



Cohabitants and their rights in the United Kingdom

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Background

- ▶ Legal and social policy towards the legal status of cohabitants in the United Kingdom has developed differentially in the 3 jurisdictions of England and Wales, Northern Ireland and Scotland in recent years despite broadly similar demographic and social trends and despite previous piecemeal approaches in all.
- ▶ In particular, the calls for reform in England and Wales to recognise a formal status of cohabitation in order to provide remedies for financial provision on relationship breakdown have been rejected whereas in Scotland, they were embraced in 2006 legislation.
- ▶ Northern Ireland has followed the English and Welsh approach which might reflect the generally higher rates of religious adherence and lower rates of cohabitation. Yet this is in contrast to the Catholic Republic of Ireland which adopted Cohabitation Law reform in 2010.



Families and Households, 2014, ONS

- ▶ **‘Couples living together without being married is the fastest-growing type of family in the UK’**
- ▶ The Office for National Statistics (ONS) 2014 data confirm the increase in opposite sex cohabiting couple families between 2004 and 2014 in the UK is statistically significant, rising from 2.3 million to 3.0 million.
- ▶ In 2014 there were an estimated 84,000 families consisting of a same sex cohabiting couple and 61,000 consisting of a civil partnered couple, the latter having steadily increased since the introduction of civil partnerships in the UK in December 2005.
- ▶ In 2014, 39% of opposite sex cohabiting couples had dependent children and in 2012, 30% of all births were to cohabitants.
- ▶ A much lower percentage of same sex cohabiting couple families - 11% - had dependent children in 2014.



Legal policy approach to cohabitation in common law jurisdictions

- ▶ In contrast to Europe's predominantly 'opt-in' approach, a 'presumptive' or 'opt-out' approach to regulation has occurred in other parts of the common law world such as Australia and New Zealand, where cohabitation is considered a legally equivalent status to marriage.
- ▶ In England and Wales and Northern Ireland, the piecemeal recognition of cohabitants is presumptive, although the definition of 'cohabitant' and whether or not a remedy equates with that available to those who are married, varies from context to context.
- ▶ Scotland (and Ireland) reforms- presumptive 'opt-out' approach but *without* equivalence to marriage.



Legal response - Scotland

- ▶ Scotland has virtually identical social trends to England and Wales but has a separate legal system. In Family Law, it has always chosen its own path.
- ▶ In contrast to England and Wales, prior to 1996 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.
- ▶ Although the Scottish Law Commission recommended reform as long ago as 1992 (Discussion paper no. 86 & Scot Law Com No 135), 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 recommendations and also abolished the last remaining form of common law marriage for the future.

Legal and political response - Scotland

- ▶ Scottish Minister for Justice, 2006, was happy to respond-
 - ▶ *“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.”*
- ▶ However, cohabitants have different (and fewer) rights to married couples and civil partners on relationship breakdown (there is no maintenance and different principles apply) and death of a partner.
- ▶ The Family Law (Scotland) Act 2006 is based on redressing economic disadvantage suffered by a cohabitant (no time qualification needed for eligibility (s25)) during the relationship -



Section 28

- ▶ The court may make an order for payment of a capital sum by one cohabitant to the other, having regard to:
 - ▶ whether the defender (the respondent) has derived economic advantage from contributions made by the applicant; and
 - ▶ whether the applicant has suffered economic disadvantage in the interests of the defender or any child.
- ▶ The court must also have regard to:
 - ▶ 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
 - ▶ 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.



Gow v Grant (Scotland) [2012] UKSC 29 clarification?

- ▶ Lord Hope (at para 58) in confirming that different principles to the divorce and civil partnership context applied, imported a ‘fairness’ principle into the calculation, drawing on Scottish Law Commission report and Ministerial statements –
 - ▶ ‘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.’
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Current position – England and Wales

- ▶ Cohabitants have no specific legal status and cannot ‘opt in’ to civil partnerships, which are exclusively same-sex. Same-sex cohabitants are treated the same as different-sex cohabitants since Civil Partnership Act 2004 in the UK.
 - ▶ **Piecemeal reforms** since the 1970s, see cohabitants treated as married in some situations, as inferior to married couples/cps in others, and as separate individuals in yet others.
 - ▶ 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, not aimed directly at cohabitants.
 - ▶ Rented tenancies of the family home can be transferred between cohabitants but Trusts Law must be used to litigate property disputes (including owner occupied family home) between couples – complex, lengthy and very expensive e.g. *Seagrove v Sullivan* [2014] EWHC 4110.
 - ▶ Adoption is now possible by cohabiting couples if they can show they are “*two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.*” (Section 144(4)(b) Adoption and Children Act 2002)
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Marriage equivalence

- ▶ **Social security and tax credits**
 - ▶ All means-tested social security benefits and tax credits treat cohabiting couples as if they were married or civil partnered (the so-called 'cohabitation rule'), assessing their financial eligibility and need together as a couple, even though there is no legal obligation between cohabitants to financially support each other.
- ▶ **Succession to some rented tenancies**
 - ▶ Private sector Rent Act tenancies and assured tenancies governed by the Housing Act 1988 permit a cohabiting partner who resided with the deceased in the family home to succeed to the tenancy, regardless of the duration of the relationship, as is the case for spouses and civil partners.
- ▶ **Domestic violence – personal protection under FLA 1996**
 - ▶ No distinction is made between remedies available to married/civil partnered and cohabiting couples who all fall within the definition of 'associated persons' (s62) (in contrast to rights to occupy the family home).



Cohabitation recognised as inferior

▶ Remedies on death of partner

- ▶ SI(3) Fatal Accidents Act 1975 (wrongful death) and s1A Inheritance (Provision for Families and Dependants) Act 1975 require an eligible applicant to have *lived in the same household with the deceased for a period of at least two years immediately before the death as the husband or wife or the deceased*

and provides a lesser remedy than that available to spouses.

▶ Secure (council) tenancy succession

- ▶ Housing Act 1985 requires a secure tenancy successor to have – *lived together ‘as husband and wife’ for a period of 12 months to succeed to the tenancy.*

▶ Occupation of family home (Family Law Act 1996 Pt 4)

- ▶ This divides cohabitants in contrast to spouses into ‘entitled’ and non-entitled applicants. Those cohabitants who do not own or rent the family home solely or jointly with their partner, have more rigorous criteria to comply with and a remedy limited to a maximum of 12 months occupation of the home where the ex-partner tenant/owner has been violent, although tenants can go on to apply for a transfer of the tenancy to them, again as measured against stricter criteria than spouses or joint tenants of the home (ss 33(6) and 36(6)).



Cohabitation ignored as a family form

- ▶ In pensions and contributory benefits, cohabitation is ignored and the couple are treated as strangers.
- ▶ In property disputes between cohabitants, there is no statutory recognition that a family home is property which should be afforded 'special treatment' in order to benefit the wider interests of members of the family, although it may constitute one factor in disputes under s14-15 TOLATA 1996. Case law has been willing to use constructive trusts to reach a more family law-like resolution of some family home disputes in some circumstances – *Stack v Dowden* [2007] UKHL 17, *Jones v Kernott* [2011] UKSC 53 – and where there are children should be heard together with Schedule 1 Children Act proceedings, which allows property to be settled for the benefit of the child.



Socio-Legal Research

- ▶ The British Social Attitude Survey shows a ‘common law marriage myth’ plus great tolerance of cohabitation law reform and even of marriage equivalence where there are children or long relationships in England and Wales (Barlow et al, 2008).
- ▶ Many studies (e.g. Douglas et al, 2009, Barlow et al, 2001, 2008) confirm the public confusion, difficulties and dissatisfaction with the current law in England and Wales.
- ▶ Miles, Wasoff and Mordaunt (2011) in their 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.
- ▶ Kiernan et al (2007), have shown introduction of cohabitant rights is not a statistically significant factor in decline in marriage rates in Australia and The Netherlands.



Approach of the Law Commission for England and Wales

- ▶ The Law Commission published its report in 2007 in which it strongly criticised current law and accepted the need for reform.
 - ▶ It rejected the idea cohabitation should be placed on a par with marriage (see Law Com No 307, CM 7182, (2007) London:TSO).
 - ▶ It put forward a radical new presumptive scheme which does not mirror marriage but which proposed acceptance of cohabitation contracts and (opt-out) redress for relationship-generated economic disadvantage or retained benefit.
 - ▶ In 2011, it also recommended reform of intestacy law to provide automatic succession for cohabitants on partner's death in some situations (see Law Com No 331(2011)).
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Government response

- ▶ Parliament (under the New Labour government) wished to see the effects of the Scottish legislation before committing in 2008.
- ▶ In 2009, government opposed Lord Lester's Cohabitation Bill proposing reform.
- ▶ Despite research by Miles et al (2011), the Coalition government again rejected similar legislation as proposed by Law Commission during this Parliament.
- ▶ In March 2013, it also rejected the proposed intestacy reforms for cohabitants.
- ▶ There have been various attempts to amend cohabitation law using Private Member's Bills. The Cohabitation Rights Bill introduced in 2014 by Lord Marks is currently in Committee Stage but is likely to be lost.
- ▶ Even formal recognition of enforceable cohabitation agreements was ignored by government, although case law has assisted in some clarification (*Sutton v Mishcon de Reya* [2003] EWHC 3166).



Political hurdle impossible in England and Wales?

- ▶ There is now a pro-marriage atmosphere which is symbolised by the re-introduction of (minimal) tax relief for married couples, despite public tolerance.
 - ▶ 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 (*Ferguson & others v UK*) and judicial review.
 - ▶ Meanwhile the flexible approach of the common law courts in property law plus piecemeal, inconsistent legislation developed since the 1970s remains, whilst the ‘common law marriage’ myth thrives amid shifted social norms, with over half the population believing they have general rather than patchwork ‘marriage-equivalence’.
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Judicial activism to the rescue?

- ▶ In *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.
- ▶ They cited socio-legal research (Barlow et al, 2008 and Miles et al, 2011) in support of the case for reform.
- ▶ They have also attempted to reduce the strictures of Trusts Law to build in a more family law approach to disputes (see dicta in e.g *Jones. v Kernott* [2011] UKSC 53), which has divided Trusts lawyers and Family Lawyers.



ECHR to the rescue?

- ▶ Ferguson and others v UK is challenging the lack of same sex marriage for but also of civil partnerships for different-sex couples
- ▶ This claim seems strong (articles 8 and 14) if the Marriage (Same-Sex Couples) Act 2013 given implementation without repeal of the Civil Partnership Act 2004



Conclusions

- ▶ The social trends speak for themselves and demand a response - we cannot turn the clock back through law
- ▶ Whilst there are arguments against reforms adopting 'presumptive' marriage equivalence, to fail to legislate for cohabitants is 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
- ▶ The Scottish (and Irish) reforms (and the English Law Commission proposals) do address some gaps in the law



Conclusions

- ▶ 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”.
- ▶ We need to be clear about what we want family law to achieve for cohabitants
 - ▶ Make them marry – Napoleonic approach?
 - ▶ Protect the economically vulnerable (including children) - marriage equivalence, compensation or needs approach?
 - ▶ Promote autonomy – contractual or opt-in approach?
- ▶ Cohabitants are a diverse group and reasons for cohabiting are wide ranging
 - ▶ Do we need a pluralistic approach?

