

# A COMPARATIVE CRITICAL ANALYSIS OF THE FINANCIAL REMEDIES FOR COHABITING COUPLES UPON RELATIONSHIP BREAKDOWN IN SCOTLAND AND GERMANY\*

*Leonard Luszna\*\**

- A. INTRODUCTION
- B. MOST APPROPRIATE LEGAL MEASURES IN GENERAL
  - (1) Default Statutory or Voluntary Legal Measures
  - (2) Legal Framework for Cohabiting Couples
  - (3) General Principles Applicable Across Jurisdictions
  - (4) Contracting out of the Legal Measures and its Limitations
- C. FINANCIAL REMEDIES IN SCOTS AND GERMAN LAW
  - (1) Definition of Cohabitation
  - (2) Existing Financial Remedies
  - (3) Time Limit and Period of Prescription
  - (4) Contracting out of the Financial Remedies and its Limitations
- D. COMPARATIVE CRITICAL EVALUATION OF SCOTS AND GERMAN LAW
  - (1) Legal Measures Assimilated to or Distinguished from Marriage
  - (2) Existing Financial Remedies
  - (3) Time Limit and Period of Prescription
  - (4) Contracting out of the Financial Remedies and its Limitations
- E. CONCLUSION

## A. INTRODUCTION

In autumn 2022, the Scottish Law Commission published its recommendations to enhance the provisions of the Family Law (Scotland) Act 2006 (asp 2) (hereinafter: FL(S)A 2006) regulating cohabitation.<sup>1</sup> This statute created for the first time a financial remedy upon separation of the couple within Scots family law, rendering the inadequate resort to general private law mostly redundant.<sup>2</sup> The German legislature has, in contrast, resisted similar reforms, despite numerous proposals from German academics and practitioners,<sup>3</sup> most notably of the *Deutscher Juristentag* (German Jurists Forum) – a highly-esteemed association devoted to

---

\* The article was updated online on 5 November 2024 because it was, by accident, not published in its latest version.

\*\* The author is Research Associate at the Chair of Private Law, Private International Law and Comparative Law of Professor Dr Anatol Dutta, MJur (Oxford), at the Ludwig Maximilian University Munich. Email: leonard.luszna@jura.uni-muenchen.de. The article is an adapted version of an essay submitted for the seminar 'Family Law in Comparative Perspectives' by Dr Donna Crowe-Urbaniak in the course of the author's Master of Laws (LLM) in Comparative and European Private Law at the University of Edinburgh, which has been supported by a scholarship from the German Academic Exchange Service (DAAD eV).

<sup>1</sup> Scottish Law Commission, *Report on Cohabitation* (Scot Law Com No 261, 2022).

<sup>2</sup> Elaine E Sutherland, *Child and Family Law*, vol 2 (*Intimate Adult Relationships*) (3rd edn, W Green/Thomson Reuters 2022) para 6-450.

<sup>3</sup> See Marina Wellenhofer in Franz Jürgen Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (9th edn, CH Beck 2022) Anh § 1302 BGB paras 29f, 67.

giving impetus for the development of the law – in 1988<sup>4</sup> and 2008.<sup>5</sup> Cohabitation (*nichteheliche Lebensgemeinschaft*) is instead governed predominantly by the case law of the *Bundesgerichtshof* (German Federal Court of Justice) in the field of general private law.<sup>6</sup>

The article will take these distinct approaches as an opportunity to assess which financial remedies are across jurisdictions most appropriate once cohabitation – that is, for the purposes here, only a non-registered enduring intimate (heterosexual or homosexual) adult relationship between two persons (see also C(1) below for the definition of cohabitation in both Scots and German law) –<sup>7</sup> breaks down as well as to critically and comparatively analyse the existing legal measures in both Scotland and Germany. The main focuses will be placed on how to balance protecting the more vulnerable cohabitant with private autonomy and on which inspirations both jurisdictions might draw from each other.

The analysis is necessarily limited in scope and of a non-exhaustive nature. Issues of legal uncertainty – most of them are (eventually) resolvable by case law (and legal literature) –<sup>8</sup> and the effects of cohabitation on third parties (especially children) will generally not be addressed. For the purposes of the article, financial remedies are only those that permanently reallocate assets between the partners without consideration. Hence, temporary legal measures, especially regarding the family home,<sup>9</sup> and presumptions of ownership, particularly for household goods,<sup>10</sup> are excluded. Pension sharing will, as a specialised subject, equally not be considered.<sup>11</sup>

The article will begin by assessing which legal measures are across legal systems most adequate to balance the interests of the economically weaker partner with private autonomy (B) before comparatively analysing the existing financial remedies upon relationship breakdown in Scots and German law (C). Subsequently, the article will – building upon those deliberations – critically evaluate whether the legal situation in both jurisdictions is appropriate while identifying potential for reform (D). At the end, the main conclusions will be summarised (E).

---

<sup>4</sup> Ständige Deputation des Deutschen Juristentages, *Verhandlungen des Siebenundfünfzigsten Deutschen Juristentages Mainz 1988* (CH Beck 1988), vol II (*Sitzungsberichte*), Resolutions of the Department Cohabitation I., II., I 233f.

<sup>5</sup> Ständige Deputation des Deutschen Juristentages, *Verhandlungen des Siebenundsechzigsten Deutschen Juristentages Erfurt 2008* (CH Beck 2008), vol II/1 (*Sitzungsberichte – Referate und Beschlüsse*), Resolutions of the Department Private Law A. IV. 3., B. I. 6. b), I 68f.

<sup>6</sup> Anatol Dutta and Charlotte Wendland, 'De Facto Relationships in Germany' in Andy Hayward and Jens M Scherpe (eds), *De Facto Relationships: A Comparative Guide* (Edward Elgar 2025, forthcoming, manuscript of March 2024) 1.2, 4.; compare also Dieter Henrich, 'Rechtsregeln für nichteheliches Zusammenleben – Zusammenfassung' in Inge Kroppenber and others (eds), *Rechtsregeln für nichteheliches Zusammenleben* (Ernst und Werner Gieseking 2009) 341f.

<sup>7</sup> Consequently, polyamorous (see for example, Sutherland (n 2) paras 1-147ff) and platonic (see for example, Scottish Law Commission, *Aspects of Family Law: Discussion Paper on Cohabitation* (Scot Law Com DP No 170, 2020) paras 3.102ff) relationships are beyond the scope of the article.

<sup>8</sup> Compare Niamh Rodgers, "'Should have put a Ring on it?' A Comparative Analysis of the Law of Cohabitation in Ireland, Scotland and England and Wales' (2012) 11 HLJ (Hibernian Law Journal) 122, 146, 166.

<sup>9</sup> See for Scots law Matrimonial Homes (Family Protection) (Scotland) Act 1981, ss 18f (see Katy Macfarlane, *Thomson's Family Law in Scotland* (8th edn, Bloomsbury Professional 2022) 213ff) and for German law Wellenhofer (n 3) Anh § 1302 BGB para 66.

<sup>10</sup> See for Scots law FL(S)A 2006, ss 26f (see Sutherland (n 2) paras 3-074, 3-079) and for German law Wellenhofer (n 3) Anh § 1302 BGB paras 47f, 98.

<sup>11</sup> See for Scots law Scottish Law Commission (n 1) paras 5.73ff and for German law Wellenhofer (n 3) Anh § 1302 BGB para 95.

## B. MOST APPROPRIATE LEGAL MEASURES IN GENERAL

Cohabitation is nowadays a socially accepted way of living together,<sup>12</sup> confronting many jurisdictions with the challenge of how to regulate it best. The spectrum of possible legal approaches ranges from treating cohabitants akin to strangers to equating them to spouses.<sup>13</sup> This section will contemplate which legal measures are, in general, most appropriate in light of the competing<sup>14</sup> policy aims of protecting the more vulnerable partner and materialising private autonomy, between which lawmakers have to strike a balance.<sup>15</sup> The article will argue that jurisdictions should not rely on voluntary legal measures but instead implement a default statutory regime (1), that the nature, requirements and legal effects of financial remedies are questions which each legal system has to address individually (2) but that nevertheless, two general principles apply across them (3) and that there should be the possibility of opting out, subject to formal and substantive limitations (4).

### (1) Default Statutory or Voluntary Legal Measures

Legislators could draft their law of cohabitation solely on a voluntary basis, that is, adopting an opt-in system, be it either in the form of cohabitation contracts or of registered partnerships (including marriage). While this approach would maximise private autonomy – even sparing those who oppose any kind of state regulation for their intimate adult relationship from the effort and expense to contract out of the default statutory regime –<sup>16</sup> it is evidently an inadequate solution for the whole of society. Instead of balancing both policy aims, private autonomy would be absolutely upheld and protecting the more vulnerable party completely neglected.<sup>17</sup> A default statutory regime is, in this regard, superior to mere voluntary legal measures:

First of all, the legal framework for intimate adult relationships, which applies in the absence of any agreement between the partners, should provide what is just and fair for the majority of them (insofar as the interests of all affected groups of cohabitants are irreconcilable): Those who oppose any kind of state regulation for their relationship are – at least nowadays – in the minority.<sup>18</sup> Considerably more frequent in the overall very heterogeneous<sup>19</sup> group are couples who treat cohabitation as ‘trial marriage’<sup>20</sup> intending, or at least being open, to tie the knot in the future.<sup>21</sup> It is also regularly the case that one partner

---

<sup>12</sup> Dutta and Wendland (n 6) 1.1 (text with fn 3); compare also Sutherland (n 2) paras 1-123f.

<sup>13</sup> Macfarlane (n 9) 207; Anna Stępień-Sporek and Margaret Ryznar, ‘The Consequences of Cohabitation’ (2016) 50 USFL Rev (University of San Francisco Law Review) 75, 96, 98, 100.

<sup>14</sup> Rodgers (n 8) 127.

<sup>15</sup> Stępień-Sporek and Ryznar (n 13) 87; Elaine E Sutherland, ‘Unmarried Cohabitation’ in John Eekelaar and Rob George (eds), *Routledge Handbook of Family Law and Policy* (2nd edn, Routledge 2021) 72.

<sup>16</sup> Compare Anatol Dutta, ‘Paarbeziehungsregime jenseits der Ehe: Rechtsvergleichende und rechtspolitische Perspektiven’ (2016) 216 AcP (Archiv für die civilistische Praxis) 609, 659.

<sup>17</sup> Compare Joanna Miles, ‘Unmarried cohabitation in a European perspective’ in Jens M Scherpe (ed), *European Family Law* (Edward Elgar 2016), vol III (*Family Law in a European Perspective*) 95f.

<sup>18</sup> Compare Martin Löhnig in Julius von Staudinger (fd), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Otto Schmidt and De Gruyter 2023) Anh §§ 1297ff BGB para 7; Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (2nd edn, Palgrave 2015) 183.

<sup>19</sup> Dagmar Coester-Waltjen, ‘Die Lebensgemeinschaft – Strapazierung des Parteiwillens oder Staatliche Bevormundung?’ [1988] NJW (Neue Juristische Wochenschrift) 2085, 2085; Miles (n 17) 87f, also 96 and 110; compare also the four psychological types identified by Anne Barlow and Janet Smithson, ‘Legal assumptions, cohabitants’ talk and the rocky road to reform’ (2010) 22 CFLQ (Child and Family Law Quarterly) 328, 335.

<sup>20</sup> Sutherland (n 15) 65.

<sup>21</sup> See Wellenhofer (n 3) Anh § 1302 BGB paras 11f; Dutta and Wendland (n 6) under heading 1.1 (text with fn 5); Herring, Probert and Gilmore (n 18) 184.

(typically the female) would like to formalise their relationship but not the other (typically the male).<sup>22</sup> Exactly for those (as well as other) types of cohabitation, the protection of the economically weaker partner has significant weight,<sup>23</sup> particularly with regard to the fundamental value of gender equality since it is the female who predominantly suffers economic disadvantages in the course of them,<sup>24</sup> whereas private autonomy only plays a minor role.

What is more, the notion of private autonomy is misleading in terms of intimate adult relationships (compared to commercial settings) because cohabitants are not (well-informed)<sup>25</sup> individuals who only pursue their own interests:<sup>26</sup> Cohabiting couples are generally emotionally committed to each other and, hence, considerate of their partner's position in the way they regulate their (financial) affairs.<sup>27</sup> They are also frequently affected by optimism bias, that is, the overly optimistic assumption that their relationship will not break down, rendering any voluntary protective legal measures (erroneously) unnecessary.<sup>28</sup> In addition, some of them are inert without additional incentives to change the *status quo*,<sup>29</sup> unaware of the legal effects of both marriage and cohabitation or even have misconceptions about them.<sup>30</sup>

These considerations justify a default statutory regime – taking into account the possibility of contracting out of it discussed below (see detailed B(4)) –<sup>31</sup> instead of mere voluntary legal measures since it strikes the best balance between private autonomy and protecting the economically weaker partner.<sup>32</sup> Otherwise, the law would abandon the – always existing –<sup>33</sup> cohabiting couples who do not conclude cohabitation contracts or register their relationship.<sup>34</sup> Private autonomy is not a legal value which trumps everything else. On the contrary, legislators are entitled to impose legal provisions (even of a generalising nature)<sup>35</sup> which restrict basic freedoms if they pursue – like here – a legitimate aim and are proportionate.<sup>36</sup>

---

<sup>22</sup> See Löhnig (n 18) Anh §§ 1297ff BGB paras 7, 20.

<sup>23</sup> Compare Nina Dethloff, *Unterhalt, Zugewinn, Versorgungsausgleich – Sind unsere familienrechtlichen Ausgleichssysteme noch zeitgemäß? Gutachten A für den 67. Deutschen Juristentag* (CH Beck 2008) A 141.

<sup>24</sup> Dethloff (n 23) A 140f; Marina Wellenhofer, 'Gesetzlicher Unterhaltsanspruch für nichteheliche Lebensgemeinschaften?' [2015] FamRZ (Zeitschrift für das gesamte Familienrecht) 973, 973.

<sup>25</sup> See Sutherland (n 15) 65f.

<sup>26</sup> Coester-Waltjen (n 19) 2087; Wellenhofer (n 24) 974.

<sup>27</sup> Coester-Waltjen (n 19) 2087; Marina Wellenhofer 'Regelungslücken bei der nichtehelichen Lebensgemeinschaft? Freiheit der Lebensformen im Lichte des Artikel 6 GG' [2008] AnwBl (Anwaltsblatt) 559, 559, 565; compare also Wellenhofer (n 3) Anh § 1302 BGB para 86 fn 433.

<sup>28</sup> Miles (n 17) 98; Sutherland (n 15) 67; see also Manfred Lieb, *Empfiehl es sich, die rechtlichen Fragen der nichtehelichen Lebensgemeinschaft gesetzlich zu regeln? Gutachten A für den 57. Deutschen Juristentag* (CH Beck 1988) A 12.

<sup>29</sup> Dutta (n 16) 655f.

<sup>30</sup> Miles (n 17) 97; Sutherland (n 15) 65, 70.

<sup>31</sup> See also Sutherland (n 2) para 1-134.

<sup>32</sup> Agreeing, for example, Herring, Probert and Gilmore (n 18) 183; Miles (n 17) 96, 110; Rodgers (n 8) 129, 160, 165.

<sup>33</sup> Mustafa El-Mumin, 'A Comparative Study of Cohabitation: UK, Scotland, France and Australia' (2016) 7 QMLJ 44, 69f; Rodgers (n 8) 128.

<sup>34</sup> Sutherland (n 15) 69f.

<sup>35</sup> Compare Dethloff (n 23) A 151; compare also BVerfG NJW 2023, 1494 para 169 in relation to the protection of minors, exemplified by the provisions on legal capacity (§§ 107ff *Bürgerliches Gesetzbuch* (hereinafter: BGB)).

<sup>36</sup> Compare, for example, Angela Schwerdtfeger in Jürgen Meyer and Sven Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union* (5th edn, Nomos, Stämpfli and Facultas 2019) Art 52 GRCh paras 27, 35ff.

## (2) Legal Framework for Cohabiting Couples

There is no general answer to the question which nature, requirements and legal effects financial remedies for cohabiting couples should have. Each and every legal system has to work out its individual legal framework against the background of its specific culture, economy, history, politics and religion while having regard to the (ideally by research corroborated) expectations of the cohabitants.<sup>37</sup>

This is particularly true in terms of whether the legal measures should be assimilated to those of spouses or be distinguished from them since there are compelling arguments in favour of both:<sup>38</sup> Functionally, cohabiting couples are very similar to married ones in the way they lead their lives (even though both are diverse groups),<sup>39</sup> particularly how they support each other emotionally and economically as well as care for their children.<sup>40</sup> There is also no persuasive evidence that being married is more beneficial for the well-being and stability of the relationship than cohabiting.<sup>41</sup> Moreover, legal systems generally conceive marriage as the optimal legal framework for intimate adult relationships; hence, the argument against restricting it to married couples is strong.<sup>42</sup>

At the same time, equating cohabitation with marriage would restrict the fundamental rights of cohabitants significantly,<sup>43</sup> especially the right to respect for private and family life and the negative dimension of the freedom to marry.<sup>44</sup> In addition, it seems doubtful whether the principle of equal sharing, which characterises financial remedies in many jurisdictions, particularly the default property regimes of civil law jurisdictions,<sup>45</sup> reflects the expectations of cohabitants adequately.<sup>46</sup> Moreover, the start and end dates of cohabitation are – in the absence of registration – difficult to ascertain,<sup>47</sup> making the necessary calculations for any award even more challenging than for marriage.

Regarding the eligibility requirements for the default statutory regime to apply at all (especially minimum duration and existing children),<sup>48</sup> it is similarly true that there is no general answer.<sup>49</sup> However, subject to the specific characteristics of each legal system as well as the nature and legal effects of the financial remedy in question, it seems to be generally preferable to refrain from imposing them (except possibly, for public policy reasons, in relation to forbidden degrees or underage couples)<sup>50</sup> since they categorically exclude some cohabitants who are worthy of protection in the individual case.<sup>51</sup> Above all, minimum duration periods are

---

<sup>37</sup> Miles (n 17) 87, 96.

<sup>38</sup> Agreeing Scottish Law Commission (n 1) para 2.36.

<sup>39</sup> Compare Stępień-Sporek and Ryznar (n 13) 101.

<sup>40</sup> Compare Scottish Law Commission (n 1) para 2.36; Sutherland (n 2) para 1-133.

<sup>41</sup> Dutta (n 16) 662f; Jonathan Herring, *Family Law* (11th edn, Pearson 2023) 143ff.

<sup>42</sup> Compare Dutta (n 16) 668.

<sup>43</sup> Compare Wellenhofer (n 24) 974f.

<sup>44</sup> Eva Schumann in Hans-Theodor Soergel (fd), *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (13th edn, W Kohlhammer 2013) NehellG para 24; Ingeborg Schwenzer, 'Gesetzliche Regelung der Rechtsprobleme nichtehelicher Lebensgemeinschaften?' [1988] JZ (JuristenZeitung) 781, 782.

<sup>45</sup> See Jens M Scherpe, 'The financial consequences of divorce in a European perspective' in Scherpe (ed) (n 17) 153, 156f, 158f, 161, 163f, 168ff, 192.

<sup>46</sup> See for Scotland Scottish Law Commission (n 1) paras 2.23, 2.38, 5.69.

<sup>47</sup> See Wellenhofer (n 3) Anh § 1302 BGB para 7; Scottish Law Commission (n 1) para 2.36.

<sup>48</sup> Miles (n 17) 96.

<sup>49</sup> Compare Stępień-Sporek and Ryznar (n 13) 100.

<sup>50</sup> Compare Katharina Boele-Woelki and others, *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions* (Intersentia 2019) 61f; Scottish Law Commission (n 1) paras 3.31ff; Rodgers (n 8) 137f.

<sup>51</sup> Compare Rodgers (n 8) 136.

arbitrary.<sup>52</sup> The more favourable approach is to build these periods into the substantive requirements for the financial remedies: For instance, where they presuppose that the relationship results in advantages gained or disadvantages suffered, the duration of the cohabitation – having considerable influence over both – naturally becomes a significant factor.<sup>53</sup>

### **(3) General Principles Applicable Across Jurisdictions**

Even though each legal system has to develop its legal framework for cohabitation individually (see B(2) above), two general principles have universal validity:

Firstly, the default statutory regime for cohabitating couples should have no stronger legal effects than the one for married ones<sup>54</sup> – except if there are valid reasons which apply only to cohabitation: Legal systems usually envision marriage as the optimal legal framework for intimate adult relationships because they have balanced the interests of both partners in the best possible way.<sup>55</sup> Hence, there is generally no justification to go further for cohabitants.

Secondly, the legal measures for cohabitation have to be compatible with the structure of each legal system.<sup>56</sup> Otherwise, contradictions of values and inconsistencies of doctrine, both complicating the practical application of the law, will be the consequence. For example, it would be highly problematic if England and Wales, which grants the courts discretion in a case of divorce, would opt for the Spanish<sup>57</sup> community of property regime once cohabitants separate.<sup>58</sup>

### **(4) Contracting out of the Legal Measures and its Limitations**

Creating a default statutory regime for cohabitation to protect the economically weaker party – as advocated here (see B(1) above) – does not disregard private autonomy completely but instead embraces it if it allows couples to contract out of it. Giving the possibility to opt out is particularly important since the default legal provisions will, because of the heterogeneity of cohabitating relationships (see B(1) above), not be equally suitable for all.<sup>59</sup> In line with the principle that legal measures governing cohabitation should, in general, not go further than those for marriage (see B(3) above), an opt-out mechanism is, in addition, indispensable for jurisdictions which recognise it regarding matrimonial contracts.<sup>60</sup>

The possibility to contract out of the default statutory regime should nevertheless be limited by formal and substantive safeguards to ensure the protection of the more vulnerable partner.<sup>61</sup> Even though an opt-out system shifts the effort and expense (compared to an opt-in system) to those who envision another legal framework for their relationship (see B(1)

---

<sup>52</sup> Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992) para 16.4; El-Mumin (n 33) 57; Jo Miles, Fran Wasoff and Enid Mordaunt, 'Reforming family law – the case of cohabitation: 'things may not work out as you expect'' (2012) 34 JSWFL (Journal of Social Welfare and Family Law) 167, 174f.

<sup>53</sup> Compare Scottish Law Commission, *The Effects of Cohabitation in Private Law* (Scot Law Com DP No 86, 1990) para 5.14; Rodgers (n 8) 134, 164.

<sup>54</sup> Compare Coester-Waltjen (n 19) 2088; Rodgers (n 8) 125, 140.

<sup>55</sup> Dutta (n 16) 614, 668.

<sup>56</sup> Compare El-Mumin (n 33) 62f.

<sup>57</sup> See for both England and Wales as well as Spain Scherpe (n 45) 151ff, 167ff.

<sup>58</sup> Miles (n 17) 93; compare also Henrich (n 6) 340f.

<sup>59</sup> Compare Dethloff (n 23) A 151.

<sup>60</sup> Dethloff (n 23) A 151; Wellenhofer (n 24) 976.

<sup>61</sup> Agreeing Rodgers (n 8) 161 regarding formal safeguards; Scottish Law Commission (n 1) para 7.20 regarding substantive safeguards.

above),<sup>62</sup> it does not on its own guarantee that cohabitants are (well-informed) individuals who pursue their own interests effectively (see B(1) above). Depending on the structure of the legal system, formal requirements might entail the written form or notary authentication as well as independent legal advice (by a solicitor or civil law notary).<sup>63</sup>

Substantive safeguards have to take into account both the initial agreement and any subsequent change of circumstances: A cohabitation contract should – apart from not allowing to contract out of legal provisions which exist for reasons of public policy –<sup>64</sup> be invalid if it is manifestly unfair regarding its content or the circumstances of its conclusion.<sup>65</sup> In addition, if there has been an unanticipated change of circumstances – which happens regularly because of the dynamic nature of intimate relationships –<sup>66</sup> it is just and fair that legal systems grant their courts the power to modify the cohabitation contract or even to set it aside.<sup>67</sup> The paradigmatic example are cohabitants who initially assumed to contribute to childcare equally while working both full-time but of whom subsequently one becomes – with (tacit or express) consent of the other – the primary carer of their children while working only part-time or not at all.<sup>68</sup>

### C. FINANCIAL REMEDIES IN SCOTS AND GERMAN LAW

Having contemplated legal frameworks for cohabiting couples in general, the article will now turn to a comparative analysis of the available financial remedies in the specific jurisdictions of Scotland and Germany. This section will examine how both legal systems define cohabitation (1), which legal remedies – focusing on the general characteristics instead of the details – exist within them (2), what time limits and periods of prescription apply (3) and to what extent contracting out of the default statutory regime is allowed (4) – while contrasting the legal situation of cohabitants to those of spouses.

Apart from these remedies, couples in both legal systems are able to arrange their relationships by voluntary partnership contracts,<sup>69</sup> either extending, modifying or limiting (see, however, C(4) below about the limitations of contracting out) their rights and duties. The additional choice of entering into a registered partnership other than marriage is only offered in Scotland, even though the legal effects<sup>70</sup> of its civil partnership are essentially (with minor distinctions) identical to marriage.<sup>71</sup>

---

<sup>62</sup> See also Sutherland (n 2) para 1-146.

<sup>63</sup> Compare Rodgers (n 8) 161; Scherpe (n 45) 199.

<sup>64</sup> Compare Miles (n 17) 93.

<sup>65</sup> Compare The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) para 5.51; Scherpe (n 45) 203.

<sup>66</sup> Compare Dutta (n 16) 636f.

<sup>67</sup> Compare The Law Commission (n 65) para 5.53; Rodgers (n 8) 163.

<sup>68</sup> See Dutta (n 16) 636; Scherpe (n 45) 203.

<sup>69</sup> See for Scots law Susie Mountain, *A Practical Guide to Cohabitation and the Law in Scotland* (Law Brief 2020) 78f and for German law detailed Herbert Grziwotz in Klaus Schnitzler (ed), *Münchener Anwaltshandbuch Familienrecht* (5th edn, CH Beck 2020), § 30 paras 1ff.

<sup>70</sup> What sets the civil partnership apart from marriage is, in essence, its name, which leaves the cultural, religious and social connotations of marriage behind it (see Jens M Scherpe and Brian Sloan, 'Reformen im Familienrecht von England und Wales in 2013: Gleichgeschlechtliche Ehen, Kindschaftsrecht und Todesvermutung' [2013] FamRZ (Zeitschrift für das gesamte Familienrecht) 1469, 1470; compare Dutta (n 16) 627f; Miles (n 17) 103).

<sup>71</sup> See Jane Mair, 'Informal Relationships – National Report: Scotland' (*Commission on European Family Law February 2014*) 1 <<http://ceflonline.net/wp-content/uploads/Scotland-IR.pdf>> accessed 14 June 2024.

## (1) Definition of Cohabitation

The definitions for cohabiting couples are quite similar in both jurisdictions: Neither of them has eligibility requirements (especially no minimum duration) (see B(2) above);<sup>72</sup> instead, both require an overall assessment of each individual relationship, taking all relevant facts into account.<sup>73</sup> The Scottish legislation defines cohabitants as opposite-sex or same-sex couples who are living together as if they were spouses (FL(S)A 2006, s 25(1)(a) and Marriage and Civil Partnership (Scotland) Act 2014 (asp 5) (hereinafter: MCP(S)A 2014), s 4(2)(b), (3))<sup>74</sup> while expressly stipulating to have regard to the nature and length of their relationship and any financial arrangements (FL(S)A 2006, s 25(2)). German jurisprudence and literature, in the absence of a statutory definition,<sup>75</sup> generally regard them as two persons of the opposite or same sex not being married who live together with the intention that their relationship is enduring and exclusive as well as are committed to responsibility for each other.<sup>76</sup> Criteria are in both legal systems, among others, whether the partners live in the same house or flat and are in a sexual relationship,<sup>77</sup> although both are on their own neither essential nor conclusive.<sup>78</sup>

## (2) Existing Financial Remedies

First of all, it has to be highlighted that cohabitation does neither in Scotland<sup>79</sup> nor in Germany<sup>80</sup> affect the separation of property between the partners, which is also true for Scottish (Family Law (Scotland) Act 1985 (hereinafter: FL(S)A 1985), s 24(1)(a))<sup>81</sup> and German (§ 1363(2)1 *Bürgerliches Gesetzbuch* (hereinafter: BGB))<sup>82</sup> spouses. Moreover, both jurisdictions do not recognise maintenance obligations during cohabitation,<sup>83</sup> which is in contrast to the legal situation of married couples (FL(S)A 1985, ss 1ff and §§ 1360f BGB).<sup>84</sup> Where cohabitation

---

<sup>72</sup> See for both Scots and German law Boele-Woelki and others (n 50) 58f.

<sup>73</sup> See for Scots law Macfarlane (n 9) 208f and for German law Wellenhofer (n 3) Anh § 1302 BGB paras 5, 7.

<sup>74</sup> FL(S)A 2006, s 25(1)(b) has ceased to have effect according to MCP(S)A 2014, s 4(4) (see Macfarlane (n 9) 208ff fn 1, fn 11, 210f fn 1).

<sup>75</sup> Dutta and Wendland (n 6) 2. (text after fn 24).

<sup>76</sup> Löhnig (n 18) Anh §§ 1297ff BGB paras 11ff; Nina Dethloff, Dieter Martiny and Mirjam Zschoche, 'Informal Relationships – National Report: Germany' (*Commission on European Family Law* April 2015) 4 <<http://ceflonline.net/wp-content/uploads/Germany-IR.pdf>> accessed 14 June 2024.

<sup>77</sup> See for Scots law Mair (n 71) 6 and for German law Wellenhofer (n 3) Anh § 1302 BGB para 5.

<sup>78</sup> See for living in the same house or flat for Scots law Scottish Law Commission (n 1) paras 3.6f, 3.24ff; Macfarlane (n 9) 208f fn 4 and for German law Dethloff, Martiny and Zschoche (n 76) 5; Dutta and Wendland (n 6) 2.1 (text with fn 33) and for being in a sexual relationship for Scots law Sutherland (n 2) paras 2-027, 6-462 and for German law Schumann (n 44) NeheILG para 1; Dutta and Wendland (n 6) 2.3 (text with fn 41).

<sup>79</sup> Anne Griffiths, John Fotheringham and Frankie McCarthy, *Family Law* (4th edn, W Green/Thomson Reuters 2015) para 12-01; Mair (n 71) 19f.

<sup>80</sup> Wellenhofer (n 3) Anh § 1302 BGB para 47; Dutta and Wendland (n 6) 3.1 (text with fn 48).

<sup>81</sup> Catriona Laidlaw, 'Schottland' in Jürgen Rieck and Saskia Lettmaier (eds), *Ausländisches Familienrecht: Eine Auswahl von Länderdarstellungen* (23rd supp, CH Beck August 2022) para 10; Jane Mair, 'Property Relationship Between Spouses – National Report: Scotland' (*Commission on European Family Law* August 2008) 2, 11 <<http://ceflonline.net/wp-content/uploads/Scotland-Property.pdf>> accessed 14 June 2024.

<sup>82</sup> Dieter Martiny and Nina Dethloff, 'Property Relationship Between Spouses – National Report: Germany' (*Commission on European Family Law* August 2008) 11 <<http://ceflonline.net/wp-content/uploads/Germany-Property.pdf>> accessed 14 June 2024.

<sup>83</sup> See for Scots law Scottish Law Commission (n 1) para 5.47 and German law Dethloff, Martiny and Zschoche (n 76) 14.

<sup>84</sup> See detailed for Scots law Griffiths, Fotheringham and McCarthy (n 79) paras 10-24ff and detailed for German law Regina Bömelburg in Philipp Wendl and Hans-Joachim Dose (eds), *Das Unterhaltsrecht in der familienrichterlichen Praxis: Die neueste Rechtsprechung des*

ends otherwise than by death, Scots law provides, however, a special statutory financial remedy in the realm of family law by virtue of the FL(S)A 2006 (see A above), which gives the courts broad discretion<sup>85</sup> to make orders for payments to achieve fairness between the parties.<sup>86</sup> The orders are – in simplified terms (without going into the details) – based, on the one hand, on the extent to which both partners have derived economic advantages from the contributions of the other and have suffered economic disadvantages in the interest of the other or their children (FL(S)A 2006, s 28(2)(a), (3)–(6))<sup>87</sup> and, on the other hand, on the (future) economic burden one partner has to bear because of caring for their children (FL(S)A 2006, s 28(2)(b)).<sup>88</sup>

This legal remedy is in line with the approach of Scots law in relation to marriage, where the courts have a similar discretion<sup>89</sup> and where – contrary to civil law jurisdictions including Germany – there is equally no fundamental distinction between matrimonial property regimes and maintenance obligations.<sup>90</sup> What sets the FL(S)A 2006 apart, however, is that its financial remedy is only based on the two considerations described above instead of the five principles which are applicable to married couples:<sup>91</sup> Most notably, the principle that spouses should share the value of their matrimonial property fairly (FL(S)A 1985, s 9(1)(a)), which generally means equally (FL(S)A 1985, s 10(1)), does not apply.<sup>92</sup> In addition, in exercising their discretion, courts have neither to take into account whether one cohabitant is substantially financially dependent on the other nor whether one of them would suffer serious financial hardship as a result of the separation.<sup>93</sup> Moreover, their judicial powers are more limited for cohabiting couples: Courts are neither enabled to order the transfer of property and periodical payments (instead of capital sums) nor to make incidental orders.<sup>94</sup>

German law, in contrast, has no special remedy within family law: Cohabiting couples are – unlike their married counterparts – not subject to a community of accrued gains<sup>95</sup> (the default matrimonial property regime, § 1363(1) BGB); it requires the spouse whose accrued gains exceed those of the other to pay half of the surplus on divorce (§§ 1372ff, particularly § 1378(1) BGB). Equally, cohabitants, who are financially able, are generally free from maintenance obligations towards an indigent partner if the relationship breaks down; the only exception<sup>96</sup> is the claim of the mother or father regarding (future) childcare (§ 1615I(2)–(4) BGB), which applies, however, regardless of whether the parents were cohabiting.<sup>97</sup> Because of marital solidarity,<sup>98</sup> spouses are, by contrast, entitled to maintenance after divorce in the

---

*Bundesgerichtshofs und die Leitlinien der Oberlandesgerichte zum Unterhaltsrecht und zum Verfahren in Unterhaltsprozessen* (10th edn, CH Beck 2019) § 3 paras 1ff.

<sup>85</sup> *Whigham v Owen* [2013] CSOH 29, 2013 SLT 483 [10]; Macfarlane (n 9) 222.

<sup>86</sup> *Gow v Grant* [2012] UKSC 29, 2013 SC (UKSC) 1 [31ff]; Sutherland (n 2) paras 6-497ff, 6-507f.

<sup>87</sup> Detailed Sutherland (n 2) paras 6-485ff.

<sup>88</sup> Detailed Sutherland (n 2) paras 6-507ff.

<sup>89</sup> *Little v Little* 1990 SLT 785, 787; Felix Odersky, 'Das Unterhaltsrecht in Großbritannien' [2013] FPR (Familie Partnerschaft Recht) 72, 74; Sutherland (n 2) paras 6-191, 6-193.

<sup>90</sup> Odersky (n 89) 72; compare also regarding England and Wales as well as Ireland Scherpe (n 45) 165.

<sup>91</sup> El-Mumin (n 33) 56; Rodgers (n 8) 141.

<sup>92</sup> Macfarlane (n 9) 222.

<sup>93</sup> Compare FL(S)A 2006, s 28(2)(a), (b) for cohabitation with FL(S)A 1985, s 9(1) for marriage (compare also Scottish Law Commission (n 7) para 5.6).

<sup>94</sup> Compare FL(S)A 2006, s 28(2) for cohabitation with FL(S)A 1985, s 8(1), s 12, s 13, s 14 for marriage and see Sutherland (n 2) paras 6-475, 6-511 who herself argues in favour of the opposite with regard to periodic payments (see also Elaine E Sutherland, 'Still left holding the baby' (2023) 68 (3) JLSS (Journal of the Law Society of Scotland) 22, 24).

<sup>95</sup> Wellenhofer (n 3) Anh § 1302 BGB para 95.

<sup>96</sup> Löhnig (n 18) Anh §§ 1297ff BGB paras 80f; Dutta and Wendland (n 6) 3.2.1 (text after fn 53).

<sup>97</sup> Dethloff (n 23) A 131; Dutta and Wendland (n 6) 3.2.1 (text after fn 53).

<sup>98</sup> Dieter Martiny and Dieter Schwab, 'Grounds for Divorce and Maintenance Between Former Spouses – Germany' (*Commission on European Family Law* October 2002) 23  
<<http://ceflonline.net/wp-content/uploads/Germany-Divorce.pdf>> accessed 14 June 2024.

following situations: (future) childcare (§ 1570 BGB), old age (§ 1571 BGB), illness or infirmness (§ 1572 BGB), unemployment (no appropriate employment available) (§ 1573(1) BGB), topping-up ((appropriate) employment unable to provide for the marital standard of living) (§ 1573(2), § 1578(1) BGB), education, training or retraining (§ 1575 BGB) or gross inequity (§ 1576 BGB). Together these maintenance claims are able to compensate for economic disadvantages suffered because of the marriage.<sup>99</sup>

The *Bundesgerichtshof* has, nevertheless, developed in its case law<sup>100</sup> default statutory financial remedies in the areas of contract (doctrine of frustration, § 346(1), (2), § 313 BGB), partnership (§ 738(1)2 BGB) and unjustified enrichment (§ 812(1)2(2) BGB) law, although they have a limited scope: Only contributions between partners, which surpass what is needed for the ordinary way of living and which still enrich the beneficiary at the time of separation, have to be compensated.<sup>101</sup> Consequently, cohabitants will, for example, be reimbursed regarding payments they made for acquiring the family home of which the other partner is the sole owner<sup>102</sup> but not those made for childcare or rent.<sup>103</sup> This mirrors the legal situation of spouses who have opted out of the community of accrued gains (by concluding a marriage contract) in favour of the separation of property.<sup>104</sup> Scots law equally recognises unjustified enrichment claims besides its statutory financial remedy,<sup>105</sup> possibly even for spouses.<sup>106</sup>

### (3) Time Limit and Period of Prescription

Applications for the financial remedy of the FL(S)A 2006 are only possible within one year after the cohabitation ceased (FL(S)A 2006, s 28(8)); there is no judicial discretion to accept later submitted claims.<sup>107</sup> In contrast, both the Scottish unjustified enrichment claim is and the German remedies generally are governed by the ordinary rules of prescription: They are time-barred, in the case of the former, five years after becoming enforceable<sup>108</sup> and, in the case of the latter, typically three years after separation (§ 195, § 199(1) BGB);<sup>109</sup> however, maintenance obligations are principally excluded for the past (§ 1615l(3)1, § 1613 BGB). With regard to spouses, Scots law integrates the orders for financial remedies into the divorce proceedings (see FL(S)A 1985, s 8(1), s 12(1), s 13(1)), which is why no provisions regarding their time limits exist; in German law, the legal position is identical to the one for cohabitants (see above; however, § 1578b BGB applies instead of § 1615l(3)1 BGB).

### (4) Contracting out of the Financial Remedies and its Limitations

The FL(S)A 2006 does not address the question whether cohabiting couples are permitted to contract out of the financial remedy.<sup>110</sup> Scottish legal literature, nevertheless, concurs that

---

<sup>99</sup> Compare Beate Heiß and Hans Heiß in Winfried Born, *Unterhaltsrecht: Ein Handbuch für die Praxis* (54th supp, CH Beck July 2018) Kap 1 para 1; Bömelburg (n 84) § 4 paras 103f.

<sup>100</sup> BGH NJW 2008, 3277 paras 18, 29 (see Dethloff, Martiny and Zschoche (n 76) 25ff).

<sup>101</sup> Wellenhofer (n 3) Anh § 1302 BGB paras 99ff.

<sup>102</sup> Löhnig (n 18) Anh §§ 1297ff BGB para 87.

<sup>103</sup> Wellenhofer (n 3) Anh § 1302 BGB para 100.

<sup>104</sup> Löhnig (n 18) Anh §§ 1297ff BGB para 66; Dutta and Wendland (n 6) 4.3 (text after fn 101); Henrich (n 6) 342.

<sup>105</sup> See detailed Sutherland (n 2) paras 6-469ff.

<sup>106</sup> See Scottish Law Commission (n 1) para 8.12.

<sup>107</sup> Scottish Law Commission (n 1) para 6.5.

<sup>108</sup> *Pert v McCaffrey* [2020] CSIH 5, 2020 SC 259 [24]; Scottish Law Commission (n 7) para 8.33; Hector MacQueen, 'Cohabitants, unjustified enrichment and law reform: Part 1' (2019) 160 FamLB (Family Law Bulletin) 1, 4.

<sup>109</sup> Wellenhofer (n 3) Anh § 1302 BGB para 124; Dutta and Wendland (n 6) 4.3.5 (text with fn 139).

<sup>110</sup> Rodgers (n 8) 160.

cohabitation contracts, which, in principle, do not have to observe formal requirements,<sup>111</sup> are able to deviate from the default statutory regime.<sup>112</sup> In this regard, the general limitations of contract law to their effectiveness apply, among others, error, extortion and fraud.<sup>113</sup> Marriage contracts are treated the same way (including their form), but courts have the additional power to vary unreasonable or unfair terms (or contracts) or set them aside (FL(S)A 1985, s 16).<sup>114</sup> What is crucial to be aware of is, however, that only the time of entering into them but not any subsequent change of circumstances is of relevance for both cohabitation<sup>115</sup> and marriage<sup>116</sup> agreements since unilateral hardship is, on its own, not sufficient for the doctrine of frustration.<sup>117</sup>

German law allows cohabitants and spouses to modify and exclude their financial remedies in a similar way, although the restrictions are stronger: Whereas for marital contracts notary authentication is prescribed (§ 1410, § 1585c(2), § 128 BGB),<sup>118</sup> cohabitational contracts are only governed by the limited formal requirements of general contract law.<sup>119</sup> In terms of substantive safeguards, according to the predominant view,<sup>120</sup> cohabitation agreements are, in principle, treated identically to marriage agreements: They are void if – at the time of their conclusion – one party has objectively to bear a unilateral burden which is evidently unreasonable and the other party acted subjectively reprehensible;<sup>121</sup> they have to be varied or set aside if – at the time of divorce – such a burden has occurred because of a change of circumstances.<sup>122</sup>

#### D. COMPARATIVE CRITICAL EVALUATION OF SCOTS AND GERMAN LAW

Having contemplated which legal measures are generally most appropriate for cohabitation upon relationship breakdown and having comparatively analysed the financial remedies available in Scotland and Germany, the article is now in the position to critically evaluate the legal framework in both jurisdictions. This section will – after the preliminary remarks below – assess whether the situation of cohabitants in Scots and German law should be identical to or distinct from those of spouses (1) and whether and in what respect the existing legal rules should be reformed (2). The time limit and the prescription of the financial remedies (3) as well as the possibility of contracting out of them (including applicable limitations) (4) will be

---

<sup>111</sup> Mair (n 71) 35.

<sup>112</sup> See, for example, Scottish Law Commission (n 1) paras 7.6f; Mair (n 71) 32; Rodgers (n 8) 160; Sutherland (n 2) para 6-513.

<sup>113</sup> Scottish Law Commission (n 1) para 7.7.

<sup>114</sup> Kenneth McK Norrie, 'Marital Agreements and Private Autonomy in Scotland' in Jens M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012) 304, 305f; see also Macfarlane (n 9) 201ff.

<sup>115</sup> See Mair (n 71) 39; Scottish Law Commission (n 7) para 7.36.

<sup>116</sup> Scottish Law Commission (n 1) paras 7.3, 7.17, 7.26.

<sup>117</sup> Hector L MacQueen, *MacQueen and Thomson on Contract Law in Scotland* (5th edn, Bloomsbury Professional 2020) paras 5.72, 5.86.

<sup>118</sup> Anatol Dutta, 'Marital Agreements and Private Autonomy in Germany' in Scherpe (ed) (n 114) 172, 173f.

<sup>119</sup> Wellenhofer (n 3) Anh § 1302 BGB para 86.

<sup>120</sup> Marina Wellenhofer in Beate Gsell and others (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (CH Beck 1 April 2024) § 1297 BGB para 96; Herbert Grziwotz, *Nichteheliche Lebensgemeinschaft* (5th edn, CH Beck 2014) § 8 para 9; Wellenhofer (n 3) Anh § 1302 BGB para 87; Herbert Grziwotz in Christof Münch (ed), *Familienrecht in der Notar- und Gestaltungspraxis* (4th edn, CH Beck 2023) § 10 para 32; Herbert Grziwotz, 'Möglichkeiten einer vertraglichen Regelung' [2021] NZFam (Neue Zeitschrift für Familienrecht) 410, 411; Herbert Grziwotz, 'Auseinandersetzung einer faktischen Lebensgemeinschaft: Arbeitshilfe und Rechtsprechungsübersicht' [2015] NZFam (Neue Zeitschrift für Familienrecht) 543, 545.

<sup>121</sup> BGH NJW 2014, 1101 paras 14, 39; Alexander Stöhr, 'Die Inhaltskontrolle von Eheverträgen' [2022] JuS (Juristische Schulung) 805, 807f.

<sup>122</sup> BGH NJW 2015, 52 para 22; Stöhr (n 121) 808f.

evaluated separately. Where appropriate, it will be contemplated what the jurisdictions are able to learn from each other.

That both Scots and German law have settled for statutory default regimes (see C(2) above) – even if their scope, particularly in Germany, is limited (see C(2) above and D(2) below) – instead of voluntary legal measures corresponds with what the article advocates (see B(1) above). Equally positive is that both legal systems have abstained from imposing eligibility requirements (see B(2) and C(1) above), which has not caused any major issues – in contrast to other legal systems which took the opposite path.<sup>123</sup> Even having no statutory definition at all and leaving the matter to the judiciary is an acceptable way, as German law demonstrates (see C(1) above).<sup>124</sup>

### **(1) Legal Measures Assimilated to or Distinguished from Marriage**

Whether the financial remedies for cohabitants should be assimilated to or distinguished from those of spouses is a question each jurisdiction has to respond to individually (see B(2) above). Treating cohabitation like marriage would entail that the couple is, in Scots law, subject to the principle of sharing their cohabitational property fairly, that is, equally, and, in German law, subject to the default property regime, where the accrued gains are distributed equally (see B(2) and C(2) above). These legal provisions go beyond protecting the economically weaker partner<sup>125</sup> and would significantly reshape how cohabitants arrange their financial affairs without them having voluntarily chosen them.<sup>126</sup> Unless those rules reflect the expectation of the majority of cohabiting couples, which is doubtful (see B(2) above), neither Scotland nor Germany should adopt them.<sup>127</sup>

### **(2) Existing Financial Remedies**

While both legal systems provide financial remedies for the (future) burden of childcare (see C(2) above), German law – unlike Scots law, which protects the more vulnerable partner in this regard – fails to provide any redress for cohabitants who suffered economic disadvantages because of the relationship, particularly for upbringing children or housekeeping (see C(2) above):<sup>128</sup> Only contributions which exceed what is needed for the ordinary way of living are compensated (see C(2) above). Unsurprisingly, the legal situation in Germany has, for this reason, been criticised for decades, and various proposals to improve it have been made.<sup>129</sup> An extension is justified because the other partner regularly has accepted the division of responsibilities, which has led to the disadvantages, and has generally profited from it.<sup>130</sup> Here, German law is able to draw inspiration from Scots law.

However, transplanting the Scottish financial remedy is – in line with the principle that legal measures have to be compatible with the structure of each legal system (see B(3) above) – highly problematic<sup>131</sup> as Scottish family law does not distinguish between relationship property

---

<sup>123</sup> Miles, Wasoff and Mordaunt (n 52) 175; Rodgers (n 8) 133.

<sup>124</sup> Agreeing Wellenhofer (n 24) 976; compare also Jan Busche, 'Unterhaltsansprüche nach Beendigung nichtehelicher Lebensgemeinschaften – Eine kritische Bestandaufnahme' [1998] JZ (JuristenZeitung) 387 <396>.

<sup>125</sup> Compare Stephan Szalai in Beate Gsell and others (eds) (n 120) (1 May 2024) § 1363 BGB para 6.

<sup>126</sup> Scottish Law Commission (n 1) para 2.38.

<sup>127</sup> Agreeing, for example, Scottish Law Commission (n 1) para 2.38; Löhnig (n 18) Anh §§ 1297ff BGB para 20; Lieb (n 28) A 107; Stępień-Sporek and Ryznar (n 13) 100f.

<sup>128</sup> Dethloff (n 23) A 140f; Wellenhofer (n 24) 973.

<sup>129</sup> See Wellenhofer (n 3) Anh § 1302 BGB paras 29f, 67; see also A above.

<sup>130</sup> Wellenhofer (n 24) 975; see also Dethloff (n 23) A 141.

<sup>131</sup> Compare Henrich (n 6) 340f; Miles (n 17) 93.

regimes and maintenance obligations as German law does (see C(2) above). Because the Scottish broad judicial discretion (see C(2) above) is generally unfamiliar to German matrimonial property law but established within maintenance law,<sup>132</sup> reform should, instead of the former, focus on the latter, where provisions which remedy economic disadvantages caused by the relationship already exist for spouses (see C(2) above).

Scots law is, however, not without shortcomings either. In particular, the available orders are too limited: There is no persuasive justification for why the transfer of property and incidental orders (see C(2) above) should be reserved for spouses, which is why the Scottish Law Commission has recommended their introduction.<sup>133</sup> Without the possibility of conveying ownership of the family home, there is a risk that the property has to be divided and sold, depriving both partners (and their children) of its benefits.<sup>134</sup> Equally, orders for periodical payments (instead of capital sums), which the Scottish Law Commission only has discussed in passing,<sup>135</sup> should be allowed because there is likewise no valid reason for divergence,<sup>136</sup> in particular, since Scots law favours a clean break not only in the financial relationship of cohabitants<sup>137</sup> upon their separation but also in those of spouses.<sup>138</sup>

Whether financial remedies should also be available where one partner suffers economic disadvantages unrelated to the relationship or otherwise financial hardship, for example, because of being of old age, ill or infirm, is less straightforward. However, cohabiting and married couples are functionally similar, in particular, emotionally committed to each other (see B(1) above), and a remedy would serve the protection of the more vulnerable partner (unlike the principle of equal sharing) (see D(1) above). Hence, German law should extend the principle of solidarity from marriage to cohabitation and equalise its corresponding maintenance obligations,<sup>139</sup> unless there is evidence that this approach would be contrary to the expectation of the majority of cohabitants. For the very same reasons, Scots law should expand the considerations on which the financial remedy of the FL(S)A 2006 is based to include – as recommended by the Scottish Law Commission –<sup>140</sup> serious hardships suffered

---

<sup>132</sup> Scherpe (n 45) 159f; compare, on the one hand, § 1381 and § 1383 BGB (equity) for the community of accrued gains as well as, on the other hand, § 1570(1)2, 3, (2), § 1574(2), § 1576, § 1577(2)2, (3), § 1578b, § 1579, § 1581, § 1585(2), § 1585a(1)2, § 1615l(2)4, 5, (3), § 1611, § 1613(3)1 BGB (equity) and § 1573(1), § 1574, § 1578(2), (3), § 1578b(1), § 1581(1), § 1585a(1)3, § 1615l(3)1, § 1603(1), § 1610 BGB (appropriateness) for maintenance obligations (see in relation to the non-binding guidelines of the Higher Regional Courts Werner Reinken in Wolfgang Hau and Roman Poseck (eds), *BeckOK BGB* (70th edn, CH Beck 1 May 2024) § 1610 BGB paras 8ff; Hans-Joachim Dose in Wendl and Dose (n 84) § 1 paras 16ff).

<sup>133</sup> Scottish Law Commission (n 1) paras 5.72, 5.77f, 5.79 with recommendation 8(a), (c), (e) (also 112f), 121f (especially FL(S)A 2006, s 28(3)(c), (d), (4), s 28A in the recommended amended version).

<sup>134</sup> Compare Scottish Law Commission (n 1) para 5.64.

<sup>135</sup> See Scottish Law Commission (n 1) paras 5.47, 5.49, 5.66, 5.68, 5.75, 5.85, 7.3 fn 3 ('we do not recommend that that position should change'); however, orders to make payments for up to six months are recommended in relation to serious hardships suffered as a result of the separation (Scottish Law Commission (n 1) paras 5.75f, 5.79 with recommendation 8(b) (also 112), 121ff (especially FL(S)A 2006, s 28(3)(b), s 28A(3)(a) in the recommended amended version).

<sup>136</sup> Agreeing in relation to future childcare Sutherland (n 2) para 6-512; Sutherland (n 94) 24.

<sup>137</sup> Sutherland (n 2) para 6-504.

<sup>138</sup> Griffiths, Fotheringham and McCarthy (n 79) para 13-03; Michael Meston, 'Grounds for Divorce and Maintenance Between Former Spouses: Scotland' (*Commission on European Family Law* October 2002) 13 <<http://ceflonline.net/wp-content/uploads/Scotland-Divorce.pdf>> accessed 14 June 2024.

<sup>139</sup> Apparently agreeing in principle Dutta (n 16) 667f; partially agreeing Henrich (n 6) 343; however, disagreeing, for example, Lieb (n 28) A 88f, A 112; Rodgers (n 8) 149ff; Wellenhofer (n 24) 975f.

<sup>140</sup> See Scottish Law Commission (n 1) paras 5.46f, 5.52, 5.58 (recommendation 6(b)) (also 111), 5.76, 123f (especially FL(S)A 2006, s 28B(1)(b) in the recommended amended version).

as a result of the separation and – going beyond its recommendations –<sup>141</sup> substantive financial dependence of one cohabitant to the other. The absence of maintenance obligations during the relationship (see C(2) above) is on its own not an argument against these extensions, even if it was the main substantive one the Scottish Law Commission used in 1992 to reject both extensions advocated above.<sup>142</sup> The legal situation in the course of and upon breakdown of cohabitation has not (necessarily) to be the same, which is already demonstrated by the financial remedy of the FL(S)A 2006, being applicable only in the latter but not the former case.

### (3) Time Limit and Period of Prescription

Since the German law of prescription is identical for both cohabitation and marriage (see C(3) above), and its generally three-year period (see C(3) above) gives the economically weaker partner sufficient time to assert any claims, there is no scope for improvement.

In comparison, the Scottish time limit to apply for the financial remedy of the FL(S)A 2006 causes hardships,<sup>143</sup> with the result that it has been heavily criticised:<sup>144</sup> One year is simply insufficient to deal, in many cases, with the significant consequences of relationship breakdown<sup>145</sup> and fails to protect the more vulnerable partner appropriately.<sup>146</sup> In particular, accommodation, benefits, childcare and employment are regularly more pressing issues after separation for the economically weaker cohabitant.<sup>147</sup> Moreover, the provision has unnecessarily burdened the court system as actions are typically raised and immediately resisted to avoid the claim becoming time-barred.<sup>148</sup> With regard to possible reform, replicating the time limit for marriage is of no avail since there is none (see C(3) above). Adopting the five-year prescription period for unjustified enrichment claims (see C(3) above) would align with the German approach. However, – corresponding with the principle that any reform has to be compatible with the structure of the legal system (see B(3) above) – this solution comes into conflict with the principle of a clean break, which Scots law favours for both marriages and cohabitations (see above). A conceivable middle way might be a two-year time limit with a judicial discretion to allow later claims within two further years, which goes beyond the recommendations of the Scottish Law Commission of a one-year time limit and one further year.<sup>149</sup>

---

<sup>141</sup> The Scottish Law Commission recommends financial dependence only as a factor for the consideration of serious hardship suffered as a result of the separation but not as an independent consideration (see Scottish Law Commission (n 1) paras 5.46f, 5.52, 5.58 (recommendation 7(2)(b)) (also 111f), 124ff (especially FL(S)A 2006, s 28C(2)(b) in the recommended amended version).

<sup>142</sup> Scottish Law Commission (n 52) para 15.16; see, however, more nuanced Scottish Law Commission (n 53) paras 5.11f, 5.19; possibly still in this direction Scottish Law Commission (n 1) para 5.47.

<sup>143</sup> See *Simpson v Downie* [2012] CSIH 74, 2013 SLT 178 [14].

<sup>144</sup> See Fran Wasoff, Jo Miles and Enid Mordaunt, 'Legal Practitioner's Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006' (January 2011) University of Cambridge Faculty of Law Research Paper No 11/03, 55f, 71, 74, 126f <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736612](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736612)> accessed 14 June 2024.

<sup>145</sup> Scottish Law Commission (n 1) para 6.12.

<sup>146</sup> Compare Sutherland (n 2) para 6-466.

<sup>147</sup> Scottish Law Commission (n 1) para 6.12 fn 27.

<sup>148</sup> Scottish Law Commission (n 1) paras 6.3f, 6.12; Wasoff, Miles and Mordaunt (n 144) 54, 57, 72ff, 115f, 126f.

<sup>149</sup> Scottish Law Commission (n 1) paras 6.25 with recommendation 10 (also 113), 6.33ff, 6.42 with recommendation 12 (also 113), 127 (especially FL(S)A 2006, s 28E in the recommended amended version).

#### **(4) Contracting out of the Financial Remedies and its Limitations**

That both Scotland and Germany allow cohabiting couples to opt out of the default statutory regime is the right approach since this possibility is indispensable to appropriately balance protecting the economically weaker partner with private autonomy; contracting out has, nevertheless, to be subject to formal and substantive safeguards in the interest of the more vulnerable cohabitant (see B(4) above).

Whereas the absence of formal requirements in German law is excused in light of the nature of its financial remedies and their limited scope (see C(2) above) – if maintenance obligations are, however, extended, notary authentication should be mandatory for corresponding agreements –<sup>150</sup> the same approach of Scots law neglects the protection of the economically weaker partner, for whom the remedy of the FL(S)A 2006 is of great significance. The minimum requirement should be the written form<sup>151</sup> – even notary authorisation could be a possibility, which is compatible with Scots law (see Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 1(6), (5)) –<sup>152</sup> while independent legal advice by solicitors might impose undue efforts and expenses.<sup>153</sup> Since cohabitation should, in principle, not have stronger legal effects than marriage (see B(3) above), it would, however, be inconsistent to enhance only the legal situation of cohabitants but not the identical one (see C(4) above) of spouses.

In terms of substantive safeguards, both Scots and German law provide basic protection for the more vulnerable partner at the time of entering into a cohabitation contract (see C(4) above). Given the functional similarity of cohabiting and married couples (see B(2) above) and the unlikeness of contrary expectations of cohabitants, both legal systems should extend their protective framework for marriage to cohabitation, which Germany does, but Scotland does not (see C(4) above). Scottish courts should – in line with the recommendation of the Scottish Law Commission – have the power to vary unreasonable or unfair terms (or contracts) or set them aside.<sup>154</sup>

In contrast, regarding unanticipated changes of circumstances – a regular situation for both cohabiting and married couples (see the paradigmatic example under B(4) above) – Scots law practically abandons the economically weaker partner since there is no remedy available (see C(4) above). German law, which ensures adequate protection in this respect, could serve as an inspiration for reform – but again, to avoid inconsistencies, any improvement of the legal situation of cohabitants has to be replicated for spouses.<sup>155</sup>

### **E. CONCLUSION**

Across jurisdictions, the most appropriate way to balance the protection of the more vulnerable party with private autonomy while regulating financial remedies upon cohabitation breakdown is by providing a default statutory regime, from which the partners are able to contract out subject to formal and substantive requirements; mere voluntary legal measures are insufficient (see B(1) and B(4) above). Whereas both Scots and German law principally conform with these legal benchmarks, only the latter but not the former ensures adequate safeguards in case of unanticipated changes of circumstances (see D and D(4) above).

---

<sup>150</sup> Agreeing Wellenhofer (n 24) 976.

<sup>151</sup> Disagreeing Scottish Law Commission (n 1) para 7.24.

<sup>152</sup> See for its protective purpose Earl of Mansfield (Minister of State in the Scottish Office), HL Deb 9 April 1981, vol 419 (5th series), col 686 and Malcolm Rifkind (Parliamentary Under-Secretary of State for Scotland), HC Deb 30 June 1981, vol 7 (6th series), col 769.

<sup>153</sup> Compare Rodgers (n 8) 161.

<sup>154</sup> Scottish Law Commission (n 1) paras 7.20, 7.25, 7.27 with recommendation 14(c) (also 114), 126f (especially FL(S)A 2006, s 28D in the recommended amended version).

<sup>155</sup> Compare Scottish Law Commission (n 1) paras 7.17f, 7.26.

The nature, requirements and legal effects of the financial remedies, particularly whether they should be assimilated to those of marriage, have to be determined for each jurisdiction independently with regard to the expectations of cohabiting couples (see B(2) above). Two general principles apply, nevertheless: Default statutory regimes for cohabitation should not have stronger legal effects than those for marriage and legal measures have to be compatible with the structure of each legal system (see B(3) above).

While Scotland and Germany are right in distinguishing the legal effects of cohabitation from marriage (see D(1) above) and in abstaining from imposing eligibility requirements (see D above), their protection of the more vulnerable partner has to be expanded: German law, on the one hand, should introduce maintenance obligations where one partner suffers economic disadvantages or financial hardships – regardless of whether they are related to cohabitation (see D(2) above). Scots law should, on the other hand, reform its financial remedy not only to extend the available court orders and the considerations on which they are based (see D(2) above) but also to prolong the time limit to apply for it (see D(3) above).