

Narratives of capital versus narratives of community: conservation covenants and the private regulation of land use

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1. Introduction

This article engages with two contrasting narratives¹ relating to private controls on land use: one in which such controls are seen as an efficient, ‘bottom up’ means of regulation and another in which they are criticised as typifying an unaccountable, exploitative relation in which ecological interests are subordinated to those of capital. It aims to contribute to debates around the role of private landowners in nature conservation by means of a critical assessment of the Law Commission’s 2014 proposals for a new statutory burden on land in England and Wales, the ‘conservation covenant’.² It is submitted that this can be understood as one manifestation of a form of environmental governance³ ‘involving the totality of interactions between public and private actors, and the state no longer playing a central role in decision-making.’⁴ By allowing private parties to agree and enforce long-term conservation measures, the conservation covenant could provide new opportunities for participation in conservation activity; the article questions, however, whether the private and voluntary character of the mechanism may jeopardise its ability to deliver the public environmental and social benefits cited as justifications for reform. A central claim of the article is that protection of these public interests requires that more attention be given to questions of environmental justice, in particular to the fair distribution of information and opportunities for participation. More generally, it is suggested that it is difficult to address the social and political dimensions of land-use conflicts adequately within the adjudicative structures associated with private law relationships; caution is therefore required regarding the part that conservation covenants should play in conservation policy.

After outlining the structure of the proposed covenant mechanism, the article positions it within the context of broader moves to create markets in environmental goods and services, for example through the institution of tradeable biodiversity credits in environmental compensation schemes. The potential for the proposals to empower private conservation activity is contrasted with the abstraction and closure that is argued to inhere in commodified private property relations: a private agreement would, by its nature, exclude consideration of a range of social and ecological interests. It is contended that reliance on private initiative could risk the displacement of certain communities from control over

¹ The distinction between ‘narrative[s] of capital’ and ‘narrative[s] of community’ is drawn by Giles Mohan and Kristian Stokke, ‘Participatory Development and Empowerment: The Dangers of Localism’ (2000) 21 *Third World Quarterly* 247, 250.

² Law Commission, *Covenants* (Law Com No 349, 2014).

³ The term ‘governance’ is used here to reference a wider range of regulatory strategies and actors that traditional state-centred models of regulation; see Neil Gunningham, ‘Environment Law, Regulation and Governance: Shifting Architectures’ (2009) 21 *JEL* 179, 203.

⁴ *ibid.*

which sites are protected and in what manner, raising questions of environmental justice. There is no easy way to reconcile these contradictions, but it is suggested that the potential of the covenant mechanism to enable conservation activity of genuine public benefit would be increased if, rather than approaching covenant creation as solely an exercise of private power, more emphasis were to be placed upon principles of administrative governance such as transparency, accountability and legitimacy.

For this reason, the article asserts that equitable and inclusive public participation could play a limited but crucial role in securing the legitimacy of any future reform, and perhaps also its environmental effectiveness. The penultimate section highlights opportunities for better collection and dissemination of information about covenants and for the involvement of a more diverse range of actors in monitoring and enforcement. If public regulation were to incentivise or require the creation of conservation covenants, effective oversight would be crucial to the legitimacy of the system. Even under an entirely voluntary scheme, greater public engagement would help to ensure that, were conflicts to arise, covenants would be perceived as playing a just and transparent role in the decision-making process. The bipolarity of the covenant relationship and the ‘agenda-setting’⁵ power of the landowner restrict, however, the ability of conservation covenants to serve as a substitute for the public regulation of land use: private agreements are ultimately an unsatisfactory way of determining public conservation priorities. It is concluded that this reflects a more general limit to the ability of property mechanisms to provide environmental justice.

2. Conservation Covenants: The Law Commission Proposals

2.1 Proprietary effect

The terminology used varies across jurisdictions (devices similar to the conservation covenant may be referred to as ‘conservation easements’,⁶ ‘conservation burdens’⁷ or ‘conservation servitudes’⁸), but

⁵ The owner’s ‘agenda-setting’ role is highlighted by Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58(3) UTLJ 275.

⁶ The term ‘conservation easement’ in the United States is generally used to refer to a device similar to the proposed ‘covenant’. On the preference for ‘easement’, see Gerald Korngold, ‘Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection’ (2011) 28 Wisconsin International Law Journal 585, 594.

⁷ See Title Conditions (Scotland) Act 2003 (asp 9) ss 38-42; Colin T Reid, ‘Conservation burdens and covenants’ (2014) 165 SPEL 108.

⁸ ‘Servitude de conservation’ is sometimes used as a French translation of ‘conservation easement’, see eg Commissariat Général au Développement Durable, *Sécuriser des engagements environnementaux: Séminaire d’échange sur les outils fonciers complémentaires à l’acquisition* (Études & documents no 82, April 2011) 9.

the Commission's proposals are essentially concerned with the idea of an environmental obligation that can function as a burden on land. According to its Report:

A conservation covenant is an agreement made between a landowner and a conservation body which ensures the conservation of natural or heritage features on the land. It is a private and voluntary arrangement made in the public interest, which continues to be effective even after the land changes hands.⁹

The most important feature of a covenant is its ability to provide long term security for environmental benefits through the creation of conservation obligations enforceable against successors in title.¹⁰ These would take effect as a form of statutory burden on land rather than as one of the legal interests in land enumerated in s 1 of the Law of Property Act 1925.¹¹ Pratt, however, makes a cogent argument that, in the proposed form, a conservation covenant could nevertheless be included within the category of proprietary (as opposed to personal) rights.¹² The main distinction between the proposed mechanism and the existing restrictive freehold covenant is that a conservation covenant would not require to benefit a dominant parcel of land, it could also include positive obligations that bind successors.¹³

Given the emphasis placed upon the stability and permanence of the covenant structure, a central challenge faced by any reform is how to combine this with flexibility and responsiveness to environmental and social change. The Law Commission propose that modification or discharge of a covenant could be achieved by application to the Lands Chamber of the Upper Tribunal, who, after having regard to a number of factors including changes to the character of the land and the extent to which the performance of the obligation remains affordable and practicable, would decide on the basis of what is reasonable.¹⁴ Later in the article, it is argued that the legal construction of disputes about covenant modification and discharge as concerning principally the burdened landowner and

⁹ Law Commission, *Covenants* (n 2) para 1.1.

¹⁰ This is identified by Hodge as 'critical': Ian Hodge, 'Conservation Covenants: A Policy Perspective' (2013) *Conv.* 490, 491.

¹¹ Law Commission, *Covenants* (n 2) para 2.97.

¹² Natalie Pratt, 'Conservation covenants: a proprietary analysis' (2014) *Conv* 328.

¹³ See Law Commission, *Covenants* (n 2) para 2.66 and, on restrictive freehold covenants, Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) paras 3.4.20-3.4.27. These rules are features of land burdens in many legal systems; for comparative discussion see S van Erp and B Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart 2012) 245.

¹⁴ Law Commission, *Covenants* (n 2) paras 7.71-7.79.

responsible body may limit the range of public interests that will be considered.¹⁵ A more open and plural process would be better equipped to cope with ecological change and complexity.

2.2 Public benefit and the role of responsible bodies

Despite the ‘private and voluntary’¹⁶ character of the proposed covenant, the public and collective significance of land-use decision-making provides an important justification for its introduction. A conservation covenant should have a conservation purpose and be for the public good.¹⁷ It is ‘the public interest in conservation’, as well as ‘the enthusiasm of landowners to protect important features on their land’,¹⁸ that requires the creation of a new mechanism. Covenants could provide opportunities for local communities to protect important environmental or historic features. Among the principal potential uses identified by the Law Commission are facilitation of philanthropy and preservation of ‘heritage’ and ‘community’ assets.¹⁹ In sections four and five, the contrasting narratives introduced in the opening lines are used to explore the risks and benefits of adopting private law means to further these public ends. Which publics and which goods are likely to profit from reform?

In order to ensure that these conservation purposes are realised, the Commission proposals afford an extensive role to non-governmental organisations in the monitoring and enforcement of conservation covenants. The principal means of guaranteeing that the scheme will provide the promised environmental benefits is regulation of the ‘responsible bodies’ who may enforce the obligations contained in a covenant. The Law Commission suggest that local authorities, public bodies and charitable organisations should be permitted to become responsible bodies in accordance with criteria specified by the Secretary of State.²⁰ This is similar to the Scottish system under which only a limited number of bodies can enforce a conservation burden, allaying fears about overburdening of land and proliferation of inutile restrictions.²¹ It does, however, raise questions, explored in the penultimate section, about the extent to which it might be desirable for a wider range of individuals and organisations to be able to participate in the monitoring and enforcement process.

2.3. Voluntary nature

¹⁵ See 6.5 below.

¹⁶ Law Commission, *Covenants* (n 2) para 1.1.

¹⁷ Law Commission, *Covenants* (n 2) paras 3.17-3.38.

¹⁸ Law Commission, *Covenants* (n 2) para 1.3.

¹⁹ Law Commission, *Covenants* (n 2) paras 2.8-2.11; 2.12.

²⁰ Law Commission, *Covenants* (n 2) para 4.57.

²¹ See Title Conditions (Scotland) Act 2003, s 38(4); Reid, ‘Conservation burdens’ (n 7).

Although the proposed covenant is characterised by the Law Commission as a voluntary, uncompensated and private mechanism, it is acknowledged by observers that, without some form of incentivisation, conservation covenants might not be widely used.²² Even if covenants were initially popular, it seems probable that the difficulty (and potentially the cost) of protecting land would rise over time, as the supply of suitable land and willing landowners diminished.²³ In the United States, tax incentives been crucial in encouraging the creation of conservation easements.²⁴ According to Reid, the Scottish experience has been that few conservation burdens have been created, with the majority relating to ‘cultural heritage’ such as historic buildings and a preference for comparatively short durations over perpetual obligations.²⁵ This may reflect the lack of obvious motivators such as favourable taxation and perhaps also unfamiliarity with the possibilities of a new mechanism.

There are, in addition, significant differences between the use of voluntary obligations by landowners already inclined towards conservation, as under for example the model used by Australia’s Forest Conservation Fund,²⁶ and imposition of covenants during, for example, public planning processes.²⁷ If conservation covenants were to be incentivised or exacted by public regulation, this would amplify the concerns raised below regarding legitimacy and environmental justice. Research on voluntarily created conservation restrictions in Massachusetts has identified that most of the restrictions surveyed probably did not impose substantial changes on the use of the land.²⁸ Questions of monitoring and

²² See eg Colin T Reid, ‘The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK’ (2011) 23 JEL 203, 214; Natalie Pratt, ‘Analysing conservation covenants’ (2014) JPL 1310, 1315.

²³ This appears to have been the experience in Tasmania: M S Iftekhar et al, ‘Private lands for biodiversity conservation: Review of conservation covenanting programs in Tasmania, Australia’ (2014) 169 Biological Conservation 176.

²⁴ Raymond and Fairfax characterise the situation in the United States as representing a blurring of boundaries between public and private rather than a straightforward shift towards the private: Leigh Raymond and Sally K Fairfax, ‘The ‘Shift to Privatization’ in Land Conservation: A Cautionary Essay’ (2002) 42 Natural Resources Journal 600, 626-628. Jeff Pidot, ‘Reinventing Conservation Easements’ Policy Focus Report, Lincoln Institute of Land Policy (2005) 4 and Gerald Korngold, ‘Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process’ (2007) Utah L Rev 1039 highlight the role of public subsidy in encouraging creation of conservation easements.

²⁵ Reid, ‘Conservation Burdens’ (n 7) 109.

²⁶ On the merits of the Australian model, see Charlie Zammit, ‘Landowners and conservation markets: Social benefits from two Australian government programs’ (2013) 31 Land Use Policy 11, 12.

²⁷ This is one possibility mentioned by the Law Commission: *Covenants* (n 2) para 1.14.

²⁸ Zachary Bray, ‘Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements’ (2010) 34 Harv Envtl L Rev 119, 174. Similar findings are mentioned by Adena R Rissman and

enforcement would become especially pressing if covenants were to be used to pursue environmental goals that were perceived as contrary to landowners' interests or current land-use practices. The gathering of environmental information, despite its associated costs, could be beneficial to landowners who are personally interested in the conservation status of their land but would be likely to be perceived as an extra burden if covenants were to be imposed in conditions attached to grants of planning permission.²⁹ This could reduce the quality of the protection afforded: in the context of mitigation measures under the Habitats Directive, McGillivray has raised concerns that reluctantly gathered information might underestimate ecological value.³⁰

3. Context: Biodiversity Offsetting

This section asserts a link between the proposed reforms and what is characterised as a drive towards the creation of markets in environmental goods and services.³¹ Discussion focuses on the role of covenants in providing legal security for environmental compensation measures or 'offsets'.³² One of the key advantages mentioned by the Law Commission of a new mechanism is its potential to contribute to the biodiversity offsetting scheme piloted in six English local authorities between 2012 and 2014.³³ It is not yet clear how these pilots, or indeed the Commission proposals, will affect government policy,³⁴ but facilitation of offsetting was identified by the Department for Environment,

Nathan F Sayre, 'Conservation Outcomes and Social Relations: A Comparative Study of Private Ranchland Conservation Easements' (2011) 25 *Society and Natural Resources* 523, 529. The forest preservation easement described by Laurie A Wayburn, 'Conservation Easements as Tools to Achieve Regulatory Environmental Goals' (2011) 74 *LCP* 175 also involves the landowner facing reduced regulatory requirements.

²⁹ Contrast Zammit's description of social benefits in 'Landowners' (n 26) 14 with the difficulties of negotiating biodiversity compensation in the context of a planning application, 'the delivery of [...which] relies on finding various hooks such as non-biodiversity planning reasons, presence of protected species [etc.]' (Collingwood Environmental Planning Ltd, *Evaluation of the Biodiversity Offsetting Pilot Phase - Indicative Costs of Current Compensation Arrangements for Biodiversity Loss: Illustrative Case Studies* (2013) para 4.4.)

³⁰ Donald McGillivray, 'Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Article 6 of the Habitats Directive' (2012) 24 *JEL* 417, 428.

³¹ For an introduction to debates in this area, see the papers collected in *Transnational Environmental Law* (2013) vol 2 and Colin T Reid and Walters Nsoh, *The Privatisation of Biodiversity: New Approaches to Nature Conservation Law* (Edward Elgar 2016) chs 1 and 2.

³² On biodiversity offsetting generally, see Reid and Nsoh, *Privatisation* (n 31) ch 4.

³³ See Law Commission, *Covenants* (n 2) paras 2.26-2.55. On the pilots, see DEFRA, *Biodiversity Offsetting in England* (Green paper, 2013) and evaluation reports and research available at <https://www.gov.uk/biodiversity-offsetting>.

³⁴ At the time of writing, DEFRA had not yet published its forthcoming 25-year plan.

Food and Rural Affairs ('DEFRA') in the 2011 'Natural Environment' White Paper,³⁵ as a 'key reform' needed for protecting and improving the natural environment.³⁶ Offsetting is defined by DEFRA as 'conservation activities designed to deliver biodiversity benefits in compensation for losses in a measurable way.'³⁷ The usual context is the loss of biodiversity in the course of land-use change; the creation of an 'offset' allows a developer to compensate for the damage caused by undertaking conservation or restoration activities elsewhere. Depending on the type of scheme adopted, offsetting raises the possibility that offsets could be created, and in some cases 'banked' for future use, in return for financial gain.³⁸ Despite the current lack of formal national provision, in England offsets can be arranged, and biodiversity 'credits' bought and sold, via brokers such as the Environment Bank Ltd.³⁹

These structures are part of a broader move towards what has been described as the 'financialisation'⁴⁰ of ecological functions and the promotion of the concepts of 'ecosystem services'⁴¹ and 'natural capital'⁴², reflected in the creation following the White Paper of a Natural Capital Committee to advise on the valuation of ecosystem services⁴³ and an Ecosystems Markets Task Force to develop markets in ecosystem services and 'green' investment opportunities.⁴⁴ The key

³⁵ DEFRA, *The Natural Choice: securing the value of nature* (White Paper, Cm 8082, 2011). In Scotland plans to develop a more formal structure for biodiversity offsetting were put on hold after concerns were raised during consultation; see *The 2020 Challenge for Scotland's Biodiversity - Consultation Report* (2013) 6 and *A Consultation on the 2020 Challenge for Scotland's Biodiversity: An Analysis of Consultation Responses* (2013) paras 3.14-3.28.

³⁶ DEFRA, *Natural Choice* (n 35) 15.

³⁷ DEFRA, *Natural Choice* (n 35) para 2.38.

³⁸ On 'biobanking' schemes, see Reid and Nsoh, *Privatisation* (n 31) para 4.7.

³⁹ See <http://www.environmentbank.com>.

⁴⁰ See eg Sian Sullivan, 'Banking Nature? The Spectacular Financialisation of Environmental Conservation' (2013) 45 *Antipode* 198.

⁴¹ Broadly, this represents a view of the relation between human and environment in which ecosystems are characterised as providers of 'provisioning', 'regulating', 'cultural' and 'support' services: DEFRA, *Natural Choice* (n 35) para 1.7. See further The Economics of Ecosystems and Biodiversity (TEEB), *Mainstreaming the Economics of Nature: A Synthesis of the Approach, Conclusions and Recommendations of TEEB* (2010).

⁴² See the publications of the Natural Capital Committee and eg D Helm, 'Taking natural capital seriously' (2014) 30 *Oxford Review of Economic Policy* 109.

⁴³ DEFRA, *Natural Choice* (n 35) para 3.11. See the Committee's website at <https://www.naturalcapitalcommittee.org/> and the reports *The State of Natural Capital: Towards a Framework of Measurement and Valuation* (2013) and *The State of Natural Capital: Restoring our Natural Assets* (2014).

⁴⁴ DEFRA, *Natural Choice* (n 35) para 3.28.

contention of this approach is that, rather than making unrealistic attempts to halt depletion entirely, policymakers should develop metrics and balance sheets that allow adequate quantification of the natural resources depleted and provide for compensation to ensure that the total supply is maintained.⁴⁵ For example, in biodiversity offsetting metrics permit ‘the compensation requirement to be quickly calculated, rather than expensively negotiated on a case-by-case basis’.⁴⁶

It is not yet known whether any nationwide biodiversity offsetting scheme would restrict offset locations to the same locality (e.g. the same local authority area) as the harm to be offset but the logical implication of a market approach is that offsets should take place in the most economically efficient location. For example, Helm emphasises preservation of the aggregate stock of natural capital rather than any particular asset as a central tenet of the offsetting calculus.⁴⁷ This raises concerns around what Ruhl and Salzman refer to as the ‘nonfungibility of space’: conservation activity in one location is not necessarily equivalent to conservation in another.⁴⁸

Property structures are an essential component of trade in environmental goods and services.⁴⁹ Given the legal security associated with proprietary rights, property mechanisms are often perceived as a robust means of ensuring that investments in environmental projects are protected over the long term.⁵⁰ For example, recent French legislation providing for biodiversity offsetting also introduced a new conservation burden (*obligation réelle environnementale*) that may be used to secure offset sites.⁵¹ In principle, the proposed conservation covenant could perform a similar function, protecting the biodiversity values of offset sites and facilitating the development of an effective market.⁵² It

⁴⁵ See sources at n 42.

⁴⁶ DEFRA, *Offsetting* (n 33) para 7. For the metric used in the pilots, see DEFRA, *Technical paper: The metric for the biodiversity offsetting pilot in England* (2012).

⁴⁷ See Helm, ‘Natural capital’ (n 42) 117-118.

⁴⁸ James Salzman and J B Ruhl, ‘Currencies and the Commodification of Environmental Law’ (2000) 53 *Stan L Rev* 607, 627-631; 665-666 (distributive justice implications).

⁴⁹ A point highlighted by Reid and Nsoh, *Privatisation* (n 31) para 2.9.

⁵⁰ See eg Law Commission, *Covenants* (n 2) para 1.8. Wayburn, ‘Easements’ (n 28) 194 notes that carbon offsets secured by easements command higher prices in California due to the perceived quality of the security offered.

⁵¹ See Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages, Art 72. For an overview of the reforms in English, see O Darses, ‘France’s new biodiversity law and implications for no net loss of biodiversity’, available at <http://bbop.forest-trends.org/pages/webinars>.

⁵² DEFRA, *Guiding Principles for Biodiversity Offsetting* (2011) 3-4 states that offsets should be provided ‘in perpetuity’. Possibilities for using covenants to secure biodiversity gains are discussed at 22-23. The

could also allow offsets to be undertaken outside the area of the local authority in which a damaging development was to take place, something that would be more complicated using existing alternatives such as planning agreements.⁵³ The Commission proposals exclude for-profit organisations from acting as responsible bodies;⁵⁴ there remains, however, the possibility of ‘substantial potential commercial application’⁵⁵ if future rules were to permit for-profit arrangements (for example in the context of ‘payment for eco-system services’).⁵⁶ Although not specifically mentioned by the Commission, it seems likely that conservation covenants would be used to protect carbon sequestration activities, which could then give rise to carbon offsets potentially tradeable as credits where appropriate markets exist.⁵⁷

4. Narratives of Community: Private Action for the Public Good

4.1 Connection with nature and environmentally responsible landownership

Implicit in these moves towards the use of market mechanisms is a potential for increased involvement of private actors as market participants, administrators and even regulators.⁵⁸ The contrasting narratives introduced at the outset illustrate the differing ways in which this shift might be interpreted: in one sense, it could be seen as empowering, in another alienating. This section assesses the extent to which the Commission proposals might further participation in environmental protection, arguing that, despite the clear possible benefits of involving a wide range of actors in terms of

Commission’s proposals are referred to as a part of a potential offsetting system in DEFRA, *Biodiversity Offsetting* (n 33) para 46.

⁵³ Law Commission, *Covenants* (n 2) para 2.49. On planning agreements, see s 106 Town and Country Planning Act 1990 and Victor Moore and Michael Purdue, *A Practical Approach to Planning Law* (13th edn, OUP 2015) ch 17.

⁵⁴ Law Commission, *Covenants* (n 2) paras 4.55-4.58.

⁵⁵ Response of the Central Association for Agricultural Valuers to the Law Commission Consultation, cited in Law Commission, *Covenants* (n 2) para 4.46.

⁵⁶ DEFRA, *Payment for Eco-system Services: A Best Practice Guide* (2013) 64-65 highlights conservation covenants as a possible legal mechanism to secure an obligation to provide eco-system services.

⁵⁷ See Hodge, ‘Covenants’ (n 10) 493. Easements have been required to secure certain carbon offsets in California: Kelly Kay, ‘Breaking the bundle of rights: Conservation easements and the legal geographies of individuating nature’ (2015) 48(3) *Environment and Planning A* 504, 516-517; James L Olmstead, ‘Carbon Dieting: Latent Ancillary Rights to Carbon Offsets in Conservation Easements’ (2009) 29 *Journal of Land, Resources and Environmental Law* 121.

⁵⁸ For analysis of these shifts in governance, see Gunningham, ‘Governance’ (n 3) and Reid and Nsoh, *Privatisation* (n 31) para 2.14.

knowledge and legitimacy, important questions remain regarding distributive justice and accountability.

From one perspective, conservation covenants could provide a means of reconciling traditional abstracted notions of landownership with a recognition that ownership may (and indeed for both practical and ethical reasons must) coexist with duties to protect the environment.⁵⁹ Among others, Rodgers has highlighted the ‘dynamic’ role that property rules can play in environmental regulation,⁶⁰ even before the Law Commission proposals, Gray and Gray argued that

[t]here is, in [...] English law, increasing reason to believe that the so-called neighbour burden is beginning to come into its own, not as a device for the imposition of the selfish or isolated or eccentric individualist protectionist impulse, but rather as the longstop guardian of a more general, community-spirited, conservationist concern.⁶¹

There are strong arguments for encouraging private landowners to become involved in environmentally sound land management; research in Australia has identified benefits including development of ecological consciousness and creation of new social networks and communities of conservation-minded individuals and organisations.⁶² Indeed, a central concern of the *Natural Choice* White Paper is the facilitation and encouragement of ‘connection with nature’:⁶³ voluntary conservation action by individuals and businesses can be seen as part of a virtuous circle in which those involved will gain a greater understanding of nature’s value and be more likely to act to protect it in future.⁶⁴ Responsibility for conservation thus becomes shared rather than primarily a function of the state, with any landowner able to participate by selecting his or her land for protection.⁶⁵ The

⁵⁹ See eg Kevin Gray and Susan Francis Gray, ‘The idea of property in land’, in S Bright and J Dewar (ed), *Land Law: Themes and Perspectives* (OUP 1998) 15, 41 and for fuller discussion of the notion of ‘stewardship’ and further references Emily Barritt, ‘Conceptualising Stewardship in Environmental Law’ (2014) 26 JEL 1.

⁶⁰ Christopher Rodgers, ‘Nature’s Place? Property Rights, Property Rules and Environmental Stewardship’ (2009) 68 CLJ 550.

⁶¹ Kevin Gray and Susan Francis Gray, ‘The Future of Real Burdens in Scots Law’ (1999) 3 Edinburgh Law Review 229, 232.

⁶² Zammit, ‘Landowners’ (n 26) 14-15. See also Chris Harrington *et al*, ‘Learning Conservation: the role of conservation covenants in landscape redesign at Project Hindmarsh, Victoria’ (2006) 37(2) Australian Geographer 187.

⁶³ See eg DEFRA, *Natural Choice* (n 35) ch 4.

⁶⁴ Although not stated explicitly, this is arguably one of the underlying assumptions of the White Paper, see eg DEFRA, *Natural Choice* (n 35) para 4.38.

⁶⁵ For examination of this shift, see Reid, ‘Privatisation’ (n 23) 227.

political implications of such a shift are examined further below, but given pressure on state resources,⁶⁶ voluntary action by those actually present on the land may appear to be the only realistic way to ensure that environmental objectives are actually met.⁶⁷

It may also extend the focus of conservation activities beyond the relatively narrower range of protected sites covered under existing legislation.⁶⁸ Ecological fragmentation currently presents major risks to the survival of species and habitats.⁶⁹ As Bell, McGillivray and Pedersen put it, ‘it is now accepted that there is little future in having isolated areas of protected wildlife in an otherwise barren landscape’.⁷⁰ Covenants may be one way of securing ecological ‘corridors’ on land where ecosystems cannot be regulated in some other way⁷¹ and could support large-scale conservation initiatives where it is not possible or desirable for all the land involved to be owned outright by conservation bodies.⁷²

Notwithstanding this potential, the voluntary nature of the Commission proposals implies that such gains would be by no means assured. Incentives may well be necessary to facilitate wide participation, but the greater the public expenditure incurred supporting covenants, the more important the governance-related issues addressed in sections five and six below would become. It is further important to consider which communities are, due to their existing knowledge and skills, best placed to exploit these opportunities. What benefits would conservation covenants bring to those who do not own land, or to those landowners unable to afford to change land-use practices?

4.2 Involvement of non-state bodies

A further attraction of the Commission proposals is that they would allow approved conservation charities to secure protection of large areas of land without taking ownership. This could provide

⁶⁶ Whether or not there is an absolute scarcity of resources, resource allocation usually involves choice between competing objectives; indeed, this is (presumably intentionally) emphasised by the title of the White Paper.

⁶⁷ In the US context, for example, Wayburn argues that a forest conservation easement held by a land trust increased the net resources available for conservation activities: ‘Easements’ (n 28) 190.

⁶⁸ For an overview of current legislation, see Christopher P Rodgers, *The Law of Nature Conservation* (OUP 2013) ch 3.

⁶⁹ See European Environment Agency, *Fragmentation of natural and semi-natural areas* (2015). Data available at <http://www.eea.europa.eu/data-and-maps/indicators/fragmentation-of-natural-and-semi-1/assessment-1>.

⁷⁰ Stuart Bell, Donald McGillivray and Ole W Pedersen, *Environmental Law* (8th edn, OUP 2013) 720.

⁷¹ See Law Commission, *Covenants* (n 2) paras 2.15-2.16 and for examples in the US see eg Adena R Rissman, ‘Rethinking Property Rights: Comparative Analysis of Conservation Easements for Wildlife Conservation’ (2013) 40 *Environmental Conservation* 222, 227; Bray, ‘Reconciling’ (n 28) 166.

⁷² A point made by Hodge, ‘Covenants’ (n 10) 499-500.

resource efficiencies for the organisations involved;⁷³ the presence of civil society groups again brings opportunities for collaboration, information sharing and the creation of new communities and networks. For example, the role played by non-governmental organisations in accessing local knowledge and building community awareness has been identified as one of the strong points of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) regime.⁷⁴ Non-state bodies such as environmental charities may be perceived to have legitimacy not available to state actors;⁷⁵ ‘many landowners may prefer to agree a conservation covenant with a charity than with an arm of the state.’⁷⁶

The diffusion of power, however, entails a certain amount of risk, which raises important questions regarding ultimate responsibility for the ecological and social consequences of a covenant (or its failure). Even under an entirely voluntary scheme, the role of the state has changed rather than disappearing entirely: the governmental approval of responsible bodies remains a crucial guarantor of legitimacy and suitability. No public oversight of the content of covenants at the point of creation is recommended by the Law Commission, but it is recognised that this could change if covenants were to be used in biodiversity offsetting.⁷⁷ There remains a fundamental difference between the public land-use planning system and a system based on private agreements. Particularly over the long term, it might be difficult to ensure that responsible bodies allocate adequate resources to monitoring and enforcement of covenants that they hold.⁷⁸ As Korngold notes, the non-profit sector in the United States is particularly large and well resourced; United States’ models of holding and enforcement of easements may not work so well in other jurisdictions.⁷⁹ Lack of resources is not, of course, a problem unique to non-governmental bodies but the question of accountability is more difficult. Although

⁷³ Law Commission, *Covenants* (n 2) para 2.16. There has been insufficient analysis of the long-term costs of holding a covenant compared to owning the land outright: Green Balance Report to the National Trust, *The Potential of Conservation Covenants* (2008) 6. In the US, obtaining a conservation easement may cost 70-90% of the cost of purchasing the property outright: Rissman, ‘Rethinking’ (n 71) 226.

⁷⁴ Sheila Jasanoff, ‘NGOs and the environment: From knowledge to Action’ (1997) 18(3) *Third World Quarterly* 579, 587.

⁷⁵ For example, Gunningham cites legitimacy as a benefit of community collaboration: ‘Governance’ (n 3) 207.

⁷⁶ Law Commission, *Covenants* (n 2) para 4.57.

⁷⁷ Law Commission, *Covenants* (n 2) para 4.100. If covenants were to be imposed as part of the planning process, the local planning authority might play a role in monitoring.

⁷⁸ For a more detailed exploration of some of the challenges that may face the voluntary sector, see Hadrian Cook and Alax Inman, ‘The voluntary sector and conservation for England: Achievements, expanding roles and uncertain future’ (2012) 112 *Journal of Environmental Management* 170.

⁷⁹ Korngold, ‘Globalizing’ (n 6) 614-615.

charitable organisations are subject to oversight by trustees and the Charity Commission,⁸⁰ they are not democratically accountable in the same way as a local authority. What follows argues that these issues of legitimacy and accountability are part of a more general difficulty with the use of private mechanisms to further public interests.

5. Narratives of capital: Commodification and Environmental Justice

5.1 Commodification, abstraction and displacement

The features of the proposed covenant that make it a suitable foundation for trade in environmental goods and services may limit the extent to which it can take full account of the complexities of ecological and social systems. This section builds on commodification-based critiques⁸¹ to argue that the certainty and security provided by proprietary mechanisms is likely to be based on the exclusion of a range of human and non-human interests. Castree identifies a number of possible dimensions to commodification processes: privatisation, alienability, individuation, abstraction, valuation and displacement.⁸² Although Castree's work is situated within a particular Marxian tradition and is not exhaustive of possible understandings of or responses to commodification, it is used here as a lens through which to examine the narrowing of focus that accompanies the creation of private property rights, and the possible environmental justice implications of this process.

Although they do not require the transfer of land from public to private ownership (privatisation); the Commission proposals are predicated on private control over environmental values. A landowner could choose to destroy the goods in question rather than protect them with a conservation covenant. This focus on private interest risks spatial and social displacement of persons from their ecological contexts. Local communities could be physically excluded from land protected by a covenant, but would also be excluded from decision-making and access to information about the management of that land, obscuring of the network of ecological relationships which sustain the community as a whole. Adoption of a private property-based perspective could foster mistrust of public ownership and management and an unwillingness on the part of landowners to accept public regulation.

Governments might use the existence of private mechanisms as an excuse to reduce the state funding

⁸⁰ See Part 2 of the Charities Act 2011. For discussion, see Law Commission, *Covenants* (n 2) paras 4.33-4.37.

⁸¹ On the concept of commodification generally and on the importance of a process-orientated analysis, see Noel Castree, 'Commodifying What Nature?' (2003) 27(3) *Progress in Human Geography* 273, 277; Scott Prudham, 'Commodification', in N Castree *et al* (eds), *A Companion to Environmental Geography* (Wiley-Blackwell 2009) 123.

⁸² Castree, 'Commodifying' (n 81) 279-283.

available for biodiversity protection and enhancement.⁸³ In the United States, the proliferation of easements has been linked to ‘hollowing out of public financing for land acquisition and increased resistance to land-use regulation.’⁸⁴

In addition to prioritising particular, private, human interests, the proposed covenant further implies abstraction of environmental features from their ecological contexts. Individuation ‘involves putting legal and material boundaries around phenomena so that they can be bought, sold and used by equally ‘bounded’ individuals, groups or institutions’.⁸⁵ The creation of a conservation covenant would necessitate reduction of what may be a complex and continuously evolving range of activities to a calculus that is sufficiently certain to be enforceable. The potential use of covenants to support trade in biodiversity offsets (or other ecological services) would transform a previously inalienable resource (such as the biodiversity value of the land) into one upon which a market could be built.⁸⁶ Something that previously appeared physically inseparable from the land itself could now be detached in exchange for payment.⁸⁷

Property law values stability and predictability; the object of property rights is required to have an identity that is relatively constant across space and time.⁸⁸ This is not the case with ecological phenomena, which are often unstable, mobile and potential rather than fixed or static.⁸⁹ An act of translation is required to enable ecological information to be meaningful in the legal domain; adopting a systems-theoretical analysis, Robertson argues that scientists cannot provide the necessary

⁸³ A concern noted by M Hannis and S Sullivan, *Offsetting Nature? Habitat Banking and Biodiversity Offsets in the English Land Use Planning System* (2012) Technical Report, Green House 14.

⁸⁴ Amy Wilson Morris and Adena R Rissman, ‘Public Access to Information on Private Land Conservation: Tracking Conservation Easements’ (2009) *Wis L R* 1237, 1244.

⁸⁵ Castree, ‘Commodifying’ (n 81) 280; see also David Harvey, *Justice, Nature and the Geography of Difference* (Blackwell 1996) 153.

⁸⁶ On the role of covenants in carbon trading in the United States, see sources at ns 34; 36.

⁸⁷ Fitting Castree’s definition of alienability: ‘Commodifying’ (n 81) 279-280.

⁸⁸ This is a basic assumption of most property scholarship, see eg Gray and Gray, *Land Law* (n 13) paras 1.7.9-1.7.10.

⁸⁹ This is particularly true in the case of animals, see for example the discussion of black redstarts in Steve Hinchcliffe, ‘Reconstituting Nature Conservation: Towards a Careful Political Ecology’ (2008) 39 *Geoforum* 85. However, the complexity of any ecological phenomena is a barrier to the imposition of fixed categories; see Morgan M Robertson, ‘The nature that capital can see: science, state, and market in the commodification of ecosystem services’ (2006) 24(3) *Environment and Planning D: Society and Space* 367.

information in an uncontroversial way.⁹⁰ Ecological and scientific coherence could thus require to be sacrificed in order to produce a covenant agreement that was legally and economically coherent. Whether or not this view is accepted, there would be both legal and practical reasons⁹¹ to restrict covenant terms to features that were easily observable and measurable. For example, a prohibition on building would be far easier to monitor than a restriction on introduction of non-native species or an injunction to maintain diversity of forest ‘stand’ age. Indeed, it has been argued to be difficult to protect more complex values using a static, perpetual mechanism.⁹²

The individuation process risks the complex and chaotic nature of biological systems becoming obscured by a focus on discrete elements of ecosystem function.⁹³ There is a tension between valuation of biodiversity function (which does not obey spatial boundaries and is difficult to separate on any given plot from the function of the landscapes surrounding it) and valuation on an acreage basis (which does not assist in assessing the ecological values of the site in comparison with others).⁹⁴ This links to the idea of abstraction. Castree⁹⁵ identifies two dimensions to abstraction – functional and spatial. Functional abstraction involves particular qualities, such as the biodiversity ‘value’ of a piece of land, being separated from the ‘messy uniqueness of the physical site’.⁹⁶ This is intimately connected to spatial abstraction: the specificity of place-in-itself loses importance and becomes merely an example of a broader category of, for example, ‘wetland’ or ‘forest’ habitat.

Any attempt to translate ecological value into legal protection entails a certain level of abstraction. However, the proposed covenant lacks the nexus between persons and place that plays a critical role in justifying other private law rules restricting land use. The benefit of the covenant would no longer be rooted within the particular social and ecological context of the locality, but would instead be

⁹⁰ Robertson, ‘Nature’ (n 89) 370. Robertson’s argument here draws on difficulties with wetland banking in the United States.

⁹¹ Although it seems that only extremely vague covenant terms would be likely to be struck down altogether, as for example the prohibition on ‘unseemly’ buildings in *Murray v Dunn* [1907] AC 283, terms that required protracted negotiation or even litigation to determine whether they applied in a given instance would provide little practical benefit.

⁹² Jessica Owley, ‘Conservation Easements at the Climate Change Crossroads’ (2011)74 LCP 199, 226-228.

⁹³ A problem that Carol Rose describes as ‘partial proprietarisation’: ‘The Several Futures of Property’ (1998) 83 Minn L Rev 129, 170-171. See also N Kosoy and E Corbera, ‘Payments for Ecosystem Services as Commodity Fetishism’ (2010) 69 Ecological Economics 1228, 1232.

⁹⁴ A problem also present in forms of offsetting such as wetlands banking: Morgan M Robertson, ‘No Net Loss: Wetland Restoration and the Incomplete Capitalization of Nature’ (2000) 32(4) Antipode 463, 479.

⁹⁵ ‘Commodifying’ (n 81) 281.

⁹⁶ Robertson, ‘Restoration’ (n 94) 473. See also Robertson, ‘Nature’ (n 89) 373.

directed at a diffuse, disparate and potentially conflicting public. The traditional structure of a freehold covenant necessitates a relation between two neighbouring pieces of land (the ‘touch and concern’ rule).⁹⁷ The fact that enforcement of such covenants is, at least in theory, embedded in the specificity of the neighbour relation and a community of interests based on proximity and shared amenity preserves some link to the particularity of place. In the case of a conservation covenant, the connection between the responsible body and the burdened land would be of an altogether more nebulous character; although the covenant would require to have a conservation purpose, its terms would not necessarily reflect the full range of purposes and interests that might be relevant. Instead, a particular version of the public interest would be protected by an organisation representing the public.

5.2. Environmental Justice Implications

These features have important implications from an environmental justice perspective. Building on the themes of abstraction and displacement, this section argues that the proposed covenant could foster the uneven distribution of ecological risks and benefits. It is beyond the scope of this article to explore the various meanings that may be ascribed to the term ‘environmental justice’⁹⁸ and its explanatory power compared to alternative concepts such as ‘political ecology’⁹⁹ or ‘ecological justice’.¹⁰⁰ ‘Environmental justice’ is used here in a broad sense to draw attention to the substantive relation between social and economic justice and ecology and the role that exclusion from decision-making can play in the production of environmental and social inequalities. Discussion is principally concerned with the fairness of land-use decision-making procedures, but this is arguably related to substantive environmental outcomes.¹⁰¹ If environmental goods are conceptualised as being a matter

⁹⁷ See *P and A Swift Investments v Combined English Stores Group Plc* [1989] AC 632; Gray and Gray, *Land Law* (n 13) paras 3.3.7-3.3.9.

⁹⁸ The meanings which may be attributed to ‘environmental justice’ are rich and plural; on some of the recent debates see David Schlosberg, ‘Theorising environmental justice: the expanding sphere of a discourse’ (2013) 22 *Environmental Politics* 37. For a UK perspective, see Ole W Pedersen ‘Environmental justice in the UK: uncertainty, ambiguity and the law’ (2011) 31(2) *LS* 279.

⁹⁹ See e.g Erik Swyngedouw and Nikolas C Heynen, ‘Urban Political Ecology, Justice and the Politics of Scale’ (2003) 35(5) *Antipode* 898.

¹⁰⁰ See for example Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008) ch 3 and discussion in David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2007) ch 8.

¹⁰¹ Many definitions of environmental justice link the need for equal protection from environmental harm to the procedural question of access to decision-making processes; see, for example, that of the United States Environmental Protection Agency: <https://www.epa.gov/environmentaljustice>. The link between procedural and substantive is also recognised by in the preamble to the United Nations Economic Commission for Europe

of private rights and interest, this would also change how people think about and value these goods: ‘property disciplines both owners and non-owners to become market subjects’.¹⁰²

The theoretical possibilities that the proposals offer for individual involvement in environmental governance may obscure the reality that some groups are much better equipped to advance their interests through participation than others.¹⁰³ Communities that are already disadvantaged and lacking in social and economic capital would be unlikely to be agents in processes of covenant creation, whether as covenantors or by involvement in the activities of responsible bodies.¹⁰⁴ Indeed, it would be likely to be wealthy landowners of large land parcels who were best placed to benefit from the opportunities offered by conservation covenants, particularly if tax incentives were to be available.¹⁰⁵ The values of affluent, conservation-minded individuals could conflict with the knowledge and practices of surrounding communities.¹⁰⁶ The use of conservation covenants is not, therefore, a neutral or technical move but part of what Harvey describes as ‘the instantiation in nature of a certain regime of values’.¹⁰⁷

The proposed use of covenants in offsetting has raised fears that development pressures on green spaces will increase, development being ‘offset’ by the creation or maintenance of natural sites elsewhere which may not be accessible to the same communities (or may not be publicly accessible at

(UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) (‘the Aarhus Convention’).

¹⁰² Becky Mansfield, ‘Privatisation: Property and the Remaking of Nature-Society Relations’ (2007) *Antipode* 393, 396.

¹⁰³ Riikka Paloniemi *et al.*, ‘Public Participation and Environmental Justice in Biodiversity Governance in Finland, Greece, Poland and the UK’ (2015) 25 *Environmental Policy and Governance* 330, 339 note that ‘while on the one hand we see the increasing inclusion of specific, often powerful, actors with rather vague criteria, on the other we see the increasing exclusion of other, less powerful, social groups or even the suppression of local struggles’.

¹⁰⁴ Katie Moon *et al.*, ‘Personal circumstances and social characteristics as determinants of landholder participation in biodiversity conservation programs’ (2012) 113 *Journal of Environmental Management* 292 highlight the importance of existing social capital in facilitating participation.

¹⁰⁵ Easements are argued to have benefited wealthy landowners in the US: Amy Wilson Morris, ‘Easing conservation? Conservation easements, public accountability and neoliberalism’ (2008) 39 *Geoforum* 1215, 1217.

¹⁰⁶ On cultural differences between covenantors and local farmers in Australia, see Harrington *et al.*, ‘Learning’ (n 62).

¹⁰⁷ Harvey, *Justice* (n 85) 119.

all).¹⁰⁸ In such a context, overall ecological function would be prioritised at the expense of the specificity of place; it is argued below that the relatively closed sphere of private law adjudication is not a suitable forum for making this type of sensitive decision.

If conservation covenants were to be used to facilitate the creation of markets in environmental goods and services, there would be a risk that they would simply ‘stabilise [the pre-existing] capitalist relations of power and accumulation’.¹⁰⁹ Reliance on private agency does not address the current marginalisation of individuals and groups lacking market power, but appears likely to perpetuate and reproduce existing socio-economic hierarchies.¹¹⁰ Although the proposed covenant must provide public benefit, the reference to the ‘public’ does not appear to mean that the benefit is embedded within any particular actual community. Nor is public access to conserved land necessary;¹¹¹ a covenant might ‘add to the general public wellbeing whether or not the public is able to visit, to observe, or to touch what is being conserved.’¹¹² As presented in their Report, the Commission proposals seem likely to continue existing patterns of social exclusion.

6. Improving the governance of the covenant structure

6.1 Participation and legitimacy

There is no simple way to resolve these difficulties. One response to the risks associated with commodification would be a comprehensive reorientation of environmental policy. Failing this, this section considers the extent to which there may be opportunities to improve the equity, and perhaps the effectiveness, of the Commission proposals. It engages with questions of administrative legitimacy,¹¹³ and the need for adequate forums and processes for making decisions about land use the impacts of which are ultimately collective and public.¹¹⁴ It is suggested that participation of a more

¹⁰⁸ In the US context, Ruhl and Salzman argue that wetland banking policies have resulted in a redistribution of wetlands from urban areas to rural ones, with important ecological and social impacts: J B Ruhl and James Salzman, ‘The Effects of Wetland Mitigation Banking on People’ (2006) 28 *National Wetlands Newsletter* 1.

¹⁰⁹ Shannon Logan and Gerda Wekerle, ‘Neoliberalising Environmental Governance? Land Trusts, Private Conservation and Nature on the Oak Ridges Moraine’ (2008) 39 *Geoforum* 2097, 2100.

¹¹⁰ A point made eg by Kosoy and Corbera, ‘Payments’ (n 93) 1234.

¹¹¹ Bray, ‘Reconciling’ (n 28) 163 refers to public access as creating a ‘unique synergy between community involvement and increased conservation value’. However, evidence suggests that the majority of US conservation easements make no provision for public access; see Kay, ‘Breaking’ (n 57) 12.

¹¹² Law Commission, *Covenants* (n 2) para 3.22.

¹¹³ On the importance of administrative legitimacy in environmental decision-making, see Elizabeth Fisher, ‘Unpacking the Toolbox: Or Why the Public/Private Divide is Important in EC Environmental Law’, in M Freedland and J B Auby (eds), *The Public Law/Private Law Divide: une entente assez cordiale?* (Hart 2006) 215.

¹¹⁴ The continuing relevance of governance issues is recognised by Reid and Nsoh, *Privatisation* (n 31) para 2.14.

diverse range of actors in monitoring and better access to information would improve any reform introduced. However, the private nature of the mechanism implies that it would be inappropriate for private agreements to play a major role in determining conservation priorities.

Detailed exploration of forms of participation is outwith the scope of this article,¹¹⁵ but argument here is premised on the view that there is a meaningful distinction between direct involvement by the public in elements of the covenanting process and representation of the community interest by established organisations such as public authorities or large conservation charities.¹¹⁶ Following Arnstein's influential conceptualisation of participation as 'redistribution of power',¹¹⁷ discussion focuses on the extent to which a range of individuals and groups may have meaningful opportunities to influence outcomes. Participation is understood as requiring more than simply co-option into a dominant culture or discourse but rather in a richer sense as opportunity for recognition.¹¹⁸ The Commission proposals allow for the public to participate indirectly through involvement with responsible bodies, but the points made earlier about abstraction and displacement emphasise the need for opportunities to participate at a variety of scales and intensities.¹¹⁹ Although participation is no panacea,¹²⁰ it may help, in a small way, to ensure that the presence of multiple, competing interests is made visible.

6.2 Covenant creation and agenda setting

Regardless of any efforts that may be made to increase participation, it is submitted that voluntary agreements are essentially a poor means of setting collective land-use priorities. Landowners would

¹¹⁵ For discussion of possible typologies of participation, see Mark S Reed, 'Stakeholder participation for environmental management: A literature review' (2008) 141(10) *Biological Conservation* 2417 and Barry Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development', in Donald M Zillman *et al.* (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP 2002) 77.

¹¹⁶ Difficulties with selective participation by well-organised groups are highlighted by Yvonne Rydin and Mark Pennington, 'Public Participation and Local Environmental Planning: the collective action problem and the potential of social capital' (2000) 5(2) *Local Environment* 153, 165.

¹¹⁷ Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Institute of Planners* 216

¹¹⁸ On recognition, see Adrian Martin *et al.*, 'Global environmental justice and biodiversity conservation' (2013) 179 *Geographical Journal* 122.

¹¹⁹ Different problems may require different participatory strategies; see eg Rydin and Pennington, 'Participation' (n 116).

¹²⁰ For example Frances Cleaver, 'Paradoxes of Participation: Questioning Participatory Approaches to Development' (1999) 11 *Journal of International Development* 597; Mohan and Stokke, 'Empowerment' (n 1).

retain the power to determine covenant content; it would be antithetical to the private and voluntary scheme proposed by the Commission for members of the public to have control over the terms of a covenant. The environmental justice concerns set out above imply that social and political conflict over land uses, which may involve choice between different environmental amenities and public benefits, is unlikely to be resolved equitably by private initiative alone. In the current English law, individual proprietary rights have been argued to exist in the context of a ‘socially constituted and dynamic’ system of determining land-use rights through administrative processes that generally provide some opportunities for public participation and deliberation.¹²¹ In the longer term, a regime that lacks legitimacy is unlikely to provide the basis for a sustainable land-use policy.¹²²

A scheme based on private initiative may also lack ecological efficacy. The Law Commission proposals do not include any formal provision for responsible bodies to work together to co-ordinate activities. A covenant relating to a single landholding may not adequately acknowledge the existence of ecological networks and the dependence of one biodiversity feature on numerous other ecological features both within the parcel of land and elsewhere.¹²³ Where land values are high, efforts to address fragmentation through property-by-property restrictions could well fail.¹²⁴ The risk of leakage (displacement of the harmful activity restricted by the covenant) would remain high if there were no broader scheme of land-use planning. Protection through individual covenants could fail to address cumulative impacts: for example, low-impact development on one land parcel may not significantly damage biodiversity but could contribute to a detrimental trend.¹²⁵

Further, the private nature of the proposed covenant implies that it would not necessarily have the same legal status as a designation under one of the various public law regimes affecting, for example,

¹²¹ Eloise Scotford and Rachael Walsh, ‘The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context’ (2013) 76 MLR 1010, 1025.

¹²² The fundamental importance of legitimacy is emphasised by Scotford and Walsh, ‘Symbiosis’ (n 121) 1043-1044.

¹²³ The need for coherence is recognised eg by Reid, ‘Privatisation’ (n 23) 224. Data from the US indicates that development density in the surrounding area has a greater effect on some biodiversity variables than the existence of a conservation easement: Amy Pocewicz *et al.*, ‘Effectiveness of Conservation Easements for Reducing Development and Maintaining Biodiversity in Sagebrush Ecosystems’ (2011) 144 Biological Conservation 567, 573.

¹²⁴ For a US case study in which easements did not prevent ecological fragmentation, see Rissman, ‘Rethinking’ (n 71) 228.

¹²⁵ For examples of this problem in the US context see Adena R Rissman *et al.*, ‘Conservation Easements: Biodiversity Protection and Private Use’ (2007) 21(3) Conservation Biology 709, 716.

sites of special scientific interest and national parks.¹²⁶ In Australia, sites protected by covenants have been affected by the exploitation of mineral rights as such rights are owned separately from the rights to use the surface;¹²⁷ it would be theoretically possible for this to occur in England.¹²⁸ It seems unlikely that the fact that land was protected by a covenant would prevent licenses for unconventional means of energy production and exploration such as hydraulic fracturing being granted.¹²⁹ Although in the absence of powers of compulsory extinction¹³⁰ a covenant would not be affected by the grant of planning or other regulatory consent in respect of the surface land, this would probably lead to an application for modification or discharge, issues relating to which are discussed below.

6.3 Access to information

In order to ensure that land-use conflict was addressed in a democratic and transparent manner, public access to information about covenants and their role in land-use decision-making would be crucial. Proper and effective monitoring of the effects of any reform requires affected communities to have access to information about the existence of covenants and also monitoring activities. Scientific access to data on covenants would also bring many benefits such as increased understanding of

¹²⁶ The problem of coordination between the various regimes is raised eg by Reid, 'Privatisation' (n 23) 224-225. In the absence of express legal provision, covenants would be unaffected by existing statutory designations and the possibility of conflict would have to be considered when drafting covenant terms.

¹²⁷ Vanessa M Adams and Katie Moon, 'Security and equity of conservation covenants: Contradictions of private protected area policies in Australia' (2013) 30 Land Use Policy 114, 117.

¹²⁸ Mineral rights in England may also be owned separately from the rights to use the surface – see Gray and Gray, *Land Law* (n 13) para 1.2.18 - and the surface landowner cannot necessarily refuse to allow these rights to be exploited. For example, under the terms of the Mines (Working Facilities and Support) Act 1966 and the Petroleum Act 1998, if rights to use the surface land for extractive operations and access cannot be obtained by private bargain on reasonable terms, they may be granted by court order.

¹²⁹ ss 43-48 of the Infrastructure Act 2015 give the right to use deep-level land for petroleum exploration without the consent of the surface landowner. The Onshore Hydraulic Fracturing (Protected Areas) Regulations 2016 indicate only limited protection may be offered to significant natural sites – SSSIs for example are not mentioned. For exploration of land-use conflicts in the context of renewable and unconventional energy production, see Gerald Korngold, 'Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection' (2014) 3 Louisiana State University Journal of Energy Law and Resources 101.

¹³⁰ Such as those set out in s 237 of the Town and Country Planning Act 1990 which, along with analogous provisions, would continue to apply to the proposed covenant: Law Commission, *Covenants* (n 2) para 7.115.

climate change impacts.¹³¹ Were conservation obligations to be required as mitigation for environmental harms, public scrutiny would be particularly important.¹³² There are fears, however that the introduction of conservation covenants could actually weaken public access to environmental information.¹³³

At a general level, the increased involvement of private actors in environmental protection may negatively affect the way that the public interest in access to information is perceived and implemented. The use of conservation easements in relation to privately owned land in the United States appears to have fostered concern about privacy, in particular a misapprehension that information about the existence of covenants might lead the public to believe that access rights exist (which would not be the case for some or perhaps many covenants).¹³⁴ Rather than nurturing an ethic of community, linking conservation activities to a sphere understood as bounded and protected from outside intrusion diminishes the desire to share information. Framing an issue in terms of the private rights of the landowner focuses debate on protection of privacy interests rather than the collective problem of access to environmental information.

The Law Commission suggest that, in order to be enforceable against successors, covenants should be registered as local land charges on the Land Charges register.¹³⁵ It is thought to be impracticable to have any central registration of covenants that would permit analysis of their use across England,¹³⁶ but it is recommended that responsible bodies should make information available to the relevant Secretary of State about agreements to which they are party.¹³⁷ This would allow information about covenants to be disseminated in compliance with the Environmental Information Regulations 2004¹³⁸

¹³¹ Indeed there may be an ethical obligation to make this data available: James L Olmstead, 'The Invisible Forest: Conservation Easement Databases and the End of Clandestine Conservation of Natural Lands' (2011) 74 LCP 51, 63.

¹³² This public aspect is emphasised by Morris and Rissman, 'Access' (n 84) 1240.

¹³³ See eg Reid, 'Privatisation' (n 23) 226.

¹³⁴ Morris and Rissman, 'Access' (n 84) 1267.

¹³⁵ Law Commission, *Covenants* (n 2) para 5.66.

¹³⁶ Law Commission, *Covenants* (n 2) paras 5.64; 5.71. The fact that covenants are understood as a statutory burden rather than an interest in land is argued to prevent registration in the Land Register, but this seems an unsatisfactory position given the manifold benefits of centralised registration. There are also strong arguments that the proposed covenant would have many of the characteristics of a proprietary interest and would not therefore be out of place in the Land Register; see Pratt, 'Covenants' (n 12).

¹³⁷ Law Commission, *Covenants* (n 2) paras 5.86-5.87.

¹³⁸ SI 2004/3391.

but would not ensure that information about, for example, monitoring and enforcement, was collected in adequate detail.

These proposals do not go far enough. Despite the widespread use of conservation easements in the United States, there is no publicly accessible data showing how exactly how many conservation easements exist or where they are located.¹³⁹ There is a disjuncture between the spatial and temporal scales at which easements operate and the scale at which data is collected.¹⁴⁰ The Law Commission refute concerns based on this experience, arguing that, as land-use planning is already locally organised, local registration is consistent with the English policy context.¹⁴¹ This response does not take sufficient account, however, of the increased need for transparency given the lack of public participation in decision-making about covenants, the fact that there would be a strong public and academic interest in access to national-scale data about how any new mechanism is being used and the risk that important information about the condition and ongoing status of covenant-protected sites would not be collected at all.

It would be especially important that the social and ecological distribution of benefits and burdens be carefully scrutinised if publicly funded incentives were to be offered. The Commission position is that its recommendations should not be regarded as a tax mitigation tool.¹⁴² However, the tax implications of any scheme might only emerge after implementation. Reid identifies potential for reduction of inheritance tax and stamp duty land tax liabilities;¹⁴³ it seems likely that there would also be capital gains tax consequences if a covenant were viewed as reducing the value of a property.¹⁴⁴ Currently available capital gains and inheritance tax relief for owners of ‘national heritage assets’

¹³⁹ See eg Olmstead, ‘Databases’ (n 131); Morris and Rissman, ‘Access’ (n 84). A voluntary database, the National Conservation Easement Database, exists: see <http://conservationeasement.us/>.

¹⁴⁰ Morris and Rissman, ‘Access’ (n 84) 1241.

¹⁴¹ Law Commission, *Covenants* (n 2) para 5.78.

¹⁴² *Covenants* (n 2) para 2.5.

¹⁴³ Colin T Reid, ‘Conservation Covenants’ (2013) Conv 176, 181.

¹⁴⁴ Reid notes that stricter restrictions on development in the UK may mean that a covenant would not affect the value of the property, but if a covenant did not provide any additional protection against environmental degradation this would call into question the benefit of introducing the mechanism; see Reid, ‘Conservation Covenants’ (n 143) fn 38.

(these may include land or other forms of heritage such as artworks) made publicly accessible¹⁴⁵ has been criticised for providing inadequate levels of access in return for the funding given.¹⁴⁶

The compulsory collection and dissemination of more extensive information about covenant creation and monitoring would thus be necessary to ensure that any new scheme could be evaluated robustly.

6.4 Accountability and participation in monitoring and enforcement

The need for legitimacy and accountability is additionally crucial to the design of systems for monitoring and enforcement of conservation covenants. There is no guarantee that a covenant would function effectively at all. Enforcement of private agreements by parties who do not hold neighbouring land fundamentally changes the interests involved: enforcement is no longer the private right of a neighbour but the public concern of a conservation organisation or other responsible body. Entering into new covenants may hold many attractions for conservation bodies, but it is extremely important to ensure that adequate resources are set aside for long-term monitoring and enforcement of agreements.¹⁴⁷ There is a basic asymmetry of information between the occupier of the land and the responsible body,¹⁴⁸ where a large parcel of land is involved, terms such as restrictions on hunting may be difficult or impossible to monitor on a day-to-day basis.¹⁴⁹

In jurisdictions such as Australia where conservation covenants have been widely used, academics have criticised a lack of standardisation in approaches to monitoring and evaluation.¹⁵⁰ Further, covenant effectiveness may have decreased over time: landowner enthusiasm has been identified as a potential obstacle to achieving biodiversity outcomes where the burdened party is not the original

¹⁴⁵ See further Her Majesty's Revenue and Customs (HMRC), *Capital taxation and the national heritage* (2013), available at <https://www.gov.uk/government/publications/capital-taxation-and-tax-exempt-heritage-assets>.

¹⁴⁶ See eg M Brown and N Gil, 'Tax exemption for public access to treasured artworks is 'a racket'' *The Guardian* (London, 27th December 2013), <<http://www.theguardian.com/artanddesign/2013/dec/27/tax-exemption-public-access-treasured-artworks-racket>>. On problems in the US, see D Halperin, 'Incentives for Conservation Easements: The Charitable Deduction or a Better Way?' (2011) 74 LCP 29; Bray, 'Reconciling' (n 28) 146-147.

¹⁴⁷ The need for careful financial planning is highlighted by Green Balance, *Potential* (n 73) 36.

¹⁴⁸ A point highlighted by Hodge, 'Covenants' (n 10) 496.

¹⁴⁹ For examples, see Rissman, 'Rethinking' (n 71) 226.

¹⁵⁰ J A Fitzsimons and C B Carr, 'Conservation Covenants on Private Land: Issues with Measuring and Achieving Biodiversity Outcomes in Australia' (2014) 54 *Environmental Management* 606, 614.

covenantor.¹⁵¹ As most Australian covenants were only established relatively recently (from 1980 onwards), many may still be in the hands of the original covenantor or their close relatives; it is unknown how the passage of longer periods of time will affect compliance with covenant terms.¹⁵²

It is significant that the proximity requirement that usually applies to restrictive freehold covenants means that monitoring and enforcement will happen almost automatically: if a neighbour's interests are genuinely harmed by breach of a covenant, he or she will usually be aware that this is the case. However, where the interest enforced is public rather than private the question of monitoring is more complicated. Due to the inadequate provision for information dissemination identified earlier, those geographically close to the land might have no idea of a covenant's existence. Although a large environmental organisation can be assumed to be ideologically committed to adequate enforcement, its interest is of a very different character to the interest of a neighbouring landowner in his or her private amenity and may well require to be balanced against various other organisational concerns and objectives. Enforcement of obligations through the public land-use planning system guarantees at least a minimal degree of transparency and democratic accountability that does not exist in relation to the enforcement of property rights by private bodies.¹⁵³

If a covenant were to be breached, or its terms disputed, litigation costs could be substantial.¹⁵⁴ Smaller breaches would cause particular difficulties as the financial costs of legal action might often far outweigh the potential benefits.¹⁵⁵ Responsible bodies may, due to political reasons or resource constraints, be unable or unwilling to ensure strict compliance with agreements and the proposed scheme contains no formal system of public oversight.¹⁵⁶ The Law Commission reject the idea of third

¹⁵¹ Fitzsimons and Carr, 'Covenants' (n 150) 611-612. See also A R Rissman and V Butsic, 'Land trust defense and enforcement of conserved areas' (2011) 4 Conservation Letters 31, 35.

¹⁵² As Rissman and Sayre argue, the success of any easement will depend not just on the content of the formal legal agreement but on the social relations between benefited party and landowner: 'Outcomes' (n 28). These will be strongly influenced by the individual personalities involved, which may vary if the land is transferred or there is a change of personnel at the relevant responsible body. See also Green Balance, *Potential* (n 73) 38.

¹⁵³ Of course, planning obligations are by no means a perfect mechanism: Carolyn Harrison and Tracey Bedford, 'Environmental Gains? Collaborative Planning, Planning Obligations, and Issues of Closure in Local Land-use Planning in the UK', in Jane Holder and Carolyn Harrison (eds), *Law and Geography* (OUP 2003) 343.

¹⁵⁴ Several consultees raised concerns about the cost of injunctions, the Commission's recommended primary enforcement mechanism: Law Commission, *Covenants* (n 2) paras 6.78-6.80.

¹⁵⁵ For examples of this in the US (where litigation costs may be even higher), see Rissman and Butsic, 'Defense' (n 151) 34.

¹⁵⁶ The Commission do refer to the possibility of responsible bodies facing 'public pressure and reputational loss (or even de-listing) for failing to enforce': *Covenants* (n 2) paras 4.109-4.111.

party enforcement because this would be inconsistent with the private and voluntary character of the agreement.¹⁵⁷ However, given the centrality of the public interest in environmental protection to the entire scheme, it is submitted that this argument does not adequately address the concerns that inadequate enforcement may raise. Although the burden of a conservation covenant falls on a private landowner, the benefit is avowedly public and communal. Inclusion of a broader range of actors in the monitoring and enforcement process would enhance the equity, and perhaps also the environmental effectiveness,¹⁵⁸ of the covenant mechanism.

One obvious suggestion is oversight by a state body such as a local authority or a government agency.¹⁵⁹ There is also the possibility of direct enforcement by members of affected local communities. At a basic level, residents could be encouraged to participate in responsible bodies' monitoring activities. This could provide many of the benefits of private involvement identified in part four but would still leave monitoring policy entirely in the control of responsible bodies. A model for an independent power of public intervention might be the power of persons aggrieved by a statutory nuisance to, in summary proceedings, ask for an order requiring the nuisance to be abated and/or prohibiting its recurrence.¹⁶⁰ These schemes would, however, be likely to decrease the willingness of landowners to burden their land with a conservation covenant.

Similar issues arise when determining suitable remedies for breach of a covenant. The private and voluntary nature of the mechanism limits the extent to which a wider range of approaches and sanctions are thought to be appropriate.¹⁶¹ The remedies recommended by the Law Commission comprise specific performance, injunctive relief and damages (including exemplary damages in appropriate cases),¹⁶² but questions may be raised about how effective such a regime would be in practice in ensuring that a conservation covenant fulfils its stated objectives. The barriers to obtaining

¹⁵⁷ Law Commission, *Covenants* (n 2) para 4.111.

¹⁵⁸ J Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach' (2001) 21(3) OJLS 415 argues that participation may increase the quality of environmental decisions, particularly regarding the acceptability of risks.

¹⁵⁹ For discussion of public authority powers of intervention, see Reid, 'Conservation Covenants' (n 143) 184; J Pidot, 'Conservation Easement Reform: As Maine Goes Should the Nation Follow? (2011) 74 LCP 1, 14-15. The Maine provisions are, however, premised on the inability of the responsible body to take action due to reasons such as bankruptcy or dissolution; the concerns raised here relate not just to inadequacy on the part of a responsible body but to the structure of the covenant mechanism.

¹⁶⁰ See s 82 Environmental Protection Act 1990.

¹⁶¹ This is the implication of Law Commission, *Covenants* (n 2) para 6.93.

¹⁶² Law Commission, *Covenants* (n 2) paras 6.69-6.127.

appropriate relief might include ambiguity in the drafting of the covenant, the need to meet relevant standards of proof and the inadequacy of damages.¹⁶³

There exists no simple solution but punitive sanctions for landowners who deliberately breach a covenant might be desirable in some circumstances, depending on the seriousness of the harm caused and the presence of, for example, intent to profit fraudulently from it. The risk of fraud would be especially relevant if covenants were used in biodiversity offsetting or carbon sequestration ventures.¹⁶⁴ Although the Commission recommendations allow for exemplary damages, questions can be raised about how appropriate it is to use this mechanism as a sanctions regime. There are strong arguments that any scheme designed to impose sanctions of a punitive nature requires more developed attention to appropriateness of sanction, evidential standards, defences and rights of appeal.¹⁶⁵

6.5 Modification and discharge

The tension between flexibility and permanence¹⁶⁶ raises further questions regarding the ability of a property mechanism to deal with change and conflict in a fair and transparent manner. It is acknowledged by the Commission that the temporal dimension of the covenant structure is problematic: short term goals are undesirable,¹⁶⁷ as these would require regular variation, but environmental change¹⁶⁸ or other political or social factors may mean that any long term obligations quickly become inappropriate or are so vague as to be meaningless.¹⁶⁹ If covenants were to be used to secure compensatory measures in respect of developments causing permanent ecological damage, the conservation value created by the covenant would require to be perpetual but perpetual private ordering in relation to land use is particularly troubling as it restricts the autonomy of future

¹⁶³ For examples of difficulties in the US and an argument that exemplary damages and criminal sanctions are important deterrents, see Ann Harris Smith, 'Conservation Easement Violated: What Next? A Discussion of Remedies' (2010) 20 *Fordham Environmental Law Review* 597.

¹⁶⁴ On existing problems with fraud in carbon trading, see Carole Gibbs and Michael Cassidy, 'Crimes in the carbon market', in Lorraine Elliot and William H Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar 2016) 235.

¹⁶⁵ See Richard Macrory, 'Sanctions and Safeguards: The Brave New World of Regulatory Enforcement' (2013) 66 *CLP* 233.

¹⁶⁶ A point highlighted by Reid, 'Conservation Covenants' (n 143) 178-179.

¹⁶⁷ Law Commission, *Covenants* (n 2) para 2.5.

¹⁶⁸ Climate change impacts are emphasised by Owley, 'Crossroads' (n 92) 206-208. For further references, see Korngold *et al.*, 'An Empirical Study of Modification and Termination of Conservation Easements: What the Data Suggest About Appropriate Legal Rules' (2016) 24 *NYU Environmental Law Journal* 1, 23.

¹⁶⁹ See eg Owley, 'Crossroads' (n 92) 205-207.

individuals and communities to determine appropriate land-use patterns.¹⁷⁰ It is unknown what the environmental needs of future generations may be, and whether they would be willing or able to enforce the terms of any particular covenant.¹⁷¹

It follows from this that the promised perpetuity can only ever be an illusion.¹⁷² Given that biological systems are necessarily continuously adapting and evolving, conservation covenants would require to be drafted with this in mind and their objectives framed to focus on building resilience rather than achieving ‘conservation’ of a certain state.¹⁷³ As Barritt has argued in relation to stewardship obligations, the object of the covenant would then require to be interpreted flexibly in line with the values it is designed to conserve.¹⁷⁴ One suggestion made in the United States has been the use of shorter ‘renewable term’ easements.¹⁷⁵ These would better reflect a cyclical, rather than a linear, approach to decision-making consistent with adaptive management paradigms.¹⁷⁶

However, this approach could imply a greater commitment to management and monitoring on the part of burdened owners.¹⁷⁷ If a covenant included positive obligations, this would further increase these costs, potentially jeopardising its attraction as a voluntary and flexible mechanism.¹⁷⁸ More expenditure could also be required on enforcement, reducing the perceived efficiency benefits for conservation bodies of the covenant structure compared to outright ownership.¹⁷⁹ Regular amendment

¹⁷⁰ See for example J Owley, ‘Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements’ (2011) 30 *Stan Env LJ* 121, esp. at 154-155. Of course, many land-use decisions, including a decision to develop, have permanent impacts on biological systems.

¹⁷¹ Owley, ‘Changing’ (n 170) 169.

¹⁷² A point highlighted by Pidot, ‘Reinventing’ (n 24) 22.

¹⁷³ On the general importance of resilience, see Jan McDonald and Megan C Styles, ‘Legal Strategies for Adaptive Management Under Climate Change’ (2014) 26 *JEL* 25,41-42. The difficulties presented by epistemic uncertainties in the natural sciences are highlighted by Adena R Rissman, ‘Designing Perpetual Conservation Agreements for Land Management’ (2010) 63 *Rangeland Ecology and Management* 167, 173-174.

¹⁷⁴ See Barritt, ‘Stewardship’ (n 59).

¹⁷⁵ See Owley, ‘Changing’ (n 170).

¹⁷⁶ On which see McDonald and Styles, ‘Strategies’ (n 173) 28-29.

¹⁷⁷ An argument made by Adena R Rissman *et al.*, ‘Adapting Conservation Easements to Climate Change’ (2015) 8(1) *Conservation Letters* 68, 73.

¹⁷⁸ Lack of time to manage the property has been identified as an important obstacle to achieving biodiversity outcomes in Australia; see Fitzsimons and Carr, ‘Covenants’ (n 150) 612. See also Owley, ‘Crossroads’ (n 92) 225-226.

¹⁷⁹ See Jessica Owley and Adena R Rissman, ‘Trends in private land conservation: Increasing complexity, shifting conservation purposes and allowable private land uses’ (2016) 52 *Land Use Policy* 76, 81; Owley, ‘Crossroads’ (n 92) 225-226.

and review would add further costs for all parties involved.¹⁸⁰ For this reason, responsible bodies might wish to avoid agreements involving complex management requirements.¹⁸¹ Alternatively, important provisions could be moved to management plans; these could be even more remote from public scrutiny than covenant terms.¹⁸²

The Commission proposals regarding modification and discharge¹⁸³ are consistent with the need to respond to environmental and social change. However, they again raise the issue of protection of the public interest in a covenant. One of the factors proposed for consideration is the possibility of substitution of the benefits provided by the covenant for similar benefits under a scheme carried out on other land owned by the burdened party;¹⁸⁴ public trust in covenants would be likely to be eroded if such substitutions took place regularly. Moreover, how would the Lands Chamber take into account any incentives that had been offered to the original covenantor or, in the case of offsetting, the destruction of habitat that had taken place on the strength of the covenant? The circumstances in which the covenant was entered into might be relevant to the ‘extent to which the conservation covenant is in the public interest and designed to benefit the public’¹⁸⁵ but the discretion afforded to the Lands Chamber to balance this against other factors and decide that modification or discharge is ‘reasonable’ seems relatively wide.¹⁸⁶

Third parties might also have relied on the existence of the covenant in order to obtain a planning or other benefit; it seems likely that such persons would nevertheless bear no liability to ensure the covenant operated successfully and was appropriately monitored and enforced.¹⁸⁷ There is additionally a risk that responsible bodies could agree to modification for reasons that do not strictly

¹⁸⁰ Bray’s analysis of Massachusetts restrictions emphasises concern over future amendment costs: ‘Reconciling’ (n 28) 140-145; 169-172.

¹⁸¹ See eg the comments of the RSPB: E Comerford et al., *Financing nature in an age of austerity*, RSPB (2010) 10. See also Green Balance, *Potential* (n 73) 14.

¹⁸² See Owley and Rissman, ‘Trends’ (n 179) 82. Rissman notes that, due to issues with resources and enforceability, management plans were not a preferred tool for staff at The Nature Conservancy, one of the largest non-profit easement holders in the US: ‘Designing’ (n 173) 172.

¹⁸³ See 2.1 above.

¹⁸⁴ Law Commission, *Covenants* (n 2) para 7.79.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ A similar problem arises when a covenant is entered into as part of a permit to ‘take’ endangered species under the Endangered Species Act in the US: Jessica Owley Lippmann, ‘Exacted Conservation Easements: The Hard Case of Endangered Species Protection’ (2004) 19 J Envtl L & Litig 293, 343.

reflect the conservation objectives embodied in the covenant; any ulterior motivations would be difficult for the Lands Chamber to assess.¹⁸⁸

The Commission reject any further form of oversight, such as a requirement for public consultation,¹⁸⁹ on the basis that this would reduce the flexibility of the system. It is certainly the case that increased participation might make the scheme less attractive to landowners, it would also be difficult to achieve within the structures associated with a private mechanism. The organisation of the adjudicative process as concerning principally the parties to the covenant limits the opportunities for full and open deliberation. For example, should a covenant protecting open space values be discharged to allow construction of wind turbines? The policy of the relevant responsible body and the wishes of the landowner are unlikely to be exhaustive of the range of possible views on this question.

The bipolarity of the private law relationship¹⁹⁰ means, however, that legal focus would be on gain by one party and correlative loss by the other, rather than the wider distribution of burdens and benefits in society. Another way of putting this point might, following Weinrib,¹⁹¹ be that private law adjudication generally involves corrective justice rather than distributive justice. Without endorsing Weinrib's exclusion of distributive justice from all private law adjudication, his contention that the structures of private law are poorly equipped to determine policies that affect the public as a whole remains relevant. There is some precedent for consideration of the circumstances in which a restrictive covenant was granted when considering whether it should be modified or discharged,¹⁹² but

¹⁸⁸ Korngold et al., 'Modification' (n 168) 31 note that a significant proportion of the easement modifications studied had the potential to decrease conservation values but the process followed was opaque and it was impossible to be sure whether countervailing benefits were gained elsewhere.

¹⁸⁹ Law Commission, *Covenants* (n 2) para 7.31.

¹⁹⁰ At least in terms of adjudicative structures: proprietary rights are generally understood as being exigible against the world in general but in order for a claimant to enforce a right in court a nexus between the claimant and a particular respondent is generally required. For further discussion, see L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas L Rev 2115. Developments in the English law of trespass allowing injunctions to be issued against 'persons unknown' (see *Hampshire Waste Service v Persons Unknown* [2003] EWHC 1738 (Ch)) complicate this picture somewhat but arguably a connection between one or more specific persons and the complainant is still necessary for such an order to be enforced.

¹⁹¹ E J Weinrib, *The Idea of Private Law* (2nd edn, OUP 2012).

¹⁹² See eg *Re Beech's Application* (1990) 59 P & CR 502; N D M Parry, 'Discharge of Restrictive Covenants' (1990) Conv 455. In *Beech's* the applicants sought to discharge a covenant imposed by a local authority as part of a sale under the 'right to buy' provisions in the Housing Act 1985. The Tribunal declined the application, stating that they would support the Council's imposition of a scheme of covenants as part of its obligation to manage housing stock.

this does not mean that the Lands Chamber is the best forum for this type of dialogue. If the ‘persons entitled to the benefit of the covenant’ were the general public, it should not be presumed that a responsible body could sufficiently represent all pertinent interests.

7. Conclusion: Private Means for Public Ends?

Proprietary mechanisms, such as restrictive covenants, are well suited to coordinating private interests. Their tendency towards coherence and certainty plays a valuable role in their justification, in what it means for them to be understood as just.¹⁹³ The features that provide this consistency and stability, however, the abstraction from the chaotic realities of the material world and the circumscription of considerations and actors, also make them unsuitable for providing an environmental justice that is plural, participatory and concerned with both human and non-human communities. The Law Commission proposals for the introduction of a conservation covenant, while of great interest to property lawyers, seek to maintain an uneasy balance between public and private that may ultimately be detrimental to the scheme’s potential for social and environmental benefit.

It is important to be clear about the strategic objectives of introducing conservation covenants and to identify what such mechanisms could achieve that existing processes cannot. The major question that this article has engaged with is whether covenants can empower private conservation activity while responding in a just manner to the ‘public, collective and competing needs’¹⁹⁴ that characterise land-use decision-making. The article has highlighted concerns that an increasing reliance on private actors and markets will advantage a narrow range of social and ecological interests, with significant environmental justice implications. It has focussed on public participation and access to information as means of increasing the inclusiveness and legitimacy of any reform, arguing that involvement of a broader range of actors is necessary to secure the kind of community benefit promised by the Commission proposals.¹⁹⁵

In this respect, the scheme proposed would be enhanced by the addition of opportunities for input by actual communities (rather than the responsible bodies who must be presumed to represent them) into the monitoring and enforcement of the obligations created. Provision for more extensive central

¹⁹³ One view of the importance of coherence in private law doctrine is that it requires a ‘single integrated justification’: Weinrib, *Private Law* (n 191) 32 ff. For a critique, see K Kress, ‘Coherence and Formalism’ (1993) 16 *Harv J L & Pub Poly* 639. Although Weinrib’s discussion of the justificatory role of coherence is valuable, the term ‘coherence’ is used here in a wider sense.

¹⁹⁴ Scotford and Walsh, ‘Symbiosis’ (n 121) 1016.

¹⁹⁵ Eg Bray, ‘Reconciling’ (n 28) 151; Hodge, ‘Covenants’ (n 10) 494-495.

collection and dissemination of information about conservation covenants would further improve their governance. However, the primary role of the parties to a conservation covenant limits the extent to which it could be a suitable mechanism for setting or securing public conservation priorities; this is reflected in the limited scope for public involvement in covenant creation and modification or discharge. These are not necessarily arguments against the introduction of any form of conservation covenant, but do point to the need for reflection on the private nature of the mechanism and an acknowledgement of its limitations.