Written evidence from Professor Russell Sandberg, Cardiff University [HAB0343]

Introduction

An often overlooked aspect of the cohabitation law debate is the position of those couples who have undergone a wedding ceremony that is not legally recognised in England and Wales. Unless such couples also undergo a wedding ceremony that is legally recognised under the Marriage Act 1949, such couples have the legal status of cohabiting partners – though they may erroneously think that they have the same legal protection as couples who are married or in a civil partnership.

My research on this matter – published as Religion and Marriage Law: The Need for Reform (Bristol University Press, 2021) – notes that these couples fall into two main categories. The first is what may be styled as 'non-religious marriages': those ceremonies that are conducted by belief organisations such as Humanists UK or by independent celebrants. Marriage law currently provides no means by which these can be legally binding in their own right. It is likely that Covid restrictions and the resultant backlog has increased the number of such weddings and has meant that many couples have not been able to book their additional civil ceremony with the registrar.

The second category is 'unregistered religious marriages': these exist where the couple undergo a religious ceremony that does not comply with the Marriage Act 1949. Religious marriages are recognised under the Act but in relation to religious weddings[1] the ceremony must take place in a registered place of religious worship in order to be legally binding. Otherwise, though the couple are married in the eyes of their faith, they are not married in the eyes of the law.

Reform to the law on getting married, as currently being considered by the Law Commission,[2] would provide a much needed step forward. My research supports the Law Commission's call for a move from registering buildings to recognising officiants and argues that all religion or belief organisations (and possibly all organisations) should have the right to nominate officiants. This would overcome the issue of non-religious marriages and would mitigate the

[1] Other than Church of England, Church in Wales, Quaker and Jewish ceremonies which are dealt with specifically under the Act.
[2] Law Commission, *Getting Married: A Consultation Paper on Weddings Law* (Consultation Paper 247, 2020).

issue of unregistered religious marriages by removing laws that currently discriminate against some religious groups by requiring that the wedding takes place in a registered place of religious worship.

However, even if the proposals were enacted in full, some unregistered religious marriages would remain. There are several reasons why couples might have unregistered religious marriages: it may be the choice of the parties (in some communities, religious marriages effectively allow the couple to date, to be together without a chaperone), it may be because the parties are unsure of the law or it might be because it is difficult or impossible for a religious ceremony reflecting their beliefs to be held in a way that is compatible with marriage law requirements. All but the last of these reasons would continue to apply if the law on getting married was reformed along the lines proposed. However, unregistered religious marriages would remain problematic where the decision to enter into a religious only marriage has not been entered into on behalf of one or both of the parties.

The Need for Cohabitation Law Reform

Reform of cohabitation law could provide the solution to this problem (as well as being needed generally given the significant number of cohabiting relationships). The need for reform of the law on cohabitation is discussed in chapter 9 of Religion and Marriage Law: The Need for Reform (Bristol University Press, 2021). The following provides a summary of the arguments made there.

There is a need to be specific when talking about cohabitation rights. While some legal rights and contexts recognise cohabiting partners, others do not. The major point of concern is with cohabitation rights on relationship breakdown. Other than where there are children as a result of the relationship or where the couple have been renting, if a cohabiting relationship breaks down then any financial and property disputes are dealt with through the law of property which focuses on the question of ownership rather than fairness. The call for cohabitation rights, therefore, more specifically focuses on what the Law Commission termed, 'a statutory scheme for the adjustment of property rights or financial provision between cohabiting couples on separation'.[3]

[3] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 1.5

Cohabitation rights on relationship breakdown would provide a remedy to those who are in unregistered religious marriages where the decision not to enter into a legal marriage has not been entered into voluntarily or where the relationship has changed over time so that one party has become reliant on the other or have suffered a detriment as a result of the relationship. This would apply, for instance, where one party has given up paid work, reduced their hours or forgone promotion in order to raise children, keep the home and / or to look after the other party. These detriments are likely to be gendered and can often be subtle.

However, it is also important not to take a too paternalistic approach. It is vital that cohabitation rights do not trample upon the free choice of the parties. If the parties have made an autonomous choice not to marry, then this should be respected. The lead of other jurisdictions should be followed to allow couples to opt out of such cohabitation-based protection while also ensuring that this is voluntary and fair. This opt out rather than opt in requirement would ensure that cohabitation rights are afforded to couples who are choosing to cohabit thinking that they will accrue marriage-like legal rights as well as those where there is an intention to marry but the couple do not get around to it.[4]

Developing a Scheme

There are four important precedents on how a scheme providing opt-out cohabitation rights on relationship breakdown could operate: (1) the system that applies in Scotland;[5] (2) the Irish system;[6] (3) the system suggested in Law Commission's proposed reform;[7] and (4) the schema developed in two recent Private Member's Bills.[8] From these, three main characteristics of a scheme can be distilled:

1. The statutory scheme will apply to cohabitants on separation provided that they have not opted-out

Most approaches provide for an opt-out either implicitly or explicitly. There is no explicit right to opt out in the Family Law (Scotland) Act 2006 itself but it is thought that it is possible under the general law for cohabitants to opt out of these provisions by making an

[4] Such as the couple in *Her Majesty's Attorney General v Akhter* [2020] EWCA Civ 122.
[5] Family Law (Scotland) Act 2006.
[6] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[7] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).
[8] Lord Lester's Cohabitation Bill in 2009 and Lord Marks' Cohabitation Rights Bill, which was first introduced in 2013 and mostly recently reintroduced in February 2020.

agreement.[9] It would be preferable, however, to make explicit provision for the opt-out and it must be an opt-out rather than an opt-in. As the Law Commission argued: 'If we want to remove more couples from the scope of property and trust law and the unsatisfactory outcomes that it often produces on separation, and thereby provide better basic justice between cohabitants, then an opt-in approach is not the answer'.[10]

The Law Commission and the Private Members Bills explicitly provide for opt-out agreements and stipulate what this should contain. These recommendations should be followed. It should be stated that the opt out agreement needs to be in writing, signed and make clear the parties' intention to disapply the statute. [11] The agreement should contain a statement by each of the parties that they have each separately received legal advice from a qualified practitioner as to the effect of the opt-out agreement and understand its effect. [12] The agreement should specify whether it is to apply either in all circumstances, or only to such extent, or in such circumstances, as may be specified in the agreement. The signature should be witnessed by at least one person and must be accompanied by a certificate by a qualified practitioner that the practitioner has given legal advice. Both the Law Commission and the Private Members Bills provided that proformas should be made available to enable these requirements to be laid out and met. The Law Commission reasoned that a religious marriage agreement, such as a Nikah contract, 'would only constitute an opt-out agreement if it indicated an intention to disapply the statute'.[13] Provision should be made for the parties to vary or revoke the agreement[14] and for an agreement to be disapplied by the courts where it is manifestly unfair taking into account the circumstances as the time the agreement was made and at separation, taking into account changes in circumstances between these dates. [15]

2. The scheme would apply if the couple had been cohabitants and this would be understood as having child together or living together for a certain amount of time.

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[9]Fran Wasoff, Jo Miles and Enid Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield foundation, 2010) 142. The Private Members Bills (Cohabitation Bill 2009 and Cohabitation Rights Bill 2020) state that their schema would apply unless there is an opt-out agreement in force or deed of trust (clause 6).

[10] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 2.86.

[11] Ibid paras 5.56 and 5.58.

[12] Cohabitation Bill 2009 and Cohabitation Rights Bill 2020, clause 12.

[13] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) paras 5.67.

[14] Cohabitation Bill 2009 and Cohabitation Rights Bill 2020, clause 13.

[15] Ibid clause 14; Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) paras 5.61 and 5.68.

Some of the different approaches provide more details as to the definition of the term cohabitants than others. The four definitions of cohabitants are: those who are or were 'living together as if they were husband and wife' or as if they were civil partners;[16] two adults 'who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other';[17] those who are 'are living as a couple in a joint household and (2) they are neither married to each other nor civil partners';[18] and two people who live together as a couple and either have a child together or have lived together as a couple for a continuous period of three years or more who are not married or in civil partnerships with each other or within the degrees of relationship in relation to each other.[19]

The less detailed definitions, however, are often then supported by a list of criteria to be taken into account in determining cohabitant status. In the Scottish model, this includes the period in which they have lived together, the nature of their relationship during that period and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.[20] The Irish model is even more detailed.[21] The Law Commission similarly highlighted 'some of the central factors that we think a court would wish to have in mind when deciding whether the parties' relationship was that of a couple' but also rejected the notion of a statutory list of criteria to assist with this definition on the basis that this could 'encourage a "box-ticking mentality"'.[22] The Law Commission and the Private Members Bills suggested that the test ought to be either that the couple had lived together for a specified number of years or had had a child together.[23] This would seem to be the appropriate threshold. As the Law Commission noted, 'no jurisdiction which has legislated in this field has confined remedies to cohabitants with children' and that there was 'evidence that cohabitants without children have the same potential to encounter unfairness on separation as cohabitants with children'.[24]

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[16] Family Law (Scotland) Act 2006 s 25
[17] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s 172
[18] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 31.3
[19] Cohabitation Bill 2009 and Cohabitation Rights Bill 2020, clause 2.
[20] Family Law (Scotland) Act 2006 s 25
[21] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s 172
[22] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) paras 3.18-3.19, 3.17.
[23] Ibid paras 3.31 and 3.63; Cohabitation Bill 2009 and Cohabitation Rights Bill 2020 clause 2.
[24] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307,

3. The scheme would allow a cohabitant to seek a financial order on separation if certain circumstances are met.

Here a variety of approaches have been suggested. The broadest approach is that found in Lord Lester's Cohabitation Bill, which simply says that an order can be made if 'having regard to all the circumstances, the court considers that it is just and equitable to make an order'. Most approaches, however, require evidence of an advantage or disadvantage. This is usually economic. The Scottish model focuses on economic disadvantage as a direct result of the cohabitation and judicial comments have underscored that it is based on the concept of fairness.[25] The Irish model provides that an order can only be granted if the applicant satisfies the court that they are 'financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship' in which case the order will be made if it 'is just and equitable to do so in all the circumstances'.[26] And under the Law Commission's proposals, financial relief would only be granted to the cohabitant 'based upon the economic impact of cohabitation' and only where ' the respondent has a retained benefit; or the applicant has an economic disadvantage as a result of qualifying contributions the applicant has made'.[27]

Each approach also provides a range of slightly different factors are for the court to take into account in determining whether there has been a disadvantage / advantage.[28] The Law Commission, for instance, states that the welfare of any children of both parties which will be 'the court's first consideration' but that a range of other factors including the finances of both parties and their conduct.[29] However, it is questionable what emphasis should be placed on conduct, especially given the advent of 'no fault' divorce. The Irish system also takes into account 'the duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another'.[30] It would be

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2007) paras 2.81 and 2.77.
[25] *Gow v Grant* [2012] UKSC 29, para 31.
[26] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s173.
[27] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) paras 4.32, 4.33. Lord Marks' Cohabitation Rights Bill follows the Law Commission proposals: see clause 8.
[28] See also the list in Cohabitation Bill 2009 and Cohabitation Rights Bill 2020, clause 9.
[29] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 4.38.
[30] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s173.

vital that the non-financial contributions of both parties are considered and that the court considers the changing circumstances of the relationship over time.

Conclusion

From the synthesis of these approaches, it would be straightforward to develop a scheme of cohabitation rights on relationship breakdown in England and Wales. Such a scheme is needed given the numbers of couples currently in cohabiting relationships and the continuing prevalence of the 'common law marriage myth', the current and on-going difficulties with obtaining slots for registrar marriage ceremonies, the popularity of weddings by independent celebrants and by celebrants representing belief organisations that are not currently legally recognised and the number of unregistered religious marriages. The introduction of opposite sex civil partnerships and the needed reform to the law on getting married (which is currently being examined by the Law Commission), though welcome, do not provide complete solutions and so an opt out law of cohabitation rights on separation is desperately needed to bring the law of England and Wales in line with our neighbouring jurisdictions and the social realities of relationships in the twenty-first century.

About the Author

Professor Russell Sandberg is Professor of Law at Cardiff University. His research interrogates the interaction between Law and the Humanities. He is author of *Law and Religion* (Cambridge University Press, 2011), the first textbook in the field; *Religion, Law and Society* (Cambridge University Press, 2014), which explores the interplay between the legal and sociological study of religion; and *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021), which argues that history should be at the beating heart of the law curriculum. He is editor or co-editor of seven edited collections and serves as the series editor of three book series published by Routledge (the ICLARS Series on Law and Religion, Transforming Legal Histories and Leading Works in Law) as well as the Anthem Studies in Law Reform.

The relationship between religion and family law has emerged as a particular focus of his work. His most recent book is *Religion and Marriage Law: The Need for Reform* (Bristol University Press, 2021), which argues that the current law has failed to keep up to date with the social reality of adult intimate relationships in the twenty-first century and which

proposes reform of the law on getting married and cohabitation rights. He was also co-investigator (with Professor Gillian Douglas, Professor Norman Doe, Professor Sophie Gilliat-Ray and Dr Asma Khan) of the first comparative empirical study of religious tribunals in England and Wales and their jurisdiction in relation to marriage and divorce, which was funded by the AHRC / ESRC Religion and Society programme.

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