

LEGISLATING FOR COHABITATION IN COMMON LAW JURISDICTIONS IN EUROPE: TWO STEPS FORWARD AND ONE STEP BACK?

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1. ABSTRACT

Within Europe, the common law jurisdictions of England and Wales, Scotland and the Republic of Ireland have not taken a unified approach in their legal response to the increasingly common social phenomenon of unmarried cohabitation. Whereas both Scotland and Ireland have recently legislated to provide financial provision remedies as between cohabiting partners on relationship breakdown, in England and Wales (and in Northern Ireland), there are still no family law remedies for financial provision when such relationships break down. This is despite the Law Commission for England and Wales recommending reform in 2007 (see *Cohabitation: the financial consequences of relationship breakdown*, Law Com No 307, CM 7182, (2007) London: TSO). Interestingly, in the recent Supreme Court decision of the Scottish case of *Gow v Grant* (Scotland) [2012] UKSC 29, the Supreme Court Justices expressed their frustration at this state of affairs, calling loudly for English law to be changed in line with that of Scotland. Yet so far these calls have fallen on deaf ears. Thus whilst England and Wales has now embraced legal recognition of same-sex marriage, heterosexual cohabitation continues to be regarded by government as a social problem and a threat to formal marriage, with both the Scottish approach to compensating economic disadvantage within cohabitation relationships and an extension of civil partnerships to different-sex couples having been recently rejected once again by government.

Drawing on socio-legal research evidence and discussion (including the continued existence of the 'common law marriage myth'), this paper will explore these legal and policy developments in all three jurisdictions against the background of the changing socio-demographic nature of family structures within these societies. It will consider whether the piecemeal legal response to cohabitation in England and Wales provides adequate remedies, given policy objectives, or alternatively whether the Irish and/or Scottish solutions could be appropriately adopted within England and Wales (and Northern Ireland) or indeed, whether a different approach is called for.

2. INTRODUCTION

At the beginning of the 19th century, Napoleo reportedly said, 'Cohabitants ignore the law, so the law ignores them'. Love and marriage, according to the received wisdom embedded in popular culture in the mid 20th century, were still felt to go together 'like a horse and carriage'.¹ Certainly, in most jurisdictions within Europe this hierarchy of relationship recognition, with marriage firmly at the top, remains in place, with jurisdictions increasingly now extending this gold standard to same-sex

¹ So says the famous popular Frank Sinatra song, dating back to 1955 (released by Capitol records).

couples. Yet, arguably, the key question for Family Law within today's Europe is whether, in the light of clearly changed cultural shifts and social trends surrounding modern partnering and parenting practices, such a strategy is in need of radical revision to make family law fit for purpose in the 21st century. For if family law principally regulates those who marry, yet increasingly fewer (heterosexual) people choose to marry whilst growing numbers choose to cohabit, surely there comes a point when family law is completely missing its target and it consequently stands accused of failing to fulfil the function expected of it; namely to regulate fairly family life within contemporary society.

In many parts of the common law world, this is exactly the conclusion that has been arrived at and we see a pragmatic legal response being made to such changing social trends. Thus common law jurisdictions such as Australia and New Zealand have taken an inclusive and presumptive approach to regulating cohabitation, by extending the rights and responsibilities of married couples presumptively (that is, without any need to 'opt-in' or formally register a partnership or civil union) to those who cohabit, unless they actively choose to 'opt-out'. In these jurisdictions, there is no material difference between the rights and responsibilities and legal remedies available on death of a partner or on relationship breakdown between those who marry and those who cohabit.²

One might therefore expect this same approach to have been adopted within what might be termed 'common law Europe'; that is the three United Kingdom (UK) jurisdictions of England and Wales, Scotland, Northern Ireland plus the Republic of Ireland which often draw on experience in these other common law jurisdictions to resolve common problems. These are, after all, societies which share histories, culture, social problems and social trends as well as language. However this has not been the case with regard to the phenomenon of cohabitation, despite broadly similar demographic patterns.

Drawing on empirical research findings within the UK, this author and others have long argued that family law needs to formally acknowledge and adapt to social change and shifting social norms around marriage decline and increased cohabitation. Ideally, it has been suggested, this should be done through legislation in a cohesive way, creating a clear legal status for the increasingly large numbers of couples who cohabit and form families outside marriage. Indeed, the four Law Commissions within the UK and Ireland have each independently drawn the same conclusion. However, the reaction to these changing trends within these four jurisdictions of the British Isles³ has been far from cohesive, with different states choosing different regulatory approaches to a common changing social landscape. Thus, whilst reforms have occurred, we have not witnessed a unified response.

² Both jurisdictions do require cohabitants to show they are eligible to be treated as married. In New Zealand, eligibility for equal sharing of assets arises after three years cohabitation (or marriage or same-sex civil union) under the 2002 and 2005 amendments to the Property (Relationships) Act 1976; Australia requires two years cohabitation or birth of a child under the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 to apply the same remedies as married couples.

³ The British Isles is a geographical term for the whole of the United Kingdom plus the Republic of Ireland.

Rather, there have been differential legal responses which, when judged against the social trends, are not what might have been predicted and do not copy the marriage-mirror solutions favoured in Australia and New Zealand. Neither, however, have solutions found elsewhere in Europe, (most often an 'opt-in' registered partnership approach), been adopted in the context of heterosexual cohabitants, although civil partnerships providing marriage-like rights, status and remedies, are available to same-sex couples within all four jurisdictions.⁴

The aim of this chapter is therefore to compare and contrast the differential legal and policy developments towards the legal status of (heterosexual) cohabitants in the different 'common law' jurisdictions of England and Wales, Scotland and The Republic of Ireland⁵ and to assess the relative merits of these different 'common law' responses. It will go on to consider the calls for reform in England and Wales in the context of demographic trends, socio-legal research and the unpacking of the role of family law in the modern western world.

3. CHANGING SOCIAL TRENDS IN THE BRITISH ISLES

The incidence of heterosexual cohabitation in the constituent parts of the UK and Ireland has broadly followed the same upward trajectory, with people delaying or rejecting marriage. Across the different parts of the UK, the numbers marrying have declined whereas those choosing to cohabit have increased. The 2012 data from the Office for National Statistics (ONS) indicate the number of couples who cohabit has doubled since 1996 and has reached 2.9 million. This makes couples living together without being married the fastest-growing type of family in the UK and there are no significant differences between the trends as experienced in England and Wales as compared to Scotland.⁶ Added to this, over the same period the number of dependent children living in opposite sex cohabiting couple families doubled from 0.9 million to 1.8 million and in 2012, 30 per cent of all births were to cohabiting couples. Thus although marriage is still the most popular family form in the UK where there are a total of 12.2 million married couples, this represents a decrease of

⁴ All parts of the UK adopted the Civil Partnership Act 2004 which provides same-sex couples with the same rights as those extended to married couples, with very minor differences. The Irish legislation is contained in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provides for same-sex civil partnership.

⁵ It is not proposed to discuss Northern Ireland as despite recommendations made by the Law Reform Advisory Committee for Northern Ireland in *Matrimonial Property Report No 10* (Belfast: TSO, 2000), the law is currently the same as in England and Wales and in contrast to Scotland and the Republic of Ireland, there have been no recent reforms or proposals for reform.

⁶ UK Labour Force Survey, Families and Households, 2012, ONS; see also BBC news report 01/11/2012, available at <http://www.bbc.co.uk/news/uk-20174078> (last accessed 19.11.2013). Northern Ireland, not specifically under discussion in this chapter, experiences increasing yet significantly lower levels of heterosexual cohabitation, thought mainly to be due to the very specific divided religious context within that jurisdiction, with religious the likelihood of marriage increasing with the levels of religious adherence (see A. BARLOW, C. BURGOYNE, E. CLERY and J. SMITHSON, 'Cohabitation and the Law: Myths, Money and the Media' in A. Park, J. Curtice, K. Thompson, M. Phillips and E. Clery (eds) *British Social Attitudes - The 24th Report*, London: Sage, 2008, pp. 29 - 51).

457,000 over the same period. These figures indicate that cohabiting couples now represent some 20 per cent of all couples who share a household. Research has also revealed that many characteristics of cohabitants overlap with those of married couples in the UK, although cohabitants are on average younger, and less likely to be religious than marriage couples and are a more diverse group.⁷ However, the average length of cohabitation is steadily increasing, particularly where there are children of the relationship.⁸ Although they are on the face of it statistically more likely to break down than married relationships and are seen as less committed, with any commitment made being private rather than public, recent research by the Institute of Fiscal Studies show that when you control for other factors (such as age, education, socio-economic group), there is no statistically significant difference between the likelihood of cohabitation breakdown and marriage breakdown for those with children.⁹

Despite no legal recognition of cohabitation whatsoever in the Republic of Ireland prior to implementation of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Ireland saw a four-fold increase in cohabitation between 1996 and 2006 and according to the 2006 census, cohabitants represented 11.6 per cent of family units.¹⁰ This on its own shows that family law does not have the power to directly constrain changing social norms when greater social forces (such as decline in religious adherence and increased financial independence of women) are at work. In Ireland, these trends seem to show that most cohabiting couples ultimately go on to marry, but are marrying later than in previous generations. Whereas in the UK it is quite common for couples to have children and continue cohabiting for some years before marrying, in Ireland, by contrast, parents of children born within cohabitation tend to marry quite soon after birth, with a smaller minority seeing cohabitation as an alternative to marriage. One shared feature of

⁷ See A. BARLOW et al, 2008, above n. 6. One typology of cohabitants in Britain classifies them in the overlapping categories of 'idealogues, romantics, pragmatists and uneven couples', a more nuanced analysis of Smart and Steven's spectrum ranging from the mutually committed to the contingently committed in C. SMART and P. STEVENS, *Cohabitation Breakdown*, London and York: Family Policy Studies Centre/Joseph Rowntree Foundation, 2000. See further A. BARLOW and J. SMITHSON, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 (3) *CFLQ*, pp. 328-338.

⁸ A. BARLOW et al, 2008, above n. 6.

⁹ A. GOODMAN and E. GREAVES, *Cohabitation, Marriage and Relationship Stability*, London: Institute of Fiscal Studies, 2010. Thus although parents who are cohabiting when their child is born in the UK are three times more likely to split up by the time their child is five than married parents (27% compared to 9%), they are also typically younger, less well off, less likely to own their own homes, have fewer educational qualifications and are less likely to plan their pregnancies than married people. Institute of Fiscal Studies (IFS) analysis of such parents within the Millennium Cohort Study shows that once these differences between the two groups are accounted for, the difference in the likelihood of separation almost disappears (falling to 2 percentage points). The IFS analysis concludes that relationship stability is mainly determined not by marriage but by other factors such as age, education, occupation and income, and delaying and planning pregnancy. These factors are also influential in whether people choose to marry or not. So while married couples have more stable relationships than couples who cohabit, this is not because they are married, but because of the other characteristics they have that lead to marriage.

¹⁰ CENTRAL STATISTICS OFFICE, *Census 2006 Principal Demographic Results*, TSO, 2007, p. 21.

cohabitation in Ireland and the UK is that whilst the majority of cohabitants are young never-married couples, in quite a high proportion of such couples - one quarter in Ireland and 30 per cent in the UK - one or both partners have been in a married relationship prior to their current relationship. However, it is clear that most longer-term cohabitation in Ireland is childless. Whereas over half of all couples without children in Ireland cohabit rather than marry, the vast majority of those with children marry, with cohabitants representing just 10 per cent of such parents (half the proportion of the UK).

4. THE LEGAL LANDSCAPE

As noted above, each of the Law Commissions of the jurisdictions within the British Isles have considered and recommended reform of cohabitation law in the light of social trends, yet England and Wales (and Northern Ireland), whilst having previously responded piecemeal to some issues affecting cohabitants, have explicitly rejected comprehensive reform for the time-being. In contrast, reforming legislation following similar recommendations has now been enacted in both Scotland and the Republic of Ireland.

Interestingly, whilst rejecting the Antipodean approach of marriage-equivalence, neither have they adopted the 'opt-in' model adopted by some of their European neighbours such as France and the Netherlands. Instead, they have each chosen a 'presumptive' or 'opt-out' approach to regulation which gives cohabitants rights inferior to those available to married couples, treating them as a similar but different style of family to married couples; so 'opt-out' but *without* equivalence.

4.1. Legal response – Scotland

Whereas Scotland has virtually identical social trends to England and Wales in recent years, it has always had a separate legal system and in Family Law it has consistently chosen its own path. In contrast to England and Wales, prior to 2006 Scotland did not amend its legislation piecemeal to accommodate cohabitation, although it did retain a form of informal 'common law marriage' – marriage by cohabitation, habit and repute, which permitted legal recognition as a marriage of established cohabitation relationships where a couple had held themselves out as married and were recognised as such within the community.¹¹

Although the Scottish Law Commission recommended reform as long ago as 1992,¹² it was only in 2005 that the devolved Scottish Executive recommended further consideration of reform. This resulted in the Family Law (Scotland) Act 2006 which implemented the Scottish Law Commission recommendations and also abolished the last remaining form of common law marriage for the future. Whereas in England and Wales, cohabitation reform was seen politically as something which might undermine marriage and family life and was thus to be avoided, in Scotland a

¹¹ See further A. BARLOW and A. BISSETT-JOHNSON 'Cohabitation and the Reform of Scots Law' (2003) (2) *Juridical Review*, pp. 105–28.

¹² SCOTTISH LAW COMMISSION, *The Effects of Cohabitation in Private Law*, Discussion paper No 86, 1990; *Report on Family Law*, Scot Law Com No 135, 1992.

positive view was taken by the Scottish Minister for Justice in 2004, who was happy to defend the extension of rights to unmarried couples, saying, "Some will see any change in the law in this area as a 'defeat' for traditional values. They should not - for the reforms published today are based around a principle that is central to everything we stand for as a country and as a society - the best interests of children. That must be the pillar around which we build strong family law in Scotland."¹³

However, the model finally chosen ensured that in Scotland, cohabitants have different (and fewer) rights to married couples and civil partners on relationship breakdown. There is no possibility of periodical maintenance payments and different, less generous principles apply on relationship breakdown and on death of a partner. Instead, the Family Law (Scotland) Act 2006 is based on redressing economic disadvantage suffered by a cohabitant, rather than any principle of entitlement to relationship property. After some consideration, it was agreed that there would be no time qualification period before a cohabitant was eligible to apply for redress, recognising that economic disadvantage could occur early in a relationship (s25)). The key provisions are set out in s28 which states:

...

(3) The court may make an order for payment of a capital sum by one cohabitant to the other, having regard to:

- a) whether (and if so to what extent) the defender¹⁴ has derived economic advantage from contributions made by the applicant; and
- b) whether (and if so to what extent) the applicant has suffered economic disadvantage in the interests of (i) the defender or (ii) any child...

The court must also have regard under ss 28(5) & (6) to:

- 5) the extent to which any economic advantage derived by the defender from contributions by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant or any child; and
- 6) the extent to which any economic disadvantage suffered by the applicant in the interests of the defender or any child is offset by any economic advantage the applicant has derived from contributions made by the defender.

The Act did not trigger a mass of litigation between cohabitants in the Scottish courts. Indeed a review of the workings of the Act based on research into practitioner experience by Miles, Wasoff and Mourant, concluded that the Act was working relatively well.¹⁵ However, exactly how generous the law should or could be in interpreting economic disadvantage in the Scottish context under s28 became

¹³ Launch of the consultation on *Improving Scottish Family Law*, 5th April 2004.

¹⁴ This is the Scots Law term for 'the respondent'.

¹⁵ F. WASOFF, J. MILES, E. MORDAUNT *Legal Practitioners Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, October 2010, available at <http://www.cfr.ac.uk/assets/Cohabitation-final-report.pdf> (last accessed 10 November 2013), p. 125. The authors suggest that the decision not to include a minimum cohabitation requirement in the Scottish legislation may be regarded as a success because of 'limited evidence of "nuisance claims", in so far as these might be manifested by claims brought after only short relationships'. See further, F. WASOFF, J. MILES, E. MORDAUNT, 'Cohabitation: lessons from research north of the border?', (2011) **23(3)** *CFLQ*, pp. 302-322.

an issue in 2012 before the UK Supreme Court, which is the final appellate court for all the UK jurisdictions. Thus clarification was sought in the case of *Gow v Grant*.¹⁶ The facts of this case involved an older couple, Mrs Gow (aged 64) and Mr Grant (aged 58). At the outset of their relationship they each owned their own home. Mr Grant was keen that they should cohabit but Mrs Gow only agreed to move in, selling her own flat to do so, on condition that they became engaged to be married which they did in 2003. Although Mr Grant encouraged her to sell the flat at a value of £50,000 (leaving her with £36,000 net after mortgage repayment), there was no duress. The couple lived together for five years in Mr Grant's property (valued at £200,000 in 2003), during which time Mr Grant also encouraged Mrs Gow to give up her part-time job as a typist. Whilst she applied the sale monies from her flat partly for her own use, paying off other debts, lending £4,000 to her son, investing £5,000 in an investment bond, she also invested £7,000 in a timeshare arrangement and then paid £1,000 on a holiday, both jointly with Mr Gow, and used the balance of her money to contribute to joint living expenses. When the relationship broke down, Mr Grant continued living in his home, whereas Mrs Gow had to find rented accommodation. Her previous flat, it was found, would have been worth £88,000 meaning she had potentially lost a maximum of £38,000. She therefore brought a claim against Mr Grant. At first instance, the Sherriff, employing a restrictive interpretation of s28, found that there was no evidence she had suffered any economic disadvantage. On appeal to the Second Division, the court found that although there had been 'encouragement' by Mr Grant to sell the flat, there was not enough to show that this was disadvantage Mrs Gow had suffered 'in his interests' pursuant to s28(2) and that any disadvantage suffered by Mrs Gow was offset by Mr Grant's contributions to their joint living expenses. Mrs Gow therefore appealed again to the Supreme Court. In particular, the questions before the court were whether an intention to benefit the other cohabitant was required by s28(3)(b) & (6); whether disadvantage suffered must benefit the defender alone or whether it could be to provide a joint benefit and lastly, if relevant economic disadvantage was established, what was the extent of the court's discretion as to the award to be made. In hearing the case, Lord Hope in confirming that different principles to the divorce and civil partnership context applied to cohabitants' claims under the Act, imported a 'fairness' principle into the calculation, drawing on the original Scottish Law Commission report and Ministerial statements in which it had been stated that through these provisions they sought to establish a 'fair' remedy and confirmed-

'the statutory purpose does no more than reflect the reality that cohabitation is a less formal, less structured and more flexible form of relationship than either marriage or civil partnership. I think therefore, contrary to the views expressed by the Second Division in para 3, that it would be wrong to approach section 28 on the basis that it was intended simply to enable the court to correct any clear and quantifiable economic imbalance that may have resulted from the cohabitation. That is too narrow an approach.'¹⁷

¹⁶ *Gow v Grant (Scotland)* [2012] UKSC 29.

¹⁷ *Gow v Grant (Scotland)* [2012] UKSC 29, para. 58.

Fairness is a principle which has been developed by the courts under provisions for financial relief on divorce in English and Welsh Family Law to avoid discrimination between financial and non-financial contributions to a marriage or civil partnership or to redress 'relationship-generated disadvantage' on relationship breakdown. This does not apply in Scots Law but the Supreme Court were ready to find the need for a broader approach than had been used up until that point in order to achieve a fair remedy (perhaps influenced by English jurisprudential thinking) in favour of Mrs Gow. They accepted she had suffered economic disadvantage for Mr Grant's benefit and not withstanding their joint benefit and used their discretion to award her £39,500 which they adjudged to be the extent of her overall disadvantage.

Thus the Scottish legislation, whilst based on economic disadvantage, arguably since this decision provides a more generous remedy to situations where cohabitation does cause financial loss suffered for the benefit of the relationship, rather than solely for the other partner. Whilst it does not adopt the same approach as the divorce legislation in Scotland, it nonetheless allows the financial consequences of the relationship to be addressed in a more global way than had previously been the case. This therefore seems to provide some family law protection from less than legally rational financial decisions taken for the benefit of a relationship at a moment in time and from which one partner alone would otherwise suffer the consequences.

4.2. Legal response – Ireland

The Republic of Ireland is a traditionally Catholic country where marriage is constitutionally protected¹⁸ and which has only recently considered its response to changing social trends. As noted above, whilst these do not exactly mirror British patterns and affect fewer children, growing numbers of cohabitants is an observed social phenomenon, although unlike the UK, Ireland has at the same time witnessed an upsurge in the numbers marrying since 1997.¹⁹ Following an earlier consultation paper, the Ireland Law Reform Commission reported on the rights and duties of cohabitants in 2006, recommending reform.²⁰ It cited changing demographic trends, the lack of cohesion in the piecemeal reforms which had taken account of cohabitants' legal situation and the fact that cohabitation was likely to 'continue at some level' and was functioning as 'a route into marriage'.²¹ It took the view that 'the current legal framework does not reflect this social reality'.²²

¹⁸ Article 41, Irish Constitution.

¹⁹ The results of the Irish *Census 2002 Principal Demographic Results* (Central Statistics Office 2003) is available at <http://www.cso.ie/en/census/2002censusreports/census2002principaldemographicresults/> (last accessed 16.02.14); data between 1997 and 2000 show that the number of marriages increased dramatically, from 15,631 in 1997 to 19,168 in 2000, with the marriage rate increasing correspondingly from 4.5 to 5.1. CSO data shows that the marriage rate has been maintained, averaging 5.1 between 2000 and 2005. The data reveals that cohabitation increased by 250% between 1994 and 2002.

²⁰ IRELAND LAW REFORM COMMISSION, *Report: Rights and Duties of Cohabitants* (LRC 82-2006), Dublin: ILRC, 2006.

²¹ Above n. 20 p. 9.

²² Above n. 20, p. 11.

Legislation, which also addressed the rights of same-sex couples, was enacted in 2010 in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act. Cohabitants are defined in s172 as two adults (whether of the same or opposite sex) who live together as a couple in an intimate relationship and who are not related, married or civil partnered to each other. The legislative scheme gives 'qualifying cohabitants' (where there has either been 5 years cohabitation or 2 years where there is a dependent child of the relationship) the right to apply for redress on relationship breakdown or intestacy which is within the discretion of the court. It also in s202 sanctions the making of "cohabitants' agreements" by all cohabitants (traditionally considered void for immoral consideration (purpose) in common law jurisdictions) . The main principles of the Irish scheme include a right for qualifying cohabitants on relationship breakdown to apply for 'redress' in the form of a property adjustment order and/or in contrast to Scotland, where no claim for maintenance is possible, a compensatory maintenance order. In addition, applications can also be made for a pension adjustment order or for an order for provision from the estate of the other cohabitant on their death.²³ The Act, as in Scotland, quite deliberately gives different (and fewer) rights to cohabitants than married couples and civil partners. Section 173 sets out the circumstances in which a 'qualifying cohabitant' may obtain a property adjustment order under section 174 of the Act, a compensatory maintenance order under section 175 or a pension adjustment order under section 187.

However, the 2010 Act has attracted some serious criticism in Ireland. One key limitation on the scheme is that the claimant must establish 'financial dependency' as a prerequisite of a remedy. The financial dependence must be caused by the relationship or its breakdown, but the statute is not clear on what exactly 'financial dependency' means. Professor John Mee in his analysis of the legislation²⁴ argues this requirement significantly limits the scope of the scheme and is likely to generate anomalous results, whereby a remedy will be denied to claimants who have suffered serious loss as a result of a relationship but who have not become 'financially dependent'. An example might be if one cohabitant transfers their home into the joint names of themselves and their partner but can support themselves at the end of the relationship. Whereas under the Scottish scheme this would be likely to represent economic disadvantage which could be compensated, under the Irish scheme, the claim would not be successful. Thus if Mrs Gow's case had been brought under Irish law, she may not have succeeded in bringing a claim, as that sort of financial interdependence would seem likely to be insufficient in the Irish context. The Irish court must also go on to find that it is 'just and equitable' to make the order according to a statutory checklist, even where financial dependence is established. If it does, it has a large discretion as to the award that can be made, with no specific protection for the defendant's own position such as exists in the Scottish scheme. The Act is of course very recent and is yet to be tested in the higher courts in Ireland. However, Mee goes so far as to suggest in light of the scheme's limited nature and the various potential problems with its provisions, that it is questionable whether its

²³ See further ss173, 175, 187 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

²⁴ See J. MEE, 'Cohabitation law reform in Ireland', (2011) **23(3)** *CFLQ*, pp. 323-343.

enactment represents a positive development. He is pessimistic about the impact the Act is likely to have, promising more than it can deliver and is also concerned at the complexity of the cohabitation contract provisions. He states:

'Given the tendency of the public to misunderstand the law in respect of the property rights of cohabitants, the introduction of limited statutory reform risks misleading cohabitants into believing that it is safe for them to rely on their relationship rather than seeking to protect their separate property rights. Moreover, the measures in the Act in relation to cohabitation contracts, which impose onerous formal requirements for such contracts to be valid, do not appear justifiable in light of the limited rights afforded by the Act and may serve to thwart some attempts by cohabitants to regulate their entitlements by agreement.'²⁵

4.3. Legal Response - England and Wales

Yet the fact that any law reform relating to cohabitants' rights was enacted in Ireland is a matter to be marvelled at in England and Wales, where there has been stout political refusal to act, despite the recommendations of the Law Commission for England and Wales. The current position in this jurisdiction is that cohabitants have no specific legal status and cannot 'opt in' to civil partnerships, which are limited to same-sex couples exclusively. Although legislation enabling same-sex marriage has been passed, it has yet to be implemented.²⁶ As for the legal rights of cohabitants (whether same- or opposite-sex), piecemeal reforms since the 1970s, see cohabitants treated as married in some situations, as inferior to married couples in others, and as separate unrelated individuals in yet others. Thus, on relationship breakdown, some family law remedies exist under the Schedule 1 Children Act 1989 to provide financial provision for the benefit of the child as between parents of children under 18 but there is no maintenance or asset redistribution for cohabitants on relationship breakdown. Rented tenancies can be transferred between cohabitants but general property and trusts law must be used to litigate property disputes (including family home) between couples as if there were no personal relationship. This is complex, lengthy and very expensive and has been heavily criticised by the Law Commission, which recommended reform in 2007 on remedies available on relationship breakdown and made further recommendations in 2011 regarding inheritance rules as they affect cohabitants on death of a partner who dies without making a will.²⁷ Leading up to and after the Law Commission's recommendations for reform, there has been much socio-legal research conducted around attitudes to marriage, cohabitation and the law and also to experiences of using existing piecemeal remedies. For example, the British Social Attitudes Surveys in 2001 and 2008 show the continued existence of a 'common law marriage myth' whereby people falsely believe that those cohabiting do have the same rights as if they were formally

²⁵ J. MEE, above n. 24, p.343.

²⁶ The Marriage (Same Sex Couples) Act 2013 will be implemented on 29 March 2014.

²⁷ See LAW COMMISSION, *Cohabitation: The Financial Consequences of Cohabitation Report*, Law Com No 307, Cm 7182, London: TSO, 2007; and LAW COMMISSION, *Intestacy and Family Provision Claims on Death*, LAW COM No 331, London: TSO, 2011.

married. This is coupled with great support for cohabitation law reform and the public are even in favour of extending marriage equivalence to cohabitants where there are children or long relationships in England and Wales.²⁸ Thus many studies confirm the public confusion, difficulties and dissatisfaction with the current law in England and Wales.²⁹ Miles, Wasoff and Mordaunt in their 2011 study of the Scottish system concluded that the introduction of broadly similar provisions in England and Wales would not place significant additional demands on court and other justice system resources, were it made available for such claims.³⁰ The demographer Kiernan, has shown that introduction of cohabitant rights is not a statistically significant factor in decline in marriage rates in Australia and The Netherlands or indeed in Europe.³¹ Yet the government has twice declined to implement the Law Commission recommendations for England and Wales.

The approach proposed by the Law Commission was more similar to the Scottish scheme based on economic advantage and disadvantage during the relationship than the Irish scheme based on meeting need at the discretion of the court at the point of breakdown. Its 2007 report strongly criticised current law and accepted the need for reform. However, it rejected the idea that cohabitation should be placed on a par with marriage.³² Rather, it put forward a radical new presumptive scheme which did not mirror marriage but which proposed the acceptance of cohabitation contracts (as in Scotland and Ireland) plus redress for relationship-generated economic disadvantage or retained benefit from which people could opt-out. So this was to be a presumptive scheme with the ability for people to opt-out and draw up their own cohabitation agreements. The Law Commission recommended that its scheme should apply to all cohabitants with children and other childless cohabitants (whether same of different-sex) who have lived together for a qualifying period, which they suggested should be between 2 and 5 years. Couples should be able to opt-out of the scheme in order to protect individual autonomy providing certain conditions were satisfied, notably that the agreement was in writing, signed by both parties and made clear the parties' intention to disapply the scheme.³³ In the case of manifest unfairness a court would have power to set aside an opt-out agreement,³⁴ an approach ultimately rejected by the Irish 2010 Act, despite a similar recommendation by its Law Reform Commission.

The idea of the England and Wales scheme was to base a former cohabitant's claim upon the "economic impact" of cohabitation. On separation, an eligible applicant in making a claim against their partner would have to prove that either the respondent

²⁸ A. BARLOW et al, 2008, above n. 6.

²⁹ See for example G. DOUGLAS, J. PEARCE and H. WOODWARD, 'Cohabitants, property and the law: a study of injustice', (2009) 72(1) *Modern Law Review*, pp. 24-47; A. BARLOW et al, 2008, above n. 6.

³⁰ F. WASOFF, J. MILES, E. MORDAUNT, 'Cohabitation: lessons from research north of the border?', (2011) 23(3) *CFLQ*, pp. 302-322.

³¹ K. KIERNAN, A. BARLOW AND R. MERLO, 'Cohabitation Law Reform and its impact on Marriage: Evidence from Australia and Europe International', (2007) 63 *International Family Law*, pp. 71-74.

³² See LAW COMMISSION, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307, CM 7182, London: TSO, 2007.

³³ Above n. 32, para. 5.56.

³⁴ Above n. 32, para. 5.61.

has a retained benefit, or the applicant has an economic disadvantage as a result of qualifying contributions the applicant made. It recommended that the same style of orders would be available for financial provision as is currently the case on divorce or civil partnership dissolution with the exception of periodical maintenance payments, although the grounds for making the orders were to be quite different.

Only those who had made qualifying contributions - defined as any contribution to the shared lives or welfare of members of the family and could be non-financial - were eligible to apply under the scheme. An economic disadvantage was stated to be a present or future loss. It could include a diminution in current savings as a result of expenditure or of earnings lost during the relationship, lost future earnings or the future cost of paid child care. A retained benefit, on the other hand, could take the form of capital income or earning capacity that has been acquired, retained or enhanced.

The proposed remedy in respect of retained benefit was straightforward. The court would be able to order the reversal of any retained benefit 'in so far as it is reasonable and practical and having regard to the discretionary factors' which were similar to those applying on divorce. With regard to a finding of economic disadvantage, however, how exactly this would be calculated in practice was cause for concern among commentators, with a crystal ball being seen as a useful piece of equipment in the calculation of lost future earnings.³⁵ In any event, only one half of any economic disadvantage would be paid over according to the principle that any loss should be shared equally, and in making any order, the court 'shall not place the applicant for the foreseeable future in a stronger economic position than the respondent'. The proposals were not needs-based and did not create an equal sharing principle and so were accepted as a distinct yet presumptive remedy to those available on divorce or civil partnership dissolution. They also respected the autonomy of the parties by permitting couples to opt out through contract, at a time when pre-nuptial agreements had no binding force in English law.

Notwithstanding this, the government response to the proposals has been to ignore them. Parliament (under the New Labour government) wished to see the effects of the Scottish legislation before committing to reform in 2008. In 2009, the same government also opposed Lord Lester's Private Member's Cohabitation Bill proposing a needs-based reform for cohabitants. Despite the research by Miles et al published in 2011, the Coalition government again rejected legislating on the Law Commission proposals 'during this Parliament', meaning any reform will not be considered again before 2015. Furthermore, in March 2013, it also announced it rejected the proposed intestacy reforms for cohabitants in the Law Commission's Draft Inheritance (Cohabitants) Bill contained in their 2011 Report.

5. CONCLUSION

Within Common Law Europe, it can be seen that Scotland and Ireland have legislated to give cohabitants a legal status and presumptive rights and remedies on relationship breakdown and death of a partner. Arguably this represents two steps forward, although we cannot yet assess the impact of the Irish reforms. Yet in

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R. PROBERT, 'Cohabitation: contributions and sacrifices', (2006) *Family Law*, p. 1060.

England and Wales, it seems that although the Law Commission is completely convinced that presumptive reform is the way forward, reforming cohabitation law is an impossible political hurdle. No government wants to be seen to undermine marriage and indeed, the Prime Minister has reacted to the current pro-marriage political atmosphere by agreeing to the symbolic re-introduction of (minimal) tax relief for married couples, under pressure from members of his party who contested his initial decision to delay any such tax reform.³⁶ Some consider this to be a step backwards, when tax relief or credits had been reformed in the 1990s to focus on families with children rather than just those who marry. What is more, it is clear from research that the public in general and thus the electorate are very tolerant of those who cohabit, considering it a matter of private choice, a view which aligns with the 'right to private and family life' contained in Article 8 of the European Convention on Human Rights (ECHR). In addition, perhaps surprisingly, heterosexual civil partnership (unlike same-sex marriage) was fiercely resisted by government during the passage of the Marriage (Same-Sex Couples) Act 2013 and this is subject to a claim before the ECHR.³⁷

Meanwhile the flexible approach of the common law courts in property law plus piecemeal, inconsistent legislation developed since the 1970s remains the reality for the growing number of cohabitants in England and Wales, whilst the 'common law marriage' myth thrives amid shifted social norms, with research showing that over half the population still believe they have general rather than patchwork 'marriage-equivalence'.³⁸

However, although Parliament is happy for matters to remain as they are, the senior judiciary are not and perhaps judicial activism may help to rescue the situation. In *Gow v Grant*,³⁹ the Supreme Court Justices expressed their frustration at this state of affairs, calling loudly for English and Welsh law to be changed in line with that of Scotland, citing socio-legal research in support of the case for reform.⁴⁰ They have also attempted to reduce the strictures of Trusts Law to build in a more family law approach to disputes, which has divided Trusts lawyers and Family Lawyers.⁴¹

Another possible source pressure for reform may come through the ECHR. The application made to the ECHR in *Ferguson and others v UK* was initially challenging the lack of same sex marriage in the jurisdiction on the grounds that it was discriminatory under articles 12 and 14 to offer civil partnership that gave all the same substantive rights as marriage but could not be called marriage. However, although this has been addressed by the Marriage (Same-Sex Couples) Act 2013, the other argument advanced under articles 8 and 14 was that heterosexual couples were being discriminated against as they were forbidden from entering into civil

³⁶ A married couples transferable tax allowance benefiting eligible couples by up to £200 per year was announced in the Autumn Statement by the Chancellor of the Exchequer on the 5th December 2014. Further details are available at <https://www.gov.uk/government/news/autumn-statement-2013-key-announcements> (last accessed 16.02.14).

³⁷ *Ferguson & others v UK*, File No 8254/11.

³⁸ See A. BARLOW et al, 2008, above n. 6.

³⁹ *Gow v Grant* (Scotland) [2012] UKSC 29.

⁴⁰ A. BARLOW, S. DUNCAN, G. JAMES and A. PARK, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century*, Oxford: Hart, 2005 and F. WASOFF et al, 2011, above n. 30.

⁴¹ See for example dicta in *Jones. v Kernott* [2011] UKSC 53.

partnerships. Given the 2013 Act will keep civil partnership for same-sex couples who will then have the choice of either marriage or civil partnership, whereas heterosexual couples must either marry or cohabit, this claim seems strong given the Marriage (Same-Sex Couples) Act 2013 will indeed be implemented without repeal of the Civil Partnership Act 2004, although this will be subject to review.

Thus in England and Wales as elsewhere in Europe, the social trends away from marriage into cohabitation speak for themselves and demand a response. In reality, we cannot turn the clock back through law and surely the Napoleonic approach has had its day and needs to be revisited. Whilst there are arguments against reforms adopting 'presumptive' marriage equivalence, to fail to legislate for cohabitants is surely to bury the governmental head in the sand. To open civil partnership to different-sex couples would be a European-style 'opt-in' solution which would assist but not protect those who believe in the common law marriage myth in England and Wales, unless it triggered a culture change. Nonetheless, this would be a choice welcomed by some groups of cohabitants, according to research.⁴² The Scottish and Irish reforms (and the English Law Commission proposals) do address some gaps in the law and are worthy of further consideration, although to compensate economic disadvantage without addressing need or vice versa, is arguably an unprincipled way to ensure a distinction between remedies for cohabitants and those divorcing or dissolving civil partnerships. They do however try to combine autonomy through permitting enforceable cohabitation contracts with presumptive protection from at least some aspects of relationship-generated disadvantage, which undoubtedly can be suffered by cohabitants who should have some redress.

As Lady Hale observed in her judgment in *Gow v Grant*, "The [Scottish] Act has undoubtedly achieved a lot for Scottish cohabitants and their children, English and Welsh cohabitants deserve no less".

Perhaps the real problem is that we have not to date been clear about what we want family law to achieve for cohabitants. Do we want to make them marry? If so, a Napoleonic approach is understandable although recent history would indicate that it does not work. Are we trying to ensure the law protects the economically vulnerable within families (including children)? In which case presumptive marriage equivalence, or a compensation or needs approach are all possibilities which address the problem and provide differently incentivised risks for partners as between themselves. Or do we feel that partners within cohabiting relationships are now equal and family life does not provide sufficient relationship-generated disadvantage for the law to undermine a couple's autonomy to decide these matters at the outset of a relationship? If so, we can use family law to promote autonomy and encourage a contractual or opt-in approach to cohabitation contracts. This sounds ideal, yet research shows that it is more ideal for some cohabiting couples than for others and the balance of power within any relationship may make this an appealing yet quite often a substantively unfair remedy in practice, where the ability to change agreements as circumstances change is often illusory rather than real. Cohabitants are a diverse group and reasons for cohabiting are wide ranging and so

⁴² A. BARLOW AND J. SMITHSON, 2012, above n. 7.

perhaps one thing we should agree on as different jurisdictions grapple with the same problem, is that we need a pluralistic approach which gives people choice where there is real agreement and roughly equal power but which protects in other circumstances. To agree this would indeed be a step in the right direction for Europe as a whole.