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Article

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COHABITATION LAW REFORM – MESSAGES FROM RESEARCH
ABSTRACT. Empirical research in this field has underlined the diversity of the cohabitation population, the existence of the common law marriage myth and the lack of consensus on the best way forward for reform of the law in England and Wales. Against the backdrop of the English Law Commission's on-going project on cohabitation law, this article will explore the reasons found by recent research for people's choice of cohabitation over marriage, the interrelationship between commitment and economic vulnerability and the tension in feminist debates as to whether an extension of rights for opposite-sex cohabitants that are analogous to married spouses (either by an opt-in model or opt-out model) might be an appropriate solution or a reinforcement of patriarchal marriage values. It will also consider, given recent research findings and other initiatives aimed at raising awareness about the legal differences between different styles of cohabitation relationship, law's dual and conflicting role in shaping regulated family structures whilst both protecting vulnerable family members inside and outside such structures and at the same time also offering socially acceptable standards of dispute resolution in this most personal of spheres.

KEY WORDS: cohabitants, cohabitation, cohabitation law reform, socio-legal research

Unmarried heterosexual cohabitation has become the focus of research in many fields both within and outside law. Research has both identified and sought to explain changing social norms, behaviours and attitudes towards partnering and parenting in Britain as well as exploring the possibilities for and implications of law reform in this field both theoretically and through comparison with other jurisdictions.¹ However, given that the Law Commission for England and Wales is currently considering the need for reform of cohabitation law as it applies on relationship breakdown and death (Law Commission 2005), the availability of a now substantial body of legal and socio-legal research is unlikely to be ignored in the process of shaping the options for law reform. This article's principal task is to explore the messages from research available to

¹ Examples are: Legal – Bailey-Harris 1996, Bottomley 1998, Eekelaar (ed.) 2001, Glennon (2000), Miles (2003), Probert (2004), Wong (2003); Socio-legal – Arthur et al. (2001), Barlow & Probert (2004), Barlow et al. (2005), Douglas (2000), Lewis (2001), Eekelaar & Maclean (2004); Demographic – Kiernan (2004), Ermisch & Francesconi (2000), Shaw & Haskey (1999); Sociological/Social Policy – Duncan et al (2005), Jamieson et al. (2002), Smart & Stevens (2000); Psychological – Burgoyne (1995).

those seeking to reform cohabitation law. What does research tell us about who cohabits and why? Do people take the legal situation into account in their relationship choice? How committed or uncommitted are cohabitation relationships and does this matter any way from the law reform perspective? What do the public think the law should do in this context and how important is that?

Furthermore, unlike their *Sharing Homes* project concluded in 2002 (Law Commission 2002) the Law Commission's focus is not this time to stray beyond "people who are living together in relationships bearing the hallmarks of intimacy and exclusivity" who are neither married nor civil partners.² The terms of reference make clear that "while there need not necessarily be a sexual element to the relationship, at the very least the relationship should involve cohabitation and bear the hallmarks of intimacy and exclusivity, giving rise to mutual trust and confidence between partners" (Law Commission, 2005, para. 3.6). The stated focus of the Law Commission's project - the financial hardship suffered by cohabitants or their children on the termination of their relationship by separation or death³ - combined with the marriage-like style of relationship to which it is limited, is implicitly, if not explicitly, raising direct comparisons with the legal treatment of married partners in these contexts, a treatment now largely shared with registered civil partnerships (see the Civil Partnerships Act

² Law Commission website at <http://www.lawcom.gov.uk/cohabitation.htm>.

³ *Ibid*, n. 2

2004). Thus a second aim of this article is to discuss the optimum approach to regulation of cohabitation. In so doing, it will draw attention to some of the potential dangers of using marriage as a yardstick against which to measure the legal rights and remedies which the Law Commission may or may not recommend be extended to unregistered/unmarried same- and different-sex cohabitants. Is this a progressive step forward extending family law's protection of vulnerable family members and one which is to be welcomed by legal feminist scholars? Or is it an unacceptable imposition of the patriarchal and heteronormative principles of family law (Deech 1980, cf. O'Donovan 1993) beyond formalised relationships founded on specific legal agreement? Might enforceable cohabitation contracts provide a more appropriate way forward for 21st century cohabitants?

This article will first explore the messages from research available to those seeking to reform cohabitation law and then consider the wider implications of adopting or ignoring them in formulating a new legal order in this sphere.

MESSAGES FROM RESEARCH

The Law Commission's Tale

The Law Commission's current interest in aspects of cohabitation law is the most recent chapter in its attempts to reform various

aspects of cohabitation law. Previous attempts have all been piecemeal in the context of different aspects of substantive law and some have been more successful than others.⁴ The *Sharing Homes* project, whilst focusing on a single issue - home-sharing - departed from other more successful ventures affecting cohabitants in that it cast its net to include not only cohabitants but the much more diverse group of home-sharers about which relatively little was known. No doubt this was one factor in the project being unable to make any recommendations after a ten year period. However, research undertaken for this project led to an acknowledgment that a family law rather than property law approach might be a more appropriate way to tackle changing social norms:

We accept that marriage is a status deserving of special treatment. However, we have identified, in the course of this project, a wider need for the law to recognise and to respond to the increasing diversity of living arrangements in this country. We believe that further consideration should be given to the adoption – necessarily by legislation – of broader based approaches to personal relationships, such as the registration of certain civil partnerships and/or the imposition of legal rights and obligations on individuals who are or have been involved in a relationship outside marriage (Law Commission 2002, p. 86).

⁴ Examples of success include reports leading to the Law Reform (Succession) Act 1995 extending provisions of the Inheritance (Provision for Family and Dependents) Act 1975 to cohabitants of ~~2~~two years standing and one of more limited success was the report leading to the Family Homes and Domestic Violence Bill 1995 which became the significantly modified Family Law Act 1996 Part IV which had to draw greater distinctions between married and cohabiting couples to avoid political mutiny – see Cretney (2003, pp. 755-756) .

The passing of the Civil Partnership Act 2004 which has effectively extended the legal privileges and obligations of marriage to same-sex couples who register their partnership in accordance with the Act has left the Law Commission with the thorny question of how the law should now treat heterosexual cohabitants who have failed to marry and same-sex cohabitants who have failed to register a partnership principally on relationship breakdown or death. Whilst marriage was in 2002 considered a status deserving of special treatment which is now shared in effect with civil partnerships, the current project must grapple with how much of such treatment might legitimately be directed towards cohabitants. It identifies four key issues:

- Whether cohabitants should have access to any remedies providing periodical payments, lump sums, or transfers of property from one party to the other when they separate.
- A review of the operation of existing remedies providing capital awards (such as lump sums and property transfers) for the benefit of children under the Children Act 1989.
- Whether, where a cohabitant dies without a will (intestate), the surviving partner should have automatic rights to inherit. The law currently gives surviving spouses an automatic inheritance in such circumstances. Cohabitants can normally only benefit from the estate in such cases if the courts (under the

Inheritance (Provision for Family and Dependants) Act 1975) grant them a discretionary award on the basis of their needs.

- Whether contracts between cohabitants, setting out how they will share their property in the event of the relationship ending, should be legally enforceable, and, if so, in what circumstances.

What can we learn from socio-legal research about these issues?

The Researchers' Tale

For a long time there was a lack of empirical research into the heterosexual cohabitation phenomenon and data-building relating to same-sex partnerships is still in its infancy. Early demographic data dating from the late 1970s identified the rise in heterosexual cohabitation but little was known about who cohabited and why cohabitation was chosen over marriage (Shaw & Haskey 1999). Even less was known about perceptions of the legal consequences of cohabitation and although its increase as a social phenomenon was recognised, legal academic opinion was divided as to how the law should respond (see e.g. Clive 1980, Bailey-Harris 1996; cf. Deech 1980, Freeman 1984). Consolidated demographic research into heterosexual cohabitation seemed to indicate that there might be little to worry about from a legal point of view. Although cohabitation was here to stay, it did not last long with the vast majority of relationships ending either by marriage or relationship

breakdown within two years on average (Ermisch & Francesconi 2000). An uncommitted underclass of cohabitants whose relationships conveniently terminated after a short period of time surely did not warrant family law regulation akin to marriage? Rather it might be enough to discourage such relationships and legitimately encourage marriage as the most stable foundation for bringing up children (Home Office 1998, Morgan 1999).

Cohabitation and the Commitment Conundrum

However, later sociological research by Smart and Stevens identified a continuum of cohabitation relationships ranging from the contingently committed to the mutually committed (Smart & Stevens 2000). This was clearly an important finding which conceptualises a significant and potentially problematic issue for law and policy reform in this area. For if cohabitation takes on many guises, can it all be regulated in the same and potentially marriage-like way? Jane Lewis (2001), looking at individualism and obligation in intimate relationships, was drawn back to Johnson's three dimensions of commitment (Johnson 1991):

Personal commitment to the partner (wanting the relationship to continue);

Moral-normative commitment (feeling the relationship ought to continue);

Structural commitment (feeling the relationship has to continue because of the investments already made in it such as housing, children, finance).

Her study and subsequent studies (Barlow *et al.* 2005, Eekelaar & Maclean 2004, Lewis *et al.* 2002) seem to show that, with some exceptions focused at the contingently committed end of the spectrum, similar styles of couples in terms of age, financial situation, responsibilities for children, experience similar pulls in terms of these dimensions of commitment regardless of whether they are married or cohabiting. In other words, the strength or weakness of the commitment is not predetermined by whether or not the couple are married or cohabiting. This tends to reinforce the view that whilst easier divorce has rendered the commitment given in modern marriage more like the more contingent commitment associated with cohabitation, cohabitation has itself taken on many of the functions of marriage, including the mutual commitment associated with marriage. If this is right, and all other things being equal, it begins to make a *prima facie* case for equal legal treatment of married and cohabiting couples based on a functional approach guided by what families do rather than the legal form/status they take on.

Nonetheless, this does leave unanswered the issue of the suitability of the contingently committed for family law-style regulation. Kathleen Kiernan's work (2004) shows that in Britain

(in contrast to the position in other countries) parenting cohabitation relationships (i.e. where there are children of the relationship) are as a group more fragile – that is more likely to break down - than parenting marriages. As Barlow *et al.* have argued (2005) and Kiernan herself acknowledges (2004a), this is not altogether surprising given that cohabitation is now front-loaded with characteristics which have traditionally made marriages more likely to break down (Thornes & Collard 1979) – most cohabitants are young, unexpected pregnancies now result in shotgun cohabitation rather than marriage. However, does the greater likelihood of separation for cohabiting parents justify an absence of legal remedies for this group? Arguably, those who are more likely to separate are in greater need of family law regulation to protect not only the weaker economic partner but more importantly the children of the relationship who are currently impoverished when their parents' relationship breaks down to a far greater extent than children of divorced parents (Arthur *et al.* 2002), although some cohabiting couples may be deliberately avoiding the paternalistic protection of the law.

Cohabitation and Social Trends and Attitudes

As Rebecca Bailey-Harris has argued (1996), the statistics alone speak for themselves and demand a legal response if the law is to continue in its role of protecting vulnerable family members. This

argument has been reinforced over time where now 70% of first partnerships are cohabitations, 25% of all children are born to unmarried cohabiting parents and among non-married people aged 16 to 59, 25% of both men and women were cohabiting in 2002 (Office for National Statistics 2005).

Add to this, the social acceptance of cohabitation by all strata of society as on a par with marriage, the woeful ignorance of people in general and cohabitants in particular about the different legal treatment of cohabitation as compared with marriage (see Barlow & James 2004), their preference for inaction even when they are aware and do intend to take action (Barlow *et al.*, 2005), and the conclusion that the Law Commission must do something seems irresistible. As the British Social Attitudes Survey 2000 (Barlow *et al.* 2001) and Barlow *et al.*'s follow up study demonstrated (2005),⁵ there is almost complete social acceptance of cohabitation as a parenting and partnering form and no great resistance to marriage-like treatment of heterosexual cohabitants. Certainly there is no evidence that the majority of cohabitants are seeking to avoid the legal implications of marriage. Rather the majority believe they are already subject to them. As demonstrated below, the social norms whereby most people see marriage and cohabitation as a personal lifestyle choice have diverged from legal norms which continue to privilege marriage over cohabitation in many significant ways, although there is no real understanding of

⁵ Both studies by Barlow *et al.* were funded by the Nuffield Foundation.

this by the British public, it seems. Thus, 67% of respondents in the nationally representative British Social Attitudes Survey 2000 (B.S.A. survey) thought it “all right for a couple to live together without intending to get married”, with only 27% agreeing that married couples made better parents than cohabiting ones and under half (48%) correctly thinking that marriage gave better financial security than cohabitation. What is more, the B.S.A. survey confirmed the existence of a ‘common law marriage myth’ whereby the majority of people in general (56%) and the majority of cohabitants in particular (59%) falsely believe that people who live together for a period of time have a common law marriage which gives them the same rights as married couples. Barlow *et al.*’s follow-up study suggested that it is perhaps false to assume people today think about relationships in terms of ‘marriages’ and ‘cohabitations’ (2005). As Susan (one of the interviewees of the follow-up study) indicated:

I don't see it as being married or not. What I do is compare my relationship, my and Martin’s relationship, with the person I was with before regardless of the fact that I was married to one and not to the other, and it's how happy I am and how the relationship’s working, and I think that's much more important than the fact that one was a marriage and one isn't.

This study also looked at why people cohabited rather than married and found that it had nothing to do with the legal consequences of the different styles of relationship, which did not factor into the

decision-making process in the vast majority of cases. As a puzzled Melanie explained when asked how the legal situation affected her decision to cohabit:

I don't think that affects us - or my choice or what I'm doing in any way.

This underlines the fact that most people do not make relationship choices based on the rational criteria assumed by legislators and policy makers, but rather according to a rationality prevailing in their own lives (Barlow & Duncan 2000). Thus whilst very few in this study were opposed to marriage as an institution, it did, as Gail explained, have an opportunity cost which meant that marriage was continually delayed:

[T]he cost of everything stops us from getting married... We want to start going on holidays and that's costing money..., it's 'what would you rather have, a new car or a wedding?' and now it's a conservatory.

Whilst others such as Natasha were seeking to avoid a gender-stereotypical patriarchal relationship:

Living together you get on better. You really do - with marriage you own each other - with that bit of paper you are tied no matter what but living together it's easier - you are easier with each other and you haven't got that piece of paper hovering over your head all the time - you haven't got that ball and chain on your

finger. He doesn't say to me you've got my ring on your finger I own you, you're mine, there's none of that.

OPTIONS FOR REFORM – IDEALS V. REALITY

In the light of these empirical research findings and changed social trends and attitudes, can we persevere with marriage-centred regulation in a society where cohabitation is increasingly performing the same functions as marriage on a large scale? This is of course one option and one which would be followed if law were to affirm its moral standard-setting role in this personal sphere of relationship regulation. However, with the decline in religious adherence within our society which underpinned both law's moral power and traditional pro-marriage social norms, marriage-centred law alone has not been able to avoid the drift away from marriage-centred family structuring into cohabitation and other non-traditional family forms. Realistically, it cannot now turn the clock back and so the question becomes whether it should take the Napoleonic approach⁶ of ignoring cohabitants because they ignore the law, or whether it should attempt to repair the divergence between social and legal norms and if so, how. The former approach avoids extending the patriarchal, if protective baggage of marriage upon women in cohabitation relationships but

⁶ Napoleon is reputed to have said that as cohabitants ignore the law, the law ignores cohabitants.

at a high cost to them and their children on relationship breakdown or death of a partner. Alternatively, to acknowledge the marriage-like nature of cohabitation is to risk further reinforcing the dependency of women upon men.

On a practical level, the arguments in favour of the Law Commission recommending adoption of a functional approach to the regulation of marriage and cohabitation seem overwhelming, particularly when it is considered that just one partner (including the economically more powerful partner) can by definition veto the other partner's wish to marry or register a civil partnership, thereby denying the weaker partner family law's protection. Yet, whilst the majority of respondents in Barlow *et al.*'s study favoured the function-based rather than status-based approach to family regulation (Barlow *et al.* 2005), that is not to say it would not be oppressive to impose the rights and obligations of marriage on all cohabitants, both different and same-sex. Given the recent adoption of a civil partnership register limited to same sex couples, realistically the creation of another register for a new French PaCS-styled civil partnership open to same and different sex couples offering something different to marriage is not a viable option, although the encouragement of cohabitation contracts may well be.⁷

⁷ See also Wong (2006) in this issue for a discussion on permitting cohabitants with the choice to regulate their relationships through cohabitation contracts.

Research has already triggered a reaction as a response to the B.S.A. survey and prompted further research which is still ongoing but will be available to the Law Commission before they report in 2007. In particular, with regard to developing a culture of private ordering, the Department for Constitutional Affairs is funding a “Living Together” awareness campaign (known as “The Living Together Campaign”) for two years from July 2004 to advise cohabitants on the different treatment of married and cohabiting couples and facilitate practical legal steps that can be taken (see www.advicenow.org.uk). Under consideration by the English Law Commission is the endorsement of the use of cohabitation contracts. Whilst the freedom to preserve private ordering in this way was recommended by the Scottish Law Commission back in 1992 (Scottish Law Commission, 1992), the recent Scottish reforms contained in the Family Law (Scotland) Act 2006 did not in the end confirm the enforceability of cohabitation contracts. Interestingly, they were viewed as an alternative rather than complementary to the functional approach towards cohabitants taken in the 2006 Act and seemingly the Scottish Parliament accepted Probert’s argument that for cohabitation contracts to work effectively, there needs to be equality within the relationship which is far from guaranteed (Probert 2001, p. 263, Harvie-Clark 2005, p. 18). Given the initiatives already undertaken by the Living Together Campaign to encourage cohabitants to put their affairs in order, it may well be that the English Law Commission will adopt a different approach

embracing the use of cohabitation contracts. However, given that 90% of cohabitants in the B.S.A. survey had taken no legal steps (such as making a will, a declaration of shared family home ownership or a parental responsibility agreement) as a consequence of their cohabitation relationship and that awareness of the legal consequences of cohabitation did little to spur couples into taking legal action despite good intentions to do so (Barlow *et al.* 2001, 2005), there seems little real hope that private ordering will boom, the legal awareness campaign notwithstanding.

Thus some other automatic safeguards must also be considered, with the opportunity for opting out by couples who do not wish to have marriage-like consequences thrust upon them. Whilst the B.S.A. survey indicated that most people supported the same rights and obligations found in marriage being extended to cohabiting couples of longstanding, it is likely given their starting point that marriage is deserving of special treatment, that cohabitants will be offered something inferior to marriage but better than the confusion which is the current law (see further Barlow & James 2004). Whilst we could and arguably should classify all caregiving relationships in one legal category as suggested by Fineman (1995, p.231):

[i]n my newly redefined category of family, I would place inevitable dependants along with their caregivers. The caregiving family would be a protected space, entitled to special preferred treatment by the state[,]

it is likely that family itself will remain undefined but a legal status of cohabitation inferior to marriage will be created.

CONCLUSION

As Jane Lewis has pointed out in considering Giddens' analysis (Giddens 1992) of the pure relationship, there is an assumption that on the subject of gender equality within relationships that 'the *ought* has become an *is*' (Lewis 2001, p. 70). Neither is it apparent how perpetuating such an assumption in the face of stark evidence to the contrary, will in practice facilitate its realisation. Rather the dilemma posed by the current law and one which the Law Commission is currently charged with addressing is summarised and resolved in principle by Baroness Hale (Hale 2004, p. 421):

Intimate domestic relationships frequently bring with them inequalities, especially if there are children. They compromise the parties' respective economic positions, often irreparably. This inequality is sometimes compounded by domestic ill-treatment. These detriments cannot be predicted in advance, so there should be remedies that cater for the needs of the situation when it arises. They arise from the very nature of intimate relationships, so it is the relationship rather than the status that should matter.

Reform of the law in this sphere cannot replace those values held in place for centuries by the moral imperatives of religion, but it can protect the vulnerable within family relationships. The

underlying rationale of the reform needs to be clear and must steer the approach taken and the reaction to research findings. Whether the Law Commission can resist the normal chaos of family law (Dewar 1998) remains to be seen. To abandon the current 'form/status' regulatory bias in favour of a 'function' test, would in theory simplify the law rather than further fragment legal remedies and their availability to different categories of cohabitants. However, functional definition will be difficult, particularly if commitment is chosen as a regulatory trigger.

Marriage was of course a convenient regulatory trigger which also provided a relationship gold standard. However, if nothing else, we are at least edging towards a better understanding of the interrelationship of legal and social norms in this sphere.

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