Trusting in trust(s): the family home and human rights

Simone Wong

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Abstract: In July 2002, the U.K. Law Commission published its Discussion Paper No. 287 on home-sharing. The conclusion drawn by the Law Commission was that it would not be possible to devise a statutory scheme for the resolution of family property disputes which is both workable and flexible enough to deal with the wide range of personal relationships that exist. It further took the view that, with appropriate changes to the way in which trusts principles are currently interpreted and applied by the courts, these trusts principles are sufficiently flexible and coherent to deal with the question of ascertaining and quantifying property rights over the family home. The aim of this paper is to examine the implications of these particular conclusions drawn by the Law Commission for both the law of trusts and the resolution of family property disputes between cohabitants. In particular, the paper will consider the extent to which trusts law remains a workable and desirable option and whether any mileage may be gained by drawing on the human rights culture that is emerging in U.K. legal and political discourse.

Keywords: constructive trusts, disputes, family property, Law Commission Discussion Paper No. 278 (2002), human rights

INTRODUCTION

In July 2002, the U.K. Law Commission published its long awaited Discussion Paper on home-sharing (2002). The Law Commission's remit was not confined to marital relationships or cohabitation, but extended to a wider range of relationships to include "friends and others who may be living together for reasons of companionship or care and support" (2002, para. 1.1).[1] One of the more striking conclusions made by the Law Commission is the impossibility of drawing up a sufficiently wide property-based statutory scheme for the determination of shares in the family home, which is capable of operating fairly and evenly across the diverse circumstances in which individuals may share a home (2002, para. 1.31

[1] The remit of the Law Commission was, to some extent, more extensive since it extended to home-sharers and thus placed no limits on the types of relationships that might be considered. However, its remit was also narrower in that the project focused primarily on the issue of property rights over a shared home and was not one on cohabitation. The Law Commission had in fact taken pains to point out in the Discussion Paper that its remit was confined to the matter of ascertaining and quantifying property rights in the shared home; it was not concerned with cohabitation and the issue of the rights and obligations of cohabitants.

and Part VI).[2] More interestingly, the Law Commission has placed the resolution of family property disputes right at the doorstep of trusts law, stating that "the trust of land offers a machinery for the establishment of beneficial interest which is both coherent and flexible" (2002, para. 2.40). The Law Commission has, *inter alia*, recommended that the issue of beneficial ownership of the shared home would be more appropriately dealt with by trusts principles and that the courts should develop a more flexible approach towards inferring common intention, in assessing qualifying contributions and in quantifying beneficial entitlement. To a large extent, the finding of the Law Commission is neither particularly new nor novel. The resounding call for a more flexible approach has been made time and again in a plethora of literature that has criticised the narrowness of the 'common intention' test formulated by Lord Bridge in *Lloyds Bank* v. *Rosset*.[3]

It is, however, disappointing that the Law Commission has not published a Consultation Paper with provisional proposals for the reform of the law. The conclusions drawn in the Discussion Paper may, in some respects, be criticised for being somewhat conservative. Certain commonwealth jurisdictions such as Australia[4] and New Zealand[5] have introduced legislation to resolve the ambiguities and weaknesses of the existing equitable principles so as to cope better with property disputes arising in a wider range of personal relationships.[6] It would have been useful to see more comments from the Law Commission regarding the alternative schemes used by other Commonwealth countries. The Law Commission had further concluded that, although the trusts principles are sufficiently coherent and flexible for the establishment of beneficial interests in the shared home, the current requirements for proving the existence of a trust are inadequate to deal with the typical informality with which parties sharing a home often deal with each other (2002, paras. 2.40 and 2.112). Thus, a more flexible approach must be taken in order for the equitable principles to respond more rigorously to the resolution of family property disputes.

The aim of this paper is to examine the implications of the Law Commission's conclusions regarding the law of trusts and its role in the resolution of family property disputes between cohabitants. These conclusions are significant in that

[2] The Law Commission had attempted to draw up a scheme which is contributions-based (see Part III) but concluded that such a scheme would not be sufficiently flexible to deal with the diverse circumstances existing in personal relationships. Moreover, it may cause greater injustice to certain parties when a strict contributions-based approach is taken in assessing their entitlement to a share in the family home and quantification of that share.

[3] [1991] 1 A.C. 107. In *Rosset,* Lord Bridge stated the criteria for imposing a constructive trust as being, firstly, the parties' common intention to share, whether express or implied, and, secondly, the claimant's detrimental reliance on such intention. For criticisms on the *Rosset* test, see Wong (1998); Wong (1999); Bottomley (1993); Eekelaar (1987); Halliwell (1991); Glover and Todd (1996); Lawson (1996); Gardner (1993).

[4] In Australia, some states, e.g. New South Wales, Victoria, and the Australian Capital Territory, have passed legislation to regulate the adjustment of property rights between parties to a non-marital relationship. The N.S.W. Property (Relationships) Act (P.R.A.) 1984 (formerly the De Facto (Relationships) Act 1984) provides the courts with the power to make property adjustment orders on the breakdown of a wider range of relationships, which include not only cohabitants but also others in familial or domestic relationships (as defined in s. 5 P.R.A. 1984). For a more detailed discussion of the P.R.A. 1984, see Wong (2001).

[5] Property (Relationships) Act 1976 which applies to both married couples and cohabitants.

[6] Cf. Law Society (2002) where the Law Society has recommended a statutory framework governing the rights of cohabitants. It should, however, be noted that the Law Society's project was dealing with the broader issue of cohabitation and not just the resolution of property disputes over the shared family home. Given that the focus of this paper is on the potential development of existing equitable principles, a full discussion of the Law Society's proposals for the reform of the law is therefore beyond the scope of this paper.

the resolution of family property disputes is located squarely in the need for the development of equitable principles that are much more flexible and adaptable to the informality of personal relationships. The call for equitable principles to be more flexible and adaptable in these disputes is not new and has, as mentioned earlier, been noted by many commentators. The more challenging question is whether, a decade on from *Rosset*, there are any indicators pointing to the possibility of such flexibility and adaptability developing in the equitable principles. In that respect, the paper will argue that, given the emergence of a discourse of human rights in U.K. legal culture, there is potential for human rights arguments to influence the development of such a flexible and holistic approach. The paper will seek to argue that the Human Rights Act (H.R.A.) 1998, which purports more directly to incorporate the European Convention of Human rights into English law, will have an indirect effect on the development of the common law. Equitable principles pertinent to family property disputes will therefore be affected in so far as courts are likely to be influenced by the values enshrined in the rights of the Convention, more particularly the principles of non-discrimination and substantive equality. This will in turn facilitate the development of the more flexible approach envisaged by the Law Commission.

THE ROLE OF THE HUMAN RIGHTS ACT 1998 IN FAMILY PROPERTY DISPUTES

In *Rosset*,[7] Lord Bridge stipulates two requirements for a common intention trust. Firstly, there must have been at some time prior to the acquisition, or exceptionally at some later date, an arrangement, agreement or understanding reached by the parties (*ibid*., p. 132). Once a finding of such intention to share is made, the claimant is required to show that s/he has acted to his or her detriment in reliance on the agreement. Where there is no evidence of an express common intention to share, an implied intention may be inferred from the parties' conduct. Lord Bridge, however, takes a narrow view regarding the types of conduct that will justify the inference of an implied intention being drawn. He states that only direct contributions to the purchase price, whether initially or by payment of mortgage instalments, will readily justify the inference of a common intention (*ibid*., p. 133). In requiring direct financial contributions to the purchase price, *Rosset* has been criticised both for its doctrinal ambiguity and its discriminatory effect on female claimants. It discounts the significance of all indirect contributions, both financial and non-financial, even if they are substantial, in establishing an implied common intention to share.[8] This prerequisite ignores much of the existing statistical data that point to the fact that, despite the increasing numbers of women in employment, they remain in a weaker economic position.[9] This is in part be due to

[7] *Supra*, n. 3.

[8] Wong (1998). See also Eekelaar (1987); Gardner (1993); Bottomley (1993). The Law Commission has recognised how the strict application of the 'common intention' requirement and the emphasis on direct financial contributions to the purchase of the property are not well suited to the typical informality of many home-sharing arrangements. Firstly, the need to prove the requisite intention to share is often unrealistic because the lack of formality in these relationships means that such sharing intention is often not articulated in any real sense. Secondly, the focus on direct financial contributions fails to recognise the realities of most cohabiting relationships and discounts the way in which the parties may organise the family income.

[9] For a more detailed discussion on this, see, for example, Pahl (1989); Neave (1991); Pahl (1990); Vogler and Pahl (1994). A recent survey carried out by the Equal Opportunities Commission (1999) indicates that there still exists a disparity in the income-earning capacity of men and women. Women in full-time employment generally earn 82 per cent of the average hourly wage of male full-time employees, while women in part-time

the continued existence of a sexual division of labour in relationships, where women with family and caring responsibilities are more likely to face disruption in employment.

With the passage of the H.R.A. 1998, there is, at present, an ongoing debate about the extent to which the Act will affect the common law. The potential applicability of the H.R.A. 1998 to family property disputes raises several issues. Firstly, there is the question of whether a cohabitant's claim will fall within the material scope of any of the Convention rights. In that respect, the Convention rights that are likely to be of relevance to a claimant are Article 8 (right to respect for private and family life, home and correspondence), Protocol 1, Article 1 (right to peaceful enjoyment of possessions), Article 14 (prohibition of discrimination) and Protocol 12, Article 1 (general prohibition of discrimination).[10] Article 14 and Protocol 12 are especially significant in that they provide protection against non-discriminatory treatment. Secondly, there is the further issue of whether the H.R.A. 1998 will apply to disputes that are purely private in nature.

The material scope of the Convention rights – Articles 8 and 14, Article 1 Protocol 1

The principal aim of Article 8 is to ensure protection against the arbitrary interference by public authorities in any one of the four following aspects of an individual's life: private life; family life; home; and correspondence. The jurisprudence of the European Commission and Court of Human Rights indicates that the right to respect under Article 8 provides the basis for preserving an individual's right in matters such as maintaining privacy of the home environment, her choice in developing private relationships with others, and the way in which they constitute a family. Cases like *Belgian Linguistic Case (No. 2)*,[11] *Marckx* v. *Belgium*[12] and *Kroon* v. *Netherlands*[13] further illustrate that the 'right to respect' imposes both positive and negative obligations on the state.[14] This suggests that a state is not only required to refrain from unjustifiable interference but also to provide effective respect for these four protected aspects of an individual's life.[15]

The European Court has generally been inclined to adopt a broad definition of 'private life' which would extend to cover the right to develop one's own personality and to create relationships, including sexual relationships, with others.[16] Similarly, 'family life and the family home' is not confined to formal relationships and legitimate arrangements. The *Kroon* case illustrates that, although living together may be a prerequisite for the existence of a relationship, other factors may be considered to determine whether a particular relationship has sufficient constancy

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work earn, on average, 60 per cent of the average hourly pay of male part-time employees.

[10] Although the U.K. has not ratified Protocol 12, the potential for human rights arguments couched in terms of non-discrimination and substantive equality should nevertheless be noted.

[11] (1968) 1 E.H.R.R. 252.

[12] (1979) 2 E.H.R.R. 330.

[13] (1994) 19 E.H.R.R. 263.

[14] See also *X., Y. and Z.* v. *U.K.* (1997) 24 E.H.R.R. 143.

[15] While the negative obligations imposed by Article 8 are clearly confined to non-interference by states, the scope of a state's positive obligations is not as clear-cut. For example, in *X. and Y.* v. *Netherlands* (1985) 8 E.H.R.R. 235, the European Court held that the state's positive obligations may extend to securing respect for private and family life not only by public actors but also by private individuals.

[16] *Niemietz* v. *Germany* (1992) 16 E.H.R.R. 97; *Dudgeon* v. *U.K.* (1981) 4 E.H.R.R. 149.

to amount to a *de facto* familial relationship. Moreover, the right to respect for the home transcends ownership rights – it extends to and includes a variety of other rights (Rook, 2001, pp. 105-106).[17] Respect for the home is further not concerned with whether an individual has a legal or an equitable right of occupation of a specific property (Rook, 2001, p. 10). The essential feature of treating a property as one's home lies not in the ownership of the property but in living, or intending to live, in it as a home.[18] However, Luba (2002) argues that this does not impose an obligation to 'respect' an occupier's right of enjoyment of every residential premises. The relevant issue is whether the premises are being occupied as the *de facto* home of the applicant.[19]

Protocol 1 Article 1, on the other hand, provides for the right to peaceful enjoyment of one's possessions. Again, the European Court has favoured a wide interpretation of the concept of 'possessions' which extends to include land, contractual rights and leases, shares, patents, debts and the goodwill of a business.[20] Like 'home' under Article 8, the concept of 'possessions' is not limited to assets in which an individual has formal ownership rights and will include assets, provided that the applicant has some genuine interest in them. Cases like *Marckx*, *Sporrong* v. *Sweden*[21] and *Lithgrow* v. *U.K.*[22] illustrate that a violation of Protocol 1 Article 1 will require an applicant to establish successfully the applicability of one of three possible rules. The first is that the peaceful enjoyment of the applicant's possessions has been interfered with. The second is that the applicant has been deprived of possessions by the state. Thirdly, the applicant's possessions have been subjected to control by the state.[23] A deprivation will normally involve a transfer of ownership wherein the rights of the owner are extinguished (Rook, 2001, p. 63).[24] Control of use, on the other hand, involves interference by the state in the use of the asset, for example, by placing restrictions on its use. In these situations, there is a curtailment rather than a loss of the rights of ownership over an asset.[25] This, as Rook (2001, p. 92) rightly observes, is consistent with the concept of 'property' as a bundle of rights. Where only one right out of that bundle of rights is restricted or lost, but the owner retains substantively all other rights over that asset, there is merely a control of use and not a deprivation. However, the distinction between deprivation and control of use is, in practice, not always

[17] The rights protected will extend to a right of access to the home, a right of occupation of the home and a right not to be excluded or evicted from the property.
[18] See *Gillow* v. *U.K.* (1986) 11 E.H.R.R. 335.
[19] Luba (2002) cites *Mabey* v. *U.K.* (1996) 22 E.H.R.R. CD 123 as an example that, for the purposes of Article 8, 'home' is not confined to properties which have been lawfully occupied or established as such.
[20] For a more detailed discussion, see Rook (2001), at pp. 96-104.
[21] (1982) 5 E.H.R.R. 35, a case which involved expropriation permits and prohibition notices issued in respect of properties located within certain proposed redevelopment sites by the Swedish government.
[22] (1986) 8 E.H.R.R. 329 (which involved the nationalisation of certain industries in the U.K.).
[23] Sermet (1992) describes the first rule as a catch-all category which provides for the inclusion of any type of interference by the state. The second rule deals more specifically with deprivation of possessions and the third rule, the control of use.
[24] See, e.g., *James* v. *U.K.* (1986) 8 E.H.R.R. 123 (the transfer of a landlord's freehold reversionary interest to the leasehold tenants); *Howard* v. *U.K.* (1987) 9 E.H.R.R. 91 (compulsory purchase of the applicant's land by a local authority); and *Lithgow* v. *U.K.* (1986) 8 E.H.R.R. 329 (nationalisation of certain industries).
[25] The retention of ownership rights, however, is not in itself conclusive that there is no expropriation. Cases like *Papamichalopoulos* v. *Greece*(1993) 16 E.H.R.R. 440, *Vasilescu* v. *Romania* (1998) 28 E.H.R.R. 241 and *Holy Monastries* v. *Greece* (1994) 20 E.H.R.R. 1 illustrate the possibility of a *de facto* expropriation of the property even where the owner retains ownership of the asset.

obvious. One test that the European Court has adopted is to view deprivation as requiring conduct by the state which removes all meaningful use of the property.[26]

A claimant in family property disputes may also attempt to draw support from Article 14 which provides for the prohibition of discrimination. Like Article 8 and Protocol 1 Article 1, Article 14 is not an absolute right and does not, therefore, confer an absolute guarantee against discrimination. It embraces a parasitic nature by providing protection against discrimination that prevents an individual from enjoying the Convention rights (Harris, O'Boyle and Warbrick, 1995, p. 463; Monaghan, 2001).[27] While an actual violation of any of the substantive rights need not be established so as to establish a concurrent violation of Article 14, the parasitic nature of Article 14 has resulted in its marginalisation once a violation of one of the other substantive rights has in fact been established.[28] Nevertheless, the European Court has indicated in some cases that Article 14 is not wholly parasitic in nature and does encompass an element of autonomy. More recently in *Abdulaziz, Cabales and Balkandali* v. *U.K.*, the European Court held that:

> Although the application of Article 14 does not necessarily presuppose a breach of [the Convention] provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.[29]

This suggests that, even though a particular measure does not of itself amount to a violation of a Convention right, there can still be a violation of both that Convention right and Article 14 taken in conjunction, if that measure is applied in a discriminatory manner which is incompatible with Article 14.[30]

A further issue that arises in relation to Article 14 is the meaning of discrimination. According to van Dijk and van Hoof (1990), the prohibition against discrimination in Article 14 embraces two principles – equality and non-discrimination – and discriminatory treatment will necessarily involve a violation of these two core principles. Thus, for Article 14 to be engaged, there has to be "(a) differential treatment of (b) equal cases without there being (c) an objective and reasonable justification, or (d) proportionality between the aim sought and the means employed is lacking" (van Dijk and van Hoof, 1990, p. 539).[31] The equality principle underpinning Article 14 is, however, not confined to assessing equal treatment in

[26] *Fredin* v. *Sweden* (1991) 13 E.H.R.R. 784, where a statute was passed which enabled the Swedish government to revoke all extraction licences within ten years from the time the statute came into force. The applicant, who had incurred expenditure in exploiting the licence for the extraction of gravel on his land, had his licence revoked within seven years of the statute coming into force. The European Court held that the revocation of the licence had not deprived the applicant of all meaningful use of his land. Thus, there was no deprivation of property within the meaning of the second rule of Protocol 1 Article 1 but only a control of use.
[27] See also. *Rasmussen* v. *Denmark* (1984) 7 E.H.R.R. 371, at para 29; *Belgian Linguistic Case (No. 2)*.
[28] *Dudgeon* v. *U.K.* (1981) 4 E.H.R.R. 149; *Botta* v. *Italy* (1998) 26 E.H.R.R. 241; *Smith and Grady* v. *U.K.* (2000) 29 E.H.R.R. 548. In *Botta* (lack of provision of disabled facilities) and *Smith and Grady* (discharge from the armed services on the grounds of the applicants' homosexuality), the applicants' failure to establish successfully a violation of Article 8 led the European Court in both cases to hold that it was unnecessary to consider the issue of a violation of Article 14.
[29] (1985) 7 E.H.R.R. 471, at para. 71.
[30] See, e.g., the *Marckx* case where the legislation restricting the *inter vivos* or testamentary disposal of property by a mother to her illegitimate children was found by the European Court not to be in violation of Protocol 1 Article 1. Nevertheless, the discriminatory effect of the legislation, i.e. applying only to unmarried mothers, led the Court to hold that there was a violation of Article 14 in conjunction with Protocol 1 Article 1.
[31] See also *Abdulaziz, Cabales and Balkandali* v. *U.K.*.

equal cases, that is, formal equality. It extends to securing substantive equality in that there should not be disproportionate unequal treatment even in unequal cases. Given the generous approach generally taken by the European Court towards the margin of appreciation doctrine and the proportionality principle, coupled with the non-free-standing nature of Article 14, this Convention right is not particularly strong in protecting against discriminatory practices.

Applicability of the Convention rights in family property disputes

An applicant alleging a violation of any one or more of the Convention rights will have to establish that her claim falls within the material scope of those rights. In the case of Article 8, the applicant must show that her rights fall within one of the four nominated interests, i.e. private life, family life, home and correspondence. As Warbrick (1998) rightly points out, Article 8 merely provides for the right 'to respect' for these four interests rather than a right to the interests themselves. It does not, therefore, provide any guarantee of a right to a home – only respect for the premises occupied as a home from unjustified interference. This means that, although 'home' is not necessarily confined to premises in which the claimant has proprietary rights, it is unlikely that the right to respect for the home will extend to include a property-conferring right, i.e. to grant proprietary rights where none previously existed (Allen, 1999; Howell, 1999). Family property disputes are often fuelled by the need to establish such rights, e.g. through a constructive trust. Any extension of the material scope of Article 8 to a property-conferring right would be controversial *per se* since the existence of such a right is not reflected in the jurisprudence of the European Court.[32] Hence, the right to respect for the home under Article 8 cannot be interpreted as comprising an obligation to confer or to secure proprietary rights to an individual.

The question of whether a cohabitant's claim will fall within the material scope of Protocol 1 Article 1 is equally controversial. Once again, the jurisprudence of the European Court indicates that, notwithstanding the broad meaning given to the concept of 'possessions', Protocol 1 Article 1 presupposes the existence of some proprietary interest in the asset. The Convention right is not intended to protect rights which are not already in existence (Rook, 2001, pp. 60-61; Howell, 1999). No doubt the English courts traditionally view the constructive trust as being institutional in nature, that is, it arises by operation of law and protects a pre-existing proprietary right. A cohabitant's claim, nonetheless, revolves around the finding of the existence of that pre-existing right. Until the claimant is able to establish successfully the presence of the requisite common intention and detrimental reliance to support the existence of a constructive trust, no proprietary interest exists that falls within the meaning of 'possessions'.[33]

A female claimant may attempt to argue that the courts' unwillingness to treat indirect financial and non-financial contributions as being relevant to the issue of common intention may amount to a violation of Article 14 since it is more likely to

[32] Allen (1999) argues that Article 8 aims at preserving an individual's right of choice in personal and familial relationships and to allow an element of privacy. The extension of Article 8 to a property-conferring right was not within the original contemplation of the drafters of the Convention.

[33] Howell (1999, p. 295) uses proprietary estoppel as an example to illustrate the limitations of Protocol 1 Article 1. She argues that, as long as the equity which a claimant has remains in an inchoate state and does not acquire full-fledged proprietary status, it cannot fall within the concept of 'possessions'.

discriminate against her than a male claimant. As Article 14 does not provide an absolute guarantee against discrimination, this particular argument may not hold up. The claimant is only likely to engage Article 14 where she is able to show that her claim falls within the material scope of one of the other substantive Convention rights, say Article 8 and/or Protocol 1 Article 1. Given the remote possibility of such a claim falling within the material scope of either of those Convention rights, it seems unlikely that Article 14 will be applicable as well. There may, however, be greater potential for pushing human rights arguments into the area of family property disputes if the U.K. were to ratify Protocol 12.[34] The aim of Protocol 12 is to widen the existing scope of Article 14 and to provide a general free-standing right against discrimination. This may enhance the claimant's prospects of successfully arguing a violation on the basis of discrimination without having to annex her discrimination claim to another Convention right (Moon, 2000). Nevertheless, the applicability of Protocol 12 may be curtailed by the fact that much will depend on the extent to which the effects of sexual division of labour and the little significance placed on indirect financial and non-financial contributions may be viewed by the courts as being forms of discrimination within the principles of equality and non-discrimination, a point that will be considered in more detail below. There is also the added issue of whether the Convention has any horizontal effect so as to extend to private disputes, to which we now turn to.

THE HORIZONTALITY OF THE H.R.A. 1998 IN PRIVATE DISPUTES

It has been argued by various commentators that the H.R.A. 1998 will invariably have some effect on the English common law. Most take the view that, while the H.R.A. 1998 is not intended to have full direct horizontal effect,[35] there is scope for indirect horizontal effect both in statute and common law (see, for example, Hunt, 1998; Phillipson, 1999; Raphael, 2000; Oliver, 2000; Brinktrine, 2001). The lack of consensus lies mainly in the extent of the indirect horizontal effect. Two aspects of the H.R.A. 1998 arguably raise the possibility of indirect horizontal effect (Phillipson, 1999). Firstly, s. 3 of the H.R.A. 1998 refers to the obligation of interpreting and giving effect to primary and subordinate legislation in a way that is compatible with the Convention rights. Given that the section makes no reference to the exclusion of legislation regulating private matters, this suggests that the obligation under s. 3 will apply to all legislation, even where it regulates private relations. What remains unclear is whether the H.R.A. 1998 will have any effect on the common law since s. 3 omits any specific reference to it.

The second aspect of the H.R.A. 1998 which raises the potential for horizontal effect is s. 6(1). This section requires all public bodies, including the courts, to act compatibly with a Convention right when interpreting and applying the law. It is, however, unclear whether the court's obligation to act compatibly with the Convention is confined only to matters involving public actors.[36] Given that a court

[34] Protocol 12 Article 1 provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

[35] To date, Wade (2000) is the only commentator who supports the view that the H.R.A. 1998 will have full horizontal effect.

[36] Unlike s. 3, there is no specific reference to the courts' obligation to act compatibly with the Convention being confined only to statute law. The wording of s. 6 appears wider in scope and suggests that the courts' obligation to act compatibly when interpreting and applying the law will relate to both statute law and common

acts as a forum for the resolution of both public and private disputes, it is arguable that its obligation under s. 6 extends to private disputes. But this in turn raises two key questions: the extent of the possible indirect horizontal effect of the H.R.A. 1998; and whether indirect horizontal effect is limited only to statute law or extends to both statute and common law.

Scope of indirect horizontal effect

The extent of the indirect horizontal effect of the H.R.A. 1998 remains, at present, a hotly contested issue. Hunt (1998), for example, suggests that indirect horizontal effect can take one of two possible positions: indirect horizontal effect; and an intermediate between direct and indirect horizontal effect. Indirect horizontal effect is narrower and allows some degree of horizontal application in private disputes only where there is some intervention of or reliance on state action (Hunt, 1998, pp. 429-434). The Convention plays a somewhat limited role in that it does not create an independent right to bring an action for a private breach of a Convention right. It may, however, influence the development of the law governing private relations so as to ensure that it is consistent with the values enshrined in the Convention rights. Intermediate indirect horizontal effect, on the other hand, takes on a more fluid approach. Hunt (1998) argues that it is a stronger version of indirect horizontal effect and its effect is much more pervasive. It takes an 'application to all law' approach which in turn has an impact on the development of all law, whether public or private.[37] Thus the court's duty to act compatibly will not be confined merely to an obligation to take Convention values into account.

Phillipson (1999), however, takes a narrower view of the potential indirect horizontal effect of the H.R.A. 1998. He argues that the court's obligation to act compatibly will apply only where Convention rights are engaged. In omitting to incorporate Article 1 in the H.R.A. 1998, Phillipson observes that there is a lack of full incorporation of the Convention rights in U.K. domestic law. The inclusion of a section equivalent to Article 1 would mean that the H.R.A. 1998 would have the effect of securing to U.K. citizens the rights and freedoms set out in the Convention. This would further mean that a failure by the state to prevent or offer redress for a violation of the Convention rights by private parties would equally be seen as an indirect violation by the state (Phillipson, 1999, pp. 834-835). However, the omission of Article 1, Phillipson argues, means that there is no positive duty on the state to protect individuals from infringements of the Convention rights by other private parties. Consequently, this weakens the argument that the H.R.A. 1998 is intended to place an obligation on the state, through the courts, to prevent or remedy violations of Convention rights by private parties (Phillipson, 1999, p. 836). This is further reflected by the fact that a declaration of incompatibility does not automatically render a particular legislation invalid. It continues to remain in force and valid.[38] Phillipson (1999) therefore concludes that the indirect horizontal effect of the H.R.A. 1998 is likely to be confined to developmental influence, that is, that the obligation to act compatibly will require the courts to apply the values enshrined

law.

[37] In that sense, Hunt's reference to the indirect horizontal effect of the Convention on 'all law' seems to make no distinction between public and private law as well as statute and common law.

[38] See ss. 3(2) and 4(6) H.R.A. 1998. It will trigger the remedial process in s. 10 of the H.R.A. 1998 but the courts themselves are not empowered to overrule the legislation and are obliged to continue applying it until amended or repealed by Parliament.

in the Convention rights rather than subject them to a developmental obligation, as Hunt (1998) suggests. Given the courts' general reluctance to extend their jurisdiction to overt law-making without Parliament's sanction, this approach is likely to find greater support since it is less onerous and more practicable for the courts (Raphael, 2000, p. 498).

Indirect horizontal effect in family property disputes

The potential indirect horizontal effect of the H.R.A. 1998 means that human rights arguments may surface before the courts when they are called upon to interpret and apply the law in private disputes such as family property disputes. The courts will be required to interpret existing common law principles, or to exercise judicial discretion, in a way that is compatible with the values enshrined in the Convention rights. Here, the values encapsulated in the principles of non-discrimination and equality, which underpin Article 14, may provide useful guidance to the courts regarding the way in which they should approach family property disputes and the exercise of their discretion. The prospects of a free-standing non-discrimination right, in the event of ratification of Protocol 12 by the U.K., may provide claimants with greater mileage in raising human rights arguments in these cases.

In family property cases, the developmental influence of indirect horizontal effect may be felt when assessing both the existence of a common intention, especially an implied intention, and detrimental reliance. In assessing whether the contributions made by the claimant are sufficient evidence of an implied intention, the courts will be required to approach the issue in a manner that is compatible with the values enshrined in the Convention rights, namely in a non-discriminatory manner. The current requirement that only direct financial contributions will be sufficient evidence of an implied common intention may arguably amount to discrimination. This view may be supported by pointing to the courts' failure to take into account the existing empirical evidence that indicates the continued existence of sexual division of labour in many marital and cohabiting relationships, coupled with male control over the family income and the direct effect this has on the allocation of the family money.[39] The Law Commission (2002, paras. 2.107 and 2.112) similarly recognises the fact that the focus on direct financial contributions under the current rules may discriminate against claimants who have either contributed financially to the general household expenditure or undertaken responsibility for the full-time care of the family. This not only fails to recognise the realities of cohabiting relationships but also forms an unsatisfactory way in which the cohabiting couples' agreement to administer the family income should have a decisive impact on how they should share beneficial ownership of the home. Thus, when assessing qualifying contributions, this narrow approach provides little scope for the courts to take a more liberal interpretation of the notion of fairness, as between the cohabitants, that is based on the principles of non-discrimination and substantive equality.

However, the adoption of human rights arguments along the lines of non-discrimination raises further issues for the claimant. This is because the concept of 'fairness' is in itself problematic. Diduck (2001), for example, argues that the notion

[39] See n. 9.

of fairness within marital (and this will equally apply to cohabiting) relationships is often imbued with certain ideologies of law such as the ideology of the marital relationship, where the parties are themselves gendered in certain ways. As such, the legal perception of the woman as being dependent and of the man as the autonomous rights-bearing property owner continues to prevail in judicial thinking. Diduck thus observes that the notion of fairness, as applied by the courts, reinforces the woman's position of dependency and the need to balance that dependency with the importance of protecting the man's property rights. This has in turn led the courts to place greater value on financial contributions which are directly referable to the acquisition of the property than on indirect financial and non-financial contributions, where such referability is more obscure (Diduck, 2001; Flynn and Lawson, 1995). As a consequence, the principles of non-discrimination and equality may have minimal impact in family property disputes if the courts continue to allow these ideologies of law to apply. The discriminatory aspects of the existing trusts principles will persist since these gendered assumptions of the parties' roles, and their expectations in the relationship, will inform the courts' construction of what is 'fair' and what may, or may not, amount to discrimination.

Gendered assumptions need not necessarily be limited to opposite sex couples. They may equally inform the court's construction of discrimination in same sex relationships where they ignore or fail to recognise the nature of the parties' relationship for what it is. This is well illustrated in the case of *Wayling* v. *Jones*,[40] where the true nature of the parties' relationship was given little consideration by the Court of Appeal, and the personal and business aspects of the parties' relationship were treated as separate. In determining whether there was detrimental reliance to ground a claim in proprietary estoppel, the court treated the parties as dealing with each other at arm's length. The acceptance of low wages in the form of 'pocket money' could not, as such, be explained away except on the basis that Wayling had relied on the assurances of Jones to his detriment. It has been argued that Wayling's claim had succeeded as a consequence of the court's construction of 'normality', which is often influenced by traditional stereotypes of women and women's work (Lawson, 1996). A wife is more reasonably expected to make certain sacrifices out of love and affection, while others in comparable situations are not.

These stereotypes can work in favour of homosexual cohabitants, like in *Wayling*, where the 'sacrifice' of providing cheap or unpaid labour both in the home and in the business is treated as an 'unnatural quality' of the relationship. The presumption remains that men, even those in same sex relationships, are not normally expected to undertake caring duties, which are still traditionally seen as being within the domain of women. The inadequate compensation paid to Wayling for his quasi-domestic labour can thus be located within the public sphere and be construed as conduct which cannot be reasonably expected but for the assurances made by his deceased partner. Conversely, the sort of construction of 'normality'

[40] [1995] 2 FLR 1029. The parties had lived together since 1971 until the death of Jones in 1987. In that time, Wayling, a trained chef, had helped out in a succession of businesses that Jones had run. These included a café in London, followed by a shop and then a hotel in Aberystwyth, and later another hotel in Barmouth. In return, Jones paid for all the couple's living expenses and had also provided 'pocket money' to Wayling for his help in the businesses. While Jones had promised to leave Wayling his business on his death, he had failed to make a new will and thus, all Wayling received under the will was some furniture and a car.

taken in *Wayling* may not necessarily benefit a lesbian cohabitant (Flynn and Lawson, 1995). A lesbian cohabitant may be subjected to similar stereotyping as her heterosexual counterpart. Consequently, contributions by a lesbian cohabitant that are similar to those in *Wayling* may not ground a claim since they may be construed as being reasonably expected of her as a woman and be labelled as 'domestic', thus falling within the private sphere. As long as the courts continue to apply these supporting ideologies and stereotypes as norms, the principle of non-discrimination will provide little benefit.

The Law Commission (2002, paras. 2.79 and 5.10) has noted that developments have taken place since *Rosset* that point to some willingness on the part of the judiciary to take a broad brush approach. There are signs in recent cases that there is an increasing willingness by the courts to take a more constructive and liberal interpretation of parties' relationships. Hence, a claimant may possibly gain greater mileage out of the principle of non-discrimination. For example, in *Fitzpatrick* v. *Sterling Housing Association*,[41] the House of Lords took the view that, although a same-sex partner could not be classified as a 'spouse' for the purposes of the Rent Act 1977, he could be classified as a 'family member', thus providing for a more inclusive view of the nature of a family and the relationships between cohabitants, whether heterosexual or same sex. The downside of such an approach, Sandland (2000) argues, is that it continues to disregard the true nature of same sex relationships and desexualises such relationships by placing them within the classification of 'family'. It may, nevertheless, be argued that the approach taken by the House of Lords is to be welcomed in that it indicates a more progressive approach than that taken by the European Commission and the European Court.[42]

Recent cases like *White* v. *White*[43] and *Cowan* v. *Cowan*[44] further illustrate the growing influence of the principle of non-discrimination in judicial thinking. Although *White* involved an application under s. 25 of the Matrimonial Causes Act 1973, the House of Lords dealt with the issue of fairness along the lines of non-discrimination and substantive equality. More significantly, their Lordships found that, while the prioritising of direct financial contributions over indirect contributions may once have seemed fair, that is no longer a tenable position. Greater value should be given to domestic contributions to the welfare of the family. *White* has since been followed by the Court of Appeal in *Cowan* where it was reiterated that a wife's non-financial contribution to home and family should rate equally alongside her husband's financial contribution.[45] This move away from the 'solid tug of money' is clearly one of the striking aspects of the decisions in *White* and *Cowan*. It stands in sharp contrast to the approach taken by Lord Bridge in *Rosset*. In equating

[41] [1999] 4 All E.R. 705. This case involved a claim by the statutory tenant's same-sex partner to remain in possession of the flat after the death of the statutory tenant. The key issue was whether the claimant, as the surviving partner in a stable and permanent homosexual relationship, would fall within the definition of 'spouse' set out in paras. 2(2) and 3(1) of Schedule 1 to the Rent Act 1977.
[42] See e.g. *X. and Y.* v. *U.K.* (1983) 32 D. & R. 220 where the Commission took the view that homosexual relationships may involve the right to respect for private life but not family life under Article 8.
[43] [2001] 1 All E.R. 1.
[44] [2001] 3 W.L.R. 684.
[45] [2001] 3 W.L.R. 684, at p 704. More recently, in *Le Foe* v. *Le Foe* [2001] All E.R. (D) 325, the court had taken a more holistic approach and had departed from the rigidity of the direct financial contributions requirement to found an implied common intention. Here, indirect contributions to the mortgage were held to be equally relevant to determining the existence of an implied intention.

fairness with the principles of non-discrimination and substantive equality, *White* illustrates the potential for the developmental influence of the values enshrined in the Convention rights. It paves the way for breaking away from what the courts in *White* and *Cowan* have recognised as being a discriminatory appraisal of the traditional role of the woman as homemaker and of the man as breadwinner. This may allow for a less rigid approach to be taken in future cases when courts are called upon to value the indirect financial and non-financial contributions of a claimant for the purposes of finding the requisite common intention and detrimental reliance, which will ensure greater substantive equality and non-discrimination for the claimant.

CONCLUSION

Recent cases like *White* and *Cowan* demonstrate the way in which judges are increasingly using the rhetoric of non-discrimination and equality, which embody the values of the Convention rights. With the emerging human rights culture taking hold in the U.K., it will be inevitable that the influence of human rights is likely to permeate through all areas of law, including the common law. This may well be felt through the influence that the values enshrined in the Convention rights will have in judicial thinking and the exercise of discretion. While the extent of the indirect horizontal effect of the H.R.A. 1998 in private disputes remains a hotly contested issue, there is, nevertheless, a fair amount of consensus among commentators that there will be some indirect horizontal effect of the H.R.A. 1998 and that human rights will increasingly affect the future development of the common law. The true extent of such indirect effect is unlikely to emerge until such time when the H.R.A. 1998 has established clear jurisprudence on the matter. The potential for indirect effect is, however, significant for family property disputes in that there may be a gradual erosion of the rigidity of the *Rosset* test. Future cases may build further on the principle of non-discrimination and the notion of substantive equality by taking a more holistic approach to the parties' relationship. This will in turn pave the way for the more flexible approach envisaged by the Law Commission (2002).

In determining the existence of a sharing intention, the courts are already beginning to evidence a greater willingness to give more weight to the contributions, both financial and non-financial, made by married and cohabiting parties, regardless of the roles undertaken by each party in the relationship. Although the H.R.A. 1998 will not provide claimants in family property disputes with a specific right to bring an action for a breach of the Convention rights, the emerging humans rights culture may provide developmental influence in a positive manner. Values such as non-discrimination and equality enshrined in European Convention rights may provide for a less gender-biased approach to determining the beneficial interests of cohabitants in the family home. It will also pave the way for a more holistic approach to dealing with the issues of the parties' beneficial entitlements to the family home; one which, as the Law Commission (2002) has noted, will be sufficiently flexible to operate fairly and evenly across the diversity of circumstances in personal relationships.

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Simone Wong
Kent Law School
Eliot College
University of Kent
Canterbury CT2 7NS

E-mail: S.W.Y.Wong@kent.ac.uk
Tel: +44 1227 82332
Fax: +44 1227 827831