



Cohabitation and the Law

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17 November 2009

I would like to set this topic in the context of the themes I presented to you at the start of my first lecture, on divorce, as relevant to the entire span of family law. One is the connection of morality in private life with morality in public life, or rather I should say this year, the lack of morality in private life and how this lack has been reflected in our public life. The other is the conflict of ideologies in the demands placed on us in family life - to be a good mother and stay at home in a stable relationship, to pursue individual happiness, to have the right to a private life with disapprobation or hindrance, to take care of our children, to take our rightful share of top jobs if we are women. The pursuit of individual happiness quite simply does not accord with the needs of young children. Our lack of judgmentalism in private life, as opposed to health, or human rights or environmental matters, where there is a widely approved set of beliefs from which it is hard to dissent, means that there is no will to present one lifestyle as better than another in the case of children. You will no doubt be able to point to internal inconsistencies in my own views on the law and cohabitation.

There is apparently a widespread but erroneous belief that there exists something called common law marriage. There does not and did not. There is no court power to adjust rights and property at the end of a cohabitation as such, although a cohabitant may claim a share of property that had been bought by both with contributions from both parties, just as any other property owner may do. Sched. I of the Children Act 1989 also makes provision for the upkeep of children of cohabitation, including lump sums for the mother and orders for her to continue to occupy the family home during the minority of the children, although it may then have to be sold in order for the legal owner to recover his capital.

A recent leading property case between former cohabitants is *Stack v Dowden* [2007] UKHL 17. The pair were in a relationship for 27 years and had four children. The house they occupied was bought in joint names, but, unusually, she was a high earner and made a greater cash contribution to the acquisition than he did. The House of Lords, while reaffirming that a property in joint names would normally be split equally where there was a demand for sale, held that this presumption could be rebutted by the unusual circumstances of this case (the couple had kept separate finances) and that the shares should be 65% in favour of Ms Dowden and 35% in favour of Mr Stack (the house sold for £750K). I have, incidentally, no doubt in my mind that had the bigger contributor in this case been Mr Stack, the court would have found that the joint ownership in the registration was conclusive - another case of paternalism. Moreover the extra share (£111K) of the proceeds that Ms Dowden was able to hold on to must have been consumed by the costs of an appeal to the House of Lords. Mr Stack's share was reportedly swallowed up by his legal costs of £100K.

Cohabitation is gradually gaining more recognition in English law, without any debate until very recently about the rights and wrongs of it. I can only echo what I said in my second lecture on maintenance, that women do not need and ought not to require to be kept by men after their relationship has come to an end. My preference is for the rights of the individual, or human rights, in this instance autonomy, privacy, a sphere of thought and action that should be free from public and legal interference, namely the right to live together without having a legal structure imposed on one without consent or contract to that effect. It is better not to have legal interference in cohabitation and leave it to be dealt with by the ordinary law of the land, of agreements, wills, property and so on. Recently special laws for cohabitants, that would treat them like married couples when divorcing or on death, have been proposed by the Law Commission and by Lord Lester in a private bill of a rather different nature. But I would argue that cohabitation law retards the emancipation of women, degrades the relationship, takes away choice, is too expensive and would extend an already unsatisfactory maintenance law for married couples to another large category. I rate most

highly personal autonomy and the use of agreements to settle legal boundaries with others, the respect for individuals' expectations and contributions, rather than stereotyping and fitting every couple into the traditional marriage mould.

By way of contrast, had Ms Dowden gone to court in Australia (Family Law Amendment (de facto Financial and Other Measures Act 2008)), the property ownership would have been determined according to past contribution and future need; cohabitation agreements are encouraged and there is a system of registration of cohabitation. Briefly, there are marital property rights for cohabitants who have a child or have lived together for 2 years. In New Zealand the Property (Relationships) Act provides that relationship property (home, chattels, post-relationship acquisitions) are shared equally after 3 years cohabitation, subject to contracting out.

In the US by way of contrast, there has been a retreat from legal recognition of cohabitation as the values of marriage have become recognised once more. But the influence of contract and agreement is very strong in the US. The watershed case there was *Marvin v Marvin*, (California 1976) concerning the actor Lee Marvin and his girlfriend of 6 years, Michelle Triola. After their relationship ended she claimed 'palimony' from him, seeking a share in his assets and rehabilitative maintenance as if she were married to him. The court held that she had no marital-type claim, but that if there were a contract between them for her upkeep, that would be enforceable in modern circumstances. It turned out that there was no such contract on the evidence, but the case came to establish the notion that cohabiting couples might have contractual claims against each other. Michelle went on to become the long term girlfriend of Dick van Dyke.

The statistics in the UK are striking. 14% of couples are cohabitants, up from 9% 10 years ago. 13% of children live with the 2 million cohabiting couples who have 1,250,000 dependant children. 75% of cohabitants under 35 hope to marry (British Household Panel Survey.) Half of cohabiting couples have one member under 35, and the median duration of the cohabiting relationship is 2 years, after which they marry or separate. 65% of cohabiting unions with children dissolve; half of cohabiting parents split before the child is 5. 35% of cohabitants' children will find themselves with both parents up to the age of 16, whereas 70% of children of married parents do likewise. (Kiernan, K, LSE CASE paper 65, 2003, Ermisch, J, The achievements of the British Household Panel Survey, 2008). Cohabitation is made less stable by childbearing, according to the statistics, as more of the couples without children stay together.

Quite apart from the theoretical problems of forcing a marital structure on those who have not consented to it, and normalising a lifestyle that is not good for children, there are problems of definition. Is a sexual relationship necessary? Why are two family members excluded from consideration, for example, sisters who have lived together for decades, and whose tax position on the death of one of them is worse than if they were two women in a relationship?

The length of time together that merits recognition as a special relationship also differs country by country. In a recent bill in the Lords, Lord Lester suggested two years, this being the median duration of a cohabitation; he was prepared to go up to five to save the bill, but on reflection I thought that ten was a better gateway, if there was to be one at all, given that only 5% of cohabiting unions in this country last for more than 10 years. Any law that was passed would have to be very clear about this, otherwise substantial amounts of private resources or legal would be spent in arguing that although the relationship had endured for less than the required time it was exceptional; let alone would one want to have a period that was retrospective or allowed to be broken by short intervals of separation. Those were some of the defects of the Lester Bill, which would have opened the door to out-of-court harassment because of its retrospectivity and lack of clear definition of a cohabitation. Every new law, it is said, gives ten good years of work to lawyers while the interpretation is fleshed out in litigation; a new law on cohabitation would be a bonanza for lawyers at a time when private family law work is declining for lack of legal aid and resources. Peers with judicial experience debating this in the Lords claimed that cohabiting parties need 'protection', and that the courts would give it to them sensibly; but what judges do not see are the numbers of cases that do not get to court but consist of a claim by one former cohabitant which may not be legally sound but results in a payment simply to end the stress of possible litigation - call it blackmail if you like.

What are the problems of litigation - or the threat of litigation - between two people who once lived together? Litigation will of course centre on money. It will ape the maintenance law that applies to the formerly married. In my last lecture I explained at length that that law, although well meaning, has no overriding objective, has had no parliamentary scrutiny for 40 years, is expensive, too heavily reliant on judicial discretion and the changing perspectives of the judiciary. Yet this is the very law that Lord Lester's

Bill would have applied to cohabiting couples, even retrospectively. There could be pressure behind the scenes, because without certainty of outcome one of the couple will hassle the other for a settlement. The Law Commission did not call, in its proposals for reform, for the application of the existing maintenance law. Its weaknesses are such that we should not extend them to cohabitation. Lord Lester's bill would also have opened action to those whose cohabitation ceased before the Bill came into force. The irony of English law is that prenuptial and postnuptial agreements remain unenforceable even though entered into freely by legally advised parties. Yet there was this attempt to impose, on people who cohabited a long time ago, in the belief that it was a private affair, and had chosen it because there were no legal consequences, without commitment, a legal regime imposed on them years later.

Whatever might happen by way of law reform in the future, it is essential that it is widely publicised so that people know what they are letting themselves in for. When I taught male students in Oxford years ago about property and cohabitation, I used to warn them to conduct their love affairs in silence. This was because the consequences of a shared home in property law might depend not only on the way in which the title is registered and shared, but also on expectations arising from what is said and relied on. So if those young men said, come and live with me and I will take care of you - you don't need your own place - they might well have found that they were in debt to the tune of at least half the property in their own names when the relationship came to an end, as illustrated by Stack, albeit that the title was registered in both names there. At least my students knew the pitfalls.

There is also a shortage of legal aid for litigation. Family lawyers have been complaining recently that a cut of £6m in legal aid will harm the most vulnerable children and mothers, but the government is adamant about cuts. How then can it be right to spend legal aid on this sort of case? And any litigation will be in open court, now that the family courts have been opened up to the public. Every couple caught up in this situation will have to say to themselves that the details of their commitment, their relationship or non-relationship, may be all over the press and may have to be recited in a courtroom full of journalists. We should recall Art 8 of the European Convention on Human Rights, the right to respect for a private and family life, and the fact that we all have a right to follow a path of relationships that suits us. This is sometimes outside the law. There is no disapproval of that. According to Professor Stephen Cretney, former Law Commissioner and family lawyer, litigation in the context of intimate relationships is very frequently if not always destructive. Of course it is right to provide a remedy for injustice but care must be taken that the cure is not provided at too great a cost. It is not the function of the legal system to provide a remedy for every situation in which someone could argue that she has plausibly suffered loss. Certainly the legal system should not provide an opportunity for what could easily become a form of harassment.

Those who want to create a legal system for cohabitants have two strong scenarios to persuade the legislators. One is the polygamous wife, brought from abroad and 'married' but not civilly, only religiously, to a man with other wives, who then leaves her. What maintenance is there for her? If she has children, Sch 1 of the Children Act applies, shortly to be described. If not, there is a gap in the law if such a person is to be maintained. But our Minister of Justice, and ordinary people too have recently said that English law should not cater for polygamy, and it would be odd to pass a law about cohabitants solely in order to cater for the polygamous wife.

The other argument in favour is the need to support children of such a relationship. The classic case on this is *Burns v Burns* [1984] Ch 317. The couple had lived together in his house without being married for 19 years, raised two children and she had been a typical housewife. Her contributions, being non monetary or very small, did not earn her a share in the house when they split. This case is generally cited as an example of the hardship that can arise. But this argument overlooks the passage since that date of Sch 1 of the Children Act 1989. This provides that a parent of a child may apply to court for the other parent to make periodical payments to the child or the carer parent, or lump sums, or a transfer of property. The payments may last as long as the child is in education and may be made to the child. This takes care of the argument that cohabitants must be responsible for their children and indeed the welfare of the children is paramount in this statute. Sch 1 could be widened if necessary, without trespassing on the principle that I espouse, the freedom of cohabitants to live outside the law while being responsible for their children.

The best thing for children, as we have seen from the statistics, is to live with two married parents. The construction of a forced law of cohabitation may deter more men from making any commitment at all, let alone marriage, against a background of widespread reluctance on the part of men to sign up to regular child support, whether through private law or a state agency. We ought not to risk adding to the number of one parent families, by encouraging men to walk out before the threshold qualifying period, say two years,

in order to avoid financial liability, when all recent studies show that Britain's children are the unhappiest and poorest in Europe. According to a Unicef study in 2007 and one by York University in 2009, Britain's children are the unhappiest in the West. The league table considered underage sex, poverty, smoking, drugs, food, time spent with parents, dislike of school and self image, and living in one-parent families (only the US has a higher rate). There is other research by the Equal Opportunities Commission pointing to the deprivation suffered by children whose fathers are absent and to the special contribution made by a father's presence to the welfare of the child (The Millennium Cohort Study 2007). So concern for children should keep us from doing anything that encourages more cohabitation or gives it the cloak of quasi-marriage.

I am not however putting out a moral message; far from it. The message is one of freedom of choice and respect for rights. Why should we make them pay when young educated people live together, or when a young woman with a good career is deserted by the young man whom she had hoped would marry her but instead demands money from her? What are the expectations of cohabitants? Whatever they are, they know that they are not married, and they have chosen to avoid the married state. There is nothing to stop them marrying, for divorce is easily enough obtained if one is already married. If they are dissatisfied with their legal lot, why not marry in order to obtain marital rights? And if they are dismissive of marriage as a mere piece of paper, or an unnecessary legal bond, then why so keen to turn to the court for compensation in reliance on the law when the free union ends? Couples may be trying out their relationship before taking the step of marriage, and we should not impose the penalties of a failed marriage on those who were experimenting in order to avoid this outcome. There should be a corner of freedom where couples may escape family law with all its difficulties. Cohabitation is not marriage, now or historically, and people ought to have the freedom to try alternative forms of relationship, not to have one form imposed on them, especially one that treats women as perpetual dependants.

Research shows that cohabiting couples have their own good reasons for not getting married. They have different expectations and intentions, and these should be met; indeed it is time that the expectations of a man entering cohabitation should be recognised to be as deserving of consideration as those of the woman. Some do not marry because they wish to keep benefits that would otherwise be terminated, for example, periodical payments from a former divorce settlement. They are well aware of the situation they have placed themselves in. A unique commitment 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, if not millennia. This is not an argument for the superiority of marriage or even its centrality but rather 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 the formerly cohabiting couple the status and structure of traditional marriage, after they have ended the relationship and therefore at the most inappropriate time. In effect, a bill to establish cohabitation law would convert the relationship into marriage *ex post facto*, and this is ironic if it comes from the champion of preventing forced marriages.

Legislation is hard because we have no consensus about women in our society. We are inconsistent. On the one hand we hear that women should expect half of all top jobs and equal salaries; on the other we hear that a woman's job is to stay home and that, whether she has children or not, living as part of a couple is somehow damaging to her career prospects and that she should be compensated for merely sharing her life for a while with a man. What message would such a Bill give to young girls contemplating further education, when it opens the way to huge handouts to women who have been fortunate enough to live with a rich man for a while, while others, equally deserving, will get nothing at the end of a relationship because there are no assets available to be shared? The Lester Bill would be a windfall for lawyers but for no one else except the gold digger. It would be bad for Bridget Jones; bad for commitment, stability and children; and a breach of 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'. Some of the definitions of cohabitation are dependent on probing to test the degree of commitment of the couple when the relationship is already over and being seen in retrospect. Research tells us that cohabitants have different perceptions of the union: the man normally does not assume commitment until he has made a clear decision about their future together, whereas the woman will see it in the fact of her moving in with him. Litigation would rarely produce enough sufficient assets to make a difference, except in the wealthiest of cases. It would open the door to more nastiness and stress at the end of relationships.

What if anything should be done to help cohabitants sort out their legal problems? We should build on their autonomy rather than take it away. Their contracts should be recognised; they should be encouraged to make wills leaving their property to each other if that is their wish (needless to say, the proposals of automatic inheritance on intestacy for cohabitants in the recent Law Commission Consultation Paper no. 191, Intestacy and Family Provision, (2009) part 4 suffer from the same illogicalities as those already described); they should have explained to them that joint registration of the home in both names will mean an equal split of the equity on separation; they could nominate each other as beneficiaries in insurance and pensions. Above all there should be explained loudly and clearly that living together does not give rise to legal rights.

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