D.E., (ed) *“Nagging” Questions: Feminist Ethics in Everyday Life* (Maryland: Rowman & Littlefield, 1995), 43.

¹²⁴ See Cudd A.E., ‘Oppression by Choice’ (1994) 25 *Journal of Social Philosophy* 22. That is not to say that women are incapable of autonomy, but rather that, historically and to some extent still, the socialisation and socio-political circumstances act to purposefully limit their ability to utilise it, as distinct from the ‘natural’ position of women as inferior as regards rationality within liberal theory as discussed above [2.5.3].

¹²⁵ Note that this is not to say that self-sufficiency is inherently anti-feminist but rather that it should not be the sole marker of success; O’Connor J. S. (et al) (eds), *States, Markets, Families: Gender, Liberalism and Social Policy in Australia, Canada, Great Britain and the United States* (Cambridge: Cambridge University Press, 1999), 54.

¹²⁶ Hon A., ‘Rethinking Virginity’ in Heuer G., (ed) *Sexual Revolutions: Psychoanalysis, History and the Father* (London: Routledge, 2011), 239.

masculinity of the public state/law have had the effect of limiting women's ability to speak.

Limitations on women's power by virtue of the public/private dualism has significantly contributed to the silencing of women. As MacKinnon states, "when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone".¹²⁷ Not only is this problematic in the context of personal relationships, which have the capacity to make women vulnerable, but it also has implications in the public sphere.¹²⁸

The real and symbolic silencing of women's voices has a considerable history, and the feminist movement has traditionally focussed on ensuring that women were heard within the public domain. The placement of women in the private sphere "excluded them from education, from reading, writing and speaking the public tongue of politics",¹²⁹ and legitimised the restrictions placed on their participation in politics and law. The attainment of suffrage ensured that women could 'speak' by virtue of their vote, attempting to dismantle the central formal limitation placed on women's political voice.¹³⁰ Despite the contributions of the feminist movement(s) towards facilitating women's speech, it is questionable as to how much the masculine state was willing to

¹²⁷ MacKinnon C. A., *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 39.

¹²⁸ This vulnerability relates to instances of violence as discussed in [2.5.4], but also to the capacity to secure property rights through express agreements as discussed at [4.3.1], and further demonstrated in Chapters 5-7.

¹²⁹ Luke C., 'Women in the Academy: The Politics of Speech and Silence' (1994) 15(2) *British Journal of Sociology of Education* 211, 213-4. Such limits on participation included the inability to vote, practice law or run to be an MP.

¹³⁰ The importance of securing places for women to speak continued on into the second wave, in which consciousness raising groups and protest ensured a platform for women's speech. This is examined in detail in Chapters 5-7.

listen, “democracy depend[s] on voice-having a voice and also the resonance that makes it possible to speak and be heard... without resonance, voice recedes into silence”.¹³¹

The Language Problem

In order for women’s voices to be heard, first they must ‘speak’ the same language as men, and second the speaker must be seen as having a valuable voice. One of the key concerns relating to voice and gender equality has centred on the fictional neutrality of language, which has led to proposals for “developing woman focussed discourses and even creating an entirely new language”.¹³² In particular, the language of the law is perceived to have been formed for and by men, rendering the feminine ‘*other*’. “As the men of law have defined law in their own image, law has excluded or marginalized the voices and meanings of these ‘others’”.¹³³ As a result, the law has not traditionally spoken to or for women, which when combined with the restrictions placed on women’s education and participation in law and politics has secured the masculinity of the state.¹³⁴

The adversarial system of law/politics and institutional sexism continue to act as a barrier to women’s full participation, and the incorporation of their voice with that of the state. Participatory democracy has been said to silence the voices of disadvantaged groups, through the dominance of those in power within such institutions.¹³⁵ The increasing number of women within the law and politics has the capacity to shift this

¹³¹ Gilligan C., *The Birth of Pleasure* (London: Vintage Books, 2003), 232.

¹³² Pauwels A., ‘Inclusive Language is Good Business’ in Holmes J., (ed) *Gendered Speech in Social Context* (Wellington: Victoria University Press, 2000), 140.

¹³³ Finley L. M., ‘Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning’ (1989) 64 *Notre Dame Law Review* 886, 892.

¹³⁴ The restrictions placed on women’s education and participation have been discussed above in this section.

¹³⁵ See for example: Gutmann A., *Liberal Equality* (Cambridge: Cambridge University Press, 1980), 191-202; Simon-Kumar, (n42), 485.

balance. However, “even where women have a formal right to speak, informal norms often impose pressures to speak in a style and language that are culturally masculine”.¹³⁶

What needs to be questioned is whether the *necessary* adoption of masculine speech in the public realm reduces the capacity for ‘women’s issues’ to be addressed?¹³⁷

Not only does the masculinity of the language need to be challenged, but the value of ‘women’s voice’ needs to be acknowledged. In addition to the historical construction of the silent woman, the basic linguistic ‘categorisation’ of man/woman has assisted in the presentation of women as *other*.¹³⁸ The ‘woman’ label, embodies and reinforces women’s difference based on their sex, and the gendered assumptions which flow from this categorisation.¹³⁹ The use of ‘man’ as the *neutral* universal label for all persons reflects the division of public/private and the notion of the universal individual as masculine, devaluing women and the value attached to their voices.

Rather than devaluing ‘women’s voice’ based on this difference, instead the value of ‘women’s voice’ can be found in this difference.¹⁴⁰ Gilligan puts forward the notion that “men and women speak different languages, [which] they assume are the same, using similar words to encode disparate experiences of self and social relationships”.¹⁴¹ This has proved particularly problematic in a legal context given that the law has itself been

¹³⁶ Jagger A. M., ‘Sex Equality as Parity of Voice’ (1998) 9 *Contemporary Legal Issues* 179, 187.

¹³⁷ There is some evidence from a feminist perspective that the inclusion of a feminist voice within judgments has the capacity to change the outcome of cases: see Hunter R. (et al) (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010).

¹³⁸ This idealised view of women is discussed above [2.5.3].

¹³⁹ See for example Pauwels A., *Women Changing Language* (London: Longmans, 1998), 50.

¹⁴⁰ That is not to say that ‘women’s voice’ will always be different, but rather that difference ought not to form the basis of their exclusion from contributing to the language of the public sphere and that those differences which are deemed from/represented by women’s voices has a valuable role in unsettling the masculinity of the public sphere.

¹⁴¹ Gilligan C., *In a Different Voice: Psychological Theory and Women’s Development* (London: Harvard University Press, 1993), 173.

shaped by masculine norms and language.¹⁴² When relying on the law to invoke their voice, women have often been left with little support. What needs to be sought is the “parity of effective voice... that women's speech should have equal weight or authority with men's”.¹⁴³ This entails not only that women have a voice, but that that voice is listened to.

Overt/Covert State Intervention

The illegitimate status of overt state intervention into the family/private sphere has declined with the growth of the welfare state.¹⁴⁴ Such intervention is premised on consent, even implied consent through mediums such as voting or market interaction are seen as sufficient.¹⁴⁵ However, the state “operates increasingly through indirect symbolic controls - by radiating messages rather than imposing physical coercion”.¹⁴⁶

Covert state action lacks the implied consent which the more explicit forms of intervention can be considered to have.¹⁴⁷ Where individuals act in the “shadow of the

¹⁴² Bottomley A., ‘From Mrs Burns to Mrs Oxley: do co-habiting women (still) need marriage law?’ (2006) 14(2) *Feminist Legal Studies* 181, 196. See also Bottomley A., ‘Self and Subjectivities: Languages of Claim in Property Law’ (1993) 20(1) *Journal of Law and Society* 56 which discusses the way in which silence is gendered within the context of cohabitation case law. The way in which this has been problematic in the context of cohabitation case law has been identified in Chapter 4 and is also identifiable in the examination of the case law in Chapters 5-7.

¹⁴³ Jaggar, *Sex Equality as Parity of Voice* (n136), 188.

¹⁴⁴ Locke’s distinction between paternal and political power, and the distinctly private nature of the family as the source for the traditional concept of non-intervention which precludes intervention into the private sphere. However, discussed in [2.5.4], the strict adherence to non-intervention has proved problematic in practice, particularly in relation to child welfare and domestic violence and as such a more flexible reading of the term has since been adopted.

¹⁴⁵ There are of course further limits placed on the state for example the separation of powers, the rule of law and international/national legislation.

¹⁴⁶ Galanter M., ‘Law Abounding: Legalisation around the North Atlantic’ (1992) 55(1) *Modern Law Review* 1, 24.

¹⁴⁷ Under Pateman’s reading of Locke’s social contract however, such consent having been extracted from all men (excluding women from the original contract and instead placing them under the power of their husbands through the sexual contract) it could be said that women have never consented to state’s role as constructed in liberal theory. See Pateman, *The Sexual Contract* (n46). Perhaps women’s ability to vote/engage in politics and the market could be said to give this implied consent.

law”,¹⁴⁸ their ‘freely made’ choices are restricted, placing a limit on individual autonomy.

Designating something as public is about making it “accessible to debate, reflection, action and moral political transformation”.¹⁴⁹ However the covert methods often used by the state to intervene in the family prevents social scrutiny and input from being properly executed. The underlying issue with the division between public/private is that the division is decided by the state itself. For example, despite the designation of the family in the private sphere, it remains subject to the decision of the state as to whether it is the appropriate family ‘form’ to warrant protection.¹⁵⁰ As “the governance of citizens through the family may now have achieved unprecedented heights”¹⁵¹ the state is provided with a system of indirect control of the family, through which they can implement their own motives. Motives which have historically strived to bind women to the private sphere for the benefit of men as economic actors who are allowed to maintain a superior position in both realms.¹⁵² Such covert intervention allows the state to shape the form of ‘appropriate’ families/behaviours and exclude others while preserving the facade of non-intervention.¹⁵³

¹⁴⁸ See Kornhauser L., ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950.

¹⁴⁹ Benhabib S., ‘Models of Public Space: H. Arendt, the Liberal Tradition, and Jurgen Habermas’ in Landes J. (ed.) *Feminism, the Public and the Private* (Oxford & New York: Oxford University Press 1988), 91.

¹⁵⁰ Regarding form over function see: [4.3.3].

¹⁵¹ Sclater S. D., *Divorce: A Psychological Study* (Aldershot: Ashgate, 1999), 17 & 185.

¹⁵² The struggle to maintain this divide in modern history can be seen in Chapters 5-7.

¹⁵³ Key examples are the ways in which the institution of marriage has been supported not only by legislation, but political discourses, policy and the tax/welfare system, and the decisions made in relation to the provision of childcare which have attempted to position women in the home. This is examined in full in Chapters 5-7.

2.5.4 Protection of Privacy

The notion of a private realm in which individuals are free to act autonomously without intervention from others or the state has meant that the private realm and autonomy are treated as inextricably connected.¹⁵⁴ However, “there can be no ‘private’ sphere that should presumptively be beyond the reach of policy and politics”,¹⁵⁵ meaning that the distinction must serve some other purpose. Much like the shifting definitions given to private/public, the state can be seen to manipulate the scope of privacy. The line which is drawn by the state as to what it can or should intervene in continues to redefine what, if anything, remains truly private and without the influence of the state. The public/private distinction “functions more as a form of political rhetoric used to justify particular results”,¹⁵⁶ a tool which lies at the hands of the state to manipulate as they see fit.

The Danger of Privacy

The public/private dichotomy stems from an idealised view of the home as “a private place, a refuge from society, where relationships can flourish untrammelled by public interference”.¹⁵⁷ The value of privacy depends on the construction of the home as a place of safety and equality.¹⁵⁸ In practice however, privacy has been secured for the benefit of men, to allow their individualistic autonomy to flourish, to the detriment of women. The designation of the home as a private domain, and the non-interference this

¹⁵⁴ The value of privacy in securing individualism has formed one of the central tenets of liberalism as discussed above [2.5.3].

¹⁵⁵ Mnookin R. H., ‘The Public/Private Dichotomy: Political Disagreement and Academic Repudiation’ [1982] 130 *University of Pennsylvania Law Review* 1429, 1438. The way in which the private domain has been covertly interfered with, which undermines this distinction, is discussed above [2.5.2] [2.5.3].

¹⁵⁶ Klare K., ‘The Public/Private Distinction in Labour Law’ (1982) 130(6) *University of Pennsylvania Law Review* 1358, 1361.

¹⁵⁷ O’Donovan, (n22), 107. Stemming from Locke’s construction of the divide [2.2].

¹⁵⁸ A claim which has been contested in feminist literature: see for example Okin S. M., *Justice, Gender and the Family* (Basic Books: New York. 1989), 116-7.

requires has facilitated the “right of men ‘to be let alone’ to oppress women one at a time”.¹⁵⁹ As a result, privacy has become tool used to render the subjection of women invisible. Without true neutrality, privacy assists in maintaining the patriarchal dominion of a husband over his wife, and allows his abuses of this power to go unrectified. The family as a self-regulating unit has, historically been a place of oppression and violence for women, leading to the claim that “the family is not private for women”.¹⁶⁰

Historically the legal system and law enforcement have maintained the boundary between the public and private domain. Violence in the home was “protected as part of the private sphere of family life protected as part of the private sphere of family life... concepts of privacy permit, encourage, and reinforce violence against women”.¹⁶¹ Privacy has traditionally been placed in a position of priority, above that of protection, reflecting the gendered hierarchy of the public/private divide.¹⁶² The private is thus a realm of freedom for men, and violence and oppression for women and “by not intervening, the state is complicit in this violence”.¹⁶³ The inaction of the state in such instances “reveals the limitations and deficiencies of the liberal insistence on separate public and private domains”.¹⁶⁴

¹⁵⁹ MacKinnon C. A., ‘Roe v. Wade: A Study in Male Ideology’ in Garfield L., & Patricia Hennessey P., (eds) *Abortion: Moral and Legal Perspectives* (Massachusetts: University of Massachusetts Press, 1984), 53.

¹⁶⁰ Walby S., ‘Is Citizenship Gendered?’ (1994) 28(2) *Sociology* 379, 383; A similar argument is raised by MacKinnon C. A., *Toward a Feminist Theory of the State* (Cambridge: Harvard University press: 1989), 191

¹⁶¹ Schneider E. M., *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000), 87.

¹⁶² Police reluctance to interfere in domestic violence incidents has been well documented: see for example Bourlet A., *Police Intervention in Marital Violence* (Milton Keynes: Oxford University Press, 1990), 9.

¹⁶³ Bailey K. D., ‘Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System’ (2010) 100(4) *The Journal of Criminal Law and Criminology* 1255, 1261.

¹⁶⁴ Barnett H., *Introduction to Feminist Jurisprudence* (London: Cavendish, 1998), 74. The public patriarchy of the state has instead been replaced with private patriarchy in the home.

The protection of privacy remains imbued with the traditional liberal fear that “not only society via its social mores but also the government would invade every field and sphere of life, exploiting its powers to coerce the individual”.¹⁶⁵ The principle of non-intervention is presented as a barrier from the encroachment of the state. As time has progressed, the “‘protection’ of women [has] served as a premise for redefining the relation between the private”¹⁶⁶ as the state has slowly moved into the previously hidden family domain. Thus revalidating the notion that strict adherence to the public/private divide for the sake of privacy ignores the ways in which the state’s intervention has proved to be beneficial to women.

The Necessity of Regulation

The welfare state has been invoked as a necessary exception to the traditional liberal principle of non-intervention. This is premised on “the need to produce a citizenry competent to meet the economic and other needs of the community”.¹⁶⁷ Supporting those in need is seen as a way of maintaining such a citizenry.¹⁶⁸ In order to avoid concerns relating to the limitations placed on autonomy by virtue of this regulation, the traditional masculine conception of autonomy needs to be reformulated. In this way state intervention can, rather than impeding autonomy, be permitted to intervene in order to secure the autonomy of those individuals who may otherwise be denied it. These persons tend to be, as seen above, women and in particular caregivers. Through

¹⁶⁵ Cohen-Almagor R., ‘Between Autonomy and State Regulation’ (2012) 87 *Philosophy* 557, 559.

¹⁶⁶ Hennessy R., & Mohan R., ‘The Construction of Woman in Three Popular Texts of Empire: Toward a Critique of Materialist Feminism’ in Hennessy R., & Ingraham C., (eds) *Materialist Feminism: A Reader in Class, Difference, and Women’s Lives* (London: Routledge, 1997), 202.

¹⁶⁷ Eekelaar J., ‘Self-Restraint: Social Norms, Individualism and the Family’ (2012) 13(1) *Theoretical Inquiries in Law* 75, 87. The discourse surrounding “supporting families” is analysed in Chapters 5-7, and can be seen developing throughout the period examined within this thesis.

¹⁶⁸ This is primarily focussed on the welfare of children.

providing for example parental leave, flexible working and state subsidised nurseries, the unrecognised burden on women which limits their autonomy and participation in the public sphere can be reduced and even eliminated.¹⁶⁹

Though there have been clear benefits to regulation and intervention in this context, the provision of welfare to those in need for example, it also provides a tool fit for political manipulation. This can be identified in the numerous examples of the governments manipulation of the welfare and tax systems to support a construction of the family in which women should maintain their position in the private, providing free labour and raising children in order to support the economic role of men in the public.¹⁷⁰

The Personal is Political

One of the key issues from a feminist perspective is that the separation of the spheres is also a gendered/sexual division. This is underpinned by the *natural* role and characteristics embodied by women, a result of which is that women's proper place is in the home, raising and maintaining the family. Although the gendered public/private dichotomy is fictitious, the reification of the division through its adoption by political, legal and societal institutions proves problematic.

The feminist 'slogan', the "personal is political" encapsulates the central critique waged against the public/private divide. The phrase signified the opposition to the construction

¹⁶⁹ See for example: Cudd A., *Analysing Oppression* (New York: Oxford University Press, 2006), 228; Okin, *Gender, Justice, and the Family* (n158), 175. The extent to which this is successful of course depends on the scope and nature of the provisions put forward, and the intentions of the government in power in implementing them. Such policies have been put into place, and their impact is considered in detail within Chapters 5-7.

¹⁷⁰ This is examined in full within Chapters 5-7.

of the private as outside the scope of politics and the law.¹⁷¹ For feminists, there were a number of ways in which the personal was indeed political. First, the domination and subordination of women is not restricted purely to women's private lives.¹⁷² Further, the ways in which interactions between men and women are not only social, but institutionalised relationships, subject to power imbalance make them an appropriate subject for socio-legal and political analysis.¹⁷³

The phrase also signified the mutually constitutive, interconnected nature of the dichotomy, undermining the traditional conception of two opposing spheres. Revealing the way in which

“Public opportunities shape private choices just as private burdens constrain public participation. Women's unequal responsibilities in the home limit options in the world outside it. Reduced earning capacity in the market also correlates with reduced power and increased obligations in the family”.¹⁷⁴

Those who have traditionally transgressed the gendered barrier between public/private, such as working-class women exemplify the ways in which the maintenance of patriarchal values can still be identified within the public realm made up of *equal* individuals. Women in the public sphere were not (and arguably still are not) viewed/treated as equal.¹⁷⁵ Despite such women entering the public domain, they were still measured against the “masculine model of the ‘individual’”.¹⁷⁶

¹⁷¹ See for example O'Donovan, (n22), 11-12.

¹⁷² MacKinnon, *Toward a Feminist Theory of the State* (n160), 193-4.

¹⁷³ Jaggar A. M., *Feminist Politics and Human Nature* (Sussex: Harvester Press, 1983), 101.

¹⁷⁴ Rhode D. L., 'Feminism and the State' (1994) 107 *Harvard Law Review* 1181, 1187.

¹⁷⁵ This can be identified in the history of occupational segregation, the devaluation of 'women's work' and numerous other factors as examined within Chapters 5-7.

¹⁷⁶ Pateman, *The Sexual Contract* (n46), 224.

The division of women's labour in the private and men's labour in the public has contributed significantly to the dependency of women.¹⁷⁷ The feminisation of largely unpaid and unrecognised labour in the home, supports the economic role of men in the private. As Okin states

“Only when men share equally in such tasks as housework and child-rearing will they come to be valued equally with those ‘masculine’ tasks which society presently acknowledges to be productive and rewards with money... there will be no such thing as ‘women’s work’”.¹⁷⁸

The undervalued position of women in the home has created both practical and psychological barriers which have prevented women's full participation in the public realm, barriers which the state has had a role in constructing and maintaining.¹⁷⁹

Overall, intervention into the domestic remains a contentious concept, and one which cannot be easily reconciled with liberal theory. There are circumstances in which intrusion by the state is deemed necessary, yet, there are considerable examples in which the state can be seen to manipulate the division to serve its own purposes.¹⁸⁰ Constructing systems in a way which encourages women's ‘traditional’ caring role, and presents the public realm as having little or no appeal to women has been the typical result of such manipulation. The state has repeatedly helped shape women as dependents rather than autonomous individuals, and maintaining their ‘natural’ place in the private sphere.¹⁸¹

¹⁷⁷ A theme which runs throughout Chapters 5-7.

¹⁷⁸ Okin S.M., *Women in Western Political Thought* (London: Virago, 1980), 269-7.

¹⁷⁹ Okin, *Gender, Justice and the Family* (n158), 111.

¹⁸⁰ Contrast the need for intervention in cases of for example, domestic violence: see [2.5.4], with those policies which trap women within the home through using the tax and welfare systems as discussed in relation to covert state action. Examples of such systems and their impact and application over time are examined in full within the Chapters 5-7.

¹⁸¹ Reflecting Lockean liberal ideology.

2.5.5 Neutral State and Neutral Laws

When considering the value of privacy versus intervention, restricting analysis to the nature of the home alone is insufficient. The character of the state and the law it produces also needs to be examined. If the state is neutral, intervention in the private, in limited circumstances and under appropriate checks and balances, then there ought to be little prospect of the Lockean fear of the tyrannical state being realised. However, the state having formed the archetypal example of ‘the public’ within the liberal theory has meant that it is imbued with, and replicates masculine norms.

As MacKinnon notes, “every quality that distinguishes man from woman is already compensated in society’s organisation and values, so that it implicitly defines the standards it neutrally applies”.¹⁸² It is clear that the law has often been used as a mechanism which supports male authority in the private realm and maintains the norm of the masculine individual in the public sphere.¹⁸³ As such, even when the state acts in a way which is gender-neutral, espousing the equality of all individuals, in refusing to intervene in private matters, where traditionally all differences manifest, it merely replicates structural inequalities.¹⁸⁴

The construction of the neutral state, is a fallacy, “the state is male in the feminist sense. The law sees and treats women the way men see and treat women”.¹⁸⁵ The masculine

¹⁸² MacKinnon, *Toward a Feminist Theory of the State* (n160), 224.

¹⁸³ As is demonstrated in Chapters 5-7.

¹⁸⁴ This is analysed in full in Chapter 3 and can also be seen in practice within Chapters 5-7.

¹⁸⁵ MacKinnon C.A., ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’ (1983) 8 *Signs* 635, 644.

construction of the state both reflects and replicates the dominant masculinity in society.

The placement of women in the private sphere, free from intervention

“has isolated the female world from the legal order sends a message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation”.¹⁸⁶

The law, as a manifestation of state power has historically maintained the division between public and private, “male social dominance perpetuates itself by setting up legal structures that fail to remedy the social sources of gender inequality”.¹⁸⁷

Therefore, *legitimately* securing women’s position as lesser.

Despite the many ways in which the law has replicated societal inequalities through the application of *neutral* and objective terms, there are examples of legal intervention preventing inequalities from persisting, particularly where substantive approach has been adopted.¹⁸⁸ Despite the fact that neither the state nor the law have traditionally been positioned as

“a defender of women... the state can, and does, set rules or provide services that can protect the weakest... Individual households offer much more arbitrary and unreliable protections, especially for the weakest”.¹⁸⁹

As such, though the state is a patriarchal institution which seeks to protect male interests, when it does see fit to intervene, the danger it poses is significantly less than if the private were to be left entirely unregulated.

¹⁸⁶ Schneider (n161), 89.

¹⁸⁷ Ward C V., ‘The Radical Feminist Defence of Individualism’ (1995) 89(3) *Northwestern University Law Review* 871, 875.

¹⁸⁸ Such a perspective can be identified within some of the legislation examined within the Chapters 5-7, and especially within the cohabitation judgments of Lord Denning. Chapter 3 also demonstrates the way in which neutrality and equality are not synonymous.

¹⁸⁹ Armstrong P., ‘Restructuring Public and Private: Women’s Paid and Unpaid Work’ in Boyd S., (ed) *Challenging the Public/private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997), 57.

State Defined Division

Despite being presented as *the* distinction between public and private

“non-intervention is a socially constructed, historically variable and inevitably political decision. The state defines as private those areas of life into which it will not intervene, and then, paradoxically, uses this privacy as the justification for its non-intervention”.¹⁹⁰

Where the state draws this line, it simultaneously obscures the division. The ability for the state to shift the boundary between public/private at will makes it unclear what, if anything, is truly private. The commitment to the family as private has been a central pillar in the liberal state in theory and espoused in practice, but never truly realised.

The malleability of the categories public/private, intervention/non-intervention, has made it increasingly difficult to conclusively define any element of society as truly private. Whether the nature of the family is such that it requires, or ought to be free from, intervention is a central argument which has arisen out of conflict

“between those demanding that private conduct meet publicly-set standards and those asserting that the essential virtue of the family as a social institution is its private character which must be defended against public intrusion”.¹⁹¹

Despite upholding the principle of non-intervention, the state has in practice persistently intervened with both positive and negative outcomes.¹⁹²

¹⁹⁰ Rose (n19), 64.

¹⁹¹ Dingwall R. W. J. & Eckelaar J. M., ‘Families and the State: An Historical Perspective on the Public Regulation of Private Conduct’ (1988) 10 *Law and Policy* 341, 341. This ‘clash’ can be identified throughout Chapters 5-7.

¹⁹² See [2.5.3] for examples of this, instances of the implications of intervention/non-intervention are also explored in additional detail in Chapters 5-7.

Though the private sphere is *defined* as a space free from intervention, this has been consistently undermined through both covert and overt state action. This has been particularly problematic in instances where “the state defines and reinforces specific roles and a particular hierarchy within the family, [as] these policies are often considered non-intervention”.¹⁹³ Non-intervention is however a form of regulation in itself.¹⁹⁴ Those instances in which the state refuses to intervene have often been based on family form, revalidating the traditional heteronormative marriage-centric family model.¹⁹⁵ For example, the unwillingness of the state to intervene with regard to unmarried cohabitation, reflects the reluctance to validate it as a family form.¹⁹⁶ Instances of regulation and non-regulation are both imbued with meaning “not legislating contains a value judgment just as legislating does. Law cannot be neutral; non-intervention is as potent an ideology as regulation”.¹⁹⁷

The value of maintaining the privacy of domestic sphere is dependent on the perception of the family. Is it the idealised family of classic liberalism, or is it a place of “oppression, raw will and authority, violence and brutality, where the powerful economically and sexually subordinate and exploit the powerless”?¹⁹⁸ History has proved the latter to be more accurate.¹⁹⁹ Whether this justifies unrestrained intervention is another matter. Some degree of intervention is necessary if we adopt the view that

¹⁹³ Olsen F. E., ‘The Myth of State Intervention in the Family’ (1985) 18 *University of Michigan Journal of Law Reform* 835, 846. As has been identified above in relation to covert action – this can be identified with changes to tax/welfare/childcare which seek to position women in the home, financially dependent on their partner. See Chapters 5-7 for examples of such policies.

¹⁹⁴ Dewar J., ‘Family, Law and Theory’ (1996) 16(4) *Oxford Journal of Legal Studies* 725, 732.

¹⁹⁵ Which in turn reinforces the inequality which results from such a model. The reluctance to validate *other* family forms also reinforces the inequalities between family forms. The form/function distinction is at [4.3.3] and can be identified in Chapters 5-7.

¹⁹⁶ The various discourses surrounding this are examined in Chapters 5-7.

¹⁹⁷ O’Donovan, (n22), 184.

¹⁹⁸ Minow M., ‘Beyond State Intervention in the Family: For Baby Jane Doe’ (1985) 18(4) *University of Michigan Law* 933, 948,

¹⁹⁹ As identified above in relation to violence in the home, and can also be identified in Chapters 3, 5-7.

“all people are citizens with rights, and no association which they can form with one another can violate these rights”.²⁰⁰ If all persons are of equal worth, then the state must intervene to protect those made vulnerable by virtue of their relationships with others.²⁰¹

As a result of the on-going conflict between pro and anti-intervention arguments, the state is currently seen as having struck a balance between the two. “The state is perceived as having a role only in the case of family default”,²⁰² where there is violence or an inability to provide financially. The adoption of this approach is categorised as the “protective intervention argument”.²⁰³ However, the degree to which ‘state assistance’ has been historically stigmatised particularly in relation to welfare/non-traditional family forms questions the extent to which this is intended to provide genuine assistance, or a warning against ‘individual decisions’ which led to scrounger-status.²⁰⁴

2.5.6 The (In)compatibility between Paternalism and Liberalism

The acts of intervention/regulation by the state in the UK can be categorised as paternalistic, an approach epitomised by coercive intervention.²⁰⁵ Paternalism is generally seen as embodying “the claim that it is legitimate for private and public institutions to attempt to influence people's behaviour [sic]”.²⁰⁶ Due to the perception that it places limitations on autonomy, such an approach has been traditionally

²⁰⁰ George R., *Ideas and Debates in Family Law* (Oxford: Hart 2012), 17.

²⁰¹ Egdell-Page O., ‘The Concept of Family Law: Understanding the Relationship Between Law and Families’ (2015) 3 *North East Law Review* 68, 73. However, such an approach can be seen to contrast the equality of treatment approach which has stemmed from liberal ideology as examined in Chapter 3.

²⁰² Fineman, *What Place for Family Privacy?* (n99), 1209.

²⁰³ Olsen, *The Myth of State Intervention in the Family* (n193), 835.

²⁰⁴ The stigma attached to non-traditional families, and those who rely on the welfare state is discussed in detail in Chapters 5-7.

²⁰⁵ See Valdés E.G., ‘On Justifying Legal Paternalism’ (1990) 3 *Ratio Juris* 173. This draws clear links to both the overt and covert actions of the state as discussed in [2.5.3].

²⁰⁶ Sunstein C. R., & Thaler R. H., ‘Libertarian Paternalism Is Not an Oxymoron’ (2003) 70(4) *The University of Chicago Law Review* 1159, 1162.

perceived as antiliberal.²⁰⁷ This section discusses the dangers and merits of a paternalistic approach and the development of a libertarian paternalistic approach.

Paternalism is frequently cast in a negative light, given that it is presented as the “usurpation of decision making, either by preventing people from doing what they have decided or by interfering with the way in which they arrive at their decisions”.²⁰⁸ This may create the perception that state intervention requires the limitation of the options available to individuals and families. However, there are also examples of the state instead providing incentives in order to encourage certain decisions/behaviours, for example those relating to the Married Couples Tax Allowance.²⁰⁹

There is the danger that adopting a paternalistic stance may

“create a ‘nanny state’, invading the autonomy of the individuals concerned and potentially infantilizing them? Or, yet worse, by legitimizing a paternalistic government, are we actually creating a potentially tyrannical state, justifying its intervention in every aspect of our lives”.²¹⁰

The ‘nanny state’ has provided a derogatory term by which Britain has been and still is described, and the potential for tyranny mentioned above typifies the traditional liberal fear of the state.²¹¹ Despite the longstanding critiques of paternalism, particularly from

²⁰⁷ As can be seen in Locke’s Two Treaties as discussed above; Alexander E., (ed) *On Liberty John Stewart Mill* (Peterborough: Broadview Press, 1999), 52; Kant I., *On the Old Saw: That May Be Right in Theory, but It Won’t Work in Practice* (Philadelphia: University of Pennsylvania Press, 1974) 58-59; See also Sunstein and Thaler (n206), 1160 summarising the opposing views of libertarians/paternalists.

²⁰⁸ Dworkin G., *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), 123.

²⁰⁹ That is not to say that providing incentives has positive implications – but rather that limiting options is not the only method through which the state can influence behaviour. The use of the Married Couples Tax allowance as a method of promoting certain forms of behaviour is discussed at [6.2.9].

²¹⁰ Le Grand J., & New B., *Government Paternalism: Nanny State or Helpful Friend* (Princeton: Princeton University Press, 2015), 1.

²¹¹ Recent critiques come in the form of the Nanny State Index which in 2017, Britain was scored as the second worst ‘nanny states’ in Europe: <http://nannystateindex.org/united-kingdom-2017>. The survey

a traditional liberal perspective, there are ways in which it can prove beneficial, and indeed be reconciled with liberal ideals.

Libertarian paternalism differs from the traditional liberal view of paternalism, insisting that “that there are ways in which the state can intervene within ‘harm to self’ issues... without necessarily compromising personal freedom”.²¹² From this perspective, the essential way in which autonomy and privacy are both purportedly secured is through choice and ensuring that the government does not impose significant costs, either financially or socially on those who ‘choose’ to defer from their preferred ‘option(s)’.²¹³

The legitimacy of paternalistic state action is said to focus on “disclosure [which] itself promotes autonomy, by allowing individuals to make informed decisions about their own ends”.²¹⁴ However, the notion of informed consent in this context is undermined in two significant ways. First, through gender socialisation/norms relating to autonomy.²¹⁵ Secondly the persistence of covert state action and limitations placed on the ‘options’ made available by the state, also determine the extent to which there is any real consent by citizens to the action of the state.²¹⁶

focussed on issues such as smoking, drinking and food consumption but it is nevertheless insightful as to the extent to which particular states are willing to intervene into the choices made by individuals.

²¹² Whitehead M. (et al)., ‘Geography, libertarian paternalism and neuro-politics in the UK’ (2012) 178(4) *The Geographical Journal* 302, 303.

²¹³ Sunstein, (n113), 138. Britain has however, historically imposed such costs: see Chapters 5-7 for examples of such policies. The notion of choice here also has implications on those whose autonomy has already been limited: see [2.5.2] and [2.1.2] in relation to gendered autonomy and individualism.

²¹⁴ *ibid.* Much like those arguments raised in defence of state intervention at [2.5.4].

²¹⁵ As discussed at [2.5.3].

²¹⁶ Both the restrictions placed on autonomy and covert state action are discussed in detail at [2.5.3], examples of which can be identified within Chapters 5-7.

Libertarian paternalism, which is now frequently invoked in UK politics has become commonly referred to as ‘nudge theory’.²¹⁷ The Conservatives in particular have gained an interest in nudge theory particularly since the 2010 coalition.²¹⁸ Despite its popularity with the state, it has been met with scepticism by the media as demonstrated in the headline “Nudge nudge, say no more. Brits' minds will be controlled without us knowing it”.²¹⁹ This epitomises the residual fear concerning paternalism, that the lack of public knowledge about the purpose which lies behind policy/legal change which impacts their decision-making process, decreases the autonomy of the individual and increases the power of the state.

In the context of public health, “nudge tactics” are seen as less controversial and tend to have been more clearly communicated. Yet, they still remain subject to scathing critique. For example, Spence, writing for *The Independent* surmised that:

“State intervention in these matters shows that those in government consider themselves better than others. Regulation of ‘sin’ products are for our ‘own good’. This betrays a supreme arrogance: contempt for ordinary people’s autonomy. ‘People need to be told’ comes the refrain. ‘They need to be educated’”.²²⁰

²¹⁷ On the increasing use of libertarian paternalistic techniques in the UK: see Whitehead, (n212).

²¹⁸ The term “nudge theory” is derived from Thaler R., & Sunstein C., *Nudge: Improving Decisions About Health, Wealth and Happiness* (New Haven: Yale University Press, 2008). See generally Dorey P. (et al.), *From Crisis to Coalition: The Conservative Party 1997-2010* (Basingstoke: Palgrave MacMillan, 2011), 76. Some examples of nudge theory/libertarian paternalism can also be identified in Chapters 5-7.

²¹⁹ Dunt I., *Nudge Nudge, Say No More. Brits' minds will be controlled without us knowing it* (The Guardian 5 Feb 2014): <www.theguardian.com/commentisfree/2014/feb/05/nudge-say-no-more-behavioural-insights-team> accessed: 20/01/2018.

²²⁰ Spence B., *Brexit was supposed to be about taking back control – but the UK has one of the most interfering nanny states in Europe* (The Independent May 10 2017): <www.independent.co.uk/voices/nanny-state-index-state-interference-smoking-drinking-junk-food-a7727571.html> accessed: 20/01/2018.

However, those ‘nudges’ which impact the decisions relating to families, such as the aforementioned Married Couples Tax Allowance to increase the incentives to marry rather than cohabit, or the cuts made to nursery care and maternity pay in the 1980’s the state’s true motivation, to encourage mothers to remain in the home, is left unexpressed.²²¹

Having considered the dangers women may face in an unregulated private realm, alongside the benefits which arise from privacy it accepted that,

“there are spheres of activity within a ‘private’ realm where there should be a strong presumption against paternalistic government regulation, and individuals should be free to decide for themselves what to do. The disagreement is over which activities belong in the public and private spheres”.²²²

It is at this stage that it must be re-emphasised that it is the state that draws the line which ‘divides’ public/private.²²³ The way in which the state has been formed for and by men has meant that the parameters of privacy have typically been constructed in a way which supports masculine dominance in both the home and the public sphere. As a result, the divide remains a tool which can be manipulated by the state under a guise of neutrality, reinforced by the supposed distaste for intervention, all while intervening when and where they see fit.

2.5.7 Public/Private in the modern Era

The extent to which the ‘division’ of the spheres is still present/relevant within the C20th/21st is often questioned given the increased presence of women within the public

²²¹ These examples are discussed in full in Chapters 5-7. They serve to demonstrate the ways in which women have been encouraged to remain in the private sphere, reinforcing the public/private dichotomy.

²²² Mnookin, (n155), 1440.

²²³ As discussed at [2.5.5].

sphere, particularly in relation to the workplace.²²⁴ Yet, despite notable improvements in their position it is clear that “women have entered the public sphere, but not on equal terms”.²²⁵ The subordination of women has been simultaneously reinforced and disguised by the bifurcation of societal life into the public and private spheres.

The denial of the interconnectedness of the spheres has made it appear as though by obtaining a place within the public sphere, those inequalities which resulted from their position in the private sphere would be erased. However, as Gal states

“public and private will have different specific definitions in different historical periods and social formations. But once a dichotomy is established, the semiotic logic forms a scaffolding... [which] can be made lasting and coercive, fixing and forcing such distinctions, binding social actors through arrangements such as legal regulation”.²²⁶

As such, despite women now having the ability to reside in either sphere, the gendered public/private dichotomy remains intact and continues to influence the value attributed to the activities and identities of individuals placed in either sphere.

Maintaining a successful career in the masculine public sphere of work, is often presented as an alternative to a successful private life for women, due to the construction of the two spheres as incompatible. Even where there has been a shift towards the “do it all” culture, this has not signalled freedom for women. The implications of the gendered nature of appropriate roles has meant that without this shift being mirrored by men, women are doomed to an eternal ‘double shift’. The continued oppression of

²²⁴ The historical shift in the position of women is examined in detail in Chapters 5-7.

²²⁵ Walby (n160), 94.

²²⁶ Gal S., ‘A Semiotics of the Public/Private Distinction’ (2002) 13(1) *Differences: A Journal of Feminist Cultural Studies* 77, 85.

women within both spheres, as outsider in the public and in her *natural* position within the private, is testament to “the power of norms to outlive the economic circumstances from which they sprang”.²²⁷

2.6 Conclusion

This chapter has examined the liberal principles and dichotomies which have influenced socio-legal structures and behaviours. The masculine, hierarchical construction of public/private has contributed significantly to the oppression of women, and fed the perception that difference equates to lesser. Further, it has demonstrated the means by which women’s oppression has been naturalised and disguised by the state under the guise of neutrality by virtue of the gendered formulation of purportedly distinct realms.

The series of dichotomies which have been discussed in this chapter are clearly identifiable in practice in the historical and case analysis within Chapters 5-7. These distinctions have provided the philosophical underpinnings of the formal/substantive, equality/difference debate which is developed in the following chapter. When taken together, it becomes clear that the liberal construction of society, reliant on a series of *strict* dichotomies, which only the state has a *legitimate* role in manipulating, underpins the historical oppression of women and the persistence of gender inequality.

²²⁷ Iversen T. & Rosenbluth F., *Women, Work and Politics* (London: Yale University Press, 2010), 163.

Chapter 3 - Equality and Difference

“Equality as a principle – never as a practice – has been an essential part of the political ideology of all democratic capitalist societies since their inception”¹

3.1 Introduction

This chapter explores the validity of the principle and practice of equality as a method of securing the equal position and status of women in law and society.² The pursuit of gender equality has been central to the feminist movement(s), and is upheld as the mark of a successful liberal state. Despite this, the formal construction of equality has, in practice, worked to secure the unequal position of many women. The focus of this chapter is on the theoretical underpinnings and consequences of the application of equality. This informs the case studies in Chapters 5-7 which explore the way in which a substantive approach to equality, which recognises difference, has proved a more useful tool for women when seeking to obtain proprietary rights.³

Building on the theoretical examination of liberalism and liberal structures in the previous chapter, this chapter engages in an in-depth analysis of the term equality, in both its substantive and formal constructions. Through this examination it emerges that equality forms a further dichotomy, that between sameness/difference.⁴ When read alongside the historical context explored in Chapters 5-7 it becomes increasingly clear

¹ Mitchell J., ‘Women and Equality’ in Phillips A., *Feminism and Equality* (Oxford: Basil Blackwell, 1987), 27.

² The reference made here to equality in practice is built upon further in Chapters 5-7 which bring together an examination of women’s position in society from the 1960s onwards with an analysis of the relevant case law relating to unmarried cohabitants.

³ This can be seen in particular in the judgments of Lord Denning, predominantly examined in Chapter 5.

⁴ This additional dichotomy is influenced and intersected by those dichotomies discussed in Chapter 2, and the liberal roots of equality explains the historical dominance of the formal ‘sameness’ approach to equality in the UKs socio-legal structures.

that the equality/difference dichotomy has proved particularly problematic for women. On one hand women have historically denied difference in order to secure formal equality with men, and on the other if they seek substantive equality for gendered issues, they have to acknowledge difference without falling into the trap of essentialism. This has meant that “from women’s point of view equality is a double-edged sword”.⁵ The dichotomisation of equality/difference is presented as a choice rather than a compatible combination which raises an additional issue in relation to the pursuit of equality of difference.

The way in which liberal dichotomies have constructed a gendered, hierarchical society, based on a masculine individualism, has problematised the application of formal equality. The adoption of a form of equality based on fictitious neutrality which treats all people as if they had the same qualities and opportunities, does not result in equality in practice but merely upholds the principle. In order to secure real equality in practice, rather than allowing ideologies distracted by debates surrounding difference to persist, it needs to be acknowledged that “equality is not an abstract principle but a social phenomenon”.⁶ As such, what ought to be recognised is the way in which equality interacts with a society derived from gendered, hierarchical, liberal dichotomies, rather continuing to rely on an idealised view of how society ought to be.

As a result of the dissatisfaction which arises from a purely formal approach to equality, and the problematic nature of the construction of equality/difference as a dichotomy, this chapter considers two of the proposed middle ways between equality and

⁵ Parvikko T., ‘Conceptions of Gender Equality: Similarity and Difference’ in Meehan E., *Equality, Politics and Gender* (London: Sage Publications, 1991), 37.

⁶ Armstrong C., ‘Complex Equality: Beyond Equality and Difference’ (2002) 3(1) *Feminist Theory* 67, 68.

difference. One of which is proposed by MacKinnon and the other involves the deconstruction of a series of dichotomies.⁷ The adoption of a ‘middle way’ would allow for a conception of equality in difference to be adopted in practice, which has the capacity to adapt to the needs of specific individuals/contexts. This would in turn facilitate the balance between flexibility required both within a social and legal context to deal with the constantly shifting position of those traditionally viewed as forming the lesser half of binary pairings.

3.2 Forms of Equality

3.2.1 Formal Equality: Equality of ‘Sameness’

Formal equality or equality of sameness, commonly referred to as equality under the law, is a central tenet of classic liberalism.⁸ Historically, calls for formal equality have had a considerable role in securing a number of legal and political rights for women. Despite the benefits which have arisen due to formal equality, on examining the position of women within society, it becomes increasingly evident that adherence to formal equality alone is insufficient to realise equality in practice.⁹ Due to the exclusion of private matters from consideration and the emphasis on sameness, formal equality fails to address the substantive causes of women’s inequality in the public domain. This section details the nature of formal equality, and begins to identify some of the weaknesses drawn on in more detail later in this chapter, in particular those relating to the gendered nature of citizenship and the faux-neutrality of formal equality.

⁷ This includes those dichotomies discussed in Chapter 2 and equality/difference.

⁸ As a result it is premised on the liberal principles and construction of the individual as discussed at [2.1.2].

⁹ Such an examination is provided in Chapters 5-7.

Formal equality can be encapsulated in the notion that “like be treated alike... the idea that women are not fundamentally different from men”.¹⁰ This is reliant on the construction of the public sphere as a realm of *gender-neutral* free and equal individuals.¹¹ Despite the centrality of sameness to the construction of individuals and the treatment they ought to receive under this formulation of equality, there is recognition of some differences from a liberal perspective. From this perspective, there are two central elements to the liberal individual which can be summarised as follows:

“first, that people are importantly the same, and therefore deserve an equal opportunity to choose and direct their lives; and second, that people are also importantly different, which means that, given an equal chance to choose, their actual choices will vary”.¹²

In this way, the universal, rational individuals are considered to be the ‘same’, and therefore treated as such, and observable differences are said to result from free, autonomous choice.¹³

Formal equality, premised on the sameness of individuals is presented as the foundation of equal treatment, and those differences which are accepted are posed as the source of inequality. It is from this position that difference and inequality have been assimilated. This has led to the assertion that liberal theory, and as a result formal equality, denies that there are differences between individuals. However, “liberalism begins and ends with the eradicable particularity, and hence diversity of individuals [in which they]

¹⁰Meehan E. & Seventiysen S., ‘Problems in Principles and Policies’ in Meehan E., *Equality, Politics and Gender* (London: Sage Publications, 1991), 3.

¹¹ Derived from the Lockean construction of the public sphere/universal individualism: see [2.1][2.4.5].

¹² Ward C. V., ‘On Difference and Equality’ 3(1) 1997 *Legal Theory* 65, 68.

¹³ As discussed at [2.1], women have not traditionally formed part of this ‘rational’ group of individuals due to their difference being founded in nature. As the above indicates, having derived from liberal theory, formal equality is also subject to those critiques pertaining to the gendered nature of the public/private dichotomies and universal individualism: see generally Chapter 2.

emphasise differentiation not from *the* other but from *every* other”.¹⁴ Despite centrality of difference/diversity to the liberal individual, within the context of equality, difference is made invisible. Presenting differences as resulting from autonomous choice or due to *natural* difference, it is rendered irrelevant due to its placement in the private sphere, the concept of difference becomes one in which the state should not intervene.¹⁵

The sameness approach has meant that women who are perceived to act like men are entitled to equal treatment as men, while those who do not are *legitimately* treated differently. “Formal equality has actually hurt many women”¹⁶ and the illusion which a formal account of equality creates, despite in some contexts benefitting women, can be dangerous for those in a caregiving or homemaker role. Where masculinity is the norm, formal equality is merely androcentrism posing as neutrality.

Influenced by traditional Liberal theory, under the formal approach “equal rights are awarded solely on the basis of one's identification as a member of the human species and, as such, are determined by our ‘sameness’ - our humanity and are not determined by our differences”.¹⁷ However, although this would be an accurate baseline for the treatment of individuals, the application of neutral principles in facilitating a sameness approach ignores the impact which differences, both biological and socially constructed between men and women, have on their treatment by, and position in society.¹⁸ As

¹⁴ Jensen P. G., ‘Introduction’ in Jensen P. G., (ed) *Finding a New Feminism: Rethinking the Woman Question for Liberal Democracy* (Toronto: Rowman & Littlefield, 1996), 5. Original emphasis.

¹⁵ See generally Chapter 2 on the public/private dichotomy and autonomy/intervention.

¹⁶ Becker M., ‘Prince Charming: Abstract Equality’ (1987) *Supreme Court Review* 201, ²14. This is due to the fact that such activities have traditionally been categorised as feminine and belonging to the private sphere.

¹⁷ Hauserman N., ‘Sexual Equality: An Essay on the Importance of Recognizing Difference’ (1983) 7 *ALSA Forum* 251, 254.

¹⁸ The difference in the treatment and position of women is explored in detail in Chapters 5-7, which also demonstrates the ways in which the application of seemingly neutral principles has proved problematic in practice.

established in the previous chapter of this thesis, the masculinity of the public realm, in which formal equality is applicable, has meant that this formulation of equality was created by men, for men. The principle of formal equality is difficult to critique. However, its application which denies those both socially constructed and biological differences, fails to produce equality for those who do not fit the traditional masculine construction of the individual. The contradictory denial of difference from this perspective forms one of the central critiques of the adoption of a formal perspective.¹⁹

3.2.2 Substantive Equality: Equality of ‘Difference’

*“Sexual difference is probably the issue in our time which could be our ‘salvation’ if we thought it through”.*²⁰

Substantive equality, or equality of difference arose out of the dissatisfaction with formal equality. As such, it acts as both a distinct formulation of equality, and a critique of the liberal equality of sameness. Although substantive equality addresses some of the difficulties which arise from an application of purely formal equality it is also subject to significant critique. This section provides an overview of substantive equality which is developed later in this chapter. This leads to the conclusion that despite the difficulties which arise from the differences approach, they can be overcome and that the substantive approach is preferable from a purely formal approach.

¹⁹ Such an approach can be identified in the strict *Rosset* approach discussed at [4.2],[4.3.2],[6.8] in which the same, neutral rule – in sum express agreement or financial contribution equates to beneficial ownership, though seemingly promoting equality of sameness has failed to impact men and women in the same way, to the detriment of women.

²⁰ Burke C., & Gilligan C., (trans) Irigaray L., *An Ethics of Sexual Difference* (New York: Cornell University Press, 1993), 5.

The substantive approach is “able to deal with relations between individuals in different original positions”.²¹ This requires a recognition of the mythology of the universal individual, and the negative impact that the gendered divisions stemming from liberal theory has had on women, which has traditionally been attributed to difference.²² This recognition has a two-fold effect. First, it counters the historical opposition to difference as the source of inequality, instead positioning the liberal construction of society and citizenship/identity, and the reluctance to recognise difference as central to the continuation of gender inequality. Second, it acknowledges that the application of *neutral* principles under a strictly procedural approach cannot result in equality of outcome where society has been arranged within hierarchical, oppositional spheres.²³

The recognition of difference risks “affirming the perspective that has been forced on women”.²⁴ However, unlike its predecessor, biological determinism, the recognition of difference here is not used to legitimise the oppression of women, but rather seeks to rectify it.²⁵ That is, the substantive approach focusses on the way in which difference has been constructed by society, and attempts to alleviate the negative consequences of that difference.²⁶ The substantive approach acknowledges that “equality is not a synonym for similarity”,²⁷ despite formalists presenting it as such. Recognising the fictional dichotomy constructed between equality and difference in this way allows for

²¹ Parvikko, (n5), 48. In contrast to the formal approach as discussed above.

²² See Chapter 2 regarding universal individualism and the issues which have stemmed from the liberal dichotomies. This can also be identified in practice within Chapters 5-7.

²³ See Chapter 2.

²⁴ Baer J., *Our Lives Before the Law: Constructing a Feminist Jurisprudence* (New Jersey: Princeton University Press, 1999), 9.

²⁵ On biological determinism: see [2.3.1]. That is not to say that there does not exist a difference based school of thought which is premised on biological deterministic thinking in which men and women are deemed ‘naturally different’. However, here the focus is on those difference approaches which are compatible with the social constructionist notion of gender.

²⁶ This notion is developed in [3.3]. Biological difference, particularly pertaining to maternity is discussed at [4.3.4]. Both of which can also be identified in Chapters 5-7.

²⁷ Parvikko, (n5), 41.

a formulation of equality which recognises and is able to react to difference to be established, avoiding the trappings of masculine neutrality suffered by the formal approach.

From this perspective, it becomes clear that formal equality alone is an insufficient tool to provide equality to those who do not reflect the traditional characteristics exemplified by the universal individual. Rather, equality is “realizable only by recognizing when it is appropriate to do so, that there are differences between men and women [sic]”.²⁸ The substantive approach to equality takes account of the biological and socially constructed differences between men and women. Accepting such differences seeks to eradicate those negative connotations which have derived from the polarisation of difference and equality, resultant from the liberal dichotomisation of society. This simultaneously facilitates a recognition of the way in which the public/private spheres are mutually reinforcing, that one’s position in the private sphere has the capacity to impact their position in the public sphere.²⁹

3.3 Equality in Theory and Practice, A Critique

Having outlined the central forms of equality, this section provides an overview of the critiques which have been raised in relation to both formal and substantive formulations of equality. This leads to the conclusion that a purely formal approach is limited in scope and suffers many of the critiques raised in relation to the liberal construction of society and the individual as discussed in the previous chapter. However, the benefits derived from the adoption of an approach which recognises difference under a substantive equality regime is also rife with problems. The range of issues discussed are then

²⁸Meehan & Seventiysen, (n10), 3.

²⁹ This is of course typified in the feminist ‘slogan’ “the personal is political” as explored in Chapter 3.

brought together with a discussion of alternative approaches to equality, and the endorsement of a middle way between equality and difference.

3.3.1 Equality and the Law

The neutrality and objectivity associated with the application of formal equality, has secured its dominance within the legal regime as identifiable in the principles of *stare decisis*, precedent and the rule of law.³⁰ In the UK historically the primary concern has been the consistent application of the law. However, under such an approach there is no guarantee of a positive outcome.³¹ A claim to equal treatment can be satisfied by both levelling down (depriving the compared parties of the benefit concerned), or by levelling up (conferring the benefit on both parties involved).³² As it is satisfied by both improving or worsening the position of individuals, formal equality “proceeds from an abstracted and objectified analysis of equality that ignores the lived experience of inequality”.³³ This raises questions as to whether the pursuit of such equality is of any value to those it is supposed to protect. The outcome of the application of *neutral* principles is not considered relevant in the application of formal equality.

³⁰ It ought to be noted that these principles do not form an exhaustive list of the ways in which formal equality has been embraced by the legal system. Central to this thesis as discussed at [4.2],[4.3.2],[6.8] is the *Rosset* approach.

³¹ Echoing the moral neutrality of the rule of law, particularly as exemplified by Raz’s knife analogy: Raz J., *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009), 225-6.

³² Barnard C., & Hepple B., ‘Substantive Equality’ (2000) 59(3) *Cambridge Law Journal* 562, 563.

³³ Brake D. L., ‘When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law’ (2004) 46(2) *William & Mary Law Review* 513, 516. Although the prospect of levelling down remains a possibility, the political implications of such an approach means that it is infrequently invoked. However, there have been examples: see *Balgobin v. London Borough of Tower Hamlets* [1987] I.R.L.R. 402, EAT and *Stewart v. Cleveland Guest (Engineering) Ltd.* [1994] I.R.L.R. 440, EAT by way of levelling down in the context of sexual harassment.

The direct discrimination legislation of the 1970s, and within the Equality Act 2010 provide specific examples of equal treatment legislation in the UK.³⁴ One of the central issues concerning direct discrimination, as an element of formal equality in practice is the requirement of a comparator, which has historically proved problematic for women due to occupational segregation and legislative loopholes exploited by employers.³⁵ This demonstrates the way in which formally neutral rules can, when played out in a gendered society, replicate inequality. That is not to say that formal equality has not benefitted those considered ‘other’, for example it was on this basis that women gained the right to vote and the right to equal pay. However, the latter serves as an example of the way in which formal rights do not go far enough in addressing the substantive causes of inequality.³⁶

Despite the natural appeal, and historical affiliation between the law and formal equality, there are increasingly instances in which a substantive approach has been adopted due to the inability for the formal approach to adequately deal with difference. This has particularly been invoked in relation to group characteristics, and can be seen within the context of indirect discrimination.³⁷ Indirect discrimination can be invoked when supposedly neutral provisions have an adverse impact upon a particular group of individuals, thus acknowledging that *neutrality* and ‘sameness’ do not always result in equality.³⁸ Maternity provisions provide an additional example of substantive

³⁴ Equal Pay Act 1970, hereafter EPA; SDA 1975, hereafter SDA; Equality Act 2010, hereafter EqA are examined in Chapters 5-7 in detail.

³⁵ EqA 2010 s1(4) EPA s23, s71 does allow for the use of a hypothetical comparator in limited circumstances, this is also examined in detail in the Chapters 5-7.

³⁶ As discussed in Chapter 7, particularly [7.2] despite numerous legislative acts aimed at alleviating the gender pay gap, it persists.

³⁷ The issues in relation to equality and group characteristics is discussed in detail below: see [3.3.2].

³⁸ Equality Act 2010, s19, Although the inability to raise claims as a group within this context has proved problematic in that it only addresses the effects on an individual rather than dismantling the structural inequality which gave rise to the issue and has the potential to impact others within such a ‘group’.

legislation in action. However, given the centrality of pregnancy and motherhood to the difference debate, this is discussed in detail below.³⁹

Overall, within a legal context equality based in neutrality remains desirable in principle. Yet, the implications of such an approach are, in practice, inherently biased and in many cases, replicate existing inequalities. The masculinity of neutrality, particularly in the context of the public sphere where male performance is the norm has meant that the application of *neutral* rules often acts to the detriment of women.⁴⁰ This has arisen due to the construction of social institutions as inherently masculine and embodying patriarchal values, from which the law has not escaped. The central flaw in the formal approach remains tied to its reluctance to acknowledge difference, relying on the construction of the neutral individual, and the preclusion of groups that this individualism entails. The notion of the neutral individual and the problems which arise from a disregard of groups is examined below.⁴¹

3.3.2 Identity and Citizenship

Having stemmed from the liberal construction of the individual, the application of formal equality has been formulated as legal and political equality, limited to the public sphere. A distinction can be drawn between the implications of equality within the home for example, relating to unpaid labour, and paid labour within the public sphere. In the latter instance, in entering the public domain, and *performing* as men, women have

³⁹ The development of UK maternity law and its implications for gender equality is considered in its historical context in Chapters 5-7, particularly [5.3], [6.4], [7.2].

⁴⁰ As can be seen in relation to the formal approach adopted in relation to sole-ownership cases under *Rosset* [6.8]. When viewed within the socio-legal context provided in Chapters 5-7 the 'neutral' financial criteria relied on in the majority of sole-ownership cases is further problematised by the additional inequalities faced by women.

⁴¹ See [3.3.2].

gradually obtained formal equality *guaranteed* by the state, in that they are treated in the same way as men.⁴² In contrast the domestic sphere is presented as a site of non-intervention and has been traditionally affiliated with the feminine. Non-intervention through seeking to prevent state interference in the private domain undermining the *choices* made by individuals, has also ensured that inequalities in the private sphere are left without address.⁴³

As a result, identity and citizenship have formed a central part of the discussion of equality. The liberal attachment to fictitious universal individualism, underpinned by the public/private dichotomy has formed the basis of citizenship and identity, and consequently, access to equality.⁴⁴ This has had two central implications. First, it has contributed to the masculinised form of citizenship which is presented as neutral/universal. Second, the individualism central to the liberal model of citizenship excludes any notion of equality based in group identity. The following section will go on to discuss the issues which arise as a result of the adoption of a formal approach to equality. Particular emphasis is placed on “the idea that citizenship is the same for all” has led to the “requirement that all citizens be the same”.⁴⁵ This has in turn reinforced the rejection of the recognition of difference in the public sphere. It also explores the alternatives offered by a substantive approach.

⁴² However, it must be noted that this notion of equality can be seen to be undermined, given that women are still paid less than their male counterparts, despite legislation existing, attempting to prevent just that as is discussed in full within Chapters 5-7. Regarding the masculinity of female performance: see [1.2.2] and [2.4].

⁴³ See generally Chapter 2 for the ways in which the state has otherwise undermined the notion of non-intervention and the critique of ‘choice’/autonomy.

⁴⁴ See the Chapter 2 in relation to universal individualism and the impact of the public/private and associated dichotomies. There is also some discussion of identity and citizenship in that chapter.

⁴⁵ Young I. M., *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), 118.

Neutral citizenship

Citizenship often refers to the “status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed”.⁴⁶ This formulation can be seen to include the political/legal construction of citizenship which gives rise to the rights and obligations attributed to a society of equal individuals. However, citizenship extends further than status, it also includes “participation, representation and access to power”.⁴⁷ Despite the *neutral* construction of citizenship status/practice, social, political and legal restraints placed on women continue to prevent them from “fulfilling the full potential” of citizenship status and as a result, their equal position in society.⁴⁸

The classic formulation of citizenship, stemming from the liberal construction of the individual and bifurcated society conferred citizenship status upon men as the head of the household (husband or father) to act as “representatives of a family” rendering women “indirect citizens”.⁴⁹ The traditional masculine construction of citizenship status was justified on the basis of women’s supposed lack of rationality, their positioning within the private sphere and the faux-universal individual.⁵⁰ As a result, despite the purportedly universality of citizenship, it meant no more than membership of what

⁴⁶ Marshall T. H., *Citizenship and Social Class* (Cambridge: Cambridge University, 1950), 28-9.

⁴⁷ Gouws A., ‘Beyond equality and difference: the politics of women’s citizenship’ (1999) 15(40) *Agenda* 54, 54.

⁴⁸ Lister R., ‘Citizenship: Towards a Feminist Synthesis’ (1997) 57 *Feminist Review* 28, 36. Much of this has hinged on the construction of women’s identity as mother/wife as can be seen in the Chapters 5-7, and also links to the participation of women in the public sphere and autonomy/voice as discussed at [2.5.3] [2.4].

⁴⁹ Vogel U., ‘Is Citizenship Gender-Specific?’ in Vogel U. & Moran M., (eds) *Frontiers of Citizenship* (Basingstoke: Palgrave MacMillan, 1991), 58. This has led to claims that marriage is the source of inequality between men and women: see Sarvasy W., ‘Beyond the Difference versus Equality Policy Debate: Postsuffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State’ (1992) 17(2) *Signs* 329. Regarding the role of the liberal construction of the individual in excluding women from full citizenship status: see Chapter 2 of this thesis.

⁵⁰ See [2.1.2].

Pateman would term the “fraternity... the brotherhood of men”⁵¹ in civil society/ the public sphere, from which women were excluded. As discussed previously, men’s ability to engage fully within the public sphere has hinged on the positioning of women within the private sphere.⁵²

Under this model, “women can only become citizens effectively if they actively participate in formal political activity”.⁵³ The *natural* placement of women within the private sphere due to their capacity to give birth, sacrificing their own citizenship for the sake of their children and their economically independent breadwinning husband has formed the foundation of women’s exclusion from the status of individual, and consequently forfeiting their access to equality.⁵⁴ As a result, women’s identity has been defined by their role or relationships, as wife/mother often being subsumed into the category of ‘family’ when such issues are raised in the public.⁵⁵ By virtue of their ability to transverse the public/private divide without consequence, the masculine categories of father and husband have not had the same effect.

Despite having ‘moved’ into the public sphere and attained formal citizenship status, many of the inequalities suffered by women remain inadequately addressed. This is due

⁵¹ Pateman C., *The Sexual Contract* (Stanford: Stanford University Press, 1988), 78. See also Fraser N., ‘What’s Critical about Critical Theory: The Case of Habermas and Gender’ in Okin S. M. & Mansbridge J., (eds) *Feminism* (Aldershot: Elgar Publishing House, 1994), 87 on the impact of women’s position in the private sphere and citizenship. This is also examined in Chapters 2, 5-7.

⁵² See Chapter 2 in relation to the historical ‘placement’ of women in the private sphere and the way in which this facilitated male access to the public sphere. Attempts to maintain the gendered divide between for example home and work can still be identified in modern politics – though this is most evident in the childcare/maternity politics of the Conservative party in the 1970s as discussed in Chapter 5, particularly [5.3].

⁵³ Prokhovnik R., ‘Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness’ (1998) 60 *Feminist Review* 84, 85.

⁵⁴ In a similar vein, autonomy as related to citizenship is also seen as having been forfeited – as discussed at [2.5.3].

⁵⁵ Women’s loss of identity can be seen in concrete terms with the historical practice of revoking women’s separate legal identity upon marriage.

to their inability to fully access the political/legal system and their unequal status and underrepresentation in these systems, which maintain their masculine formulation. Liberal individualism's focus on form over substance in relation to citizenship status has proved problematic for women in particular in that it leads to a failure to address the issues which prevent full access to power/rights, thus perpetuating their unequal status.⁵⁶

The masculinity of citizenship, hidden under the guise of *neutrality* has entailed the denial of difference within the public sphere.⁵⁷ When entering the public sphere those who embody or perform difference are told "to get what we have, be like us".⁵⁸ Meaning that masculine performance and the denial of difference has formed an essential prerequisite for the attainment of rights. The construction of citizenship and universal equality on the *neutral* citizen has meant that inequalities have been legitimised as either arising through the choices of autonomous beings or by virtue of natural differences which have no place within the public sphere.⁵⁹ As a result, "in law, this has made the problem of sexual difference all but invisible"⁶⁰ particularly under a formal approach which seeks to maintain the faux-neutrality of a liberal society without addressing the issues which maintain and in some cases replicate inequality.

⁵⁶ On the issue of liberal individualism as it related to form over substance in relation to groups: see Fraser E. & Lacey N., *The Politics of Community* (New York: Wheatsheaf, 1993). The promotion of form over substance has been a running theme in many of the issues identified in the literature surrounding family form/substance as discussed in Chapter 4 and identifiable in Chapters 5-7.

⁵⁷ Given that citizenship has been premised on sameness, as discussed in the Chapter 2, particularly [2.1.1], in turn equality is founded on the sameness of such individuals.

⁵⁸ MacKinnon C.A., *Women's Lives. Men's Laws* (London: Harvard University Press, 2007), 49. In a similar vein: see Montin K., (trans) Irigaray L., *Thinking the Difference* (London: Athlone Press, 1994), 75. As demonstrated in the examination of women's employment throughout Chapters 5-7.

⁵⁹ All of which stems from the gendered liberal public/private dichotomy and the construction of the universal individual as discussed in the Chapter 2, particularly [2.4.5] and [2.1.2].

⁶⁰ Lacey N., *Unspeakable subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998), 197.

Individuals and Communities

In addition to the masculine faux-neutrality of the universal citizen, the liberal construction of citizenship has also precluded the recognition of group identity. The sameness of individuals was seen to necessitate the abstraction of individuals from group characteristics and interests.⁶¹ Further, the individualism attributed to the liberal individual, which focusses on self-sufficiency, rationality and autonomy, legitimised women's exclusion from the public sphere and full citizenship. As such, liberalism formulated a notion of citizenship which both created numerous excluded groups and simultaneously refused to acknowledge them as groups. This section discusses the benefits and critiques associated with the notion of group identity which is contrasted with liberal individualism.

The incomplete citizen status of women is reliant on the historical construction of women's identity and their placement within the private sphere. In seeking full acknowledgement of women as citizens there arises a "tension – between needing to act as women and needing an identity not overdetermined by our gender".⁶² The issues related to treating/discussing women as a 'group' have been discussed in detail elsewhere.⁶³ However, given that the individualistic approach derived from liberalism has been shown to work to the significant disadvantage of those who do not fit the traditional model of the liberal citizen, which includes women as a 'group' it is necessary to discuss this issue as it relates to equality.⁶⁴

⁶¹ See Bacchi C., *Same Difference: Feminism and Sexual Difference* (London: Allen & Unwin, 1990), xv. For a more in-depth discussion of individualism: see [2.1.2].

⁶² Snitow A., 'Pages from a Gender Diary: Basic Divisions in Feminism' (1989) *Dissent* 205, 205.

⁶³ See [1.2.2].

⁶⁴ For an overview of the construction of the liberal individual: see [2.1.2]. See also Taylor D., 'Citizenship and social policy' (1989) 26 *Critical Social Policy* 19, 29 on "the failure of citizenship rights vested in liberal democratic institutions to meet the needs of women and racialised groups and the socially and economically marginalised".

The central challenge to the liberal construction of the individual/citizenship has come from a communitarian perspective.⁶⁵ Such an approach holds that persons should be seen as communities rather than isolated individuals, as to remove them from their social context ignores the sociability inherent in human nature and the value of communities.⁶⁶ The notion of the atomistic individual is not a true reflection of the way in which society is arranged, it “fail[s]... to give appropriate value to social identity”⁶⁷ or any notion of group identity, maintaining the fiction of the universal individual. Rejecting the notion of community/groups in favour of the mythological individual makes liberalism difficult to reconcile with issues which have an uneven impact on specific ‘groups’ of individuals, for example women.⁶⁸

The recognition of groups allows for those who have traditionally been excluded from the category of the universal individual by virtue of their difference “to effectively coordinate our behavior with another... we need shared cultural systems for categorizing [sic]”.⁶⁹ Categorising a collective of individuals as a group, allows for structural inequalities to be more easily identified, in a way which individual-centred issues of equality fails to do.⁷⁰ It brings with it the opportunity to organise political movements, to speak as a collective against the dominant ideology, to raise the issue of

⁶⁵ For examples of communitarian work: see MacIntyre A., *Whose Justice? Which rationality?* (London: Duckworth, 1988) and Sandel, M. J. *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

⁶⁶ On this point: see Caney S., ‘Liberalism and Communitarianism: a Misconceived Debate’ (1992) 40(2) *Political Studies* 273, 273.

⁶⁷ Akhtar S., ‘Liberal recognition for identity? Only for particularized ones’ (2011) 10(1) *Politics, Philosophy and Economics* 66, 67.

⁶⁸ Eisenstein Z. R., *The Radical Future of Liberal Feminism* (New York: Longman, 1981), 191.

⁶⁹ Ridgeway C., *Framed by Gender: How Gender Inequality Persists in the Modern World* (Oxford: Oxford University Press, 2011), 54.

⁷⁰ Young I. M., ‘Equality of Whom? Social Groups and Judgments of Injustice’ (2001) 9(1) *The Journal of Political Philosophy* 1, 2.

different treatment in the pursuit of an equality which has been structured around a sameness that does not reflect reality. In “subsuming women into a general “human” identity, we lose the specificity of female diversity and women’s experiences”⁷¹ and with that, the opportunity to inform and transform society at large.

Despite the role which acknowledging the relevance/reality of community and groups within the context of the realisation and formation of identity, it is not without its issues. As Fredman notes, from a liberal perspective

“the chief mischief of discrimination is that a person is subjected to detriment because she is attributed with stereotypical qualities based on a denigratory notion of her group membership. Respect for the individual requires that she be treated on her individual merits and regardless of her group membership”.⁷²

From this position groups are seen to detract from the ‘sameness’ of all persons, giving rise to stereotypes which are damaging to the individual.⁷³ It is portrayed as a method of illuminating “difference [which] is both the product of, and guarantor of, the continued subordination of powerless groups”.⁷⁴ However, this does not recognise that a number of gendered stereotypes arose due to the hierarchical dichotomies within liberal theory.⁷⁵ It is from this perspective that, for example, the housewife/breadwinner model of the family derives. To counter this, it ought to be acknowledged that it is not the membership of a group, or the acknowledgement of difference which is problematic,

⁷¹ Scott J. W., ‘Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism’ (1988) 14(1) *Feminist Studies* 32, 45-6. Note within this quote the recognition of women’s diversity within the ‘category’ of women.

⁷² Fredman S., ‘Equality: A New Generation’ (2001) 30(2) *Industrial Law Journal* 145, 154

⁷³ However, Chapters 5-7 examine the way in which stereotypes have been employed to both the benefit and detriment of women.

⁷⁴ Ward, (n12), 78.

⁷⁵ As discussed in Chapter 2. The modern history of the development of this model is traced through Chapters 5-7.

but rather it is the way in which difference has been constructed as the lesser half of the *incompatible* equality and difference dichotomy.⁷⁶

The concept of group identity has proved problematic from a number of perspectives. For Phillips, the construction of for example ‘women’ as a group entails the

“attribution of certain characteristics to everyone subsumed within a particular category... [which] naturalise or reify what may be socially created or constructed... [and] presume[s] a homogenised and unified group”.⁷⁷

Such an understanding gives rise to the idea that to speak of women as a ‘group’ risks essentialism. This has clear links with biological determinism and gender stereotyping which have proven problematic when speaking of ‘women’.⁷⁸ It is for this reason that despite the benefits derived from community and group identity, the way in which groups are thought about needs to be reconceived.

Identity ‘formed’ from group status needs to be distanced from the categorisation of persons by some shared attribute(s). A preferable formulation of what constitutes a social group is:

“an affinity with other persons by which they identify with one another, and by which other people identify them. A person's particular sense of history, understanding of social relations and personal possibilities”.⁷⁹

⁷⁶ A position which gives weight to those who endorse a deconstruction of said dichotomy: see [3.5.2].

⁷⁷ Phillips A., ‘What’s Wrong with Essentialism?’ 11(1) *Distinktion* 47, 52.

⁷⁸ As discussed in Chapter 2.

⁷⁹ Young I. M., ‘Polity and Group Difference: A Critique of the Ideal of Universal Citizenship’ (1989) 99(2) *Ethics* 250, 259. A similar notion is also adopted by MacKinnon C. A., ‘From Practice to Theory, or what is a White Woman Anyway?’ (1991) 4(13) *Yale Journal of Law and Feminism* 13, 16 who states that “comprised of all its variations, the group women can be seen to have a collective social history of disempowerment, exploitation and subordination extending to the present”.

From this perspective, identity is not defined by the characteristics or attributes of an individual, which has the capacity to be deemed essentialist, but it is instead relational. Adopting such a construction of identity allows for it to be distanced from stereotypical characteristics without excluding them from consideration entirely. Minow discusses the displacement of difference into the “relationship or matrix”⁸⁰ which creates it, rather than the individual in order to distance the implications of difference being that an individual is unequal, rather it is societies construction or treatment of them which renders them so.

This difference in turn must be understood as “plural and relational rather than oppositional”⁸¹ in order for what appears to be a homogenous group to allow for the diversity of individuals. Such a view is then compatible with the social constructionist view of gender.⁸² This makes it reasonable “to suggest that ‘women’ don’t exist – while maintaining a politics of ‘as if they existed’ – since the world behaves as if they unambiguously did”.⁸³ Thus allowing the benefits derived from the construction of women as a group to distance itself from an essentialist and homogenous understanding of women as naturally different from men and as such, unequal.

Neither a purely individualistic, or group based conception of identity provides an entirely satisfactory outcome. Instead what needs to be conceived is a notion of citizenship which reconciles universalism and difference. The way in which group and individual identity are presented as oppositional, as if accepting one necessarily

⁸⁰ Minow M., ‘Learning to Live with the Dilemma of Difference: Bilingual and Special Education’ (1985) 48(2) *Law and Contemporary Problems* 157, 206.

⁸¹ Lister R., *Citizenship: Feminist Perspectives* (London: MacMillan, 2003), 115.

⁸² As discussed in [1.2] and in [2.3], [2.4].

⁸³ Riley D., *Am I That Name? Feminism and the Category of ‘Women’ in History* (London: Macmillan, 1982), 112.

excludes the other, merely acts as a way of silencing the voices of those conceived as *other*. Group and individual identity are compatible, so long as the individual is allowed to maintain its diversity rather than being reduced to ‘sameness’ and they need to both be accepted and considered in order for society to accept and respond to difference, and achieve equality.

3.3.3 The Dilemma of Difference⁸⁴

Despite the benefits which arise from a substantive approach to equality acknowledging the biological and socially constructed differences between men and women, it is not a concept without critique. Embracing difference has been a source of concern, due to the way in which “differences can... be exaggerated, manipulated, and used opportunistically to coerce conformism and excuse corruption”.⁸⁵ Historically, difference has been “translated into evidence of female deficiency”,⁸⁶ in positioning masculinity/the male as the norm, anything which detracts from this is as other, lesser. This has been used, for example, as a justification for ‘women’s work’ being distinct from that of men, based on notion of natural attributes which make them naturally more suited to, what is coincidentally then, less valued than that performed by men.⁸⁷

⁸⁴ The subtitle for this section is drawn from Minow’s “difference dilemma”. She posits that ignoring difference in the case of subordinated groups “leaves in place a faulty neutrality,” but also recognising that placing too much emphasis on difference can result in amplifying the notion of deviance attributed to such groups. “Both focusing on and ignoring difference risk recreating it. This is the dilemma of difference”: Minow, ‘Learning to Live with the Dilemma of Difference’ (n80), 160.

⁸⁵ Alcoff L. M., *Visible Identities: Race, Gender, and the Self* (Oxford: Oxford University Press, 2006), 5-6.

⁸⁶ Greene S., ‘Biological Determinism: Persisting Problems for the Psychology of Women’ (2004) 14(3) *Feminism and Psychology* 431, 434. For a discussion of biological determinism and the oppositional construction of male/female dichotomy: see Chapter 2.

⁸⁷ The ‘lived reality’ of the devaluation of women’s work is discussed in full within Chapters 5-7.

Despite the modern liberal feminist critique of difference, its foundations can be found in one of the most famous historical proponents of women's rights, Mary Wollstonecraft. Her approach to equality can be encapsulated in the statement below:

“Let woman share the rights and she will emulate the virtues of man... speaking of women at large, their first duty is to themselves as rational creatures, and next, in point of importance, as citizens, is that which includes so many, of a mother”.⁸⁸

Here Wollstonecraft recognises the compatibility between equality and difference. The difficulties, at least in terms of the antithetic interpretations of these terms within Western Society generally is described by Pateman as the “Wollstonecraft dilemma”.⁸⁹ This phrase expresses the difficulties which have arisen due to the polarised conception of equality/difference, presenting difference is the antithesis of equality. As such, to demand that women are equal to, but different from, men seems a logical fallacy. However, this encapsulates my central argument, that the recognition of difference is precisely what is needed in order to facilitate gender equality in practice. What is needed is not an argument as to the philosophical or ideological construction(s) of equality, but rather the implications of its application in practice.

Although accepting and utilising difference is far from uncontroversial, an adoption of substantive equality is the lesser of two evils. The formulation of substantive equality discussed here “rests on a social conception of individuality, which includes both women and men as biologically differentiated but not unequal creatures”.⁹⁰ The

⁸⁸ Wollstonecraft M., *Vindication of the Rights of Woman* (New York: Norton, 1975), 145.

⁸⁹ Pateman C., ‘Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship’ in Bock G., & James S., *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity*, (London: Routledge, 1992), 20.

⁹⁰ Pateman C., *Feminist Critiques of the Public/Private Dichotomy*, in Phillips A., *Feminism and Equality* (Oxford: Basil Blackwell, 1987), 122.

problem lies not in difference itself, either in terms of sex or gender; but rather, it arises as a result of the implications of difference as constructed and replicated by societal structures. Societal structures which reinforce the perception that women, and the roles designated as feminine are lesser. To deny difference would merely allow for those inequalities, which are reinforced by the patriarchal application of formal equality to persist given that a “formal conception of equality... even if embedded in a substantive right... does not address the underlying... hierarchy which gives rise to inequalities in the first place”.⁹¹

The driving force behind equality should not be mere principle, but on the implications of equality in practice. Within Fredman’s conception of substantive equality she focusses on four dimensions which equality should seek to achieve, it should be: redistributive, ensure recognition, be transformative and participative.⁹² This recognition should not only be related to the difference of individuals, but the role of social and political institutions in shaping the consequence of this difference in order for systemic inequalities to be addressed through redistribution, leading to the transformation sought.

Difference as the Antithesis of Equality?

For those seeking equality, acknowledging difference has proved problematic from three distinct, but interrelated reasons. First, difference has a marked history through its associations with biological determinism and essentialism, which is also particularly

⁹¹ Albertyn. C. (et al)., ‘Introduction: Elusive Equalities - Sex, Gender and Women’ (2014) *International Journal of the Law in Context* 421, 422.

⁹² Fredman S., ‘The Potential Limits of an Equal Rights Paradigm in Addressing Poverty’ (2011) 22 *Stellenbosch Law Review* 566, 577.

relevant in relation to motherhood as discussed in detail below.⁹³ Secondly, difference has historically had negative connotations and consequences for those labelled as *other*. Finally, and most crucially, difference has been constructed as the antithesis of equality, forming an additional dichotomy to those discussed in the previous chapter.

Difference has been used to legitimate discrimination against women rendering it “the handmaiden of male domination”.⁹⁴ It has excluded women from full citizenship by constructing sexual difference as political difference.⁹⁵ Groups who have been labelled as different or other are tainted with “deviance, stigma, and inequality”.⁹⁶ As such, the manipulation of difference, and its affiliation with biological determinism, has reinforced the binary construction of gender which sits in opposition with a number of feminist perspectives.⁹⁷ This resulting in the inescapable inequality tied to the *natural* difference between men and women which presents the latter as lesser. As such from an equality perspective, difference has been a tool of the patriarchy. Such a history presents a challenge when attempting to demonstrate the utility of difference as a method of improving the position of women.

Despite this, difference has also proved invaluable for feminists, as Scott states “Feminists cannot give up ‘difference’; it has been our most creative analytic tool”.⁹⁸ It has allowed for those socially constructed differences between men and women to be challenged, for the gender-neutrality of individualism, society and the state to be

⁹³ In particular [2.3], [2.4].

⁹⁴ Fraser N., *Justice Interruptus: Critical Reflections on the ‘Poststructuralist’ Condition* (New York: Routledge, 1997), 100.

⁹⁵ Pateman *The Sexual Contract* (n51), 6. See also the discussion of citizenship above.

⁹⁶ Young, ‘Polity and Group Difference’ (n79), 273. For examples of this in practice: see the treatment of ‘deviant’ women in Chapters 5-7.

⁹⁷ Segal L., *Is the Future Female? Troubled Thoughts on Contemporary Feminism* (London: Virago, 1987), xii.

⁹⁸ Scott, (n71), 44.

discredited, for 'women's issues' to be heard. The reformulation of difference been central to the feminist movement(s) for a considerable time.⁹⁹ Under such a formulation "difference now comes to mean not otherness, exclusive oppression, but specificity, variation, heterogeneity",¹⁰⁰ it accepts and celebrates the diversity of women, and seeks to secure equality through the recognition of difference rather than sameness.

The equality/difference debate has resulted from an oversimplification of terms which has constructed a "false but extremely persistent dichotomy".¹⁰¹ The way in which difference has been constructed as the (lesser) opposite to equality arising from the liberal construction of equality as sameness, reliant on universal individualism which defines identity as sameness. In reality "the opposite of equality is inequality... the antithesis of difference in most usages is sameness or identity".¹⁰²

Presenting equality and difference as dichotomous is considerably more dangerous than it may appear at first instance, it requires that a choice is to be made between the two. This precludes a conception of equality in practice which relies on the recognition of difference, in favour of a theoretical equality which simultaneously reproduces and fails to recognise difference. The normification of masculinity within society means that women "must either base their claims on assertions of sameness with men or assert their differences by abandoning claims to rights"¹⁰³ neither of which produces a satisfactory

⁹⁹ As touched upon above in relation to the Wollstonecraft Dilemma and identifiable in Chapters 5-7.

¹⁰⁰ Young, *Justice and the Politics of Difference* (n45), 171.

¹⁰¹ Kimball M. M., *Feminist Visions of Gender Similarities and Differences* (London: Haworth Press, 1995), 175.

¹⁰² Scott, (n71), 44.

¹⁰³ Hirschmann N. J., 'Difference as an Occasion for Rights: A Feminist Rethinking of Rights, Liberalism, and Difference' in Hekman S (ed.), *Feminism, Identity and Difference* (Oxon: Routledge, 2013), 30. The normification of masculinity having stemmed from the gendered liberal public/private dichotomy as discussed in Chapter 2.

outcome. “The ‘choice’ between equality and difference is a false choice”¹⁰⁴ which reflects the fictitious dichotomies on which it has been constructed.

The equality/difference dichotomy has in the same way as public/private, nature/culture and male/female have within liberal theory, been presented as both oppositional and hierarchical. “Western culture has proven to be incapable of thinking not-the-same without assigning one of the terms a positive value and the other, a negative”.¹⁰⁵ Private, nature, female and difference all fall to the bottom of these dichotomised hierarchies. As Gedalof notes,

“the privileging of sameness over difference results, not in the production of universal values, but rather in the effective universalizing of the particular interests and perspectives of dominant groups”.¹⁰⁶

As a result, difference has been used to distinguish between those who are deserving of equality by virtue of their sameness, and a result it must be denied or distinguished from its negative foundations so that equality and difference can co-exist.

Striking a balance between equality and difference recognises that “while ‘assumed differences’ should be carefully scrutinized to expose any underlying prejudices, ‘real differences’ must be accommodated”.¹⁰⁷ Ignoring difference, for the sake of maintaining a flawed notion of equality based on an impossible utopian reading of society, perpetuates the subordination of the feminine and maintains the power of the

¹⁰⁴ Longo P., ‘Revisiting the Equality/Difference Debate: Redefining Citizenship for the New Millennium’ (2001) 5(3) *Citizenship Studies* 269, 270.

¹⁰⁵ Eisenstein H., & Jardine A., *The Future of Difference* (New Jersey: Rutgers, 1985), xxv.

¹⁰⁶ Gedalof I., ‘Sameness and Difference in Government Equality Talk’ (2013) 36(1) *Ethnic and Racial Studies* 117, 120.

¹⁰⁷ Minow M., ‘Making all the Difference: Three Lessons in Equality, Neutrality, and Tolerance’ (1989) 39(1) *DePaul Law Review* 1, 4.

masculine. Recognising difference in this way allows for equality and difference to be reconciled in a way which reflects the social reality to which it is applied.

The binary construction of equality and difference acts as a barrier to the attainment of equality in practice for those who have traditionally been denied full citizenship due to their real or perceived difference. Given that “women cannot be identical to men in all respects, we cannot expect to be equal to them. The only alternative... is to refuse to oppose equality to difference”, the dichotomy needs to be deconstructed.¹⁰⁸ True equality, requires the recognition of both differences and similarities depending on differing relationships and circumstances. Such an approach more adequately reflects individuals interactions with society. As a result, what is required is a denial of the opposition drawn between equality and difference, instead embracing a form of “equality in difference”.¹⁰⁹

3.3.4 Difference: Pregnancy and Motherhood

Motherhood and maternity provide an ideal standpoint from which to examine equality in practice given that “only women have the capacity to become pregnant, give birth and suckle their infants is the mark of ‘difference’ *par excellence*”.¹¹⁰ This is a difference which is acknowledged within both schools of equality, and as such the different impact of the application of each can be examined. Given that the UK approach to maternity is substantive, in that it provides women with maternity leave and pay as a ‘special’ right, the formal approach adopted within the US will be used as a point of comparison.

¹⁰⁸ Scott, (n71), 46.

¹⁰⁹ Evans J., *Feminist Theory Today: an introduction to second wave feminism* (London: Sage, 1995), 3.

¹¹⁰ Pateman, ‘Equality, Difference, Subordination’ (n89), 18.

In order for a discussion of motherhood to avoid the issues of biological determinism and essentialism, while acknowledging “the uniquely female experiences of pregnancy and motherhood”¹¹¹ mothering needs to become distinguished from pregnancy. Rich for example, denotes “two meanings of motherhood... the potential relationship of any woman to her powers of reproduction and to children; and the institution, which aims at ensuring that that potential and all women shall remain under male control”.¹¹² It is motherhood the institution, as a social construct, rather than the biological capacity for women to bear children which has contributed most considerably to their oppression.

The construction of women as mother has contributed significantly to the positioning of women as lesser. The gendered role of mother has been portrayed as the natural consequence of her ability to become pregnant and nurse a child. This has in turn been used to justify the oppression of women. As Williams points out,

“Pregnancy’s centrality to human reproduction, and hence to women’s traditional role, has made it the basis for rules which express and reinforce old ideologies about women’s proper place. The tangible, physical nature and high visibility of pregnancy have made such rules seem natural and appropriate”.¹¹³

Much like other gendered traits and behaviours, women’s mothering is considered to have arisen from their difference, in this case the capacity to carry and nurse a child.

“Social representations of motherhood have been traditionally used as a source of, as

¹¹¹ Bowman C. G., ‘Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession’ (1998) 67(2) *Fordham Law Review* 249, 252

¹¹² Rich A., *Of Woman Born: Motherhood as experience and institution* (New York: Norton, 1976), xv. See also Pateman, ‘Equality, Difference, Subordination’ (n89), 20-21 relating to the political nature of women’s pregnancy.

¹¹³ Williams W. W., ‘Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate’ (1984-1985) 13 *Review of Law & Social Change* 325, 358. See also Parshley H. M., (ed & trans) DeBeauvoir S., *The Second Sex* (London: Vintage, 1971), 64 who describes women’s biological capacity to bear children as the “key to the whole mystery” of women’s inequality.

well as an excuse, for the gendered division of labour”.¹¹⁴ The construction of motherhood as the natural consequence of pregnancy, rather than acknowledging the societal construction of the role works to *legitimise* the subordination of women.

A formal approach to maternity

The adoption of a formal approach maternity raises a number of issues as a result of the liberal philosophy which underlies it. Individualism proves particularly problematic as it is “based on a counterfactual assumption... that it is possible to ignore an individual’s sex”.¹¹⁵ The purported gender-neutrality of the public sphere and the refusal to acknowledge difference, either biological or socially constructed, between men and women becomes difficult to justify in the context of pregnancy. The historical placement of women, and therefore birth and childrearing in the private sphere allowed for the acknowledgement of women’s difference without offending the universal individualism within the public realm. However, as women’s position in the public sphere was formally secured, and the trend of women leaving the workplace as they married declined, pregnancy became a *public* issue.¹¹⁶

The formal approach adopted by the law “‘runs out’ when it encounters ‘real’ difference, and only becomes available if and when the difference is analogized to some experience men can have too”.¹¹⁷ Given that pregnancy and breastfeeding are exclusive

¹¹⁴ Birke, L. *Women, Feminism and Biology: The Feminist Challenge* (Brighton: Harvester Press, 1986), 49-50. The impact that this has had upon women’s position is examined in Chapters 5-7. Within the context of cohabitation cases, the positioning of women in the home and the gendered construction of motherhood is one of the contributing factors to women’s inability to contribute equally or in some cases at all to the acquisition of property as required under the current legal regime: see Chapter 4 in relation to the relevant the legal principles.

¹¹⁵ Becker, (n16), 209.

¹¹⁶ The development of women’s position in the public sphere with reference to maternity/motherhood is discussed in detail in Chapters 5-7.

¹¹⁷ Littleton C. A., ‘Reconstructing Sexual Equality’ (1987) 75(4) *California Law Review* 1279, 1306.

to those who are biologically female, the inability to identify a similarly situated male comparator is problematic. To resolve this a number of states in the US have classified pregnancy as a ‘temporary disability’, giving a pregnant woman the same rights as a ‘temporarily disabled’ man.¹¹⁸ Despite giving pregnant women some rights, such an approach does not adequately deal with the consequences of pregnancy.

The reluctance to treat pregnancy as a unique female experience and acknowledge not only the physicality of the act but also the gendered construction of motherhood maintains the problematic position of pregnancy within the masculinized institutions which constitute the public sphere. The central issue which arises when taking a formal approach to maternity and pregnancy is that “man is never viewed as ‘not pregnant’, so pregnancy must be constructed as women’s ‘difference’ and not man’s lacking... in this usage, being ‘different’ is the same as being unequal”.¹¹⁹ Again positioning women as naturally unequal, and maintaining the masculine construction of neutrality.

The prevalence of masculine norms in the public sphere continues to contribute to the inability of a formal approach to adapt to the diversity of workers which the employment sphere now contains. Legislative regimes which refuse to recognise the specificity of pregnancy, through the provision of maternity pay/leave, the central issue continues to be the masculine construction of the ideal worker. An individual “who works full force and full time, uninterrupted for thirty years straight-that is, someone

¹¹⁸ Pregnancy Discrimination Act 1978 this is the way in which a significantly limited ‘maternity leave’ is invoked in the US. See also Fredman S., *Women and the Law* (Oxford: Clarendon Press, 1997), 179-224.

¹¹⁹ Eisenstein Z. R., *The Female Body and the Law* (Berkeley: University of California Press, 1988), 79. In such a case, the application of formal equality results in the same *neutral* rule being applied, with unequal outcomes to the detriment of those who are deemed different: see Bartlett K. T. & Rhode D. L., *Gender and Law: Theory, Doctrine, Commentary* (4th ed) (New York: Aspen Publishers, 2006), 151.

supported by a flow of family work from a spouse, which most women never receive”.¹²⁰ It continues to reflect the traditional separate spheres ideology, and the gendered assumptions which underlie it.

The substantive approach to Maternity

In order to alleviate the inequalities which result from maternity/motherhood to be addressed, the biological/socially constructed differences between men and women need to be acknowledged. Within the UK, the legislation concerning maternity pay and leave provides women with rights which acknowledge the specificity of the experience.¹²¹ One for which there is no suitable comparison. The adoption of such an approach recognises that “uniqueness is a ‘trap’ only in terms of an analysis... which assumes that maleness is the norm”,¹²² in removing gender-neutrality from pregnancy, women have secured substantial rights in comparison to those derived from the formal approach in the US.¹²³

Despite the benefits derived from the adoption of a substantive approach, pregnancy in the public sphere, continues to impact the position of women.¹²⁴ The current provisions, despite being a marked improvement from those under a formal approach, do not go so far as to alleviate the gap in earnings or distinguish pregnancy from mothering.¹²⁵ From

¹²⁰ Williams J. C., ‘Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA’ (2009) 21(79) *Yale Journal of Law and Feminism* 79, 79.

¹²¹ For an overview of how Maternity legislation has developed in the UK, and the current scheme: see [5.3], [6.4], [7.2].

¹²² Scales A., ‘Towards a Feminist Jurisprudence’ (1981) 56 *Industrial Law Journal* 375, 435.

¹²³ The Maternity legislation, and its development is discussed in full within Chapters 5-7.

¹²⁴ See [7.2] for up to date statistics and discussion in relation to the position of pregnant women in the employment sphere.

¹²⁵ The central example within this thesis is related to lower earning capacity influencing both power relations in the family, and the capacity to contribute financially to the purchase of property, which still forms the basis of equitable ownership within the constructive trust. This issue is discussed in full within Chapters 5-7.

the discussion related to the US, it is clear that there is a need to recognise the distinct nature of pregnancy as a biological difference. However, this alone is insufficient to alleviate the inequalities which result from pregnancy. What needs to be recognised are the gendered societal implications of motherhood which are considerably more constraining than the act of childbearing. Under the substantive approach in the UK, it is the feminisation of child care which then restricts a woman's ability to return to work, notwithstanding those issues which surround the act itself.

Whether under a formal or substantive approach, maternity legislation risks “promoting the same values upon which it is based”.¹²⁶ Having derived from liberal theory, those values have positioned women, childbearing and rearing in the private sphere. As mothering and maternity have become more visible in the public sphere, it has become increasingly necessary to adopt a form of equality which is adequately suited to addressing not only those issues which arise in the public sphere, but being able to recognise and address those located in the private. As such, in order to alleviate the inequality which women as mothers (or as assumed mothers to be) face in the public sphere, those issues which arise in the private sphere also require redress.

The contention that if men were to participate more fully within the private sphere in terms of unpaid work, specifically, childcare, “does not... deny the natural biological fact that women, not men, *bear* children; it does deny the patriarchal assertion that this natural fact entails that only women can *rear* children”.¹²⁷ However, it does recognise that until the introduction of shared parental leave, and paternity leave, the designation

¹²⁶ Guerrina R., ‘Equality, Difference and Motherhood: the case for a feminist analysis of equal rights and maternity legislation’ (2001) 10(1) *Journal of Gender Studies* 33, 40.

¹²⁷ Pateman, (n90),121.

of maternity leave as an exclusively female *benefit* assisted in the replication of the societal role of motherhood rather than contributing to its deconstruction or placing women on the same footing as men.¹²⁸ The lack of ‘take up’ of such schemes now that they are in place reflects the way in which gender roles have been entrenched into society, so that even when action is taken to attempt to deconstruct them, the societal shift will not be instantaneous.

The way in which mothering has been constructed as distinct from ‘parenting’ has impacted on the approach taken towards maternity provisions. It needs to be acknowledged that, “there are moments when it makes sense for mothers to demand consideration for their social role, and contexts within which motherhood is irrelevant to women’s behaviour”.¹²⁹ Pregnancy needs to be considered as an exclusively female act or risk a formal approach which has persistently proved itself inadequate at best, and detrimental at its worst.¹³⁰ However, motherhood as an institution needs to be addressed in a way which both supports those who choose that role, but also avoids replicating the feminisation of child rearing. “The priorities of patriarchy are to keep the choices limited for women so that their role as mothers remains primary”,¹³¹ meaning that adequately addressing the gendered construction of motherhood in a system which has strived to maintain it presents significant difficulties.

3.4 Women in the Public Sphere

Despite the modernisation of the approach taken to equality, there are two underlying assertions, that ought to be made explicit, which are testament to the persistence of the

¹²⁸ This is discussed in detail within Chapters 5-7.

¹²⁹ Scott, ‘Deconstructing Equality-versus-Difference’ (n71), 47.

¹³⁰ Young, ‘Polity and Group Difference’ (n79), 269.

¹³¹ Eisenstein *The Radical Future of Liberal Feminism* (n68), 16.

treatment of women as lesser than men. First, the historical treatment of women, in terms of legal and political rights, and within the home, are still maintained in many areas through the reluctance to recognise difference, either biological or socially constructed as relevant. Second, those areas in which progress can be identified, for example, within employment law, have not gone far enough in addressing the factors which contribute to inequality in the public sphere which are deemed to be private.

Liberal individualism remains bound to formal equality which requires that like is treated alike. What is problematic here, is that this is usually applied to the public sphere. Due to the traditional dominance of men in this sphere, equality becomes a concept tainted by androcentrism, which works to maintain patriarchal power relations. Much like the formal equality, the principle is admirable, but the reality within which the principle becomes practice undermines its purpose. Overall, it is clear that “the ostensible individualism and egalitarianism of liberal theory obscure the patriarchal reality of a social structure of inequality and the domination of women by men”¹³² both in the historical exclusion of women from the status of individual, and from the opposition to difference which it has supported, and from the multifarious issues which spill from the dichotomous, gendered, hierarchical construction of the social spheres.

The combination of *neutral* individualism and the series of dichotomies within which society is constructed “pretends we can be equal in the public sphere when our differences are overwhelming in the private... it offers equality with one hand and takes it away with the other”.¹³³ Despite the general acceptance that women are now to be

¹³² Pateman C., *The Disorder of Women: Democracy, Feminism, and Political Theory* (Cambridge: Polity Press, 1989), 120.

¹³³ Phillips A., ‘Introduction’ in Phillips A., (ed) *Feminism and Equality* (Oxford: Basil Blackwell, 1987), 15.

considered individuals rather than the property of their fathers, husbands and sons, the social implications and norms which derive from this tradition remains. As Bacchi states,

“we need to expose the lie behind the public/private conceptualisation so that both men and women can achieve a better balance in their lives between the demands and rewards of paid labour, and the demands and rewards of home-life”.¹³⁴

The divide between public/private needs to be degendered and delegitimised so that it is no longer seen as either natural or necessary. This would allow for individuals to be free from the constraints placed on them by virtue of both their ‘assignment’ into either sphere and the expectations which are associated with them due to their gender.

The ‘choice’ between one sphere of life or another, between work or mothering need not be gendered, hierarchical, nor does it need to be determinative of their access to equality.¹³⁵ Rather than viewing women as abstracted individuals, what ought to be pursued is a formulation of equality which allows for the recognition of women as a group for the goal of “equality of effect” rather than “equal treatment”.¹³⁶ However, even now the threat of a demand by women for individual rights is that “it offers a threat to the fabric of interdependence on which men’s rights depend”.¹³⁷

3.5 Beyond Equality and Difference, A Third Way?

There have been suggestions that calls for equality should be abandoned. Flax for example, proposes that due to the dichotomy drawn between equality and difference,

¹³⁴ Bacchi, ‘Same Difference’ (n61), 126.

¹³⁵ Note also the restrictions which have been placed, in particular, on women concerning their choices as discussed in the Chapter 2.

¹³⁶ Kreiger L. & Cooney P. N., ‘The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality’ (1983) 13(3) *Golden Gate University Law Review* 513, 554.

¹³⁷ Pascall G., *Social Policy: A Feminist Analysis* (London: Tavistock Publications, 1986), 9.

equality cannot be distanced from the masculine universal individual to recognise women's difference. She proposes that "because justice at least leaves space for a consideration of differences, it seems to me to be a more potentially useful concept than equality".¹³⁸ However, the difference approach embodied within substantive equality makes much the same claim. What is needed is not a rejection of equality or difference, but a middle way between the two.¹³⁹ This section provides an overview of two distinct approaches/methods of conceiving a form of equality which is compatible with difference.

3.5.1 The Inequality Approach

One distinct formulation of a middle way between equality and difference is the "the differences approach" or the inequality approach, put forward by MacKinnon. This approach was established in part as a critique of formal equality. The central proposition is that there are circumstances in which the law should have the capacity to depart from a formal regime where there is a difference between the sexes which justifies their different treatment.¹⁴⁰ The differences approach works on the premise that there is a theory of "special rights"¹⁴¹ for the judiciary to use, where a woman exhibits a *real* difference, which would otherwise have negative implications. Those differences can be as a result of biology (solely in relation to childbirth), or socially constructed, where such differences negatively impact the position of an individual.

¹³⁸Flax J., *Beyond Equality: Gender, Justice and Difference* in Bock G., & James S., *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (London: Routledge, 1992), 194. See also Wolgast E., *Equality and the Rights of Women* (New York: Cornell University Press, 1980), 122.

¹³⁹ For example Phillips A., *Democracy and Difference* (Cambridge: Polity Press, 1993); Bussemaker J., *Equality, Autonomy and Feminist Politics* in, Meehan E., *Equality, Politics and Gender* (London: Sage Publications, 1991) and MacKinnon as explored in [3.5].

¹⁴⁰ MacKinnon C.A., *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), 101.

¹⁴¹ Scales A. C., 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95(7) *The Yale Law Journal* 1373.

The inequality approach is subject to the central critiques raised in relation to substantive equality. Namely, that recognising difference risks at best patronising women, and at worst it could be seen to replicate the oppression of women.¹⁴² However, MacKinnon addresses this concern through the inclusion of the precursor that, for separate standards for men/women to be used, they must not “integrally contribute... to the maintenance of an underclass or a deprived position because of gender status”.¹⁴³ It is here proposed that in order to avoid reinforcing gender stereotypes through acknowledging difference, is that the distinct treatment is not premised on an individual’s sex or gender.¹⁴⁴ To put this into context, a man who takes on the role as primary caregiver after the birth of their child would have the same rights as a woman in the same position.¹⁴⁵ Distancing the act of childcare away from the gender/sex of the individual who performs the act, it is the act which affords an individual different treatment.

When considering the merit of such a proposal it is necessary to emphasise the need for flexibility in judicial interpretation.¹⁴⁶ For example, the production of a definitive list of ‘differences’ would be to secure the ‘difference’ of an individual within one social/political/historical framework. This would not recognise the changing nature of identity and how such identity is perceived within society.¹⁴⁷ “Equality is a process

¹⁴² As discussed in detail above in [3.2.2].

¹⁴³ MacKinnon, ‘Sexual Harassment’ (n140), 117.

¹⁴⁴ That is with the sole exception of the act of childbirth.

¹⁴⁵ Notwithstanding the necessary medical leave afforded to women recovering from the act of childbearing. We see some of this with the provisions in relation to paternity leave, discussed Chapters 5-7.

¹⁴⁶ The merits of judicial flexibility in the context of cohabitation (though not without some controversy) are examined in Chapters 5-7.

¹⁴⁷ This shift is examined in Chapters 5-7.

which requires the continual re-examination of the treatment we accord to people”.¹⁴⁸

As such it would be necessary to allow for considerable flexibility and reflexivity with the application of such an approach in practice.

MacKinnon’s approach, can to some extent be identified in the approach adopted by Lord Denning, as examined in Chapters 5-7. Despite often falling into the ‘stereotype’ trap, the merits of such an approach in practice can also be identified.¹⁴⁹ The flexibility that this approach would afford the judiciary, if properly enacted, would allow for individuals to be treated equally, depending on their circumstances – whether these arise biologically from their sex, or from their gender role. Thus utilising difference in order to facilitate equality.

3.5.2 Deconstructing Dichotomies

The central issue with regard to analysing equality is the way in which it has been categorised as the superior element of the equality/difference dichotomy. The oppositional construction of equality/difference prevents the realisation of an approach to gender equality which acknowledges the ways in which law, politics and society impact the position of women in relation to men.¹⁵⁰ This is further complicated when viewed in relation to the additional dichotomies which have also been engrained within

¹⁴⁸ Minow ‘Making all the Difference’ (n107), 5-6.

¹⁴⁹ The Denning approach to equality can be considered substantive, or an equality in difference approach – this can be seen in practice within his judgments in [5.7], where the formal/substantive approach of the courts in cohabitation cases is also examined.

¹⁵⁰ In relation to the fictitious ‘choice’ between equality or difference: see [3.3.3] above. Note that this has become a major theme in feminist writing: see Barrett M., & Phillips A., (eds) *Destabilizing Theory: Contemporary Feminist Debates* (Cambridge: Polity Press, 1992), 8. See also [1.2] for an overview of Butlers work which is generally used concerning the socially constructed nature of gender, the instability of identity, and performativity, but which can also be considered as giving weight to the notion that binaries in language and materiality both need to be the subject of deconstruction: Butler J., *Bodies that Matter* (New York: Routledge, 1993), 91.

society.¹⁵¹ The interaction between these dichotomies has had a considerable role in simultaneously disguising and replicating gender inequality. The deconstruction/transcendence of these dichotomies has been put forward as a solution to the persistence of gender inequality which results from the continuation of binary social categorisations.¹⁵²

It is essential at this stage to note that deconstruction does not entail the destruction of both elements of a dichotomy. Nor does it involve reworking the binary so that one element prevails at the expense of the other. Rather, it a process which

“challenges dichotomous, oppositional thinking, thus exposing the practices and structures that establish, legislate, and maintain oppressive systems of hierarchy... dismantling binary thought, destabilizing traditional meaning structures”.¹⁵³

Much of the previous chapter focussed on the contradictions that arise when considering the construction of male/female and public/private as oppositional and hierarchical.¹⁵⁴ Revealing the ways in which these dualisms are not naturally hierarchical, but are presented as such in order to obscure the socially constructed oppression of women.¹⁵⁵ A result of which has been that women’s difference, in contrast to men’s sameness, has *justified* their unequal status. This can be attributed to the way in which “the primary or

¹⁵¹ This refers to those dichotomies discussed in the Chapter 2.

¹⁵² See for example Klare K., ‘The Public/Private Distinction in Labour Law’ (1982) 130(6) *University of Pennsylvania Law Review* 1358, 1578. Similar arguments have also been put forward regarding the Gender/Sex Dichotomy as seen in [2.4].

¹⁵³ Mumby D. K., & Putnam L. L., ‘The Politics of Emotion: A Feminist Reading of Bounded Rationality’ (1992) 17(3) *The Academy of Management Review* 465, 468.

¹⁵⁴ See Chapter 2.

¹⁵⁵ This can in itself be described as deconstruction. Also note Scott, ‘Deconstructing Equality’ (n71), 38 who describes the way in which deconstructing dichotomies reveals that they are “not natural but constructed oppositions, constructed for particular purposes in particular contexts”

dominant term derives its privilege from a curtailment or suppression of its opposite”,¹⁵⁶ men and masculinity is persistently placed in the dominant side of the binary. This inequality has been vested in women through biological deterministic thinking and socially constructed gendered dichotomies, rather than, as is revealed through deconstructive examination, resulting from a form of innate, natural difference.¹⁵⁷

The poststructuralist adoption of deconstruction works as a “destabilizing strategy” through which the fictitious nature of dichotomies can be exposed and reformulated.¹⁵⁸ The legitimacy of hierarchical binaries can be undermined through the deconstructive process by demonstrating their “arbitrary, social, and political character”.¹⁵⁹ The interrelated nature of the liberal dichotomies which collectively contribute to gender inequality, necessitates the deconstruction of each of these categories, so that equality in practice can be achieved.¹⁶⁰ The following section provides an overview of this deconstructive process as it relates to gender/sex and public/private, and equality/difference. This draws together the dichotomies which have been discussed within the previous chapter in order to demonstrate the way in which they collectively contribute to the continuation of gender inequality.

¹⁵⁶ Gross E., *Derrida, Irigaray, and Deconstruction: Left-wright, Intervention* (Sydney: Australia, 1986), 73, discussing Derrida J., *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976).

¹⁵⁷ See [2.3], [2.4] regarding biological determinism, liberal dichotomies and social construction.

¹⁵⁸ Fletcher J. K., *Disappearing Acts: Gender, Power and Relational Practice at Work* (London: MIT Press, 2001), 23. Note that this reformulation does not entail a reversal of the elements which make up a dichotomy, for example displacing male dominance for female.

¹⁵⁹ Nicholson L. & Seidman S., (eds) *Social Postmodernism: Beyond Identity Politics* (Cambridge: Cambridge University Press, 1995), 125. See also Rose N., ‘Beyond the Public/Private Division: Law, Power and the Family’ (1987) 14(1) *Critical Legal Studies* 61, 66 who describes the way in which the falsity of such dichotomies can be demonstrated by the function in which it serves in society, in other words, their masculine bias.

¹⁶⁰ The hierarchical binaries discussed here relate to those dichotomies discussed in Chapter 2 and the equality/difference dichotomy discussed in [3.3].

The deconstruction of gender resolves a number of issues which have arisen as a result of both the sex/gender and male/female dichotomy. From a deconstructive perspective there is seen to be no “coherent, self-evident or natural”¹⁶¹ subject. However, this does not preclude us from speaking of ‘women’.¹⁶² Instead it acknowledges that despite speaking of ‘women’, this forms a contested category. From this perspective, women are those in the lesser position in a dominant binary category which is used and recognised within society, which has no natural source. Their similarity is not based on biological difference or gender stereotypes, but rather by the way in which they are treated by society, as lesser.¹⁶³ Thus providing a balance between the need to acknowledge women as a group, without leading to essentialist thinking drawn from biological determinism.¹⁶⁴ This allows for “the biological particularity of the female body [to be recognised] without endorsing the historical contingencies of its engendered form”,¹⁶⁵ allowing for the inequalities which arise as a result of pregnancy and maternity.

Deconstruction has further implications regarding intersectionality. “Deconstructive strategies could enable us to chart more accurately the multiple determinants that figure in any individual's social position and (relative) power and oppress”.¹⁶⁶ This allows for the recognition of not only the differences between men and women but for the

¹⁶¹ Elam D., *Feminism and Deconstruction* (London: Routledge, 1994), 32.

¹⁶² See for example Cornell D., *The Philosophy of the Limit* (London: Routledge, 1992) on the importance of deconstructing the masculine subject; Butler J., *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) on the difficulties of ‘defining’ women; Young, ‘Polity and Group Difference’ (n79) concerning the notion of relational identity as discussed at [3.3.2] above. Similar issues are also discussed in Chapter 1.

¹⁶³ That is not to say that there will not be some cross-over between gender stereotypes, biological difference and the way in which society treats women – but it does not require reinforcing such differences as the source of the lesser treatment of women.

¹⁶⁴ Williams J. C., ‘Deconstructing Gender’ (1989) 87(4) *Michigan Law Review* 797, 840. As Williams states “the deconstruction of gender allows us to protect them by reference to their social roles instead of their genitals”.

¹⁶⁵ Eisenstein, *The Female Body and the Law* (n119), 4.

¹⁶⁶ Poovey M., ‘Feminism and Deconstruction’ (1988) 14(1) *Feminist Studies* 51, 58.

diversity/differences between women to be acknowledged. Therefore, other factors which have traditionally positioned an individual as 'lesser' for example wealth, race, sexuality to be recognised and considered in any attempt to alleviate inequality in practice.

When considering deconstruction within the context of the public/private dichotomy, the central aim is to dissolve the division which has been drawn between the two spheres. The distinctions traditionally drawn between them "denies the symbiotic dependency between the two... the traditional location of women within the later [meaning the private sphere which] renders them largely invisible in public life".¹⁶⁷ This has positioned women and 'women's issues' in the private, contributing to the perception and treatment of women as lesser. It has neglected the complex web of interactions which occur between actors in each sphere, presenting two independent gendered spheres. In recognising that those acts performed in one sphere will inevitably affect the other, this would break down some of the barriers faced in relation to women's issues.¹⁶⁸ In addition, undermining the division between the public/private dichotomy would further undermine the gendered construction of each sphere, which has persistently reinforced women's inequality.

Questioning the boundaries of public/private and their oppositional and hierarchical construction erodes the barrier which has been forged between them. The dissolution of this division allows for it to be viewed as "a continuum rather than a rigid

¹⁶⁷ Chinkin C., 'A Critique of the Public/Private Dimension' (1999) 10(2) *European Journal of International Law* 387, 389.

¹⁶⁸ See for example the concerns expressed in Milkman R., 'Women's History and the Sears Case' (1986) 12(2) *Feminist Studies* 375, 394-5 "We ignore the political dimensions of the equality-versus-difference debate at our peril, especially in a period of conservative resurgence like the present".

dichotomy”.¹⁶⁹ The liberal dichotomies which underpin the social, political and legal structures of modern society which continue to replicate inequality begin to be undermined. Embracing deconstruction “as a means of exposing the structurally embedded power relations that inhere in the deepest tissue of our daily lives, deconstruction is also a method of reinventing the world”.¹⁷⁰ Thus, the very foundations of the numerous dichotomies which have positioned women as lesser are called into question. Such an approach seeks not only the resolution of those issues which arise due to inequality, but allows for the causal factors of systemic, social and institutionalised inequality to be identified and addressed.

The masculinity of the public realm, and the position of men as superior has been maintained through the male/female, public/private dichotomies. The construction of equality/difference, reflecting the aforementioned gendered dichotomies has reinforced the legitimacy of the male norm. This has meant that even where seemingly neutral principles are put forward, they frequently reflect the androcentric structures from which they are formed.¹⁷¹ As a result, the sameness embodied by the ‘equality’ approach seeking to treat individuals in the same way, adopting neutrality ignores the bias which has been engrained into society. In deconstructing the principle and practice of equality, it becomes clear that it is insufficient to achieve real gender equality. From this perspective, the focus of equality ought to be “the elimination of individual

¹⁶⁹ Walby S., ‘From Public to Private Patriarchy: The Periodisation of British History’ (1990) 13(1) *Women’s Studies International Forum* 91, 94.

¹⁷⁰ Clark M. J., ‘Deconstruction, Feminism, and Law: Cornell and MacKinnon on Female Subjectivity and Resistance’ (2005) 12(107) *Duke Journal of Gender Law & Policy* 107, 108.

¹⁷¹ This faux neutrality is discussed in detail in Chapter 2. It has also been examined in a legal context in which “deconstructing the language of the law reveals that the primary subject of the law is male”: Barnett H., *Introduction to Feminist Jurisprudence* (London: Cavendish, 1998), 70.

disadvantage that results from distinctions made on the basis of sex, gender and/or sexual differences; it does not involve ignoring or eliminating differences”.¹⁷²

3.6 Conclusion

This chapter has demonstrated the way in which equality has developed based on liberal principles and dichotomies. As a result of the societal divisions explored in the previous chapter, as reflected in the division constructed between equality/difference, women have been categorised as both different from, and lesser to, men. Despite the gendered structure of society, formal equality is premised on the concept of a universal individualism, which seeks to treat all people as the same without regard for the differences in their identity and circumstances. Within this context, a formal approach fails to give rise to equality in practice, which makes it an ineffective tool for women.

A substantive approach allows for the recognition of difference, and avoids the numerous criticisms which arise from attempting to construct an equality of sameness which is compatible with both liberal theory and social reality. However, it brings with it a history marked with biological determinism and essentialism, and when used without a recognition of the socially constructed nature of gender and the public/private dichotomy, it risks replicating the position that it seeks to eradicate. Despite the fact that the substantive approach recognises the way in which society is imbued with inequalities as a result of the liberal dichotomisation of the masculine public/feminine private, it still must work within this framework.

Having examined the possible implications of both forms of equality, it has become

¹⁷² Nash K., ‘Human rights for women: an argument for ‘deconstructive equality’’ (2002) 31(1) *Economy and Society* 414, 422

clear that “neither an equality nor a difference approach will ever be a satisfactory one given that they both work within parameters of debate constructed according to patriarchal norms”.¹⁷³ Within a society formed around and for masculine dominance, the point of comparison will always be based on male norms, meaning that

“Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man... Gender-neutrality is thus simply the male standard”.

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As Pateman states, the sameness approach works to “obscure the patriarchal reality of a social structure of inequality and the domination of women by men”.¹⁷⁵ Acknowledging difference can and has been beneficial in some circumstances, and is certainly preferable to the formal approach, within this construction of society. However, recognising difference still risks the classification of *other*.

It is clear that although women have achieved formal equality in terms of status, in practice inequality between genders permeates society, and these social norms are perpetuated by the treatment of women before the law. Both perspectives can be critiqued, yet it is the substantive approach which holds significantly more promise where gender equality is sought given that

“formal equality cannot be the basis for implementing the kinds of changes that must be made if the status of women and men is to be equalized... the limited changes effected by formal equality will often hurt many women, especially

¹⁷³ Squires J., *Gender in Political Theory* (Cambridge: Polity Press, 2004), 123.

¹⁷⁴ MacKinnon C. A., *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); MacKinnon C.A., ‘Reflections on Sex Equality under Law’ (1991) 100 *Yale Law Review* 1281, 34.

¹⁷⁵ Pateman, *The Disorder of Women* (n132), 120.

ordinary mothers and wives [sic]”.¹⁷⁶

This is especially so given the traditional positioning of women in the private sphere and the way in which formal equality has not permeated its way into societal views or institutional constructs. It is not a foundation upon which a rigid formulation of equality can achieve its purported ends because it refuses to reflect the reality of an unequal society. The final failing, and the most fatal flaw of the formal approach to equality, is that it fails to take account of the difference both in terms of social treatment and expectations of women.

The nature of equality goes further than an attempt to increase women's rights as a feminist principle or even as a signifier of a modern, western democracy, but it runs to the core of the foundations of our legal system itself. However, as this chapter has demonstrated, the affiliation between liberalism, formal equality and the law ironically undermines its own intentions. The law is presented as if it were there to prevent against inequality. Yet, in its formal approach it denies the impact of a dichotomised society. As Mitchell states “the law... enshrines the principles of freedom and equality – so long as you don't look at the particular unequal conditions of the people who are subjected to it”.¹⁷⁷ When adopting a substantive approach it only reconciles inequalities on an individual basis, and has frequently acted to replicate the stereotypes associated with women.

Until the inequality inherent in a society based on liberal ideals is fully understood, the law can only make piecemeal contributions, through an adoption of substantive equality, toward some manifestation of equality. Although the adoption of a ‘middle way’

¹⁷⁶ Becker, ‘Prince Charming’ (n16), 224.

¹⁷⁷ Mitchell, (n1), 29.

between equality and difference, such as that proposed by MacKinnon, would go some way in resolving issues on a case by case basis, the systemic sexism remains unchallenged if it is purely left to the law to resolve.¹⁷⁸ As such, a process of deconstruction which allows for the reformulation of the societal dichotomies discussed within the chapter needs to be embarked upon, allowing for difference to be distanced from the negative connotations it has historically been imbued with, and for the interactions between public and private to be recognised and revaluated. Allowing for equality in difference to be adopted not only as a principle, but in practice.

There is no one simplistic approach to equality/difference which will alleviate gender inequality, and it would be improper for this thesis to ‘propose’ one.¹⁷⁹ The notion that there is no rule which would lead to equality does not smack of pessimism but rather it is an “acknowledgment that the search for the rule that may do justice to the case – justice to the case of women – is necessarily endless”.¹⁸⁰ When considering the implication of equality in difference in practice (whether through deconstruction or an alternative approach) what ought to be noted is the need for judicial flexibility. After examining the current CICT regime in Chapter 4, Chapters 5-7 seek to examine this point through an analysis of the case law and surrounding socio-legal context. Taken together, this analysis demonstrates that

“A juridical approach based on substantive equality can be more effective in eradicating discrimination than one based on formal equality, because the former addresses the inequality implicitly in hierarchical societies with historical disadvantages, and seeks to eliminate that inequality”.¹⁸¹

¹⁷⁸ The ‘middle way’ proposed by MacKinnon is examined above in [3.5.1].

¹⁷⁹ Indeed, it is not within the scope of this thesis to propose such a solution.

¹⁸⁰ Elam, *Feminism and Deconstruction* (n161), 108.

¹⁸¹ Haynes D. F., (ed) *Deconstructing the Reconstruction* (Aldershot: Ashgate, 2008), 124.

Affording the judiciary adequate flexibility alleviates those inequalities which arise from a purely formal approach where the circumstances require it. The analysis which follows builds on the theoretical analysis of equality contained within this chapter. Thus, providing an overview of the ways in which the judiciary has had a role in attempting to resolve the implications of systemic inequality.

Chapter 4 - Cohabitation: The Common Intention Constructive Trust

4.1 Introduction

This Chapter examines the law relating to the breakdown of cohabiting relationships, specifically the common intention constructive trust (CICT).¹ This provides the legal backdrop from which the following chapters are developed. It is within the context of the case law surrounding cohabitation that the application of equality or difference approaches are identified later in this thesis. In order to analyse the impact of each approach, it is necessary to situate the judgments within the proper legal framework and have an understanding of the criticisms which have arisen as a result of their use in practice.

This chapter will first give an overview of the CICT which is used to determine and quantify beneficial interest in the family home on the breakdown of cohabiting relationships. This provides the relevant legal framework for the subsequent chapters of this thesis. The issues which have arisen as a result of the application of the CICT, as identified in the existing literature, are then examined. This is broadly framed within two themes. The first focusses on the way the law fails to adequately address the issues faced by former cohabitants due to the conflict between the legal regime applied on breakdown, and the nature of cohabiting relationships. The second discusses the way in which the focus on direct financial contributions is inherently gendered and therefore has had a disproportionately negative impact on women's attempts to assert interest in their homes.² This itself arises from the courts' misconceived attempt to apply

¹ Hereafter CICT.

² This having been compounded by the gender inequality within society as exemplified in Chapters 5-7 and considered from a theoretical perspective Chapters 2 and 3.

procedurally neutral principles to a situation characterised, not by the equality of former cohabitants, but by gender difference and inequality.³

The final section of this chapter examines the theoretical issues which impact the application of the law. This focusses specifically on the contrast between procedural property and remedial family law approaches and attempts to uncover the development and current principles utilised by the courts in this regard. This forms an additional critique of the CICT and provides insight into the issues which underlie the application of procedurally neutral principles in non-neutral contexts, which is expanded on later in this thesis.⁴

4.2 The Legal Regime

On the breakdown of a cohabiting relationship, one of the central questions which arises is in relation to the parties' rights in the family home.⁵ The lack of a legislative regime concerning the distribution of property on the breakdown of unmarried cohabiting relationships has meant that such couples must rely on the "antiquated and unwieldy law of trusts".⁶ It is the purpose of the following section of this chapter to provide an outline of the current regime before embarking on an overview of the central critiques made against it.

³ As explored in additional detail in Chapters 5-7.

⁴ See Chapters 5-7.

⁵ The focus within this thesis being on ownership and the determination of beneficial interest rather than for example the right to occupy under the Trusts of Land and Appointment of Trustees Act 1996, s14 or the Family Law Act 1996, Part IV.

⁶ HL Deb 12 December 2014, Vol 757, Col 2069.

The starting point of the examination of proprietary interest begins with an attempt to identify an express trust.⁷ However, the ‘agreements’ made between cohabiting couples with regard to the family home, where they are present at all, are often insufficient to satisfy the necessary formality requirements.⁸ In the absence of an express trust, claimants must rely on the doctrine of proprietary estoppel or an implied trust.⁹ The most frequently invoked of these methods within the context of ‘family property’ is the CICT, and as such it forms the basis of this thesis.

The constructive trust “is not capable of precise definition and is continually developing”.¹⁰ However, the purpose of the CICT is more easily identified. It seeks to establish whether there is beneficial joint tenancy, and if so how the beneficial interest in the property is to be divided. This is generally categorised as a two-stage process involving acquisition and quantification the approach which is taken to these steps is distinct depending on whether the case involves sole or joint legal ownership, as will be examined below.

Prior to the formulation of the CICT under *Lloyds Bank v Rosset* for sole-ownership cases, and *Stack v Dowden* and *Jones v Kernott* for jointly owned property, two distinct

⁷ Such a declaration is seen to be decisive *Goodman v Gallant* [1986] Fam 106.

⁸ Law of Property Act 1925, s53(1)(b) an express trust must be signed and in writing. Even the “clearest oral agreement” will not suffice: *Lloyds Bank v Rosset* [1991] 1 AC 107, 129.

⁹ Implied trusts consisting of both the CICT and resulting trust. However, post *Stack v Dowden* [2007] UKHL 17 [31] and *Jones v Kernott* [2011] UKSC 53 [25] resulting trusts have been deemed inapplicable in relation to family property. For the debate on differences between resulting and constructive trusts and proprietary estoppel: see Hayton D., ‘Equitable Rights of Cohabitees’ (1990) *Conveyancer and Property Lawyer* 370; Ferguson P., ‘Constructive Trusts – A Note of Caution’ (1993) 109 *Law Quarterly Review* 114.

¹⁰ See McGhee P., *Snell’s Equity* (30th ed) (London: Sweet & Maxwell 1999), para 9-38; for an in-depth analysis of the way in which the CICT has been used and developed over time: see Chapters 5-7, particularly [5.7],[6.8] and [7.4].

approaches to the constructive trust can be identified.¹¹ The classic formulation can be identified in *Gissing v Gissing* and *Pettitt v Pettitt*, in which common intention as to the ownership of the property and detrimental reliance on such an intention would be deemed sufficient to grant equitable interest to the non-owning party discoverable through the acts or expressions of the parties.¹² The second consists of those cases that were decided based on considerations of fairness and justice such as *Eves v Eves* and *Grant v Edwards*, also known as the ‘excuse’ cases.¹³ *Rosset* sought to clarify the law given the history of conflicting and at times contradictory outcomes which had arisen due to the range of approaches adopted by the courts prior, though the extent to which this was successful remains questionable.¹⁴

4.2.1 Sole-ownership

Acquisition

In sole-ownership cases the acquisition stage requires that the claimant must first “surmount the hurdle of showing that she had any beneficial interest at all, before showing exactly what that interest was”.¹⁵ In order to ascertain whether there is shared beneficial interest in the property, the starting point is legal ownership as “equity follows the law”.¹⁶ In sole-ownership cases only one party has legal interest in the property, the presumption is that the beneficial interest is vested only in that individual.

¹¹ *Lloyds Bank v Rosset* [1991] 1 AC 107 hereafter *Rosset*; *Stack v Dowden* [2007] UKHL 17 hereafter *Stack*; *Jones v Kernott* [2011] UKSC 53 hereafter *Jones*; For a full analysis of the development of the case law in context: see Chapters 5-7, particularly [5.7],[6.8] and [7.4].

¹² *Pettitt v Pettitt* [1970] AC 777 hereafter *Pettitt*; *Gissing v Gissing* [1971] AC 886 hereafter *Gissing*. Note that these acts were limited to indirect/direct financial contributions, though this was given a wider interpretation than *Lloyds Bank v Rosset* [1991] 1 AC 107.

¹³ *Eves v Eves* [1975] 1 WLR 1338 hereafter *Eves*; *Grant v Edwards* [1986] Ch 638 hereafter *Grant*; the ‘excuse’ cases are discussed in additional detail in [4.3.1].

¹⁴ See [4.2.1];[4.3].

¹⁵ *Stack v Dowden* [2007] UKHL 17 [61] discussing the position of sole owners with reference to *Oxley v Hiscock* [2004] EWCA 546.

¹⁶ *Stack v Dowden* [2007] UKHL 17 [33]; Confirmed in *Jones v Kernott* [2011] UKSC 53 [22], [51], [61].

To establish whether the shares in equity ought to reflect the legal ownership the court searches for the parties' common intention as to joint-ownership.

Common Intention

Acquisition under the *Rosset* regime encompasses two categories, the first being express common intention, and the second being inferred common intention. In claims based on express common intention the task of the court is to find “some agreement, arrangement or understanding”¹⁷ between the parties as to their ownership, which is then sufficient grounds to move onto the question of quantification. The second category uses ‘referable’ conduct from which an implied common intention may be inferred by the court, this has proved considerably more problematic to satisfy. Attempting to circumscribe the ambit of those contributions which had previously been allowed to prevail under the ‘excuse’ cases noted above, Lord Bridge formulated referable conduct as:

“direct contributions to the purchase price... whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust... it is at least extremely doubtful whether anything less will do”.¹⁸

This strict financial approach which rendered non-financial and indirect contributions null has since been extended to include indirect payments towards the mortgage.¹⁹

¹⁷ *Lloyds Bank v Rosset* [1991] 1 AC 107, 133; Within *Rosset* Lord Bridge organises the cases of *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch 638 into this category. Note that the absence of ‘common’ intention in these cases has formed the basis for considerable critique: see [4.3.1].

¹⁸ *Lloyds Bank v Rosset* [1991] 1 AC 107, 132.

¹⁹ *Le Foe v Le Foe* [2001] 2 FLR 970, and obiter in *Curley v Parkes* [2004] EWCA Civ 1515. It must be noted that whether the strict financial approach is still binding in cases involving sole-owners having seen arguments counter to this in joint-ownership cases *Jones v Kernott* [2011] UKSC 53; *Stack v Dowden* [2007] UKHL 17; *Abbott v Abbott* [2007] UKPC 53. However, until a sole-ownership case reaches the supreme court, *Rosset* technically remains ‘good law’: see [4.2.3].

Detrimental Reliance

Common intention alone is insufficient to satisfy the court that the non-legal owner has a beneficial interest in the home. Claimants must also demonstrate that they “acted to his or her detriment” or “significantly altered his position in reliance on the agreement”.²⁰ Often, financial contributions perform “a dual role in establishing the common intention and providing the detrimental reliance”,²¹ which frequently means that little discussion is had as to detrimental reliance specifically. Where it has been discussed detrimental reliance has been both broadly and restrictively interpreted. Under the broad approach detrimental reliance consisted of “any act done by [the claimant]... to her detriment relating to the joint lives of the parties”.²² Under the more restrictive approach in the absence of financial contributions the courts have been unwilling to consider other acts as sufficient evidence of detrimental reliance.²³

Detrimental reliance, like common intention, is most easily satisfied by financial contributions or where there is also the presence of financial contributions. It excludes those acts which are considered to be performed out of love and affection, “ordinary domestic tasks... [are] the sort of things which are done for the benefit of the family without altering the title to the property”.²⁴ Those acts are usually those acts performed by women, deemed *feminine* and therefore ‘worthless’.²⁵ They must be actions which

²⁰ *Lloyds Bank v Rosset* [1991] 1 AC 107, 132.

²¹ Law Commission., *Sharing Homes: A Discussion Paper* (Law Com 278, 2002), 2.70.

²² *Grant v Edwards* [1986] Ch 638, 657. This has included home improvements: *Eves v Eves* [1975] 1 WLR 1338; contributions towards household expenses: *Grant v Edwards* [1986] Ch 638; and the support of a partner’s business: *Hammond v Mitchell* [1991] 1 WLR 1127.

²³ *Burns v Burns* [1984] Ch. 317 in which the lack of financial contributions led to the court finding no common intention and no detrimental reliance.

²⁴ *Burns v Burns* [1984] Ch. 317, 331. See also: *James v Thomas* [2007] EWCA Civ 1212 and *Thomson v Humphrey* [2009] EWHC 3576 (Ch).

²⁵ This is discussed in detail Chapters 5-7.

can be seen as embarked on in reliance of the fact that they have interest in the home.²⁶ Despite the distain expressed regarding legal owners “taking advantage” of the claimant “in a way that is unconscionable, inequitable or unjust”,²⁷ this not led to the extension of ‘relevant’ contributions to those with are non-financial.

Quantification

In sole-ownership cases, quantification will depend on whether the acquisition was based on express agreement or inferred common intention. Where there has been some express agreement, the quantification will match that agreement, unless this is contested by one of the parties. If it has been inferred, which is the more likely situation, then the parties conduct relevant factor in the quantification of shares.

In both sole and joint-ownership cases, the CICT affords additional flexibility with regard to the quantification of shares, in that the court is not bound by the percentage each party has contributed towards the purchase of the property.²⁸ In the context of the CICT the court are to

“undertake a survey of the whole course of dealing between the parties ... That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place”.²⁹

²⁶ Such an approach has been critiqued as gender biased and unreflective of the reality of relationships as discussed below [4.3.2].

²⁷ *Lloyds Bank v Rosset* [1991] 1 AC 107, 114.

²⁸ Contrasting the position under the application of a resulting trust: see for example *Re Densham* [1975] 3 All ER 726.

²⁹ *Midland Bank v Cooke* (1995) 27 HLR 733 at 745. Also seen later in *Oxley v Hiscock* [2004] EWCA 546. which has influenced the perspective adopted with regard to joint-ownership cases in *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53.

This approach allows for actions which under the acquisition stage would be deemed irrelevant to be considered.³⁰

4.2.2 Joint-ownership

Acquisition

In joint-ownership cases, where both parties have legal interest, but there is no declaration of trust relating to beneficial ownership, the parties' beneficial interest is deemed to also be held jointly. Legal interest in land can only be held as a joint-tenancy, as such "conveyance into joint names indicates both legal and beneficial joint-tenancy, unless and until the contrary is proved".³¹ As the issue of acquisition is easily evidenced, the central questions in relation to joint-ownership become whether the parties intended their beneficial interests to be different from their legal interests, and if so how the interest is to be quantified.³²

Rebutting the Presumption & Quantification

Quantification involves the parties rebutting the presumption that equity follows the law, which is a "heavy burden"³³ only to be displaced in "very unusual"³⁴ circumstances. The burden can be displaced in two different instances. First, if there is evidence as to the fact the parties' common intention was different at the time the property was purchased. Second, if there is evidence as to the fact that it was different

³⁰ However, the hurdle that must be overcome with regard to acquisition is generally only satisfied through financial contributions and this is often the most influential element in determining the division of shares in sole-ownership cases: see [4.3.2].

³¹ Joint-tenancy refers to joint-ownership of the whole property that without specific shares being attributable to either party; Law of Property Act 1925, s1(6); *Stack v Dowden* [2007] UKHL 17 [58].

³² *Stack v Dowden* [2007] UKHL 17 [66].

³³ *Stack v Dowden* [2007] UKHL 17 [33] affirmed in *Jones v Kernott* [2011] UKSC 53 [60].

³⁴ *Stack v Dowden* [2007] UKHL 17 [68] affirmed in *Jones v Kernott* [2011] UKSC 53 [60].

post-acquisition.³⁵ ‘Evidence’ in such cases refers to “what the parties actually intended, to be deduced objectively from their words and their actions”.³⁶ Financial contributions are relevant, but not decisive in determining the size of the respective shares. Lady Hale in *Stack* outlined a considerable list of other factors from which the common intention of the parties might be inferred which includes but is not limited to

“the nature of the parties’ relationship; whether they had children ...how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses”.³⁷

In arriving at a decision in such cases, “context is everything”³⁸ and each case turns on its own facts, allowing for a more flexible approach than that applicable to the sole-ownership regime.

In those circumstances where the parties ‘actual’ intentions cannot be deduced from their words or conduct “each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property”.³⁹

The court bases this on “what their intentions as reasonable and just people would have been had they thought about it at the time”.⁴⁰ Under this formulation of the CICT, the court has the capacity to impute rather than infer the common intention of the parties.⁴¹

This is limited to the quantification stage of proceedings, and only in circumstances in

³⁵ This is considered an ambulatory constructive trust introduced in *Stack v Dowden* [2007] UKHL 17 [62].

³⁶ *Jones v Kernott* [2011] UKSC 53 [46].

³⁷ *Stack v Dowden* [2007] UKHL 17 [69].

³⁸ *Stack v Dowden* [2007] UKHL 17 [69].

³⁹ *Oxley v Hiscock* [2004] EWCA 546 [69] as approved in *Stack v Dowden* [2007] UKHL 17 [61] and *Jones v Kernott* [2011] UKSC 53 [32].

⁴⁰ *Jones v Kernott* [2011] UKSC 53 [47].

⁴¹ *Stack v Dowden* [2007] UKHL 17 [126] describes the difference as follows: “imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend”.

which “it is impossible to divine a common intention as to the proportions in which they are to be shared”,⁴² and is deduced by reference to what is fair having regard to the whole course of dealings as discussed above. Despite the flexibility this seems to afford the court, it has not gone so far as to allow the court to impose a result purely based on considerations of fairness.⁴³

4.2.3 Two regimes?

As has been outlined above, there has for some significant time been two different regimes for cohabiting couples depending on whether the legal interest is held jointly or by one party. Due to this distinction, it had been hoped that the Supreme Court would “make clear that constructive trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to ‘joint-names’ and ‘single-name’ cases”.⁴⁴ The *obiter* in *Stack* emphasised the need for a “consistency of approach” with regard to sole/joint cases.⁴⁵ In response, in *Jones* the Court stressed that “there is of course a single regime: the law of trusts” the only distinction being that sole legal ownership and joint legal ownership would lead to sole/joint equitable ownership as a starting point respectively.⁴⁶

A number of sole-ownership cases post-*Jones*, have been decided based on principles derived from the joint-ownership regime.⁴⁷ One example of this would be *Geary v*

⁴² *Jones v Kernott* [2011] UKSC 5 [31]; see [2.3.1] on the controversy resulting from the inclusion of imputed intention.

⁴³ *Jones v Kernott* [2011] UKSC 5 [46].

⁴⁴ Gardner S. & Davidson K., ‘The Future of *Stack v Dowden*’ (2011) 127 *Law Quarterly Review* 13, 15.

⁴⁵ *Stack v Dowden* [2007] UKHL 17 [4].

⁴⁶ *Jones v Kernott* [2011] UKSC 53 [16]; The starting point referring to the burden: see [4.2.2].

⁴⁷ For an overview of the approach of the courts to CICT cases post-*Jones*: see Sloan B., ‘Keeping up With the Jones Case: Establishing Constructive Trusts in ‘Sole Legal Owner’ Scenarios’ (2015) 35(2) *Legal Studies* 226.

Rankine.⁴⁸ *Geary* involved a commercial property which had been purchased with funds provided exclusively by Mr Rankine, which was also registered in his sole-name. His partner (romantic and commercial) Ms Geary worked within the business for which she received no remuneration. The central question was whether there was a common intention that the property be held jointly, particularly given that they both lived and worked in the property, and the unpaid contributions Ms Geary had made. Following the principles developed in *Jones*, the court considered that there was no such common intention at the time of the purchase, nor had one developed. As a result Ms Geary was deemed to have no interest in the property. The application of *Jones* over *Rosset* in cases such as *Geary* may seem to give weight to the hope expressed by Dixon that “it is difficult to see a return to the *Rosset* approach now that the genie is out of the bottle”.⁴⁹

However

“*Geary* ought not to be overstated... no *Rosset* argument was advanced... [and] being such an easy case, the result would inevitably have remained the same on either the *Kernott* or *Rosset* tests”.⁵⁰

As such, despite the ‘clarification’ in *Jones*, and repetition that the “law has moved on”⁵¹ since *Rosset*, until a sole-ownership case reaches the Supreme Court, this *obiter* remains merely persuasive and the two separate regimes remain intact.

⁴⁸ *Geary v Rankine* [2012] EWCA Civ 555.

⁴⁹ Dixon M., ‘Editor’s notebook: the still not ended, never-ending story’ [2012] 76 *Conveyancer and Property Lawyer* 83, 84; Similar comments have also been raised in Lees K., ‘*Geary v Rankine*: money isn’t everything’ (2012) 5 *Conveyancer and Property Lawyer* 412, 421. Note that despite some sole cases applying *Jones/Stack*, the approach of the courts has been inconsistent: see Sloan, (n47).

⁵⁰ Lees, (n 49), 418. It was stated in *Stack v Dowden* [2007] UKHL 17 [126] “the inferences drawn... may be very different” in sole/joint-ownership cases indicating some differences in application.

⁵¹ *Stack v Dowden* [2007] UKHL 17 [26] and [60]; *Abbott v Abbott* [2007] UKPC 53 [2] and [19].

4.3 Critique

The CICT has been deemed a “Frankenstein doctrine”⁵² of judicial invention, and significant criticisms have been waged against it. In order to give an overview of the existing literature, as well as demonstrating the capacity for the equality in difference approach to impact on vulnerable cohabitants, two of the central critiques are discussed. The first of which can broadly be categorised relating to the ways in which the law does not adequately reflect the lived reality of cohabitants. The second focusses on the unfairness which results from a gendered system focussed on financial contributions. It concludes with a summation of the reasons underpinning the lack of legislative intervention, despite the fact that “for more than a generation ... the law regulating the proprietary rights of those living in non-marital relationships... [has been] unsatisfactory”.⁵³

4.3.1 Reality vs Law

Communication: contemplating breakdown

Communication is significant in determining the existence/quantification of shares in a number of ways as discussed above.⁵⁴ Despite underpinning the legal framework, this does not sit well with the reality of relationships. In their study, Douglas et al found that

“at the very time that they were making the decision to live together, couples could not simultaneously envisage anything going wrong with their relationships and instinctively did not want to ‘plan for failure’”.⁵⁵

⁵² Rotherham C., ‘The Property Rights of Unmarried Cohabitees: The Case for Reform’ (2004) *Conveyancer and Property Lawyer* 268, 272.

⁵³ *ibid*, 268.

⁵⁴ In particular: see [4.2] in relation to the reliance on the “actual intention”/“agreement” between the parties in relation to quantification in sole and joint-ownership cases, and in relation to acquisition in express common intention sole-ownership cases.

⁵⁵ Douglas G. (et al), ‘Cohabitants, Property and the Law: A Study of Injustice’ (2009) 72(1) *Modern Law Review* 24, 39.

The focus on express discussions as the most reliable method through which to obtain proprietary rights is at odds with the nature of cohabiting relationships. In reality, couples are often reluctant to discuss ownership, seeing it as “unromantic” given that the “sub-text is that the relationship may well fail”.⁵⁶ It is premised on the flawed notion that people act “sensibly”⁵⁷ or “rationally”⁵⁸ when they are in a relationship, and that on this basis they would make clear their proprietary interests. It also relies on the parties’ recollection which introduces evidentiary issues as the parties will often “reinterpret the past in self-exculpatory or vengeful terms”⁵⁹ making accurately divining the parties’ ‘actual’ intentions problematic.

Familial trust is a central element in the formation of relationships and underpins one of the reasons why either formal or informal expressions as to the existence and/or quantification of shares will often be absent. The courts have recognised the way in which

“when people... agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure... There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it”.⁶⁰

⁵⁶ Lower M., ‘The Constructive Trust: From Common Intention to Relationship?’ [2011] *Conveyancer and Property Lawyer* 515, 515.

⁵⁷ Barlow A. & Duncan S., ‘Supporting Families? New Labour’s Communitarianism and the “Rationality Mistake”’ (2000) 22(1) *Journal of Social Welfare and Family Law* 22, 23.

⁵⁸ *ibid*, 129. This lack of rationality is also linked to the issues of autonomy discussed below and [2.5.3] and can be identified in the case law [5.7],[6.8] and [7.4]. The way in which this does not fit with the reality has also been recognised by the Law Commission in 2002 and 2007: Law Commission, *Sharing Homes* (n21), 2.112, 14.14, 1.17; Law Commission., *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com 307, 2007), 2.54-7.

⁵⁹ *Stack v Dowden* [2007] UKHL 17 [67]; Similar comments were raised in: *Cox v Jones* [2004] EWHC 1486 (Ch) [18] in which the judge described the relationship between the parties as “a perfect breeding ground for differences of perception and bona fide differences of recollection and emphasis”.

⁶⁰ *Midland Bank v Cooke* (1995) 27 HLR 733, 746. See also *Jones v Kernott* [2011] UKSC 53 [61].

However, this has not been a sufficient basis from which to depart from the centrality which communication has within the CICT. Despite acknowledging the unrealistic reliance on “cold legal question[s]”⁶¹ in such cases the courts are yet to realise the full implications of familial trust *negating* the need for communication regarding assets, at least in the minds of many cohabiting couples.

‘Common’ Intention

The legitimacy of ‘common’ intention and detrimental reliance as determinative of the intention of cohabiting couples towards their home has been questioned on a number of fronts. As has been seen above, the question of ownership and the quantification of shares is often left unexpressed, rendering common intention

“The most persistent red herring... which not surprisingly, since the parties are unlikely to have reached any agreement as to the disposition of the property, is rarely to be found”.⁶²

However, even where the intention is ‘expressed’ whether this can be considered ‘common’ between the parties is less clear, particularly in relation to the ‘excuse’ cases as examined below.⁶³ This raises the question as to whether there is any truth to the ‘fiction’ of common intention, which has been subject to additional criticism given the inclusion of imputation in joint-ownership cases post-*Stack/Jones*.⁶⁴

⁶¹ *Gissing v Gissing* [1971] AC 886, 901, quoting *Gissing v Gissing* [1969] 2 Ch. 85, 93.

⁶² Glover N. & Todd P., ‘The Myth of Common Intention’ (1996) 16 *Legal Studies* 325, 328.

⁶³ See [4.3.1].

⁶⁴ Also discussed at [4.2.2].

‘Common’ Excuses

*“The object of the search is a common intention;
that is, an intention common to both parties”.*⁶⁵

Within the ‘excuse’ cases, the identification of ‘common’ intention by the courts is often only identifiable in one party and the detriment suffered by that party is used to support that finding. In *Eves* and *Grant* excuses made by their partners as to why they *could not* acquire the property jointly were considered ‘express’ agreements, and consequently the courts ‘found’ interest in the homes for the female claimants.⁶⁶ Despite ‘agreement’ being identified in such cases, “it is surely converting the intention of one party – albeit on the facts the innocent one – into an agreement”⁶⁷ rather than identifying a common intention in the true meaning of the words.

In these cases, there is no true common intention, but rather a fictional common intention has been covertly imputed by the judiciary in order to facilitate a just result where it would otherwise have been absent. Despite the way in which this “inventive approach to the facts...” allows the court to “discover a common intention when in truth none exists”⁶⁸ it can be argued that in cases involving deception, the primacy of legal principles and certainty should be secondary to an outcome which facilitates fairness.

⁶⁵ *Geary v Rankine* [2012] EWCA Civ 555 [21].

⁶⁶ *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch 638 affirmed in *Lloyds Bank v Rosset* [1991] 1 AC 107, 133. Contrast with *Curran v Collins* [2015] EWCA Civ 404 distinguished the aforementioned cases due to the lack of ‘positive assertions’ drawn from the excuse used in that case.

⁶⁷ Clarke P., ‘The Family Home: Intention and Agreement’ [1992] *Family Law* 72, 72. As acknowledged by the judiciary in *Midland Bank v Cooke* (1995) 27 HLR 733, 746 and *Lloyds Bank v Rosset* [1991] 1 AC 107, 127-128.

⁶⁸ Gardner S., ‘Rethinking Family Property’ (1993) *Law Quarterly Review* 263, 265. Similar arguments in relation to fair results taking primacy over maintaining formal principles are raised in Chapter 3 and can be identified predominantly within Denning’s approach: see [5.7.3].

Imputing ‘Common’ Intention

Allowing the court to impute common intention serves as a prime example of the way in which the judiciary have been able to present ‘fictional’ common intention as if it were fact. Imputing intention has been said to be “difficult, subjective and uncertain”.⁶⁹ The subjective element of imputation brings with it fears of unfettered judicial discretion turned judicial activism. However, its limited application and persistence of the courts to ensure that imputation did not equate to rulings based purely on fairness and the focus on objectivity means that this would be an undue criticism here.⁷⁰ Yet the flexibility that the capacity for imputing shares does mean that the outcome of such cases will be “predictably unpredictable”,⁷¹ continuing the trend of uncertainty within cohabitation decisions.

Although imputation in this context is restricted to circumstances in which there is no common intention as to the precise shares in which the property is held, it has allowed for the courts to engage in “an entirely fictional exercise to somehow fill the missing gaps”.⁷² This adds to the fictional elements which combine to create the CICT.⁷³ The case of *Aspden* serves as an example of imputation within the context of the CICT.⁷⁴ The property concerned, a farm, was registered in Mr Aspden’s sole name. Later the barn was transferred to Ms Elvy, and work was undertaken to convert said barn into a

⁶⁹ *Stack v Dowden* [2007] UKHL 17 [127].

⁷⁰ A fear which has been heeded by the judiciary: “Judicial fears focusing on the usurpation of the proper function of Parliament and the uncertainty associated with the adoption of principles which rest purely on doing justice in individual cases has led to a marked reluctance by the English courts to engage in radical creativity”: Pawlowski M., ‘Is Equity Past the Age of Childbearing?’ (2016) 22(8) *Trusts & Trustees* 892, 897. The emphasis that imputation could not lead to the judiciary deciding matters purely on the notion of fairness was made clear in *Jones v Kernott* [2011] UKSC 53 [51].

⁷¹ Lee J., ‘And the waters began to subside: imputing intention under *Jones v Kernott*’ (2012) *Conveyancer and Property Lawyer* 421, 428.

⁷² Pawlowski M., ‘Imputing Beneficial Shares in the Family Home’ (2016) 22(4) *Trusts & Trustees* 377, 381.

⁷³ Here referring to ‘common’ intention and detrimental reliance: see [4.2].

⁷⁴ *Aspden v Elvy* [2012] EWHC 1387 (Ch), hereafter *Aspden*.

dwelling house. There was conflicting evidence as to whether the work undertaken to do so was a joint enterprise and the extent to which each party contributed to the costs of the conversion. In the absence of express common intention regarding the quantification of shares, the judge had to impute a common intention based on the “whole course of dealings” between the couple. As indicated above, there was a considerable lack of clarity as to the financial/non-financial contributions made by the parties. As a result the judge considered the determination of shares (25/75) “somewhat arbitrary” adding that it was “the best” he could “do with the available material”.⁷⁵ This goes some way in demonstrating the way in which to speak of the “common intention constructive trust may be misleading”.⁷⁶

‘Common’ Intention and Detrimental Reliance

Significant confusion has arisen as a result of the way in which detrimental reliance is often indistinguishable from common intention. Where there is express common intention, detrimental reliance is identified from financial contribution or other acts; where common intention is inferred then the conduct from which this inference is drawn is simultaneously considered to be evidence of detrimental reliance.⁷⁷ On such a construction the distinction between detrimental reliance and common intention seems insignificant. Conflating the two central elements of the CICT allows for common intention to be found where it is entirely absent in those cases where common intention is discovered through inference rather than on the basis of an express agreement giving

⁷⁵ *Aspden v Elvy* [2012] EWHC 1387 (Ch) [128].

⁷⁶ Lee, (n71), 428. Despite the critiques waged against imputation, there have equally been calls for it to be extended to the acquisition stage/sole-ownership cases – Pawlowski, ‘Imputing Beneficial Shares in the Family Home’ (n72), 382; Tattershall M., ‘Stack v Dowden: Imputing an Intention’ (2008) *Family Law* 249, 250.

⁷⁷ *Grant v Edwards* [1986] Ch 638, 646-7.

further support to the notion of fictional common intention.⁷⁸ However, the fact that detriment is more easily proved as a result of direct financial contributions is of little comfort to women given that the case law demonstrates that women are less likely/able to contribute in such a way.⁷⁹

There is a considerable lack of clarity as to which detrimental actions will be sufficient to demonstrate reliance on the ‘common’ intention of the parties. The inconsistent approach of the courts concerning such acts “leaves room for arbitrary results and ‘palm-tree’ justice”.⁸⁰ This is further complicated by the fact that in those judgments where the “equally fictitious”⁸¹ elements of the CICT are considered, little if any distinction is made between their discussions of detrimental reliance and common intention.

Gendered Detrimental Reliance

Those instances in which detrimental reliance can be identified within the judicial analysis have frequently invoked criticism, particularly from a feminist perspective as such judgments rely on the “use of the stereotype as a norm”.⁸² The notion that detrimental reliance consists of “conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house”,⁸³ has

⁷⁸ Express cases being the rarer form of the two cases. Liew Y. K., ‘The Secondary-Rights Approach to the Common Intention Constructive Trust’ (2015) *Conveyancer and Property Lawyer* 210, 216.

⁷⁹ For an analysis of women’s capacity to contribute and examples of those cases in which women have been unable (financially or due to societal norms) to contribute to property: see Chapters 5-7.

⁸⁰ Halliwell M., ‘Equity as Injustice: The Cohabitant’s Case’ (1991) 20 *Anglo-American Law Review* 500, 507.

⁸¹ Riniker U., ‘The Fiction of Common Intention and Detriment’ (1998) 62 *Conveyancer and Property Lawyer* 202, 208.

⁸² Lawson A., ‘The things we do for love: detrimental reliance in the family home’ (1996) *Legal Studies* 218, 226; the use of stereotypes has been and remains controversial. However, stereotypes have frequently been invoked in order to establish difference, allowing for the judges in such cases to avoid the injustice resultant from a strict application of the law. A detailed analysis of this concept can be identified in theory in Chapter 3 particularly [3.2.2], and in practice in Chapters 5-7, particularly [5.7.3].

⁸³ *Grant v Edwards* [1986] Ch 638, 648.

led to the emergence of two distinct scenarios. The first encompasses those situations in which the usually female claimant performs acts which can be considered “the most natural thing in the world for a wife”.⁸⁴ In such circumstances the claimant will not be determined to have suffered any detriment. The second involves those cases in which the claimant “did much more than most women would do”,⁸⁵ which would then be considered detrimental reliance.

This distinction relies on the judiciary making normative, stereotypical assumptions about the ‘natural’ behaviour of women. The fact that women’s behaviour is generally considered to derive from “love and affection”⁸⁶ rather than the intention to acquire rights presents an additional hurdle for those claimants. It also fails to recognise that when in a relationship, cohabitants’ “prime motivation is usually the well-being of their relationship rather than the legal consequences of their actions”.⁸⁷

In this context “the decisions of the courts display the tenacious hold of ‘separate spheres’ ideology”⁸⁸ in which women’s domestic contributions no matter how substantial are deemed insufficient. Yet work which would otherwise be compensated and/or performed by a man, such as working a cement mixer or making improvements that required wielding a 14lb sledgehammer are seen as worthy of recompense.⁸⁹

⁸⁴ *Lloyds Bank v Rosset* [1991] 1 AC 107, 131.

⁸⁵ *Cooke v Head* [1972] 1 WLR 518, 519; a sentiment also identified in *Eves v Eves* [1975] 1 WLR 1338, 1340 with the inclusion of the statement “more than many wives” though the use of such discourses have been used to benefit women as examined in Chapters 5-7.

⁸⁶ Lawson, (n82), 219.

⁸⁷ Barlow A. & Lind C., ‘A Matter of Trust: The Allocation of Rights in the Family Home’ (1999) 19 *Legal Studies* 468, 473.

⁸⁸ Flynn L. & Lawson A., ‘Gender, Sexuality and the Doctrine of Detrimental Reliance’ (1995) 3(1) *Feminist Legal Studies* 105, 117.

⁸⁹ This can be seen to reflect the undervaluation of women’s work both in the home and in the public sphere as demonstrated Chapters 5-7. The theoretical underpinnings for this situation are explored in Chapters 2 and 3.

Despite claims that detrimental reliance is decided on the basis of an objective analysis of the parties behaviour, this objectivity is clearly tainted with gendered assumptions which replicate the stereotypes about women's appropriate role. Further to this, such assumptions often do not reflect the parties' perceptions of their behaviour, adding additional weight to the notion that the law fails to adequately reflect the reality of cohabiting couples' relationships.

Fictional Framework

The above analysis demonstrates that the current legal framework is "entirely dependent upon the use of fictions to achieve... at best only partial justice".⁹⁰ Both detrimental reliance and common intention, despite forming central elements of the CICT can be undermined in a number of ways. Detrimental reliance is both fictitious and gendered and is often subsumed within common intention making its role in proceedings questionable. Its absence from the judicial analysis in both *Stack* and *Jones* raises the question as to whether detrimental reliance can now be considered a non-essential element of the CICT.⁹¹

Common intention is "neither a necessary nor sufficient explanation for the present law".⁹² It is unnecessary in relation to those 'excuse' cases, in which the absence of common intention is transformed into an express agreement "in spite of rather than because of the intentions of the parties".⁹³ It is equally unnecessary in that, albeit in

⁹⁰ Lawson, (n82), 231.

⁹¹ However, detrimental reliance has elsewhere been deemed "essential" within excuse cases such as *Curran v Collins* [2015] EWCA Civ 404 [77]. However, it ought to be noted that this was a sole-ownership case and therefore this may indicate that it remains necessary within this context.

⁹² Eekelaar J., 'A Woman's Place – A Conflict Between Law and Social Values' (1987) *Conveyancer & Property Lawyer* 93, 95.

⁹³ Harpum C., 'Adjusting Property Rights Between Unmarried Cohabitees' 2(2) OJLS 1982 277, 282. See also Halliwell, (n80), 503.

limited circumstances, it is “invented by the judge”⁹⁴ through imputation. It is insufficient in that common intention is often insufficient unless it is evidenced through detrimental reliance, categories which often subsume one another which is particularly problematic in sole-ownership cases which do not feature any direct financial contributions.

Continuing to base decisions in this area on common intention means that individuals rights become

“dependent upon their expressed common intention, about a matter they will not usually have thought it necessary to consider, is unrealistic and the cause of frequent and sometimes severe injustice”.⁹⁵

On the other hand, allowing the fictitious form of common intention to persist provides the courts with a tool with which they can “attempt to do justice”, however without a sufficient framework to support such an approach, this will undoubtedly continue to lead to “largely arbitrary”⁹⁶ and uncertain results.

4.3.2 The Focus on Financial Contributions

The emphasis placed on direct financial contributions in relation to acquisition under *Rosset*, and the continued centrality of monetary contributions at the quantification stage under *Stack/Jones* has formed one of the most substantial critiques waged against the CICT.⁹⁷ This critique can be categorised as falling into several inter-connected categories. First is that it diminishes the value of *feminine* contributions in favour of a

⁹⁴ Gardner, ‘Rethinking Family Property’ (n68), 264.

⁹⁵ Lawson, (n82), 218.

⁹⁶ Riniker, (n81), 207.

⁹⁷ See [4.2] regarding the quantification and acquisition stage in relation to both sole and joint-ownership cases.

masculine money-centric approach which has contributed to the continuation of the devaluation of ‘women’s work’.⁹⁸ Second is that the seemingly gender-neutral approach has, and continues to have a disproportionate impact on women.⁹⁹ Finally, the *masculine* financial focus is an ill-fitting reflection of the way in which cohabiting couples view their relationships with one another and their property, and the realities of money management.¹⁰⁰

‘Worthless’ Contributions

The case of *Burns v Burns*, is most frequently invoked to portray the risks associated with the constructive trust.¹⁰¹ Valarie Burns is presented as the personification of the unfairness which results from the cohabitation regime as a woman who “walked away from a 20-year relationship with nothing”.¹⁰² She was unable to assert any interest in the shared family home despite having “worked just as hard as the man... maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children”,¹⁰³ and having contributed to household expenses. In absence of an express agreement, the lack of direct financial contributions, per the requirements in *Gissing* and *Pettitt* rendered these contributions worthless.¹⁰⁴

⁹⁸ Reflecting the way in which women’s work has been undervalued within the home and in the realm of employment as identified in Chapters 5-7. The theoretical underpinnings of which are discussed in Chapters 2 and 3.

⁹⁹ The ways in which inequality persists under the guise of neutrality can be identified throughout Chapter 4. See also [4.3.3]. The reasons for this disproportionate impact, for example due to the gender pay gap and the sexual division of labour are identified in practice in Chapters 5-7.

¹⁰⁰ Adding further weight to those arguments raised previously in this chapter as to the relationship between law and reality in this area: see [4.3.1].

¹⁰¹ *Burns v Burns* [1984] Ch. 317 indeed as Watkins D., ‘Recovering the Lost Human Stories of Law: Finding Mrs Burns’ (2013) 7(1) *Law and Humanities* 68, 74 notes, the Burns scenario has become somewhat of a “stock story”. For a full analysis of this case within this thesis: see [6.8.1].

¹⁰² Greer S., ‘Back to the Bad Old Days?’ (2008) 158 *New Law Journal* 174, 179.

¹⁰³ *Burns v Burns* [1984] Ch. 317, 345.

¹⁰⁴ Note that the requirements in *Gissing/Pettitt* as restated in *Burns* mirror those under *Rosset* as currently applied in sole-ownership cases.

Burns demonstrates the way in which the focus on direct financial contributions “prejudices economically weaker cohabitants and has led to allegations of inherent gender bias against female partners”.¹⁰⁵ The accusations of gender bias stem from the tendency for women to be the primary caregiver, the sexual division of labour and the economic inequality of women in society.¹⁰⁶ Undervalued ‘women’s work’ within and outside the home has been “denied proper recognition by a legal system in which money and rights have been inextricably linked”.¹⁰⁷ In continuing to place value purely on direct financial contributions and refusing to recognise *feminine* contributions the legal regime both perpetuates and “reflects the stereotypes of the male as breadwinner”¹⁰⁸ but does not reflect the way in which cohabiting couples view such contributions.

An approach which considers financial contributions from men and women in the same way can be claimed to be gender-neutral, the case law has demonstrated that in practice, this has had a disproportionate impact on women.¹⁰⁹ The *neutrality* and *uniform* application of the law which underpins the focus on financial contributions is in practice gendered, and has done little to ensure clarity.¹¹⁰ Such claims of neutrality fail to take account of the sexual division of labour and the economic inequality which persists between men and women which impacts their ability to contribute to property.¹¹¹ When

¹⁰⁵ Conway H., & Girard P., “No Place Like Home”: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain’ (2004) 30 *Queen’s Law Journal* 715, 747. The property law and trusts framework has generally been critiqued for being gendered: see O’Donovan K., *Sexual Divisions in Law* (London: Weidenfeld & Nicolson, 1985) and [4.3.3] in this chapter below.

¹⁰⁶ The case law and position of women in society in relation to socio-legal and economic inequality are examined in detail in Chapter 5-7.

¹⁰⁷ Riniker, (n81), 209. The links between money and rights within a property law context has formed one of the central arguments in favour of moving to a family law approach: see [4.2.3].

¹⁰⁸ Rotherham C., *Proprietary Remedies in Context* (Oxford: Hart Publishing, 2002), 231.

¹⁰⁹ See Wong S., ‘Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?’ (1998) 18(3) *Legal Studies* 369, 374; Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n58) has also acknowledged that the current law “fail[s] the primary-carer cohabitant”, 4.22. As demonstrated in: [5.7],[6.8],[7.4].

¹¹⁰ This also links to the masculinity of neutrality which runs through Chapter 2 and 3.

¹¹¹ Examined Chapters 5-7.

combined with the way in which women's work is 'naturalised' by the judiciary and the gendered norms and socio-legal restrictions placed on women's ability to contribute financially, the CICT replicates dominance of men in the home and the market.¹¹²

Where even the most minimal direct financial contribution can be identified, a significant share of the property can be found in favour of the claimant.¹¹³ In such circumstances, non-financial contributions are not deemed entirely irrelevant, they are instead limited to the determination of shares.¹¹⁴ In the absence of express agreement or financial contribution at the acquisition stage, non-financial contributions are an insufficient basis for acquiring rights in the home, making acquisition a considerable hurdle for those in a *Burns*-type scenario.

Domestic Work and Commercial Value

The lack of economic value attributed to 'women's work' can be directly contrasted with the case of *Cox v Jones*, in which non-financial acts were deemed to have financial worth and therefore constituted detrimental reliance, and as a result, interest.¹¹⁵ In that case Miss Cox had designated time and money into the renovation work on the 'country house' of which the judge said that

¹¹² This 'naturalisation' is discussed in relation to detrimental reliance [4.3.1] and refers to the way in which women's contributions are seen as stemming from natural love and affection rather than out of attempts to acquire interest in the property.

¹¹³ For example, in *Midland Bank v Cooke* (1995) 27 HLR 733 in which the claimant contributed less than 7% and was awarded a 50% share.

¹¹⁴ However, the quantification stage is still dominated by financial contributions not only in a sole-ownership context, but under *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53.

¹¹⁵ [2004] EWHC 1486 (Ch).

“she was doing something that either Mr Jones would have had to have done himself (but which he had insufficient time to do) or it would have to have been done by a professional (who would have charged for it)”.¹¹⁶

Her actions were considered to have commercial value having led to a decline in her earnings.¹¹⁷ However, those same arguments could be raised in cases involving childcare or housework having negatively impacted on the earnings of a woman, which her partner would have otherwise had to perform himself or employ another to perform them and yet such claims have been unsuccessful.¹¹⁸

Even if this does indicate an extension of the ‘relevant’ contributions, the persistence of the gendered division of labour means that men are more likely to perform acts such as renovation/DIY and women remain more likely to do those acts which are not sufficient to constitute detrimental reliance.¹¹⁹ As such it would do little to alleviate the issues which result from the gendered construction of this principle. This provides further evidence to the notion that the work done by women in the home is not valued in financial terms, unless it steps over the boundary between the public/private divide impacting their employment.¹²⁰ Clearly, the property regime in domestic contexts is “unfair because insufficient attention is paid to what might be termed domestic labour contributed to the household”,¹²¹ domestic labour which tends to be performed by

¹¹⁶ *Cox v Jones* [2004] EWHC 1486 (Ch) [73]. However, it ought to be noted that she also made indirect contributions to the property by way of the renovations.

¹¹⁷ This is again inconsistent with the case law prior: see *Lissimore v Downing* [2003] 2 FLR. 308. In which giving up one’s job was insufficient to find detrimental reliance.

¹¹⁸ See [4.3.1].

¹¹⁹ Auspurg K. (et al.), ‘Housework share between partners: Experimental evidence on gender-specific preferences’ (2017) 30 *Social Science Research* 1.

¹²⁰ Douglas, (n55), 51. Which links to the way in which only ‘deviant’ behaviour is deemed detrimental reliance: [4.3.1]. The value of work performed in the public/private domain is discussed from a theoretical perspective in Chapter 2 and can be identified in practice in Chapters 5-7.

¹²¹ Thompson M. P., ‘Home Sharing – Reforming the Law’ (1996) *Conveyancer and Property Lawyer* 154,155

women at the expense of their careers.

Finances seen as a form of commitment

The additional flexibility in relation to financial contributions under *Stack/Jones*, could have signalled a departure from strict approach in *Rosset*. However, monetary contributions have remained considerably influential under this approach. In *Jones* the decision to jointly purchase property was used as an indication of their commitment to one another.¹²² In premising beneficial interest on the legal-ownership of the home the courts consider joint-owners “more economically and emotionally entwined and committed to their relationship”.¹²³ Despite using legal-ownership as the starting point for determining equitable ownership, Lady Hale does acknowledge that couples do not

“always have a completely free choice in the matter. Mortgagees used to insist upon the home being put in the name of the person whom they assumed would be the main breadwinner. Nowadays, they tend to think that it is in their best interests that the home be jointly owned”.¹²⁴

The external influence of mortgagees and the capacity for pressure from within the relationship to register the property in either joint/sole names means that the presumption which marks the starting point of the CICT is flawed. However, some comfort can be drawn from the fact that said presumption is rebuttable.¹²⁵

¹²² *Jones v Kernott* [2011] UKSC 53 [19].

¹²³ Garland F., ‘*Jones v Kernott*’ (2012) 34(4) *Journal of Social Welfare and Family Law* 479, 483.

¹²⁴ *Stack v Dowden* [2007] UKHL 17, [67].

¹²⁵ However, often the most powerful method of rebutting this presumption is based on financial contributions/money management which has generally been shown to work to the detriment of women. It is also noteworthy that such rebuttal is entirely based on direct financial contributions under the second tier of the sole approach.

The introduction of the TR1 form was supposed to simplify the identification of equitable interest, avoiding the difficulties surrounding express intention, or the reliance on the presumption discussed above.¹²⁶ However, this is generally used regarding the transfer from vendor to purchaser rather than between occupiers, or rather cohabitants.¹²⁷ The ‘choice’ made regarding ownership at this stage cannot necessarily be seen to be a true indication of the intentions of both parties, as it is more likely that a vulnerable party (financially or emotionally) could be manipulated by the more dominant party into ‘giving away’ their rights, much like those risks associated with cohabitation contracts.¹²⁸ The ‘solutions’ currently provided still rely heavily on the assumption of equality of bargaining power even where they recognise that there may not be equality between the parties.¹²⁹

The focus placed on the way in which a family’s finances are arranged can also be identified in *Stack*, where the ‘unusual’ circumstances which justified an uneven quantification of shares were based on the fact that the couple kept their finances separate.¹³⁰ The notion that maintaining separate finances is somehow indicative of a lack of commitment is premised on a view of money management which fails to take

¹²⁶ As the form would then constitute an express trust.

¹²⁷ The TR1 form involves notifying the land registry of any transfers of property, in such situations where land is to vest in joint proprietors, they are supposed to indicate whether the land is to be held beneficially as a joint tenancy or a tenancy in common: Land Registration Act 2002, s44(1). It must be noted that the TR1 does not avoid the issues which arise in relation to property previously owned by one party which then becomes the ‘family home’ which accounts for a considerable number of cohabiting couples.

¹²⁸ Regarding the need to recognise the “interdependency” and “vulnerability” of adults and children in familial relationships and not merely focus on autonomy in this context: see Herring J., ‘Relational Autonomy in Family Law’ in Wallbank J. (et al)., *Rights, Gender and Family Law* (Abingdon: Routledge, 2009), 169-8. It also assumes that cohabitants will understand the consequence of not only sole/joint-ownership but joint tenancy and tenancy in common. The use of the TR1 is further problematised given that many solicitors fail to fill in the form completely, particularly in relation to beneficial shares much to the frustration of the judiciary: see *Carlton v Goodman* [2002] EWCA Civ 545 [44].

¹²⁹ See McLellan D., ‘Contract Marriage - the Way Forward or Dead End?’ (1996) 23(2) *Journal of Law and Society* 234, 239 on the inequality of bargaining power. This also relates to the lack of understanding which cohabitants have of the consequences of such choices/their legal position as discussed below.

¹³⁰ *Stack v Dowden* [2007] UKHL 17, [92] and [116].

account of the diversity in how couples organise their relationships. Traditionally holding a joint account has been the way in which couples have organised their finances. However, an increasing number of couples are adopting a “new individualised approach”¹³¹ where part or all of a couple’s finances are kept separately.

Financial independence in such relationships is often sought in order to “undermine the traditional inequalities within marriages and create egalitarian relationships”,¹³² one of the reasons given by cohabitants for avoiding the institution of marriage. That is not to say that all cohabiting couples “organise themselves as egalitarian economic units; that parties could and would “bargain” for an equal share in decision-making as well as in the allocation and management of household income”.¹³³ However, this is the perception of cohabiting relationship adopted by the courts, treating unmarried couples as if they were commercial parties bargaining at arm’s length.¹³⁴ It is an assumption which does not fit with the research surrounding money management and the distribution of power in relationships.¹³⁵ This is particularly problematic given the tendency for men to pay for “essentials” such as the mortgage, whilst women’s wages are spent on those items considered “luxuries”¹³⁶ deemed insufficient contributions by the courts.

¹³¹ Pahl J., ‘Family Finances, Individualisation, Spending Patterns and Access to Credit’ (2008) 37(2) *Journal of Behavioural and Experimental Economics* 577, 577. Reflecting another way in which the cohabitation regime does not reflect the reality/complexity of cohabiting couples in reality.

¹³² Elizabeth V., ‘Managing money, managing coupledness: A critical examination of cohabitants’ money management practices’ (2001) 49 *The Sociological Review* 389, 402.

¹³³ Wong S., ‘Would you “Care” to Share Your Home?’ (2007) 58 *Northern Ireland Legal Quarterly* 268, 272.

¹³⁴ That is despite a rejection of this construction of the family underpinning the decision to remove the presumption of a resulting trust in such cases.

¹³⁵ Vogler C. (et al.), ‘Intimate relationships and changing patterns of money management at the beginning of the twenty-first century’ (2006) 57(3) *British Journal of Sociology* 455.

¹³⁶ See Mossis A., & Nott S., *With All My Worldly Goods: A Feminist Perspective on the Legal Regulation of Wealth* (Dartmouth: Aldershot, 1995), 205. See also Wong ‘Would you “Care” to Share Your Home?’ (n133), 272.

The above analysis demonstrates that the way in which couples arrange their finances is an unreliable indicator of the nature of their relationship or their commitment.¹³⁷ The focus on direct financial contributions in the case of sole-owners has consistently led to unfair results for women. Although financial contributions can be indicative of the intention of the parties, it should not be decisive, which is the role it currently performs.¹³⁸ The strict approach under *Rosset*

“ignores the significantly important and often substantial non-financial and indirect financial contributions that are made towards the welfare of the parties and members of their family, which are equally important aspects of sharing a home”.¹³⁹

Despite the approach adopted in *Stack/Jones* indicating a more relaxed approach in relation to relevant conduct, there remains a focus on financial contributions. As Probert notes, “the new approach to the family home has all the disadvantages of the traditional resulting trust, but without its logic and simplicity”.¹⁴⁰ Rather than signalling a departure from the decisive nature of financial contributions under the resulting trust, the CICT sees the judiciary indulge in an exercise of muted forensic accounting to consider additional financial criteria.

Patronising Women and Replicating Models of Dependency

*“A woman’s place is often still in the home,
but if she stays there, she will acquire no interest in it”¹⁴¹*

¹³⁷ See Douglas, (n55), 39 and Barlow A., Burgoyne C. & Smithson J., *The Living Together Campaign – An Investigation of its Impact on Legally Aware Cohabitants* (London: Ministry of Justice, 2007), 42.

¹³⁸ For example Montgomery J., *Question of Intention?* (1987) *Conveyancer and Property Lawyer* 16 proposed adopting a perspective which focusses on the parties’ state of mind within which contributions could form evidence but would not be decisive of common intention.

¹³⁹ Wong S., ‘The inequity of Equity: A Home-Sharer’s Tale’ (2006) *Singapore Journal of Legal Studies* 326, 328.

¹⁴⁰ Probert R., ‘Equality in the Family Home?’ (2007) 15 *Feminist Legal Studies* 341, 350-1.

¹⁴¹ Eekelaar, (n92), 94.

The injustice which resulted from the focus on financial contributions led to flourishes of judicial creativity which ‘found’ proprietary interest for female claimants where it would otherwise have been absent.¹⁴² This manipulation of legal principles has been critiqued as presenting women as the “weaker partner” who “needs the protection of the court against exploitation”.¹⁴³ This approach is most identifiable in those judgments in which Lord Denning applied his ‘new model’ of constructive trust.¹⁴⁴

This ‘new model’ was charged with “reproducing the traditional patriarchal family”¹⁴⁵ within cohabiting couples through replicating the female dependency attributed to marital relationships. This was met with considerable critique from a feminist perspective, and led to claims that “Denning was a radical anti-feminist”.¹⁴⁶ An approach which relies on “female dependency and not on genuine contribution”¹⁴⁷ faces similar criticisms to those waged against gendered detrimental reliance above. Despite these critiques, in the ‘excuse’ cases Denning made significant contributions to the development of women’s rights utilising equitable principles and creative discourse(s), as such an approach which utilises *feminine* stereotypes to ensure a fair outcome can be described as “patronizing, perhaps, but effective”.¹⁴⁸

¹⁴² This can be seen in the ‘excuse’ cases [4.3.1].

¹⁴³ Deech R., ‘The Case Against the Legal Recognition of Cohabitation’ (1980) 29 *International Comparative Law Quarterly* 480, 485

¹⁴⁴ This model is discussed in more detail in [4.3.3]; See the detailed analysis of these cases at [7.9] and [6.8].

¹⁴⁵ Parker S., *Cohabitees* (Chichester: Barry Rose Publishers, 1981), 222-3.

¹⁴⁶ Stephens C., *The Jurisprudence of Lord Denning: A Study in Legal History* (Volume III) (Newcastle: Cambridge Scholars Publishing, 2009), 109

¹⁴⁷ Deech R., ‘The Case Against the Legal Recognition of Cohabitation’ (n143), 497; See also Pearl D., ‘The Legal Implications of a Relationship Outside Marriage’ (1978) 37(2) *Cambridge Law Journal* 252, 268-9 on the stigma attached to dependency and the way in which dependency does not form an adequate basis for a legal relationship.

¹⁴⁸ Auchmuty R., ‘Recovering Lost Lives: Researching Women in Legal History’ (2015) 41(1) *Journal of Law and Society* 34, 41. Although Auchmuty writes in the context of overriding interests the methods used by Lord Denning in the case referred to *Williams Glyn Bank v Boland* [1981] AC 487 are equally identifiable in the context of his cohabitation judgments among others as supported by the similar comments were raised in relation to *Eves v Eves* [1975] 1 WLR 1338 in Bottomley A., ‘Self and

Mrs Burns is History

Despite the characterisation of Mrs Burns having been used to demonstrate the inadequacies of the law relating to cohabitants and the need for reform, it has been claimed that she is no longer a representative figure, if she ever was. The way in which Mrs Burns

“is used to present a pattern linking cohabitation, motherhood and economic vulnerability in a way which suggests... that the figure is representative of female cohabitants”¹⁴⁹

seemingly fails to take account of the societal shift in the position of women since the 1970s. However, proposing that the law does not discriminate against women merely because they have a greater presence in the workforce, and the slowly closing wage gap is an insufficient argument.¹⁵⁰

There are still relationships which mirror that of the Mrs Burns scenario, and the fact that they are less frequent does not negate the need for reform particularly given that the research indicates that it is still women who are most frequently negatively impacted.¹⁵¹ While such situations occur there remains impetus to protect those rendered vulnerable by virtue of the lack of recognition of what is traditionally a woman's role, ignoring the lived reality of many women.¹⁵² It also fails to recognise

Subjectivities: Languages of Claim in Property Law', in Bottomley A. & Conaghan J., (ed), *Feminist Theory and Legal Strategy*, (Oxford: Blackwell, 1993), 58.

¹⁴⁹ Bottomley A., 'From Mrs Burns to Mrs Oxley: Do Cohabiting Women (Still) Need Marriage Law' (2006) 14 *Feminist Legal Studies* 181, 194.

¹⁵⁰ The position of women, including their increasing presence in the workplace and the implications that this has had on their ability to contribute to property is analysed in detail in Chapter 5-7.

¹⁵¹ See Probert R., 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' (2001) 13 *Child & Family Law Quarterly* 275, Douglas, (n55), and Douglas G. (et al.), *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Cardiff: Cardiff University, 2007), 3.4.

¹⁵² Fineman M., *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995), 26.

that Mrs Burns herself worked outside the home and used those monies to contribute towards their joint resources and still failed to gain an interest in it.¹⁵³ Instead what needs to be considered is the position of women in the market and in the home alongside the staying power of gender norms which act to maintain women's 'naturally inferior' position.¹⁵⁴

While it can be said that it is the duty of the law to protect those considered vulnerable, "women, like any other disadvantaged group, do not want to go through life needing protection".¹⁵⁵ Yet, the impact of factors outside the law, both specifically related to property and wider afield, mean that until these are reconciled, patronising protection yields fairer results than fictitious equality which replicates women's disadvantage while maintaining their theoretical position as equal.

Jones & Stack, Reverse Sexism?

Jones and Stack can be presented as ways in which men fair worse than women under the current rules, which gives rise to the argument "that the protection of women per se cannot be an appropriate expectation of the law".¹⁵⁶ However, this fails recognise that the reason that these men were awarded a smaller share was not due to the court recognising the value of the *feminine* contributions made by their partners, but due to

¹⁵³ However, it ought to be noted that "During the greater part of the period when the plaintiff and the defendant were living together she was not in employment or, if she was, she was not earning amounts of any consequence" both her lack of significant earnings and periods of unemployment were however due to her role as mother and 'housewife' *Burns* (n23), 330.

¹⁵⁴ Probert, 'Trusts and the Modern Woman' (n151), 275. The theoretical Chapters 2 and 3, and in practice in Chapters 5-7.

¹⁵⁵ Contrast: Parker D., 'Cohabitants, Their Homes and the Winds of Change' (1984) 14 *Family Law* 40; Auchmuty R., 'Using Feminist Judgments in the Property Law Classroom' (2012) 46(3) *The Law Teacher* 227, 228.

¹⁵⁶ Auchmuty R., Using Feminist Judgments in the Property Law Classroom (n155), 238.

the male parties' lesser financial contributions.¹⁵⁷ The financial focus which remains the underlying decisive factor in CICT proceedings may no longer almost-exclusively impact women (biological), but it continues to value *masculine* financial contribution over *feminine* acts of care or the absence of monetary contribution. As such it remains a gender biased system regardless of the sex of the parties.¹⁵⁸

4.3.3 Patriarchal Property Law

*“The law of property can be harsh on people, usually women”*¹⁵⁹

Property law, as the basis for determining property rights for cohabitants, has been described as an inadequate tool for remedying the injustices which result from the current regime, as seen above, and “creates new ones of its own”.¹⁶⁰ In particular, the focus on *neutral* principles and certainty which are central to traditional property law jurisprudence, produces gendered outcomes and has done little to secure certainty in the law. The shortfalls of the current framework had led to claims that a family law approach, or remedial approach which takes account of the relational aspects of the cohabiting context and allows for considerations of fairness to take place may be a more apt jurisdiction for such cases to fall into. The following section discusses the unreliability of equity as a method of securing just results, critiques lack of flexibility afforded to the judiciary under the property law regime and considers the use of remedial/family law approaches as an alternative.

¹⁵⁷ In *Jones v Kernott* [2011] UKSC 53 Mr Kernott ceased paying bills once he left the property and Mrs Kernott paid off more of the equity in the home, the lack of maintenance paid towards the children was also considered. In *Stack v Dowden* [2007] UKHL 17 Ms Dowden paid more towards the purchase price.

¹⁵⁸ For a discussion of gender and sex see [1.2.2], [2.3] and [2.4].

¹⁵⁹ *Curran v Collins* [2015] EWCA Civ 404 [9].

¹⁶⁰ Law Commission., *Sharing Homes* (n21), 3.100.

Equity as an Unreliable Tool

Historically equity was seen as “the white knight... [which has] ridden to the rescue of some damsel caught in the toils of the common law”.¹⁶¹ There were times in which equity did indeed rescue these vulnerable women who were without the protection of the law. However, as it has developed, the CICT has become a primary example of the “shortcomings and deficiencies” of property, equity and trusts, in the context of the family home.¹⁶² Despite its historical foundations lying in “principles of justice and conscience”¹⁶³ intended to lessen the ‘harshness’ of the common law rules, justice and conscience have slowly been drained from trusts relating to the family home. Notwithstanding Lord Denning’s attempts to infiltrate this system with the application of wider principles, the courts have continued to focus on a property law approach.¹⁶⁴

Influenced by the ‘founding’ cases of *Pettitt* and *Gissing* the courts saw it appropriate to apply property-law principles to situations involving family property, so as to treat couples as strangers.¹⁶⁵ The focus on predictability, consistency and clarity have resulted in a trend which has reduced the ‘equitable’ element of implied trusts. The subsequent case law reveals the way in which the “neutral form [of trusts] ... masks a discriminatory substance ... [which] operates against women on various levels”.¹⁶⁶

¹⁶¹ Conway M., ‘Equity’s Darling?’ in Scott-Hunt S., and Lim H., *Feminist Perspectives on Equity and Trusts* (London: Routledge 2013), 27.

¹⁶² Bridge S., ‘Cohabitation: Why Legislative Reform is Necessary’ (2007) 37 *Family Law* 911, 911.

¹⁶³ Halliwell (n80), 501.

¹⁶⁴ As discussed below. It is possible to state that there is perhaps a resurgence of the principle of fairness within the modern case law: see *Oxley v Hiscock* [2004] EWCA 546, *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53. However this is both significantly limited in its application and for now only applicable to joint-ownership cases.

¹⁶⁵ *Pettitt v Pettitt* [1970] AC 777, *Gissing v Gissing* [1971] AC 886. Although *Pettitt* and *Gissing* both involved married couples they were heard prior to the modern divorce framework, they were decided on the basis that the powers vested in judiciary under MWPA 1882, s17 did not entitle them to subvert the existing proprietary rights of the parties.

¹⁶⁶ Tee ‘L., Co-ownership and Trusts’ in Tee L., (ed) *Land Law, Issues, Debates, Policy* (Devon: Willian Publishing, 2002), 165. See [4.2.2] for a discussion of the gendered nature of the legal principles has been discussed.

Certainty over Flexibility

The property law framework seeks to guarantee fairness through ensuring legal certainty.¹⁶⁷ Despite this, the adherence to strict rules and principles under this framework has in practice placed “logical consistency and predictability over compassion and substantive justice”.¹⁶⁸ The issues which arise as a result from the “the unattainable precision of property law” when applied to the “inarticulacy of home sharing”¹⁶⁹ has led to claims that family property would more adequately be dealt with utilising family law principles. However, there have been attempts within the property law framework at utilising equitable principles to alleviate this unfairness. Yet those attempts to extend the CICT have cost the property framework its certainty, casting further doubt on how adequate the doctrine is in this context.

With the introduction of “family assets” as the ‘new model’ of constructive trust, Lord Denning sought to revive equitable principles which seemed forgotten in the property law context. The new approach recognised the way in which assets such as the family home, regardless of financial contribution are purchased in order to provide for a couple’s joint lives.¹⁷⁰ Therefore a trust should be imposed “whenever justice and good conscience require it”.¹⁷¹ The flexibility this afforded the judiciary however, sat in conflict with the traditional construction of property jurisprudence which opposes the

¹⁶⁷ A procedural rather than remedial approach to fairness. These approaches are discussed in more detail below.

¹⁶⁸ Massaro T. M., ‘Empathy, Legal Storytelling, and the Rule of Law: Old Words New Wounds’ (1988) 87 *Michigan Law Review* 2099, 2101.

¹⁶⁹ Briggs ‘A., Co-ownership and an Equitable Non Sequitur’ (2012) 128 *Law Quarterly Review* 183, 183; The issues which arise from the application of property law principles are discussed above in relation to the ill-reflection of reality and the unfairness which results from the focus on financial contributions [4.3.2].

¹⁷⁰ Reflecting the reality of cohabiting relationships in a way which is absent in the classic CICT.

¹⁷¹ *Hussey v Palmer* [1972] 3 All ER 744, 747. See also *Cooke v Head* [1972] 1 WLR 518, 521. The “joint family venture” approach has been adopted by the Canadian courts in which all relevant circumstances especially mutual effort, economic integration, actual intent and the degree of priority that the parties accorded to the idea that they were “a family” see *Kerr v Kerr* [2011] 1 SCR 269 at [80]-[100] based on similar principles to those utilised by Lord Denning regarding “family assets”.

prospect of judges acting as a “potentate stretched out under a palm-tree, dispensing justice upon the whim of the moment”.¹⁷² Yet, these judicial ‘whims’ provided fairer results for women than the orthodox application of the CICT.

Rosset sought to clarify the law after a sustained period in which the classic and “family asset” approaches were both being applied in a haphazard manner. However, in practice the return to strict property formulation of the CICT did little to add clarity to this area of the law which remains described as uncertain, illogical and complex.¹⁷³ The renewed consideration of factors which indicate the parties’ “emotional and economic commitment to a joint enterprise”¹⁷⁴ in *Jones* could signal a limited return to the concept of family assets and the considerations of fairness that this facilitates. Indeed, the scope for judicial discretion emerging from *Jones* has been seen by some as a departure from the property law regime: “it is something else: call it family law, call it an exercise of the court's inherent equitable jurisdiction, but, maybe, do not call it property law”.¹⁷⁵ In doing so the courts seem to be reassessing the balance between fairness and certainty once again.¹⁷⁶

Until there is legislative intervention the courts will continue “in search of doctrinal consistency in an area notorious for doctrinal fudging and the consequent risk of destabilisation” and remain unable to find a satisfactory balance between the two under

¹⁷² Mee J., *The Property Rights of Cohabitees* (Oxford: Hart, 1999), 179.

¹⁷³ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n58), 2.4. It also failed in its attempts to produce fair results as discussed above in relation to the focus on financial contributions and the way in which it fails to adequately respond to the reality of cohabiting relationships.

¹⁷⁴ *Jones v Kernott* [2011] UKSC 53 [19].

¹⁷⁵ Dixon, ‘Editor’s notebook: the still not ended, never-ending story’ (n49), 85; See also Farooq I., ‘The erosion of property law principles in cohabitation disputes—a step too far?’ (2008) 14(2) *Trusts & Trustees* 2008 120, 120.

¹⁷⁶ See Chapter 7.

a property law regime.¹⁷⁷ The courts are attempting to balance “coherent property law doctrine against the expectations of family law style justice”.¹⁷⁸ However, despite ‘clarification’ of approach in *Jones*, the CICT remains “all things to all judges”.¹⁷⁹

‘Family Property’: Family or Property

The inability for property law to adequately deal with the issues which arise in cases involving family property has led to considerable debates about the appropriate jurisdiction of such claims. That being whether the breakdown of cohabitation would be more adequately dealt with utilising family law principles. Property law is concerned with the identification of property rights, in an “unpurposive and formalist”¹⁸⁰ manner, according to a pre-determined set of rules, culminating in a fixed set of principles which are applied without additional discretion as afforded in family law. Despite the majority judgments’ rejection of the idea that family property should be treated in the same way as commercial property in *Stack* and *Jones*, indicating that there should be a different set of rules applicable to family property as opposed to other forms of property, this has yet to be fully realised.¹⁸¹ As a result, the persistence of the “very deep-rooted tendency in the common law to privilege ‘property’ over ‘family’”¹⁸² continues to have implications for cohabiting couples.

¹⁷⁷ Miles J., ‘Property law v family law: resolving the problems of family property’ (2003) 23(4) *Legal Studies* 624, 624.

¹⁷⁸ Barlow A., ‘Rights in the Family Home: Time for a Conceptual Revolution?’ in Hudson, A., (ed) *New Perspectives on Property Law: Human Rights and the Home* (London: Cavendish Publishing, 2003), 53.

¹⁷⁹ Dixon M., ‘The never-ending story - co-ownership after *Stack v Dowden*’ (2007) *Conveyancer and Property Lawyer* 456, 460. An overview of the ways in which the courts have applied/misapplied/ignored *Jones v Kernott* [2011] UKSC 53 can be seen in Sloan (n47), further demonstrating the lack of clarity and inconsistency in approach.

¹⁸⁰ Halliwell (n80), 516.

¹⁸¹ *Stack v Dowden* [2007] UKHL 17 [3], [31], [33], [42] and *Jones v Kernott* [2011] UKSC 53 [23]-[25], [53] and [60].

¹⁸² Conway & Girard, (n105), 719.

The family law framework which deals with the breakdown of marriages and civil partnerships has

“developed to protect the more economically vulnerable family members... who reduce their earning capacity as a consequence of fulfilling the home-making and child-caring functions within the relationship, leaving the breadwinning or most of it to their partner”.¹⁸³

This approach can be identified in both the legislation and case law which governs divorce and dissolution.¹⁸⁴ Within this context, proceedings are decided with considerations of “relationship-generated disadvantage” measured against a “yardstick of equality”.¹⁸⁵ Sitting in direct contrast with the property law approach in which the principle of fairness is limited, or arguably almost absent. Thus creating a “hierarchy of relationships”¹⁸⁶ between those who are married/unmarried.

It has been argued that the regulation of marriage “treats women as perpetual dependents”.¹⁸⁷ However, martial law also affords those who are economically vulnerable a protection and recognition of their contributions that without their marriage certificate, they would be without. Cohabitation, in stepping away from the patriarchal trappings of marriage allows for couples “to define gender and personal identity in more liberating and non-traditional ways”.¹⁸⁸ This paints an idealistic notion of modern relationships, which is not reflected in reality. Even where relationships are formed on

¹⁸³ Barlow A., ‘Cohabiting Relationships, money and property: The legal backdrop’ (2008) 37 *The Journal of Socio-Economics* 502, 507.

¹⁸⁴ Matrimonial Causes Act 1973 Part II; Civil Partnership Act 2004 Ch II; *White v White* [2001] 1 AC 596, *Lambert v Lambert* [2002] EWCA Civ 1685 and *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24.

¹⁸⁵ *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24 [140]; *White v White* [2001] 1 AC 596, 605

¹⁸⁶ Wong, ‘Would you “Care” to Share Your Home?’ (n133), 277.

¹⁸⁷ Deech R., ‘Cohabitation’ (2010) 40 *Family Law* 39, 43.

¹⁸⁸ *ibid*, 42.

an equal basis, the societal, political and legal inequality are almost inescapable.¹⁸⁹ In ‘trading’ the patriarchal institution of marriage for a more egalitarian relationship form, cohabitants risk having their interests determined by a patriarchal property regime.

The family law regime surrounding divorce and dissolution may be imperfect, yet it is preferable to the approach currently applicable to cohabitants.¹⁹⁰ It needs to adopt a more relational approach in order to give the appropriate weight to the nature of the parties’ relationship. Property law is an unsuitable mechanism for resolving property disputes on the breakdown of cohabiting relationships as it is “predicated on a view of human behavior that is not consistent with the social practices found in intimate relationships [sic]”.¹⁹¹

Remedial

The CICT within English law is institutional rather than remedial.¹⁹² Under a remedial approach the CICT “is a judicial remedy giving rise to an enforceable equitable obligation... the remedy can be tailored to the circumstances of the particular case”¹⁹³ which is more readily identified with family rather than property law. A remedial approach affords flexibility to the judiciary, allowing them to consider the diverse range

¹⁸⁹ See this in Theory Chapters 2 and 3 and in practice Chapters 5-7.

¹⁹⁰ On the imperfect nature of the divorce legislation see for example Glennon L., ‘Obligations Between Adult Partners: Moving from Form to Function?’ (2008) *International Journal of Law, Policy and the Family* 22, 43

¹⁹¹ Rotherham, *Proprietary Remedies in Context* (n108), 228. As discussed at [4.3.1].

¹⁹² See Etherton T., ‘Constructive trusts and proprietary estoppel: the search for clarity and principle’ (2009) *Conveyancer and Property Lawyer* 104 and Etherton T., ‘Constructive Trusts: A New Model for Equity and Unjust Enrichment’ (2008) 67(2) *Cambridge Law Journal* 265 on this point. The remedial approach is often adopted in other common law jurisdictions. With the exception of Lord Denning who seemed the most happy to play fast and loose with the ‘remedial’ constructive trust to affect an equitable outcome”: Sheedy J., ‘Civil Law Jurisdiction and The English Trust Idea: Lost in Translation?’ (2008) 20 *Denning Law Journal* 173, 180.

¹⁹³ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 715-6. For detailed analysis on the remedial constructive trust: see Birks P., ‘Rights, Wrongs, and Remedies’ (2000) 20(1) *Oxford Journal of Legal Studies* 1.

of relationships and the needs of the parties.¹⁹⁴ Thus facilitating a discretionary approach which has been all but removed from the property law.

Following *Stack* and *Jones*, there are indications that the English approach to the CICT is becoming more remedial particularly with the courts willingness to impute intention.¹⁹⁵ However, the limited scope for inference and the even more significantly limited use of imputation does not signal a significant shift. It has been said that the “distinction between imputation and inference... marks the dividing line between the constructive trust as a discretionary remedy... and an institutional trust”.¹⁹⁶ Clearly, if the courts are to value the impact of their judgments rather than focus on the consistent application of ill-fitting principles, a remedial approach should be adopted so that they might “appropriately compensate for the economic effects of the relationship. The nature and extent of the adjustment will depend on the circumstances of the relationship”.¹⁹⁷

Form over Function

The “diverse circumstances”¹⁹⁸ which constitute cohabitation has formed one of the central arguments against formulating a legislative regime. This reasoning can be

¹⁹⁴ See Wong S., ‘Cohabitation and the Law Commission’s Project’ (2006) 14 *Feminist Legal Studies* 145, 152. It is for this reason that the remedial approach is used in other common law jurisdictions, such as New Zealand, Canada and the United States. It can also be identified in the Law Commissions proposals in 2007 when considering ‘qualifying contributions’ which were not limited to financial contributions and constructing a scheme based on benefit/economic disadvantage which also would have given the judiciary a range of powers similar to those applicable to divorce proceedings, albeit in a more limited manner: Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n58), 4.26-4.40.

¹⁹⁵ See [7.4].

¹⁹⁶ Etherton, ‘Constructive Trusts: A New Model for Equity and Unjust Enrichment’ (n191), 272-3.

¹⁹⁷ Chisholm R. (et al)., ‘De facto property decisions in NSW; emerging patterns and policies’ (1991) 5 *Australian Journal of Family Law* 241, 264; such an approach is unlikely to be fully embraced without the consent of Parliament through legislation for those reasons relating to judicial law-making/activism as discussed above.

¹⁹⁸ Law Commission, *Sharing Homes* (n21), ix.

undermined by focussing on the nature of the relationships through distinguishing between couples, “blood relatives or ‘caring’ relationships and ‘commercial relationships’”.¹⁹⁹ In addition to this, the ‘difference’ between married and unmarried couples emerges as a theme in anti-legislative literature/speech. However, research indicates that cohabiting and married couples are similar in both “function and effect”.²⁰⁰ Currently the law adopts a form over function approach in this regard, differentiating between the two groups on this basis producing “disparate and inequitable results”²⁰¹ as a result.

It is proposed that the law should look at the family in terms of function rather than form, meaning what the relationship does rather than what it is.²⁰² Such an approach would allow for the law to react to “how the role-division assumed within a relationship has determined the different contributions which each party has made and has affected their respective financial futures”.²⁰³ The diversity of marital relationships is recognised within the family law framework, and yet under the property law approach such differences are almost entirely absent from consideration.

A functional approach would signal a departure from the consideration of couples rights and needs on an abstract basis, and instead allow an approach which evaluates relationships in a more value neutral way to be adopted.²⁰⁴ It would also widen the

¹⁹⁹Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n58), 1.19. Commercial relationships have already been distinguished by the courts in the existing CICT regime as noted above in this section.

²⁰⁰ Barlow A., & James G., ‘Regulating Marriage and Cohabitation in 21st Century Britain’ (2004) 62(2) *Modern Law Review* 143, 153.

²⁰¹ Conway & Girard, (n105), 748.

²⁰² See for example the dissenting judgment of Ward LJ in *Fitzpatrick v Sterling Housing Association* [1998] Ch 304; see also Glennon, (n190).

²⁰³ Bailey-Harris R., ‘Law and the Unmarried Couples – Oppression or Liberation’ (1996) 8 *Child and Family Law Quarterly* 137,141; which can be categorised as a relational approach as discussed above.

²⁰⁴ See Glennon, (n190).

remedies available to cohabiting couples beyond the existence and scope of beneficial interest, but it could include a monetary or occupation award.²⁰⁵ In summary, allowing for a remedial approach to be adopted on the breakdown of both married and unmarried couples would alleviate a number of the issues faced by economically vulnerable individuals. Yet the law is reluctant to match the social reality of cohabiting couples as they are unwilling to further ‘dilute’ the cherished institution of marriage.²⁰⁶

Undermining the Institution of Marriage

Reform relating to cohabitation has proved controversial given its historical ties with social deviance.²⁰⁷ Despite the normalisation and increasing levels of cohabiting relationships, reform is often ‘blocked’ due to “its perceived threat in some quarters to the institution of marriage”.²⁰⁸ There is currently a wide spectrum of legal responses to cohabitation. There are instances in which cohabitants are treated as though they were married, and in others it treats them as strangers with little clarification as to the reasons underpinning the diversity of approaches towards cohabiting couples.²⁰⁹

Those who oppose legislative intervention frequently cite the increasing levels of cohabitation as a problem in itself, and seek to “promote marriage as an attractive alternative”.²¹⁰ However,

²⁰⁵ See for example Dewar, J., ‘Land, Law and the Family Home’ in Bright S., & Dewar J., (eds) *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), 327–355.

²⁰⁶ HC Deb 05 February 2013, vol 558, col 161.

²⁰⁷ As can be seen in Chapters 5-7.

²⁰⁸ Miles J. (et al.), ‘Reforming family law – the case of cohabitation: ‘things may not work out as you expect’ (2012) 34(2) *Journal of Social Welfare & Family Law* 167, 168.

²⁰⁹ Barlow and James (n200), 147; Barlow A., (et al) ‘Just a Piece of Paper? Marriage and Cohabitation’ in Park A., (et al) (eds.), *British Social Attitudes: the 18th Report* (2001), 44-5.

²¹⁰ Probert R., ‘Cohabitation: Current Legal Solutions’ (2009) 62(1) *Current Legal Problems* 316, 316.

“it does not follow logically that the support of one institution necessarily undermines another - support of a variety of institutions may simply be a manifestation of the pluralism characterising contemporary society”.²¹¹

The significant societal shift in the nature of the family is a social phenomenon which “makes it imperative that the law acknowledges diverse family relationships and deals with them justly”.²¹² This is clearly a political issue, but it has, at least for cohabitants had significant legal implications. Despite public support for the extension of legal provisions similar to those which are applicable to married couples to those who cohabit, and in addition to this “most cohabitants in fact believe that they are already entitled to be treated as though married after some period of time”²¹³ there seems little hope that there will be legislative intervention into the breakdown of cohabiting relationships.

Non-Intervention and the Protection of Autonomy

*“If cohabitants are dissatisfied with their legal position and believe that they suffer injustice... ‘Why don't they marry?’”*²¹⁴

An additional argument which has been waged against the creation of a legislative regime for cohabitants, is based on individual autonomy.²¹⁵ The implication being that “fault does not lie with the common intention constructive trust” but rather with the “cohabitants [that] have chosen to remain unmarried or register the property in only one

²¹¹ Bailey-Harris, (n203), 138.

²¹² Barlow & Lind, (n87), 469.

²¹³ Bowman C. G., *Unmarried Couples, Law and Public Policy* (Oxford: Oxford University Press, 2010), 175. Note the failed attempts at introducing such legislation as discussed Chapter 7.

²¹⁴ Deech, *The Case Against the Legal Recognition of Cohabitation* (n143), 482.

²¹⁵ Autonomy is discussed in depth at [2.5.3]. See also Eekelaar, (n92), 101 who discusses the objections to use of proprietary estoppel as an alternative is libertarian individualism – in that to allow domestic contributions to have their full weight acknowledged would intrude into their domestic relationship.

partner's name".²¹⁶ From this perspective, individuals have chosen not to marry an in avoiding the "undesired norms of behaviour"²¹⁷ associated with marriage and as a result they have also forfeited their right to the legal protection afforded to married couples. Such a decision should be respected by the state, and as a private matter, the state should not intervene.²¹⁸

The above argument is premised on the idea that individuals are making a free and informed choice. This neglects three central factors. First, the nature of many cohabiting relationships means that there is no 'set' date in which cohabitation can be said to have begun, which creates difficulties in terms of discussing assets upon breakdown, notwithstanding those issues addressed above regarding the communication of couples.²¹⁹ Second, it does not recognise the number of cohabiting couples who live together in expectation of marriage.²²⁰ Finally, it assumes that such individuals are making an informed decision as regards their rights. However, despite attempts at raising awareness such as the 'living together campaign', of cohabitants as to their legal position, confusion remains.²²¹ Even the judiciary have expressed confusion relating to the legal principles surrounding cohabitation.²²²

²¹⁶ Yip M, 'The Rules Applying to Unmarried Cohabitants' Family Home: *Jones v Kernott* (2012) *Conveyancer and Property Lawyer* 159, 165; A perspective that can also be identified in Deech, *The Case Against the Legal Recognition of Cohabitation* (n143).

²¹⁷ Tee L., 'Division of Property Upon Relationship Breakdown' in Herring J., ed. *Family Law: Issues, Debates, Policy* (Devon: Willan Publishing, 2001), 46.

²¹⁸ See Chapter 2, particularly [2.5.2] regarding state intervention and the public/private division. On legal paternalism/maternalism in the context of cohabiting relationships: see Bailey-Harris, (n203), 137.

²¹⁹ As discussed in detail [4.3.1].

²²⁰ For example *Hammond v Mitchell* [1991] 1 WLR 1127 - engaged; *Burns v Burns* [1984] Ch. 317 - presenting and understood to 'be' married due to 'Mrs' Burns name change). Although this category cannot be said to encompass the majority of cohabitants, it still accounts for a significant number of them (Based on the British Household Panel Survey). See also Coast E., 'Currently Cohabiting: Relationship Attitudes Expectations and Outcomes' in Stillwell J. (et al.), *Fertility, living arrangements care and mobility: understanding population trends and processes* (Dordrecht: Springer, 2009), 120.

²²¹ This is also premised on the assumption that cohabitants will behave "rationally" in reaction to the law: see Barlow & James, (n200), 167 and Chapter 6.

²²² See *Grant v Edwards* [1986] 1 Ch 638, 648 and 651.

Underpinning the notion of ‘choice’ is the assumption that couples who marry do so for legal protection, or at least that it is a substantial factor in the decision-making process. In contrast, Barlow’s study found that “marriage as a trigger for legal rights had less appeal than... anticipated”.²²³ In addition research indicates the majority of cohabiting couples are unaware that there is no specific legal protection associated with their relationship status, which is exacerbated by the continuing belief in common law marriage.²²⁴ The ‘choice’ between getting married and obtaining rights or living together without that security whilst objectively true, serves as another example of the way in which the logic of the law does not adequately reflect the lived reality of cohabitants experiences.²²⁵ If the law continues to adopt the “Napoleonic approach of ignoring cohabitants because they ignore the law... [it does so] at a high cost to them and their children on relationship breakdown or death of a partner”.²²⁶ That is not to say that there is no value in respecting individual autonomy, there are those couples who wish to regulate their own affairs, and as such some of the legislative intervention which has been suggested, such as opt-out schemes would be problematic.²²⁷ Equally however, “there still has to be a rule for those who do not give their minds to the matter”.²²⁸

²²³Barlow, ‘Cohabiting Relationships, money and property: The legal backdrop’ (n183), 517. The most recent data on public opinion relating to cohabiting couples rights on separation can be found in Jenkins S. (et al.), *Families in Britain: The Impact of Changing Family Structures and What the Public Think* (London: Ipsos MORI, 2009), 16.

²²⁴ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n58), 1.

²²⁵ Douglas, (n55), 36.

²²⁶ Barlow A., ‘Cohabitation Law Reform – Messages from Research’ (2006) 14 *Feminist Legal Studies* 167, 175.

²²⁷ The scheme put forward by the Law Commission in 2007 for example was an opt-out scheme: Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n58).

²²⁸ Gardner S., ‘A Woman’s Work’ (1991) 54(1) *Modern Law Review* 126, 129. See also Deech, *The Case Against the Legal Recognition of Cohabitation* (n143), 483.

This overwhelmingly demonstrates that there needs to be a balance between autonomy and the protection of those made vulnerable by their relationship (gendered). Respect for autonomy need not require the total absence of the law.²²⁹ Clearly, if “pushed too far the autonomy argument may leave the vulnerable facing unjustified hardship on separation”,²³⁰ and yet the law needs to maintain a space within which those who do not wish to have their private affairs interfered with by the state can do so. Currently, despite the consequences of valuing autonomy over protecting those who are vulnerable, the law does little to attempt to rebalance the scales.²³¹

4.3.4 Parliamentary Inaction

The inability for the courts to progress the CICT further than it has already means that “the hope that Parliament might intervene”,²³² a cry which echoes as far back as *Gissing v Gissing* continues.²³³ Despite attempts to implement change, and calls for intervention, this has been unheard by Parliament.²³⁴ It is clear that “notwithstanding judicial [attempts]... to ‘familialize’ the law of trusts to allow for the social realities of cohabitation and associated domestic arrangements, judges have in a sense developed the law as far as they can”.²³⁵ Judges are clearly reluctant to continue developing cohabitation law, allowing for additional discretion until it is legitimised by Parliament.²³⁶

²²⁹ See for example Freedman J. (et al.), *Property and Marriage: An Integrated Approach*. Property, Tax, Pensions and Benefits in the Family, (London: The Institute for Fiscal Studies, 1988), 16.

²³⁰ Bridge (n162), 912.

²³¹ Conway & Girard, (n105), 747.

²³² Rotherham, ‘The property rights of unmarried cohabitants’ (n52), 268.

²³³ *Gissing v Gissing* [1971] AC 886.

²³⁴ See [7.5] for details on the proposed legislation which has been put to Parliament and rejected.

²³⁵ Conway & Girard, (n105), 769.

²³⁶ See for example Halliwell (n80), 518 and Harpum, (n93), 286.

The inaction of Parliament causes significant difficulties for the judiciary as they attempt to balance social need with their own constitutional principles. Patching up the old common-law scheme while attempting not to step on Parliament's toes. The adoption of "wide discretions can... be seen as an abdication of law's traditional mission"²³⁷ without having been sanctioned by Parliament as in the case of divorce proceedings. This has resulted in a system in which "neither the rules applied nor the results achieved are consistent or coherent".²³⁸ As such, the "patchwork" landscape which we are left with leaves much to be desired.²³⁹

4.4 Conclusion

This chapter has demonstrated that the CICT is subject to two central critiques, both of which demonstrate the need for property law to "shake free from its patriarchal roots and react appropriately"²⁴⁰ to the changing social landscape. It needs to recognise that property is no longer valued in merely monetary terms, nor is a home created purely by financial means. In adopting a more relational approach, acknowledging the difference in gendered contributions and communication, the framework would more adequately interact and deal with the issues which arise on the breakdown of cohabiting relationships.

Two approaches have been identified in the courts' approach to the valuation of 'women's work'. There are those cases in which women are patronised and given rights due to their perceived vulnerability. Or there are those cases in which "the very activity which deprives a woman of her independent means of acquiring security and saving

²³⁷ Birks P, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985), 293.

²³⁸ Barlow & Lind, (n87), 472.

²³⁹ Tee, *Co-ownership and Trusts* (n166), 132.

²⁴⁰ Barlow, 'Cohabiting Relationships, money and property: The legal backdrop' (n183), 502.

capital [namely pregnancy and raising children] is excluded”²⁴¹ from considerations as to whether she is to have security in the home she has made for herself. This reflects the conflict which arises between a difference or sameness approach to equality as examined later in this thesis, and demonstrates the way in which recognising difference is sometimes a necessary prerequisite for achieving a just result.²⁴² The courts preference for uniformity, viewing the family as “posing a problem for the purity and logic of the law of property”,²⁴³ has led to considerable injustice for predominantly women, despite their seeming neutrality.

This chapter has set out the current legal regime and alternative approaches which have been adopted by the judiciary, and provided an overview of the critiques which have arisen from the application of the CICT in practice. This gives an adequate background and understanding of the law in theory and practice which will subsequently be built upon in this thesis through an examination of these approaches from an equality/difference perspective. The following chapters provide the theoretical framework for the subsequent in-depth examination of the case law in its historical context so that the links between the social and legal treatment of women are made clear.

²⁴¹ Eekelaar, (n92), 94.

²⁴² Here the perspective offered by Deech embodies a formal approach to equality and the latter approach noted by Eekelaar can be seen to reflect a more substantive approach. See Chapter 3 in relation to the differing notions of equality.

²⁴³ Probert, ‘Cohabitation: Current Legal Solutions’ (n210), 332. It is for this reason that CICT cases provide an apt ‘case study’ for the analysis of the application of sameness/difference approaches to equality in principle and practice.

Chapter 5 - Socio-Legal Changes Influencing Cohabitation in Britain between 1960–1979.

5.1 Introduction

This chapter provides an analysis of a number of the socio-historical and legal changes which occurred between 1960-1979 which provide insight into the position of women in society. It is arranged thematically, covering a variety of issues, from employment to the nature of the family, drawing on a variety of perspectives in order to construct an image of the historical context in which the cases, which are analysed at the end of the chapter, take place. In providing this historical overview, the adequacy of different equality perspectives, as used by the judiciary can be considered against the appropriate socio-legal backdrop.

The chapter then analyses the key cases relating to the CICT which emerged during this period. This section predominantly focusses on the two distinct approaches to equality adopted by the House of Lords and the Court of Appeal. The case analysis examines the way in which the courts have constructed women, relationships and contributions. It also considers the impact that this has had on the outcome of the cases. Thus providing an insight into the impact which the application of differing forms of equality can have in practice.

5.2 Employment

The breadwinner paradigm of the family, and the gendered public/private divide had a considerable role in constructing the employment sphere as an environment based on masculine norms. The ‘ideal’ employee was the husband who required a ‘family wage’

to support the family, whereas, as women increasingly entered into employment, they were seen to “only come to work for pin-money”.¹ This section traces the development of women’s employment. In particular it examines the perception of working wives/mothers, and the conflict which was constructed between paid work (employment) and unpaid labour (motherhood). Finally, this section examines the way in which, due to the gendered construction of the ideal worker, and the perceptions of ‘women’s work’ which have stemmed from it, the financial independence that employment ought to have brought women remained unfulfilled.

5.2.1 Women’s Employment in the 1960s

Working Wives

The notion that a woman would work until she was married, and thereafter be financially supported by her husband was the prevalent ideal during the 1960s. Women were frequently posed with the choice between work and marriage, thus reinforcing the housewife/breadwinner model of the family. Although there was a perception that this was changing, and that women had a choice, the discourses surrounding working wives was filled with conflicting notions:

“not so long ago women were expected to choose either a job or marriage...

Today the ambitious girl doesn’t see why she can’t have marriage and a career.

A clear pattern has emerged: girls expect to leave school, spend the next few years training and working then leave to have a family”.²

Here *Woman’s Own*, presents the idea that the ‘ambitious girl’ can have it all. Yet, this is directly contrasted with the discussion of the ‘pattern’ that follows. The fact that the

¹ Sheila Douglass at approximately 2.09 in Trades Union Congress., *A Woman’s Worth: the story of the Ford sewing machinists*, Recording Women’s Voices: <www.tuc.org.uk/publications/womans-worth-story-ford-sewing-machinists-1968-84> accessed 20/01/18.

² The Mystery of Being a Woman: going out to work *Woman’s Own* (29 November 1969), 1.

traditional progression from worker to wife is maintained, reinforces the idea that motherhood and work remain incompatible no matter how ‘ambitious’ a woman may be.

The prevalence of the idealised ‘traditional family’ model and associated familial stereotypes meant that many women who did not have children were still treated as though they had made, or would make, *the* choice between work or marriage.³ Those women who were able to balance work and marriage were to seek employment which fit “comfortably with the concept of companionate marriage without upsetting the conventional distribution of economic and other power”.⁴ Although women’s magazines, as can be seen in the extract above, were supposedly praising the idea that women had a choice, the purported conflict between matrimonial harmony and work was frequently peddled by those same publications:

“ask any man if he’d rather his wife worked or stayed at home and see what he says; he would rather she stayed at home... You can’t have deep and safe happiness in marriage and the exciting independence of a career as well”.⁵

Women’s *choices* were therefore, still limited due to their position as wife and mother.⁶

The construction of the worker, premised on the masculine breadwinner, meant that often women would only work menial jobs, or would be prevented from working at all.⁷

³ Despite the increase in the rate of married women working, according to census data (which almost certainly under recorded women’s part-time, casual labour), 26% of married women were employed outside the home in 1951, 35% in 1961 and 49% by the early 1970s: McCarthy H., ‘Women, Marriage and Paid Work in Post-War Britain’ (2017) 26(1) *Women’s History Review* 46, 47.

⁴ Finch J., & Summerfield P., ‘Social Reconstruction and the Emergence of Companionate Marriage’ in Allen G., (ed) *The Sociology of the Family: a reader* (Oxford: Blackwell, 1999), 20–21.

⁵ Dickins M., *Woman’s Own* (28 January 1961).

⁶ A choice which stems from the series of liberal dichotomies discussed in Chapter 2.

⁷ This would of course vary depending on the circumstances. For example, working-class women have historically deviated from this model due to the need for wives to work out of necessity.

“Working wives could imperil marital harmony because of the challenge they posed to men’s ‘traditional’ identity as providers”.⁸ Wives that worked risked emasculating their husbands. If a wife needed to work, then the assumption was that her husband was unable to provide, thus questioning his ‘identity’.⁹ The importance of maintaining the work/marriage divide can be seen in the statement made at the 1966 Civil Service Clerical Workers Association annual meeting:

“What is needed was better pay so that we could keep our wives at home where they belonged. What we want is to give breadwinners throughout the country enough pay to keep their wives at home”.¹⁰

Securing the division between the masculine public sphere, and the feminine private sphere required the continuation of the breadwinner/housewife model of the family. A position which was seen to be undermined by the presence of wives in the workplace.

The uncertainty of women’s position in the workplace placed limitations on their career aspirations, “it was never worth trying to define it too sharply; after all, so much depended on the man”.¹¹ The perception that the breadwinner/housewife roles were and ought to be the norm was not only held by the public due to the way in which such roles ‘learnt’ from a young age, but they were consistently reinforced through the legal sphere, society, and the media.¹² The assumptions held by employers also had their role in limiting those jobs which were suitable for women, “the spectrum of careers was limited; professional training was thought to be wasted on a girl who was only going to give up

⁸ McCarthy, ‘Women, Marriage and Paid Work in Post-war Britain’ (n3) 3.

⁹ This is also based on the notion that a wife would only work because the family needed a second income. This assumption discounted the fact that perhaps a wife had other motivations for working, further providing insight into the perception of ‘women’s work’.

¹⁰ As quoted in Boston S., *Women Workers and Trade Unions*, (London: Lawrence & Wishart 1987), 255.

¹¹ Ingham M., *Now we are thirty: Women of the breakthrough generation*. (London: Eyre Methuen, 1981), 15.

¹² Examples of which can be seen throughout this chapter.

work when she married”.¹³ Marriage constructed women as dependents, why would a wife need to work?¹⁴

Working Mothers

The position of working mothers, though sharing many of the problems expressed above, also faced additional backlash from society and the state, both for single mothers, and those who were married. One of the key issues for working mothers was the “public provision [of childcare] reach[ed] an all-time low in the late 1960s”.¹⁵ This meant that women were either ‘trapped’ in the home having to look after their children if they could afford to do so, or ‘guilted’ into working in order to pay for private childcare.

The Plowden report 1967, which examined primary education, reflected the unsettled public perception of working mothers at the time, putting forward conflicting positions. First, they acknowledged that “much as we may deplore the increased tendency of mothers of young children to work, it would be unrealistic not to count its economic yield”.¹⁶ The report then proceeded to express concerns that despite the possible harm to children “many mothers will work”.¹⁷ Within this period, a distinction tended to be drawn between women who needed to work and those who chose to work:

“it ceases to be for the good of the child that the mother should stay at home if the result is that there is no bread to eat; on the other hand the argument that it is better for a child to have a television set, a record player and a bicycle than to

¹³ Auchmuty R., ‘Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women’ (2012) 20 *Feminist Legal Studies* 71, 74.

¹⁴ See Smart C., *The ties that bind: Law, marriage and the reproduction of patriarchal relations*. (London: Routledge and Kegan Paul, 1984).

¹⁵ Lewis J., ‘The Failure to Expand Childcare Provision and to Develop a Comprehensive Childcare Policy in Britain During the 1960s and 1970s’ (2013) 24(2) *Twentieth Century British History* 249, 250. Also see Riley D., *War in the Nursery: Theories of the Child and the Mother* (London, Virago, 1983).

¹⁶ Department of Education and Science., *The Plowden Report* (London: HMSO, 1967), 457.

¹⁷ *ibid*, 120.

have his mother at home is not completely convincing”.¹⁸

Thus suggesting that only *legitimate* reason for mothers to take up employment should be financial necessity. However, there were those who recognised that mothers needed more than domesticity. For example, the Mothers Union in 1964 urged women, especially those with young children to keep in touch with the world outside their homes, to take up voluntary work, attend evening classes all in order to ensure that they were not viewed merely as housewives, but as valued members of society.¹⁹

Jobs for Women?

Despite reinforcing traditional stereotypes and patterns of work (or lack of work) for women, in response to labour shortages in the late 1960s the need to create jobs ‘for women’ was becoming increasingly recognised.²⁰ In the Lords there was a discussion regarding “the need to encourage industry, the Civil Service and the professions to make more use of qualified married women on a part-time basis”.²¹ However, this move was not made for the benefit of women. Rather:

“jobs were set up in a context in which married women were seen as a necessary expedient to tide over a period of labour shortage... and on the assumption that their primary responsibilities lay at home. Thus, part-time work was explicitly designed to be undemanding and lacking in promotion prospects and responsibility. The ramifications of this are still being experienced by women today”.²²

¹⁸ ‘Day Care of Children under Five Years Old’ (January 1963, MH 156/51).

¹⁹ Mothers Union., *Mothers Union News* (January 1964), 2-3.

²⁰ See for example the comments about married women as an unused resource in Hunt A., *A Survey of Women’s Employment*, 2 vols (London: HMSO, 1965).

²¹ HL Deb 13 Nov 1968, vol 297, col 500.

²² Brendan B., Dale A., & Joshi H., ‘Part-Time Work Among British Women’ in Blossfeld H. P., & Hakim C., (eds.), *In Between Equalization and Marginalization: Women Working Part-Time in Europe and The United States of America* (Oxford: Oxford University Press, 1997), 211.

Despite the ways in which the creation of new jobs can be seen to benefit women, giving them some financial independence from men, gender equality did not underlie this policy.

The leak of the Women's Employment Survey 1968 demonstrates the way in which women's employment was not the source of economic freedom that some women had hoped. *The Observer* reported that the leak showed "that a least four million women are used virtually as slave labour in this country".²³ The remainder of the article drew on the problems with a lack of provision of nurseries for those women who wished to work, to the 'wastage' of women's abilities and qualifications, to the lack of governmental pressure placed on employers to facilitate practices which would benefit or encourage working women and they drew on the division of labour in the home.²⁴ The content of that article, demonstrates the way in which, despite increasing numbers of women entering employment, it remained a 'man's world'. One which had failed to adapt to the needs of workers with childcaring responsibilities, and which continued to place women in jobs which were underpaid and undervalued.

5.2.2 Women's Employment in the 1970s

In 1971 53% of women aged 16 to 64 were in work compared to 92% of men.²⁵ At this time "men with children [were] more likely to work than those without",²⁶ with the opposite being true for women, though this gap narrowed when it came to older women. This exemplifies the gendered nature of work, and the distinct roles and expectations assigned to men and women at this time. Men as the provider, women as the carer who

²³ Haworth D., 'Shock Report on women 'censored'' *The Observer* (31 March 1968).

²⁴ *ibid.*

²⁵ ONS., *Women in the Labour Market 2013* (25 September 2013), 2.

²⁶ *ibid.*, 7-8.

could return to work once their children reached school age. As a result of this employers

“showed very little interest in courses leading to professional qualifications [for women, as women were], giving the impression that they regarded it as a job for the moment only until they married. In view of this, one forgives a male employer for any prejudice he might have against employing women!”²⁷

This quote from *The Times* provides insight into the media coverage of women’s employment and the tone it adopted. Despite acknowledging that, based on gendered assumptions relating to working patterns, employers were unwilling to train women, it then legitimises discrimination and blames women for their own inequality.²⁸

By the late 70s there had been a more notable shift in the pattern of women’s employment. Rather than women employment ending prior to marriage/childbearing, it was primarily married women who went to work in order to support their families.²⁹ Increasing numbers of women began to make the transition from private to public, the feminine realm of domesticity to the masculine sphere of employment. That is not to say that women had not formed part of the male dominated culture prior to this, for example the role of women's labour during the First and Second World War is well known, but rather that “they have [previously] occupied and spoken from a different place within it”.³⁰

The increasing employment opportunities for women was undoubtedly an improvement,

²⁷ Symon P. H., ‘Advertising: setting the standards—encouraging women’ *The Times* (28 Jun 1971), 8.

²⁸ Reflecting the way in which classic liberal theory has dealt with difference: see [3.2.1].

²⁹ Vincent D., *Poor Citizens: The State and the Poor in Twentieth Century Britain*. (London: Longman, 1991) 183.

³⁰ Pollock G., ‘Feminism, Femininity and The Hayward Exhibition 1978’ (1979) 1(2) *Feminist Law Review* 33, 38.

it did not have a considerable impact on women's financial stability:

“Women were yoked to men economically, not just because they earned much less but because they often needed a signature from their father or husband to gain credit or buy bigger items”.³¹

Women still needed to rely on men, their father if they remained single, and their husband if they were married to make purchases, or even to be granted a mortgage.³² Even though women were gaining more financial independence, given the increase in the number of women working, they were not able to spend the money they had earned freely. Again, what seems like progress towards equality, is undermined in practice, by societal and institutional sexism.

Despite the positive trends in women's employment, social attitudes and business culture remained outdated. “Entry into male-defined culture involved a denial of what was specifically female”³³ their traditional role assigned them to wifedom and motherhood which has been constructed as incompatible with employment. One of the key issues during this period was the extent of occupational gender segregation in the labour market and the tendency for women to be concentrated within industries which were underpaid/undervalued and those which provided fewer hours.³⁴ The first report produced by the Equal Opportunities Commission acknowledged that:

³¹ Cochrane K., *1963: The beginning of the feminist movement: Fifty years on, we look back at the year that signalled the beginning of the modern era* (The Guardian 7 May 2013): <www.theguardian.com/lifeandstyle/2013/may/07/1963-beginning-feminist-movement> accessed: 20/01/2018.

³² The inability to be granted a mortgage even if she was able to contribute her own money without permission from their father for those who were cohabiting covertly, which was frequent during this period.

³³ Rowbotham S., *A Century of Women, The History of Women in Britain and The United States* (London: Penguin Books, 1999), 399.

³⁴ See Hakim C., ‘Sexual divisions within the labour force: occupational segregation’ (1978) 86 *Employment Gazette* 1264 and Hakim C., ‘Job segregation: trends in the 1970s’ (1981) 89 *Employment Gazette* 521.

“traditional distinctions between what is men’s work and what is women’s work have been steadily abolished in fact, although many of our industrial and social practices continue to be based on these assumptions”.³⁵

This perceived legal ‘progress’ as undermined by the trappings of socially constructed gender roles which continued to be embraced by employers and seen as the norm by the public.

The ‘economic success’ achieved by women came at a cost. The structure of the workplace and legislation surrounding it was still very much androcentric, with little consideration of the fact that the majority of women in the workplace still had the role of primary caregiver and the unequal division of labour in the home. Employment outside the home did not free them from their household duties, instead women began to perform a ‘second shift’.³⁶ This reinforced the perception of part-time work as ‘women’s work’, as it was the only form of employment which they could sustain alongside their full-time job as wife and mother.

Further contributing to the issues faced by working mothers was the lack of progress concerning the provision of childcare outside the home. The economic crisis rendered the Conservative manifesto pledge to increase part-time nursery care “a promise unfulfilled”.³⁷ This meant that the obligation/expectation that women would care for their children meant that a women’s place was still seen as at home. Again, a woman

³⁵ Equal Opportunities Commission., *First Annual Report of the Equal Opportunities Commission* (London: HMSO, 1977).

³⁶ This was due to the way in which part-time work was more compatible with performing her two ‘jobs’ most adequately. The ‘second shift’ was a term used by Hochschild & Machung to describe the double burden faced by women who were balancing work outside the home with childcare and housework: see Hochschild A. & Machung A., *The Second Shift* (New York: Penguin, 2003).

³⁷ Conservative Party Manifesto: For a Better Tomorrow, 1970. Also see ‘Nursery Education’ (August 1971, MH 156/220).

could work if she found flexible or part-time work, or if she could afford childcare, but this clearly limited the potential of many women.

The lack of flexible work and the economic consequences of part-time work which will be discussed in detail below, meant that though women had the ability to earn their own money, they were still significantly more disadvantaged than their male counterparts.³⁸ Those women who had entered into the world of business were said to have done so “because they have no money to live off”³⁹ they were not thought of as equals but looked on with pity. There were no individual women looking to improve their own lives, or those of their family, gender stereotypes prevailed and these women were to remain ‘just housewives’ who had been forced to work.

5.3 Employment Legislation

Having examined the more social elements of women’s employment in the 1960s-1970s, this section provides an overview of the acts which led to legislative change and the implications of a number of central pieces of legislation which were enacted. In particular it traces the impact which women had on legislation, and in turn, the impact which legislation had on women.

5.3.1 Industrial Action

The strike action of women in the late 1960s provided incentive for later legislative change. The most notable strike was that of the Dagenham sewing machinists in 1968. The machinists went on strike against sex-discrimination in their job grading, they

³⁸ Both financially, as is discussed in [5.3], and in terms of the jobs deemed suitable for women.

³⁹ Business News *The Sunday Times* (28 May 1972) as cited in Adams C., & Laurikietis R., *The Gender Trap: A Closer Look at Sex Roles* (Virago, London, 1976), 76.

demanding to be recognised as 'skilled workers'.⁴⁰ Striking for three weeks, this "handful of discontented women"⁴¹ halted production of the entire Ford factory. In seizing their economic power, the women at Dagenham forced their employers to react. As one manager noted, if the strike action continued "the company would be forced to lay off thousands of men and eventually stop production".⁴² These concerns were focussed on the loss of male income, reflecting the gendered construction of the breadwinning worker which was dominant at the time, the threat that the machinists posed meant that their concerns had to be listened to.

Through the impact of their strike action, women realised that they had power, that they could have an impact that was beyond their individual life. "They could stop a huge car factory... women are not used to feeling powerful, so it had a very great effect on them".⁴³ The publicity about women's ability to impact on men's lives in a man's world, for the recognition of their role, began to dismantle the notion that women in employment were powerless.⁴⁴ Despite the fact that the women at Dagenham did not seek equal pay themselves, their acts placed gender inequality firmly on the political agenda, which was subsequently seized upon by the Women's Liberation Movement and political actors, notably Barbara Castle.⁴⁵ Thus placing considerable pressure on

⁴⁰ This was in reaction to the new pay structure implemented at the factory which categorised the machinists as 'unskilled workers' and they were therefore entitled to less pay. Notably those considered skilled workers in the factory were predominantly men. See McCarthy H., 'Gender Equality' in Thane P., (ed) *Unequal Britain: Equalities in Britain since 1945* (London: Continuum, 2010), 111.

⁴¹ Friedman H., and Meredeen S., *The Dynamics of Industrial Conflict: Lessons from Ford* (London: Croom Helm, 1980), 107.

⁴² Beynon, H. *Working for Ford* (London: Allen Lane, 1984), 91.

⁴³ Wandor M., *Once a Feminist: Stories of a Generation* (London: Virago, 1990), 202.

⁴⁴ There was significant media coverage of the strikes. See for example 'Ford talks failure threat to 40,000' *The Times* (14 June 1968), 22; 'Ministry acts as women threaten jobs at Ford' *The Times* (15 June 1968), 1; *The Times* also dedicated an editorial to discussing the strike: *The Times* (24 June 1968), 9. All of which were cited in Stevenson G., 'The Women's Movement and 'Class Struggle': gender, class formation and political identity in women's strikes, 1968-78' 25(5) (2016) *Women's History Review* 741, 744.

⁴⁵ See generally Lewis J., *Women in Britain since 1945* (Oxford: Blackwell 1992), 117 and Coote A. & Campbell B., *Sweet Freedom: The Struggle for Women's Liberation* (London: Picador, 1982), 10.

politicians to act on the issue of gender inequality. The following section goes on to provide an overview of the changes to employment legislation as influenced by such industrial action, the Women's Liberation Movement and other pressure groups in the 1970s and the impact of these changes on the position of women.

5.3.2 Restricting Rights

The Industrial Relations Act 1971, which attempted to restrict workers' rights, was met by strikes by not only male workers but women. The Act was seen as a way to "make the trade unions the whipping boy for their [meaning the government] economic mismanagement".⁴⁶ Conservative policies had angered many workers, as such when Labour came to power in 1974 a plethora of legislation which attempted to improve the position of workers, particularly focussing on women, including provisions for maternity leave, the right of reinstatement and equal pay followed.⁴⁷

5.3.3 Equal Pay and Anti-Discrimination

As demonstrated through the discussion of striking women above, pay inequality and sex discrimination were becoming increasingly visible public issues. As a response to this the Equal Pay Act 1970 (EPA) and Sex Discrimination Act (SDA) were passed.⁴⁸ The EPA made pay disparity between men and women performing the same work illegal. One of the major aims of this act was to dismantle occupational segregation in the workplace.⁴⁹ Meaning that women were to be treated equally in the sphere from which they had previously been excluded. The SDA prohibited discrimination on the

⁴⁶ HC Deb 24 March 1971, vol 814, col 569.

⁴⁷ These include: Sex Discrimination Act 1975, Equal Pay Act 1970 and the Employment Protection Act 1975. As well repealing the Industrial Relations Act 1971 with the introduction of the Trade Union and *Labour Relations Act* 1974.

⁴⁸ The EPA was not fully enacted until five years later.

⁴⁹ Walker D. J., *Sex Discrimination* (London: Shaw, 1975), xiii.

basis of sex or marital status within the context of work, education and training with the aim of “promoting equality of opportunity between men and women”.⁵⁰

These equality ‘landmarks’ seemed to be putting women’s equality at the forefront. Yet the practices which followed demonstrate that employers were not yet ready to give up their cheap labour or sexist practices. Despite the implementation of both of these pieces of ‘equality’ legislation, in 1975 “the pay gap between men’s and women’s average hourly earnings in full-time employment was 28.7 per cent”,⁵¹ and this gap continues. Thus demonstrating the inability for equality of sameness, in this context, to adequately address the differentiated social construction of men and women in this period.

The debates which preceded the passing of the EPA were generally positive in tone, recognising that women ought to have equal pay for equal work. However, there remained echoes of the past:

“We know the terrible price which we pay in juvenile delinquency and all that sort of thing because some married women go into factories. I have great admiration for the woman who can realise herself through her growing family and through looking after her husband”.⁵²

Here, the breadwinner/caregiver model is idolised, and mothers who worked were again to blame for childhood delinquency. Despite this disappointing rhetoric, the discussions surrounding the SDA featured instances of chauvinism being ‘called out’ in parliament by numerous members.⁵³ Demonstrating a shift in the attitudes deemed acceptable by

⁵⁰ SDA 1975 Introductory paragraph. The denial of training to women based on gendered assumptions regarding work patterns and the impact this had on women has been discussed in [5.2].

⁵¹ Leaker D., (ONS) ‘The Gender Pay Gap in the UK’ (2008) 2(4) *Economic & Labour Market Review* 19, 23.

⁵² HC Deb 09 February 1970, vol 795, col 945.

⁵³ HC Deb 21 January 1975, vol 884, cols 1203-5.

Members of Parliament and a willingness to make this known.

Legislative Loopholes

Despite these welcome legislative changes, there was within the equality provisions, capacity to undermine them in their application. There were numerous loopholes which allowed employers to depart from their obligations without consequence. For example, the regulations pertaining to maternity made no mention of part-time workers, which is the category under which a large proportion of women fell under.⁵⁴ It was also the case that part-time pay rates which did not correspond to the full-time pay rate were not seen as discriminatory if an employer viewed part-time employment as not being ‘equivalent’ to full-time work, by the very nature of it being part-time, even if the work performed was otherwise identical.

Due to the inapplicability of these provisions to part-time workers, and flexibility afforded to employers regarding these provisions, “employers utilised part-time work to extend overall labour hours and to develop a more flexible, and exploitable, labour force”.⁵⁵ Part-time work, which was supposed to afford women flexibility allowing for them to manage work and childcare was instead providing an additional way for employers to indirectly discriminate against women. There also remained *legitimate* restrictions on the number of hours women could work and restrictions relating to night shifts.⁵⁶ Overtime and night shifts were often better paid and women remained excluded from this by virtue of archaic provisions and the imbalance of childcare within the home

⁵⁴ In 1971 35.4% of women worked part-time, which rose to 49.2% in 1977: Roberts B. (et al.), *New Approaches to Economic Life: Economic Restructuring, Unemployment and the Social Division of Labour* (Manchester: Manchester University Press, 1985), 256.

⁵⁵ Stevenson, (n44), 745.

⁵⁶ Factories Act 1961.

would prevent them from taking on such work, until 1986.⁵⁷

The equal pay provisions applied only where there was no “material difference” between those jobs performed by men and women. This required for an individual making a claim to identify an ‘actual comparator’.⁵⁸ Due to the occupational between ‘men’s work’ and ‘women’s work’ most women were unable to invoke this provision. As demonstrated in the case of *Meeks v National Union of Agricultural & Allied Workers*⁵⁹ in which all of the secretarial workers in the Norwich office where Meeks worked were women, as there was no male comparator the claim under EPA failed. Those women who were doing the same jobs as men often had their contracts or titles changed in order to avoid breaching the law, discrimination took the form of low-paid jobs for women (but not lower pay for the same job) and so the introduction of legislation did virtually nothing.⁶⁰

Further to this, the number of women bringing cases under the EPA and SDA was lower than expected.⁶¹ Many were reluctant to pursue legal action given the costs of proceedings as well as the perceived risk of losing the employment they had. The legislative loopholes in the law also allowed employers to avoid penalties for any perceived breaches. As such, despite the apparent progress which the legislation attempted to secure, employers reluctance won out in practice.

⁵⁷ Where it was removed by the Sex Discrimination Act 1986 amending previous provisions.

⁵⁸ Equal Pay Act 1970 ss1-2.

⁵⁹ [1976] I.R.L.R. 198. Claiming under EPA s1(4).

⁶⁰ Tzannatos Z., ‘Narrowing the Gap – Equal Pay in Britain 1970-1986’ (1987) 20(2) *Long Range Planning* 69, 75.

⁶¹ Aitkins S., ‘The Sex Discrimination Act 1975: The End of a Decade’ (1986) 24 *Feminist Review* 57, 59.

5.3.4 Maternity Leave

There were growing concerns about women's participation in the workforce. The pattern of working until the birth of a child continued. The lack of maternity provisions had reinforced the societal expectations about women's role as mother and wife. There was no financial provision or job security for pregnant women who intended to return to work. The introduction of paid maternity leave in the Employment Protection Act 1975 was not without controversy.⁶² Despite recognising the benefits that the provisions would have for women, there was clearly an economic incentive underpinning the legislative action:

“The concept of providing maternity leave and the right to return to work for expectant mothers has a double function; it benefits the woman by giving them some security in their work and it benefits the nation as a whole”.⁶³

There remained concerns that the provisions might have the opposite effect, discouraging businesses from employing women of childbearing age. MPs used letters from employers in their constituencies in order to give strength to these claims. One states that “the natural result will be that women will become less attractive to recruit by virtue of the maternity benefits proposed in the Bill which put an added burden on the employer”.⁶⁴ Overall, the debate focussed, not on the benefit to individual women, but rather on whether the provisions would have a positive or negative economic impact on the country and for individual businesses.

Recognising Difference?

The maternity provisions signify a recognition of the difference between men and

⁶² EPA 1975, ss34-52: provided women who contributed to the maternity fund with six weeks maternity pay (90% of their pay with deductions made for any maternity allowance they were entitled to).

⁶³ HL Deb 22 September 1975, vol 364, col 137.

⁶⁴ HC Deb 05 August 1975, vol 897, col 288.

women based on their 'natural' role as caregiver and the social stereotypes which they were battling against. However, it can also be seen that there needs to be a more widespread recognition of this difference, where it is dominant as it was in the 1970s, in order for it to make real change in practice. As one commentator stated, it is up to

“Governments to introduce on the one hand positive measures which will enable women to circumvent the obstacle of child rearing (for example Britain is notorious for the lack of provision of crèche and nursery facilities) and on the other hand to abolish tax and social security legislation which induces the continuation of sex stereotypes after marriage”.⁶⁵

This acknowledgement of the interconnectedness of the issues facing women is key. A recognition of the fact that employment provisions do not work alone, rather what is needed is action within the political sphere, and within private sphere, particularly concerning the division of labour and childcare. Moves towards equality under these Acts were limited to the public sphere, when action is required in both spheres in order to achieve equality.⁶⁶

5.3.5 Employment: Ending Economic Dependency?

The increase in women in employment ought to have alleviated some of the economic dependency women had on men. However, due to the persistence of unequal pay, insufficient legislation relating to maternity and occupational segregation prevented the attainment of financial independence. The masculinity of the 'ideal employee' and the notion that equality in the workplace ought to mean 'sameness' was frequently manipulated by employers despite legislation having been formulated to prevent inequality/discrimination. This model of dependency reinforced the

⁶⁵ Tzannatos (n60), 75.

⁶⁶ Chapter 3 demonstrates this necessity.

housewife/breadwinner model of the family which would prove particularly problematic in the context of the CICT, with the focus on financial contributions.⁶⁷

5.4 'Swinging' Sixties and Beyond

This section examines the development of attitudes towards sex. It begins with a discussion of the contrast between public attitudes and political action. This is then followed by an overview of the key legislative changes concerning contraception, abortion and sexuality. Such changes demonstrate the gradual acceptance of non-traditional family arrangements. This societal shift had a role in the transition of unmarried cohabitants from 'illegitimacy' to a more accepted family form.

The 1960s saw sex discussed more freely than in previous decades. The public trial concerning *Lady Chatterley's Lover*, in which Penguin Publishing successfully disputed the claim against the publication of the erotic novel, provides an example of the shift in attitudes which was occurring at the time.⁶⁸ It was also a decade in which *Penthouse* magazine was launched, opening up the pornography industry; it was the era of the miniskirt and sex guides were becoming more widely available.

Despite this social 'revolution' the political sphere was reluctant to react. The concept of the conservative nation, housed many meanings from sexuality, the family and the state".⁶⁹ It dictated identity, and anyone who fell short of the stereotypes perpetuated and supported by the Tory government were neglected. Conservative ideology strove to preserve and protect the nuclear family and the institution of marriage, rather than

⁶⁷ See [4.3.2].

⁶⁸ *R v Penguin Books* [1961] Crim LR 176.

⁶⁹ Campbell B., *The Iron Ladies, Why Do Women Vote Tory?* (London: Virago, 1987), 102.

recognising the needs and rights of the individual. Harold Wilson's election in 1964 was followed by a raft of legislation which reflected the appetite for change. The idea of 'change' featured heavily in the discourse adopted by Labour prior to their election as can be seen with the repetition of the phrase "only a major change"⁷⁰ in their manifesto, which was itself entitled 'New Britain'. They were putting forward that change was necessary, that politics and the legal realm need to respond to the societal shift that was occurring. That there needed to be a step away from the "backward-looking approach has prevented [the Conservatives] from responding to the major world changes of the last decade".⁷¹

The Sex legislation of the 1960s has been said to be "Labour's most radical legacy... Parliament was responding to changing social attitudes rather than initiating permissive policies".⁷² This signalled a shift in the interaction between law and society. The Sex Offenders Act 1967 legalized homosexuality, the Family Planning Act introduced birth control and the Medical Termination of Pregnancy Act 1967 meant that abortion was legal when certified by two doctors. Finally, under the Divorce Reform Act in 1969 a marriage could be ended if it had irretrievably broken down, and neither partner no longer had to prove "fault".⁷³ The significance of some of these developments are discussed below.

The 1959 handbook *Is Chastity Outdated?* for engaged couples was pulled from the

⁷⁰ Labour Party Manifesto: The New Britain, 1964.

⁷¹ *ibid.*

⁷² Rowbotham, (n33), 341.

⁷³ Instead the Act allowed couples to divorce after they had been separated for two years (or five years if only one of them wanted a divorce). See s1-2.

shelves (after selling 200,000 copies).⁷⁴ Although this occurred just before the ‘swinging sixties’ began, “that fact that this question... [was] posed indicates that we are at a point of change; that the posing of it created an avalanche of outrage and protest indicates that any change was still very limited and still very far from having gained public acceptability”.⁷⁵ The introduction of the 1960s sex legislation signified a movement away from the ‘conservatism’ of the 1950s. Even the Church of England was beginning to adopt a relaxed attitude towards issues such as premarital sex and divorce, as can be seen with the Bishop of Woolwich advocating a position “based on love”.⁷⁶ This notion was not fully embraced by members of the Church, it at least indicated the capacity for change.

5.4.1 Contraception

In 1961 the NHS began prescribing the contraceptive pill to married women only. This reinforced the idea that sex was only to take place within marriage. The pill was seen as a method of controlling the number and timing of pregnancies, rather than giving women sexual agency. However, in 1967 the contraceptive pill became available for all women regardless of marital status.⁷⁷ Though this can be seen as a marker of progress it was not until 1974 that it became available free of charge. Prior to this, women’s control of their sexual bodies came at a cost, one that working-class women often could not afford.

⁷⁴ Wilson E., *Only Halfway to Paradise: Women in Post-War Britain 1945-1968* (London: Tavistock Publications, 1980), 102.

⁷⁵ Marwick A., *The Sixties: Social and Cultural Transformation in Britain, France, Italy and the United States 1958-74* (Oxford: Oxford Paperbacks, 1999), 94.

⁷⁶ Lewis J., *Lone Mothers in European Welfare Regimes: Shifting Policy Logics* (London: Jessica Kingsley Publishers, 1997), 56.

⁷⁷ National Health Service (Family Planning) Act 1967.

Prior to the widespread availability of the pill there were instances women who pretended to be married to get contraception, “Woolworth’s did a good trade in cheap rings”.⁷⁸ The need to ‘fake’ marriage was not restricted to the purpose of obtaining contraception, but was a trick also used in order to avoid controversy on the maternity ward, and when renting property. This exemplifies, as stated above, that sex was only to take place within the context of marriage, and that marriage was and should remain the norm.

Despite the reality of the ‘slow’ sexual revolution, the “position of women in relation to sexual purity was the hallmark of 1960s’ moral panic”.⁷⁹ In previous decades, contraception was the “man’s responsibility”,⁸⁰ handing over this ‘power’ to women, was seen by some as a threat to traditional values. For them, the pill represented men’s diminishing “social power in the family”, a supposedly feminist milestone.⁸¹ However, there was not an instantaneous shift in the attitudes of the public towards pre-marital sex/contraception. Even prior to the passing of the 1967 Act, the idea of a clinic even giving advice on contraception to single women faced opposition:

“I feel I must protest at the proposed institution of a ‘sex clinic’ in Sheffield. The doctors say that their desire is to prevent the birth of unwanted children, but surely they must realise that by the widespread issue of contraceptives they are removing the only natural barrier to illicit sex encouraging a moral delinquency

⁷⁸ Murray J., *The woman’s hour: 50 years of women in Britain* (London: BBC Books, 1996), 248. This was a method of disguising unmarried cohabiting relationships.

⁷⁹ Brown C., ‘Masculinity and Secularisation in Twentieth-Century Britain’ in Werner Y. M., (ed) *Christian Masculinity: Men and Religion in Northern Europe in the 19th and 20th Centuries* (Leuven: Leuven University Press, 2011), 57.

⁸⁰ Fisher K., *Birth Control, Sex, and Marriage in Britain, 1918-1960* (Oxford: Oxford University Press, 2006), 244

⁸¹ Collins M., *Modern Love: An Intimate History of Men and Women in Twentieth Century Britain* (London: Atlantic Books, 2003), 173.

which is already woefully out of hand”.⁸²

This letter in framing the contraception debate within the context of illegitimate children, reflects one of the key attitudes of the time, that contraception was not a matter of sexual freedom, allowing women to control their sexuality, but to prevent ‘incapable’ mothers from having illegitimate children.

5.4.2 Abortion

The Abortion Act 1967 was first put forward in the House of Lords, but the interruption caused to the parliamentary calendar by the general election meant that it did not progress. However, the extensive media coverage of the debate meant that the Lords Bill was a discussion point not only within the medical profession and religious groups, but for the wider public which played an important role in raising support for the Bill in the Commons when it was introduced there.⁸³ Steele, who introduced the Bill did so, in part, due to the fact that “any law which means one law for the rich and one law for the poor is in itself unsatisfactory and should be examined”⁸⁴ drawing the attention to the fact that those women who could afford would pay a substantial fee to a medical practitioner for an illegal abortion with the ‘covering’ of legality.

The Bill was also needed to protect women from the danger of back street abortions provided by those who were medically unqualified which also required payment, and from inflicting harm upon themselves if they did not have the money to spare or did not want to risk anyone finding out about their illegal act:

“Many women to-day are so desperate that they resort to means which are

⁸² A letter printed in *The Sheffield Star* (September 1966) as cited by Laffin D., *British Society since 1945* (London: Hodder Education, 2013), 66.

⁸³ Marsh D. & Chambers J., *Abortion Politics* (London: Junction Books 1981), 14.

⁸⁴ Steel D., *Against Goliath, David Steel's Story* (London: Weidenfeld and Nicolson, 1981), 50.

gravely damaging to their health, or even to their life, to create an abortion. They take drugs and pills... they insert things into the womb by means of a syringe; they use disinfectants, running a grave risk of serious injury to tissues and organs; they use methods of violence, such as moving heavy furniture and jumping down stairs”.⁸⁵

The cost of the illegality of abortion, save in the few circumstances under which it was permitted, was borne by poor women.

Prior to the legalisation of abortion it was stated that women were “not only... ignorant about contraception, but... [they also] had no idea who we could ask for advice ... Abortion, an inconceivable horror of gin and screams, was still illegal”.⁸⁶ This new era of ‘choice’ lessened the risks associated with premarital sex, in particular regarding illegitimate children, the liberalization of attitudes to pre-marital sex. However, it did not translate into an instantaneous shift in practices given that most people remained virgins before marriage.⁸⁷

The progress that the availability of the pill and legal abortions supposedly represented was not only subject to opposition from the public, but was also critiqued from a feminist perspective. “The freedom that women were supposed to have found in the 1960s largely boiled down to easy contraception and abortion; things to make life easier for men, in fact”,⁸⁸ the idea behind this being that men would no longer be ‘tricked’ into marriage due to an unexpected pregnancy. It has also been argued that these

⁸⁵ HL Deb 30 November 1965, vol 270, col 1141.

⁸⁶ Cochrane, (n31).

⁸⁷ Weeks J., *Sexuality and Its Discontents: Meanings, Myths and Modern Sexualities* (London: Routledge, 1985), 17–21.

⁸⁸ Burchill J., *Damaged Gods: Cults and Heroes Reappraised* (London: Arrow Books, 1987), 57.

developments made women more vulnerable to pressure from men to have sex. As MacKinnon stated, “the availability of abortion removes the one remaining legitimized reason that women have had for refusing sex besides headache”.⁸⁹ As such, whether the availability of contraception, and abortion should be regarded as a progressive marker for women is questionable.

5.4.3 Illegitimacy and Pre-Marital Sex

Changes to divorce were preceded by calls for reform from the Law Commission.⁹⁰ A number of MPs also raised the issue in Parliament. Using letters from constituents in the Commons to demonstrate the “misery of... living in sin”,⁹¹ caused by cohabitants having to conceal the reality of their relationships and the problematic “brand of illegitimacy”⁹² faced by children given that many couples were unable to form ‘legitimate’ unions under the previous legislation. Children who were born outside marriage were described as being “condemned to permanent illegitimacy”,⁹³ the social stigma attached to them was still rife.

The undesirability of unmarried unions made “divorce and remarriage the lesser of two evils”.⁹⁴ The importance of maintaining the status of marriage can be seen in that where divorce was discussed within this period, it was done within the context of restabilising marriage. For example, the Divorce Reform Act 1969 the argument was put forward,

⁸⁹ MacKinnon C. A., *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), 99.

⁹⁰ Law Commission., *Reform of the Grounds of Divorce: The Field of Choice* (Cmnd 3123, 1966), 39: which made claims that if divorce were more easily obtained then “about 180,000 living illegitimate children could be legitimated... [and] in each future year some 19,000 children who would otherwise be condemned to permanent illegitimacy might be born in wedlock or subsequently legitimated”.

⁹¹ HC Deb 9 March 1951, vol 485, col 961.

⁹² HC Deb 9 March 1951, vol 485, col 982.

⁹³ HC Deb 6 December 1968, vol 774, col 2037.

⁹⁴ Probert R., *The Changing Legal Regulation of Cohabitation: From Fornicators to Family 1600-2010* (Cambridge: Cambridge University Press, 2012), 153.

that abolishing matrimonial fault, and making the grounds for divorce less arduous, would stabilise the institution of marriage.⁹⁵ It was said that allowing people to divorce was the only way to allow them to re-marry and thus have legitimate children in their new relationships. It was not the end of a marriage but rather “a licence to remarry and form a new union”.⁹⁶ The legislature was attempting to prevent the growth of non-traditional families, despite changing societal views/needs.

Similar attempts to prevent devaluing marriage can also be seen in relation to premarital sex. By this time, “premarital sex was justified or condemned by relating it to the success or failure of subsequent marriage”,⁹⁷ though this still relied on the idea that a couple would eventually marry, it signifies a shift in attitudes towards sex which indicates the potential for change. Yet for cohabitants, acceptance was still a way off, the historical negative connotations of cohabitation denoting sex was still in use at this time.⁹⁸ The attitude towards sex may have been changing, it could not, without controversy be framed within the context of cohabitation:

“I was prepared to continue as Miss X... but it would have created great problems for my mother and, as I wanted to continue teaching and was obviously pregnant, it would have been difficult. So I changed my name by deed poll and this terrible double life started. A little group of friends and tolerant relatives knew, but what about the others? Mother told them we had been secretly married”.⁹⁹

⁹⁵ Divorce Reform Act 1969.

⁹⁶ HC Deb 09 February 1968, vol 758, col 882.

⁹⁷ Hall L. A., ‘Sexuality’ in Zweiniger-Bargielowska I., *Women in Twentieth Century Britain* (London: Longman, 2001), 59.

⁹⁸ See for example: Morse M., *Unattached* (Harmondsworth: Penguin, 1965).

⁹⁹ *Nova* (October 1967), 125 as cited in Probert, (n94), 168.

An unmarried, working expectant mother, who had to change her name to hide her cohabitee status in order to be accepted exemplifies the reality of the attitude to sex in the ‘swinging sixties’. Procreation was still shameful outside of the institution of marriage. Indeed, one of the couples featured in *Man Alive: Living in Sin* documentary, who were happily living visibly as an unwed couple stated that “this is in fact the only reason I would get married”, for the children, as it would be “embarrassing for them”.¹⁰⁰ Showing that even for the boldest of couples, illegitimacy, and the social stigma this would cause such a child, would push them into an institution in which they otherwise had no interest.

5.5 The Family

Prior to the 1970s “cohabiting unions were largely statistically invisible and may well have been socially invisible”¹⁰¹ due to the stigma attached to such relationships. As the levels of cohabitation increased, many couples were still reluctant to be seen to be ‘living in sin’. It was commonplace for unmarried cohabitants to adopt the same last name, and present as married couples.¹⁰² The following section provides an overview of the socio-legal construction of the family and the difference in the treatment and perception of married/unmarried cohabiting couples through an examination of political rhetoric and the legal treatment of the family.

¹⁰⁰ BBC., *Man Alive: Living in Sin* (First aired in 1966), at approximately 8.52.

¹⁰¹ Kiernan K., ‘Cohabitation in Western Europe: Trends, Issues and Implications’ in Booth A., (ed) *Just Living Together: Implications of Cohabitation on Families, Children and Social Policy* (London: Routledge, 2013), 3.

¹⁰² There are numerous examples of women changing their names by statutory declaration, deed poll or just using their partners name in order to appear married in the case law of this period including *Eves v Eves* [1975] 1 WLR 1338; *Burns v Burns* [1984] Ch 317 are also examples of this – though *Burns* was brought to the court in the 1980s, the period of cohabitation took place within the 1960s/1970s.

5.5.1 Marriage, Moves Towards Equality?

Since its inception there have been numerous revisions to the Married Women's Property Act (MWPA), in 1964 it was updated once again. This provision made it so that money derived from the allowance a woman gained during the marriage, and any property acquired out of that money, should be treated as belonging to the husband and wife in equal shares.¹⁰³ This was a considerable marker of progress for married women, as it extended the property rights of those women who were economically dependent on their husbands.

When discussing the MWPA in parliament, there was recognition of the role of housewives and mothers. The attitude towards women was relatively progressive:

“Concerning the matrimonial home and the contribution that the wife makes to it, it means that she has a real interest in it, but, in fact, she has very few legal rights... the wife, whether she works in the home or outside, is at a great disadvantage”.¹⁰⁴

The acknowledgement of non-financial contributions by wives in this context, demonstrating an awareness of the different abilities for men and women to contribute, and the different 'roles' they were assigned in the family remained unacknowledged in the context of the CICT. Providing additional evidence of the unwillingness to protect 'mistresses'.

The introduction of the Matrimonial Homes Act 1967 made it so that the starting point for distributing assets upon divorce was equality, however:

“where there were young children, or a dependent wife who could not be

¹⁰³ Married Women's Property Act 1964, s1.

¹⁰⁴ HC Deb 24 January 1969, vol 776, col 802-4.

expected to provide for herself in the future, the priority might be to keep a roof over their heads and to provide for the reasonable needs of both parties”.¹⁰⁵

Acknowledging the way in which, during this time it is likely that a wife would be financially dependent on her husband, and as such ‘equality’ may need to be departed from, recognising difference, in order to prevent poverty.

Following this, the rights of married women with regard to financial orders/property distribution upon divorce was improved significantly with the introduction of the Matrimonial Causes Act 1973.¹⁰⁶ Of which it was stated that “in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles”,¹⁰⁷ whether that be housewife or breadwinner. Recognising different ability for men and women to contribute to the acquisition of property in a way which is still devoid in cohabitation.¹⁰⁸ Despite the increased protection for wives, campaigns such as ‘YBA Wife?’ and ‘Wages for Housework’ demonstrates that there was still dissatisfaction with the ‘inferior’ position of wives in law and society, and the lack of meaningful acknowledgement of ‘women’s work’ in the home.¹⁰⁹

5.5.2 Threats to the ‘Traditional Family’

As a result of a number of legal and societal changes, many of which have been explored above, the traditional construction of the family was undergoing transformation.¹¹⁰ As

¹⁰⁵ Hale B., ‘The 8th ESRC Annual Lecture 1997 Private lives and public duties: What is family law for?’ (1998) 20(2) *Journal of Social Welfare and Family Law* 125, 129.

¹⁰⁶ Matrimonial Causes Act 1973, s25(2).

¹⁰⁷ *White v White* [2001] 1AC 596 605. It must be noted that by 2001, Lord Nicholls when making this statement emphasised that the “traditional” division of labour was “no longer the order of the day” and as such this provision ought not to “bias” either party.

¹⁰⁸ Regarding the contrast between these approaches: see [4.3.3].

¹⁰⁹ Taking place in 1977 and 1975 respectively. See Bouchier D., *The Feminist Challenge: The Movement for Women’s Liberation in Britain and the USA* (London: MacMillan, 1983), 110-1.

¹¹⁰ The increasing number of women at work, and the deterioration of the bimodal pattern of work undermined the housewife/breadwinner construction of the family, as discussed in the ‘Employment’

a reaction to the ‘moral panic’ surrounding these changes, ‘the family’ was sized on as a central issue by the key political parties, intending to secure votes. For example, Margaret Thatcher described the Conservatives as the “family party”.¹¹¹ Of particular concern was the considerable increase in the divorce rate, which did not stabilise until the mid-1980s, and the increase in couples openly living together outside of marriage.¹¹² This was seen to undermine one of the key strands of Thatcherite ideology was the repositioning “the patriarchal family as the bedrock of social order”.¹¹³ The attempts to portray the Conservatives as the protectors of the traditional family, just as the “golden age” for the long and stable marriage was coming to an end, and cohabitation was on the increase, sought to appeal to those with traditional ideals.¹¹⁴

5.5.3 ‘The Family’ and the Law

The attitude towards the family can also be traced through the legislative changes and the discourse adopted by the courts during the 1960s-1970s. This section will therefore examine the legal construction of the family, and the extent to which this included unmarried cohabitants. In the 1950s, the infrequency of cohabitation meant that the courts were unwilling to consider unmarried cohabitants, as a family. “To say of two people masquerading, as these two were, as husband and...that they were members of the same family, seems to be an abuse of the English language”.¹¹⁵ As unmarried

section above. The more relaxed attitudes towards remarriage and illegitimate children and introduction of the contraceptive pill giving women had more choice about when/whether they would have children also led to changes in the nature of the family as discussed at [5.4]

¹¹¹ Thatcher M., Speech to Conservative Party Conference (October 14 1977).

¹¹² See ONS., *Divorces in England and Wales 2016* (18 October 2017), fig 2.

¹¹³ Lovenduski J. & Randall V., *Contemporary Feminist Politics: Woman and Power in Britain* (Oxford: Oxford University Press, 1993), 34. The approach taken to the family and Thatcher’s construction and treatment of the family is considered in additional in Chapter 6.

¹¹⁴ Thane P., ‘Unmarried Motherhood in Twentieth Century England’ (2011) 20(1) *Women’s History Review* 11, 22. See also Lewis J., *The End of Marriage?* (Cheltenham: Edward Elgar, 2001), 34.

¹¹⁵ *Gammons v Ekins* [1950] 2 KB 328, 331. This case focussing on whether a woman living ‘in an unmarried association’ with a tenant would constitute “family” under s. 12, sub-s. 1 (g), of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, and thus be entitled to the protection of the Rent

cohabitation was becoming more commonplace, fuelled by a number of the developments above, in particular the liberalisation in attitudes towards sex, the judiciary were, in some circumstances increasingly inclined to recognise unmarried cohabitants as a legitimate family form.

By the mid/late-1970s there were increasing instances of the courts being reflexive to societal change. For example, in *Dyson Holdings Ltd. v Fox*¹¹⁶ that court felt that the popular meaning of ‘family’ would, according to the answer of the ordinary man, now include unmarried cohabitants as a member of the family.

“The popular meaning given to the word ‘family’ is not fixed once and for all time... This is not to say that every mistress should be so regarded. Relationships of a casual or intermittent character and those bearing indications of impermanence would not come within the popular concept of a family unit”.¹¹⁷

Interestingly, this did not mark a significant shift in the treatments of cohabitants by the court. In *Dyson Holdings*, the court emphasised that this construction of the family, and the rights attributed to the ‘mistress’ here, were not indicative of an acceptance of such relationships as a whole. There was significant emphasis placed on the stability and longevity of the relationship, and how such a relationship would be perceived by the

Restriction Acts, enabling her to remain in the rented property they lived in together (post the death of her partner).

¹¹⁶ *Dyson Holdings Ltd. v Fox* [1976] 1 Q.B. 503. Hereafter *Dyson Holdings*. This case dealt with the question as to whether a woman living with a man (unmarried cohabitation) for 21 years until his death could be considered “a member of the original tenant’s family...” so that she was entitled to security of tenure as a statutory tenant under the Rent Act 1968 (Sched 1 para 3). The importance of the perception of such relationships by the public/their peers can also be identified in *Eves*, where emphasis is placed on the fact that the couple “live[d] as husband and wife” and were “known to their neighbours as husband and wife” though in the context of the CICT this information was not of legal significance: *Eves v Eves* [1975] 1 WLR 1338, 1341.

¹¹⁷ [1976] 1 QB 503, 511. It should be noted that the considerations made in this case were based on the view that the ordinary man would have had this view in 1961, this was, given the analysis of attitudes towards cohabitation discussed above, perhaps premature but the willingness for the courts to consider this perspective is indicative of a willingness to find rights for such women.

ordinary man. The conflict between the rights awarded to the claimant in this case, and the labelling of women in such relationships as ‘mistresses’ indicates further the fact that cohabitation in this period was still undergoing change.

During this period there was also an increasing number of policies/legislative changes which recognised, unmarried cohabiting relationships. However, much like the attitude of the courts above, the inclusion of protection for such individuals was premised on their longevity/stability. The phrase “as man and wife”, or similar, was frequently used in order to include otherwise excluded relationships within provisions.¹¹⁸ The way in which such relationships had to be seen to be ‘marriage-like’ also indicates a shift in attitudes towards unmarried cohabitation, to one which was willing to recognise those relationships which society would recognise.

5.5.4 The ‘Benefits’ of Cohabitation

Within the context of benefits and welfare cohabitants were increasingly treated as though they were married. Assuming that cohabitants acted in the same way as married couples for the purposes of taxation may seem progressive, as the law neglected to protect the financially vulnerable party on the breakdown of the relationship, such parties were left more vulnerable than prior to such acknowledgement. The following section focusses on the development of the ‘cohabitation rule’.¹¹⁹

¹¹⁸ See for example Supplementary Benefits Act 1976 Sched. 1, para. 3 (1) (6) refers to "two persons cohabiting as man and wife"; Social Security Act 1975 s24(2); s25(3); s26(1); s31; s36(2) refers to cohabitation "with a man as his wife"; Family Income Supplement Act 1970 s1(1)(b) mentions the woman "who lives with him as his wife"; Housing Finance Act 1972, Sched. 3 para 2 “a man and a woman who lives with him as his wife” were included alongside married couples; The Domestic Violence and Matrimonial Proceedings Act 1976 ss1-2 used the phrase " a man and a woman who are living with each other in the same household as husband and wife”.

¹¹⁹ The cohabitation rule required the aggregation of cohabiting couples income for the purpose of assessing their entitlement for supplementary benefits.

The cohabitation rule had formed part of social security legislation since 1948.¹²⁰ In 1977, the term “cohabiting as man and wife”¹²¹ was replaced with the phrase “living together as husband and wife”¹²² (LTAHAW) due to the negative connotations which had been associated with the term “cohabiting”. The legislation treated married and unmarried couples in the same way.¹²³

On the surface, this ‘equal treatment’ seems to signal the acceptance of diverse family forms. However, this was not the case. The reformulation of the rules relating to unmarried cohabiting couples in this context, limited the number of individuals who would be in receipt of means-tested benefits, meaning that unmarried cohabitants were negatively impacted by the application of the cohabitation rule. The investigations involved in discovering whether a couple should be considered as LTAHAW, despite the existence of guidance, predominantly focused on the existence of a sexual relationship.¹²⁴ There were examples of intrusive investigation of sexual relationships, and often benefits were withdrawn despite the couples under investigation not being in relationships which could be considered LTAHAW.¹²⁵ As such, unmarried cohabitation posed a considerable financial risk both during and at the end of the relationship.¹²⁶

¹²⁰ National Assistance Act of 1948. Under the cohabitation rule means-tested benefits were assessed on the basis of a couples combined income, rather than as two single individuals.

¹²¹ Social Security (Miscellaneous Provisions) Act 1977 s14(7).

¹²² Supplementary benefits commission: *Living together as Husband and Wife* (1976) para 52.

¹²³ Supplementary Benefits Act 1976, Sched. 1, para. 3 (1)

¹²⁴ Department of Health and Social Security., *Living Together as Husband and Wife* (London: HMSO, 1976) which put forward six criteria in deciding whether cohabitation exists or not; namely public acknowledgment, stability of the relationship, the sharing of accommodation, whether there are children of the relationship, financial support and the existence of a sexual relationship.

¹²⁵ See generally Lister R., *As Man and Wife? A Study of the Cohabitation Rule* (London: Child Poverty Action Group, 1973); This injustice is also noted by Moore in Moore P., *Sex and the Undeserving Poor*, *The New Statesman* (13 July 1973), 47: in which he examines the case of ‘Mrs’ Silver who was denied a number of her benefits under the cohabitation rule after having an affair with a man (who was observed ‘visiting’ her rather than cohabiting in the proper sense of the word).

¹²⁶ It is notable that cohabiting women were also precluded from receipt of the death grant, widows benefit/widowed mother’s allowance/widow’s pension as they were only available if the couple was married. See Social Security Act 1975, ss. 24, 25, 26, 32. Social Security Pensions Act 1975, ss. 13, 15. Although the focus of this thesis is on the examination of the CICT/the division of proprietary interest at

The approach of such investigators and the assumption that women would be supported by their partner was particularly problematic for women who were economically dependent on their partner and/or the state. In considering household income as aggregated and allowing this to impact the receipt of benefits, the cohabitation rule reinforced the traditional *masculine* obligation to maintain the family.¹²⁷

“The cohabitation ruling only embodies in slightly more glaring form the innermost assumption of marriage which is still that a man should pay for the sexual and housekeeping services of his wife”.¹²⁸

This assumption was, under the cohabitation rule, applied to cohabiting couples whose relationships were considered to be like that of a ‘husband and wife’. However, this proved more damaging for women in cohabiting relationships as married men were under a legal obligation to support their wife, but there was no same provision for cohabiting couples.¹²⁹ Indeed the ‘equal treatment’ approach here was based on the notion that “an unmarried couple should not get more favourable treatment than a married couple, which they would if they were able to claim as single persons”.¹³⁰ It attempted to reverse the perception that there was a financial benefit connected to ‘living in sin’.

the end of unmarried cohabiting relationships, there were a number of additional risks associated with such relationships on dissolution.

¹²⁷ See Lewis J. (et al.), *Lone Motherhood in Twentieth-century Britain: From Footnote to Front Page* (Oxford: Clarendon Press, 1998), 117.

¹²⁸ Wilson E., *Women and the Welfare State* (London: Tavistock, 1977) 81. In addition, the Department of Health and Social Security, (n124), 29 acknowledged that “it would be unjustifiable for the State to provide an income for the woman who has the support of a man to whom she is not actually married when it is not provided for the married woman”. Whether or not a woman actually received such support was merely assumed rather than based on evidence.

¹²⁹ Supplementary Benefits Act 1976, s17. An unmarried woman cannot obtain a maintenance order and as such if a man did not support his partner in cohabiting relationship there is no protection for her. However, there was some protection under Family Income Supplement Act 1970, s1(1)(b) under which, those in low paid work, could obtain financial assistance to support their family (including unmarried cohabiting couples)

¹³⁰ Department of Health and Social Security., *Supplementary Benefits Handbook: Supplementary Benefits Administration Paper 2* (London: HMSO, 1977), para. 19.

5.5.5 Rights for ‘Common Law Wives’

As the number of unmarried cohabiting couples increased, and changes in law and policy began to recognise the existence of such couples, the myth of common law marriage took hold. In particular, the way in which such reforms were (mis)reported contributed to a “belief among cohabiting couples – and indeed the wider population – that there were no longer any significant legal differences between cohabitation and marriage”.¹³¹ For example, the equal treatment of cohabitants under the cohabitation rule, discussed above, added to the perception that there were rights derived from ones position as a ‘common law wife’, despite the negative implications for cohabiting women in this context. As Probert notes,

“the publicity given to the fact that cohabiting couples were treated in the same way as spouses in this context is likely to have contributed to an expectation that this was also true in other areas, especially when combined with the new language of ‘common-law wives’”.¹³²

Even pamphlets produced in order to inform women of their rights contributed to the perpetuation of this myth. For example, *Women’s Rights: A Practical Guide* advised readers that “you are normally regarded as a ‘common law’ wife if you have been living with a man for more than two years as though you were married, without actually going through the ceremony”.¹³³ This guidance was accurate in the narrow context of the article this fed into the rapidly growing myths surrounding common law marriage.¹³⁴ The increasing perception that unmarried couples would, at least after a certain period, have the same rights as married couples, meant that numerous individuals would

¹³¹ Probert (n94), 214.

¹³² *ibid*, 203.

¹³³ Coote A. & Gill T., *Women’s Rights: A Practical Guide* (Harmondsworth: Penguin, 1974), 258.

¹³⁴ This guidance was given in regard to financial assistance for prison visits.

LTAHAW under the impression that there was no legal/financial incentive to getting married, thus making the vulnerable on breakdown.¹³⁵ This is an issue which was pertinent for unmarried cohabitantes, especially given the widespread belief in common law marriage.¹³⁶

5.6 Cohabitation: An Overview

The 1960s is the lowest level of cohabitation examined within this thesis.¹³⁷ In this period marriage was almost universal, following on from the 1950s structure of the family in which the housewife/breadwinner family structure was the norm. Approximately 1% of women under 50 cohabited in this period.¹³⁸ 1960s sociologists had “failed to notice that [the home] was also a place of work”,¹³⁹ and this was a notion which was replicated in the legal sphere in which women’s rights were menial. The changes which occurred within this period can be identified within cultural/societal shifts much before it prompted legal/political action.¹⁴⁰

Despite the slowly emerging view that women were more than mother/wife, the notion that women must choose between work or wifedom/motherhood prevailed. As a result, though the increasing levels of women in the workplace allowed some women a degree of independent income, the majority of women who would betray their ‘natural role’ as

¹³⁵ Probert’s extensive research concludes “in the mid-to-late 1970s that couples began to believe that living together gave them the same rights as if they had married” Probert (n94), 216.

¹³⁶ See [5.7] for examples of this in the CICT case law.

¹³⁷ The exact levels of cohabitation prior to this period are unknown as it was either unexamined, or inaccurately examined, in studies prior to this, as is acknowledged by Probert (n94), 166. Despite the lack of data concerning cohabitation there is evidence that “free unions are at least as old as marriage itself” Frost G. S., *Living in Sin: Cohabiting as Husband and Wife in Nineteenth Century England* (Manchester: Manchester University Press, 2008), 1.

¹³⁸ Murphy M., ‘The evolution of cohabitation in Britain, 1960-95’ (2000) 54 *Population Studies* 43, 45.

¹³⁹ Oakley A., *The Sociology of Housework* (London: Martin Robertson, 1974), 32.

¹⁴⁰ Which is a pattern that is identified in Chapters 6-7.

wife and mother, to enter the workplace, did so out of financial need.¹⁴¹ Making it unlikely that women would be able to contribute financially to the acquisition of their home.¹⁴²

The number of couples cohabiting was increasing, in part due to the introduction of the pill and the legalisation of abortion, which allowed for a form of ‘trial marriage’ without the same risk of pregnancy, it was an arrangement which still faced stigma. Cohabitation was defined by a “fear of disapproval and... concealment of their relationship”.¹⁴³ They were considered to be ‘living in sin’ and as such for many couples keeping up the pretence of marriage, even if they did not desire it, was key. Indeed, even by the early 1970s women who wished to cohabit were advised to adopt her partners name and the title ‘Mrs’.¹⁴⁴ The myth of the common-law marriage prevailed, many believing that as cohabitants, they had rights, when in reality the law treated cohabitants as strangers.¹⁴⁵

By the 1970s increasing numbers of women were entering employment, but they were still often faced with the assumption that they would work until marriage or the birth of their first child. Where they did work, it was often underpaid and undervalued. All of this meant that despite a perceived improvement in terms of women’s financial position/independence, in reality women had little more money than they had

¹⁴¹ See [5.3.5].

¹⁴² Consequences explored in the context of the CICT in [5.7].

¹⁴³ Beyfus D., *The English Marriage: What is it like to be Married Today* (London: Penguin, 1971), 140.

¹⁴⁴ *Woman* (29 April 1972), 12 as cited in Probert, (n94), 182. And many did so, as discussed at [5.4.3] and evidenced in [5.7].

¹⁴⁵ See Merin Y., *Equality for Same Sex Couples: Legal Recognition of Gay Partners in Europe and the United States* (London: University of Chicago Press, 2002), 38; Glendon M. A., *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (London: University of Chicago Press, 1989), 253.

previously.¹⁴⁶ This impacted on women's (in)ability to contribute to the purchase of property, and as such their rights on the breakdown of cohabiting relationships.

In the 1970s, attitudes towards cohabitation were again changing. Probert describes three distinct phases which took place during this period; It began with the increase of covertly cohabiting couples, followed by an increasing openness – though this remained controversial as such couples faced “disappointment and disapproval”¹⁴⁷ from the families, and it ended with a lack of social stigma attached to cohabitants, aside from those held by the older generation.

Guides on concealing cohabitation appeared in women's magazines, in the early 1970s, for example in *Cosmopolitan's Living Together Handbook*, they suggested purchasing removable labels for letterboxes “so you won't have to spend hours scratching his name off when your mother arrives”.¹⁴⁸ The barriers to cohabiting couples both with regard to council housing and private rentals began to decline. Moving from a need to produce a marriage licence, to a situation in which they were treated as married couples.¹⁴⁹ However, the seeming equality within the rental market, again did not match the restrictive approach regarding ownership.

By the mid-1970s even the courts accepted that there has been “a complete revolution in societies attitude to unmarried partnerships”¹⁵⁰ also claiming that the social stigma

¹⁴⁶ See [5.3], [5.2].

¹⁴⁷ Probert, (n94), 188.

¹⁴⁸ *Cosmopolitan*, *Living Together Handbook: Cosmo's Guide to Unwedded Bliss* *Cosmopolitan* (March 1973), 93.

¹⁴⁹ See for example *Council Tenants Accused of Immorality* *The Times* (17 April 1971), 3; Bottomley A. (et al.), *The Cohabitation Handbook: A Women's Guide to the Law* (London: Pluto Press, 1981), 29.

¹⁵⁰ *Dyson Holdings v Fox* [1976] QB 503, 512.

attached to them has almost disappeared. Despite this where women were successful in gaining rights in the court, the media drew on many of the old derogatory terms which had been used to describe cohabitants. The *Daily Express* even went so far as to say that “judges and Parliament between them have done away with nearly all the differences in the rights of wives and mistresses”.¹⁵¹ Such misleading coverage was both dangerous, in that it both reaffirmed the myth of common law marriage, and it was used to demonise those women who dared to have a family outside of the institution of marriage.

During this period home ownership remained a male activity. Women were still required to have a male guarantor, their father or husband, in order to acquire a loan, credit or a mortgage until the passing of the SDA.¹⁵² This based on the prevailing view was that “women as a class were not credible economic participants”¹⁵³ embracing the stereotype of women as dependants whilst simultaneously dismissing their opportunity to be independent. Within the context of cohabitation the implications were two-fold. First was that this construction of women financially dependent on men is in stark contrast with the requirement that, in the absence of an express agreement, they should contribute financially to the acquisition of property. Secondly, the restrictions placed on women’s ownership also meant that where there was a sole-ownership case, in all likelihood it would be held in the male cohabitants name.

¹⁵¹ *The Daily Express* (30 November 1978), 9 as cited in Probert, (n94), 210.

¹⁵² Numerous first-hand examples of the discrimination women faced in this context can be seen in Bates C., *Credit card sexism: The woman who couldn't buy a moped* (BBC News Magazine, 6 July 2016): <www.bbc.co.uk/news/magazine-36662872> accessed: 20/01/2018.

¹⁵³ Enke F. A., *Finding the Movement: Sexuality, Contested Space, and Feminist Activism* (Durham: Duke University Press, 2007), 7.

5.7 Case Analysis

This section begins with an overview of the development of the CICT, though this is provided in detail in Chapter 4, it is helpful to view such developments in their historical context.¹⁵⁴ The first section also provides a brief overview of the facts in the central cases during this period so that where relevant, they can be linked with the thematic analysis which continues. The themes which have emerged from an analysis of the judgments will then be examined.

5.7.1 Background

From the 1950s the courts had been developing the notion of ‘family assets’ and interpreting the MWPA in a way which gave the court considerable discretion when determining the distribution of beneficial interests in family property.¹⁵⁵ The use of ‘family assets’ in particular sought to alleviate the injustice faced by the economically vulnerable party, most often wives, upon the breakdown of marriage by virtue of their dependence on their husbands.¹⁵⁶ In the case of *Wachtel v Wachtel* Lord Denning drew on a number of sources which illuminate his position regarding the injustice of property distribution on the breakdown of a relationship.¹⁵⁷

“If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own”.¹⁵⁸

¹⁵⁴ See [4.2].

¹⁵⁵ Specifically, MPWA s17 1882.

¹⁵⁶ The phrase was ‘invented’ by Lord Denning, it was first used overtly in *Cobb v Cobb* [1955] 1 W.L.R. 731 though in Denning B. A., *The Due Process of Law* (London: Butterworths, 1980), 232 that he claims that he had applied the principle two years earlier in *Rimmer v Rimmer* [1953] 1 QB 63.

¹⁵⁷ *Wachtel v Wachtel* [1973] Fam 72.

¹⁵⁸ *Royal Commission on Marriage and Divorce* (Cmd. 9678, 1956), 178 as cited in *Wachtel v Wachtel* [1973] Fam 72, 92. See also Sir Jocelyn Simon Law Society (1965) 62 *Law Society Gazette*, 34 as cited in *Wachtel v Wachtel* [1973] Fam 72, 92.

This extract emphasises the economic dependency faced by many wives due to the gendered construction of appropriate roles in relationships and the working patterns which were interrupted for marriage/childbearing.¹⁵⁹ He then reflects on the “injustice” which arose as a result of the courts inability to consider “other contributions”,¹⁶⁰ namely non-financial *feminine* contributions. The formulation of ‘family assets’ on the basis of this injustice, determined that “where a couple, by their joint efforts, get a house... intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house... is a ‘family asset’ in which each is entitled to an equal share”.¹⁶¹

In *Pettitt v Pettitt* and *Gissing v Gissing*, the courts sought to depart from the application of these increasingly flexible rules, emphasising that there were no special rules concerning family property, instead they were to be decided by reference to strict property law principles.¹⁶² The more restrictive approach adopted in *Gissing* and *Pettitt*, lay the foundations of an approach based on *gender-neutral* financial contributions which would continue to be developed.¹⁶³

The following section will analyse the central themes which emerge from the discourse(s) identified in the central cases taking place in within this period. Beginning with ‘formal’ approach in *Gissing* and *Pettitt*, this section will progress chronologically

¹⁵⁹ As discussed in [5.2]. A position which was not unique to wives but also those LTAHAW.

¹⁶⁰ *Wachtel v Wachtel* [1973] Fam 72, 92.

¹⁶¹ *Gissing v Gissing* [1969] 2 Ch 85, 93. The attempts Lord Denning made to covertly apply the principles which underpinned ‘family assets’ see [5.7.3].

¹⁶² In *Pettitt v Pettitt* [1970] AC 777, hereafter *Pettitt*, this took the form of rejecting the notion that MWPA s17 gave court a wide discretion to alter property rights between spouses: *Pettitt v Pettitt* [1970] AC 777, 792-3. In *Gissing v Gissing* [1971] AC 886, hereafter *Gissing*, the court rejected the concept of ‘family assets’: *Gissing v Gissing* [1971] AC 886, 899-900.

¹⁶³ This approach reflects the adoption of a formal approach to equality. The formal equality approach with regard to the CICT is most evident in *Rosset*: see [6.8.3].

to discuss the ‘difference’ based approach adopted by Denning. This provides additional insight into the position of unmarried cohabitants in law and society and the perception of the law surrounding the division of assets on breakdown. It also provides a base from which the construction of gendered family roles and how they have been used in this context to be analysed. Taken together with the historical analysis which preceded it, the adequacy of a formal/difference approach can be accurately considered.

5.7.2 *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1971] AC 886

Both *Gissing* and *Pettitt* involved considerations of ‘contributions’ made to the home as there was an absence of express agreement. *Pettitt* concerned a claim by a husband to beneficial interest in the matrimonial home which was in his wife’s sole name, based on work he had done on the home. *Gissing*, more typically, involved a claim by a wife, attempting to assert beneficial interest in the family home as a result of indirect contributions and work she had done to the property. The claims by the non-owning parties in *Gissing* and *Pettitt* were both unanimously rejected by the court. The cases of *Gissing* and *Pettitt*, though involving married couples, were central in the establishment of the CICT. For the purposes of this chapter, they also provide a key point of analysis as regards the discourse(s) surrounding family property, and the courts perception of gender roles and the nature of the family.

Considering Contributions

The requirements of the CICT, relying on express agreement or contributions from which intention as to beneficial interest can be inferred is at odds with the way in which couples’ act and how they perceive their proprietary interest.¹⁶⁴ Even those cases in

¹⁶⁴ See [4.3.1] for an overview of this issue.

which the court was unwilling to manipulate the principles of the CICT in order to ‘do justice’, the conflict between legal principles and social reality was recognised. For example, the court in *Pettitt* acknowledged the way in which couples’ relationships progress:

“without any thought of legal consequences and without making any agreement, one spouse may pay the instalments of the purchase price and the other may pay for the improvements... Payment of the instalments will obtain for him or her a proprietary interest in the house, but payment of the cost of the improvements will not give him or her either an interest in the house or a claim against the other spouse. That seems to me to be entirely unsatisfactory”.¹⁶⁵

This recognition of the reality of dealings within the relationship context can be seen when Lord Reid refers to the fact that many couples will arrange their finances, or contribute in different ways ‘without any thought of legal consequences’. Despite this admittance, the application of the CICT is then based on those same arrangements/contributions.¹⁶⁶ This undermines the notion that the CICT is based on common intention given that contributions are deemed to be evidence of an intention which the judges admit parties will not have thought about.¹⁶⁷ It also allowed the continuation of the arbitrary distinction between payments to the purchase price and payment/performance of improvements, at odds with reality.

Promises/Discussions

An additional issue which further indicates the conflict between law and reality is that

¹⁶⁵ *Pettitt v Pettitt* [1970] AC 777, 794 per Lord Reid. Lord Reid also makes similar comments in *Gissing v Gissing* [1971] AC 886. This issue is raised in a number of subsequent cases, discussed below in this chapter, and in Chapters 6-7.

¹⁶⁶ Both in relation to sole/joint-ownership as a starting point, and financial contributions as indicative of common intention/detriment as discussed in [4.2] [4.3.2].

¹⁶⁷ See [4.3.1].

discussions between the couple, or promises which have been made are used to evidence common intention. However, where such agreements are made, they are unlikely to be expressed in writing, and are therefore unenforceable as an express trust.¹⁶⁸ Further, where such comments are made, they must also be supported by some detrimental act on the part of the non-owning party. Given the financial focus of detriment, this would often be unfulfilled.¹⁶⁹ For example, in *Gissing*, when Mr Gissing left, he stated, “don’t worry about the house: it’s yours”.¹⁷⁰ Yet, upon finding himself in financial difficulties, this position changed. He suggested that the wife should move out so that he may sell the property. Despite the way in which such a statement would indicate that the wife would have security in a property she considered her home, and that it would be detrimental were she to lose her home, the court were unwilling to be flexible in their application of the CICT.¹⁷¹

Stereotypes and contributions

When considering the nature of an individual’s non-financial contributions, they have often been constructed in a gendered way. In *Pettitt*, Mr Pettitt’s claim, attempting to assert beneficial interest in the property was based on the fact that he had “carried out a considerable number of improvements to the house and garden”.¹⁷² His claim was rejected. When explaining his reasoning, Lord Reid refers to the judgment of Lord Denning in *Button v Button* with agreement, in which he states with regard to the husband, that:

“he should not be entitled to a share in the house simply by doing the 'do-it-yourself'

¹⁶⁸ See [4.2].

¹⁶⁹ Particularly by financially dependent women.

¹⁷⁰ *Gissing v Gissing* [1971] AC 886, 889.

¹⁷¹ On the consequences of the breakdown of such relationships: see [1.5].

¹⁷² *Pettitt v Pettitt* [1970] AC 777, 792.

jobs which husbands often do”.¹⁷³

In *Button*, the wife’s contributions were also discussed, noting that she:

“does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property”.¹⁷⁴

It is notable that in reference to both the wife and husband, the court in *Button* were not satisfied that acts which can be considered gender-typical were insufficient to be considered as a ‘contribution’. Indeed, those cases in which gender roles have been ‘out performed’ are the only ones in which, non-financial contributions have been considered adequate.¹⁷⁵ See for example the analysis of *Eves v Eves*, in which Lord Denning notably reinforces the ‘housewife’ gender stereotype, but uses this as a marker which must be surpassed in order to obtain proprietary rights.¹⁷⁶

The gendered construction of certain behaviours and contributions can be seen in the overview given by Lord Diplock in *Pettitt*:

“If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom, while the wife does the shopping, cooks the dinner and bathes the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that

¹⁷³ *Button v Button* [1968] 1 WLR 457, 461 as cited by Lord Reid in *Pettitt v Pettitt* [1970] AC 777, 796.

¹⁷⁴ *Button v Button* [1968] 1 WLR 457, 462.

¹⁷⁵ However, it is questionable as to whether the case was decided on this basis, the courts post-*Eves* interpreted the decision as such.

¹⁷⁶ Although this is used in order to assist Janet Eves in obtaining interest in the property as discussed in the following section of this chapter.

their domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home”.¹⁷⁷

Discussing the likely scenario, that there has been no express agreement as to beneficial shares “then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought”.¹⁷⁸ Despite this seeming to indicate that some consideration could be given to whether it would be inequitable to deny the wife a share, when coming to a decision the court only considers financial contributions. No weight is given to other *gender-typical* activities, or the payment of bills of purchase of chattels – the property is viewed as just that, a property and not a home.¹⁷⁹ As can be seen in the judgment of Lord Pearson “it is concerned solely with a property claim arising in the sphere of property law as distinct from matrimonial law”.¹⁸⁰

The discussion of hypothetical relationships made by Lord Reid in *Pettitt* also provides an insight into the courts perspective on contributions.¹⁸¹ He continues on from his discussion of an individual who makes ‘improvements’ with two additional examples. The first involving a wife who pays all of the household bills, and the second in which a wife who “unable” to contribute directly to the property but through “good management and cooperation”¹⁸² enables her husband to make said payments. In both of these situations the wife would have “no claim of any kind”.¹⁸³ In contrast to the ‘entirely unsatisfactory’ treatment of the individual who makes improvements, socially

¹⁷⁷ *Pettitt v Pettitt* [1970] AC 777, 826.

¹⁷⁸ *Gissing v Gissing* [1971] AC 886, 896.

¹⁷⁹ See [1.5].

¹⁸⁰ *Gissing v Gissing* [1971] AC 886, 902. Emphasising the difference between two jurisdictions, as discussed at [4.3.3].

¹⁸¹ The first part of this hypothetical discussion can be seen above in this section.

¹⁸² *Pettitt v Pettitt* [1970] AC 777, 794

¹⁸³ *Pettitt v Pettitt* [1970] AC 777, 794

constructed as a masculine act perceived to have financial value, Lord Reid notes that “opinions may differ... as to whether she should have any claim”.¹⁸⁴

It is notable that following on from the gender-neutral discussion of contributions in the first instance that ‘wifely’ contributions are overtly classified as different. However, under a formal approach, difference is used as a legitimate reason for denying proprietary rights.¹⁸⁵ The dissatisfaction which arises as a result of the *masculine* contribution (improvements), which is lacking when considering a wife spending her ‘pin money’ on bills or contributing to ‘family life’, indicates the gendered construction of family roles and contributions as perceived by the courts during this period. The differing opinions as to whether or not such acts should result in a successful claim reflects the societal shift which was taking place during this period, particularly in relation to women’s ability to contribute financially (directly or indirectly), due to the increasing levels of women in employment.¹⁸⁶ Despite these differing opinions, masculine financial contributions were given precedence.

Ability to contribute

In the *Gissing* judgment, the court acknowledges the different earning capacities of men/women. Lord Diplock gives the hypothetical example of a property obtained by a “young couple who were both earning when the house was acquired but who contemplated having children whose birth and rearing in their infancy would necessarily affect the future earning capacity of the wife”.¹⁸⁷ The payment of indirect/direct financial contributions made irregularly/at variable amounts, would in those

¹⁸⁴ *Pettitt v Pettitt* [1970] AC 777, 794

¹⁸⁵ See Chapter 3 on the relationship between formal equality and difference.

¹⁸⁶ As discussed in [5.2] and [5.3] above.

¹⁸⁷ *Gissing v Gissing* [1971] AC 886, 909.

circumstances be considered evidence of a common intention that the property was to be held in equal shares. Thus in some way acknowledging the need to consider the ability to contribute to property consistently, but in a way which remained underpinned by financial contributions.

In later cases, the different ability to contribute was also noted, “as very often happens, the major contribution in cash was made by the man, who in this case was earning a good deal more than the woman”.¹⁸⁸ This clearly links with the unequal earning capacity and economic dependence which impacted the ability of women to contribute financially as discussed above. However, despite acknowledging the difficulties in relation to women contributing consistently due to working patterns impacted by maternity/childcare, the requirement that there be some direct/indirect financial contribution was maintained.

Despite recognition of the different earning capacities of men and women in this period, the notion that women were no longer economically dependent on their partner was also relied on in *Pettitt* in relation to whether proprietary interest could be found on behalf of a non-contributing woman based on a ‘gift’. The contradictory approach, resulting from gendered assumptions is highlighted in the *Pettitt* judgment:

“Where a husband expends money on his wife's property there is a presumption that it is a gift to the wife. Where, however, a wife expends money on the husband's property there is a presumption of a trust in her favour”.¹⁸⁹

Lord Reid discussed the tendency for courts to assume that works done to a property would be considered a mere gift. He postulated that the justification for this ‘gift’

¹⁸⁸ *Cooke v Head* [1972] 1 WLR 518, 522.

¹⁸⁹ *Pettitt v Pettitt* [1970] AC 777, 781.

approach which had been based on the assumption that “husbands so commonly intended to make gifts”.¹⁹⁰ He also drew attention to the way in which the economic dependency of wives on their husbands, at one time justified the presumption in their favour.¹⁹¹

Adopting a formal equality approach, Lord Reid noted that “these considerations have largely lost their force under present conditions”.¹⁹² This would, on the face of it, seem progressive. No longer treating women as if they were dependent on men, that they would be gifted property because they could not obtain it otherwise. However, given the societal context in which this case was decided, such an approach was premature. As this chapter has demonstrated, women were not yet free from dependency on their husbands/partners.

5.7.3 *Eves v Eves* [1975] 1 WLR 1338, 1340; *Cooke v Head* [1972] 1 WLR 518

Despite the attempts to restrict the ambit of the CICT in the House of Lords, Lord Denning attempting to re-establish the principles underlying his rejected invention, the ‘family asset’, adopted a more flexible approach which sought to give legal recognition to the contributions of the non-owning party. This section will focus on two key cases in which physical contributions were acknowledged by the court. This approach is one which can be categorised as adopting equality of difference.¹⁹³ In straying away from a focus on financial contributions, it recognised the different abilities for men/women to contribute to the home, the different power held by each party and the financial dependency many women were subject to during this period. The central case in

¹⁹⁰ *Pettitt v Pettitt* [1970] AC 777, 793.

¹⁹¹ *Pettitt v Pettitt* [1970] AC 777, 793.

¹⁹² *Pettitt v Pettitt* [1970] AC 777, 793.

¹⁹³ See [3.2.2].

demonstrating this approach is *Eves v Eves*, in which Janet Eves was awarded $\frac{1}{4}$ beneficial interest in the property based on the deceptive behaviour of her partner, supported by her physical contributions to the property.¹⁹⁴ The case of *Cooke v Head* which involved unmarried cohabitants also provides an insight into Denning's approach and as such forms part of the following analysis.¹⁹⁵ In *Cooke*, the property was purchased in the sole name of Mr Head, and Ms Cooke asserted that her physical and financial contributions entitled her to a beneficial interest in the property, and therefore a percentage of the proceeds of sale. She was awarded $\frac{1}{3}$ beneficial interest based on the combination of her financial and physical contributions.

Stereotypes

Ms Cooke did not contribute towards the purchase of the property, but she did however contribute to the mortgage instalments and she also did considerable work to the property.¹⁹⁶ It is interesting that the work she performed was considered distinct from the work a 'typical' woman would do:

“the plaintiff did quite an unusual amount of work for a woman. She used a sledge hammer to demolish some old buildings. She filled the wheelbarrow with rubble and hard core and wheeled it up the bank. She worked the cement mixer... She did painting, and so forth. The plaintiff did much more than most women would do”.¹⁹⁷

The combination of her financial contributions to the mortgage, and the *masculine* work on the property going beyond that expected of a woman assisted the judges in determining that she did have beneficial interest in the property.

¹⁹⁴ *Eves v Eves* [1975] 1 WLR 1338, 1340, hereafter *Eves*.

¹⁹⁵ *Cooke v Head* [1972] 1 WLR 518, hereafter *Cooke*.

¹⁹⁶ *Cooke v Head* [1972] 1 WLR 518.

¹⁹⁷ *Cooke v Head* [1972] 1 WLR 518, 519.

In *Eves*, Lord Denning's lengthy overview of the facts presents Janet's role as one which was not only of 'housewife' and 'mother' but that she went further than this:

“She did much more than many wives would do. She stripped the wall paper in the hall. She painted woodwork in the lounge and kitchen. She painted the kitchen cabinets. She painted the brickwork in the front of the house. She broke up the concrete in the front garden. She carried the pieces to a skip. She, with him, demolished a shed and put up a new shed. She prepared the front garden for turfing. To add to it all, they had their second child”.¹⁹⁸

Here Lord Denning uses Janet's hard labour as going beyond that usually performed by women, perpetuating the distinct gender norms assigned to women. He notes that she is a mother, signifying her feminine role. However, he places considerably more emphasis on those *masculine* contributions which distinguish her from that of the stereotypical *wife*. Despite having been used as authority in later cases concerning physical contributions, they were not the determinative factor in awarding beneficial interest to Janet in *Eves*.¹⁹⁹ Rather, they were acts done in “pursuance of some expressed or implied arrangement and on the understanding that she was helping to improve a house in which she was to all practical intents and purposes promised that she had an interest”.²⁰⁰ They were merely used to demonstrate the detriment she suffered.²⁰¹

It is clear that the use of stereotypes in these cases performs two functions. First, in considering the 'typical' work performed by women, the work done by Janet and Ms

¹⁹⁸ *Eves v Eves* [1975] 1 WLR 1338, 1340.

¹⁹⁹ See for example *Grant v Edwards* [1986] 1 Ch 638 and *Hall v Hall* (1982) 3 FLR 379, both of which are discussed in [6.8].

²⁰⁰ *Eves v Eves* [1975] 1 WLR 1338, 1345.

²⁰¹ As discussed at [4.3.1].

Cooke is categorised as masculine. This out-performance of their gender role is given value, as evidence of their detrimental reliance, in a way which is absent in those cases involving gender-typical behaviour.²⁰² Despite minimising *feminine* contributions, in a way which reflects the socio-political construction of ‘women’s work’ at the time, the result is one which allows the court to find beneficial interest where it would otherwise be absent. Secondly, in *Eves* the emphasis which is given to her role as ‘wife’ and mother, acknowledges that she performed those *masculine* acts in addition to performing her *natural* role, caring for her children. Thus emphasising the detriment she suffered, contributing to the construction of such women as ‘victims’ of both the laws inadequacy and the ill-treatment they suffer at the hands of their partners.²⁰³

Moral Judgments

The emotive nature of Lord Denning’s judgments, employing discourse(s) which “reinforc[e] stereotypes of weakness”²⁰⁴ constructing women as vulnerable. This is demonstrated in the way in which he often constructs unfaithful/lying men as ‘the villain’ in his judgments, attempting to raise sympathy for the wronged woman, thus disguising his manipulation of the law. The use of stereotypes, in particular those which categorise women as weak or vulnerable is far from uncontroversial, it is through the adoption of these discourses that he is able to find women interest in the family home which they would otherwise be denied. It is for that reason that *Eves* and *Cooke* are categorised as ‘moral’ judgments.

²⁰² See *Pettitt and Gissing* in [5.7.2].

²⁰³ That is, they are characterised as the victim in contrast to villain construction of men within these ‘moral judgments’.

²⁰⁴ Posner R., *Law and Literature* (Cambridge: Harvard University Press, 1998), 349.

In *Cooke*, the money the couple accumulated was put into an account in “the plaintiff’s name. It was not put into the defendant’s name because he did not want his wife to know of it”.²⁰⁵ This account was used to buy furniture and pay mortgage instalments. It is notable that Lord Denning frequently mentions the fact that Mr Head was married, while he was cohabiting with another woman, not to derogatively construct Ms Cooke as a mistress, but instead to portray Mr Head as a man toward which we should have contempt. Thus *justifying* the equal distribution of beneficial interest in the family home. Albeit, with the minor financial contributions in this case, the construction of Mr Head as ‘the villain’ and Ms Cooke as ‘the victim’ did not deem it necessary to go so far as it did in *Eves*.

In *Eves*, the lies espoused by Stuart are seen to be a “clear inference” that the property was to be shared “otherwise no excuse would have been needed”.²⁰⁶ It was on this basis that an agreement between the couple was identified by the court, which then gave rise to her interest in the property. When discussing Stuart’s behaviour Lord Denning argued that “he should be judged by what he told her – by what he led her to believe – and not by his own intent which he kept to himself”.²⁰⁷ In manipulating the law, Lord Denning makes a ‘moral’ judgment which is given additional weight as a result of the discourse he constructs surrounding the women ‘victims’ of male manipulation. It also evidences the difficulty concerning express trusts, the expectation that a couple will vocalise their intention, and the supposed reliability of such statements is undermined when considering the frequency at which ‘promises’ are made and broken in such cases.²⁰⁸

²⁰⁵ *Cooke v Head* [1972] 1 WLR 518, 520.

²⁰⁶ *Eves v Eves* [1975] 1 WLR 1338, 1344.

²⁰⁷ *Eves v Eves* [1975] 1 WLR 1338, 1342.

²⁰⁸ As discussed at [4.3.1].

Similar issues are raised in relation to promises to marry which were never fulfilled. In *Eves* the couple were said to “intend... to marry when they were free to do so”,²⁰⁹ though this intention was only truly held by Janet. Having purchased the property Stuart “told her that it was to be their house and a home for themselves and their children”²¹⁰ and had stated that, if it were not for her age, that the property would have been put in joint names. This shows the nature of a relationship based on trust, in which ones expectations can be easily manipulated. Janet herself stated that:

“So far as I was concerned, we were husband and wife, and I did trust him. I never ever thought anything was going to happen while we were building the home up: as far as I knew we were going to stay there”.²¹¹

This demonstrates the lack of awareness unmarried cohabitants had regarding their legal position.²¹²

Giving a summary of the case Lord Denning made a point of emphasising the immoral behaviour of Stuart once again

“Although Janet did not make any financial contribution... He told her that it was to be their home for them and their children. He gained her confidence by telling her that he intended to put it in their joint names (just as married couples often do)”.²¹³

In emphasising the lies and deception of Stuart, Lord Denning was again constructing Janet as the naive woman contrasted with manipulative man. The recognition of the way

²⁰⁹ *Eves v Eves* [1975] 1 WLR 1338, 1340. Again evidencing the often one sided nature of how the courts perceive ‘common’ intention, albeit a common intention to marry would not be a sufficient basis from which to imply a CICT.

²¹⁰ *Eves v Eves* [1975] 1 WLR 1338, 1340.

²¹¹ *Eves v Eves* [1975] 1 WLR 1338, 1340.

²¹² As discussed in [4.3.3].

²¹³ *Eves v Eves* [1975] 1 WLR 1338, 1341.

in which Stuart “gained her confidence” raises the issue of trust in cases involving couples, particularly concerning agreements from which common intention is inferred.²¹⁴ It also recognises the difference in decision making power within relationships, which usually vested in the partner who is the highest wage earner, most often the male partner.²¹⁵ Both of which serve to emphasise Janet’s vulnerability.

Describing Stuarts treatment of Janet after the breakdown of the relationship, though not relevant to the proceedings, Lord Denning sought to again rouse sympathy towards Janet:

“He did not keep up... [the child maintenance] payments. He went back to the house... He locked up two big rooms, leaving Janet and the children one bedroom and the kitchen and toilet. He took away the deep freeze and the stair carpet. It was a poor return for all she had done”.²¹⁶

Lord Denning also repeatedly discusses the threats of violence made to Janet by Stuart’s new partner.²¹⁷ It is through this “vortex of wife/mother/innocent... Janet is transformed into the victim who needs the protection of law”.²¹⁸ Although the use of gender stereotypes and the construction of Janet as a victim raises a number of issues, it is only through acknowledging difference and manipulating the law that Janet is successful in her claim.

²¹⁴ Trust is discussed in [4.3.1] and in additional detail in the Case Analysis section in [6.8].

²¹⁵ Power as it is linked with financial position discussed in [6.5.1].

²¹⁶ *Eves v Eves* [1975] 1 WLR 1338, 1340.

²¹⁷ *Eves v Eves* [1975] 1 WLR 1338, 1341.

²¹⁸ Bottomley A., ‘Self and Subjectivities: Languages of Claim in Property Law’ (1993) 20 *Journal of Law and Society* 56, 57.

‘Man and Wife’

The series of cases which developed the CICT in this period emphasised that there was no difference between married and unmarried couples in this context.²¹⁹ However, as the law relating to married couples developed so as to protect, to some extent, the economically vulnerable party, the position of unmarried cohabitants remained subject to antiquated property law principles.²²⁰ The reluctance to adhere to the orthodox approach in *Gissing* and *Pettitt* can also be identified as stemming from Lord Denning’s unwillingness to treat unmarried couples differently from married couples:

“I do not think it is right to approach this case by looking at the money contributions of each and dividing up the beneficial interest according to those contributions. The matter should be looked at more broadly, just as we do in husband and wife cases”.²²¹

A similar point is raised in *Eves* where “her contribution was such that if she had been a wife she would have had a good claim to have a share in [the house] on a divorce”.²²² To treat all couples in a way which acknowledges the different ability for men and women to contribute financially to the property would “accord with recent developments”.²²³ Thus acknowledging the developing societal acceptance of relationships between men and their *mistresses*, and the way in which the function of such relationships is often the same.²²⁴

The way in which Lord Denning constructed women has been condemned for being

²¹⁹ See the discussion of *Gissing* and *Pettitt* in [5.7.2].

²²⁰ See the discussion of the development of marriage in [5.5.1].

²²¹ *Cooke v Head* [1972] 1 WLR 518, 521.

²²² *Eves v Eves* [1975] 1 WLR 1338, 1342.

²²³ *Cooke v Head* [1972] 1 WLR 518, 520 drawing on *Diwell v Farnes* [1959] 1WLR 624.

²²⁴ See [4.3.3] for a discussion of the differences (or lack thereof) between how married and unmarried couples act in their relationships.

patronising, particularly by feminists who see the role of the law as being to “mitigate structural inequalities ... without reproducing models of dependency”.²²⁵ However, the difference approach he adopted did succeed in obtaining property rights for women who would have otherwise been denied them. In recognising the position which many women had been placed in by virtue of the dominant gender stereotypes during this period and economic dependency, the sameness based focus on financial contributions was avoided so as to result in equality in practice. Despite the fact that this was facilitated through the adoption of creative, albeit questionable, discourses, the use of gender stereotypes, ‘moral judgments’ and a manipulation of express agreements, the orthodoxy of the formal approach under *Gissing* and *Pettitt* was avoided.

5.8 Conclusion

The historical analysis section(s) of this chapter have provided an overview of some of the central shifts in the position of women so as to provide a sufficient socio-legal and economic background from which the treatment of unmarried cohabitants, and in particular the woman in such cases, have been treated by the courts. In particular it has emphasised the ways in which, despite their increasing presence in the public sphere, women were still viewed as wives/mothers rather than individuals. As a result, the sameness based equality legislation did little to address the substantive differences in women’s experience, which meant that the economic dependency of women was yet to be alleviated.

The case analysis section of this chapter provided an analysis of the two distinct approaches which emerged in the courts concerning the CICT. The formal approach

²²⁵Bottomley, ‘Self and Subjectivities’ (n218), 58.

exemplified by *Gissing* and *Pettitt*, in refusing to acknowledge the persistence of socially constructed differences between men and women as replicated in law and society, and the inability for most women to contribute at the same level as their male counterparts to the acquisition of property, meant that women fared worse under this approach.²²⁶

The difference approach which did recognise the issues raised above, rather than relying on fictitiously neutral financial contributions, allowed women to obtain proprietary rights which they would have otherwise been denied.²²⁷ However, the way in which such an approach was facilitated, positioning acts considered appropriate for the individual's gender being set as a bar which must be surpassed, is not without its issues.

²²⁶ See [5.7.2].

Chapter 6 - Socio-Legal Changes Influencing Cohabitation in Britain between 1980 – 1999.

6.1 Introduction

This chapter provides an analysis of a number of the socio-historical and legal changes which occurred between 1980-1999 which provide insight into the position of women in society. Like the chapter which preceded it, it is arranged thematically, covering a variety of issues ranging from employment to the nature of the family drawing on a variety of perspectives in order to construct an image of the historical context in which the cases, which are analysed at the end of the chapter take place. In providing this historical overview, the adequacy of different equality perspectives, as used by the judiciary can be considered in context.

The chapter then analyses the key cases relating to the CICT which occurred during this period. This section predominantly focusses on the resurgence of the formal approach which dominated the approach of the courts. However, it is notable that there were also instances of the court attempting to reinstate elements of the difference approach adopted by Lord Denning. The case analysis section identifies and examines the way in which they have constructed women, relationships and contributions. The dominance of the formal finance-based regime, in this period meant that *feminine* contributions were given little weight. As a result, many women were left without interest in their homes. Thus demonstrating the inadequacy of such an approach to equality.

6.2 Women and Employment

This section provides an overview of the development of employment legislation, and

the impact it had on women during the 1980s/1990s.¹ The position of women in the employment sphere, particularly those changes which have lessened their earning capacity have had a considerable impact on their ability to contribute financially to property, and the power dynamics of the family unit and as such has made them vulnerable within the context of the CICT.²

6.2.1 Unemployment, (Un)equal Pay and Discrimination: Employment in the 1980s

The pressure was on, both economically and ideologically, to keep women in the home due to the levels of unemployment and cuts in public expenditure. However, women's financial contribution to the home was becoming increasingly necessary to individual families. It is this contradictory position which underlies the difference between political ideals and the lived reality of the poor during this period. Despite the improvements which ought to have been borne from the SDA and EPA the position of women in the workplace was still one in which they felt, and indeed were underpaid and undervalued.³ Pollert described the 'choice' women had during this decade as "increasingly grim: go back home or accept the role of being cheap and disposable commodities".⁴

6.2.2 Unemployment

Unemployment more than doubled between 1979-1984.⁵ Despite women's full-time employment falling at a similar rate to men's, part-time employment increased during

¹ Maternity provisions will be dealt with as a distinct issue in this chapter see [6.4].

² Issues which are discussed in detail at [6.8].

³ See [5.4] and [5.5].

⁴ Pollert A., *Girls, Wives and Factory Lives* (London: Macmillan Press, 1981), 231.

⁵ Leaker D., (ONS) 'Unemployment: Trends since the 1970s' (2009) 3(2) *Economic & Labour Market Review* 37, 37-38.

this period.⁶ Given the construction of part-time work as women's work in decades prior this meant that women were a good source of cheap labour. Where employers wished to cut costs and maintain business, it was essential to retain a more affordable workforce, women working part-time.

The widespread unemployment of men was incompatible with the government's focus on the breadwinner/housewife construction of the family.⁷ In keeping with the ideology of free market individualism, men needed to work and contribute in order to be considered a worthy member of society.⁸ Within this climate "the workless tend[ed] to be viewed as worthless".⁹ This attitude can be seen to have been embedded within the Conservative ideology when considering this statement made by the Secretary of State, "everyone knows the apathy of dependence and can compare it with the sheer delight of personal achievement".¹⁰ This echoed the rhetoric of self-reliance inherent in free market ideology which was promulgated by the government, which occurred at a time where many people were unemployed and most needed support from the State.

6.2.3 Part-time Work

The concentration of women in part-time work proved problematic for a number of reasons.¹¹ First, women in part-time work were the lowest earning individuals. An examination of part-time wage differentials, shows that the percentage of the male full-

⁶ Part-time work is discussed in detail at [6.2.3].

⁷ See [6.5].

⁸ Free market ideology was integral to Conservative thought during this period and the 1970s. For a full discussion of the Liberal roots of individualism and its links to citizenship: see Chapter 2 generally.

⁹ Marsden D. *Workless* (Beckenham: Croom Helm, 1982), 2. Again reflecting the masculine construction of the individual discussed at: [2.1.2].

¹⁰ John Moore, UK Secretary of State for Social Security 1987, quoted in Fine M. & Glendining C., 'Dependence, Independence or Interdependence? Revisiting the concept of "Dependency"' (2005) *Ageing and Society* 601, 601.

¹¹ During this period 99% of part-time workers were women: Office of Population Censuses and Surveys., *Labour Force Survey 1984* (London: HMSO, 1986).

time wage earned by part-time women “rose in the late-1970s... it fell back in the 1980s, and by 1993 female part-time earnings were still only 63 per cent of male earnings”.¹² Secondly, the unequal division of labour in the home meant that women sought work which would fit around childcare, flexible work with less hours than they might otherwise take. “Employers who can offer these convenient working hours may be in a good bargaining position concerning the other aspects of the pay and employment conditions package, particularly pay”.¹³ Further to this, part-time work was primarily viewed as unskilled. This was due to the construction of such work as ‘women’s work’ and “women workers carry into the workplace their status as subordinate individuals, and this status comes to define the value of the work they do”.¹⁴ In turn, the perception that such jobs only required a low level of skill, which though untrue, was often used in order to justify a lower level of pay.¹⁵

6.2.4 Equal Value?

In 1982 the Conservative government were found to be non-compliant with EU provisions concerning equal pay for work of equal value, which led to the enactment of the Equal Pay (Amendment) Regulations 1983.¹⁶ However, these amendments left a number of issues unresolved. A male comparator working for the same employer was still required though they did not need to perform the same role.¹⁷ In addition the new procedure for bringing claims was said to be so complex that “no ordinary lawyer would

¹² Low Pay Commission, *The National Minimum Wage* (Cm 3976, 1998), 194.

¹³ Ermisch J.F. & Wright R.E., ‘Wage offers and full-time and part-time employment by British women’ (1993) 28 *Journal of Human Resources* 111, 113.

¹⁴ Phillips A. & Taylor B., ‘Sex and Skill: Notes towards a Feminist Economics’ (1980) 6 *Feminist Review* 79, 79.

¹⁵ Horrell S. (et al), ‘Unequal Jobs or Unequal Pay’ (1989) 20(3) *Industrial Relations Journal* 176, 181-182. This is also linked to the genuine material factor/difference defence used by employers which is discussed in detail below.

¹⁶ Art 119 *Treaty of Rome* 1957 (later. Article 141); Equal Pay Directive 1975 75/117/EEC; Case 61/81 *Commission v United Kingdom* [1982] ECR 2601.

¹⁷ The issues with the need for a male comparator have been discussed in detail at [5.3.3].

be able to understand them”.¹⁸ How was it that lay people were supposed to understand and invoke their rights? It was said that for a woman to have a chance at a successful claim under these provisions that “she will need to be well informed herself or receive strong support from her union”.¹⁹ This occurred at the same time as unions’ power was declining. Even where a claimant was lucky enough to have the support of their union, “union negotiators... [had] an inadequate understanding on equality issues”²⁰ meaning that women who wished to bring claims had very little adequate support to do so.

Unable to deviate from their obligations under EU law the government took on a “policy of damage limitation and produced domestic legislation offering the maximum number of escape routes for employers”.²¹ The genuine material factor/difference defence remained a key tool for employers seeking to *legitimately* avoid their equal pay obligations.²² Occupational segregation allowed for employers to use different pay structures of the material difference defence in order to pay women less for their labour.²³ Job valuations performed by employers were deemed to be relevant evidence of the value of different jobs.

The broad nature of the new provisions relating to equal pay were termed so that there should be pay equity “where a woman is employed on work... of equal value to that of a man in the same employment”.²⁴ As a result, whether pay was ‘equal’ was based, not

¹⁸ HL Deb 5 December 1983, vol 455, col 901.

¹⁹ Townsend-Smith A., ‘Equal Pay (Amendment) Regulations’ (1984) 47(2) *Modern Law Review* 201, 202.

²⁰ Gregory J., ‘Equal Pay for Work of Equal Value: The Strengths and Weaknesses of Legislation’ (1992) 6(3) *Employment & Society* 461, 446.

²¹ *ibid*, 463.

²² See the [5.3.3].

²³ See *Reed Packaging Ltd v Boozer* [1988] ICR 39 on the use of different pay structures. See for example *Enderby v Frenchay Health Authority* [1991] ICR 382 regarding the use of the “genuine material factor” defence.

²⁴ Equal Pay (Amendment) Regulations 1983, s2(1).

on similar work, but work which is of comparable value to the employer. For example, in *Neil and others v Ford Motoring Company*,²⁵ in which job valuations performed by the employers seemed the work of female machinists as of less value than that of male cutters were upheld. Setting this against the earlier strikes by the Ford Sewing Machinists demonstrates how little progress had been made for those women who prompted the equal pay legislation over a decade prior.²⁶

Women's work is "habitually viewed as less important than the work performed by men, and may not be considered 'real' work".²⁷ Even where work takes place within the same sector, the notion of skilled work is one which has historically been gendered, sewing does not require skill, it is women's work, whereas cutting is men's work, clearly then requiring skill. As such, deciding cases based on the 'value' of work, as decided with reference to the employer's valuation, who had an economic incentive to continue the devaluation of women's work meant that women would never really find a just result under this legislation in practice.

6.2.5 Gender Pay Gap

Despite the fact that equal pay provisions had been in force since the mid-1970s, the gender pay gap continued.²⁸ Blau and Kahn found that in Britain, single, childless women fared relatively well, earning 95% of a single man's wage, married mothers on average only earned 60% of a married man's pay.²⁹ This reflects the impact of the

²⁵ [1984] IRLR 339.

²⁶ See [5.3.1] regarding the Ford Sewing Machinists Strike.

²⁷ Bradley H., *Men's Work, Women's Work: A Sociological History of the Sexual Division of Labour in Employment* (Cambridge: Polity Press, 1989), 1.

²⁸ It is acknowledged that equal pay and the gender pay gap are two distinct issues, there are ties between them and as such the enactment of the EPA should have had some impact on the gender pay gap.

²⁹ Blau F. & Kahn L., 'The Gender Earnings gap: Learning from International Comparisons' (1992) 82 *American Economic Review* 533, 534.

systemic and social pressures encouraging women to return to the home after childbirth, and the minimal remuneration women received where they did work. This ‘family pay gap’ is gendered, in that unlike married women, historically married men have earned more than their single counterparts.³⁰ The family gap reflects the role of the mother as care giver, who should sacrifice her career so that her husband may progress and provide.

6.2.6 Occupational Segregation/Gender Roles

The prevalence of occupational segregation and the continuation of familial gender roles contributed considerably to the ineffectiveness of the equal pay provisions. In the mid-1980s, close to half the public agreed “a man’s job is to earn money; a woman’s job is to look after the home and family”.³¹ Despite the increasing levels of women in the workplace, the dominance of the traditional model of the family has acted as a barrier to progress. “The assumption that a woman’s place is in the home implies that it is not in a career”,³² given that the role of homemaker and child carer has been constructed as feminine, whether a woman works or not, the expectation is that she will assume this position.

Given that “attitudes towards the employment of women... [are] bound up with people’s beliefs about appropriate behaviour”³³ the compulsion to subscribe to ‘appropriate’ roles which ‘fit’ their sex is considerable. Societal pressure and assumptions, fed by the media and Thatcher’s ‘family’ discourse meant that the idea

³⁰ Greenhalgh C., ‘Male-Female Wage Differentials in Great Britain: Is Marriage an Equal Opportunity?’ (1980) 90(360) *The Economic Journal* 751, 771. It has been argued that this could be due to experience. However, the experience of women workers has made little difference to their pay. Historically women are more likely to be overqualified for a job than a man: see Brynin M., ‘Overqualification in Employment’ (2002) 16(4) *Work, Employment & Society* 637.

³¹ Park A. (et al) (eds), *British Social Attitudes: the 30th Report* (London: NatCen Social Research, 2013), 119.

³² Oakley A., *Sex, Gender and Society* (Aldershot: Gower Publishing Company, 1985), 197.

³³ *ibid*, 152.

that women should be in the home, to support the working husband took precedence. At a time where unemployment was widespread, a woman who worked while her husband was left searching for work would be seen as emasculating rather than supportive.

“If men fail to be breadwinners, they challenge not only norms of masculinity, but also the more general social norm of work itself. In this way, stronger work cultures reinforce expectations to live up to the breadwinner norm”.³⁴

The centrality of self-reliant individuals/families under conservative ideology at this time, there would be an increasing pressure amongst men to be seen as a breadwinner.

The slow movement of women into traditionally male jobs, had not been mirrored by men at the same rate. There was little incentive provided for men to take up traditionally feminine roles both within and without the workplace, given that they remained undervalued both socially and financially in comparison to those perceived as masculine. Women who worked performed what has been termed a ‘double shift’. One in the work place, and one at home. The pressures of ‘keeping house’ did not automatically decline when a woman entered paid employment. This was especially so for those women working in jobs which were less well paid given the lack of nursery provision by the state and employers.³⁵

It is clear that “once jobs have become sex-typed, it is... hard to break down the patterns of segregation”.³⁶ This difficulty can be identified in the fact that despite legislation which purported to make changes for women having been enacted “Britain in the 1980s

³⁴ Thebaud S., ‘Masculinity, Bargaining and Breadwinning: Understanding Men’s Housework in the Cultural Context of Paid Work’ (2010) 24(3) *Gender and Society* 330, 336.

³⁵ Discussed at [6.2.7].

³⁶ Bradley, (n27), 9.

retain[ed]... a structure of sexual differentiation at work which has apparently resisted all the campaigning for equality".³⁷ The relationship between law and society is a difficult one. Even where the law attempts to push progress, change needs to be adopted by society, and socio-political structures. Without this societal overhaul, changes in women's equality cannot be implemented at a desirable pace.

6.2.7 Childcare

The Education Act of 1980, removed the obligation for local authorities to provide nursery care for children aged 3-5.³⁸ This exacerbated the pre-existing issues regarding a lack of affordable childcare.³⁹ It represented another way in which support was taken away from, in particular, working class families, shifting the burden from the state to families, the community and the charitable sector.⁴⁰ The government refused to review state-based child provision stating that "day care will continue to be primarily a matter of private arrangements between parents and voluntary organisations".⁴¹ This inaction however, was interrupted in 1985 when workplace subsidised nurseries were categorised as a taxable benefit.⁴² This added to women's tax bills, and unless they were working in a well-paid job, would incentivise them to return to the home and assume the role of child carer.

6.2.8 Discrimination

The previous neglect of women in the workplace was somewhat curtailed with the Sex

³⁷ *ibid*, 10.

³⁸ Education Act 1980, s24.

³⁹ On the issues raised regarding childcare prior: see [5.2] and [5.3].

⁴⁰ David M., 'Women and "work" in the Decade of Thatcherism' in Taylor I., (ed) *The Social Effect of Free Market Policies: an international Text* (London: Harvester Wheatsheaf, 1990), 119.

⁴¹ HC Deb 18 Feb 1985, vol 73, col 396.

⁴² See Heitlinger A., *Women's Equality, Demography and Public Policies: A Comparative Perspective* (London: MacMillan, 1993), 257.

Discrimination Act 1986, which made it illegal to dismiss women at 60 within the public sector and extended acts' provisions to small undertakings and private households.⁴³ Sexual harassment was illegal in its entirety by 1989, as the exceptions in the previous SDA were alleviated. This had a role in increasing the number of women appearing in traditionally masculine jobs, and the numbers of women entering the employment sphere more generally. The opportunity for economic stability for women seemed to be appearing. Yet this hope once again remained unfulfilled in practice. The workplace was still seen as the domain of men. Although the progress made by women was not as substantial as hoped, perceptions can be powerful. If women believed that they could 'make it' then more would strive to do so, paving the way for increased levels of female employment.

6.2.9 Tax and Benefits

When Thatcher gained power in 1979 and the consequences for the 'poor' were considerable. Direct taxes were used to substitute indirect taxes, making concessions for the rich.⁴⁴ Thatcher reflected on 1980s Conservative policy/ideology noting that they were "rediscovering... [Victorian values which] distinguished between the 'deserving' and 'undeserving poor'".⁴⁵ These actions have been described as demonstrating the way in which the Conservative government were "committed to increasing inequality in income and wealth for a number of reasons and regarded poverty as an absolute condition".⁴⁶

⁴³ Sex Discrimination Act 1986, ss 1-2.

⁴⁴ Income tax for the well off in society fell from 83%, to 60% and finally to 40%: 1979 Budget Hansard HC, vol 968, col 235-264; 1988 Budget Hansard, HC vol 129, col 993-1013; In that same period the VAT was doubled to a rate of 15%: 1979 Budget Hansard HC, vol 968 col 235-264, continued under the 1988 budget.

⁴⁵ Thatcher M., *The Downing Street Years* (London: Harper Collins, 1993), 627.

⁴⁶ Hickinson K., 'Conservatism and the poor: Conservative party attitudes to poverty and inequality since the 1970s' (2009) 4 *British Politics* 341, 343.

Despite greatly increased unemployment, the Thatcher's government 'turned the screw' on benefits out of work.⁴⁷ The market was promoted over state provision and individual benefits were cut. The earnings-related supplement for the unemployed was abolished, making the short-term unemployed much worse off and forcing them onto supplementary benefit.⁴⁸ In 1982 *The Economist* published extracts from a confidential report on "options for radical cuts in public spending, many involving the dismantling of huge chunks of the welfare state".⁴⁹ This was followed by the leaked minutes of the Family Policy Group to *The Guardian*. These minutes showed that serious consideration was being given to a range of options for reducing state spending on welfare provision.⁵⁰ This provides insight into the attitude of the Conservative government towards the welfare state, "everything that could be privatised would be privatised, leaving only a residual role for the state in securing the living standards of the population".⁵¹ This reduction in state funded welfare would have a considerable impact on women who were expected to fill the care deficit it created.

The Married Couples Allowance also introduced in the 1988 Budget serves as "prime example" of using the "tax system to encourage certain behaviours that its members regarded as virtuous".⁵² Protection of marriage was embedded into the tax system at a time in which the diversity of family forms was a cause of concern for traditionalists.

⁴⁷ Atkinson A. B. & Micklewright J., 'Turning the Screw: Benefits for the Unemployed 1979-1988' in Dilnot A. & Walker I., (eds) *The Economics of Social Security* (Oxford: Oxford University Press, 1989).

⁴⁸ Social Security (No. 2) Act 1980.

⁴⁹ *The Economist* (18 September 1982), as cited in Mack J. & Lansley S., *Poor Britain* (London: George, Allen & Unwin), 243.

⁵⁰ *The Guardian* (17 & 18 February 1983), as cited in Mack J., & Lansley S., *Poor Britain* (London: George, Allen & Unwin), 243.

⁵¹ Mabbett D., 'The Second Time as Tragedy? Welfare Reform under Thatcher and the Coalition' (2013) 84(1) *The Political Quarterly* 43, 43.

⁵² Wade R., *Conservative Party Economic Policy: From Heath in Opposition to Cameron in Coalition* (Basingstoke: Palgrave Macmillan 2013), 65.

The preservation of the nuclear family can also be seen in the cuts to nursery provisions.⁵³ These cuts increased the instability women faced in the workplace and in the home, those who did work needed to rely on flexible working hours or part-time work which meant that they could still care for children who were not yet of school age. As discussed previously, this sort of work left women vulnerable to inequality in terms of pay.⁵⁴ Overall, the Conservative approach to benefits sought to incentivise work and reinstall the traditional notion of the breadwinner family. Only by cutting benefits which Thatcher believed “encouraged illegitimacy, [and] facilitated the breakdown of families”⁵⁵ could the traditional family remain in prime position.

6.3 Employment in the 1990s

6.3.1 Benefits and Work Incentives

In 1997, New Labour took over the core Conservative aim of strengthening incentives to work. They mirrored much of the discourse adopted by their predecessors, for example Blair stated that “the new welfare state must encourage work, not dependency”.⁵⁶ This same notion can be seen in the *New Contract for Welfare* Green Paper which proposed a system based on “rights and responsibilities”⁵⁷ reinforcing the focus on “empowerment not dependency”.⁵⁸ Despite this, there was a renewed sense of acceptance, and attempts to assist, those who could not work and a blurring (if not removal) of the distinction between the deserving and undeserving poor.

From a socio-economic perspective “worklessness... [was seen as] the main cause of

⁵³ As discussed in the [6.2.7] and [6.3.3].

⁵⁴ See [6.2.3].

⁵⁵ Thatcher, (n45), 8.

⁵⁶ Blair T., Leaders Speech (May 1 1997).

⁵⁷ *A New Contract for Welfare*, Cm 3805 (London, HMSO, 1998), 23.

⁵⁸ *ibid*, 19.

poverty and social exclusion”⁵⁹ and Labour saw “work for those who can”⁶⁰ as key to solving those issues. This was to be tackled using a multi-pronged approach, including welfare-to-work programmes, providing incentives to work, and reforms to child benefits and childcare. ‘Making work pay’ was keystone of New Labour’s welfare strategy aimed at reducing dependency which can be seen in the introduction of the national minimum wage and the introduction of the Working Families’ Tax Credits for low-wage families.⁶¹ These changes were implemented alongside the National Childcare Strategy. This strategy included the childcare tax credit, additional expenditure on afterschool care, the promise of a nursery place for all under 4s and funding child-care workers.⁶² This signalled a departure from the Conservative strategy which saw women’s employment and childcare as matters as a purely private issue, requiring minimal legislative intervention.⁶³ What was now seen to be essential was the recognition of individual circumstances, needs and assets and that the best way to improve employment opportunities was through ‘tailor-made’ packages.⁶⁴

6.3.2 Part-time/Flexible Work

The gap between male and female workforce participation was closing, though still notable at 67.8% of women, and 83.9% of men in 1998.⁶⁵ Despite an increase in the number of women working full-time during the 1990s, a significant number of women

⁵⁹ Department of Social Security., *Opportunity For All: Tackling Poverty and Social Exclusion, First Annual Report* (London: Department for Social Security, 1999), 78.

⁶⁰ *ibid*, 7.

⁶¹ National Minimum Wage Act 1998; The working families tax credits replaced the previous system of family credit in 1999.

⁶² Department for Education and Employment., *Childcare a Framework and Consultation Document* (London: HMSO, 1998) and Minister for Women., *Focus on Childcare* (London: Minister for Women, 1998).

⁶³ See [2.5.4].

⁶⁴ Millar J., ‘Changing Obligations and Expectations: Lone Parenthood and Social Policy’ in Boje T. & Leira A., *Gender, Welfare State and the Market: Towards a New Division of Labour* (London: Routledge, 2000), 248.

⁶⁵ OECD., *Employment Outlook, Statistical Annex* (Paris: OECD, 1999), Table B. The percentages above are based on the total working age population for women and men respectively.

still worked part-time.⁶⁶ This is particularly problematic given the levels of poverty amongst those who were in part time work, in 1996 a survey found that “2.5 million part-time workers are on poverty level pay”.⁶⁷ The poverty associated with part-time work was however, lessened with the introduction of the national minimum wage in 1999, which also increased the number of employees who met National Insurance contributions, giving them access to a wider range of employment rights including maternity and redundancy pay.⁶⁸

Further to this, the gap between the hours worked by women working part-time and full-time was significant, the pronounced difference in working hours impacted earning capacity and access to rights for women in the UK.⁶⁹ The difference in patterns of working associated with women with children and without children persisted, though to a lesser extent than in previous decades.⁷⁰ Despite these improvements, the employment rate of lone mothers in the early 1990s was lower than in the late 1970s at just under 40%.⁷¹ Labour did create a number of initiatives, which were introduced by after the 1997 election, aimed at reducing this gap through the introduction of the Working Families Tax Credit which sought to improve the financial incentives to work, and the New Deal for Lone Parents which aimed to encourage and support single parents in returning to work.

⁶⁶ 80.4% of part time employment was still fulfilled by women 1998: *ibid*, (Table E).

⁶⁷ Carby-Hall J., ‘The function and effect of British social law in the context of the employment-unemployment debate’ (1996) 38(6) *Managerial Law* 1, 30.

⁶⁸ Maternity is discussed in detail at [6.4].

⁶⁹ On average ¼ of women who worked part-time, worked for less than ten hours, whereas those who were in full-time employment worked over 41 hours: Rubery J. (et al.), *Changing Patterns of Work and Working-time in the EU and the Impact of Gender Divisions* (Manchester: UMIST, 1995), 93.

⁷⁰ Duffield M., ‘Trends in Female Employment 2002’ (2002) *Labour Market Trends* 605, 610 and Millar J., ‘State, Family and Personal Responsibility: The Changing Balance for Lone Mothers in the United Kingdom’ (1994) 48 *Feminist Review* 24, 26.

⁷¹ Gregg P., & Harkness S., *Welfare Reform and Lone Parents Employment in the UK* (CMPO Working Paper Series No. 03/072, June 2003), 1.

Women's *preference* for flexible work were thought to arise out of inadequate or costly childcare provision.⁷² For example in 1997 it was found that "14% of women part-timers would like fulltime work but were prevented from seeking it by domestic commitments".⁷³ The lack of affordable and adequate childcare was a persistent barrier to parents working full-time, and in particular given the gendered division of childcare within the home, this often fell on women. Rather than signifying increased gender equality, part-time employment can "be regarded as a means of avoiding more basic changes in the relationship between women and men",⁷⁴ since it enabled women to enter the labour market but still maintain their primary responsibility for unpaid caring work. In 1995 there was still over an hour and a half more housework performed by women than men, not including 'neutral' chores such as shopping or childcare, which have historically been performed by women.⁷⁵ Taken together, this shows that though the number of women participating in the labour market was increasing, their responsibilities in the home were not declining to match this, meaning that the 'double shift' for women continued.

6.3.3 Childcare

One of the key issues which has proved problematic for women generally, and particularly for lone mothers has been a lack of affordable/adequate childcare. There

⁷² Perrons, D., *Flexible employment and the reconciliation of work and family life* (Paper Presented to the ESRC Seminar series – Parenting, Motherhood and Paid Work, University of Bradford, 16-17 September 1998).

⁷³ Burchell B. (et al), 'Part-Time Work Among British Women' in Blossfeld H. & Hakim C., (eds.) *In Between Equalization and Marginalization: Women Working Part-Time in Europe and The United States of America* (Oxford: Oxford University Press, 1997), 217.

⁷⁴ Scott, J., 'Family change: revolution or backlash in attitudes in McRae, S. (ed.). *Changing Britain: Families and Households in the 1990's* (Oxford: Oxford University Press, 1999), 72.

⁷⁵ Altintas E., & Sullivan O., 'Descriptive Finding Fifty years of change updated: Cross-national gender convergence in housework' (2016) 35(16) *Demographic Research* 455, 457.

was a clear gap between the intentions of promoting lone mothers' participation in the labour market, with the reality of low wages and a lack of publicly funded day care. A situation which "can make labour force participation a very poor deal for lone mothers".⁷⁶ In the early 1990s, and prior, working parents with children under three relied almost entirely on either the private market or their social networks.⁷⁷ The position on childcare shifted with the election of the labour government. Gordon Brown in his 1997 Budget speech drew attention to this by stating

"A generation of parents have waited for their Government to introduce a national childcare strategy. From this Budget forwards, child-care will no longer be seen as an afterthought or a fringe element of social policies but from now on as it should be an integral part of our economic policy".⁷⁸

Attempting to emphasise the centrality of childcare within forthcoming Labour policies.

As part of its National Childcare Strategy, alongside the in-work-benefits discussed above, Labour also aimed to improve the provision of childcare in the UK. The government recognised the impact of the previous failures with regard to the provision of childcare when it stated that

"For too long, the UK has lagged behind in developing good quality, affordable and accessible childcare. The approach taken by previous Governments to the formal childcare sector has been to leave it almost exclusively to the market".⁷⁹

⁷⁶ Larsen J. E., 'Lone Mothers: how do they Work and Care in Different Welfare State Regimes? in Employment' in Boje T. & Leira A., *Gender, Welfare State and the Market: Towards a New Division of Labour* (London: Routledge, 2000), 234.

⁷⁷ Moss P., 'Day Care for Young Children in the United Kingdom' in Melhuish E. & Moss P., (eds.) *Day Care for Young Children* (London: Routledge, 1991), 125.

⁷⁸ Brown G., Budget Speech (July 2 1997).

⁷⁹ Department for Education and Employment., *Meeting the childcare challenge* (Cm 3959, 1998), 5-6.

In leaving childcare to the market, many of those who wished to work, or wished to work more than a part-time job, particularly women, were excluded from doing so.

One of the key ways in which Labour sought to rectify this issue was with the provision of “good quality, affordable childcare for parents who wish to work outside the home”.⁸⁰ The emphasis on ‘good quality’ and ‘affordable’ nursery provision were themes which ran throughout the Green Paper, acknowledging that it was primarily those on lower incomes who struggled to find adequate childcare, particularly given the need to balance the cost of childcare against low wages. As a result of this policy, after 1998 all four-year-olds have been entitled to receive a free part-time nursery education place for the three terms before they reach statutory school age.⁸¹

These provisions tied in with the overall welfare-to-work strategy, addressing the fact that unaffordable and unsatisfactory provision of childcare was proving to be a major barrier to parents, in particular mothers, in returning to or taking up paid work. In addition to this the introduction of Childcare Tax Credit within the Working Families Tax Credit in 1999 subsidized the cost of childcare for lower income families.

Despite these improvements

⁸⁰ Department for Education and Employment, Department of Social Security & the Minister for Women., *Meeting the Childcare Challenge: A Framework and Consultation Document* (Cm 3959 1998), 5.

⁸¹ A provision extended in 2004 to include all three-year olds.

“some parts of care work have been commodified but the rest of the responsibility for care work still rests with women and is unpaid – in spite of their growing involvement in paid work”.⁸²

What is clear is that though increasing numbers of women were in paid work, this did not alleviate the gendered association of women with childcare. Historically, the cultural values held in the UK have stressed the role of motherhood, which has often been constructed as incompatible with employment and many policies have gone on to support this model. The introduction of the progressive policies above indicates that there was some political appetite for readdressing the balance between these supposedly opposing categories. However, despite improvements in this regard, the increased number of nursery places, were still insufficient to cover demand.⁸³ As such, though the position of many women had been improved, there were still many who were unable to take advantage of the new provisions.

6.3.4 Legislative Inaction & The Pay Gap

The Equal Opportunities Commission (EOC) in 1998 made numerous suggestions which called for a single sex equality act based on the principle of a fundamental right to equal treatment between men and women and the introduction of a duty on employers to review their pay systems and take action to close the gender pay gap.⁸⁴ One of the key issues identified by the EOC was that the EPA and SDA were often contradictory, and complex, meaning that the protection offered by the equality legislation was

⁸² Boje T. & Almquist A., ‘Citizenship, Family Policy and Women’s Patterns of Employment’ in Boje T., Leira A., *Gender, Welfare State and the Market: Towards a New Division of Labour* (London: Routledge, 2000), 56.

⁸³ Rutter J., *Childcare Costs Survey 2015*:

<www.familyandchildcaretrust.org/sites/default/files/files/Childcare_cost_survey_2015_Final.pdf>
accessed: 20/01/2018.

⁸⁴ Equal Opportunities Commission., *Equality in the 21st Century: A New Sex Equality Law for Britain* (London: HMSO,1998).

limited.⁸⁵ The legislation concerning sex discrimination was “hopelessly out of date”⁸⁶ and relied on notions of sex discrimination from two decades ago which failed to properly recognise maternity rights and sexual harassment.⁸⁷

Despite these issues, and Labour’s supposed commitment to equality, the government rejected the proposals stating that “at this stage we do not consider that undertaking a major legislative overhaul... will of itself achieve the practical changes that are needed”.⁸⁸ The media coverage of the governments’ refusal to act was damning as can be seen in the ‘Equal Pay? No Way?’ article criticising this inaction:

“The government yesterday sent a message to all those who believe women should earn the same pay as men for the same work or work of equal value. We care, really we do, the minister said. We just don’t care enough to change the law.”⁸⁹

There was a perception that Labour’s equality rhetoric was not matched by an intention to implement real change for women.

The gender pay gap, though still substantial, was in decline. By 1999 it had dropped to 26.9% male median wage from 32.71% in 1990.⁹⁰ However, it is interesting to note that much like the inaction regarding equal pay, this gained media coverage.⁹¹ The organisational structure(s) within the employment sphere based on “large bureaucracies

⁸⁵ EPA and SDA discussed in [5.3].

⁸⁶ Kamlesh Bahl (chair of the EOC) as quoted in Bolger A., Equality body urges updated law against sex discrimination *Financial Times* (16 June 1998), 11.

⁸⁷ As discussed in [5.3.4].

⁸⁸ HC Deb 14 July 1999 vol 335 col 194.

⁸⁹ Ward L., ‘Equal Pay? No Way’ *The Guardian* (15 July 1999), A6.

⁹⁰ OECD (2017), Gender wage gap (indicator) <www.oecd.org/gender/data/gender-wage-gap.htm> accessed: 20/01/2018. With the exception of 1998, this had been a steady decline. However, in that year the pay gap widened though only by 0.1%

⁹¹ See for example Cenny C., ‘Pay Gap between the sexes widens’ *The Guardian* (16 October 1998), 2.

with tall hierarchies requiring long unbroken service”⁹² were considered to be a key contributing factor in the continuation of the gender pay gap. Such a model, based on masculine norms had not evolved to accommodate employees with primary childcaring responsibilities, or adapted to alleviate the financial burden caused by gaps taken for the purpose of childbirth/rearing. Further to this, the fact that many women remained concentrated in part-time jobs “characterised by lower wages, high job insecurity, and little chance of promotion”⁹³ contributed to the difficulties in obtaining similar earnings to men.

The ineffectiveness of the equal pay regime is emphasised by the persistence of the ‘motherhood gap’. A typical mid-skilled mother of two lost over half of her potential earnings after having her first child in 1980 and now loses a quarter.⁹⁴ Though in decline, the loss of a quarter of one’s wages due to ‘motherhood’ is clearly substantial. Rake’s study also notes that the contributions to a couples’ joint lifetime earnings ranged from 40-49% where they did not have children but those women with children would only contribute 24%.⁹⁵

This is particularly problematic when considering the focus on financial contributions and common intention in cohabitation cases. First, women are less likely to be able to contribute as much due to the difference in employment patterns/pay. Secondly, as Vogler notes:

⁹² Storey J., ‘Equal Opportunities in retrospect and prospect’ (1999) 9(1) *Human Resource Management Journal* 5, 6.

⁹³ Bardasi E. & Gornick J C., *Women and Part-Time Employment: Workers’ ‘Choices’ and Wage Penalties in Five Industrialized Countries* (ISER Working Paper Series ISER, 2000), 17.

⁹⁴ Rake K., *Women's Incomes over the Lifetime: A Report to the Women’s Unit, Cabinet Office* (London: HMSO, 2000), 15.

⁹⁵ *ibid*, 84.

“when couples saw the man as the main breadwinner, discourses emphasising earners’ rights of ownership and entitlement to money tended to clash with and take precedence over, discourses of equal sharing, regardless of how much wives actually earned”.⁹⁶

This tends to result in gendered unequal bargaining positions, which in turn makes it unlikely that a common intention which benefits the economically dependent partner will be found between the couple.⁹⁷ Notwithstanding those additional problems raised due to social expectations derived from the breadwinner/caregiver model.

6.3.5 Glass Ceiling

By 1997 women had increasingly been entering professions such as law, banking and medicine. To take banking as an example, in 1995 almost 2/3 of banking employees were women. However, there was only a growth from 1-35% of women in managerial positions and the number of women in executive roles was minute. These figures indicate that there was still some way to go in terms of addressing the glass ceiling.⁹⁸ It has been indicated that in some sectors, the glass ceiling, rather than being broken through, has in fact been heightened and now occurs at higher levels within organisational hierarchies. There has therefore been some considerable improvement, but women were still restricted from the top jobs. There were still examples of covert discrimination not only in the attitudes of employers towards women, often asking whether they intended to have children, or not hiring women who were of ‘childbearing age’. Employers also continued to engage in those methods which have been in use since the enactment of the equal pay provisions, such as by changing job titles in order

⁹⁶ Vogler C., ‘Cohabiting Couples: rethinking money in the household at the beginning of the twenty first century’ (2005) 53(1) *The Sociological Review* 1, 14.

⁹⁷ Smart C. & Neale B., *Family Fragments?* (Cambridge: Polity Press, 1999), 101.

⁹⁸ Anonymous., ‘Still a Glass Ceiling’ (1995) 13(6) *Banking World* 14.

to avoid paying women the same as men.⁹⁹

6.3.6 Outperformance

Girls were outperforming boys academically, and increasing numbers of women were entering university, by 1999, almost half of the university undergraduate population were women.¹⁰⁰ The outperformance at schools and increased attendance at university, combined with the increasing *feminine* service industry and numbers of women in work were seen as a threat to masculinity.¹⁰¹ In 1999 Heath's research indicated

“that girls are outstripping boys at the top end of the academic league tables has captured the imagination of the media to an astonishing degree, feeding into much broader debates around the changing role of women and the resultant ‘crisis of masculinity’ in British society”.¹⁰²

This concern surrounding female achievement was linked with backlash against feminism in the 1990s where feminism was portrayed not as seeking equality, but female superiority. “The dominant explanation takes an anti-feminist stance, arguing that anti-sexist policies have gone too far and that boys are the 'new victims' of a de-industrialising society”.¹⁰³

The media coverage of the issue can be seen to support the emergence of a masculinity crisis in various forms. In the Panorama 1995 documentary ‘*Men Aren't Working*’, which explored contrasting the experiences of men and women post-school, much of

⁹⁹ See [5.3.3].

¹⁰⁰ McNabb R., Pal S. & Sloane P., ‘Gender Differences in Educational Attainment: The Case of England and Wales’ (2002) 69(275) *Economica* 481, 481.

¹⁰¹ Including in feminine jobs discussed in [6.3.7].

¹⁰² Heath S., ‘Watching the Backlash: the problematisation of young women’s academic success in 1990s Britain’ (1999) 20(2) *Discourse: Studies in the Cultural Politics of Education* 249, 249.

¹⁰³ Pye D. (et al.), ‘The training state, deindustrialisation and the production of white working class trainee identities’ (1996) 6(2) *International Studies in the Sociology of Education* 133, 144.

the rhetoric of the programme was one which reinforced the idea that women's success came at the cost of men's failure.¹⁰⁴ However, there were examples of more enlightened views, such as those voiced by Jacqui Lait MP who stated "I suspect that those young men are still brought up in an atmosphere in which they believe that the only real jobs are physical, heavy jobs".¹⁰⁵ The issue was not one of women and girls 'taking' jobs, but rather that occupational segregation and gender stereotypes, were standing in the way of men too.



(Fig 1) Phillips M., Death of the Dad
The Observer (2 November 1997).

Furthermore, in articles such as '*Death of the Dad*'¹⁰⁶ the print media pushed ideas of biological determinism, masculine aggression 'repurposed' into 'pro-social purposes'

¹⁰⁴Panorama: Men Aren't Working (first aired 16 October 1995).

¹⁰⁵ HC Deb 07 March 1996 vol 273, col 527-8.

¹⁰⁶ Phillips M., Death of the Dad *The Observer* (2 November 1997) as seen in Figure1 above.

within the workforce.¹⁰⁷ The article also discussed the ‘growing crisis among men’ linked to fatherhood, employment and the outperformance of girls at school. Fuelling the anti-feminist, or even anti-women flames, particularly notable when the article ends on a note which speaks of ‘destroying the male role’ and the ‘alarming implications for the social order’ that this would have.¹⁰⁸ This not only gives insight into the extent to which the notion of a ‘masculinity crisis’ was feared, but that it was the fault of women and girls, and the progress they were making.

6.3.7 Feminisation and Macho Culture

Employment in the 1990s was problematised by the contrasting arguments of the feminisation of employment and macho work culture. The privatisation of state services since 1971 resulted in an “explosion... [of] low-level service work for women”.¹⁰⁹ It was now men who ‘struggled’ to enter these new ‘feminine’ jobs without risking their masculinity. The growth of ‘feminine’ service/care industries and the decline in ‘masculine’ manufacturing jobs meant that men were increasingly moving into ‘women’s jobs’.¹¹⁰ This shift was particularly problematic in that in adopting a traditionally ‘feminine’ job such as nursing “men... have repeatedly noted challenges and threats to their masculine identity”,¹¹¹ conflicting with their masculine breadwinner status.

¹⁰⁷ Biological determinism having been a key factor in supporting the gendered public/private dichotomy as discussed in [2.4].

¹⁰⁸ Phillips, (n106).

¹⁰⁹ Crompton R. & Harris F., ‘Women’s Employment and Gender Attitudes: A Comparative Analysis of Britain, Norway and the Czech Republic’ (1997) 40 *Acta Sociologica* 183, 191. Jobs such as hospital cleaning and school meals service.

¹¹⁰ Male employment in defeminising female jobs increased by 25% in the 1990s although this only accounted for 6% of all working men it was set to increase: Bruegel I., ‘No More Jobs for the Boys? Gender and Class in the restructuring of the British Economy’ (2000) 71 *Capital & Class* 79, 90.

¹¹¹ Mc Dowell J., ‘Masculinity and non-traditional occupations: Men’s talk in women’s work’ (2015) 22(3) *Gender, Work and Organisation* 273, 291.

In this same period there was an increasingly ‘macho’ culture within many industries, where the ‘long hours’ culture and enduring high levels of stress were seen as requirements for employees who wished to progress.¹¹² This sort of working environment has been critiqued for being incompatible with work/family balance. Such working environments reinforce the gendered notion of employment as “women who wanted to get on remained childless and were still expected to behave as one of the boys”.¹¹³ Women who wanted to be truly economically dependent, working outside of traditionally feminine jobs were not women at all, but were to act as men; to forfeit a family in order to have success and live as an individual. The fear of unemployment meant that those who did have jobs were desperate to keep them, regardless of the low level of income this might equate to.

6.4 Maternity Provisions

“In the 1980s Britain became the only member state in Europe to have decreased maternity rights”.¹¹⁴ Conservative ideology perceived measures which protected employees such as maternity leave/pay or unfair dismissal as increasing the costs to employers and reducing the flexibility of the market.¹¹⁵ Thus one of the key aims of limiting such rights was to restrict the number of people relying on the state. This section explores the series of Acts which limited maternity leave/pay and unfair dismissal, eroding the progress which had been made in the provisions enacted in the

¹¹² Lewis S., ‘Organizational change and gender equity: Case studies from the UK’ in Hass L., Hwang P., & Russell G., (Eds.) *Organizational change and gender equity* (London: Sage, 1999), 202.

¹¹³ Graycar R., & Morgan J., *The Hidden Gender of the Law* (2nd Ed) (Sydney: Federation Press, 2002), 89.

¹¹⁴ Browne J., *Sex Segregation: Inequality in the Labour Market* (Bristol: Polity Press, 2006), 150.

¹¹⁵ Thane P., ‘The ‘Welfare State’ and the Labour Market’ in Crafts N., Gazeley I., & Newell A., *Work and Pay in Twentieth Century Britain* (Oxford: Oxford University Press, 2007), 197.

1970s.¹¹⁶ This is then followed by an examination of the resurgence of maternity rights, and the introduction of shared parental leave in the 1990s.

6.4.1 Maternity Rights in the 1980s

Statutory Maternity Pay

In 1987 the Statutory Maternity Pay Provisions (SMP) replaced the previous maternity pay regime.¹¹⁷ The new scheme was considered “too complex” and concerns were raised about making employers, who were “often ill-informed about the payment of maternity pay”¹¹⁸ responsible for making these payments. The claims of complexity arose as a result of the tiers of entitlement based on length of service.¹¹⁹ In addition, the eligibility criteria for SMP was further qualified by the requirement for women to have received normal weekly earnings for the last eight weeks of that period, which could not be less than the lower earnings limit for National Insurance contributions.¹²⁰ The requirements relating to National Insurance Contributions rendered a considerable number of women ineligible, especially those in part-time work. By the end of the 1980s almost 50% of women’s contributions were below the lower limit and so would not be entitled to receive SMP.¹²¹

Rather than acting as a form of support for those who needed it, the new scheme was constructed as “a form of reward for continuous service with one employer for a period

¹¹⁶ See [5.3].

¹¹⁷ Social Security Act 1986, s46-50. The regime prior was discussed in [5.3].

¹¹⁸ Wyvill V., ‘Maternity Rights: Equal Opportunities at Work’ (1989) 31(3) *Managerial Law* 1, 7-8.

¹¹⁹ The basic entitlement for SMP consisted of a flat rate paid for 18 weeks, this applied to women who had worked for 26 weeks before the 14th week prior to confinement. In order to qualify for the higher rate a woman would need to work for two years (full-time), or five years (part-time). This would entitle them to a payment of 90% of their wages for six weeks, and a flat rate for 12 weeks: Social Security Act 1986, s48.

¹²⁰ Social Security Act 1986, s48(4).

¹²¹ Lister R., *Women’s Economic Dependency and Social Security* (Manchester: EOC, 1992), 27.

of years”.¹²² This notion of ‘reward’ mirrored the Conservative market-oriented ideology which focussed on individualistic self-sufficiency.¹²³ By the end of the 1980s only 40% of mothers received some form of maternity pay.¹²⁴ When combined with the abolition of the universal maternity grant meant that women were worse off under the new provisions. Overall, maternity amendments under the Conservative government “restricted women’s maternity rights or rendered them more complex”.¹²⁵

Maternity Grant

In this same period, the universal provision of maternity payments, the maternity grant, was replaced by discretionary payments from the social fund.¹²⁶ These payments were made “to meet, in required circumstances, maternity expenses”.¹²⁷ They were usually linked to the receipt of other benefits, meaning that there was some level of provision for women who were low/non-earners. However, placing the decision as to how much/whether a payment would be made with a social fund officer added uncertainty to the financial position of pregnant women. Eradicating the flat rate meant that “the new provisions offer[ed] less in real terms even to those who are in the most need”, even those awarded the highest rate under new system would be entitled to less than they would have been entitled to prior.¹²⁸ It was estimated that 94,000 mothers would

¹²² Department of Health and Social Security., *Reform of Social Security Volume II* (Cmnd 9518, 1985).

¹²³ See Chapter 2.

¹²⁴ McRae S., *Maternity rights in Britain: the PSI report on the experience of women and employers* (London: Policy Studies Institute, 1991), 85.

¹²⁵ Kamerman S. B. & Kahn A. J., *Family Change and Family Policies in Great Britain, Canada, New Zealand and the United States* (Oxford: Clarendon Press, 1997), 50.

¹²⁶ Social Security Act 1986, s32(2)(2) and s32(2).

¹²⁷ Social Security Act 1986, s32(2)(a).

¹²⁸ Conaghan J., ‘Social Security: Statutory Maternity Pay Under the Social Security Act 1986’ (1987) 16 *Industrial Law Journal* 125, 127.

lose the right to maternity allowance and only 20,000 were expected to gain under these new provisions.¹²⁹

The decreasing financial support for women from the state, combined with the lack of childcare provision, reinforced the housewife/breadwinner model of the family by making women economically dependent on men.¹³⁰ Such concerns were raised by the NCCL who characterised the provisions as “reflecting a Victorian view of women as subservient, dependent and unequal”.¹³¹ It also reflected the notion that motherhood and employment were incompatible, which had been dominant in decades prior.¹³²

Maternity Leave and Dismissal

Maternity leave provided job security for women by allowing them to return to their job after the birth of their child. However, the inclusion of “where it is reasonably practicable”¹³³ in the Employment Act 1980, undermined the right to reinstatement. It also allowed for employers to offer women a different job, if a woman rejected this offer, she effectively revoked her right to return.¹³⁴ This provided an additional loophole for employers to utilise and lessened the protection of women. Small businesses were made entirely exempt from providing the right to return.¹³⁵ The White Paper ‘Building Businesses... not Barriers’ proposed the expansion of this exception for firms with less

¹²⁹ Lister R., *Of Little Benefit: A Critical Guide to the Social Security Act 1986* (London: Social Security Consortium, 1986).

¹³⁰ See [6.8].

¹³¹ *The Guardian*, June 10, 1985 as cited in Conaghan, (n128), 126.

¹³² As discussed in [5.2].

¹³³ Employment Protection (Consolidation) Act 1978 amended to include s56A (2)-(4) by Employment Protection Act 1980 s12.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

than ten employees, a clear policy statement in favour of employers and the market, at the expense of women.¹³⁶

The new provisions also required women to give written notice of their intention to return 21 days prior to their proposed return date, without which their right would be forfeited.¹³⁷ The lack of protection for pregnant women and new mothers regarding dismissal was worsened as the qualifying period claims was increased from 12 months to two years (full-time) or five years (part-time women).¹³⁸ Concerns related to unemployment provided additional impetus for the restriction of women's rights. "The government cannot alone create jobs... It is important that we should take all reasonable steps to remove the barriers that might be standing in the way of new jobs being created".¹³⁹ Those barriers protecting women were seen as detrimental to the enterprise culture which was central to many of the provisions enacted by the government.

Women's employment issues were a secondary concern in a climate in which employment conditions and prospects for men were declining. The changes which had been made to the original equality legislation, though not without their problems, embodied the idea that women "could have 'equality' if they continued to care for the family".¹⁴⁰ This is clearly a flawed interpretation of equality, attempted to limit women to the private sphere once again. Women were to pay the price for men's market freedoms, the idea that the state must step away from welfare meant that women were

¹³⁶ Department of Employment., *Building Businesses... not Barriers* (Cmnd 9794, London HMSO, 1986).

¹³⁷ Employment Protection Act 1980 s11(1)(d) amending Employment Protection (Consolidation) Act 1978, s33.

¹³⁸ Unfair Dismissal (Variation of Qualifying Period) Order 1985.

¹³⁹ HL Deb 16 May 1985, vol 463, col 1297.

¹⁴⁰ Lovenduski J. & Randall V., *Contemporary Feminist Politics: Woman and Power in Britain* (Oxford: Oxford University Press, 1993), 295.

to fill this gap – reinforcing their role as carer, whether or not this fit with the shifting nature of the family at the time.

The approach of the Conservative government in this regard provides an interesting historical example of a formal equality approach in action. Reflecting on the impact of Thatcherism, Douglas noted that it had

“done nothing concrete and positive to enhance women's rights to equality indeed, it has made things worse... because it prefers to ignore issues of gender entirely. When it comes to employment, women are regarded in exactly the same light as men, with no account taken of the reality of their economic and social circumstances”.¹⁴¹

In refusing to acknowledge both social and biological differences between men and women, and reinforcing the division the public/private spheres, the employment legislation of the 1980s significantly disadvantaged women who sought work.

6.4.2 Maternity Provisions in the 1990s

Maternity Leave

From 1993-4 a series of Acts were passed with the intention of extending maternity leave, making it more inclusive.¹⁴² These changes formed the basis of the maternity leave scheme implemented under the Employment Rights Act (ERA) 1996.¹⁴³ Under the 1996 Act there were three types of maternity leave: ordinary, compulsory and additional.¹⁴⁴ Compulsory leave refers to the two weeks leave which must be taken for

¹⁴¹ Douglas G., ‘Family Law under the Thatcher Government’ (1990) 17(4) *Journal of Law and Society* 411, 421.

¹⁴² This was done in order to adhere to the provisions in the Pregnant Workers Directive, EC Directive 92/85 1994; Changes to maternity rights were contained within the Trade Union and Employment Rights Act 1993 and Maternity (Compulsory Leave) Regulations 1994 (SI 1994/2479). Changes to maternity benefits were contained within the Maternity Allowance and Statutory Maternity Pay Regulations 1994 (SI 1994/1230).

¹⁴³ Employment Rights Act 1996 Part VIII

¹⁴⁴ ERA 1996, s 71; ERA 1996, s 72; ERA 1996, s 73.

health and safety reasons. Ordinary leave under the Pregnancy Directive required a minimum period of 14 weeks.¹⁴⁵ Additional leave was available to women who had two years' continuous employment to qualify.¹⁴⁶

The new Labour government, in the White Paper *Fairness at Work*, stated their intention to create 'Family Friendly' employment policies and, in order to facilitate this, maternity leave provisions again needed to be improved and simplified.¹⁴⁷ Following on from this, the ERA 1999 was implemented, amending the ERA 1996 and introducing the Maternity and Parental Leave Regulations.¹⁴⁸ These changes meant that ordinary maternity leave was extended to 18 weeks from 14 to bring it in line with maternity pay provisions, and the requirements to qualify for additional maternity leave were reduced to one year.¹⁴⁹ All women, regardless of length of service were entitled to ordinary maternity leave which was the first 26 weeks and employees no longer had to notify their employer of their intention to return. The second 26 weeks was considered additional maternity leave providing the ability on qualification for 52 weeks maternity leave in total.¹⁵⁰

Maternity Allowance/Pay

As a result of the Maternity Allowance and Statutory Maternity Pay Regulations 1994 the provisions relating to SMP were changed. The qualification period for SMP was more easily satisfied.¹⁵¹ The rate of pay was for the first 6 weeks, 90% of their rate of

¹⁴⁵ Council Directive 92/85/EEC Art 8.

¹⁴⁶ Maternity and Parental Leave Regulations Act 1999, Regulation 5; ERA 1996, s 79(1)(b)

¹⁴⁷ Lourie J., *Fairness at Work* (Cm 3968, 1998), 54.

¹⁴⁸ 1999 SI No 3312.

¹⁴⁹ Maternity and Parental Leave Regulations 1999 SI No 3312, Regulation 7(1); Regulation 5; Regulation 7(4) Maternity and Parental Leave Regulations 1999 SI No 3312.

¹⁵⁰ ERA 1996 s71(4) as amended by the 1999 ERA (Sch 4).

¹⁵¹ The qualification period of 26 weeks for SMP remained but this period was to have occurred within 66 weeks rather than 52: Social Security Contributions and Benefits Act 1992, s164.

pay, followed by 12 weeks at a flat rate which was in line with statutory sick pay. As a result of these legislative changes more women were eligible for maternity leave and a higher rate of maternity pay was available. The new provisions would

“benefit around 285,000 women a year. Some 90,000 women a year will be entitled to the higher rate of statutory maternity pay... for the first time. Women will have greater freedom about when to start their maternity leave. At the same time the scheme has been simplified to make it easier for employers to administer”.¹⁵²

As such the position of mothers in the employment sphere were improving. With this additional freedom, women could combine motherhood and employment without the same level of dependence on their partner.

Parental Leave

The introduction of parental leave, available to both fathers, mothers and adoptive parents aimed to “help working parents balance their work and family responsibilities”.¹⁵³ The provisions allowed for unpaid leave to be taken where a mother or father had been employed for one year meaning that qualifying criteria was considerably more easily fulfilled than those concerning maternity.¹⁵⁴ Some of the attitudes towards the introduction was considerably more enlightened than those made in relation to the maternity provisions. Lord Sainsbury noted that

“We live in a changing society. The traditional image of the breadwinner husband and the home-making wife will become an outdated concept as we move into the 21st century. More women are entering the labour market, and

¹⁵² HL Deb 03 May 1994, vol 554, col 1079.

¹⁵³ HL Deb 09 December 1999, vol 607, col 1447.

¹⁵⁴ Maternity and Parental Leave Regulations 1999 SI No 3312 s13 & 14; and ERA 1999 S76.

more men want to play a role in caring for their children. Family friendly employment practices can help people care for their family without risk to their jobs”.¹⁵⁵

Emphasising the compatibility of motherhood and employment, and denouncing the housewife/breadwinner construction of the family.

The fact that parental leave was unpaid, led to concerns that “only people who can afford to take advantage of the Government's policy on parental leave are well-off and professional people who are on the sort of salaries that allow them to take their parental leave entitlement”.¹⁵⁶ It was also stated that the take-up among fathers will be particularly low given that the leave is unpaid.¹⁵⁷ Both the difference in attitudes identified by the legislature, the simplicity of the provisions and the easily fulfilled qualification criteria reflect the minimal ‘economic burden’ placed on employers as a result of the minimal absence allowed by virtue of these provisions.

Overall, the increased protection of mothers in employment in the 1990s was a welcome departure from the restrictions imposed by the Conservative government in the decade prior. Through the implementation of Parental leave and the extension of maternity rights, the breadwinner/housewife model of the family was being questioned, and the economic burden placed on women by virtue of their ‘role’ as mother was lessened.

¹⁵⁵ HL Deb 09 December 1999, vol 607, col 1450.

¹⁵⁶ HC Deb 05 November 1999, vol 337, col 605.

¹⁵⁷ HC Deb 05 November 1999, vol 337, col 609.

6.5 Restructuring the Family

This section examines the way in which the ‘family’ was perceived and treated over the 1980s-1990s, focussing on the increasing number of ‘illegitimate’ families, the attempts for the Conservatives to revive traditionalist values, and Labours support for marriage.

6.5.1 Illegitimacy & Marriage

In 1983 leaked government papers on one parent families were filled with mentions of the “illegitimacy and immorality” of said families.¹⁵⁸ The family policies with regard to benefits and maternity as discussed above, go some way in demonstrating the ways in which the Conservatives attempted to maintain the traditional family unit. However, by the end of the 1980s the stigma attached to illegitimacy, divorce and infidelity was near to non-existent as reflected in the development of legislation surrounding those issues. The time limits relating to divorce were reduced, and some of the disadvantages tied to ‘illegitimacy’ were eliminated.¹⁵⁹ It was at this time that pre-marital cohabitation began to be increasingly commonplace, lessening the stigma attached to ‘living in sin’.¹⁶⁰

6.6.2 Conservative ‘Back to Basics’

The early 1990s continued the period of ‘moral panic’ surrounding single mothers.¹⁶¹ This was covered by the media with various inflammatory headlines such as ‘Single Parents Cripple Lives’.¹⁶² As a response to this ‘panic’, the Conservatives ‘Back to Basics’ campaign stressed a ‘return to family values’ and castigated the role of the

¹⁵⁸ Macaskill H., *From the Workhouse to the Workplace: 75 Years of the One Parent Family Life 1918-1993* (London: NCOFP, 1993), 44.

¹⁵⁹ Family Proceedings Act 1984; Family Law Reform Act 1987.

¹⁶⁰ See Haskey J., ‘Spouses with identical residential addresses before marriage: an indicator of premarital cohabitation’ (1997) 89 *Population Trends* 13.

¹⁶¹ Chambers S., *Representing the Family* (London: Sage, 2001), 147.

¹⁶² ‘Single Parents Cripple Lives’ *Daily Telegraph* (2 August 1991).

welfare state in providing housing benefit and welfare to lone mothers.¹⁶³ The “moral and traditionalist”¹⁶⁴ discourse utilised by the government sparked political campaigning seeing to reinforce the centrality of the family. For example, the Conservative Family Campaign argued the family as under attack with “too easy divorce” and social security and tax systems which “promote... unnatural arrangements... fundamentally by undermining the role of men in society today”.¹⁶⁵

These notions were also seen from within the party itself. The Minister of Housing in particular scapegoated lone mothers for issues surrounding a lack of council housing

“How do we explain to the young couple who want to wait for a home before they start a family that they cannot be rehoused ahead of the unmarried teenager expecting her first, probably unplanned, child”. Social security benefits were reviewed with the goal of “tackling incentives to become or remain a lone parent”.¹⁶⁶

Though there were examples of media coverage which acknowledged that lone mothers were subject to vilification by the government, such as ‘Tories Target Lone Mothers’, on the whole, lone mothers in particular were “subject to much adverse comment from politicians, media and some policy ‘think tanks’ and highly negative images of these families have been very strong in the UK”.¹⁶⁷

¹⁶³ Associated with John Major’s Speech 1993 Conservative Party Conference Blackpool 8 October: see Robert P., *Revisiting the Welfare State* (Maidenhead: McGraw-Hill International, 2007), 97.

¹⁶⁴ Epstein D. & Johnson R., *Schooling Sexualities* (Buckingham: Open University Press, 1998), 75.

¹⁶⁵ Innes S., *Women, Change and Challenge in the 1990s* (London: Chatto & Windus, 1995), 205.

¹⁶⁶ *The Guardian* (9 November 1993) as cited in Pascall G., ‘Women and the Family in the British Welfare State: The Thatcher/Major Legacy’ (1997) 31(3) *Social Policy and Administration* 290, 293.

¹⁶⁷ Wintour P., ‘Tories Target Lone Mothers’ *The Guardian* (14 Aug 1995); Millar J., ‘Changing Obligations and Expectations: Lone Parenthood and Social Policy in Employment’ in Boje T., Leira A., *Gender, Welfare State and the Market: Towards a New Division of Labour* (London: Routledge, 2000), 250.

Lone mothers were both perceived and constructed as a social problem, seeing them at fault for their own and their children's deprivation. This notion of depravation is then linked to the social cost of lone mothers and anti-social behaviour, as it has been since lone mothers became a focus of political and cultural discourse.¹⁶⁸ One of the key issues was the way in which lone mothers were "characterised and caricatured as 'welfare mothers'".¹⁶⁹ The economic cost of single parenthood was problematised, and seen as leading to those social problems which were also rooted in 'unstable' families, those outside the institution of marriage. Such images were adopted and reinforced by the media coverage of single mothers with headlines such as "Wedded to Welfare"¹⁷⁰ appearing with increasing frequency. The Panorama programme "Babies on Benefits"¹⁷¹ which portrayed lone mothers as young and irresponsible who were having children in order to obtain benefits and council housing also contributed to this perception. It used "inflammatory and derogatory" language to describe the 'case studies' involved and used "misleading [and]... unrepresentative"¹⁷² figures in order to enflame the pre-existing negative perception of lone mothers.

One of the moral fears associated with lone mothers was that

"Families without fathers produce egoists. We become a society of fatherless families... When the process is far enough spent, by what magic then will we

¹⁶⁸ Giddens A., *Sociology* (Cambridge: Polity Press, 1997), 155.

¹⁶⁹ Larsen, (n76), 233.

¹⁷⁰ *Sunday Times* 11 July 1993 as cited in Mann K. & Roseneil S., 'Some Mothers do 'ave 'em': backlash and the gender politics of the underclass debate' (1994) 3(3) *Journal of Gender Studies* 317, 322.

¹⁷¹ Panorama: Babies on Benefits, (first aired 20 September 1993).

¹⁷² Edwards R. & Ribbens J., *Feminist Dilemmas in Qualitative Research: Private Lives and Public Knowledge* (London: Sage, 1998), 187. See also Broadcasting Complaints Commission., *Complaint from the Council for One Parent Families – Adjudication* (London: Broadcasting Complaints Commission, 1994).

be able to produce the dutiful citizens who will protect their partners and their children from their economic and cultural disadvantages?”¹⁷³

Emphasising the necessity for a male breadwinner to support the family.

The Child Support Act 1991 was the legislative expression of the notion that “parenthood is for life... Legislation cannot make irresponsible parents responsible. But it can and must ensure that absent fathers pay maintenance for their children”.¹⁷⁴ Despite the Act having seemingly been created in order to support single mothers, in practice placed more emphasis on cutting state benefits by making fathers responsible for the maintenance of their children. This can be seen as part of the attempts to reduce reliance on the welfare state and a “renewed move towards men’s role as the breadwinner”.¹⁷⁵

Though these reforms in some ways support the position of lone mothers, they also attempt to restrict changes to the familial structure so far as is possible, rather than adapting to and accepting the change. As Millar puts it,

“what these proposals do is to try and reproduce traditional family and gender relationships after couples have separated. The separated family is treated almost as if the relationship had not broken down at all”.¹⁷⁶

The men remain breadwinners, financially providing for the family, though absent from the home, and the mothers continue as the primary caregiver. It replicates the gender

¹⁷³ Dennis, N. & Erdos G., (eds) *Families Without Fatherhood* (London: Institute of Economic Affairs 1992), 71.

¹⁷⁴ Margaret Thatcher speaking at the Pankhurst Lecture to the 300 Group, London 18.7.90, reported in *The Independent* (19 July 1990).

¹⁷⁵ Larsen, (n76), 233.

¹⁷⁶ Millar, ‘State, Family and Personal Responsibility: The Changing Balance for Lone Mothers in the United Kingdom’ (n70), 33.

roles within the family even without the traditional structure of the family “it is clearly expected that the Child Support agency should turn fathers back into breadwinners, making them support lone mothers – who are 90 per cent of caring parents”.¹⁷⁷ That is not to say that there ought not to be support for those providing the caregiving role, but rather, the method adopted in the Child Support Act merely replicates a model based on reliance on a breadwinner and creating a faux-marriage.

The extension of Family Credit, a wage supplement paid to low-paid workers with children, to part-time workers in 1992 aimed at incentivising the combination part-time work and benefits, lessening the economic burden on the state. However,

“while Family Credit may encourage lone parents to go out to work, it encourages married mothers to stay at home and look after their children. If they take up work, they lose 70p in Family Credit for each pound they earn before counting work expenses”.¹⁷⁸

These legislative changes though appearing to readdress the incompatibility between parenting and employment, in practice reinforced the dichotomy between carer and worker. Lone mothers in particular faced a double burden in that they have traditionally been excluded from the labour market by virtue of their gender which is exacerbated when their role as mother is not supported by the state or a breadwinner.

Labour Supporting Marriage?

Attempting to distance his own policies from those of the previous government, Blair stated:

¹⁷⁷ Pascall, (n166), 293-4.

¹⁷⁸ Marsh A. & McKay S., *Families Work and Benefits* (London: psi, 1993), 14.

“I have no desire to return to the age of Victorian hypocrisy about sex, to women’s place being only in the kitchen, to homophobia or to preaching to people about their private lives as the ill-fated ‘back to basics’ campaign by the Conservatives attempted to do”.¹⁷⁹

Despite this, the rhetoric of the Labour manifesto was not dissimilar to that of the Conservative government with regard to the family. Statements such as their intent to “uphold family life” and the notion that “families are the core of our society” following on with concerns that “the breakdown of family life damages the fabric of our society”.¹⁸⁰ However, this was supplemented by statements such as “The clock should not be turned back. As many women who want to work should be able to do so”.¹⁸¹ Indicating a change of step from the attitude of the government(s) which preceded them.

Despite the fact that 22% of children were born to cohabiting parents and 15% were born to lone mothers the government continued to focus on protecting marriage.¹⁸² The *Supporting Families* Green Paper included numerous suggestions which aimed to ‘support marriage’. One element was that couples planning to marry would be given written guidance as to their rights and responsibilities and those who wished to divorce would be expected to attend meetings to establish if the marriage could be saved and how it might best be handled if this was not the case. Indeed, the intention of “strengthening marriage”¹⁸³ formed the title of the fourth chapter and mentioned numerous times throughout the paper. It did however, recognise that “strong and

¹⁷⁹ Quoting Blair’s appearance on Radio 4 (14.10.16); White M., ‘Family Key to Society, says Blair’ *The Guardian* Oct 15 1996, 1.

¹⁸⁰ Labour Party Manifesto: New Labour because Britain Deserves Better, 1997.

¹⁸¹ *ibid.*

¹⁸² Figures for 1997 in *Social Trends* vol 29 (London: HMSO, 1999), 50.

¹⁸³ Home Office., *Supporting Families: A Consultative Document* (London: HMSO, 1998), para 4.1.

mutually supportive families and relationships outside marriage” and that “many unmarried couples remain together... and raise their children every bit as successfully as married parents”.¹⁸⁴ Despite this being a tokenistic reference, the remainder of the document made little mention of unmarried couples and provided no means of ‘strengthening’ such relationships. Overall, the paper was merely a document detailing “The Government’s make ’em marry crusade”.¹⁸⁵ Meaning that, though there was an increased recognition of the existence, and validity of different family forms, there was little action to support anything that was not a legal marriage.

Part II of the Family Law Act 1996, which was to be implemented in 2000, incorporated the elements of the Green Paper discussed above and the inclusion of no-fault divorce. It echoed the same idea that the “institution of marriage” is to be “supported” and that where a marriage “may” have broken down that the parties should be “encouraged to take all practicable steps”¹⁸⁶ in order to save the marriage. Again, this saw divorce provisions “situated within a piece of legislation that explicitly declared its support for marriage, and which imposed a framework of mechanisms designed to encourage couples to stay together”.¹⁸⁷ Despite that the provisions in Part II, including no fault divorce, were not implemented and were subsequently repealed, the government stated that they were still committed to “saving saveable marriages”.¹⁸⁸

The supposed support labour had for marriage was called into question when the Married Couple’s Allowance was abolished in 2000 which was the only remaining

¹⁸⁴ *ibid*, para. 4.7.

¹⁸⁵ Campbell B., ‘Oh yes you do’ *The Guardian* (5 November 1988).

¹⁸⁶ Family Law Act 1996, S1(a) s1(b).

¹⁸⁷ Hasson E., ‘Setting a Standard or Reflecting Reality? The ‘Role’ of Divorce Law, and the Case of the Family Law Act 1996’ (2003) 17(3) *International Journal of Law, Policy and the Family* 338, 338.

¹⁸⁸ Draft legislation on Family Justice Explanatory Notes Cm 8437 (2002), 46.

“relic” of the joint taxation system.¹⁸⁹ A result of which was a reduction in the tax benefits derived from marriage. The only remaining difference between unmarried and married couples (within this context) were for married couples which remained childless whose income tax was only marginally less.¹⁹⁰ As a result of which the traditionalists in the opposition made claims that “the Government have attacked marriage”.¹⁹¹

Similarly, the expectation that a Labour government would support the plight of single mothers rather than castigate them seemed to be short lived when in one of their first acts they removed the extra allowances for lone parents.¹⁹² This caused controversy not only publicly but within the party itself as many MPs had opposed the proposal when it had been introduced by the conservatives

“The way to get lone mothers out of poverty and cut spending on benefits for them is not by cutting the amount on which they have to live year by year and plunging them further into poverty”.¹⁹³

What was seen as most problematic was that the cuts to benefits preceded the measures which “make work pay” or in some cases, “make work possible”.¹⁹⁴ These measures include the changes to the welfare system such as the introduction of WFTC and the increased provision of childcare, and the New Deal for Lone Parents.¹⁹⁵ The New Deal

¹⁸⁹ Himmelweit S., ‘Making Visible the Hidden Economy: The Case for Gender-impact Analysis of Economic Policy’ (2002) 8(1) *Feminist Economics* 49, 68.

¹⁹⁰ Evans M. & Williams L., *A Generation of Change, a Lifetime of Difference? Social Policy in Britain Since 1979* (Bristol: Polity Press, 2009), 93.

¹⁹¹ HC Deb 18 July 2000, vol 354, col 282.

¹⁹² For example, the removal of the One Parent Benefit in 1998.

¹⁹³ HC Deb 28 November 1996, vol 286, col 500.

¹⁹⁴ Millar J., ‘Adjusting Welfare Policies to Stimulate Job Entry: The Example of the United Kingdom’ in Sarfati H. & Bonoli G., (eds) *Labour Market and Social Protection Reforms in International Perspective: Parallel or Converging Tracks* (Aldershot: Ashgate, 2002), 267.

¹⁹⁵ Jarvis T., *Welfare-to-Work: The New Deal* (House of Commons Research Paper 97/118, 12 November 1997), 13.

sought to move lone parents into the labour market in order to increase employment levels, reduce expenditure on welfare and improve the economic situation of women, though the latter is usually framed within the context of children. This was done through inviting those with school age children to their local job centre and offering help and advice on jobs, training and childcare.¹⁹⁶ However there were concerns that due to what Duncan and Edwards term “gendered moral rationalities”,¹⁹⁷ which refers the cultural attitudes about gender and parenting roles which are thought to have more influence on employment decisions than economic factors. Meaning that some women, will feel morally obliged to remain in the home, rather than work due to the historical gendered division of parenting roles and the backlash faced by mothers who ‘abandon’ their children.

This links to the social resentment towards many of the policies within this decade, and in places lack of success of some of the family law legislation in the 1990s as it was imposed “from the top down” rather than enacted in response to social pressure, “from the bottom up”.¹⁹⁸ This can be seen in the attempts to mould social practices, and uphold marriage as the ideal conception of the family despite increasing social changes. Some of this discontent can be seen with regard to the changes to divorce with headlines such as “Divorce: A Law Nobody Wants”.¹⁹⁹ However, in reality “legal marriage, while still an important institution bringing real advantages to many, is no longer essential to the legal concept of a family”.²⁰⁰ Instead what was becoming more important was

¹⁹⁶ *ibid.*

¹⁹⁷ Duncan S. & Edwards R., ‘Lone mothers and paid work; rational economic man or gendered moral rationalities’ (1997) 3(2) *Feminist Economics* 29.

¹⁹⁸ Smart & Neale, *Family Fragments?* (n97), 175.

¹⁹⁹ Smithers, R., ‘Divorce: A Law Nobody Wants’ *The Guardian* (18 June 1996).

²⁰⁰ Hale B., ‘The 8th ESRC Annual Lecture 1997 Private lives and public duties: What is family law for?’ (1998) 20(2) *Journal of Social Welfare and Family Law* 125, 133.

parenthood. In “witnessing a renewed emphasis on the family as the one institution which should not change... it is taken for granted that everything else around the family is changing radically”.²⁰¹ Despite the changing nature of the family, overall successive governments “appear to stick to an unrevised family ideology – i.e. unchanged relations between generations – as if nothing had happened in the world around us”.²⁰² Upholding marriage in their rhetoric, and in their legislative action.

6.6 Cohabitation: An Overview

The economic turbulence of the 1980s and 1990s and increasing house prices meant that again, cohabitation was on the rise. Although there were some rights afforded to those who “live together as man and wife”, and to “common law wives” within some legislative acts, these still did not extend to property ownership.²⁰³ The increased levels of cohabitation began to be discussed in parliament, yet this did not lead to any policy change, despite it being apparent that the courts approach was confused and inconsistent.²⁰⁴ Where cohabitants, and their growing numbers were discussed, it was done so to induce alarm. This sat alongside a re-emergence of the demonization of cohabitation as the source of increasing “mental cruelty and abuse”,²⁰⁵ and that such couples are unemployed and turn to “mugging, robbery or burglary”.²⁰⁶ As such, though the number of cohabitants were increasing, and there was a generation of people who, for the most part, accepted the practice, this was clearly polarised with those who held views like those above. Coinciding with the resurgence of such views, and the

²⁰¹ Smart C., ‘Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy’ (1997) 26(3) *Journal of Social Policy* 301, 302.

²⁰² Qvortrup J., ‘Childhood and modern society: a paradoxical relationship?’ in Brannen J. & O’Brien M., (eds.), *Childhood and Parenthood*, (London: Institute of Education, 1995), 194.

²⁰³ See for example: Housing Act 1980 s50(3)(b); Social Security Act 1980, s5.

²⁰⁴ See for example: HL Deb 8 March 1982, vol 428, col 42; HL Deb 30 March 1982, vol 428. Col 1282.

²⁰⁵ HL Deb 27 October 1987, vol 489, col 498.

²⁰⁶ HL Deb November 1981 vol 245, col 48.

retirement of Lord Denning who was well known for supporting the plight of cohabiting women, the courts began to undo the progress which had been made.²⁰⁷ This, in combination with the pressure to conform to housewifery and the lack of well-paid work for women left many female cohabitants in a problematic position where their relationship broke down.

During this 1990s, where efforts were made to give protection to those outside of the institution of marriage, even within the context of domestic violence, they were faced with cries from the press, accusing them of ‘sabotaging’ marriage.²⁰⁸ Despite Labour’s promise of a departure from the Conservative approach to the family, their attempts to “uphold family life” though more liberal and accepting towards single mothers and ‘different’ forms of the family, were not the overwhelming re-haul of the system that some had predicted. The dominance of the treasury meant that when considering changes to family policy, the need for the recognition of cohabitants relationships would be measured against the financial cost, with the latter carrying considerably more weight.²⁰⁹ Given that there had already been significant family policy changes, incurring considerable cost, cohabitants were once again, ignored.

6.7 Right to Buy

The “Right to Buy” scheme, introduced in the Housing Act 1980, seemed to be giving people an opportunity which they would otherwise be unable to afford, providing a generous discount to council tenants who wished to purchase their home. Enabling people to own their own home fit with the Conservative ideology of independence and

²⁰⁷ See [5.7.3].

²⁰⁸ Dougherty S., ‘Anger at Bill to “sabotage” marriage’ *Daily Mail* (23 October 1995), 8.

²⁰⁹ See generally Larsen T. P. (et al), ‘New Labour’s Policy Style: A Mix of Policy Approaches’ (2006) 35 *Journal of Social Policy* 629.

the non-intervention/distancing of the State in the lives of individuals which was been propagated at the time. Reasserting the idea of individual self enhancement, seeing “the attitudes of independence and self-reliance that are the bedrock of a free society”.²¹⁰

However, despite the theoretical merits of increasing homeownership, in practice the provisions merely added to the raft of legislation which was making the distinction between the deserving and undeserving poor ever clearer. The ideology behind the “Right to Buy successfully obscured knowledge of persistent market failure and structural inequalities within housing”.²¹¹ There was no real acknowledgement of the risks associated with the scheme, or with the fact that the poorest in society would still be unable to purchase their own homes. “The important point made is that those who fail to become effective consumers are the new socially excluded”.²¹²

The economic incentives which fuelled the Act, was prompted by the intentions to reduce the number of those living in council housing, posing this as a restriction on liberty and self-determination. The true concern was that the spread of council housing was seen as a risk to the private market. The ‘risks’ were instead shifted onto those individuals who were only just able to afford to buy their homes under this scheme. This is due to the fact that those who became owner-occupiers under the Right to Buy scheme were more likely to be marginal than those who would usually purchase property. As such the insecurities involved in home ownership, particularly in times of recession are greater for such a group of people.²¹³

²¹⁰ HC Deb 15 January 1980, vol 976, col 1445.

²¹¹ Carr H., ‘The Right to Buy, the Leaseholder, and the Impoverishment of Ownership’ (2011) 38(4) *Journal of Law and Society* 519, 523.

²¹² *ibid*, 520.

²¹³ Ginsburg N., ‘A Note on Council House Sales’ (1981) 1(2) *Critical Social Policy* 48, 49.

6.8 Case Analysis

The first element of this section examines three of the central cases which allows for the courts return to the formal approach first identified in *Gissing* and *Pettitt* to be traced.²¹⁴ This section ends with a consideration of economic dependency in the light of the restrictive finance based approach which resulted from the cases of *Burns v Burns* and *Lloyds Bank v Rosset*.²¹⁵ This is then followed by a discussion of the key issues which have arisen due to the requirement for the non-owning party to rely on express agreements which focusses on the cases of *Hammond v Mitchell* and *Coombes v Smith*.²¹⁶ Finally, the re-emergence of a fairness based approach which more closely reflects the adoption of a difference approach to equality is then considered with particular reference to *Hammond* and *Midland Bank v Cooke*.²¹⁷

6.8.1 *Burns v Burns* [1984] Ch 317

The flexible interpretation of the CICT developed by Lord Denning during the 1970s was departed from in the case of *Burns v Burns*, signalling a return to an increasingly formal approach to equality within this context. Under *Burns*, in the absence of an express agreement, common intention could only be inferred from financial contributions to the property rendering *feminine* contributions worthless.

²¹⁴ As discussed in [5.7].

²¹⁵ *Burns v Burns* [1984] Ch 317, hereafter *Burns*; *Lloyds Bank plc v Rosset* [1990] 1 AC 107, hereafter *Lloyds*.

²¹⁶ *Hammond v Mitchell* [1991] 1 WLR 1127 hereafter *Hammond*; *Coombes v Smith* [1986] 1 W.L.R. 808, hereafter *Coombes*.

²¹⁷ *Midland Bank v Cooke* (1995) 27 HLR 733 hereafter *Midland*.

As the property was registered in Mr Burns' sole name, Mrs Burns sought to make a claim based on the contributions she had made to the property.²¹⁸ She had contributed to the family by way of her role as mother and 'wife' and had purchased commercial goods, furniture and wallpapered parts of the property.²¹⁹ However, she "made no financial contribution; she had nothing to contribute".²²⁰ Rather than acknowledge the value of the contributions she had made, and the impact of her inability to contribute financially, the court instead reverted to the orthodoxy of *Gissing* and *Pettitt*, with a renewed focus on direct/indirect payments.²²¹ The lack of *masculine* financial contributions led Fox LJ to conclude that there was "nothing at all to indicate that the claimant should have any interest in the property".²²²

Directly addressing the lack of 'value' which *feminine* contributions were deemed to have, the court stated that

"no doubt, that she would do housekeeping and look after the children. But those facts do not carry with them any implication of a common intention that the plaintiff should have an interest in the house".²²³

The execution of 'wifely duties' which she would 'no doubt' perform is deemed insufficient. This same sentiment can be seen when Fox LJ states that

"the mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing

²¹⁸ Note that though referred to and known as Mrs Burns the couple were unmarried. Valarie Burns provides an example of those women who during the 1960s-1970s seeking to hide the 'illegitimacy' of their relationship changed their name (in this case by deed-poll) so as to appear married. This is discussed [5.4.3].

²¹⁹ *Burns v Burns* [1984] Ch 317, 320.

²²⁰ *Burns v Burns* [1984] Ch 317, 327.

²²¹ See [5.7].

²²² *Burns v Burns* [1984] Ch 317, 327.

²²³ *Burns v Burns* [1984] Ch 317, 327.

property rights of either of them”.²²⁴

Though the consideration of the ‘ordinary domestic tasks’ here echoes their use by Lord Denning, the result of their consideration is not one underpinned by motives of fairness or justice.

The gendered construction of the different contributions which men and women would, in the courts view, typically make can be identified in the hypothetical scenario discussed by May LJ:

“that the husband may spend his weekends redecorating or laying a patio is neither here nor there, nor is the fact the woman has spent so much of her time looking after the house, doing the cooking and bringing up the family”.²²⁵

This discussion of *masculine* and *feminine* contributions echoes the continuation of the breadwinner/housewife construction of the family by the courts, despite its increasing inaccuracy in society.²²⁶ In ignoring contributions which are considered *feminine* and instead focussing purely on financial contributions the courts returned to a sameness approach. However, this fails to acknowledge is that financial contributions are not a gender-neutral basis on which to consider intentions concerning a property. The male-bias inherent in the formal approach, which refuses to acknowledge the disproportionate impact which supposedly neutral rules often have on women, and ignores the different position society has placed women who subscribe to gender norms in, does not result in equality in practice.²²⁷ During this period, the focus on financial contributions proved particularly problematic in that it “perform[ed] the twofold function of establishing the

²²⁴ *Burns v Burns* [1984] Ch 317, 331.

²²⁵ *Burns v Burns* [1984] Ch 317, 344.

²²⁶ Albeit *Burns* evidences that there were still such families in this period.

²²⁷ As demonstrated in the historical context above

common intention and showing that the claimant has acted upon it”.²²⁸

Summing up May LJ states that

“when the house is taken in the man's name alone, if the woman makes no ‘real’ or ‘substantial’ financial contribution towards either the purchase price, deposit or mortgage instalments... then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union”.²²⁹

Though seeming to acknowledge the *feminine* contributions made by Mrs Burns, they are deemed not to be ‘real’ or ‘substantial’ reflecting the lack of worth attributed to ‘women’s work’ in the home.

6.8.2 *Grant v Edwards* [1986] 1 Ch 638

Despite the attempts to return to a more restrictive financial approach in *Burns*, the approach of Lord Denning in *Eves* was still considered “a sure foundation for a just decision”²³⁰ in *Grant v Edwards*.²³¹ As such, elements of Lord Denning’s difference based approach survived the restrictive approach in *Burns*. At the outset it is important to note that in *Grant* the absence of ‘relevant’ financial contributions not defeat Mrs Grants claim. She was awarded ½ of the beneficial interest based on inferred common intention. The lies Mr Edwards told Mrs Grant, which formed the basis of this

²²⁸ *Grant v Edwards* [1986] 1 Ch 638, 647.

²²⁹ *Burns v Burns* [1984] Ch 317, 345.

²³⁰ *Grant v Edwards* [1986] 1 Ch 638, 650. Note Mustill LJ also noted that he was “glad” to agree with the order proposed by Nourse LJ as “the conclusion appears just” at 651.

²³¹ Hereafter *Grant*.

‘common’ intention, concerned the reasons which were given for not registering the property in joint names.²³²

Due to the influence of *Eves* on Nourse LJ's decision in *Grant*, the judgment contains a number of gendered constructions of contributions. When discussing conduct which can be considered evidence of detriment it was determined that:

“it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house... she could reasonably be expected to go and live with her lover, but not, for example, to wield a 14-lb. sledge hammer in the front garden. In adopting the latter kind of conduct she is seen to act to her detriment on the faith of the common intention”.²³³

The use of ‘reasonable’ here is premised on gendered assumptions about what a man or woman would generally contribute, drawing on *masculine* act of “wielding a 14-lb sledgehammer”²³⁴ in *Eves* as an example of going beyond what might reasonably be expected from a woman. However, when applying this to the Facts in *Grant*, Nourse LJ instead considered the

“very substantial contribution which the plaintiff made out of her earnings... to the housekeeping and to the feeding and to the bringing up of the children enabled the defendant to keep down the instalments payable under both

²³² Regarding the lies see *Grant v Edwards* [1986] 1 Ch 638, 649 this issue is discussed in detail below; Regarding quantification of $\frac{1}{2}$ see *Grant v Edwards* [1986] 1 Ch 638, 651. Reflecting the approach in *Eves* as discussed in the previous chapter. The use of lies in this time period is discussed in more detail in [6.8.5].

²³³ *Grant v Edwards* [1986] 1 Ch 638, 649.

²³⁴ *Eves v Eves* [1975] 1 WLR. 1338, 1344.

mortgages out of his own income and, moreover, that he could not have done that if he had had to bear the whole of the other expenses as well”.²³⁵

as evidence of detriment. ‘Housekeeping’ and ‘feeding and bringing up the children’ are usually categorised as *feminine* acts. However, the fact that they were fulfilled through financial means, rather than the act of for example childcare, meant that they were considered to have facilitated Mr Edwards payment of the mortgage instalments. This transformed the acts from irrelevant *feminine* contributions, to the equivalent of a *masculine* financial contributions.

Providing further recognition of feminine contributions, Sir Browne-Wilkinson referred to the fact that “contributions by way of labour or other unquantifiable actions”²³⁶ are relevant even where such acts are not directly referable to the acquisition of the property. Thereby giving the courts broad scope in cases involving express agreements when it comes to the determination of acts which constitute detrimental reliance. Yet, this did not go so far as to give them the same weight as financial contributions in establishing common intention, which continues to be a significant hurdle for economically vulnerable claimants. As such, elements of Lord Denning’s difference approach were preserved, albeit in the limited context of detrimental reliance in cases involving express agreement.

²³⁵ *Grant v Edwards* [1986] 1 Ch 638, 649.

²³⁶ *Grant v Edwards* [1986] 1 Ch 638, 647 this is in contrast to the position in cases involving financial contributions as evidence of common intention in which financial contributions are often deemed to have a dual-purpose at 647.

6.8.3 *Lloyds Bank plc v Rosset* [1990] 1 AC 107

The law remained unclear and unsettled after *Burns*. This incentivised the judges in *Rosset* to “circumscribe the ambit”²³⁷ of those contributions which could be taken into consideration. The resultant focus on financial contributions and express intention rendered non-financial and indirect contributions invalid, thus re-establishing the formal approach in *Gissing* and *Pettitt* while making the criteria even more restrictive. *Rosset* concerned a wife who was attempting to defeat the claim of the third-party creditor by means of an overriding interest.²³⁸ To do so she was required to show that she had beneficial interest in the family home which was registered in the sole name of her husband, which she sought to establish on the basis of a CICT.

The unwillingness of the court to accept that “the conversations between the parties concerning into whose name the property was to be transferred and the nature of the joint venture and the purpose of purchasing”²³⁹ the property indicated a common intention between the parties, meant that the focus of proceedings turned to the nature of Mrs Rosset’s other contributions. Particular emphasis was placed on the

“defendant's special skills in painting and decorating over and above those of the average housewife and her indirect contribution to reducing the cost of renovation of the farmhouse by carrying out certain painting and decorating herself”.²⁴⁰

²³⁷ Tee L., ‘Co-ownership and Trust’ in Tee L., (ed) *Land Law, Issues, Debates, Policy* (William Publishing, Devon, 2002), 158.

²³⁸ As per the requirements of the Land Registration Act 1925, s 70(1)(g). After the enactment of the Matrimonial Causes Act 1973, the number of married couples appearing in the courts asserting their interest on the basis of a CICT were limited to similar circumstances.

²³⁹ As cited in *Lloyds Bank plc v Rosset* [1990] 1 AC 107, 130. The court decided that there had been no express agreement on the basis that the trustees of the husband’s family trust fund stipulated that the trust monies would only be released if the property was acquired in the sole name of the husband. The issues with using sole/joint-ownership as determinative of couples true intentions regarding beneficial ownership has been discussed in [4.3.2].

²⁴⁰ *Lloyds Bank plc v Rosset* [1990] 1 AC 107, 130.

At first instance the emphasis placed on how Mrs Rosset had gone beyond those acts performed by ‘the average housewife’, adopting the gendered discourse(s) prevalent in Lord Denning’s difference approach.²⁴¹ In contrast, the House of Lords were unwilling to see those acts as anything more than “the most natural thing in the world for any wife, in the absence of her husband... quite irrespective of any expectation she might have of enjoying a beneficial interest in the property”.²⁴² Under *Rosset*, *feminine* contributions are considered as directly “referable to the mutual love and affection of the parties”²⁴³ rather than an evidencing an intention to share property. The courts had not yet done away with gender stereotypes, Mrs Rosset’s contributions were still judged against what is to be expected of a ‘housewife’. However, rather than use the performance of acts which go beyond the gendered expectations as evidence from which to identify detriment, they instead reverted to a focus on *gender-neutral* financial contributions.

The court expressed their narrow finance-based approach as follows: in the absence of express agreement

“direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust... it is at least extremely doubtful whether anything less will do”.²⁴⁴

This almost exclusive reliance on direct financial contributions though seemingly *gender-neutral*, only provides security for the breadwinner and completely ignores the housewife role traditionally assigned to women. In practice, treating men and women

²⁴¹ As discussed in [5.7].

²⁴² *Lloyds Bank plc v Rosset* [1990] 1 AC 107, 131.

²⁴³ Greer S. & Pawlowski M., ‘Constructive Trusts and the Homemaker’ (2010) 22 *Denning Law Journal* 35, 41.

²⁴⁴ *Lloyds Bank v Rosset* [1991] 1 A.C. 107, 133.

the same under this formal equality approach, leads to injustice for those who ascribe to those traditional gender roles. It proves particularly problematic for women given that it was, and to some extent still is, common for men in relationships to pay for the home due to the structures of “household economies”²⁴⁵ which have been built on the construction of men as providers. It works on the basis of an (inaccurate) assumption that women and men have the same ability to contribute to the acquisition of property, the same balance of power in a relationship so as to allow them to ensure that they secure an express agreement regarding their interest. It ignores that in some circumstances women have been prevented from contributing financially to the property when they have had the ability to do so and that some women still remain unable to do so, either by virtue of their lack of employment, low earnings or due to the fact that the property is already owned by their partner.

6.8.4 Economic Dependency

Despite the increasing frequency at which women were entering the workforce, there were still women who found themselves economically dependent on their partner. Moreover, in a number of the cases reaching the courts at this time, involved periods of cohabitation which had taken place during the 1960s/1970s, in which women’s economic dependence on men had been considerably more severe.²⁴⁶ This made the strict financial approach adopted in *Burns* and *Rosset* increasingly problematic for women.

The most frequently drawn upon example of the dependent woman who was left with nothing after her 20-year relationship broke down is that of Mrs Burns. Mrs Burns had

²⁴⁵ Collier R., *Masculinity, Law and Family* (London: Routledge, 1995), 195.

²⁴⁶ See [5.7], [5.3.5].

not been able to take up paid employment between 1961-1975 as “she could not earn any money when the children were small”.²⁴⁷ On those occasions where she did earn money, as was commonplace during this period, “she was not earning amounts of any consequence”.²⁴⁸ The money which she did earn was put towards the family expenses. She was economically dependent on Mr Burns who owned the home, paid the bills and have her a “generous housekeeping allowance”.²⁴⁹ However, on the breakdown of the relationship, this support, and the belief that this would continue is transformed into considerable disadvantage. The requirements of the CICT at this time were at odds with the nature of women’s employment patterns, (in)ability to contribute and the construction of the breadwinner/homemaker family which the courts maintained as a base for comparison. As Bottomley notes

“Not only was she economically disadvantaged by her role as mother, but she had also clearly seen herself as, and acted as, an economically dependent ‘wife’ who expected to be supported by her partner”.²⁵⁰

Mrs Burns perception of herself, and lack of awareness of her vulnerable position signifies the lack of knowledge which unmarried cohabitants continued to have, further problematising the lack of recognition of *feminine* contributions.²⁵¹

The economic dependence experienced by women in unmarried cohabiting relationships can also be identified in *Coombes v Smith*.²⁵² That case despite involving

²⁴⁷ *Burns v Burns* [1984] Ch 317, 320.

²⁴⁸ *Burns v Burns* [1984] Ch 317, 330. Regarding the circumstances surrounding women’s low rate of pay/lack of employment during this period: see [5.2] and [5.3].

²⁴⁹ *Burns v Burns* [1984] Ch 317, 317.

²⁵⁰ Bottomley A., ‘From Mrs Burns to Mrs Oxley: Do cohabiting women (still) need marriage law?’ (2006) 14 *Feminist Legal Studies* 181, 190 Belief that such support would continue, and that as a common law wife they had an interest can also be seen in *Hammond v Mitchell* [1991] 1 W.L.R. 1127, 1132. “in her heart she believed she did have an interest, and that was enough for her”.

²⁵¹ Continuing on from the common law marriage myth.

²⁵² *Coombes v Smith* [1986] 1 W.L.R. 808.

an unsuccessful claim in proprietary estoppel, still provides insight into a number of the discourses surrounding the nature of relationships during this period, and as will be discussed below, the issue of communication between couples. In *Coombes v Mr Smith*, despite only ‘visiting’ the property and never moving in with his ‘mistress’ paid all of the household bills and provided her with an allowance.²⁵³ After the birth of their child in 1975 “she did not look for a job... this was by arrangement with the defendant”.²⁵⁴ The fact that there was an ‘arrangement’ with this man, who was financially supporting her, that she would not work and would instead remain a ‘housewife’ demonstrates the extent to which she was completely dependent on this man for her home, and the upkeep of herself and her child. Despite acknowledging that there was an ‘agreement’ between the couple, this was considered as an insufficient base for her claim. In addition, the feminine acts which underpinned the evidence of detrimental reliance: her role as mother and housewife, leaving her previous partner, and giving up her employment prospects, were also deemed insufficient. As a result Mrs Coombes claim in proprietary estoppel failed, giving her no equitable interest in the family home.

The judge goes on to highlight the difficult position that Mrs Coombes finds herself in since the relationship has broken down:

“Since February 1985 the plaintiff has had a job as a part-time school cleaner, working two hours a day... In addition, she is in receipt of social security... She has no capital assets. She plans to look for a full-time job when Clare is a year or two older. She has no qualifications”.²⁵⁵

²⁵³ *Coombes v Smith* [1986] 1 W.L.R. 808, 811.

²⁵⁴ *Coombes v Smith* [1986] 1 W.L.R. 808, 811.

²⁵⁵ *Coombes v Smith* [1986] 1 W.L.R. 808, 812.

When considered against the socio-economic backdrop provided above, the increasingly restrictive approach to state support and the concentration of women in low paid, part-time work, the injustice of the courts unwillingness or inability to find equitable interest in the property becomes all the more concerning. To make matters worse, the judgment closes with a reminder of the precarious position Mrs Coombes would find herself in once Clare reached 17, at which time she would lose the right to occupy the property.²⁵⁶

6.8.5 Trust and Lies: Express Agreement

Despite the otherwise restrictive approach in *Rosset*, the court were still willing to give effect to agreements, even if the exact terms of such an agreement were “imprecise” and “imperfectly remembered”²⁵⁷ by the parties. As a result, the courts were still willing to support cases in which the common intention was founded as a result of an ‘excuse’.²⁵⁸ More importantly, it was within these cases that when considering detrimental reliance, the courts were keen to recognise not only any indirect financial contributions, but also stereotypically *feminine* contributions. *Hammond* serves as an example of such a case. There, when discussing detrimental reliance, Waite J considered “Miss Mitchell's contribution as *mother*/helper/unpaid assistant and at times financial supporter”²⁵⁹ to be of such value that her beneficial interest was determined to be one half. However, there remained a series of issues in relation to express agreements.

Hammond provides an example of the issues which arise in relation to the evidential

²⁵⁶ *Coombes v Smith* [1986] 1 W.L.R. 808, 822.

²⁵⁷ *Lloyds Bank plc v Rosset* [1990] 1 AC 107, 13; the issues which have arisen concerning agreement in this context have been discussed at [4.3.1] and is examined through the case law below.

²⁵⁸ Reaffirming the approach adopted in *Grant* and *Eves* as discussed in Chapter 5 but only in cases where express agreement can be identified.

²⁵⁹ *Hammond v Mitchell* [1991] 1 WLR 1127, 1136. Emphasis added.

weight which may/may not be attached to such agreements. When discussing the evidence which had been given in prior proceedings, Waite J concluded that “neither side had the monopoly of truth. Both were prone to exaggeration”.²⁶⁰ This statement draws attention to the general difficulties surrounding evidence in this context. Given that such agreements relate to family property, the assets of which are most likely being considered on breakdown, an individual might, willingly or unwillingly, develop malicious hindsight concerning their prior agreements.

The bungalow purchased after the birth of the child was purchased in Mr Hammond’s name. He made several excuses for this relating to his divorce proceedings and tax reasons, despite this he stated:

“As soon as I am divorced we will get married... [and] Don't worry about the future because when we are married it will be half yours anyway and I'll always look after you and [the boy]”.²⁶¹

This was consequently considered to support the finding of an express agreement, though without the aforementioned ‘excuses’ used in this case, such statements would on their own be deemed insufficient.

A further issue which arises is the unlikelihood that a couple will expressly discuss either the fact that the property is considered to be jointly owned, nor what their respective share ought to be. Even in *Rosset*, despite its restrictive approach, the court recognised that it is unlikely that the court will find that a couple has made an express agreement as to how the property is to be ‘divided’, “Spouses living in amity will not

²⁶⁰ *Hammond v Mitchell* [1991] 1 WLR 1127, 1130.

²⁶¹ *Hammond v Mitchell* [1991] 1 WLR 1127, 1130-1. His excuses were based on his divorce proceedings and his precarious tax situation.

normally think it necessary to formulate or define their respective interests in property in any precise way”.²⁶² *Hammond* serves as an example of the way in which couples communicate is often incompatible with the form of communication which is deemed relevant under the law. It is worth noting that, in that case Miss Mitchell was still able to succeed on the basis of the ‘excuses’ made to her by Mr Hammond, Waite J recognises that “natural self-respect, that held her back from pressing him on the marriage question for the remaining years of their association”.²⁶³

Were it not for the fact that Mr Hammond made excuses regarding why the property was not placed into joint names, Miss Mitchell’s understandable reluctance to continue asking about marriage, which would have gained her meaningful protection would have in all likelihood been the undoing of her claim. It has been stated that after *Rosset* “cohabiting partners must... contemplate and address the unthinkable, namely that their relationship will break down and that they will fall out over what they do and do not own”.²⁶⁴ However, as *Hammond* demonstrates, when considering this in practice, it is unlikely that it will be pursued.

The final issue raised by the express agreement element of the CICT discussed here is the nature of familial trust.²⁶⁵ *Coombes* provides insight into the way in which a couple will often act on the basis of trust, without consideration of the breakdown of their relationship. Viewing this from a romantic rather than legalistic perspective, why would there be any need to verbalise the existence/quantification of shares when you trust the

²⁶² *Lloyds Bank plc v Rosset* [1990] 1 AC 107, 127-8.

²⁶³ *Hammond v Mitchell* [1991] 1 WLR 1127, 1131.

²⁶⁴ *Jones v Kernott* [2011] 3 WLR 1121 [61].

²⁶⁵ See [4.3.1].

person who reassures you that “we'll spend the rest of our lives together”.²⁶⁶ Similar expressions of trust can be seen in statements such as “I thought it was joint otherwise I wouldn't have put my money into it. He said he would put my name on it in about a months time. I trusted him completely”²⁶⁷ in *Drake v Whipp*.

Coombes also serves as an example in which the nature of communication can change over the course of a relationship. Early on in the relationship their silence as to proprietary interest was indicative of their contentment. When Ms Coombes had asked about what would happen to her if something happened to Mr Smith to which he replied “Don't worry. I have told you I'll always look after you”.²⁶⁸ This generalised reply is the source of one of the key issues with reliance on intention within a familial context. It is the phrase upon which proprietary interest so often balances. Clearly Ms Coombes saw in this longevity and security, whereas the Mr Smith was merely avoiding the question and continuing his previous pattern of deception with regard to his relationships with women. A history which was evidenced and referenced within the judgment.²⁶⁹

The second use of silence, when Ms Coombes began to become insecure about her position in the relationship was met with a reluctance of Mr Smith to discuss the matter as can be seen with his exclamation of “don't dictate to me”.²⁷⁰ Here silence is at the polar opposite of its original usage. Mr Smith uses it to assert his dominance. This two-fold silence concerning security in the home is problematic given that at the start of a relationship, to speak about ownership is stigmatised, it is linked to a foreseeable

²⁶⁶ *Coombes v Smith* [1986] 1 W.L.R. 808, 810.

²⁶⁷ *Drake v Whipp* (1996) 28 HLR 531, 535.

²⁶⁸ *Coombes v Smith* [1986] 1 W.L.R. 808, 811.

²⁶⁹ *Coombes v Smith* [1986] 1 W.L.R. 808, 812.

²⁷⁰ *Coombes v Smith* [1986] 1 W.L.R. 808, 812.

termination. Yet once the end of a relationship begins to be signalled, a breach of silence is met with hostility. This makes express agreements a rarity, and an unreliable and unrealistic occurrence for a financially vulnerable party to rely on.

Coombes demonstrates the fluidity of communication within just one relationship. It exemplifies the inexact nature of commitment, and the immediate effect happiness can have on parties' thoughts towards property which are exacerbated upon breakdown. It may be unreasonable to expect the court to fully analyse the 'ups and downs' of a cohabiting couples' relationships, this case serves as an example of the caution necessary when looking for intention which is not merely financial. Yet, in saying this, I am not condoning the purely financial approach. It has been said that hard cases make bad law, a concept which can be identified throughout the development of the CICT.

The disparity amongst couples' inference from silence can also be identified in *Rosset* in Mrs Rosset's evidence as to her beneficial interest when she states that:

"I always understood we were going to share whatever we had, big or little. We always discussed it as being ours. The only discussion was in very general terms... If you live with someone, you don't 'dissect' it. It was an accepted thing".²⁷¹

This paints a realistic picture of a family unit, and an understanding not limited to married couples.²⁷² It is the natural way of things that the possibility of relationship breakdown is not discussed outright. Although this may seem illogical, it is a social convention which should not be ignored by the courts. The reality of the matter is, "whilst there may be mutual (?) dreaming about what the couple will do together, there

²⁷¹*Lloyds Bank plc v Rosset* [1989] Ch. 350, 378.

²⁷²*Hammond v Mitchell* [1991] 1 WLR 1127, 1131 in support of this statement.

is rarely concrete discussion about the practicalities of economic relations, especially should the couple separate”.²⁷³ Thus, in only providing adequate protection to those couples who expressly assert their proprietary interest, or in only providing for financial contributions to be considered with any weight the courts are ignoring the reality of cohabitating relationships.

6.8.6 Fairness?

The need to analyse a couple’s beneficial interest in the family home has to be “worked out according to their strict entitlements in equity, a process which is anything but forward-looking and involves, on the contrary, a painfully detailed retrospect”²⁷⁴ rather than making any consideration of their future needs or fairness.²⁷⁵ However, it has also been argued that having to evaluate the variety of circumstances which may give some indication of the intention of the parties is “time-consuming and laborious”.²⁷⁶ In contrast, a purely financial approach is presented as a time/cost saving device which allows the court to determine the parties true common intention.²⁷⁷ It seems of little consequence that this approach is often implemented at the expense of the financially vulnerable party, without truly reflecting the intention of the parties.

Despite the supposed benefits of a finance-based approach with regard to expediency, even financial contributions are not always easy to ascertain undermining the reasoning for relying on them rather than the nature of the relationship. For example, the “chaotic”

²⁷³Bottomley A., ‘Self and Subjectivities: Languages of Claim in Property Law’ (1993) 20 *Journal of Law and Society* 56, 61.

²⁷⁴ *Hammond v Mitchell* [1991] 1 WLR 1127, 1129.

²⁷⁵ That is in comparison to the position Matrimonial Causes Act 1973, s25.

²⁷⁶ *Hammond v Mitchell* [1991] 1 WLR 1127, 1130.

²⁷⁷ How accurate financial contributions are in determining common intention is questionable. This has been discussed in detail in [4.3.2].

book keeping in *Hammond* meant that it was difficult to ascertain with any certainty the contributions made by, and earnings of, the couple.²⁷⁸ Additionally, in *Midland*, Waite LJ dedicated a large portion of his judgment to the evidence regarding payments to the purchase price

“because it provides a vivid illustration of the difficulties which these cases pose for the honest recollections of witnesses and the barrenness of the terrain in which the judges... are required to search for the small evidential nuggets on which issues as to the existence - or the proportions - of beneficial interest are liable to depend”.²⁷⁹

The fact that the analysis of financial contributions is still liable to misrepresentations, remains time consuming and does not truly indicate the parties’ intentions has led to some judges to attempt to extend the matters deemed relevant when considering acquisition and quantification in order to provide a more just result.²⁸⁰

The reluctance of the courts to adhere to the restrictive approach in *Rosset* can be identified in the continuing willingness for judges to find ‘express’ agreements. This was evident even in cases such as *Hammond* in which by the judges’ own admittance the discussion(s) which formed the basis of this finding were “not directed with any precision as to proprietary interests”.²⁸¹ As a result of this Waite J determined that the court should “examine the subsequent course of dealing between the parties for evidence of conduct detrimental to the party without legal title”.²⁸² Here the non-financial contributions of the parties were given a role in ascertaining the meaning

²⁷⁸ *Hammond v Mitchell* [1991] 1 WLR 1127, 1133.

²⁷⁹ *Midland Bank v Cooke* (1995) 27 HLR. 733, 738.

²⁸⁰ Not unlike the approach adopted in *Grant v Edwards* [1986] 1 Ch 638 and discussed above.

²⁸¹ *Hammond v Mitchell* [1991] 1 WLR 1127, 1137.

²⁸² *Hammond v Mitchell* [1991] 1 WLR 1127, 1129.

behind their express agreement(s). Thus indicating the intention of the courts to consider a broader range of factors than those deemed relevant in *Rosset*.²⁸³

The inflexibility of the approach under *Rosset*, also led some judges to adopt a broad approach to quantification. This is particularly identifiable in *Midland*. When the question of quantification arose

“the judge [in the court below] was in my view in error when he proceeded to treat the cash contribution to the purchase price as wholly determinative of the issue of the current proportions of beneficial entitlement, without regard to the other factors emerging from the whole course of dealing between the husband and wife”.²⁸⁴

He then goes on to discuss a number of factors which he deemed relevant in the determination of her shares including her role as a mother and her indirect financial contributions (the payment of household bills).²⁸⁵ Similarly to the approach adopted by Lord Denning years prior,²⁸⁶ Waite LJ also emphasised the “anxiety and distress”²⁸⁷ Mr Cooke had caused her, attempting to demonstrate that to deny her a ‘fair’ share would be unjust. The influence of Lord Denning is most identifiable when Waite LJ surmises that “one could hardly have a clearer example of a couple who had agreed to share everything equally”,²⁸⁸ determining that the couple should share the beneficial interest

²⁸³ Compare *Hammond v Mitchell* [1991] 1 WLR 1127, 1137 with *Lloyds Bank v. Rosset* [1991] 1 A.C. 107, 133.

²⁸⁴ *Midland Bank v Cooke* (1995) 27 HLR 733, 747. Not unlike *Rosset*, *Midland* in dealing with married couples involved the determination of beneficial interest (necessary for establishing an overriding interest) on the basis of a CICT due to the involvement of the 3rd party creditor.

²⁸⁵ *Midland Bank v Cooke* (1995) 27 HLR 733, 747.

²⁸⁶ See [5.7.3] which details Denning’s construction of women as ‘victims’.

²⁸⁷ *Midland Bank v Cooke* (1995) 27 HLR 733, 747.

²⁸⁸ *Midland Bank v Cooke* (1995) 27 HLR 733, 747.

in the property equally. This invokes the same kind of considerations of ‘joint effort’/‘joint lives’ as in the rejected family assets approach.²⁸⁹

The financial contribution by Mrs Cooke was at best minimal, and at worst questionable given that this finding was based on a very small proportion of the overall purchase price of the property due to a payment made by Mr Cooke’s parents which was deemed a ‘wedding gift’ by the court.²⁹⁰ However, Waite LJ’s motivation for the finding such a substantial beneficial share in *Midland* can be seen as an attempt to reinvoke some degree of fairness within property law proceedings, indeed he notes that the current law is guilty of causing “human heartache as well as public expense”.²⁹¹

In addition to the recognition which Waite LJ gives to Mrs Cooke’s role as mother as discussed above, his attempts to reinstate fairness within CICT proceedings can be identified in his recognition of the different abilities for mothers to contribute consistently to, for example mortgage repayments. In looking at both the “social conditions of today” and the nature of the relationship in the round, holding that the shares should be held equally “would be a natural enough common intention of a young couple who were both earning when the house was acquired but who contemplated having children whose birth and rearing in their infancy would necessarily affect the future earning capacity of the wife”.²⁹² In allowing for a consideration of the whole course of dealings so as to fully recognise the contributions which had been made by

²⁸⁹ *Midland Bank v Cooke* (1995) 27 HLR 733, 741. As discussed in detail in [5.7].

²⁹⁰ This was a very small proportion of the funds used to finance the purchase of the property, made in a very indirect way.

²⁹¹ *Midland Bank v Cooke* (1995) 27 HLR 733, 736

²⁹² *Midland Bank v Cooke* (1995) 27 HLR 733, 744.

the non-owning party, *Midland* attempted to reassert fairness in CICT proceeding, albeit in a limited capacity.

This approach, motivated by fairness and influenced by the rejected family assets approach is further evidence of the determination of some judges, where possible, to avoid the application of the harsh *Rosset* regime. A similar intention can also be identified in *Grant* in the advent of *Burns* as discussed above. Through recognising the value of *feminine* contributions such as mothering, this could be seen as a re-emergence of a difference based approach. However, the application remained unfortunately limited due to the ruling in *Rosset*.

6.9 Conclusion

The historical overview provided by this chapter has demonstrated the way in which “women were the shock-absorbers of the economic and social system”.²⁹³ They faced eroding maternity rights, cuts to nursery care and were disproportionately impacted by a number of changes to employment legislation and the tax system. Provisions were enacted which reinforced the idea that women’s place was in the home, particularly when she had children. Those who needed/wanted to work were ill supported by the government and they were often stuck in jobs which were low paid and did not match their level of skill. By the end of the 1980s, the purpose of persisting in the enforcement of traditional values against the tide of social change was becoming questionable:

²⁹³ Rowbotham S., *A Century of Women, The History of Women in Britain and The United States* (London: Penguin Books, 1999), 501.

“As changes in marital behaviour became more dramatic in the last quarter of the century, so policy makers had to decide whether to recognise and work with when or whether to try and put back the clock”.²⁹⁴

Despite this, it seemed that Parliament and the courts settled on turning back the clock.

The continued shift into the public sphere of employment has brought with it both progress and problems for women in the 1990s. It has continued to struggle to adapt to the development of women’s role as one beyond wife/mother. Despite progress in terms of the provision of childcare, maternity provision and the introduction of the minimum wage, this remained insufficient. The persistence of the pay gap, in combination with the prevalence of women in part-time work have meant that women remain more financially vulnerable than men. The gradual “decline of the male-breadwinner model”²⁹⁵ having been all but replaced by a dual-earner relationship model has not necessarily lead to financial independence for many women. More than that, it certainly has not done away with the stereotypes which sprang from this model, given that they were still evident in the workplace, and the home, given the continuing distinction between the nature and value of ‘women’s work’ as against men’s. The workplace, and it’s focus on long hours culture, and long unbroken service being central to promotion serve as an example of the way in which employment was still constructed within a framework of masculine norms.

The case analysis section of this chapter has demonstrated the overwhelming tendency towards a formal approach of the courts, particularly in the cases of *Burns* and *Rosset*.

²⁹⁴Graycar R., & Morgan J., *The Hidden Gender of the Law* (Sydney: Federation Press, 2002), 122.

²⁹⁵Lewis J., ‘On Marriage’ in Zweiniger-Bargielowska I., *Women in Twentieth Century Britain* (London: Longman, 2001), 78.

In focussing on financial contributions, the *gender-neutral* criteria of the CICT when viewed against the historical context, and in the content of the cases themselves demonstrate the extent to which this worked to the detriment of women. Although there were elements of a re-emergence of a difference approach in *Hammond*, *Midland* and *Grant*, in which the different ability of women to contribute was recognised and influenced the decisions made it was difficult for the courts to avoid the hard-line approach in *Rosset*, continuing the detriment suffered by women by virtue of their 'role' as mothers and their unequal position in society.

Chapter 7 - Socio-Legal Changes Influencing Cohabitation in Britain from 2000

Onwards

7.1 Introduction

This chapter examines a number of the central socio-legal and changes which provide insight into the treatment of women in society which occurred from 2000 onwards. Like the two chapters which precede it, it is arranged thematically, focussing particularly on employment and the changing shape of the family. This overview provides the necessary socio-legal historical background from which to examine the case analysis which follows. Allowing the judgments to be analysed in context. In particular this is used to inform the discussion related to the (in)adequacy of the adoption of different equality approaches.

The chapter then goes on to analyse the key cases relating to the CICT in this period. This section predominantly focusses on the increasing willingness of the courts to consider ‘fairness’ within their judgments. Unlike the previous decades examined, the purely formal approach is almost absent from consideration. However, this is due to the fact that the law in relation to sole-ownership has not truly moved on from *Rosset*. As such the more recent case law examined in this chapter, though signalling potential progress for economically vulnerable parties in the context of the CICT only applies in cases of joint-ownership. This section also examines a number of the proposals for legislation within this period, which provides additional insight into the social and legal perceptions of unmarried cohabitation.

7.2 Employment

This section provides an overview of the key legislative changes which have occurred in relation to equal pay. It also considers the position of women in relation to flexible/part-time working and the continuation of the pay gap. Finally, it examines the development of maternity, paternity, and shared parental leave which has attempted to redistribute child care responsibility between parents.

7.2.1 Equality Act 2010

Despite legislative action in the 1970s attempting to address the issue of inequality in the workplace, “deep-seated discriminatory structures”¹ have remained intact. The introduction of the Equality Act 2010² aimed to harmonise and simplify the provisions contained in a plethora of equality legislation. The provisions are based around a series of protected characteristics which include sex and pregnancy/maternity.³ The content of the Act is wide-ranging, but for the purposes of this chapter, the elements relating to employment and gender will be the focus. The EqA has made “very few substantial changes”⁴ in the area of gender equality, having replicated much of the content from the legislation which preceded it.

The failure to extend those rights which were enshrined in the previous legislation has meant that many of the issues which contribute to gender inequality in the workplace remain unresolved. This includes the replication of the concept of ‘work of equal value’ and the inclusion of the material factor defence, which despite dropping the ‘genuine’

¹ Fredman S., *Discrimination Law* (Oxford: OUP, 2011), 6. On the discrimination legislation in this period: see [5.2], [5.3].

² Hereafter EqA.

³ Equality Act 2010, s4.

⁴ Hepple B., *Equality: The New Legal Framework* (Oxford: Hart, 2011), 98.

from the name, remains the same in form as its predecessor in the EPA 1970.⁵ The method of enforcement maintains its reliance on a complaints-based model, which requires that an individual bring proceedings against an employer.⁶

The use of this model is a cause for concern for several reasons. First, the cost of proceedings as a barrier to pursuing claims remains intact, and the burden of lengthy and costly litigation often falls on those who are most vulnerable.⁷ Much like the disproportionate impact on women caused by cuts to legal aid,⁸ the introduction of tribunal fees in 2013⁹ “has had devastating implications for... access to justice”¹⁰ for women and the low paid. It has also been suggested that relying on this system is “the most significant reason why the EqA does not adequately tackle occupational segregation”.¹¹ Basing these rights on individual complaints also means that there is little obligation placed on employers “to correct the institutional structure which gave rise to the discrimination”.¹² Therefore, though it continues to provide some recompense to those who are aware of their rights, and who are financially able to pursue a claim, it does nothing to promote institutional change, which is essential if gender equality is to be embraced within the employment sphere.

⁵ Equality Act 2010, s65(1)(a)1(c) & s69. As discussed at [5.3.3] and [6.2.4].

⁶ Employer, previous employer, or prospective employer for those cases which involve discrimination at the hiring stage of employment.

⁷ Fredman S., ‘Reforming Equal Pay Laws’ (2008) 37 *Industrial Law Journal* 193, 206.

⁸ Legal aid cuts were introduced in Legal Aid, Sentencing and Punishment of Offenders Act 2012.

⁹ The introduction of tribunal fees is contained in the Employment Tribunals and Employment Appeal Tribunals Order 2013.

¹⁰ Trades Union Congress., *At What Price Justice? The Impact of Tribunal Fees* (June 2014), 2: <https://www.tuc.org.uk/sites/default/files/TUC_Report_At_what_price_justice.pdf> accessed: 20/01/18.

¹¹ Burton B., ‘Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice?’ (2014) 43(2) *Industrial Law Journal* 122, 132

¹² Fredman, ‘Reforming Equal Pay Laws’ (n7), 297.

The actual comparator requirement remains a feature of the EqA.¹³ This continues to prove problematic due to the persistence of occupational segregation, which means that often no actual comparator exists. However, the Act has inserted provisions which allow for a hypothetical comparator to be used in certain limited situations.¹⁴ Despite this, the example given in the explanatory notes raises questions as to the validity of this provision:

“An employer tells a female employee ‘I would pay you more if you were a man’... In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination”.¹⁵

It is unlikely that an employer will behave in such an overtly discriminatory manner, which despite marking a shift in position from decades prior, restricts the value of the addition as it is only applicable to cases of direct discrimination. As a result, the inclusion of the hypothetical comparator has limited application and does little to counter inequality in the workplace.

In its considerable gestation period, the Bill included provisions which would have contributed to the reduction of gender equality regarding the pay gap. This included the provision under s78 which required the publication of information relating to the pay of employees to determine if there are any differences between the pay for men and women in companies which employed 250 or more individuals. This was removed just prior to

¹³ See [5.3.3], [6.2.4].

¹⁴ Equality Act 2010, s71.

¹⁵ Equality Act 2010 Explanatory Notes, Para 246.

the enactment of the legislation.¹⁶ However, it ought to be noted this section of the Act has subsequently been reinstated, and came into force in 2018.¹⁷

Given that “the Bill does not establish new procedures for providing arbitration in equal pay disputes nor does it impose positive duties on employers to take steps to monitor and respond to patterns of pay inequality”,¹⁸ it is clear that the Act has fallen short of the expectations of many. Positive duties were seen by many as essential in eradicating inequality in the workplace particularly those who believe that formal equality is inadequate and therefore promote a substantive model.¹⁹ As it stands, the current mode of enforcement relies on the notion that employers will self-regulate in order to avoid proceedings as without individual claims, there are no positive obligations placed on employers to insure equality and non-discriminatory practice.²⁰ Overall, it is clear that the EqA in and of itself is not enough – it needs to be accompanied by “strategies at the level of structures and institutions... in public and private spheres”²¹ which are still lacking.

7.2.2 Pay Gap

Over this period, the levels of both part-time and full-time employment have increased, for women, the current level is at the joint highest since comparable records began in

¹⁶ See [7.2.2].

¹⁷ The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, s2. Discussed in [7.2.2].

¹⁸ Joint Committee on Human Rights., *Legislative Scrutiny: Equality Bill 26th* (HL169/ HC 736, 2008-9), para 186.

¹⁹ See for example: O’Cinneide C., ‘Positive Action and the Limits of Existing Law’ (2006) 13 *Maastricht Journal of European and Comparative Law* 351, 354 and Fredman, *Discrimination Law* (n1), 7.

²⁰ Fredman S. & Sarah Spencer S., ‘Beyond Discrimination: It’s Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes’ (2006) 6 *European Human Rights Law Review* 598, 599.

²¹ Verloof M., ‘Multiple Inequalities, Intersectionality and the European Union’ (2006) 13 *European Journal of Women’s Studies* 211, 215.

the 1970s.²² The gender pay gap has shown a general pattern of decline over this period. For full-time employees, the current pay gap sits at 9.1%, and when part-time work is included the overall pay gap is at 18.4%.²³ Interestingly, there is a negative pay gap where part-time work is concerned, meaning that women tend to earn more than men within this context, this figure sits at -6%.²⁴ This has generally widened since the early 2000s, though the pattern is less clear than for full-time workers given that there is evidence that the part-time gender pay gap has widened in the long-term.²⁵

The motherhood gap has continued to be one of the most striking gaps in pay. Despite it being generally accepted that “women who do decide to become mothers should not have to pay a penalty at work”,²⁶ these changes in parliamentary/political rhetoric and public opinion have done little to change the reality of working mothers. The motherhood gap is identifiable through examining the shift from the minimal gap between men and women, which increases from their late 20s onwards. The gap (in full-time employment) goes from on average 10% to approximately 33% after the birth of first child measured over a period of 20 years.²⁷ At the period while “male wages continue to increase, especially for the high-educated, while female wages completely flatline on average”.²⁸ This is in part due to the gendered division of care, in that women are still more likely to be the primary carer for their children, and also for elderly relatives and neighbours.²⁹ However, there is also evidence to suggest that, in taking a

²² ONS., *Statistical Bulletin UK Labour Market: January 2018* (24 January 2018), 4.

²³ ONS., *Annual Survey of Hours and Earnings: 2017 provisional and 2016 revised results 2017* (26 October 2017), 7.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Banyard K., *The Equality Illusion. The Truth About Women and Men Today* (London: Faber and Faber, 2010), 79.

²⁷ Costa Dias M., Elming W. & Joyce R., *The Gender Wage Gap* IFS Briefing Note BN186 (IFS 2016), 12.

²⁸ *ibid.*, 11.

²⁹ McGuinness F., *Gender Pay Gap* Briefing Paper Number 7068, 26 October 2016, 7.

break from the labour market, there are “negative views of women’s commitment to work after having children and positive views of fathers in the workplace, probably associated with the traditional male breadwinner role – are at play too”.³⁰ This demonstrates the continuation of stereotypes which have been identified for a considerable time.³¹

Occupational segregation continues to be a significant contributor to the gender pay gap. Most notably, the full-time pay gap is smallest in female dominated industries, and the part-time pay gap is largest in the higher paid positions and industries, which predominantly employ men.³² A clear pattern emerges, that where a sector is largely male, women are underpaid and where women make up the majority of employees, the gap is more minimal, or even negative, but so are the earnings. This continues with the theme that “women’s work” whether paid or unpaid remains undervalued.³³ Although the feminisation of work can be perceived as positive, as Harris notes

“low pay tends to follow where women work. Where men come into traditionally feminised sectors, the pay tends to go up; where women move into sectors where they have not been before the pay tends to go down”.³⁴

It seems to be an inescapable cycle as of yet. The concentration of women in the lowest paid industries and work is made considerably more problematic given the income gap between the highest and lowest paid employees. This is especially the case within the

³⁰ Trades Union Congress., *The Motherhood Pay Penalty: Key Findings from the TUC/IPPR Research* (March 2016), 5: <www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf> accessed: 20/01/2018>.

³¹ As identified throughout Chapters 5-6.

³² Harris S., Written evidence provided for and cited in House of Commons Women and Equalities Committee., *Gender Pay Gap* (HC 584, 2015-16), para 35.

³³ See [5.2],[6.2].

³⁴ Harris (n32), para 35.

UK as it has been described as “the outlier within Europe, it is the most grossly unequal country”.³⁵

As mentioned above, one of the ways in which the government seeks to close the pay gap is through the enactment of the provisions relating to the publication of large companies’ gender pay gaps.³⁶ Of this, TUC General Secretary Frances O’Grady said:

“While today’s announcement is a step in the right direction, we’re disappointed that firms won’t have to publish their gender pay gap figures until 2018. There is no need for such a long delay”.³⁷

Though it has been questioned as to whether this ‘name and shame’ tactic will have any considerable impact given that it relies entirely on the notion that businesses will change their behaviour in order to place highly on a league table.³⁸

As part of their commitment to closing the pay gap, as can be seen in both Cameron’s promise that, “my one nation government will close the gender pay gap”,³⁹ the national living wage was introduced. The thought behind this was that fact that given that they are disproportionately concentrated in the lowest paid jobs, “the measure will provide a particular boost for women across Britain”.⁴⁰ Perhaps this will eradicate some of the pay inequality in the UK. However, without larger scale societal and institutional

³⁵ Dorling D., ‘Income inequality in the UK: Comparisons with five large Western European countries and the USA’ (2015) 61 *Applied Geography* 24, 27.

³⁶ See [7.2.1].

³⁷ As quoted in Mason R., *Gender pay gap reporting for big firms to start in 2018* (The Guardian 12 February 2016): <www.theguardian.com/society/2016/feb/12/gender-pay-gap-reporting-big-firms-start-2018> accessed: 20/01/2018.

³⁸ As the first public disclosure by companies only occurred in April 2018 there is insufficient data from which to draw any concrete conclusions as to its impact on employers’ incentives towards alleviating the pay gap at this stage.

³⁹ Prime Minister’s Office, press release, 14 July 2015.

⁴⁰ HM Treasury, Department for Business Innovation and Skills and Osborne G., *Today Britain gets a pay rise, thanks to the National Living Wage* (1 April 2016): <www.gov.uk/government/news/today-britain-gets-a-pay-rise-thanks-to-the-national-living-wage> accessed: 20/01/2018.

change towards the traditional gender roles of women and men, and without the support structures needed to facilitate this shift, the pay gap will remain to decline at an undesirably slow pace.

7.2.3 Flexible Working/Part-time Work

Increasing numbers of women work full-time, though this still sits at 40%, which is only a 4% increase since 1997.⁴¹ The number of women who work part-time still outweighs the number of men (41% compared with 12% respectively).⁴² Despite this increase in the number of men working part-time, the notion that such work is ‘women’s work’ continues. The issues associated with part-time work have continued.⁴³ It tends to be low paid work with little chance of promotion. The part-time workforce is made up of numerous individuals working in positions which do not match their level of experience/qualifications, a Resolution survey found that “44% of women questioned has taken a lower skilled job as they were working part-time”.⁴⁴

The move from full-time to part-time work, though affording flexibility, is often perceived as ‘career suicide’. It is possible for part-time work to lead to pay increases and promotion. However, the dominance of long hours culture has meant that employers will often associate the time spent in the office as indicative of commitment and productivity.⁴⁵ The construction of the worker as an individual who works full-time and one who does not have the ‘distraction’ of a family (or at least whose family is not

⁴¹ ONS., *UK Labour Market*, October 2016 (19 October 2016), Table EMP01 SA - data at March-May as a percentage of women of working age.

⁴² ONS., *Labour Force Survey*, Quarter 2 2016 (11 September 2016), Table EMP04 - as a percentage of women/men of working age.

⁴³ Detailed in [6.3.2].

⁴⁴ Alakeson V., *The price of motherhood: women and part-time work* (Resolution Foundation, 9 February 2012), 5:

<<https://www.resolutionfoundation.org/publications/price-motherhood-women-part-time-work/>>
accessed: 20/01/2018.

⁴⁵ Lewis S., ‘Restructuring workplace cultures: the ultimate work-family challenge?’ (2010) 25(5) *Gender in Management* 355, 358.

perceived as a distraction because they are cared for by their mother) contributes to the continuation of the masculine model of employment.⁴⁶ This is particularly problematic for those who work part-time, predominantly women, and those women who take time out from employment due to pregnancy, and then maternity leave. These individuals are perceived as lacking commitment, and therefore are less likely to progress financially at work.

The role(s) often assumed by women, in particular in relation to care giving continues to have an impact on their employment. As Paull summarises:

“the prevalence of women in part-time work continues to be a distinguishing feature of female employment. Condemnation for the prevalence of shorter hours is often expressed in the ‘part-time pay penalty’ and the notion that part-time work consists of dead-end jobs in poorly paid occupations, perpetuating the weaker position of women in employment positions”.⁴⁷

Due to a lack of affordable childcare, and the gendered nature of care (both for children and the elderly) means that part-time work is frequently the only option. In a *Resolution* survey of mothers who worked part-time:

“44 percent specifically cited the lack of affordable quality childcare as a barrier. In addition, 43 percent said that it was not financially worth their while to work full-time. This is largely because the additional childcare costs that would be incurred would leave mothers with little take home pay”.⁴⁸

Even with the implementation of a number of policy changes and legislative acts supposedly aimed at increasing the number of women in the workforce, the reality for

⁴⁶ As seen in [5.2], [5.3], [6.2], [6.3].

⁴⁷ Paull G., ‘Children and women’s hours of work’ (2008) 118(526) *Economic Journal* F8, F8.

⁴⁸ Alakeson, (n44), 6.

working women is that the barriers they face in entering full-time employment are the same they have faced for the last fifty years, albeit to a lesser extent.

Despite societal changes, including the fact that only a small minority of people, support the gendered separation of roles, the division of labour in the home still frequently reflects the breadwinner/caregiver model of the family.⁴⁹ Alongside the fact that fathers want to take a larger role in childrearing, with almost half of fathers stating that they “think they currently spend too little time with their children and half think they spend too much time at work”.⁵⁰ The legal and political changes clearly have not adequately facilitated such a shift. Without significant institutional change and the provision of affordable and adequate childcare, employment structures remain unyielding. Thus meaning that the issues faced by women historically in contributing financially to the home, either at all or to the same extent as their partner, continues.⁵¹

7.2.4 Maternity, Paternity and Shared Leave

Over this period maternity pay, allowance and leave have all been gradually extended through a series of legislative acts.⁵² The period of unconditional maternity leave has been increased by the gradual reduction in the qualification criteria, meaning that all women who have a contract of employment are now eligible for 52 weeks maternity leave regardless of their hours of work or length of service.⁵³ This is still however, split into the distinction between Ordinary Maternity Leave and Additional Maternity Leave.

⁴⁹ 13% of the public support the gendered separation of roles: Scott J. & Clery E., ‘Gender Roles’ in Park A. (et al) (eds), *British Social Attitudes: the 30th Report* (London: NatCen Social Research, 2013).

⁵⁰ Ellison G. (et al), *Work and care: a study of modern parents 15th report* (Manchester: Equality and Human Rights Commission, 2009), 10.

⁵¹ This of course having considerable consequences in cases concerning the CICT as discussed in [4.3.2], [5.7], [6.8], [7.4].

⁵² Employment Act 2002; Work and Families Act 2006.

⁵³ Work and Families Act 2006 repealed the qualifying period of 26 weeks; Maternity and Parental Leave etc Regulations 1999, reg 7(4).

The key distinction between these forms of leave lies in the nature of the protection provided for each 26 week period of leave and the non-accrual of pension contributions during the unpaid period. During Additional Maternity Leave the right to return is subject to the “reasonable practicable”⁵⁴ clause.

The length of Statutory Maternity Pay and Maternity Allowance (for those who do not qualify for statutory pay) have also been extended from 26 to 39 weeks.⁵⁵ The way in which payments are fixed has remained relatively unchanged since 2007, except for adjusting the flat rates in line with the consumer price index. Although the increased maternity rights both with regard to pay and leave signify progress, a number of issues still remain. In particular, the fact that the length of pay still does not match the length of leave, meaning that many cannot afford to take full advantage of the 52 weeks of entitlement. In addition the payments made are still at a low level, again meaning that in order to take lengthy leave there must usually be another earner in the household. As a result, financial necessity has been identified as one of the key reasons women return to work early from maternity leave is due to financial necessity. As James states, “piecemeal increases in the length of Statutory Maternity Leave are a safe way of appearing to be family-friendly whilst, in practice, failing to address the real needs of families in 21st Century Britain”.⁵⁶ Finally, the lower level of protection associated with Additional Maternity Leave still has the capacity for misuse by employers, and the pension restrictions has longer term negative implications for women.

⁵⁴ Maternity and Parental Leave etc Regulations 1999, reg 18(2) – for AML and 18(1) OML.

⁵⁵ Social Security Contributions and Benefits Act 1992, s116 and Working Families Act 2006, s2.

⁵⁶ James G., ‘The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?’ (2006) 35(3) *Industrial Law Journal* 272, 273.

There have been significant changes to the rights of the father/partners with regard to leave and pay. The introduction of paternity leave in 2003 meant that, where the qualification criteria was met, the father, or partner of the mother were entitled to paid leave for the first time.⁵⁷ The length of leave was set at two weeks and the level of pay was either 90% of their average weekly earnings or a flat rate, whichever was lower. These rights were further extended in 2011 with the introduction of additional paternity leave and pay.⁵⁸ This meant that fathers/partners were entitled to up to 26 weeks of leave if the mother returned to work before exhausting her 52 weeks statutory maternity leave. However, this would only be paid if the mother had returned to work before the 39 weeks of statutory maternity pay. As a result additional paternity leave relied on the early return of mothers. It also became clear that “few fathers can afford to take time off on statutory pay... [though it was seen as] a step in the right direction”.⁵⁹

Despite the improvements which had been made it was suggested that

“The current system of maternity and paternity leave and pay is rigid and restrictive. It dictates to families and employers how leave and pay must be taken. Allocating a long period of maternity leave to a woman that is lost irrevocably if she returns to work early is restrictive and makes it difficult for working couples who want to share the baby’s care to do so”.⁶⁰

The restrictive nature of paternity leave has meant that little progress had been made towards the aims of increasing fathers roles in childcare, alleviating some of the

⁵⁷ Employment Act 2002, s1 &2, SI 2002/2788 and SI 2002/2822.

⁵⁸ First posed in the Work and Families Act 2006, implemented through Additional Paternity Leave Regulations 2010 AI 2010/1055 (introduced as of 2011).

⁵⁹ Rutherford S., *Women’s Work, Men’s Cultures: Overcoming Resistance and Challenging Organizational Cultures* (Basingstoke: Palgrave Macmillan, 2011), 106.

⁶⁰ Department for Business, Innovation and Skills., *Consultation on Modern Workplaces – Government Response on Flexible Parental Leave* (London: HMSO, 2012), 25.

gendered division of care, lessening the impact of motherhood on women's careers. The low level of statutory payment was seen as "pitiful"⁶¹ given that was set at less than the minimum wage. This dissuaded many fathers from taking leave, especially if they are the main breadwinner. It was clear that more needed to be done. There needed to be increased flexibility, choice and equality between parents.

With this in mind, the provisions relating to additional paternity leave and pay were replaced in 2015 with Shared Parental Leave (SPL).⁶² Maternity leave, and the two weeks of paternity leave remain intact. These provisions are considerably more flexible and generous than its predecessor. The period of leave can be taken for a period of 50 weeks, after the first two weeks of maternity leave, and the leave can then be shared in a variety of ways, whether it involves both parents taking leave at the same time, or dividing the leave between them. The pay sits at 90% of the average weekly wage, or the flat rate of statutory parental pay, whichever is lower. This is available for 39 weeks minus any weeks of maternity pay, maternity allowance or adoption pay, the remaining period of leave, if taken, is unpaid.

Prior to the enactment of SPL, Nick Clegg stated that

"we have to sweep away those Edwardian rules which still hold back those families working hard to juggle their responsibilities at home and work. For decades, our parental leave system has been based on the assumption that it's dad who goes out to work while mum cares for the kids"⁶³

⁶¹ James G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (London: Routledge, 2009), 43.

⁶² The Children and Families Act 2014 s. 117, inserting chapter 1B into part 8 of the Employment Rights Act 1996. See also Shared Parental Leave Regulations 2014.

⁶³ Clegg N., Speech at the launch of Cityfathers on shared parental leave (April 23 2014).

One of the aims of SPL was to undermine traditional gender roles, and the issues which they have caused. It was hoped that it would both encourage and enable fathers/partners to take a larger role in childcaring, thereby benefitting both themselves, and assisting in reducing the impact of pregnancy and childrearing on women's careers. The fact that this will be a slow process has been accepted, with the government stating that they

“don't expect to achieve fully shared childcare from day one. Cultural attitudes do not change overnight. But we believe that this new system has the capacity to bring about transformative change for parents and businesses, and is a major stepping stone towards achieving smart economics in the UK”.⁶⁴

The fact that such legislation has been enacted nevertheless signifies an appetite for change.

It was predicted that only 2-8% of parents will take up their entitlement to SPL.⁶⁵ Recent statistics found that “less than 1% of men have engaged”⁶⁶ though it needs to be noted that the percentage given is out of all men surveyed and not all eligible men. The reasons for the low uptake have suggested that this may be due to the financial burden of taking time off. However, “pay is just one factor. Employers need to get used to the idea that parenting is a shared experience, and that this is more of a societal change”.⁶⁷ The fear associated with extended leave, and the belief that this will have a negative impact on your career will take some time to shift.

⁶⁴ Department for Business Innovation and Skills., *Modern Workplaces* (n60), 3.

⁶⁵ Department for Business Innovation and Skills., *Modern Workplaces: Shared Parental Leave and Pay Administration Consultation - Impact Assessment* (London: HMSO, 2013), 4.

⁶⁶ My Family Care & Women's Business Council., *Shared Parental Leave: Where are we now?* (April 2016), 2:

<www.myfamilycare.co.uk/resources/white-papers/shared-parental-leave-where-are-we-now/>
accessed: 20/01/2018.

⁶⁷ Alan Beazley as quoted in Faragher J., ‘Shared Parental Leave a Labour of Love?’ (2014) (July/August) *Employers Law* 12, 13.

One of the issues which remains with SPL, alongside the aforementioned social and economic factors is that both parents are required to meet minimum eligibility criteria. In contrast, mothers can access maternity leave so long as they have an employment contract, as a result “the mother’s caring role... is prioritised”.⁶⁸ Therefore, despite claims that the introduction of SLP was seen as “a crucial step towards reducing the gender bias that currently applies to women’s careers”, in reality the inequality between the leave given to mothers and fathers/partners (notwithstanding the medically necessary two weeks provided for mothers), undermines the progress which has been made.⁶⁹

Overall, though many of the policy and legislative changes over this period have looked at improving ‘work-life balance’, this sits in direct contrast with the long-hours culture which is evident in much of the employment sphere. It must be acknowledged that “work–life balance... ignores the often blurred and ultimately socially constructed nature of what counts as work and what does not and tends to mask the large amount of reproductive work performed by women in the private sphere”.⁷⁰ In addition, despite attempting to increase mothers’ workplace participation, and encouraging more fathers/partners to take SPL and Paternity leave, when parents return to work the “provision of affordable and suitable childcare remains inadequate”.⁷¹

⁶⁸ The Shared Parental Leave Regulations 2014, reg. 33(1); Mitchell G., ‘Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave’ (2015) 44 *Industrial Law Journal* 123, 129.

⁶⁹ Department for Business, Innovation and Skills., *Consultation on Modern Workplaces* (n60), 3.

⁷⁰ Smith F. (et al)., ‘Women, work-life balance and quality of life: case studies from the United Kingdom and Republic of Ireland’ (2011) 18(5) *Gender, Place and Culture* 603, 604.

⁷¹ *ibid.*

The low take up of the schemes applicable to fathers has meant that women remain the primary caregiver, and continue to face the financial consequences of motherhood status. Although this could lead to a cultural shift within the employment sphere, helping to deconstruct the stereotypes surrounding work and childcare, this is yet to be seen. Until there is a redistribution of labour in the home, women will continue to be at a disadvantage in the employment sphere, and therefore less able to contribute financially to the acquisition of property.

7.3 Reshaping ‘the Family’

For a significant period, successive governments have been reluctant to accept the changing nature of the family. From the mid-2000s onwards there has been progress towards the recognition of homosexual couples as equal. First, the age of consent for homosexual couples was lowered so that it was in line with the age of consent for heterosexual couples.⁷² This was then followed by the introduction of Civil Partnership in 2005.⁷³ This Act extended the legal privileges and obligations, previously only enjoyed by married couples, to same sex couples. It has been argued that “a civil partnership is a marriage in all but name”.⁷⁴ However, there are differences in terms of the formation and terminology. With regard to the formation of civil partnerships, there is a provision which prevents the ceremony from being religious or taking place on religious premises, in addition it is formed by signing documents but requires no exchange of vows.⁷⁵ It also provides that the signing of the certificate is done by both parents rather than by just the fathers of the parties, which if anything is a welcome departure from the martial position. There is also no requirement for consummation,

⁷² Sexual Offences (Amendment) Act (2000), s1.

⁷³ Civil partnership Act 2004 which came into force in December 2005.

⁷⁴ See [7.3].

⁷⁵ Civil Partnership Act 2004, s2 & s6.

and upon breakdown adultery is not considered a ground, unlike within opposite sex marriage. This will be discussed in more detail below.⁷⁶

The distinction made between marriage and civil partnership has also been described as symbolically different.⁷⁷ The terminology used attempted to distance itself from marital rhetoric, avoiding terms such as husband, wife, spouse(s) and indeed marriage, reinforcing the governments claims that they had “no plans to introduce gay marriage”.⁷⁸ This distinction was seen as depriving same sex couples of the “highest social status and approval”,⁷⁹ through excluding them from both the discourse of marriage and the institution itself. However, despite legislative attempts to emphasise the difference between civil partnerships and marriage, the public and the media often referred to civil partnership as gay marriage.⁸⁰ Though this was done in both positive and negative ways, given that one of the aims of the act was to provide cultural change as well as respond to societal attitudes/needs, the affirmative coverage will have assisted with this.⁸¹

Further progress for the rights of homosexual couples were also seen more recently in the Marriage (Same Sex Couples) Act 2013. Many of the rights and obligations contained within this Act again mirror those of opposite sex marriage, it also provided

⁷⁶ Civil Partnership Act 2004, s44.

⁷⁷ Dobson E., ‘Civil Partnership – Marriage in all but name?’ (2005) 155(7163) *New Law Journal* 203, 205.

⁷⁸ HL Deb 22 April 2004 vol 660, col 405.

⁷⁹ Auchmuty R., ‘Same-sex marriage revived: feminist critique and legal strategy’ (2004) 14(1) *Feminism and Psychology* 101, 102. See also Kitzinger C. & Wilkinson S., ‘The re-branding of marriage: why we got married instead of registering a civil partnership’ (2004) 14(1) *Feminism and Psychology* 127, 133.

⁸⁰ See for example Frean A., ‘Gay marriage’ for 700 couples *The Times* (17 December 2005), 26; Peterkin T., Lesbians make history with first UK same-sex wedding *The Daily Telegraph* (19 December 2005), 19.

⁸¹ Department of Trade and Industry & Women and Equality Unit., *Civil Partnership: A framework for the legal recognition of same-sex couples* (London: DTI & Women and Equality Unit, June 2003), Para 1.5.

for civil partnerships to be converted into marriages where couples wished to do so.⁸² The aim of the Act was to bring equality between homosexual and heterosexual couples. Cameron, writing for *Pink News* announced that “in Britain it will no longer matter whether you are straight or gay – the State will recognise your relationship as equal”.⁸³ Yet, despite the promise of equality, distinctions have still been made.

The introduction of the Act has alleviated some of the differences between civil partnership and marriage. For example, the formation is made using a prescribed form of words, the religious exemption has been diminished (albeit not removed), and it is the fathers’ names which appear on the certificates. Adultery is considered a ground for divorce within a same sex marriage, unlike dissolution within civil partnerships. However, adultery is defined as taking place between two people of the opposite sex.⁸⁴ It does provide that a same sex marriage can be annulled as voidable if the respondent was at the time of the wedding suffering from a ‘venereal disease’, which is not the case for civil partners.⁸⁵

The absence of non-consummation as a ground for annulment remains problematic. There have been arguments that consummation should be removed from opposite sex marriage for a wide variety of reasons but such proposals have been rejected on numerous grounds. While it remains, there is no equality between same and opposite sex marriages. With the former being ‘de-sexed’ due to the reliance on a

⁸² Marriage (Same Sex Couples) Act 2013.

⁸³ Cameron D., *David Cameron: When people’s love is divided by law, it is the law that needs to change* (28 March 2014): <www.pinknews.co.uk/2014/03/28/david-cameron/> accessed: 20/01/2018.

⁸⁴ The Marriage (Same Sex Couples) Act 2013 inserted a new section 1(6) to the Matrimonial Causes Act 1973 giving statutory effect to the common-law position and maintaining the definition of adultery as sexual activity between two persons of different sex.

⁸⁵ Marriage (Same Sex Couples) Act, s4 amending Matrimonial Causes Act 1973, s12.

heteronormative construction of sex. Indeed “the omission of consummation (and adultery) is a negative gap in the C.P.A., a place where lesbian and gay sexuality is left unspoken”.⁸⁶ Advocating formal equality whilst undermining it with the exclusion of the provisions relating to consummation and adultery which, given their explicit exclusion within the context of same sex marriage, amounts to discriminatory treatment.⁸⁷ It is an Act which still constructs/supports marriage as heteropatriarchal institution despite on the face of it seeming to promote equality.⁸⁸ Overall, despite same-sex marriage often being described as promoting equal marriage, “by excluding only same sex couples from these provisions the government undermines its commitment to truly equal marriage”.⁸⁹

The introduction of Civil Partnerships and same sex marriage are often seen as markers of progress. However, they are not without their critique. This comes not only from religious groups and those who wish to promote the sanctity of marriage, but also by those who believe marriage should not be the aim given the problematic nature of marriage as heteropatriarchal, inherently unequal and that it is not only a social but a religious institution. Connected to this, arguments have been raised as to whether heterosexual couples should have access to civil partnerships as an alternative to marriage. This would be of particular use to those who cohabit, and do not wish to marry due to what they perceive as problems with the institution of marriage. Meaning that they would be able to gain recognition of their relationship both publicly and privately,

⁸⁶ Barker N., ‘Sex and the Civil Partnership Act: The future of (non) conjugality’ (2006) 14 *Feminist Legal Studies* 241, 251.

⁸⁷ Beresford S., ‘We’re All Same (Sex) Now?: Lesbian (Same) Sex Consummation; Adultery and Marriage’ (2016) 12(5) *Journal of GLBT Family Studies* 468, 47; Equal Rights Trust., *Memorandum on Marriage (Same Sex Couples) Bill* (MB 68, 4 March 2013), 61.

⁸⁸ Similar critiques have also been made about Civil Partnerships, which have been described as “modelled on a conservative ideology of marriage”: Barker N., ‘For Better or For Worse? The Civil Partnership Bill [HL] 2004’ (2004) 26(3) *Journal of Social Welfare and Family Law* 313, 321.

⁸⁹ O’Donnell J., *Memorandum on Marriage (Same Sex Couples) Bill* (MB 08: 15 February 2013), 1.

but more importantly, it would give such couples legal rights and obligation which are currently lacking.

The Civil Partnership Act explicitly specifies that opposite sex couples are excluded.⁹⁰ Which has led to couples leaving the country to enable them to have a civil partnership and to legal challenges.⁹¹ Recently, the prohibition was challenged in the courts asserting that it constituted a breach of Art 8/14 ECHR.⁹² Within the Court of Appeal judgment it was acknowledged that the couple have

“deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature. They wish, instead, to enter into a civil partnership, a status which they consider reflects their values and gives due recognition to the equality of their relationship”.⁹³

This acknowledges some of the reasons couples cohabit rather than marry, that there are couples who seek legal recognition and in terms of rights and responsibilities which mirror those of marriage. However, it does not change the legal position of opposite sex couples who wish to be civil partners. The successful appeal in *Steinfeld and Keidan* before the Supreme Court does raise the possibility that Civil Partnership will be extended to include opposite sex couples so as to eliminate breach of Articles 8/14. It ought to be noted that the obligations under the case could equally be satisfied by removing Civil partnership in its entirety. It is however, beyond the scope of this thesis

⁹⁰ Civil Partnership Act 2004 s1, s3(1)(a).

⁹¹ Khomami N., *First heterosexual UK couple in civil partnership urge government to end ban* (The Guardian, 21 October 2016): <www.theguardian.com/lifeandstyle/2016/oct/21/first-heterosexual-uk-couple-isle-of-man-civil-partnership-urge-government-end-ban> accessed 20/01/2018.

⁹² *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128 and *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32.

⁹³ *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128 [2].

to discuss the possible implications of this case on the current/future cohabitation regime in full.

To allow opposite sex couples to have civil partnerships would, according to David Cameron would be to “undermine the sanctity of marriage”,⁹⁴ despite earlier concerns having been voiced about civil partnerships in their entirety. Civil Partnerships are an attractive option for numerous reasons from the inclusion of both parent’s names on the certificate, to freedom from prescribed vows and religious overtones. Most importantly “the institution of marriage is still saturated in sexist trappings and traditions that once recognised women as less legitimate and less equal to their partners”.⁹⁵ The extension of civil partnerships to heterosexual couples, would then provide an avenue through which couples can secure proprietary rights without having to submit to an institution which they are inherently opposed to.

7.3.1 Cohabitation Overview

Cohabitation has continued to grow, and women’s position in the work place and in society has continued to evolve. However, “cultural stereotypes still persist as to women's maternal role”, and they still face inequality in the employment sphere and the “seemingly unbreakable connections between work and home life”⁹⁶ continue. Cohabitation is no longer seen as ‘morally wrong’ and is no longer hidden from the public eye. Despite this clear social shift, the changes in the approach of the courts and

⁹⁴ Woolf M., ‘No 10 and Clegg Split Over Straight Civil Partnerships’ *The Sunday Times* (27 March 2014).

⁹⁵ Baxter H., *As a straight woman, why shouldn't I have a civil partnership?* (The Guardian 19 April 2014):

<www.theguardian.com/commentisfree/2014/apr/29/straight-civil-partnership-marriage-tradition-women-less-equal> accessed: 20/01/2018.

⁹⁶ Banyard, (n26), 1345.

the attempts to introduce legislation into parliament, their legal position remains stagnant.

It is essential to note that though married/civil partners make up the largest family form, cohabitants make up the second largest group.⁹⁷ Cohabiting couples are the fastest growing family form in the UK. It is clear that society now accepts cohabitation as a normal social practice and it is increasingly commonplace. Yet, the position goes further than this. The “British Social Attitudes Survey in 2009 established that 56% of people in general and 59% of different-sex cohabitants in particular believed couples who had lived together for some time had a common law marriage giving them the same legal rights as married couples”.⁹⁸ Yet the law refuses to reflect the current social beliefs.

Many couples now chose to cohabit, not as a pre-requisite to marriage, but as a form of commitment in and of itself. As Barlow notes, “cohabitation has itself taken on many of the functions of marriage, including the mutual commitment associated with marriage”.⁹⁹ Yet, despite the fact that the overriding consideration of fairness applies to those who are married or in civil partnerships, “in stark contrast to cohabiting couples, on divorce or dissolution of a civil partnership family assets may be redistributed whether or not there are minor children, and largely regardless of the original ownership of assets”.¹⁰⁰ Cohabitants remain without reliable legal protection. There have been numerous failed attempts during this period to introduce legislative protection for cohabitants: Cohabitation Bill; Cohabitation Rights Bill, some of which are discussed

⁹⁷ ONS., *Families and Households in the UK 2016* (4 November 2016), 2.

⁹⁸ Barlow A., ‘Cohabiting relationships, money and property: The legal backdrop’ (2008) 37 *The Journal of Socio-Economics* 502, 508.

⁹⁹ Barlow A., ‘Cohabitation Law Reform – Messages from Research’ (2006) 14 *Feminist Legal Studies* 167, 172.

¹⁰⁰ Barlow, *Cohabiting relationships, money and property* (n98), 509.

at length elsewhere.¹⁰¹ However, the latest Bill is awaiting a date for its second reading, perhaps this attempt will be successful, but that remains to be seen.

7.4 Case and Legislative Analysis

7.4.1 Overview

This section provides an overview of the development of the CICT and the attempts to legislate for the breakdown of unmarried cohabiting couples relationships. It adopts a chronological approach to the case analysis as, unlike in previous decades, the lack of distinct themes which run through the judgments would make a thematic approach ill-fitting. The analysis focusses on three of the central cases in the development of the CICT, *Oxley v Hiscock*, *Stack v Dowden* and *Jones v Kernott*.¹⁰² It is essential to note that the latter of these two cases involves jointly-owned properties, and as such, though seeming to indicate that we have moved away from the strict formal approach in *Rosset*, it remains binding in cases involving sole-ownership.¹⁰³ This section then also provides an in-depth analysis of the second reading of the Cohabitation Rights Bill which provides insight into the socio-political perspectives on cohabitation and opinions on the approach the law ought to adopt regarding such relationships.

7.4.2 *Oxley v Hiscock* [2004] EWCA Civ 546

The central issue to be determined by the court in *Oxley* was regarding how the proceeds of the property, registered in Mr Hiscock's sole-name ought to be quantified. The purchase of the property was in part funded by the sale of the couple's previous home.

¹⁰¹ See [7.5].

¹⁰² *Oxley v Hiscock* [2004] EWCA Civ 546, hereafter *Oxley*; *Stack v Dowden* [2007] UKHL 17 hereafter *Stack*; *Jones v Kernott* [2011] UKSC 53 hereafter *Jones*.

¹⁰³ Even where *Rosset* has not been applied it has been done so in a restrictive way so that the approach mirrors that adopted in *Rosset*: see [7.4.4].

Ms Oxley had exercised her right to buy that property for a discounted rate under the right to buy scheme, and Mr Hiscock provided the funds which resulted from the sale of his previous property. The proceeds of sale were combined with an additional sum from Mr Hiscock and a mortgage.¹⁰⁴ Mr Hiscock was solely responsible for the mortgage over the property. However, the court considered that the couple had both contributed towards the mortgage repayments, and the maintenance/improvement of the property.

Despite having been received in the media as a case which “changed Lovers’ Law”,¹⁰⁵ the ‘changes’ which occurred as a result of *Oxley* were in fact minimal. *Oxley* maintained the orthodox approach to acquisition which was restated in *Rosset*.¹⁰⁶ However, when seeking to clarify the legal position in relation to quantification, it is the inclusion of considerations of fairness which are of most interest. When considering the question of quantification, Chadwick LJ set out the following: where there is some agreement between the parties that the beneficial interest is to be held jointly then when it comes to the question of quantification beneficial interest will be determined by evidence as to what the parties said/did.¹⁰⁷ Where there is no evidence as to any discussion as to the division of shares:

“the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property... [which] includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions,

¹⁰⁴ The relative financial contributions were considered to be 28% Ms Oxley, and 48% Mr Hiscock with the remaining sum secured via the mortgage.

¹⁰⁵ *Daily Star*, (25 May 2005).

¹⁰⁶ As discussed in detail in [4.2], [6.8].

¹⁰⁷ *Oxley v Hiscock* [2004] EWCA Civ 546 [69].

council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home”.¹⁰⁸

The inclusion here of considerations of “fairness having regard to the whole course of dealing”, echoed the approach adopted in *Grant v Edwards* and *Midland Bank v Cooke* as discussed in the previous chapter.¹⁰⁹ This confirmation of this more flexible, fairness based approach, including *feminine* acts such as “housekeeping” indicates once again, an intention for the courts to maintain an element of the difference based approach adopted by Lord Denning.¹¹⁰ It allows for a consideration of the reality of couple’s relationships, the different contributions which might be made.

This inclusion of “fairness” enhances the flexibility of the court within the context of the quantification of shares by enabling them to more adequately consider a range of ‘contributions’ to the relationship, not limited to, but still informed by financial contributions. *Oxley* itself demonstrates this in that Mr Hiscock was awarded 60% of the beneficial interest which was decided on the basis that despite their general ‘pooling of resources’, from which Chadwick LJ would have been satisfied at inferring an intention to share the proceeds equally, Mr Hiscock had made the more significant direct financial contribution.¹¹¹

As such, though it was suggested that the affirmation of the relevance of fairness in CICT proceedings “may help avoid the injustice that has often befallen non-legal title holders, particularly female partners, for whom a share of the property proportionate to

¹⁰⁸ *Oxley v Hiscock* [2004] EWCA Civ 546 [69].

¹⁰⁹ See [6.8].

¹¹⁰ The difference based approach adopted by Lord Denning was discussed in [5.7].

¹¹¹ *Oxley v Hiscock* [2004] EWCA Civ 546 [74].

their financial contribution does not amount to a fair result”,¹¹² those sole-owners who are unable to pass the first stage of the *Rosset*-test, namely acquisition determined by express agreement or financial contribution, remain vulnerable.

The final point which arises as a result of the *Oxley* judgment is in relation to the ‘vulnerability’ of female cohabitants. Although Mrs Oxley cannot be said to be economically vulnerable in the same way that Valarie Burns or Janet Eves were, there are aspects of the judgment which indicate a different form of vulnerability.¹¹³ When encouraged by her solicitors to enter into a deed of trust regarding the new property Mrs Oxley responded, “I am quite satisfied with the present arrangements, and feel I know Mr Hiscock well enough not to need written legal protection in this matter”.¹¹⁴ Despite being made aware of the risks of not formalising her arrangements with Mr Hiscock, her trust in him was ‘enough’ for her. This feeling of trust and security, was no doubt bolstered by the fact that in 1988 he had asked her to marry him, which even when unfulfilled (or even unspoken), has been shown to induce a sense of mutual commitment.¹¹⁵

As Bottomley points out “what Mrs. Oxley represents is a woman whose vulnerability arises from the fact that she believed that the resources within the relationship would be pooled”.¹¹⁶

Although this is not considered in great detail by Chadwick LJ, and thus cannot be

¹¹² Fox L., ‘Trusts of the Family Home: The Impact of *Oxley v. Hiscock*’ (2005) 56 *Northern Ireland Legal Quarterly* 83, 104.

¹¹³ As discussed in [5.7], [6.8].

¹¹⁴ *Oxley v Hiscock* [2004] EWCA Civ 546 [9].

¹¹⁵ *Oxley v Hiscock* [2004] EWCA Civ 546 [11]. See for example moral judgments in [5.7.3] and the discussion of *Hammond v Mitchell* in [6.8].

¹¹⁶ Bottomley A., ‘From Mrs Burns to Mrs Oxley: Do cohabiting women (still) need marriage law?’ (2006) 14 *Feminist Legal Studies* 18, 194.

considered to have influenced the judge's findings, it provides insight into the position of unmarried cohabitants, even when they are made aware of the law and the difficulties which arise by virtue of the trust inherent in such relationships.¹¹⁷

7.4.3 *Stack v Dowden* [2007] UKHL 17

Stack concerned the conveyance of a property into the joint names of the couple, without an explicit declaration of their beneficial interests. As the property was in joint names, the court did not need to consider the question of acquisition (as in sole-name cases), instead their role was limited to the determination of shares, quantification. The starting point for this is that “equity follows the law”,¹¹⁸ and therefore the shares are assumed to be equally distributed. It is for the party arguing against the presumption of equal shares to establish why this is the case.

A departure from *Rosset*?

Stack was seen to signal a departure from the restrictive approach adopted in *Rosset*.¹¹⁹ When considering the emphasis placed on direct financial contributions for the purpose of inferring a common intention to share the beneficial interest in the property Lord Walker was keen to emphasise that “the law has moved on... [since *Rosset*] and your Lordships should move it a little more in the same direction”.¹²⁰ This statement seems to indicate a departure from the centrality of financial contributions to CICT proceedings so that the law more adequately reflects societal change. However, an

¹¹⁷ It is not used in the same way that Lord Denning often used the construction of vulnerable women to make a ‘moral’ judgment: see [5.9.3]; Familial trust has been examined in detail at [4.3.1] and [6.8.5], and in [6.8].

¹¹⁸ *Stack v Dowden* [2007] UKHL 17 [33]; Confirmed in *Jones v Kernott* [2011] UKSC 53 [22], [51], [61]. See [4.2].

¹¹⁹ See [4.2.1] and [6.8.3] for an in depth assessment of the law under *Rosset*.

¹²⁰ *Stack v Dowden* [2007] UKHL 17 [26]. See also Lady Hale’s comments at [63].

analysis of the judgment finds that *Stack* fails to adequately address them.

The supposed willingness of the court to consider “many more factors than financial contributions may be relevant to divining the parties’ true intentions”¹²¹ seems to signal a clear departure from the strict financial approach in *Rosset*. These relevant factors included the nature of the couple’s relationship, as well as “the parties’ individual characters and personalities”.¹²² In cases concerning joint-owners the court proposed that what was necessary was an examination of context in order to support the inference that the beneficial interest of the parties was to be held otherwise than equally. Here, “context is supplied by the nature of the parties’ conduct and attitudes towards their property and finances”.¹²³ Despite the seemingly broad criterion which could be considered, an examination of *Stack* reveals that financial contributions remained almost determinative of common intention.

It is telling that considerable emphasis was placed on the fact that, on examination of the evidence, the couple did not pool their resources “for the common good”.¹²⁴ Indeed, the property under dispute in this case was one of the only things which was held jointly. However, though the reason for this, that it was intended to be shared beneficially was accepted by Ms Dowden, it was stated that that alone “cannot be conclusive”¹²⁵ as to in what shares it was held.

¹²¹ *Stack v Dowden* [2007] UKHL 17 [69]; an analysis of the issues this had caused women in particular both in the original formulation of the finance-based approach (in *Gissing* and *Pettitt*) and under *Rosset* has been discussed in detail in the Chapters 5 and 6.

¹²² *Stack v Dowden* [2007] UKHL 17 [69].

¹²³ *Stack v Dowden* [2007] UKHL 17 [90].

¹²⁴ *Stack v Dowden* [2007] UKHL 17 [90].

¹²⁵ *Stack v Dowden* [2007] UKHL 17 [90].

Lady Hale critiques the approach of the judge at first instance for having:

“founded his conclusion on the length and nature of their relationship, which he repeatedly referred to as a partnership, despite the fact that they had maintained separate finances throughout their time together. With the best will in the world, and acknowledging the problems of making more precise findings on many issues after this length of time, this is not an adequate answer to the question”.¹²⁶

The use of “partnership” by the judge in the court below was seen to signify that the couple had led a joint life, and that from this intention to share equally, which was considered to be incompatible with the fact that they had maintained separate accounts. In contrast to the relationship in *Stack*, Lady Hale acknowledged that in “cases of real domestic partnership”¹²⁷ then there would be nothing to indicate that the beneficial interest should be different from how the property is held at law. When assessing the evidence which indicated that the property was not intended to be held in equal shares these considerations were dominated by financial considerations. This assumes that the way in which couples arrange their finances correlates with their level of commitment, which given the diversity of such arrangements between couples is an unsatisfactory basis for such a presumption.¹²⁸

Despite going on to recognise the “pitfalls in an arithmetical approach to ascertaining the parties' intentions”,¹²⁹ the focus of the court regarding the determination of the couples intentions remained focused on financial contributions. Lady Hale then went

¹²⁶ *Stack v Dowden* [2007] UKHL 17 [86].

¹²⁷ *Stack v Dowden* [2007] UKHL 17 [87].

¹²⁸ See for example Pahl J., ‘Family Finances, Individualisation, Spending Patterns and Access to Credit’ (2008) 37(2) *Journal of Behavioural and Experimental Economics* 577, 577 on the increasingly individualised approach adopted by couples with regard to their finances as discussed at [4.3.2]. This also provides another example of the way in which the legal regime does not reflect the reality/diversity of unmarried cohabiting couples.

¹²⁹ *Stack v Dowden* [2007] UKHL 17 [89].

on to say that an imbalance of financial contributions can “support the inference of an intention to share otherwise than equally”¹³⁰ yet the court remained silent on factors other than financial contributions/arrangements. As such, rather than ‘supporting the inference’ that the property was not to be held in equal shares, it is, at least in *Stack*, determinative.

When summing up, the centrality of the couple’s financial arrangements to the court’s decision that the beneficial interest was not intended to be shared equally becomes increasingly evident:

“There cannot be many unmarried couples who have lived together for as long as this, who have had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares... to be equal”.¹³¹

As a result of the lower level of payments made by Mr Stack, the shares were determined to be 35/65 with Ms Dowden holding the larger share.

Though the focus on financial arrangements/contributions in *Stack* may seem to indicate that the court had not truly departed from the strict regime in *Rosset*, there are indications that other constrictions, were they present, may be relevant. In particular Lady Hale’s ‘list’ of factors which may be relevant in determining the parties’ intentions included a number of non-financial (and indirect financial) contributions:

“any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names... the purpose for which the home was acquired; the nature of the parties’

¹³⁰ *Stack v Dowden* [2007] UKHL 17 [89].

¹³¹ *Stack v Dowden* [2007] UKHL 17 [92].

relationship; whether they had children for whom they both had responsibility to provide a home... other household expenses... The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay".¹³²

However, despite the positive indications that this list of relevant considerations has for domestic contributions, their lack of applicability in *Stack* makes it difficult to predict what weight they would have, when such considerations arise. As Lord Neuberger notes:

"Had it been clear that he had undertaken to pay for consumables and child minding, it might have been possible to deduce some sort of commitment that each would do what they could. But Mr Stack's evidence did not even go as far as that".¹³³

Indicating that if he paid for, perhaps even performed, *feminine* contributions then the court may have been more amenable to Mr Stack's claim for an equal share of the beneficial interest in the property. This is of course speculative.

The comments made regarding the quantification of beneficial interest also provides insight into the centrality of financial arrangements/contributions in CICT proceedings. The court maintained that when considering quantification, they are to "take into account all the circumstances of their relationship".¹³⁴ However, this was followed by a caveat, that being that such a consideration "does not mean that all the circumstances of the relationship are of primary or equal relevance".¹³⁵ Viewing this statement in light of the way in which the nature of "their close and loving relationship" was given no real

¹³² *Stack v Dowden* [2007] UKHL 17 [69].

¹³³ *Stack v Dowden* [2007] UKHL 17 [91].

¹³⁴ *Stack v Dowden* [2007] UKHL 17 [132].

¹³⁵ *Stack v Dowden* [2007] UKHL 17 [132].

consideration by the court, and the focus on financial contributions in the determination, it would seem that the latter remains of “primary”¹³⁶ relevance.

Two additional issues must also be considered within this context. First, the considerations of fairness regarding quantification as reaffirmed in *Oxley* were limited in *Stack*.¹³⁷ There the court were keen to emphasise that

“the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair”.¹³⁸

The re-emphasis on the intention of the parties, opposed to a consideration of fairness, lessened the ability for the courts to consider those aspects of the relationship which have traditionally been restricted under the application of *Rosset*. Thus, indicating a return to orthodoxy, and to formal equality. Finally, as *Stack* was a case involving joint-ownership, *Rosset* would at any rate still arguably be binding in the context of sole-ownership cases.

Despite these concerns, the Privy Council in *Abbott v Abbott* sought to emphasise that the law has “moved on”¹³⁹ since *Rosset* and critiqued the court below for placing “undue significance”¹⁴⁰ on *Rosset* in relation to the question of quantification. Despite *Abbott* involving a property which was registered in the sole-name of this husband, the question of acquisition did not arise as the parties were in agreement that there was a beneficial

¹³⁶ *Stack v Dowden* [2007] UKHL 17 [132].

¹³⁷ *Oxley v Hiscock* [2004] EWCA Civ 546 [69] as discussed at [7.4.2].

¹³⁸ *Stack v Dowden* [2007] UKHL 17 [161], see also [60] and [144].

¹³⁹ *Abbott v Abbott* [2007] UKPC 53 [5]-[6]. Hereafter *Abbott*.

¹⁴⁰ *Abbott v Abbott* [2007] UKPC 53 [19].

share, but disputed the extent of that share. Therefore the case more accurately reflected a joint rather than sole-ownership case. The case was primarily decided on financial contributions, rather than a consideration of *feminine* contributions. As a result, despite the willingness of the courts to apply *Stack* in lieu of *Rosset* to sole-ownership cases, the impact cannot be said to be too extensive given that the central issue with sole-ownership usually concerns acquisition. In addition, though this would seem to indicate a consistency of approach as regards sole/joint-ownership cases, *Abbott* was purely persuasive, and given that the same Justices appeared in *Stack* and *Abbott*, it is unlikely that they would suffer from the same confusion as to the intention of their previous judgment as the lower courts would.¹⁴¹

As a result, it would seem that despite Lady Hale's emphasis that it "should not be assumed that... [financial arrangements/contributions] always take pride of place over natural love and affection",¹⁴² and yet very little consideration is given in *Stack* as to anything other than the respective financial contributions made by the couple. As a result of the above analysis, the extent to which *Stack* was truly a departure from *Rosset* is questionable.

7.4.4 *Jones v Kernott* [2011] UKSC 53

Jones was also a joint-ownership case, which involved the court seeking to determine the extent of the couple's individual beneficial shares. In 1985 the couple purchased the family home and registered it in their joint names. The £6000 deposit was paid exclusively by the proceeds of sale from Ms Jones's previous home. Both Mr Kernott and Ms Jones made repayments towards the £30,000 mortgage. In 1986 the couple

¹⁴¹ See [4.2.3].

¹⁴² *Stack v Dowden* [2007] UKHL 17 [69].

jointly took out an additional £2000 loan to build an extension, Mr Jones having done some of the work on this himself. By 1993 their relationship had deteriorated and Mr Kernott left the property. From this point he no longer contributed to the property or the maintenance of the children. In 1996, after a number of failed attempts at selling the family home, Mr Kernott and Ms Jones decided to cash in their life insurance policy. They divided the proceeds so as to facilitate Mr Kernott's purchase of a new property, with Ms Jones continuing to live in the property that had originally been the family home with the children.

The court considered that the couples' intention with regard to the property at the time of purchase had been that they held it in equal shares. However, having split the proceeds of their life insurance policy to facilitate the purchase of Mr Kernott's new home, the court considered that there must have been a change in intention at this stage.¹⁴³ Without the dividends from the insurance policy he would have been unable to fund this new purchase if he were still liable to contribute towards the outgoings attached to the family home. The couple were seen to have the sole-interest and capital gain associated with the two different properties. Ms Jones, in what had been the family home, and Mr Kernott in his new property. As a result of these changes Mr Kernott's interest was determined to be 10% based on the 50% of the interest at the value of the property in 1993/1995, taking into consideration the huge increase in value that the property had undergone since the time of purchase.

¹⁴³ *Jones v Kernott* [2011] UKSC 53 [48]

Financial contributions or Fairness?

After the slightly more restrictive approach to fairness in *Stack, Jones* can be seen to more firmly reposition fairness within the CICT regime. The court's decision to allow imputed common intention in the context of the CICT has proved controversial, given that it can be seen to undermine the 'common intention' element of the doctrine, by "attributing to the parties an intention which they did not have".¹⁴⁴ However, the inclusion of imputation is limited and has facilitated the inclusion of fairness within proceedings, which is a welcome development.

The court were keen to emphasise that the primary search is to "ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct".¹⁴⁵ There are two exceptions to this general rule, only the latter of which is relevant in this context. That is

"where it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared... [in such] situations, the court is driven to impute an intention to the parties which they may never have had".¹⁴⁶

It is at this stage that the court must have regard to "fairness" as the "court has a duty to come to a conclusion on the dispute put before it".¹⁴⁷

If the parties' intentions can be discovered then "it is not open to a court to impose a solution upon them in contradiction to those intentions, merely because the court

¹⁴⁴ *Jones v Kernott* [2011] UKSC 53 [31]. See also [4.3.1].

¹⁴⁵ *Jones v Kernott* [2011] UKSC 53 [31].

¹⁴⁶ *Jones v Kernott* [2011] UKSC 53 [31].

¹⁴⁷ *Jones v Kernott* [2011] UKSC 53 [47].

considers it fair to do so”.¹⁴⁸ Therefore imputation is permissible only when it comes to the quantification of shares, the initial intention to share differently from the presumption can only be inferred. The court cannot embark on a crusade of redistributive justice based on fairness, undermining the common intention of the parties.

Despite having been considered “a disappointing development”¹⁴⁹ due to the restrictive application of fairness, the judgment in *Jones* does hold some promise for those who cannot make financial contributions. The ability for the courts to consider the whole course of dealings per *Oxley* as interpreted widely in *Stack* widens the scope of considerations considered relevant, at least for the purposes of quantification, to include *feminine* contributions.¹⁵⁰

“Adapting old principles to new situations”?¹⁵¹

In cases involving joint-ownership, there is a presumption of beneficial joint tenancy, that is that the beneficial interest will be equally divided.¹⁵² In *Jones*, the discussion as to the reasoning behind this presumption, and why attempts to rebut the presumption are “not to be lightly embarked on”¹⁵³ raises two interrelated points. First, it illuminates the increasing consideration which the courts are giving to the social reality of cohabiting relationships. Secondly the issues raised with regard to evidence in the context of the CICT. These points will be dealt with below.

¹⁴⁸ *Jones v Kernott* [2011] UKSC 53 [46].

¹⁴⁹ Garland F., ‘Jones v Kernott’ (2012) 34(4) *Journal of Social Welfare and Family Law* 479, 487.

¹⁵⁰ See *Oxley v Hiscock* [2004] EWCA Civ 546 as interpreted in *Stack v Dowden* [2007] UKHL 17 [69]. Discussed at [7.4.2] and [7.4.3] respectively.

¹⁵¹ *Jones v Kernott* [2011] UKSC 53 [57].

¹⁵² See [4.2.2].

¹⁵³ *Jones v Kernott* [2011] UKSC 53 [19].

Concerning this first point, based on the fact that many couples when acquiring a property will do so through obtaining a mortgage for which they are jointly liable, the court considered that such acts provide “a strong indication of emotional and economic commitment to a joint enterprise”.¹⁵⁴ The inclusion of joint enterprise within this echoes the family assets approach, formulated by Lord Denning with the aim of producing fairness, again emphasising that the court intended to consider a wider range of factors than those which were purely financial.¹⁵⁵ In addition, the recognition of both the emotional and economic commitment between couples, though informed here by a joint commitment to a financial obligation, indicates a willingness to consider the nature of the parties relationship more broadly than in decades prior.¹⁵⁶

The way in which this may indicate emotional/economic commitment was recognised even where it is not expressed by the couples. Citing *Midland Bank v Cooke* as evidence of this point:

“Equity has traditionally been a system which matches established principle to the demands of social change... When people... agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure... There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership”.¹⁵⁷

¹⁵⁴ *Jones v Kernott* [2011] UKSC 53 [19].

¹⁵⁵ As discussed at [5.7.1] and as also echoed in *Midland Bank v Cooke* (1995) 27 HLR 733 as discussed at [6.8.6].

¹⁵⁶ Note this emotional commitment in the context of the discussion of emotional vulnerability concerning Mrs Oxley above at [7.4.2].

¹⁵⁷ *Midland Bank v Cooke* (1995) 27 HLR 733, 575 as cited in *Jones v Kernott* [2011] UKSC 53 [20]. See [6.8] for a more detailed analysis of *Midland*.

The restatement of *Midland* is also testament to the courts willingness to recognise the reality of communication within relationships, in that it is unlikely that they will expressly discuss their beneficial shares, a point which will be examined further below.

In *Jones* the court took the opportunity to make clear that there is no presumption in favour of a resulting trust in those cases involving married/unmarried couples.¹⁵⁸ In justifying the step away from resulting trusts as a possible mechanism in assessing proprietary interest it is justified by the change in social and economic circumstances which it would have been better suited to.¹⁵⁹ Resulting trusts, are quantified based on a “solid tug of money”,¹⁶⁰ as a result the beneficial interest in the property proportionate to the size of the financial contribution to the acquisition of the property. In expressly removing the resulting trust from the context of disputes concerning the family home, property disputes between couples are less likely to work to the detriment of those who have been unable to contribute/unable to contribute significantly as although financial contributions remain relevant in the context of the CICT they are not determinative.

Finally, when discussing the issue which arise due to the nature of the evidence in the context of the CICT the court stated:

“the task of seeking to show that the parties intended their beneficial interests to be different from their legal interests was not to be ‘lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms...’”.¹⁶¹

¹⁵⁸ *Jones v Kernott* [2011] UKSC 53 [[23]-[25], [53] and [60].

¹⁵⁹ *Jones v Kernott* [2011] UKSC 53 [24].

¹⁶⁰ *Hofman v Hofman* [1965] NZLR 795, 800.

¹⁶¹ *Jones v Kernott* [2011] UKSC 53 [12] citing *Stack v Dowden* [2007] UKHL 17 at [68] and [33].

Here, the reality of the human nature of the parties to the case is directly recognised in the judgment. The fact that, in hindsight, particularly if the breakdown of the relationship was unpleasant then events which happened may become tainted with malice, whether purposefully or subconsciously. Herein lies the difficulty of evidence which is not purely economic, given that even economic contributions become tainted with emotion. However, this is not an adequate justification to allow for the context of the relationship itself to be disregarded particularly given the injustice which arises when financial contributions are considered to equate to commitment.

Sole Owners After *Jones v Kernott*

Despite the progress towards a more fairness based approach with regard to joint-ownership cases, and the *obiter* in *Stack* and *Jones* indicating that there was one regime for sole/joint-ownership cases under the CICT, until a sole-ownership case reaches the Supreme Court, *Rosset* remains binding.¹⁶² There have been instances in which the courts have applied *Stack/Jones*. Yet, the restrictive interpretation of these cases has meant that on application the approach differs little from that of *Rosset*, which remains ‘good’ law despite the courts seeming unwillingness to apply it. The issues raised as a result of the *Rosset* approach have been discussed elsewhere in this thesis, however, the following section uses the case of *Graham-York v York* to demonstrate the injustice which has continued in relation to sole-ownership cases post-*Jones*.¹⁶³

¹⁶² Per *Stack v Dowden* [2007] UKHL 17 [56] and *Jones v Kernott* [2011] UKSC 53 [51]-[51]. However, there has been inconsistency in the approach adopted by the lower courts. In some instances they have chosen to apply *Rosset*, and in others they have applied *Jones/Stack*. For a detailed overview of the treatment of sole-owners post-*Jones* see Sloan B., ‘Keeping up with the Jones Case: Establishing Constructive Trusts in ‘Sole Legal Owner’ Scenarios’ (2015) 35(2) *Legal Studies* 226. See also [4.2.3].

¹⁶³ *Graham-York v York* [2015] HLR 26.

In *Graham-York*, the couple had cohabited from 1976 until the man's death in 2009 in a property registered in the man's sole name. From 1976 to 1985 Miss Graham-York worked as a singer, during which time her earnings were given to Mr York, after 1985 her income was limited, as such any contribution that she did make was minimal. After Mr York's death the woman continued to live in the property. As a result of the large mortgage arrears which had accumulated, due to Miss Graham-York's insignificant income, the bank issued proceedings and in response she claimed to have an overriding interest. In order to demonstrate this interest, she relied on establishing a CICT. On the evidence at first instance the judge determined that there was no express agreement between the couple giving rise to the inference of common intention, and so instead relied on her financial contributions to make that finding. Awarding her 25% which was considered a "fair reflection"¹⁶⁴ of her financial and non-financial contributions during the relevant period of cohabitation. In the CoA the quantification of her share became the central issue.

Tomlinson LJ in his judgment placed emphasis on the whole course of dealings *in relation to the property*.¹⁶⁵ Despite suggestions from Miss Graham-York's council that the judge at first instance ought to have taken into account that Miss Graham-York had "contributed 'as much to the household as she reasonably could'"¹⁶⁶ and therefore should have been awarded 50%, Tomlinson was unwilling to consider the context of the couples' relationship. The violence suffered at the hands of her partner, and the controlling nature of the relationship in fact worked against a finding in favour of Miss Graham-York:

¹⁶⁴ *Graham-York v York* [2015] HLR 26, 536.

¹⁶⁵ *Graham-York v York* [2015] HLR 26, 543.

¹⁶⁶ *Graham-York v York* [2015] HLR 26, 539-40.

“it is not easy to reconcile the judge’s findings as to Norton York’s controlling and threatening nature with the suggestion of a ready inference of a common intention as to equality of interests”.¹⁶⁷

Not only was Miss Graham-York’s lower earning capacity not considered, the fact that Mr York took ownership of her earnings also held no weight. The judge directly asserted that in deciding what is *fair*, the court is not concerned with redistributive justice:

“it is irrelevant that it may be thought a ‘fair’ outcome for a woman who has endured years of abusive conduct by her partner to be allotted a substantial interest in his property on his death. The plight of Miss Graham-York attracts sympathy, but it does not enable the court to redistribute property interest in a manner which right-minded people might think amounts to appropriate compensation”.¹⁶⁸

Though attracting ‘sympathy’ this was not used in order to construct a ‘moral’ judgment in the style of Lord Denning.¹⁶⁹ Instead it had no impact on the quantification of shares. As a result of the strict application of the fairness element of the CICT, the approach of the court in this sole-ownership case, focussing on financial contributions with no consideration of the reality of the relationship more accurately reflects the orthodox *Rosset* approach, putting to rest the hopes of a more holistic approach even with regard to quantification.

7.5 Recommendations and Legislative Proposals

The following section examines two of the key proposals for reform made by the Law Commission and the most recent attempt at legislating for the breakdown of unmarried

¹⁶⁷ *Graham-York v York* [2015] HLR 26, 540.

¹⁶⁸ *Graham-York v York* [2015] HLR 26, 543.

¹⁶⁹ See [5.7.3].

cohabitation to get to the second reading stage of Parliamentary proceedings, the Cohabitation Rights Bill. This examination seeks to evaluate the extent to which the proposals would adequately address the injustices which currently arise under the CICT.¹⁷⁰ However the examination of the second reading of the Cohabitation Bill also allows for the multiplicity of discourses which arose during the debate to be analysed. Thus providing additional insight into the differing opinions as to how the law ought to treat cohabitants, and how such relationships are perceived.

7.5.1 Law Commission

Much of the literature on cohabitation focuses on the stance of the Law Commission previous to its 2007 paper.¹⁷¹ Having acknowledged this, the merits of the 2002 paper can still be seen in that many of the proposals made then, are still evident in the 2007 paper, as such the literature surrounding this can still be seen to have merit.

The proposed scheme made clear that it is not intended to be applicable to all cohabitants, again referring to the diverse nature of this large group of people.¹⁷² They list the relevant criteria which should be considered when assessing whether financial award should be made. These are listed in summary as depending on whether:

“the couple satisfied certain eligibility requirements; the couple had not agreed to disapply the scheme; and the applicant had made qualifying contributions to the relationship giving rise to certain enduring consequences at the point of

¹⁷⁰ Other approaches which might be adopted are discussed at [8.3].

¹⁷¹ Law Commission., *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com 307, 2007).

¹⁷² See [4.3.3].

separation”.¹⁷³

Including non-financial contributions as a relevant contribution under the category of qualifying contributions, would allow for the consideration of those *feminine* contributions which have traditionally been absent under the CICT to occur. As a result, this would alleviate a significant amount of the injustice which has arisen under the current approach.

The aims of the Law Commission can be summarised as intending to remove reliance on common intention, which would be a welcome development given that common intention has proved problematic in practice.¹⁷⁴ Alongside this the introduction of a new statutory default scheme for determining beneficial ownership was necessary to give “greater clarity and consistency”¹⁷⁵ in the treatment of couples on the breakdown of cohabiting relationships.

Under the regime proposed by the Law Commission, Greer describes the factors that would be considered by the court which include:

“the financial needs and obligations of the parties; the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future; the welfare of any children who live with, or might reasonably be expected to live with, either party; and the conduct of each party”.¹⁷⁶

One of the key issues which the Law Commission raised with regard to treating

¹⁷³ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, (n171), 1.13. Note that the proposal here was an opt-out scheme. This was done as a result of the concerns relating to autonomy. See also [2.5.3].

¹⁷⁴ See [5.7], [6.8], [7.4].

¹⁷⁵ Wong S., ‘The shared home a rational solution through statutory reform’ in Lim H. & Bottomley A., eds. *Feminist Perspectives on Land Law* (2007: Routledge Cavendish, London), 200.

¹⁷⁶ Greer S., ‘Back to the Bad Old Days?’ (2008) 158 *New Law Journal* 174, 178.

cohabitantes in a marriage-like manner, is the broad range of cohabitantes, not all cohabitantes are in a marriage-like relationship, some will be cohabitations merely of convenience, or based on a care-giving relationship and the like.¹⁷⁷ Yet, it seems to me that the diversity of cohabitants does not render them a group of people for whom legislation would necessarily be too inflexible. For example, it would be possible to create an opt-in statutory scheme, which used a non-exhaustive list of eligibility criteria to be consulted by the courts when determining whether cohabitants were in a marriage-like relationship. However, such a proposal would still raise the issue of communication.

For an opt-in scheme to benefit cohabiting couples, they are required to contemplate and speak about the breakdown of the relationship. As a result, such a regime would fail to protect vulnerable parties, a point recognised by Law Commission.¹⁷⁸ Perhaps what is truly necessary is for legislation to give more adjustive powers to the judiciary, which allow them to consider the relationship in its totality. If such a regime legitimised fairness as a consideration, this would likely reaffirm the relevance of feminine contributions. Placing such discretion on statutory footing would legitimise the judicial flexibility necessary in such cases, without risking the disruption of constitutional principles and restrictive precedent.¹⁷⁹ It would allow for a substantive approach to be taken, one which can embrace the diverse nature of cohabitation relationships and address the inequality which has resulted from the unequal construction of women in society where necessary.

¹⁷⁷ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n171), 1.10.

¹⁷⁸ *ibid*, [1.15].

¹⁷⁹ The constitutional principles referred to here are those which put restrictions on judicial law making, namely the separation of powers and the supremacy of Parliament.

7.5.2 Cohabitation Rights Bill [HL] Second Reading¹⁸⁰

Based on the proposals of the Law Commission in 2007, the Bill suggested that:

“The starting point is for the applicant to show ‘qualifying contributions’ to the parties’ shared lives. These could be financial or they could be in work, in care or in kind”.¹⁸¹

Though it should be noted that they would still be required to demonstrate that they had suffered “economic disadvantage”.¹⁸² In some ways this recognises that contribution is more than payments towards the purchase price/mortgage. Having been preceded by a discussion of contributions which included care-based acts, it can be assumed that “economic disadvantage” would not preclude non-financial *feminine* contributions in practice.

Lord Marks, who proposed the Bill noted the current reliance on the “antiquated and unwieldy law of trusts”.¹⁸³ The lack of consistency and focus on financial contributions has made the law of trusts an unsound basis for those in a vulnerable position to secure proprietary rights. Lord Marks goes on to describe the current position of unmarried cohabitants as follows:

“On separation, there are no legal rights at all for the woman who has given up her career to look after her partner’s children—or their joint children... There are no rights for the woman who gives up working to keep house for her family and then does so for many years before the relationship breaks down”.¹⁸⁴

¹⁸⁰ Cohabitation Rights Bill [HL] Second reading (2014/15). Note that this same Bill was re-introduced in 16-17 but did despite passing the first stage did not progress on to its second reading. The same Bill has now been introduced again and is currently awaiting a date for second reading.

¹⁸¹ Cohabitation Rights Bill [HL] Second reading (2014/15), Col 2070-2071.

¹⁸² Cohabitation Rights Bill [HL] Second reading (2014/15), Col 2070-2071.

¹⁸³ Cohabitation Rights Bill [HL] Second reading (2014/15), Col 2069.

¹⁸⁴ Cohabitation Rights Bill [HL] Second reading (2014/15) col 2069.

The reliance on stereotypes here, constructing women as mother/homemaker can be seen to adhere to a similar approach to that employed by Lord Denning in constructing women as vulnerable in order to manipulate the law for their benefit.¹⁸⁵ Here, the emotive language used when discussing those women who have “given up” their careers for the sake of a relationship is utilized in order to elicit sympathy for those who the law has failed to protect, in order to support his proposed Bill.

It is stated that the proposed Bill “aim[s] to address economic unfairness at the end of a relationship that has enriched one party and impoverished the other in a way that demands redress”.¹⁸⁶ This again attempts to rouse an emotional response which attempts to make those hearing the proposition consider the moral implications of the law in their current state.

Baroness Butler-Sloss, also speaking in favour of the Bill, did so by discussing the groups which the Bill would impact. For the purpose of this thesis, it is the first one, cited below, which is of most relevance.

“Generally it is the woman, but could be the man, who has been living with the other partner sometimes for 25 or 30 years... That woman very often either did not have a job because her partner was well-to-do and wanted her to stay at home, or she had a modest job that was not compatible with her considerable abilities. When she is left by that man, who, after 25 or 30 years, looks for a younger woman... she is absolutely stuck. She has no house because the house is very often in his name and she did not suggest that it should be in both names... They are left on their own with the children growing up; they are not

¹⁸⁵ See in particular [5.7].

¹⁸⁶ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2070.

required to have maintenance; they are homeless and without a proper job, and they have to find something to be able to keep themselves, or live off benefits. Of course, they also have no pension”.¹⁸⁷

The ‘typical’ cohabitant constructed by Baroness Butler-Sloss mirrors the experience of a number of the claimants who have been examined within this thesis.¹⁸⁸ In drawing on the human element of these cases, this extract recognises not only the issues which arise as a result of the current regime, but also the impact that the wider socio-legal context can have on individuals, in particular in relation to employment.¹⁸⁹ It also draws considerable attention to the consequences that the current regime can have on the party who is unable to assert any, or only insubstantial beneficial interest, in that it goes beyond the loss of a financial asset.

The central issues which were raised in relation to the passing of the Bill were threefold. First, and most expectedly there were arguments as regards the sanctity of marriage.¹⁹⁰ The second argument against the Bill, though not unrelated to the first was that in *encouraging* cohabiting relationships, which would ‘damage’ children due to the frequency of breakdown.¹⁹¹ Even those who recognised the issues which face unmarried cohabitants on breakdown used the issues family breakdown can cause children as a reason against the Bill progressing. Lord Farmer focussed on the way in which lone parents (though focusing particularly on mothers as they make up the largest percentage of single parent families) “struggle to provide adequately for their children, both

¹⁸⁷ Cohabitation Rights Bill [HL] Second reading (2014/15), Cols 2079-80.

¹⁸⁸ In [5.7], [6.8], [7.4].

¹⁸⁹ A link which has been drawn out throughout this thesis.

¹⁹⁰ See for example Cohabitation Rights Bill [HL] Second reading (2014/15), col 2074. This has been discussed in detail at [4.3.3] and is a theme which has emerged Chapters 5-7.

¹⁹¹ See for example Cohabitation Rights Bill [HL] Second reading (2014/15), col 2073. See also [5.2] and [6.5.1] for similar arguments raised in relation to lone mothers.

financially and in terms of the time and attention they need to thrive”.¹⁹² This was further problematised through casing the issue in terms of the economic costs to the tax payer, a tactic which has historically been used when arguing against issues attempting to address various inequalities.¹⁹³ This is despite the fact that if this Bill were to be implemented, it would make “the bad men pay instead of us as taxpayers”¹⁹⁴ by providing security (financial or property based) for the economically vulnerable party on breakdown.

Finally, the Bill was met with claims of “paternalism”.¹⁹⁵ To provide rights on breakdown to those who had specifically chosen not to marry was presented as an “attack on the liberty”.¹⁹⁶

The “corner of freedom where couples may escape family law”,¹⁹⁷ that is unmarried cohabitation. This “liberty” which Baroness Deech and other proponents of the Bill wish to protect in fact leaves couples trapped by patriarchal property law, which has traditionally only protected breadwinners and made the economically vulnerable, more vulnerable. As Baroness Butler-Sloss emphasises, “the freedom that is talked about is very often a freedom for one cohabitant but a sentence for the other, who is left on an inadequate income to cope with the children”.¹⁹⁸

An interesting point was raised by the Lord Bishop of Sheffield. Having acknowledged the “inequities and hardships”¹⁹⁹ which can arise at the end of cohabiting relationships,

¹⁹² Cohabitation Rights Bill [HL] Second reading (2014/15), col 2075.

¹⁹³ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2075.

¹⁹⁴ Cohabitation Rights Bill [HL] Second reading (2014/15), 2081.

¹⁹⁵ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2073. Such a claim has interesting links with the material discussed at [2.5.3] and [2.5.6].

¹⁹⁶ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2073 2073.

¹⁹⁷ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2075.

¹⁹⁸ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2079.

¹⁹⁹ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2078.

he considered that they should “be addressed where necessary on a case-by-case basis”.²⁰⁰ Similar to the proposals made in the previous Cohabitation Bill, which would, if enacted have given the courts a wider discretion to do what is “just and equitable”²⁰¹ having regard to all the circumstances. Such an approach has merit. However, what must be considered is the courts current unwillingness to take the law further than they already have, in particular in relation to considerations of fairness within the CICT. The courts have sought parliamentary action on this matter due to the restrictions which are placed on their own law-making abilities. It is possible that even if the legislation surrounding the rights of unmarried cohabitants were not to take the form of the Bill outlined above, and instead merely legitimised judicial flexibility, that such a scheme could emerge. This would enable the courts to address issues based on the circumstances of the parties concerned, avoiding the need for gender stereotypes to be invoked, but without risking a return to a purely formal approach which is in practice, inherently patriarchal.

7.6 Conclusion

The historical analysis sections of this chapter have demonstrated the ongoing issues in relation to women’s position in society. Despite increasing numbers of women in full and part-time employment, the public sphere is still dominated by masculine norms which prevent the fulfilment of equality in practice. This had provided the necessary socio-legal backdrop from which to analyse the case law. That is, that due to the continuing difference in the treatment and position of women in society, how ill-fitting a purely formal approach would be.

²⁰⁰ Cohabitation Rights Bill [HL] Second reading (2014/15), col 2078.

²⁰¹ HL Deb, 13 March 2008 vol 699 cols 1413-1443.

The case/legislative analysis has provided additional insight into the treatment of cohabitants, and the public perception of such relationships. It has demonstrated that, although the courts showed the promise of developing an equality in difference approach when they included considerations of fairness, this was left unfulfilled. Fairness, within the context of the CICT ought not to be limited to quantification, but instead should be an overriding consideration. The acquisition stage of the CICT, particularly for sole-owners remains purely formal, resting on financial contributions and express agreements in a way which though seemingly gender-neutral, has worked to the detriment of women who cohabit.²⁰² Although the supposed willingness of the courts to consider quantification more holistically seemed to indicate a shift in approach, in practice this has also been limited to financial contributions.

To adopt an equality in difference approach, would be to provide a scheme not unlike that proposed in the Cohabitation Rights Bill where the “starting point is for the applicant to show ‘qualifying contributions’ to the parties’ shared lives. These could be financial or they could be in work, in care or in kind”.²⁰³ Taking into consideration both financial contributions, and *feminine* contributions would recognise the difference in the ability for those who perform a feminine role/whose income, and therefore ability to contribute financially due to childcaring responsibilities. If this were then underpinned by fairness as regards quantification, looking at the relationship in the round, and considering future needs this would alleviate the issues which have arisen as a result of the strict property law regime which has undue focus on financial contributions. This would be particularly useful in counteracting the injustice which results from the purely formal approach adopted in cases concerning sole-owners.

²⁰² As shown in [5.7], [6.8], [7.4].

²⁰³ Cohabitation Rights Bill [HL] Second reading (2014/15), Col 2070-2071.

Due to the courts reluctance to develop the ‘fairness’ element of the current scheme further without the consent of Parliament, what is needed, in summary, is a statutory provision in which the courts are given a *wide* discretionary power to impute common intention based on fairness. A regime which is not limited to the consideration of financial contributions, but those which are indicative of the relationship as a whole, including *feminine* contributions. Failing that, the use of a gains/losses type model such as that seen in Scotland would act as a satisfactory compromise.²⁰⁴ Under that model on the breakdown of a cohabiting relationship a number of factors can be taken into consideration when determining the economic disadvantage suffered by one party by virtue of their relationship, including those *feminine* acts which are often excluded under the CICT regime.²⁰⁵ Of particular importance is the degree of flexibility that such legislation provides the judiciary, in relation to both the degree of the monetary award, and the factors which can be considered as contributing to “economic disadvantage”. This combination of judicial flexibility and the recognition of feminine contributions would allow for the full development of an equality in difference approach without the limitations currently placed on the judiciary by virtue of precedent and an unwillingness to embark on covert judicial law making as Lord Denning did in decades prior.²⁰⁶ Although “it is... wrong to say that existing law ignores cohabitants altogether”²⁰⁷ merely because there is a lack of a statutory scheme, it is ‘wrong’ to say that the current scheme adequately addresses the issues raised on the breakdown of cohabiting

²⁰⁴Family Law (Scotland) Act 2006, s28. As demonstrated in *Gow v Grant* [2012] UKSC 29.

²⁰⁵ Family Law (Scotland) Act 2006, s28(9) “contributions” are considered to include indirect and non-financial contributions, including childcare. “Economic advantage” includes gains in capital, income and earning capacity. This is in turn used to determine “economic disadvantage”.

²⁰⁶ See [5.7].

²⁰⁷ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n171), 1.4.

relationships.

Chapter 8 – Thesis Conclusion

8.1 Analysis Overview

This thesis has explored the extent to which a formal approach to equality, as adopted by the courts within the context of the common intention constructive trust (CICT), has proved an inadequate tool for the distribution of property rights on the breakdown of unmarried cohabiting relationships. Having analysed the development of the relevant case law, it has been demonstrated that the application of a formal approach to equality is inherently flawed, and rather than resulting in equality in practice, has instead produced significant injustice. The consequences of the application of formal equality have a considerable impact, predominantly on women.

The gendered impact of the application of formal equality within the context of the CICT arises due to a number of factors. First, the historical placement of women in the private sphere, and the way in which the feminine has been associated with the lesser-half of a series of liberal dichotomies.¹ As a result of this, the contributions made by women have continued to be undervalued, and women's position in the public realm has been persistently lesser than that of men. This has proved problematic when considering the focus on financial contributions in the acquisition and quantification of beneficial interest in the family home. Such contributions have been presented as though they were gender neutral, without recognising the way in which the socio-legal construction of women has continued to present women as different from men.²

¹ As explored in Chapter 3.

² The way in which women have continued to be constructed as lesser is examined in Chapters 5-7.

Secondly, the refusal to acknowledge the biological and socially constructed differences between men and women under the formal equality approach, have meant that substantive inequalities have been allowed to persist. Those issues which contribute to the inability for women to contribute in the same way as men are multi-faceted and interrelated, and have been discussed thematically within Chapters 5-7 of this thesis. The biological difference between men and women, referring only to the capacity to give birth to and suckle a child, has not been distanced from socially constructed motherhood.³ That has positioned women as the primary-care giver, a private role which is persistently undervalued. The consequences of motherhood (whether a reality for the individual woman or a presumption of motherhood) have continued to have implications on the attainment of equal pay.⁴ This has in turn reinforced the breadwinner/housewife construction of the family which has for a considerable time been pushed by political and legal regimes as either an ideal or a necessity.

In addition, notwithstanding the issues relating to motherhood, employment practices and norms have worked to the detriment of women. The classification of 'women's work' as of less value, occupational segregation and discriminatory practices have all negatively impacted women's ability to contribute to the acquisition of property, and fostered the requirement that a woman remain financially dependent on her breadwinning partner.⁵ Moreover, the perceptions of normative behaviours in relationships has reduced the likelihood that women would succeed in their claim for beneficial interest in the family home. The lower level of pay and the staying-power of

³ See [2.3], [2.4] and [3.3.4].

⁴ The continuation of the pay gap has been examined at [7.2.2].

⁵ See [5.2], [5.3],[6.2],[6.3] and [7.2].

the connection between masculinity and man's role as provider has, in a number of cases, prevented women from making contributions.⁶

Further, the way in which the CICT has been formulated does not reflect the reality of cohabiting relationships. The gendered construction of common intention and detrimental reliance have, for the most part, refused to acknowledge *feminine* contributions.⁷ Instead, the doctrine has relied on express common intention. Express common intention relies on the unrealistic notion that a couple will discuss what is to happen to the property on the breakdown of their relationship. This fails to take account of the reality that couples are unlikely to discuss such matters. This is made more problematic when considering the emotional vulnerability of some of the claimants and the centrality of familial trust in such cases has meant that there will be individuals who are unwilling to ask their partner about their interest, or even if they are made aware of their lack of rights on breakdown, they will be unwilling to consider the end of their relationship even if it is to ensure that they are adequately protected. In addition, the way in which different communications or even silence will be interpreted not only by the involved parties, but by the court leaves room for individuals to feel as if they were protected but end up with nothing.

In the absence of such agreements, the courts have relied on *gender-neutral* financial contributions in order to infer common intention, which as explored above, are masculine in practice. As such, these contributions have been more easily fulfilled by men. The unwillingness to consider contributions towards the family or indirect contributions towards the property has reinforced the notion that 'women's work' in the

⁶ See the excuse cases discussed at [5.7.3] and [6.8.5] and at [4.3.1].

⁷ See [4.3.2], [5.7], [6.8] and [7.4].

home is of no economic value. Despite the courts supposed widening of such criteria in *Stack/Jones*, those cases were still decided on the basis of financial contributions without any consideration of the other contributions the parties might have made. In those same cases it was also emphasised that not all forms of contribution will necessarily hold the same value, and given the historical tendency to undervalue feminine contributions, this is a concerning admission. The position of sole-owners being one of uncertainty means that either under *Rosset* or under the joint-ownership regime, they remain likely to have to attempt to assert their interest on the basis of financial contributions.

The requirement that a claimant must also demonstrate detrimental reliance has also proved considerably problematic. First, financial contributions often play a dual role, in that where financial contributions demonstrate common intention, they are simultaneously used to satisfy the detrimental reliance requirement. Further, where detrimental reliance has been demonstrated by virtue of acts which are considered non-financial, the construction has been both inconsistent and inherently gendered. The way in which detrimental reliance has been constructed as gendered has meant that in many cases, it is only where a claimant has gone beyond those acts deemed 'normal' for a woman/man. Where such acts have been performed this has assisted in the finding of common intention. However, it has had a role in both reinforcing the law's perception of gender roles in the family (breadwinner/housewife) and further indicated the devaluation of traditionally feminine acts. Indeed, where women have not been successful, this has generally been due to the way in which their contributions are considered to have arisen as a result of love and affection rather than on the basis that there was a common intention that she ought to have beneficial interest in the property.

To summarise, the refusal to acknowledge the socially constructed and biological differences between men and women has meant that the *neutral* requirements of the CICT, applied under a formal equality approach, do not alleviate inequality in practice, but rather work to the detriment of women.

8.2 Demonstrating the Inadequacy of the Formal Approach

The chronological review of the case law, within their socio-legal and historical context has allowed for the development of formal and substantive approaches to be reviewed against the position which society has placed women in. This can be categorised as occurring in three waves. First, the 60/70s constitutes a predominantly formal approach. Second, the 80/90s marked the strict restatement of formal equality, after attempts had been made to undermine it, particularly stemming from the Court of Appeal. Finally, the third period examined in this thesis, 2000 onwards, marks a supposed departure from formal equality, having integrated a number of substantive factors into the considerations which the courts are at liberty to make.

The first period explored in this thesis was 60s-70s, in which the formal approach under the orthodox CICT took precedence.⁸ This formal approach is most readily identifiable in *Gissing* and *Pettitt* which emphasised that common intention could only be established through express agreement or direct financial contributions.⁹ The restatement of property law principles in those cases put an end to the emergence of considerations of fairness which had been occurring in cases prior. In restricting the scope of the contributions deemed relevant when attempting to uncover the intentions of the parties the House of Lords adopted a *neutral* criterion, financial contributions,

⁸ See [5.7].

⁹ *Gissing v Gissing* [1971] AC 886; *Pettitt v Pettitt* [1970] AC 777. See [5.7.2].

which does not make any consideration of the substantive inequalities that the parties involved may face and instead assumes the sameness of all individuals. Sameness within the context of the CICT refers mainly to the ability to contribute financially, which having been examined in its socio-legal context throughout Chapters 5-7 of this thesis, is an inaccurate reflection of the inequality suffered by women, particularly in regards the capacity to contribute financially.

Despite the formal construction of this rule, purportedly ignoring any differences between the parties, the discussion in regard to non-financial contributions used gender stereotypes as a measure against which the behaviour of the claimants ought to be judged. 'DIY' having been considered to be typical behaviour for a man, and the care of the children and acts generally performed by 'housewives' seen as typical for a woman. As is commonplace under the formal approach to equality, where difference is recognised, it is not seen to undermine the purportedly neutral rule, but instead is seen to result from either natural difference or the decision made by autonomous individuals. This natural difference, has proved particularly problematic for women, given that the usual default option of the law in formal schemes is masculine. Despite the 'equality of outcome' in *Pettitt* and *Gissing*, in that both the claimants were unsuccessful, this arose as a result of the courts unwillingness to consider the gender-typical behaviour of the male/female claimants in those cases. Despite the findings in *Gissing/Pettitt* indicating that there is no greater impact on women, when viewed against the socio-historical background in which these cases took place, the rarity of the wife being the sole owner in *Pettitt* makes it a situation which was considerably less likely to impact men.

Due to the potential for injustice under the orthodox approach in *Gissing and Pettitt*, the Court of Appeal in *Eves and Cooke* sought to avoid the formal construction of the CICT, instead attempting to reassert the considerations of fairness which had been embodied in the rejected doctrine of family assets.¹⁰ In those cases, the out-performance of gender roles was considered to evidence detrimental reliance. The way in which difference is expressed in these cases is at best, questionable. However, the emergence of a substantive approach to equality in this context was a welcome development. The manipulation of common intention to include ‘excuses’ allowed for non-financial acts to be considered as evidence of detriment. Although these non-financial acts were constructed in a gendered way, it did allow for non-financial contributions to be considered where they were considered invalid under a formal approach.

Within those cases, the need to make judgments which can be considered ‘fair’ also emerges. These considerations of fairness arose as a result of the ‘moral judgements’ constructed by Lord Denning. Again, though the construction of men/women as villain/victim in these cases is not without its issues, the sense of legitimacy this gave to the end result, with beneficial interest having been found for women who would otherwise have been denied it, demonstrates the benefits of a more substantive approach, even if this was done in a flawed manner.

The 80s/90s was dominated by the re-emergence of the formal approach. The return to orthodoxy put an end to the adoption of elements of substantive equality which had enabled the courts to recognise, albeit in a haphazard and at times problematic way, the contributions made by women. The cases of *Burns* and *Rosset* demonstrate the injustice

¹⁰ *Eves v Eves* [1975] 1 WLR 1338, 1340; *Cooke v Head* [1972] 1 WLR 518. See also [5.7.3].

which arises as a result of an unwillingness to recognise difference in the context of the CICT.¹¹ The focus on purely financial contributions in the absence of express agreement, ignoring the socio-legal factors which impacted women's ability to contribute in the same way as men, meant that injustice arose for women who were unable to meet this *neutral* criteria.

In both of those cases, Mrs Rosset and Valarie Burns were left with nothing, despite having made significant non-financial and indirect financial contributions. The figure of Mrs Burns has been frequently invoked in the literature to signify the injustice which has arisen as a result of the CICT, and in particular, to emphasise that this is a gendered issue. Mrs Burns had, for significant periods during the relationship been unable to work due to her role as primary caregiver for their two children, and when she did work, her money was used to purchase items for the family and to pay for household expenses. The court's unwillingness to attribute any value to the feminine contributions Mrs Burns had made, and their reluctance to accommodate the way in which her difference from the male-norm had impacted her ability to contribute, she was deemed to have no beneficial interest in her home. Despite the court's acknowledgement that she "had nothing to contribute",¹² under a formal approach such differences are given no credence. The feminine acts that she had performed were determined to be acts which she would inevitably perform by virtue of her pseudo-wife status.¹³ Indeed the use of gender stereotypes in Burns was rife, and applied to both men and women. However, particularly during the period in which the case, and the cohabitation took place, it was more likely that an unwillingness to give weight to *gender-typical* behaviour would

¹¹ *Lloyds Bank plc v Rosset* [1990] 1 AC 107; *Burns v Burns* [1984] Ch 317, 327. See [6.8.1] and [6.8.3].

¹² *Burns v Burns* [1984] Ch 317 237.

¹³ *Burns v Burns* [1984] Ch 317 235.

work to the disadvantage of women, as they would be less likely to be able to contribute, and less likely to be the sole-name registered. Despite the detriment that her economic dependency on her partner would inevitably cause her, such detriment is not seen to be a valid consideration under the CICT.

After the harsh return to formal equality in *Burns*, the Court of Appeal in *Grant* again sought to preserve elements of the approach adopted by Lord Denning in *Eves* and *Cooke*.¹⁴ In attempting to ensure that a “just decision”¹⁵ was made, the courts relied on the ‘excuses’ which had been made by Mr Edwards as to why the property had not been registered in joint-names in order to find common intention between the parties. The considerations of detrimental reliance were again based on the notion that this ought to be demonstrated by acts which could not be reasonably expected from a ‘wife’, in this case her feminine contributions were considered sufficient, and she was as a result deemed to have ½ of the beneficial interest in the home. However, these acts were underpinned by the fact that the housekeeping and feeding/caring for the children were from her “earnings”¹⁶ rather than the performance of the acts. This was seen to allow Mr Edwards to make mortgage instalments, and as such this was still underpinned by financial contributions, albeit more liberally than under the orthodox or *Rosset* approach. Yet, the same argument could be made about the economic value of the acts involved in motherhood, though whether these would have been deemed sufficient, even before the court of appeal, in this period is doubtful. Although *Grant* maintains elements of the substantive approach adopted by Lord Denning, and despite the

¹⁴ *Grant v Edwards* [1986] 1 Ch 638: see [6.8.2].

¹⁵ *Grant v Edwards* [1986] 1 Ch 638 650, 649.

¹⁶ *Grant v Edwards* [1986] 1 Ch 638 650, 649.

reformulation of formality in *Burns*, it was only by virtue of the courts ability to find an excuse, that the strict finance-based approach was avoided.

In *Rosset* the court, in the absence of an express agreement, were presented with an opportunity to clarify what acts would be sufficient to demonstrate common intention and detrimental reliance. The strict financial approach which was subsequently developed, which restricted 'relevant' contributions to the *gender-neutral* criterium of direct payments to the purchase price. When considering those contributions that Mrs Rosset had made, the House of Lords deemed that work she had performed on the property, by way of painting and decorating were again categorised as acts 'naturally' performed by a wife and echoed the sentiment expressed in *Burns* before it, that such contributions are 'worthless'. In the absence of financial contributions, the claimants had to rely on some form of express agreement which does not adequately reflect the way in which couples deal with property when in a relationship, they often, unsurprisingly, do not contemplate breakdown when embarking on their joint lives together.

In *Burns* and *Rosset*, despite the recognition of the social reality of such relationships, in relation to the unlikelihood that they will form express intention, and the barriers which exist, preventing women from contributing to the acquisition of property, they nevertheless sought to clarify the law and do away with the inconsistent application. However, in seeking consistency, relying on a formal approach, and adopting the supposedly neutral criteria of financial contributions, treating men and women the same, would persistently work to the detriment of women.

Despite the considerably restrictive restatement of the CICT in *Burns* and *Rosset*, the Court of Appeal, where possible, refused to adopt a purely formal approach. *Hammond v Mitchell* demonstrated the willingness of the courts to recognise stereotypically feminine contributions, namely her role as mother/unpaid assistant and indirect financial contributions.¹⁷ This was again supported by the presence of express common intention. Without finding an excuse, the courts were often unable to facilitate a substantive approach in the period in the advent of *Rosset*. That is with the exception of *Midland Bank v Cooke*, in which the court was reluctant to consider financial contributions as determinative of the issue of quantification. Instead, what the courts ought to examine was the whole course of dealing between the couple, an approach which saw fairness reinstated, at least to some extent within the context of quantification. However, it ought to be noted that in that case there were financial contributions by way of a marriage gift which equated less than 7% of the purchase price. This was therefore consistent with *Rosset* and the formal approach, but it was only when stretching the law and adding considerations of fairness to quantification, which indicates a covert substantive approach, that the court were able to afford Mrs Cooke 50% beneficial interest. Indeed, the courts sympathy towards her, and their dissatisfaction with the strict approach of the law was expressed outright, with reference to “human heartache”.¹⁸

The final period examined in this thesis is the one which can most accurately be described as indicating a shift away from the formal approach which had dominated CICT proceedings prior. Under the joint-ownership regime, this departure is more pronounced. The approach to joint-ownership cases under *Stack/Jones* has facilitated

¹⁷ *Hammond v Mitchell* [1991] 1 WLR 1127: see [6.8.5].

¹⁸ *Midland Bank v Cooke* (1995) 27 HLR 733, 736. See also [6.8.6].

the ability for the courts to consider the course of dealing of the parties, the context which allows for the differences in contributions, and different abilities of the parties to contribute to be considered. In combination with the, albeit limited, inclusion of fairness within the regime, it is for this reason that it is the period which most reflects a substantive approach.¹⁹ However, the uncertain approach to sole-ownership cases continues to be problematic. The issues relating to sole-ownership cases are twofold. First, if *Rosset* remains binding then the significant critique which has thus far been waged against a formal finance-based approach applies, and the CICT continues to work to the detriment of women who are financially vulnerable. Second, even under the more holistic approach typified in *Stack/Jones*, the different starting point for sole/joint owners proves problematic. If the presumption that there is no beneficial interest for the non-legal owner is as difficult a presumption to shift as it has been under the joint-ownership regime, then this would act as a significant barrier for those seeking to establish said interest. This is of additional concern given that under *Stack/Jones* the presumption has only been displaced on the consideration of financial contributions. As a result, the scheme would be of little use to cohabitants who would have been unable to demonstrate the necessary criteria under *Rosset*, as both maintain a focus on financial criteria.

It was in the sole-ownership case *Oxley* that the need to consider fairness within the CICT was restated, developing on from *Midland Bank v Cooke*.²⁰ This signalled the inclusion of an element of substantive equality in sole-ownership cases, though this was

¹⁹ *Stack v Dowden* [2007] UKHL 17, *Jones v Kernott* [2011] UKSC 53. See [7.4.3] and [7.4.4].

²⁰ *Oxley v Hiscock* [2004] EWCA Civ 546: see [7.4.2].

limited to the quantification stage. The inclusion of fairness and the wider considerations of context in *Oxley* were subsequently given consideration in *Stack*.

Stack supposedly signalled a departure from *Rosset*, and brought with it the potential for the development of a substantive approach. Particularly the inclusion of the list of factors which can be considered when attempting to ascertain the common intention of the parties, which explicitly included *feminine* contributions. However, the application of *Stack* raises a number of concerns in that the way in which the presumption in favour of equal shares in that case, was displaced on the basis of financial considerations. Such arrangements, it is argued, do not necessarily reflect the reality of cohabiting relationships, and work to the detriment of the economically vulnerable party.

The criteria suggested by Lady Hale has the potential to give rise to a substantive form of equality in practice, in that it recognises the different ability for individuals to contribute and the different forms of acts which can be considered as a valid contribution. Yet, the fact such contributions were not considered in *Stack*, raises concerns how much weight such contributions would be given on application. In *Stack* the fact that not all forms of contributions would have the equal weight is raised by the court. This proves troublesome given that feminine contributions have historically been considered as less than those deemed masculine, and if the law were to make those same assumptions, then little will have changed since *Rosset*. Perhaps some hope can be taken from Lord Neuberger's statement that he may have considered financial contributions to childcare if there had been any from Mr Stack, which may indicate that the performance of such acts may also have been considered.

Jones firmly repositioned fairness within the context of the CICT, again providing an indication that the courts are willing to abandon the formal approach typified by *Rosset*. Despite indicating a shift in approach, the inclusion of fairness was limited in scope. Fairness would only form part of the court's considerations. Those circumstances been where it was impossible to divine the intentions of the parties, and therefore the court would then impute a common intention based on the conduct of the parties, "deduced objectively from conduct". However, objective considerations have traditionally focussed on masculine contributions for some time, as such it would depend on the weight given to different kinds of contributions developed in *Stack* as to whether that trend continues.

It must be noted that where there was evidence of a common intention between the parties, the restatement of fairness did not go so far as to allow the courts to put such intention aside and instead decide on the basis of what was fair. The redistributive CICT as used in other jurisdictions has not been adopted by the English courts. Despite this, it is possible that the inclusion of fairness in those circumstances where it is used further indicates a shift towards the adoption of a substantive approach.

Attempts to rebut the presumption in favour of equal shares are "not to be lightly embarked upon",²¹ suggesting that it is difficult to establish that a jointly-owned family home is merely a commercial asset which is to be decided on the basis of financial contributions. The inclusion of this burden in joint-ownership cases reflects the reality of cohabiting relationships in which the home is a family asset which has more significance than a mere financial investment. However, *Stack* and *Jones* both avoid the

²¹ *Jones v Kernott* [2011] UKSC 53 [57].

presumption on the basis of financial contributions. Which again, could prove problematic for the financially vulnerable party in sole-ownership cases.

It must be noted the fact that it was Mr Stack and Mr Kernott who fared worse under the CICT in Jones and Stack does not undermine the critique(s) which have been waged against the doctrine. Those cases were decided on the basis that their partners had made larger financial contributions than they had, rather than on the basis of a renewed focus on feminine contributions. The law still refuses to acknowledge the contributions of those women who are financially/emotionally vulnerable particularly in sole-ownership cases. In those cases involving joint-owners it remains to be seen whether feminine contributions will be given sufficient value, though it is hoped that the indications of the emergence of a substantive approach and the recognition of difference within the judgments indicates that this is the case.

8.3 A Solution?

Clearly the CICT as underpinned by formal equality is unfit for purpose. It does not adequately reflect the nature of cohabiting relationships and has persistently acted to the detriment of women. The purpose of this thesis has not been to provide *the* solution to the CICT, but rather to examine the consequences of the differing forms of equality in this context and in particular demonstrate the inadequacy of the formal approach. There are however a number of considerations which ought to be borne in mind if/when the law relating to unmarried cohabitants is reformed which can be drawn from this thesis.

First, it ought to be noted that the inequality suffered by women under the CICT does not entirely lie with the CICT. Rather, the socio-legal construction of women as other/lesser, has given rise to the continuation of gender inequality.²² Under such conditions, formal equality, ignoring the consequences of both biological and socially constructed differences, cannot facilitate equality in practice.²³ To alleviate these inequalities requires a herculean task of deconstruction, so as to alleviate the hierarchical construction of the binary pairings which have been used to construct society.²⁴ While society remains an environment defined by a series of inter-related inequalities, a formal approach will continue to privilege those who adhere to the masculine norm. The adoption of a formal approach which re-emphasises difference without addressing the substantive causes of the unequal status which has been tied to that difference. Without the implementation of an approach to equality which recognises that these differences have an impact on those individuals to which they are assigned, and which attempts to alleviate them, gender inequality is merely replicated.

One possible solution would be the adoption of a reformulated ‘family assets’ approach. The doctrine of ‘family assets’ had, prior to its rejection, been used to afford considerable discretion to the courts on the breakdown of relationships.²⁵ The distributive powers this afforded the courts was based on the notion that where a couple had through their “joint efforts” acquired a property which has been intended to form part of their “joint lives”,²⁶ that the interest in said property ought to be equal. A number

²² Based on the series of gendered hierarchical dichotomies which have been explored in this thesis Chapters 2 and 3.

²³ The impact of such differences has been examined in Chapters 5-6.

²⁴ The need to deconstruct each of the dichotomies discussed in this thesis, due to their interrelated construction/function is discussed at [3.5.2].

²⁵ See [5.7.1] and [5.7.3]; rejected in *Gissing v Gissing* [1971] AC 886, 899-900.

²⁶ *Gissing v Gissing* [1969] 2 Ch 85, 93.

of points must be made concerning how this doctrine ought to be reconceived. First, the “joint efforts” of the couple must include more than purely financial contributions as it did in its original form. The list of considerations proposed by the Supreme Court in relation to acts from which the burden of equality of shares might be displaced, which has included a variety of non-financial contributions has tended to instead be decided on the basis of financial criteria.²⁷ It is unclear as to whether this is due to the nature of those specific cases, or due to the unequal weighting of feminine/financial contributions. It is for this reason that the criteria must not give precedence to financial contributions.

Secondly, the assumption related to ownership of the property ought to arise from the nature of the parties’ relationship rather than on legal ownership. Using the notion of the couples “joint efforts”/“joint lives” in this way would allow for the law to recognise that, in cohabiting relationships legal ownership is unlikely to be determinative of the couples commitment, or their intentions towards the property. Although the court in *Jones* did consider the notion of “joint enterprise”, this was limited to the assumptions drawn from the basis of a couple being joint and severally liable for a mortgage, again relying on financial contributions.²⁸ Distancing beneficial interest from legal ownership, instead assuming that the interest is jointly held, would alleviate the risks posed to sole-owners under both *Rosset* and *Jones/Stack*, and would more adequately reflect the nature of cohabiting relationships. When combined with the need to consider more than purely financial contributions, this would prevent the main source of injustice in the current CICT regime.

²⁷ The list of considerations refers to *Stack v Dowden* [2007] UKHL 17 [69]; *Jones* and *Stack* both having been decided on financial criteria.

²⁸ *Jones v Kernott* [2011] UKSC 53 [19].

The final point to be made regarding a possible family assets approach is that the doctrine was underpinned by fairness. The Supreme Court have, albeit to a limited extent, firmly repositioned considerations of fairness within the CICT. However, it is argued that expanding the scope for such considerations beyond situations involving imputation, and instead positioning it as an overriding consideration would allow for the courts to depart from the assumption of equal shares, where it is required. The flexibility this would afford the judiciary would allow for the weighing up of contributions made, and future need, ensuring the difference in the nature of individuals and relationships can be adequately dealt with.

The second approach would be to reformulate the current CICT in a way which reflects an equality in difference approach. The examination of the case law in this thesis has demonstrated that the recognition of difference within substantive approaches can have considerable benefits.²⁹ However, those cases in which difference has been used to effect equality in practice have had a role in replicating gender stereotypes. Whilst the ends may be said to justify the means, the means can be improved.³⁰ That is, difference can and should be recognised within the CICT.

Under an equality in difference approach, the formal basis for deciding how beneficial interest is to be determined, at least in the way it is formulated under *Stack/Jones* can remain.³¹ That is, legal ownership being indicative of beneficial interest or ‘the burden’.

²⁹ As identified in the Denning judgments: see [5.7.3].

³⁰ The ‘means’ used refers to the use of gender stereotypes and patronising language.

³¹ The formal approach under *Rosset*, based on financial contributions would continue to cause significant issues for economically vulnerable parties and as such is not considered a reasonable basis for the formal element of an equality in difference approach.

It is at this stage that in considering whether the burden can be surmounted that factors which have influenced/impacted how the property is held, and the contributions of the parties to the “whole course of dealings” in relation to the property could then be implemented.

Under this approach, only two changes to the current approach of the CICT are necessary. First, is that the burden should not be a difficult one to surmount but should instead be departed from where it is considered fair, having regard to all the circumstances. Secondly, those circumstances ought to be divined from factors which have impacted the ability to contribute financially, as well as financial contributions. That is, they need to recognise traditionally feminine contributions, without the indication that not all contributions will have equal weight, indicating that financial contributions will take precedence. Despite this supposedly being possible in the current regime, this cannot be done with the consideration of fairness. Through more firmly positioning fairness within the CICT doctrine, would allow for judicial flexibility, so that the law might adapt to the facts of each individual case, and to the changing needs of society.

The possible approaches above are underpinned by three central factors which, it is proposed, any reform which occurs in relation to the breakdown of cohabiting relationships, ought to include. First, is the need to recognise non-financial contributions. However, such a recognition needs to move away from the assumptions which have been made regarding the reasons that women perform certain acts. The way in which the law has constructed the contributions made by women as regards the home

and family a “natural outpouring”³² of love and affection has meant that women’s contributions have been persistently undervalued or constructed in a way which relies on the use of gender stereotypes.³³

Secondly, any such reform cannot be allowed to continue the devaluation of that which has been traditionally considered women’s work merely because it has historically been constructed as if it had no (financial) value. Such considerations have been used in the context of marital law, see for example in *White v White* where the contributions are considered in such a way: “[i]f, in their different spheres, each [spouse] contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets”.³⁴ However, such considerations remain absent within the context of cohabiting relationships.³⁵ As Newnham notes: “greater judicial sensitivity to non-financial contributions is likely to achieve a better fit between the CICT and couples’ thinking on the matter. It is also likely to produce fewer unfair outcomes”.³⁶ In validating feminine contributions in this context, such reform would have a role in undermining the traditional distinction which has been drawn between men’s work and women’s work. Thus, reducing detriment faced by whichever partner it is who has assumed the role of homemaker/caregiver.

Finally, judicial discretion and flexibility is necessary so that any remedy provided for cohabitants is able to adequately react to changing societal norms and the specific

³² Tronto J., *Moral Boundaries: A Political Argument for an Ethic of Care* (London: Routledge, 1993), 111.

³³ Chapters 5-7 consider the construction of women’s contributions against their ability to contribute.

³⁴ *White v White* [2001] 1 AC 596, 605.

³⁵ On the distinction which has been drawn between the property law and family law approaches: see [4.3.3].

³⁶ Newnham A., ‘Common intention constructive trusts: a way forward’ [2013] *Family Law* 718, 719.

context of the cases before them. This flexibility should allow for the consideration of fairness to a wider extent than is currently adopted in relation to the CICT. Under the current approach

“For all the talk of ‘fairness’... it is clear that the circumstances in which an interest may be acquired in the family home remain limited, and the quantification of interests by the courts appears to reflect the financial contributions of the parties rather than any broad-brush analysis based on the whole relationship of the parties”.³⁷

However, it may be that such flexibility requires state intervention. The courts have been unwilling to adapt the law relating to the breakdown of cohabiting relationships further than they have so far. This is despite being aware of its shortcomings.³⁸ The preferable approach would be for the such a regime to place judicial flexibility on legislative footing so as to avoid the concerns of the courts relating to undermining constitutional principles, while ensuring that such cases are not based on a list of criteria which are forever fixed on the statute book, undermining the flexibility necessary for the law to adapt to the ever changing social context.

If this broad range of factors were to be included in the approach adopted on the breakdown of cohabiting relationships, it would avoid the injustices which have arisen as a result of attempting to apply a legal regime which does not adequately recognise the reality of cohabiting relationships, and the focus on financial contributions which has worked to the significant detriment of women.

³⁷ Probert R., ‘Cohabitation: contributions and sacrifices’ [2006] *Family Law* 1060, 1062.

³⁸ As demonstrated in Lady Hale’s endorsement of the Scottish legislation in *Gow v Grant* [2012] UKSC 29.

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