

Written evidence from Baroness Ruth Deech [HAB0002]

As a lecturer in family law I have been writing regularly about the topic of cohabitation since 1977 and have commented on various iterations of Bills intended to put it on a statutory footing.

Should there be a legal definition?

Analysis below is based on two possible approaches to settlements between former cohabitants – property law, which treats them as it would any other claimants to property; and ongoing maintenance, for which there is no rationale.

If the legal relation between former cohabitants is treated as a matter of determining property ownership, then there is no need for a definition. If it were to be based on an intimate relationship, there are complex problems. Any qualifying length, whether say 3 or 5 years, would generate disappointment and litigation from those just outside the limit – what is “living together” or a “relationship”? what does it mean to live as a couple? two different households or one? The presence of children? Why should family relatives be excluded? Is it to be retrospective? Would intermitting periods of separation affect it? How would courts and lawyers interpret the phrases common in defining monetary recompense in cohabitation law - “economic disadvantage” and “qualifying contribution”? Judges in reported cases apply outdated gendered notions of what is a disadvantage and what is a contribution on the part of women, and disregard the fact that living together is more economically advantageous than living alone. Many contemporary cohabitations may have come about so that two people are able to afford to buy a property that each could not afford on their own, or it could even have come about because of the pandemic. Even brief litigation would consume the assets that should be preserved for the children.

Are legislative changes needed?

There are already comprehensive legal remedies which quite rightly treat the former cohabitants like any other two people in a property dispute. Now that civil partnership and same sex marriage are available with appropriate remedies on dissolution, it is hard to formulate any reason for an additional category of law. Trusts law has moved in the direction of giving cohabiting couples equal shares in property they have occupied in most cases. That principle was departed from in *Stack v Dowden*, not unexpectedly, because the woman was the major contributor. Cohabiting partners have rights to claim under the Inheritance (Provision for Family & Dependents) Act 1975, which has been enlarged. The Law Reform Succession Act 1995 enables cohabitants of 2 years’ duration to claim without proving dependency.

A new law, especially without legal aid, is more likely to be deleterious than not. It is largely lawyers calling for reform – the general public is against it, see below. Cohabitation law would put back the status of women, take away choice, would be too expensive, and would suck in a large number of

unsuspecting and unwilling people into an already unsatisfactory judicial discretion law of financial provision.

If cohabitation legislation adopted the same discretionary approach to financial provision for a former cohabitant as is taken in divorce law, it would suffer from the same self defeating problems. If there were too much judicial discretion to reallocate the cohabitants' property with no rational principles except paternalism, this would make negotiation between the former couple difficult, and whatever was gained would be eaten up by costs, as in divorce law. There would be blackmail behind the scenes, because without firm principles for the assessment of property transfers, one of the couple would hassle the other for a settlement, in order to avoid even more costly litigation and the examination of their circumstances in court. Judges do not see this - they only see the cases that come to them, the tip of the iceberg. As for encouraging couples to make opt-out agreements, as has been suggested, they would be disappointed and financially penalised if one of them subsequently went to court to challenge the agreement as unfair, whatever that means, or call for it to be set aside because there had been an unforeseen change of circumstances, which is inevitable. The courts are likely to override the expressed will of the couple, as evident in their grudging attitude to prenuptial agreements. If cohabiting couples don't at the moment know the law, namely that they don't have marriage rights, as is postulated, why would they know about any new opt-out law?

The issues of equality and human rights

Forced marriage is unacceptable. Art 8 of the European Convention on Human Rights protects the right to respect for a private and family life, and everyone has the right to adopt a style of relationship that suits them. Sometimes that may not be covered by the law, which is unobjectionable. Research shows that cohabiting couples have their own good reasons for not getting married. They have different expectations and intentions. "Commitment" means nothing, and certainly is no basis for imposing marriage on those who have not entered it. That commitment, if it ever existed, has ended when the relationship ended. A University of Denver study demonstrated that men see the ceremony of marriage, not cohabitation, as the assumption of obligation, whereas women see attachment and living together as binding. So there is an inherent clash of perspectives.

What we should be asking is whether it is right for the law to impose obligations on those who have lived together, without their consent or knowledge, and when they may have been trying to avoid that. Some people don't marry because they wish to keep benefits that would terminate on marriage. Elderly peers have told me they live with someone, and won't marry again, because they wish to preserve the assets from their first marriage, and their children, from the risk of losing those assets to a second spouse or cohabitant, if the law changed. Some couples are trying each other out before they decide to marry, or are living together to save money. We should not impose the penalties of a failed marriage on those who were experimenting in order to avoid this outcome. There should be freedom of choice and respect for individuals. Why should young people face litigation over their

assets when they live together at the outset of their careers, or when a woman who has built up assets is deserted by the man she hoped would marry her, but instead demands money from her at the end of their cohabitation?

A unique promise and assumption of obligations is made by those who marry, and not, as they are well aware, by those who refrain from marrying, and no amount of emphasis on the similarities between spouses and cohabitants can obscure the difference, one of the most fundamental in social existence for centuries. The view expressed here is not a moral view. It is not an argument for the superiority of marriage or its centrality, or the need to bolster it. It is for the preservation of the freedom to try alternative forms of relationship, a freedom which at present is being eroded by the increased tendency of the law to impose on former cohabitants the status and structure of traditional marriage. In effect, a cohabitation law would convert the relationship into marriage *ex post facto*, maybe when one of the two absolutely refused to marry the other, and this is ironic if it comes from the champions of preventing forced marriage.

Better provision for the children of cohabitation

Downgrading blood ties and family ties is another aspect of the potential unfairness of cohabitation law. Pitting the surviving cohabitant against the deceased's children is one of the least edifying and most bitter legal disputes. Of course children of a union, any union, should be taken care of. The Children Act 1989 Sched 1, provides for orders for the support of a parent and child, periodical payments, lump sums and transfer of property. It could enable a mother to reside in the property during the children's minority. There is the Child Maintenance Service, which now, regrettably, charges fees to those who use it. Child support from unmarried fathers has always been like getting blood from a stone and nothing in a new law will alter that sad fact. If the energy devoted by lawyers to pressing for a cohabitation law were directed to enforcing generous child support through to the age of 21, the welfare of children would be improved.

Should cohabiting partners have the same rights as married?

Most cohabitations last for only a short while. There is no rationale for making one former cohabitant support the other by way of ongoing maintenance, although property should be shared according to general property law principles. Many cohabitations conclude with marriage. Various statistics are available. Some indicate that the cohabiting couple is likely to separate or marry after 5-10 years. https://www.researchgate.net/publication/51706606_Cohabitation_and_marriage_in_Britain_since_the_1970s. Others, for example, data from the British Household Panel Survey, indicate that fewer than half are still together after 3 years. It is only long relationships that raise concern, and the situation in the case of *Burns*, often quoted as the outstanding example of unfairness, would be better remedied under more recent law.

Family relationships law should safeguard personal autonomy and encourage the use of agreements to settle legal boundaries with others. It should respect individuals' expectations, contributions and freedom to choose a way of living, rather than judicially stereotyping and fitting every couple into the tradition marriage mould, characterised by dependence and state control. Since cohabitation is so widespread, lawyers assert that it must give rise to marriage-like consequences for the protection of women, though quite what that protection amounts to and whether it is what either of the couple wants, is debatable. A new law would benefit very few. By way of analogy, in financial provision on divorce, very few court maintenance orders are made, either because there are no assets to share or an agreement has been reached. Enact a new cohabitation law, and cohabitation will become as expensive and legalistic as marriage, and bound to deter even more men from taking on the responsibilities that their children so badly need.

Treating cohabitants as if they were married would be expensive for them, since there is no likelihood of legal aid. On the basis of existing experience of family money disputes, it might well benefit lawyers more than the claimants - there are cases where disputes result in the loss of three-quarters of the couple's assets in costs, or even bankrupt the husband. It is said that every new family law leads to ten years of fresh litigation for interpretation. It would also be a denial of civil liberties, the right to live as you wish without the state interfering. The case for cohabitation law is based on the stereotype of the woman as victim, unable to pursue a career while living with a man, damaged by the cohabitation. The operation of a new law would be regressive because in reality it is only the ex partners of the wealthy who are able to go to court and benefit. This provides an unhelpful model for young women, namely that divorce or separation pays better than a career.

Years ago it was argued that some people had to cohabit because they were not free to marry, shackled to a former spouse by a strict divorce law. But now there is nothing to stop people marrying, or entering civil partnerships, even if already married, because divorce is readily obtainable. If cohabitants are dissatisfied with their legal lot, why not marry in order to obtain marital rights? And if, as is said, they are dismissive of marriage as a mere piece of paper, or an unnecessary patriarchal structure, why would they be keen to turn to the court for money in reliance on the law when the free union ends? They can make wills and agree in writing to share their property with each other if they want to.

A new law would probably not be popular. It would be seen as an attack on the liberty of 2 people who have refrained from marrying or entering into a civil partnership. These are some of the comments culled from *Guardian* readers on occasions when the possibility of a cohabitation law was reported:

"if they do not want the state or law to play any part in their relationship, then why should they be entitled to look to the state and/or the law to play a part in their separation?"

"so the law will force them, because the partner can't? we already have laws for cohabiting couples, it's called marriage and costs a few quid"

"if your partner refuses to marry you, then you are free to draw the appropriate conclusions. But don't think you have the right to a 'fair' division of property (which often seems like the right to gouge what someone else has worked for) just because you say so."

"I've just kicked my girlfriend out. She had been living with me for 2 years and I knew we would soon be reaching the point where my property was at risk. She stayed here free for two years and I pay all the bills. That's more than enough."

"This long standing campaign to erode people's rights in the name of empowering them is shameful."

"Getting really tired of the illiberal campaigns to compel cohabiting couples into a quasi state determined relationship."

And from The Times: "This issue would be better served by educating people that living together is not a 'common law' marriage. It is going to affect older people who own houses they are willing to let another person live in with them. They are not going to be so keen to do that if it gives someone a right to the house after a certain time. What next, renters getting a right to a house because they have lived in it for 10 years? Funny that it always seems the lawyers who are keenest on cohabitating couples having rights like married couples. Not enough people getting divorced for them these days?"

If it is considered that there is a gap in the law, the remedy is to publicise the fact that there is no such thing as common law marriage. Then everyone can make their own informed decisions.

It would be illiberal to impose on couples an intrusive contractual or quasi-marital obligation, not freely entered into, and it would encourage more unstable relationships because of the inducement to separate before 3 years, or whatever the qualifying limit, have passed. We should encourage contracts between those who share property. Rather than opt-out provisions in a cohabitation law there should be *opt-in* provisions - in other words a new law would apply only if the couple had read it and signed up to accepting it. Otherwise, there should be a corner of freedom from the legal system, where couples may avoid family law and divorce, with all its difficulties, uncertainty and unwelcome expense and intrusion. Cohabitation is not marriage, now or historically. People need the freedom to try alternative forms of relationship, not to have one imposed on them, especially one based on outdated views of the roles played by men and women in living together.

International comparisons

There is a cohabitation law in Scotland, but a recent research study has found that it is little used: that the width of the discretion in its wording, and the problems that can be experienced in attempting to prove and quantify economic advantage and disadvantage, leave clients and their advisers uncertain about their position. Reportedly the men are resentful, and the women can't see why they get less than wives. The time limits for bringing a claim created further barriers and unnecessarily increased demands on the court by effectively requiring lawyers to start actions prematurely, potentially exacerbating or creating conflict.

There is little to be gained from examining Scottish or other international legal systems. This is because England is the only country in the Western and common law world with a financial provision law which is so discretionary, stereotyped, uncertain and expensive. A simple division of assets law, as in Scotland, would be cheaper and fairer to apply to cohabiting couples, were that the chosen route, albeit that it has been reported that Scottish practitioners do not find their cohabitation law satisfactory

(<https://era.ed.ac.uk/bitstream/handle/1842/4767/Briefing%2051.pdf;jsessionid=F392F877CD433B71A3EA5F15CF664526?sequence=1>).

Conclusion

Support for feminism and civil liberties must mean that there should not be a new law that would breach the right to private life and the freedom to marry or not. It would produce cases of expense and uncertainty, and create another class of people who just missed out on eligibility because they had not lived together long enough, or as a couple. Litigation would rarely produce enough assets to make a difference, except in the wealthiest and possibly least deserving cases. It would open the door to more upset and stress at the end of relationships. A new cohabitation law based on out of date gender stereotyping would cement in English law the notion that attaching oneself to an ex-partner's support is as valid a lifestyle and ambition as self-support.

See also Ruth Deech 'The Case Against Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly*, pp 480-497; Ruth Deech, 'Cohabitation' (2010) 40 *Family Law* p.39, 2009-10 Gresham Lectures, www.gresham.ac.uk Case citations can be provided.

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July 2021