

Legal Rationality and Family Property

What has Love got to Do with It?

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INTRODUCTION

Family law, in so far as it is trying to regulate disputes relating to money and property on relationship breakdown, has its work cut out. For it is trying to deal in a rational way with issues between people who are in an emotionally charged relationship situation and where most might predict that rationality is unlikely to prevail (Beck and Beck-Gernsheim, 1995). Whilst some, such as John Dewar, see the answer as conceding to what he terms ‘the normal chaos of family law’ which nonetheless works on a practical level due to the pragmatic solutions of professionals operating within a discretionary legal framework (Dewar, 1998), others have argued that this is not the optimal way forward for family law in general (Henaghan, 2008) and the regulation of new family forms in particular (Barlow et al, 2005).

This chapter will therefore consider whether family law can avoid the trap of a ‘rationality mistake’ – whereby legislators overestimate the law’s ability to steer behaviour in a particular direction (Barlow and Duncan, 2000; Barlow et al, 2005) – yet still develop a coherent theory of family law to apply in this field (Eekelaar, 2006; Henaghan, 2008). It has been argued convincingly by critical theorists that family law ‘needs to be socially located’ (see eg Freeman, 1985: 153–54). Given shifting attitudes and more complex married and unmarried families resulting from changed parenting, partnering, and repartnering patterns and behaviours, this presents a real challenge. In rising to this, it will be argued by drawing on empirical research that it is now time to take stock of both the emotional and economic foundations and commitment on which modern couple relationships are built in order to consider how family law should weigh the competing values of promoting personal financial autonomy yet providing legal protection for the economically weaker partner on

relationship breakdown. Arguably this has already been done in the cohabitation context by the Law Commission in its consideration of proposals for the reform of cohabitation law (Law Commission, 2007). But has the right balance been struck here? Is the current legal hierarchy still fit for purpose or are we drawing the regulatory lines in the wrong places? These are the questions this chapter aims to pursue. In so doing, it will draw on empirical research to examine whether family law in this area can find a way to cope with its chaotic raw material, avoid the legal rationality mistake yet become sufficiently coherent to provide satisfactory outcomes for those it serves.

LEGAL RATIONALITY AND THE NORMAL CHAOS OF LOVE

At its foundation, law is a system predicated on its power to bring about what might be termed ‘legally rational’ behaviour. It is a closed system which assumes that its deterrents and rewards are known (or should be known) and will shape behaviour. Whilst this classical positivist formulation of the working of the legal system has been much critiqued (see, eg, Dworkin, 1977), an assumption of ‘legal rationality’ still underlies the way law is expected to work. This approach remains visible in the family law field, where different styles of family receive different legal treatment in different contexts but according to a preferential hierarchy which has developed in an ad hoc manner, with only sporadic legislative review.

The assumption of a legally rational reaction to family law is certainly a matter which has influenced legislators and which dominates discussions surrounding any family legislation which might potentially detract from more traditional moral standards. Whilst the same-sex civil partnership legislation (the Civil Partnership Act 2004) was able neatly to side-step allegations of undermining heterosexual marriage (with which, after all, it was not a direct competitor), by focusing debate on the government’s equality and non-discrimination agenda (Department of Trade and Industry, Women and Equality Unit, 2003), attempts to introduce greater legal rights for informal cohabitants – often dubbed ‘marriage-lite’ (Morgan, 2000) – are seen to pose a greater threat. This has been observed most recently in the government’s

cautious reaction to the Law Commission's recommendations for reform of cohabitation law (Law Commission, 2007). Rather than acknowledging the case for reform made out very strongly in the Law Commission's report, more research into Scotland's experience of similar but very recent legislation was deemed necessary prior to legislative action (Prentice, 2008).¹ Despite the already overwhelming statistics showing the decline in marriage and increase in heterosexual cohabitation (National Statistics Online, 2008), the belief in law's power to influence the future direction of these social phenomena remains undiminished and is deeply influential within party politics. As Baroness Young asserted in the parliamentary debates surrounding the Family Law Bill 1996 proposing divorce reform, 'law influences behaviour and it sends out a very clear message. There would be no point in legislating at all if law did not influence behaviour.'² It is this concept of legal rationality which is used in this chapter where its role as a useful tool or inhibitor of progress in the family law field will be explored.

Love, on the other hand is the very antithesis of rational thought and behaviour, legal or otherwise. Indeed, sociologists such as Beck and Beck-Gernsheim (1995) talk convincingly of 'the normal chaos of love', a phrase which encapsulates the way in which rationality is overpowered by love, which is something far stronger and beyond control, leaving the 'victim's' reason in a distant parallel universe and at least temporarily beyond recall. When the first flush of love fades, a semblance of rationality may return, but its roots are not deep. It can easily be dislodged by the all-too-powerful emotions which accompany love's rejection or a fear that love might be lost. Thus when relationships based on love break down, rationality is not restored. On the contrary, often more chaos is fuelled, which poses the question of law's suitability for resolving disputes born out of such emotionally charged situations.

This leads us to ask whether family property disputes are social problems for which law, at least in its present form, is altogether unsuited or whether it is indeed possible to use law to help find more imaginative solutions. Dewar (1998) identified

¹ Ministerial Statement to Parliament, *Hansard* HC vol 472 col 22WS (6 March 2008).

² *Hansard* HL vol 569 col 1638 (29 February 1996).

the normal chaos of family law, endorsing Bourdieu's suggestion that the logic of following a rule ceases at the point at which logic ceases to be practical. How practical are legal rules in a sphere dominated by emotions where diverse social (and behavioural) norms are no longer reined in by a set of moral and religious values shared across society that can be reflected in law? Should we instead be asking ourselves how long can we go on pretending that society is well served by such a mismatching of social problems and legal solutions?

Or is this to overstate the case? Can people, even those in love-based relationships, be persuaded to take legally rational steps to protect their interests? According to Barlow et al (2005), to assume this is generally possible is to fall prey to the legal rationality mistake, whereby law assumes people act according to the logic of the law whereas in reality they act in accordance with the social imperatives within their own lives:

[P]olicymakers risk falling into what we have called a 'rationality mistake' ... They may create policy assuming a particular sort of public behaviour and rationality, whereas in fact most people make their decisions according to different criteria ... according to moral, relational and emotional judgements of what is the proper thing to do in their situation. To preserve this rationality mistake by not reforming cohabitation law, may be to risk a permanent rupture between social and legal norms. This could completely undermine the credibility of the law in relation to families.' (Barlow et al, 2005: 97–98)

Avoiding the Legal Rationality Mistake

How then might law avoid the rationality mistake? Barlow et al's view was formed following a two-year study focused on the social and legal attitudes of a nationally representative sample of people in England and Wales. One key finding was that in the British Social Attitudes Survey conducted in 2000, the majority of people (56 per cent) and a bigger majority of cohabitants (59 per cent) believed in a 'common law marriage myth' whereby people falsely believed cohabiting couples have a 'common law marriage' in which they gain the same rights as married couples after a period of time (Barlow et al, 2001, 2005). Another important finding, however, was that the vast majority of those cohabitants who did *not* believe this myth and *were* aware of the legal position they were in did not respond by taking available legal steps such as making wills or declarations of ownership regarding the family home, often despite a

desire and intention to do so. Reasons for this included the cost of legal advice, the perceived need for advice only when things go wrong, the complexity of the various legal steps needed, and a general inertia surrounding putting one's affairs in order (Barlow et al, 2005: 78–79).

One possible solution if one does not want to reform the law is to make people more legally aware and to better facilitate the taking of appropriate legal steps; and this was indeed the government response. A web-based public information campaign, The Living Together Campaign (www.advicenow.org.uk/living-together/), which aimed to inform cohabitants of their legal situation and help dispel the common law marriage myth, as well as provide downloadable forms to enable people to take the requisite legal steps more easily and cheaply, was funded by the Department for Constitutional Affairs (now the Ministry of Justice) over a three-year period from summer 2004.

However, this campaign was launched against the background of a legal culture which, it could be argued, has actually discouraged those in love from being legally rational about family property. Its unwillingness to enforce pre-marital agreements on divorce³ in a sense endorses the view that legal rationality and love do not and should not go hand in hand. Similarly, the Law Commission's strong recommendation that, regardless of whether other reform was enacted, cohabitation agreements should be made unequivocally enforceable and explicit confirmation that they are not regarded as contrary to public policy be provided (Law Commission, 2007: [5.8]–[5.9]) has so far gone unheeded by Parliament. Add to this the inconsistencies within our law as to whether to treat cohabitants as married – as in the case of social security, tax credits, and private tenancy succession law; two single individuals – as in the case of capital taxes and pensions; or somewhere in between – as for compensation under the Fatal Accidents Act 1976 or a claim from a deceased partner's estate under the Inheritance (Provision for Family and Dependants) Act 1975), and one begins to understand why the falsely supposed existence of common law marriage (Barlow et al, 2005, 2008a)

³ *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45; *NG v KR* [2008] EWHC 1532; cf *K v K (Ancillary Relief: Pre-nuptial Agreement)* [2003] 1 FLR 120.

seems far more credible than the actual state of the law and the legally rational yet disparate and complex steps which it consequently requires.

If public information might not then be the whole answer, what else might be considered? Could family law mould itself differently so as to better fit the needs of the community it serves? Is there any public consensus on how law should tackle these problems which can be used to better socially locate the role of family law as the arbiter in the (gendered) power struggle which often erupts on heterosexual relationship breakdown? Is there, perhaps, an optimum moment at which to focus a couple's minds on a marital or cohabitation agreement perhaps, if private ordering is part of the solution? What about views of those who have experienced marriage or cohabitation on what the law *should* do for people when relationships break down and there are disputes about property and post-relationship support? Is there any room for a bottom-up approach to legislating in this sphere, where the very nature of family law's impact on a person's exercise of their right to private and family life (guaranteed by Article 8 of the European Convention on Human Rights) might justify the legislature taking into account public attitudes in this sphere more than in any other? In other words, how best can we deliver family law solutions in this field which are socially located? In order to address these issues, let us now consider the messages from recent research as it relates to relationships, separation, property, and attitudes to legal reform in this field.

MARRIAGE, COHABITATION AND FAMILY PROPERTY – TIME FOR RESPONSIVE MODE?

Research confirms that the decision whether to marry or cohabit is now considered a lifestyle choice by the vast majority of people in Britain, and the legal consequences of these different family forms have little or no bearing on the choice of family structure, at least on entering a first relationship (Barlow et al, 2005; Hibbs, Barton and Beswisk, 2001; *cf* Dnes, this volume). Love clearly triumphs over legal rationality in this situation. Similarly, the need for 'a proper wedding' – a powerful social symbol – trumps any desire to have the security of a legal contract in the eyes of many.

A lawyer's response to this might well be '*caveat emptor*' – let the buyer beware – and if you know you are not married, then you know you are getting something other than the legal contract of marriage, however marriage-like **you might think your relationship is**. However, if despite the government-funded information campaign people still wrongly believe that cohabiting for a period of time gives couples the same legal rights as if they were formally married, as the most recent British Social Attitudes Survey suggests (51 per cent of people in general and 53 per cent of cohabitants so believe (Barlow et al, 2008a)), then this gives pause for thought. Furthermore, the proportion of people who correctly do not believe in the myth has remained constant (37 per cent) since 2000 (although among cohabitants this had increased from 35 to 39 per cent), but there has been a growth in the percentage of those who are unsure of the legal position which has risen from 6 to 10 per cent. Whilst there was a significant increase in the numbers who agreed that marriage provided greater financial security than cohabitation, this still left less than half of all cohabitants agreeing with this view, which is a matter of concern given the financial consequences of the legal disparities between the two styles of relationship.

The Living Together Campaign, whilst moving things in the right direction, has not, according to these results from the latest British Social Attitudes Survey, significantly dismantled the common law marriage myth. Neither has it persuaded large numbers of people to put their cohabitation affairs in order, either by marrying or by taking appropriate legal action, such as making wills (only 12 per cent of cohabitants in the recent national study had done so), taking legal advice (19 per cent had done this), or entering into cohabitation agreements. There is some evidence of an increase in the number of declarations of trust relating the family home made when property is jointly purchased (15 per cent, compared with 8 per cent in 2000), probably in large part due to the change in Land Registry Rules requiring declarations to be lodged prior to registration of a purchase.

The study of the campaign's effectiveness on legally aware cohabitants (Barlow, Burgoyne and Smithson, 2007) showed how difficult it is to have any great impact even with a well-publicised media and website campaign that provided free legal information and documentation and was relatively easy to use. Although there were some positive outcomes, particularly on how useful the site was perceived to be,

most people found it too difficult to take action for a variety of reasons. Even when people wanted to behave in a legally rational way, there were many obstacles. Reasons given included: there was no appropriate action that could be taken to achieve what the couple wanted; a fear that action might cause problems in their relationship; that a partner would not agree to the proposed action; or, for the largest category, they had not yet got around to it. Others mentioned the cost, either financially or emotionally, of legal action against the likelihood of needing the benefits of that action at a later stage. There was also a recurring view that filling out a living together or cohabitation agreement was 'too negative'. Optimism also made it difficult in a relationship which was going well to think of things turning sour:

You've got to weigh up the cost of these sort of legal transactions and think, well, ..., is it really worth going into it for, you know, something that's probably not going to happen. (Laura, cohabitant)

Overall, it was concluded that policies directed at encouraging legally rational behaviour over relationship choice were useful but not transformative in changing behaviour, impacting only at the margins (Barlow et al, 2007, 2008).

Thus both the continued existence of the common law marriage myth and the lack of behaviour transformation through awareness campaigns pose problems for the continuation of family law's current hierarchy of relationships where law privileges marriage and now civil partnerships, yet deals with the increasing numbers of informal relationships differently in different contexts.

Another more radical response might be for law to give people the rights they think they already have. For if people are making decisions on a false premise but which they sincerely believe is imbued with a 'common law' legal truth drawn from the lived 'social truth' that married and cohabiting couples are functionally similar and deserving of equal treatment, particularly where there are children, should the law then not consider aligning itself with that social truth? This is the approach that has been taken in other common law jurisdictions such as Australia and New Zealand (Atkin, 2001, 2003; Graycar and Millbank, 2007) but is met here with the criticism that to go down this road is oppressive to those who are deliberately avoiding marriage and its legal obligations and encourages women's dependency on men (Deech, 1980; Freeman, 1984). Certainly research has characterised different types of

cohabitant. Smart and Stevens (2000) identified a continuum of cohabiting and married relationships which range from the contingently committed to the mutually committed, with more marriages falling at the mutually committed end and cohabiting relationships being far more mixed. Lewis's study revealed most cohabitants in her sample as mutually committed rather than individualistic (Lewis, 2001), and Maclean and Eekelaar's study (2004) did not find that the moral obligations felt towards family members in unmarried as opposed to married families differed significantly. Barlow et al (2007) found diversity among their sample of legally aware cohabiting couples who had used the Living Together Campaign website. This included a typology of four main styles of couple – ideological, pragmatic, romantic, and uneven – and concluded that different legal solutions were needed to meet the different needs of each group. Protection of uneven cohabitants, where one of a couple wanted to marry or take legal action whilst the other did not, was seen as particularly necessary, for these couples could never agree to resolve the situation for themselves, leaving one partner very vulnerable and in need of legal protection, particularly on relationship breakdown. Enforceable cohabitation agreements which were accompanied by an acknowledged legal status similar to but other than (as they viewed it) patriarchal marriage would, on the other hand, be very welcome to ideological couples. Pragmatic couples would all be prepared to take legal steps or even marry for legal reasons if necessary, even though they may delay taking such action and would prefer not to have to do so. Romantic couples, on the other hand, many of whom were in a trial marriage and were building towards a big wedding that might still be years away, felt it would be wrong to marry for purely legal or financial reasons. However, very few (10 per cent) even in this study of legally aware cohabitants, many of whom were ideologically opposed to marriage, were opposed to the extension of legal rights currently enjoyed only by married couples to cohabitants with children. Nor were views expressed that this type of legislation would be oppressive, providing a couple could jointly agree to opt out from the presumptive scheme.

At the time when the Law Commission was looking at reform of cohabitation law on separation and death, social attitudes nationally were again tested in the British Social Attitudes Survey 2006 and follow-up study (Barlow et al, 2008a, 2008b). This looked, inter alia, at which behaviours within different styles of (heterosexual) cohabiting relationships warranted claims for financial support on relationship

breakdown or death. As with the Living Together Campaign Study discussed above, there were few signs that an extension of legal rights would be viewed as oppressive and this was particularly the case where there were children of the relationship. Public attitudes were tested by putting forward 10 scenarios which explored how meritorious a partner's claim for financial provision was viewed where the law currently metes out different treatment to married and cohabiting couples on relationship breakdown on death and which was under review by the Law Commission. The aim was to see how views changed according to variables such as: the presence or absence of children; whether the parties were married; the length of the relationship; financial and domestic contributions to the relationship; and the circumstances leading to the claim for financial provision.

Table 14.1 below summarises the findings of what was viewed as appropriate on relationship breakdown

[\[Table 14.1 about here\]](#)

This confirmed a different hierarchy of relationship status after short couple relationships to that embodied in law.

Similarly, when asked about the situation where a cohabitant died, even after a two-year short childless relationship, there was clear support for a functional approach to regulating couple relationships. Two-thirds felt the same remedies should be available to cohabitants as married couples, with 98 per cent believing this after a 10-year childless relationship.

This research found little support nationally for the law to distinguish between financial remedies for separating married and cohabiting couples where the relationship was long term; where there are children of relationship, or where there is evidence of joint enterprise contributions, for example to a business.

There was evidence that views change across the generations and this supports the idea put forward by Eekelaar (2006) that it might be important to bear this in mind when attempting to legislate for future generations in this field. Whilst it is difficult to know for certain if this variance in views is a periodic or generational effect which may change as people get older, younger people without children tended more readily to endorse the promotion of financial autonomy on relationship breakdown. However,

this was more so in scenarios which did not involve children. Most people were found to be very child-centred in their thinking, which does reflect one of the main tenets of family law. Those who were older or who had more than one child tended to favour more equal recognition of financial and non-financial contributions, and where there was a child in the scenario this approach broadened across all categories of research participants, endorsing the functional approach favoured by participants in earlier research (Barlow et al, 2005; Barlow, Burgoyne and Smithson, 2007; Cooke, Barlow and Callus, 2006).

Why does this Differ from what Law Currently Does?

If law could justify its different treatment of approaches to family property in the married and cohabitation contexts in a convincing manner, then perhaps the legally rational approach could be endorsed. As things stand, whereas cohabitants' assets are divided according to property law on relationship breakdown with little or no attention being given to the nature of the relationship (*Burns v Burns*;⁴ *Stack v Dowden*⁵), a completely different approach is taken on marriage breakdown where the aim is to achieve fairness as between the parties. For financial and non-financial contributions to the marriage are viewed as equal and justify an equal division of assets on divorce, unless other factors such as the needs of the parties, a truly exceptional contribution by one party alone, or inherited wealth or non-matrimonial assets justify a different approach (*White v White*;⁶ *Miller v Miller*; *McFarlane v McFarlane*⁷). However, much of the logic as to why we do as we do in the married context, has been lost. Why is an economically weaker spouse rewarded for the public commitment given on marriage at the point of divorce when that commitment has been broken? We have no-fault divorce and so assets are in the vast majority of cases

⁴ [1984] Ch 317.

⁵ [2007] UKHL 17.

⁶ [2001] 1 AC 596.

⁷ [2006] UKHL 24.

redistributed regardless of who is to blame – we are not compensating an innocent party for a breach of contract, as was reiterated forcefully by the House of Lords recently in *Miller; McFarlane*.⁸ Often, quite the reverse is true. On divorce, pre-marital cohabitation may in effect lengthen the duration of the marriage for the purpose of deciding how assets should be redistributed, accepting that the private commitment of cohabitation is valuable if it translates into marriage.⁹ Yet we do not redistribute assets on the basis of a long-lasting private commitment if a long cohabitation relationship breaks down.

If the rationale behind the messages being sent by the current state of the law is itself confused and at odds with what is socially acceptable, clear messages are not likely to get through to the public, let alone encourage ‘legally rational’ behaviour. Either we need to accept this as Dewar’s normal chaos of family law or questions need to be posed about what law is doing and whether it can justify the different treatment of cohabitants from that of functionally similar married couples. What are we rewarding on divorce exactly? If it is the fact that one party has sacrificed their own financial position for the greater good of the family, perhaps by giving up work to care for children, why is this rewarded only in the married context when exactly the same benefits are being gained by the partner, children, and, indeed, society when cohabitants order their lives in this way? The empirical evidence clearly shows that it is not public attitudes nor, indeed, those of cohabitants that are standing in the way of such a development.

Furthermore, the strength of public support for maintenance on separation following a short childless relationship is also questioned by the results from the most recent British Social Attitudes Survey (see Table 14.1 above). Whilst there was little support for cohabitants without children who separate after two years to receive financial provision (just 38 per cent were in agreement), more surprisingly there was less support for maintenance following a two-year childless marriage, where 62 per

⁸ Ibid.

⁹ See, eg *W v W (Judicial Separation: Ancillary Relief)* [1995] 2 FLR 259; *GW v RW* [2003] EWHC 611.

cent agreed this was appropriate, than for maintenance for the primary caring cohabitant following a two-year cohabitation relationship with one child, for which 74 per cent were in favour.

This begs the question of whether the regulatory lines have been drawn correctly in providing financial provision on separation. Clearly to use marriage and now civil partnership as the sole determining factor for providing financial provision is convenient from the point of view of the legal system. Whether or not you hold the required status is easy to prove by production of the marriage certificate or civil partnership document. There may be more arguments about whether or not a couple fall within the definition of cohabitants, yet this is something that the courts already deal with quite competently in those areas where rights have been extended to such couples. Ease of regulation cannot really stand up as a very good reason not to endorse a change of approach, particularly where this has been achieved in other common law jurisdictions with seemingly minimal difficulty.

The feminist argument that the law should, at the beginning of the twenty-first century, be discouraging rather than promoting further financial dependence of women on men might hold more sway. Yet where there is relationship-generated need or disadvantage which falls principally on women, who are most often the primary carers of children in all styles of relationship, should the law continue to discriminate against those who have done this outside marriage yet not require financial autonomy from divorcing childless women in the name of fairness?

The last and most cited justification for the continuance of the status quo is so as not to undermine marriage. Marriage is more stable than cohabitation and is seen as special. Indeed, only 9 per cent of the public in the most recent British Social Attitudes Survey agreed that marriage is only a piece of paper (Barlow et al, 2008). Yet, retaining the status quo has not in this jurisdiction stemmed the tide of those cohabiting nor, indeed, the decline of the numbers marrying each year. Policy documents from both the major political parties talk of supporting marriage in the name of creating more stable families for children (Home Office, 1998; Social Justice Policy Group, 2007). However, there is an argument that it is those families that are likely to break up that need most to be regulated. Certainly, research shows that the current law can produce great economic disadvantage for cohabitant parents on

relationship breakdown (Tennant, Taylor and Lewis, 2006; Lewis, Tennant and Taylor, chapter eight, this volume). Furthermore, where is the logic in encouraging marriage whilst providing a perverse incentive not to marry by denying legal remedies for other styles of families with children who are in need of them when relationships break down? Generally, it is not clear how extending rights and obligations which appertain to marriage to functionally similar cohabiting couples will in any way undermine marriage further than is already happening.

What is it that we are concerned about in extending remedies to the cohabitation context, given the seemingly uncomplicated experiences of other jurisdictions that have awarded legal status and family property rights to cohabitants (see eg [Atkin](#), 2001; Graycar and Millbank, 2007) and the fact that countries that have gone down this route have not suffered any observable decline in marriage rates above and beyond existing rates of decline (Kiernan, Barlow and Merlo, 2007)?

RECONSIDERATION OF HIERARCHY TO REFLECT CHANGING CIRCUMSTANCES?

The Law Commission for England and Wales has recently reviewed the law governing the financial consequences of cohabitation breakdown and, after a two-year project in which it consulted widely, it made recommendations for reform of cohabitation law in its report in 2007 (Law Commission, 2006, 2007). However, the idea that cohabitation law should be put on a par with marriage was rejected. In its consultation paper, the Law Commission explained the view as put to it by one consultee:

Some account should be taken of the decision of the parties not to marry: it is one thing to relieve the unequal impact of the relationship, but quite another to treat the parties as if they had actually married. (Law Commission, 2006: [6.239])

The report confirmed this view:

Applying the MCA would impose an equivalence with marriage which many people would find inappropriate, and some consultees suggested that it is unlikely that a scheme which equated cohabitation with marriage in this way would be politically attainable. (Law Commission, 2007: [4.8])

Rather it put forward a radical new presumptive scheme which does not mirror marriage but which proposed acceptance of cohabitation contracts and redress for relationship-generated economic disadvantage or retained benefit.

The Law Commission recommended that its scheme should apply to all cohabitants with children and other childless cohabitants (whether of same or different sex) who have lived together for a qualifying period, which they suggested should be between two and five 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 (Law Commission, 2007: [5.56]). In the case of manifest unfairness, a court would have power to set aside an opt-out agreement ([5.61]).

The idea of the 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 had a retained benefit, or the applicant had an economic disadvantage as a result of qualifying contributions the applicant had 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.

A qualifying contribution was defined as any contribution to the shared lives or welfare of members of the family, and could be non-financial ([4.34]). 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 ([4.36]). A retained benefit, on the other hand, could take the form of capital income or earning capacity that had been acquired, retained, or enhanced ([4.35]).

The 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:

- the welfare of any minor child of both parties (which was to be the court's first consideration);
- the financial needs and obligations of both parties;
- the extent and nature of any financial resources of each party now and in the foreseeable future;
- the welfare of any child living with, or who might reasonably be expected to live with, either party;
- the conduct of each party, defined restrictively but including a qualifying contribution made despite the express disagreement of the other party

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 (Probert, 2006). 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 should not place the applicant for the foreseeable future in a stronger economic position than the respondent. Whilst this sharing of risk and loss sounds very egalitarian, it might well have meant that where there was an unequal distribution of assets between cohabitants, an economically weaker primary carer partner would not on separation have been able to recover their full loss from a very wealthy former partner. Equal sharing of loss would not always have been fair.

The attractiveness of the scheme is its promotion of financial autonomy between the partners. Indeed, some respondents to Barlow et al's most recent BSA (see Table 14.1) and follow-up study recognised the Law Commission's approach to be appropriate for married and unmarried childless couples. As Noreen, a cohabitant in her thirties with one child, explaining her view on the position in the scenario where a **childless** couple breaks up after a two-year marriage or cohabitation, confirmed:

... there's no children involved, why should one person be responsible for supporting you financially?

However, the fact that the Law Commission scheme deliberately did not directly address the financial needs of those facing separation, and so would have been likely to have operated harshly on those who were post-separation primary carers of children of the relationship in some cases was not universally welcomed. The Law

Commission took the view that relationship-generated economic disadvantage was a fairer and more specific way of defining and thereby addressing (albeit indirectly) the sort of post-cohabitation relationship need worthy of legal redress where, unlike in marriage, the parties had not publicly declared their commitment to the relationship (Law Commission, 2007: Appendix C, [C9]–[C12]). Indeed the BSA Survey did reveal some support for this approach (see Table 14.1 above) as did the follow-up study. As Ruth, in her thirties and a cohabitant with three children, saw it:

[I]n a partnership people make compromises and quite often it's the woman that makes compromises and that's part of the deal. If it then turns sour ... they shouldn't be penalised because they've made sacrifices.

Where there were children, though, the appetite for a difference in approach between married and cohabiting families was greatly reduced, and evidence of thinking that there should be a functional approach to families with children based on their needs is found across the recent studies:

I don't think it [legal protection] should be automatically tied into marriage or cohabiting or just living separately. It should be to do with the rights everybody has to have a minimum safety net. It should be to do with the rights that children have to have their parents have an income with which to bring up the children, regardless of, you know, whether the parents are still in a relationship or not. (Daniel, cohabitant of nine years, two children, respondent in Barlow et al's 2007 study)

Similarly, in Cooke, Barlow and Callus's 2006 study, when asked for reasons why a cohabiting mother with children should have the same rights to the family home owned by her partner as a married mother on relationship breakdown, a married respondent explained:

I think she should be allowed to stay in the house and then the property sold. ...[Why?] ... Because they've still got the same responsibilities to each other and their children. (Cooke, Barlow and Callus, 2006: 32)

However, probably the biggest problems with the Law Commission's scheme were its apparent complexity and its unfamiliar approach which resulted in being received less enthusiastically than it in fact deserved.

Despite the Law Commission's misgivings about equal treatment of functionally similar married and cohabiting couples, research does now clearly show that there is public (if not political) support for reconsideration of the hierarchy of

those whom the law provides may obtain financial provision on relationship breakdown. As has been seen, there is greater support for financial provision after a two-year relationship for a cohabitant who has a child than there is for a spouse after a two-year childless marriage. It is not clear to people why Mrs Miller should have got £5 million after a two-year childless marriage to a very rich man (*Miller; McFarlane*¹⁰), whereas Mrs Burns, a cohabitant of 19 years' standing with another rich man, who brought up two children and worked part time, received nothing (*Burns v Burns*¹¹). If we can agree that it is couples with children who are the most deserving of the law's remedies, as public opinion seems to confirm, then we need to reformulate the hierarchy to reflect society's consensus on this point, which is one with which, outside the sphere of family property, family law agrees. At the very least, it should be possible to extend to cohabitants the provision of reasonable requirements – a needs-based approach to financial provision on separation – as existed for married couples before the cases of *White v White*¹² and *Miller; McFarlane* introduced the principle of equal sharing of matrimonial assets on divorce in higher asset cases under the Matrimonial Causes Act 1973. The Law Commission rejected its consultees' call for a needs-based redistribution of assets on relationship breakdown as it felt there was not

a clear, principled justification for needs-based relief that would help to determine how 'need' should be measured, which 'needs', if any, should be met by a partner, in what circumstances and for how long' (Law Commission, 2007: Appendix C, [C9]).

However, these are all matters which the courts have had to address in the divorce context. In the majority of cases where assets do not exceed needs, it is the housing needs of the children and then those of the primary carer which are addressed first, followed by the housing needs of the other parent. The future income needs of all would then be considered and addressed. Before *White* and *Miller; McFarlane*, the other assets were left undisturbed (see Bird, 2000) but would now be subject to the equal sharing principle if they were classified as matrimonial assets in the divorce

¹⁰ [2006] UKHL 24.

¹¹ [1984] Ch 317.

¹² [2001] 1 AC 596.

context. The courts are familiar with exercising their discretion in this context and could, as they used to on divorce, generously interpret needs in higher asset cases. Thus implementation of such a scheme would, from a practical point of view, be relatively easy and address the concerns of the public without wading into the difficulties which the equal sharing principle poses in the non-contractual cohabitation context (see Law Commission, 2007, Appendix C, [C5]–[C8]).

Where there are no children, on the other hand, then financial autonomy may be a better goal for both the married and unmarried cohabitants and would encompass the call for enforceable pre-marital and cohabitation agreements, alongside a safety net of legal redress based on relationship-generated economic disadvantage and retained benefit.

CONCLUSION

Love then has everything to do with it, as it makes law's subjects far less susceptible to legally rational behaviour, within the current legal framework, in the context of their private lives. This means that we follow our hearts, often with the best of motives, and social norms endorse this approach. People do what is right for them in the context of their own lives and to act legally rationally, given the demands of the current law, is often seen as inappropriate or too difficult. To ignore the social trends away from marriage leaves law looking rather inadequate in the face of social change. It is failing to protect the most vulnerable 'uneven' partners and it is failing to recognise that there are many ways to 'do family' (Morgan, 2000) which serve society well and which are worthy of support when things go wrong. Certainly, in the public mind, there is an equality discourse between functionally similar couples – where there are children and where there is 'marriage-like' behaviour which is borne out of a freedom to choose which partnering and parenting structure to adopt according to the context of your own life, perhaps best understood as a social interpretation of the meaning of one's right to private and family life free from state interference.

Indeed, this idea fits with some legal dicta – Hale LJ (as she then was) in *SRJ v DWJ (Financial Provision)*¹³ observed:

It is not only in [the child's] interests but in the community's interests that parents, whether mothers or fathers and spouses, whether husbands or wives, should have a real choice between concentrating on breadwinning and concentrating on home-making and child-rearing, and do not feel forced, for fear of what might happen should their marriage break down much later in life, to abandon looking after the home and the family to other people for the sake of maintaining a career.

To find a way forward, we need to consider regulation of family property disputes across both married and cohabitation contexts in the light of twenty-first century values. The only clear alternative is to allow chaos to continue to reign, rather than socially locate family law within the real-life situations found in society. The best way forward, in my view, involves coming back to Teubner's solution of reflexive law (Teubner, 1993), which, as King and Piper (1995) explain:

is offered as an answer to the crisis caused by the failure of legal rationality under modern conditions to provide law with the necessary tools to restore consensual, moral and political values.

This approach offers a 'bottom-up' solution, which departs from the normal uniform standard-setting role that law has traditionally played and would permit a pluralistic approach to family regulation. That is not to say it would abandon standard-setting altogether. Rather that it would attempt to meet the needs of a society where partnerships founded on love take diverse forms, by being better attuned to shifting public attitudes and respecting the need for greater flexibility for couples to make their own arrangements whilst acknowledging minimum standards.

Family property is surely a good starting point to examine how this could be done and protection for weaker economic partners where there are children, and regardless of whether or not they happen to have married, is clearly publicly acceptable, if not politically so. There is also a taste for private ordering where there are no children or where a couple have carefully thought through the implications of

¹³[1999] 2 FLR 179, at 182.

their separation for themselves and their whole family. Pre-marital and cohabitation agreements must surely have their day and allow couples to separate their financial and emotional layers of commitment where they are both fully cogniscent of their choices. By combining these features of autonomy and protection, we should at least be en route to achieving a new normal order of family law as advocated by Henaghan (2008) and Eekelaar (2006) which is firmly socially located in current family practices and public expectations and yet is flexible enough to empower rather than enslave future generations.

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