

RESEARCH ARTICLE

A human rights framing of cohabitation reform

Helen Rodway[†] 

The University of Manchester, Manchester, UK

Email: helen.rodway@manchester.ac.uk

(Received 07 August 2025; revised 02 December 2025; Accepted 24 March 2026)

Abstract

Despite the exponential rise in the number of couples cohabiting, across Europe, cohabitants are unable to access comprehensive legal protections. To strengthen calls for reform, this paper advocates for the adoption of a human rights framing and traces its potential development. It begins with an analysis of the current discourse and offers an explanation as to why there is limited engagement with human rights argumentation. The focus will then shift to the need for a human rights framing. Through an analysis of the merits of such, it will be demonstrated that the common criticisms of a human rights framing are not applicable in the cohabitation context. Moreover, it will be argued that, owing to a previous judicial recognition of human rights infringements, the debate is primed for the adoption of a novel framing. This paper will conclude by considering how a human rights framing could be applied in practice.

Keywords: human rights; cohabitation; family; framing; legal recognition

Introduction

In England and Wales, spouses and civil partners can benefit from bespoke schemes of legal protections upon relationship breakdown and automatic entitlement following the death of a partner.¹ Despite cohabitation being the fastest growing family type in the UK,² there are no corresponding provisions for cohabitants.³ It has been nearly four decades since *Burns v Burns*,⁴ where the applicant was not eligible for financial provision following her relationship breakdown, despite cohabiting with her partner for 17 years and raising two children together. In this case, Fox LJ commented that the situation facing the applicant was an ‘unfairness ... that is not a matter which the courts can control. It is a matter for Parliament.’⁵ No reforms have been introduced by the UK government. What is more, repeated proposals for reform have been rejected.

In 2007, the Law Commission proposed a statutory scheme of legal protections on relationship breakdown for cohabitants.⁶ This was rejected by the Labour Government who stated that they wanted to

[†]Thanks go to Luke Graham, Kathryn O’Sullivan and Andy Hayward for comments on earlier drafts. Any errors remain my own.

¹The term ‘spouses’ will be used to refer to both spouses and civil partners owing to their legal similarities.

²Office for National Statistics ‘Families and households in the UK: 2024’ (ONS, 23 July 2025) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2024> (last accessed 23 April 2026).

³The term ‘cohabitation’ will be used to refer to those who are live together in a romantic relationship which has not been formalised either through marriage or through civil partnership.

⁴*Burns v Burns* [1984] Ch 317, [1984] 2 WLR 582.

⁵*Ibid.*, at 332.

⁶Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* Law Com 307 (London: TSO, 2007).

first understand the outcomes of the recently introduced protections for cohabitants in Scotland before engaging with the proposals.⁷ In 2011, the Coalition Government confirmed that they did not ‘intend to take forward the Law Commission’s recommendations’, as cohabitation reform was not a priority.⁸ Nine years on, the Conservative Government rejected renewed calls for reform from the Women and Equalities Committee,⁹ who recommended that the government revisit the Law Commission’s earlier proposals.¹⁰ The Labour Party hinted at a change in the tide with a promise to ‘strengthen the rights’ of cohabitants in their 2024 election manifesto.¹¹ However, there is still no indication when reforms are likely to be introduced and what they will entail.

England and Wales can also be considered an outlier in its approach towards cohabitation compared with neighbouring jurisdictions. Across Europe, some jurisdictions have introduced comprehensive legal protections for cohabitants,¹² while some ignore them entirely.¹³ Others, like England and Wales, recognise cohabitants insofar as it economically benefits the government or to achieve other policy goals, such as protecting women through domestic abuse protections, but confer no meaningful protections on relationship breakdown or following the death of a partner.¹⁴ Although the domestic position is not uncommon across Europe, it contrasts with the position in neighbouring Scotland and Ireland, where bespoke protections for cohabitants have been introduced.¹⁵

Perhaps because of the government’s response, cohabitants in the UK have been reliant on strategic litigation based on human rights to challenge their exclusion from benefits reserved for spouses.¹⁶ Despite a judicial recognition of the relevance of human rights in this context, this paper argues that the role that human rights can play in the cohabitation reform debate has been overlooked by advocates for reform. It will be argued that owing to the sustained governmental inertia and the increasing need for reform, a human rights framing of the issues facing cohabitants is necessary.

To demonstrate the applicability of a human rights framing in the cohabitation context and to trace its potential development, this paper is divided into five sections. [Section 1](#) identifies framings commonly applied to the cohabitation debate, exploring arguments underpinning each approach. [Section 2](#) moves to the focus of this paper: the role of human rights in the cohabitation debate. In examining the historical absence of a human rights presence, reasons for the lack of a coherent human rights narrative will be submitted. In concluding that these reasons should no longer stifle an engagement with human rights, [Section 3](#) will then proceed to explore why a human rights framing should be adopted. Six prominent

⁷Hansard, HC Deb vol 472, col 122WS, 6 March 2008.

⁸Hansard, HC Deb vol 532, cols 15–16WS, 6 September 2011.

⁹Women and Equalities Committee ‘The right of cohabiting partners: Government response to the Committee’s Second Report’ (HC 2022–23) p 766.

¹⁰Women and Equalities Committee *The Rights of Cohabiting Partners* (HC 2022–2023) p 92.

¹¹Labour Party ‘Change: Labour Party Manifesto 2024’ (Labour Party, 2024) available at <https://labour.org.uk/wp-content/uploads/2024/06/Labour-Party-manifesto-2024.pdf> (last accessed 23 April 2026).

¹²Including Croatia, Slovenia, Sweden, Finland, Ireland and Scotland.

¹³Including Russia, Poland and Greece.

¹⁴Including France, Denmark, Spain.

¹⁵Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Part 15; Family Law (Scotland) Act 2006, ss 25–29. See B Tobin ‘The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?’ (2013) 35(3) *Journal of Social Welfare and Family Law* 279 and K O’Sullivan ‘Cohabitant protection on relationship breakdown in Ireland: a lesson in illusory justice’ (2023) 37(1) *International Journal of Law, Policy and the Family* 1 for a discussion of the position in Ireland. See EE Sutherland ‘From “bidie-in” to “cohabitant” in Scotland: the perils of legislative compromise’ (2013) 27(2) *International Journal of Law, Policy and the Family* 143 and F Garland ‘Gender imbalances, economic vulnerability and cohabitation: evaluating the gendered impact of section 28 of the Family Law (Scotland) Act 2006’ (2015) 19(3) *Edinburgh Law Review* 311 for a discussion of the position in Scotland.

¹⁶*Re an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48, [2018] 1 WLR 4250; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, [2018] QB 804; *Brewster v Northern Ireland Local Government Officers’ Superannuation Committee* [2017] UKSC 8, [2017] 1 WLR 519; *R (on the application of Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), [2020] 1 WLR 1441; *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271, [2020] 1 WLR 537; *Swift v Secretary of State for Justice* [2013] EWCA Civ 193, [2014] QB 373.

criticisms levelled at the implementation of a human rights framing will be analysed, assessing possible impacts on cohabitation reform. It will be concluded that this alternative framing will strengthen, not undermine, the calls for reform. To support this assertion, Section 4 will evidence how the debate is primed for a greater engagement with human rights argumentation through a judicial recognition of human rights infringements. Finally, Section 5 concludes by considering how advocates for increased protections could use human right argumentation in practice. It will be argued that the adoption of a human rights framing is overdue and such a framing can provide a greater impetus for reform and would increase the pressure on governments to ensure cohabitants can access legal protections.

While the need to adopt a human rights framing is emphasised in this paper with reference to the position in England and Wales, it has the potential to have a broader application across other European jurisdictions. As will be explored subsequently, it is unlikely that a human rights framing of cohabitation reform will stem from Strasbourg jurisprudence, whereas the current circumstances in England and Wales are conducive for the development of a human rights framing. While the initial adoption of this framing may be state-specific, the benefits of such are not limited to one jurisdiction and can be embraced by advocates for reform across Europe.

1. Framing cohabitation reform

Framing an issue is to engage with ‘forms of argumentation that help people organise information and make sense of the world’.¹⁷ Relying on a specific set of beliefs or goals can ‘inspire and legitimate the activities and campaigns’.¹⁸ Although the need for cohabitation reform is not yet being articulated using the language of rights, a number of alternative framings are identifiable in the current discourse. This paper will briefly explore three broad frames: economic; feminist; and socio-legal. While not exhaustive, this list identifies the themes often adopted in the debate.

(a) Economic

The need for cohabitation reform is most often framed as an economic issue, with the focus on alleviating the adverse effects facing cohabitants resulting from the absence of bespoke economic protections on relationship breakdown or bereavement. The economic implications of the current law have been at the forefront of the cohabitation debate since *Burns*. In recommending a comprehensive opt-out scheme of legal protections in 2007, the Law Commission acknowledged that although there was no consensus on the basis for financial redress for cohabitants, ‘principles focusing on the economic impact of the relationship’ were generally supported by those consulted on reform.¹⁹

An economic approach is also adopted when evaluating the effectiveness of existing provisions. The common law principles which have been developed by domestic courts in response to the absence of legislative protections²⁰ are also often criticised for their emphasis on direct financial contributions.²¹ The development of the common intention constructive trust into a tool for cohabitants to establish a beneficial interest in the family property irrespective of the legal title can be useful but is limited in its application. Once a trust has been established, the judiciary has the discretion to quantify shares as they see fit, giving effect ‘to the whole course of dealing’.²² However, for a trust to operate, in the absence of an

¹⁷P Gready ‘How to build a culture of human rights in the era of populism: reflections from the human rights city of York (UK)’ (2025) 34(4) *Social and Legal Studies* 602 and 610.

¹⁸RD Benford and DA Snow ‘Framing processes and social movement: an overview and assessment’ (2000) 26 *Annual Review of Sociology* 611 and 614.

¹⁹Law Commission, above n 7, at [4.29].

²⁰AP Hayward ‘“Family property” and the process of “familialisation” of property law’ (2012) 24(3) *Child and Family Law Quarterly* 284.

²¹Law Commission, above n 7, at [2.12]–[2.16]; R Probert ‘Equality in the family home?’ (2007) 15 *Feminist Legal Studies* 341.

²²*Oxley v Hiscock* [2004] EWCA Civ 526 at [69].

express agreement to share ownership of the property, the party seeking to establish a beneficial interest must evidence a financial contribution to the purchase price or mortgage payments.²³ Despite efforts to ‘familialise’ the trust law framework,²⁴ cohabitants are still required to satisfy property law principles, not ones that are more cognisant with family realities.

While there is no bespoke legislative scheme of protections, in specific circumstances cohabitants can seek legal recourse through broader legislative provisions available to all. The Inheritance (Provision for Family and Dependents) Act 1975 provides a route for cohabitants to challenge their inheritance entitlement when their partner dies and the Children Act 1989 allows for applications for financial provision from a non-resident parent to aid with child-rearing.²⁵ However, these routes are often insufficient owing to the financial inadequacies of the protections available or they are unworkable as any award may be dwarfed by the costs of litigation.²⁶ These criticisms have contributed to the calls for reforms and strengthen the arguments that the current provisions offer insufficient financial protections.

(b) Feminist

Much of the discussion about cohabitation reform is situated at the intersection of an economic and feminist framing. This stems from evidence detailing how women are disproportionately impacted by relationship breakdown.²⁷ Although the absence of protections for cohabitants is not ostensibly gendered, female cohabitants may be disproportionately impacted resulting from a lack of economic provision.²⁸ The characterisation of cohabitation reform as a feminist issue has been adopted by the Labour Party. Prior to entering government, Emily Thornberry MP pledged that Labour would address ‘three injustices facing women’, one of which was the absence of legal protections for cohabitants.²⁹

Notably, feminist arguments have also been used to oppose automatic protections for cohabitants. Auchmuty argues that the real issue facing women is not the absence of legal protections, but the sustained gender inequality in relationships, and society more widely, which is not being addressed.³⁰ Auchmuty concluded that bespoke protections will ‘discourage further efforts within society towards gender equality or by individual women to achieve financial independence’.³¹ Bottomley has also urged caution as to the extent to which legislative protections should be heralded as protecting the property interests of female cohabitants following relationship breakdown.³² Another line of argumentation which is pervasive in the cohabitation debate, and will be explored in greater detail subsequently, is that the introduction of legislative protections may undermine the position of women. Baroness Deech, a

²³*Lloyds Bank v Rosset* [1991] 1 AC 107.

²⁴Hayward, above n 20.

²⁵Section 1(1)(e) of the Inheritance (Provision for Family and Dependents) Act 1975 allows a dependent of the deceased to make a claim for financial provision. Although a cohabitant could qualify as a dependent, s 1(1A) of the Act is specifically aimed at allowing claims by cohabitants who had lived in the same household as the deceased, as spouses or civil partners, for at least two years immediately preceding the deceased’s death.

²⁶See H Rodway ‘Reconceptualising cohabitation reform as a children’s rights issue’ (2024) 36(3) *Child and Family Law Quarterly* 235 for a discussion of the limitations of these provisions.

²⁷LJ Weitzman *The Divorce Revolution* (New York: Free Press, 1985); H Fisher and H Low ‘Who wins, who loses and who recovers from divorce?’ in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Oxford: Hart Publishing, 2009) p 227.

²⁸Women and Equalities Committee ‘Oral evidence: the rights of cohabiting partners’ (HC 130, 3 November 2021) Q39 Graeme Fraser.

²⁹E Thornberry MP ‘Making the law work for women’ (speech delivered at the Labour Party Conference 2023, Liverpool, 10 October 2023) available at <https://www.emilythornberry.com/shadow-attorney-general/2023/10/10/making-the-law-work-for-women-my-labour-conference-speech-2023/> (last accessed 23 April 2026).

³⁰R Auchmuty ‘The limits of marriage protection in property allocation when a relationship ends’ (2016) 28(4) *Child and Family Law Quarterly* 303.

³¹*Ibid.*

³²A Bottomley ‘From Mrs Burns to Mrs Oxley: do co-habiting women (still) need marriage law?’ (2006) 14(2) *Feminist Legal Studies* 181.

former academic, a member of the UK House of Lords and a strong opponent of cohabitation rights, has argued that redistributive provisions for cohabitants are 'based on outdated views of the roles played by men and women living together' and portray the female party as the 'victim' in need of financial support.³³

Despite a feminist framing being adopted on both sides, it is a clear line of argumentation in cohabitation debate.

(c) Socio-legal

A socio-legal framing sees the need for cohabitation reform articulated with reference to the failure of the law to keep up with social change. The relationship between 'the legal and the social' has been explored in detail by Eekelaar, who recognised how normative assumptions about how people should behave can influence the development of family law.³⁴ Although social norms can be 'difficult to identify' and may involve a degree of 'vagueness and indeterminacy',³⁵ it is hard to deny that cohabitation has become a social norm in England and Wales. This can be evidenced by its growing prevalence – an increase of 144 per cent between 1996 and 2021³⁶ and the prediction that one in four couples will cohabit by 2031.³⁷ Empirical research into why people cohabit, their understanding of their legal rights, and their opinions on how the law should be reformed are often invoked as powerful arguments for the need to develop the law in line with social attitudes and expectations.³⁸

A socio-legal framing also plays a significant role in debates surrounding the shape that reform should take. It is generally accepted by advocates for legal reform that lawmakers should take a function-based approach.³⁹ Traditionally, the state has taken a form-based approach towards family regulation. Only when parties had opted into a marriage or civil partnership would the state impose obligations and afford rights. However, as the rates of cohabitation have continued to rise, there has been a 'functional convergence' between the relationship of spouses and cohabitants.⁴⁰ The characteristics once widely associated with marriage – interdependence, commitment, intimacy, amongst others – are no longer exclusively recognised in marriages. As much as cohabitants are increasingly functioning in the same way as spouses, many marriages are now often reflective of cohabitation as a negotiated and potentially financially independent partnership.⁴¹ This argument is strengthened by the introduction of non-contested divorce, which removes many of the legal barriers to divorce and shows a legal recognition of the reality that for many marriage is no longer a life-long commitment.⁴² The social reality of

³³Women and Equalities Committee 'Written evidence submitted by Baroness Ruth Deech' [HAB0002], available at <https://committees.parliament.uk/writtenevidence/36132/pdf/> (last accessed 23 April 2026). See also R Deech 'The case against legal recognition of cohabitation' (1980) 29(2–3) *International & Comparative Law Quarterly* 480 at 485–489.

³⁴J Eekelaar 'Uncovering social obligations: family law and the responsible citizen' in M Maclean (ed) *Making Law for Families* (Oxford: Hart Publishing, 2000).

³⁵*Ibid.*, pp 13, 16.

³⁶Office for National Statistics 'Births in England and Wales: 2021' (ONS, 9 August 2022), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/birthsummarytablesenglandandwales/2021> (last accessed 23 April 2026).

³⁷A Hayward et al 'Cohabitation rights in England and Wales, Scotland and Australia' (*Financial Remedies Journal*, 3 July 2023), available at <https://financialremediesjournal.com/cohabitation-rights-in-england-and-wales-scotland-and-australia/> (last accessed 23 April 2026).

³⁸A Barlow and G James 'Regulating marriage and cohabitation in 21st century Britain' (2004) 67(2) *Modern Law Review* 143.

³⁹*Ibid.*; K Griffiths 'From "form" to function and back again: a new conceptual basis for developing frameworks for the legal recognition of adult relationships' (2019) 31(3) *Child and Family Law Quarterly* 227; A Barlow and J Smithson 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22(3) *Child and Family Law Quarterly* 328.

⁴⁰A Barlow et al *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Oxford: Hart Publishing, 2005) pp 85–87.

⁴¹*Ibid.*

⁴²Divorce, Dissolution and Separation Act 2020.

cohabitation and marriage has infused the debate and supports arguments that a function-based approach to reform is needed.⁴³

2. Developing a human rights frame

The cohabitation debate has consistently been subjected to different conceptual framings. These are not mutually exclusive, with proponents often adopting an intersectional approach to emphasise the need for reform. There is, however, a notable absence. Stammers contends that since the Enlightenment period, social movements have been '[utilising] rights claims to challenge such relations and structures of power'.⁴⁴ As human rights are 'one of the most pressing and intractable matters of political life',⁴⁵ a human rights framing can be particularly potent. Despite this, a prominent human rights discourse does not yet exist in the cohabitation context. When human rights arguments are raised, the discussion is often centred on the concern that the introduction of protections for cohabitants could infringe the rights of cohabitants, not safeguard them.⁴⁶ Similarly, in the media the focus is often on informing cohabitants of the financial consequences they face on relationship breakdown or bereavement, as opposed to advocating for the need to introduce greater protections.⁴⁷

The absence of a human rights discourse is surprising following successful human rights litigation by cohabitants. More so after *Re McLaughlin*,⁴⁸ where the UK Supreme Court held that the exclusion of unmarried parents from bereavement benefits was incompatible with the European Convention on Human Rights (ECHR), and which was widely reported on.⁴⁹ Although strategic litigation has the potential to bring 'major media attention to a particular issue',⁵⁰ this is yet to occur. In addition, there is also a lack of a human rights discourse in academic commentary. Although previous research by this author has explored in detail the role that litigation based on human rights could play in advancing the protections available for cohabitants,⁵¹ any further recognition of the relevance of human rights remains largely unexplored. What can be identified in the discourse, however, is a foundational recognition of equality and discrimination issues, which could form the basis of a wider human rights framing.

References to potential discrimination or equality issues resulting from the current law are often made by family law practitioners commenting on the impacts of specific legislative provisions on specific

⁴³Barlow et al, above n 40, p 86.

⁴⁴N Stammers 'Social movements and the social construction of human rights' (1999) 21(4) *Human Rights Quarterly* 980 at 989.

⁴⁵T Balfour and E Cadava 'The claims of human rights: an introduction' (2004) 103 *South Atlantic Quarterly* 277 at 277.

⁴⁶R Deech 'Cohabitation' (2010) 40 *Family Law* 39; E Aloni 'Compulsory conjugality' (2021) 53(1) *Connecticut Law Review* 55.

⁴⁷H Meyer 'Cohabiting couples: your rights on money, property, tax and more' (*The Guardian*, 13 November 2023) available at <https://www.theguardian.com/money/2023/nov/13/your-rights-if-you-are-cohabiting> (last accessed 23 April 2026); Z Khalil 'Martin Lewis issues money warning to every couple living together in the UK' (*The Mirror*, 12 October 2022) available at <https://www.mirror.co.uk/money/martin-lewis-issues-money-warning-28216025> (last accessed 23 April 2026).

⁴⁸*McLaughlin*, above n 16. Although not argued on ECHR grounds see the case of *O'Meara v Minister for Social Protection* [2024] IESC 1 for recent equality considerations in the cohabitation context. Here the Irish Supreme Court held that the exclusion of a surviving parent from a contributory pension for widows was contrary to Art 40.1 of the Constitution of Ireland 1937, which guarantees equality.

⁴⁹A Topping '“Someone has to make a stand”: widow's battle for cohabiting couples' (*The Guardian*, 27 January 2018) available at <https://www.theguardian.com/uk-news/2018/jan/27/widows-battle-for-cohabiting-couples-siobhan-mclaughlin-supreme-court-legal-rights> (last accessed 23 April 2026); S Ali 'As a family lawyer, I know the impact the Supreme Court ruling in favour of unmarried couples will have' (*The Independent*, 30 August 2018) available at <https://www.independent.co.uk/voices/unmarried-couples-supreme-court-victory-siobhan-mclaughlin-cohabiting-a8515206.html> (last accessed 23 April 2026).

⁵⁰R Smith 'Test case strategies and the Human Rights Act' (2004) 1(1) *Justice Journal* 65.

⁵¹H Rodway 'Invoking human rights to protect unmarried couples' (2022) 30(3) *Child and Family Law Quarterly* 221; H Rodway 'Maternity allowance: the last bastion of the marriage-based benefits system under threat from Article 14' (2022) 29(2) *Journal of Social Security Law* 200.

groups of people.⁵² Practitioners and judges writing extra-judicially have also expressed concern about the discriminatory impact facing children resulting from shortcomings of provisions for unmarried parents when compared with those available for married parents.⁵³ While the above references demonstrate that there is a recognition of discrimination and equality issues arising from the current law, these disparate concerns are yet to develop into a wider recognition of the relevance of human rights argumentation in the reform debate. The unwillingness of the European Court of Human Rights to be proactive in recognising the rights of cohabitants and the weight placed on autonomy could provide an explanation as to why this has not occurred.

3. Barriers to the development of a human rights frame

(a) *European Court of Human Rights jurisprudence*

In a number of cases at the Strasbourg level, cohabitants have been unsuccessful in arguing that their exclusion from legal protections reserved for spouses infringes Article 14, the prohibition of discrimination, with Article 8, right to respect for private and family life.⁵⁴ The margin of appreciation granted to states in areas of social or economic sensitivity has proven fatal for claims by cohabitants.⁵⁵ In *Shackell v United Kingdom*, the Chamber held ‘the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent Government’.⁵⁶ While recognising that Strasbourg does need to proceed with caution in areas which are political or where there is no clear consensus across Europe, Draghici expresses disappointment in how the Court has ‘resorted to the notions of consensus and margin of appreciation to avoid a substantive analysis of proportionality’.⁵⁷ The same concerns about the margin of appreciation granted by Strasbourg were identified by Wong, in an early exploration into the impact that human rights could have on the rights of cohabitants, not long after the implementation of the Human Rights Act 1998.⁵⁸ This cautious approach by Strasbourg could be interpreted as signalling that there is a limited role for human rights and may contribute to the absence of a wider discourse.

Domestically, however, cohabitants using ECHR-based arguments to challenge their exclusion from spousal benefits have fared much better.⁵⁹ Questions arise as to why these successes have not been capitalised on by advocates for reform. Perhaps, as considered in *O’Meara v Minister for Social Protection*,⁶⁰ this is because the Supreme Court has since signalled limits to the interpretation of Convention rights beyond Strasbourg jurisprudence, questioning the authority of earlier cases and threatening the success of future challenges by cohabitants. A further possible explanation is because of the nature of the claims and the benefits that have been litigated. Much of the discussion following

⁵²For examples see J Viney ‘The goal of Schedule 1’ [2023] Family Law 831; G Fraser ‘How law reform could help reduce domestic abuse for cohabitants’ [2025] Family Law 136.

⁵³For examples see Women and Equalities Committee ‘Written evidence submitted by The Family Law Bar Association’ [HAB0333], available at <https://committees.parliament.uk/writtenevidence/37658/html/> (last accessed 23 April 2026); Mr Justice Munby ‘Families old and new – the family and Article 8’ (2005) 17(4) Child and Family Law Quarterly 487.

⁵⁴*Lindsay v United Kingdom* Application No 11089/84, Decision, 11 November 1986; *Shackell v United Kingdom* Application No 45841/99, Decision, 27 April 2000; *Burden v United Kingdom* Application No 13378/05, Merits, 29 April 2008; *Saucedo Gómez v Spain* Application No 37784/97, Decision, 26 January 1999.

⁵⁵*Ibid*, *Shackell v United Kingdom* [1]; *ibid*, *Burden v United Kingdom* [50].

⁵⁶*Ibid*, *Shackell v United Kingdom* [1].

⁵⁷C Draghici *The Legitimacy of Family Rights in Strasbourg Case Law: ‘Living Instrument’ or Extinguished Sovereignty* (Oxford: Hart Publishing, 2017) p 144.

⁵⁸S Wong ‘The Human Rights Act 1998 and the shared home: issues for cohabitants’ (2005) 27(3/4) Journal of Social Welfare and Family Law 265.

⁵⁹*McLaughlin*, above n 16; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust*, above n 16; *Brewster v Northern Ireland Local Government Officers’ Superannuation Committee*, above n 16; *R (on the application of Jackson) v Secretary of State for Work and Pensions*, above n 16; *Langford v Secretary of State for Defence*, above n 16.

⁶⁰*O’Meara v Minister for Social Protection*, above n 48.

McLaughlin is focused on the Court's approach to challenges to social security measures and reconciling this with previous social security cases.⁶¹ While litigation has targeted specific and disparate social security and pension provisions, this paper argues that it should be interpreted more widely. These cases show the direct impact that a litigation strategy based on human rights can have on the legal position of cohabitants. This reliance on human rights, and more importantly judicial recognition of the relevance and potential infringement of human rights, should therefore be harnessed and used to strengthen the calls for reform.

(b) The autonomy argument

Discussions surrounding possible reform and the relevance of human rights have predictably been met with concerns by those who perceive the introduction of legal protections for cohabitants as undermining the autonomy of those who want a relationship free from state regulation. The protection of autonomy continues to occupy a central role in the cohabitation debate. It can also provide an explanation for the absence of a human rights narrative. The following section will evidence how the autonomy argument, while persuasive, cannot justify the state's failure to act and can strengthen the argument that a new approach based on human rights should be adopted.

Families, and specifically adult relationships, are inherently private. One reason for conferring autonomy during the relationship is that 'families do not want to be lectured about their behaviour or what type of relationship they are in'.⁶² Although external structures, such as welfare and housing, influence family life, there is a belief in non-intervention that shrouds relationships and families.⁶³ A move away from traditional relationship roles sees the meaning of marriage and family 'vary from relationship to relationship'.⁶⁴ As a result, autonomy in the organisation of family affairs is being increasingly encouraged and applies to all couples.⁶⁵ For spouses, autonomy decreases once the relationship comes to an end, either through breakdown or death, whereas for cohabitants it continues. This can be justified, from an autonomy perspective, owing to the tacit consent of spouses to state interference in their relationship.⁶⁶

The debate surrounding whether more comprehensive legal protections for cohabitants are needed can be summarised as the 'pitting of autonomy against protection'.⁶⁷ Unlike marriage, described by Eekelaar as 'a legal event with legal consequences',⁶⁸ cohabitants have not formalised their relationship. The argument that increased rights for cohabitants would amount to 'an attack on the liberty of two

⁶¹ M Simpson 'Social rights, child rights, discrimination and devolution: untangling the web' (2018) 40(1) *Journal of Social Welfare and Family Law* 3; C Clarke 'Now you see them, now you don't: the role of children's interests in social security law' (2022) 19(1) *Journal of Social Security Law* 12.

⁶² Home Office *Supporting Families: A Consultation Document* (Stationary Office, 1998) [4.2].

⁶³ K O'Donovan *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985) p 13.

⁶⁴ A Diduck *Law's Families* (London: LexisNexis UK, 2003) p 7.

⁶⁵ Two examples of this are child maintenance reform, which now favours family-based arrangements, with parents being encouraged to reach an agreement regarding child maintenance instead of relying on the statutory system (Department for Work and Pensions *Strengthening Families, Promoting Parental Responsibility: The Future of Child Maintenance* (CM 7990, 2011)), and the introduction of a requirement of mediation to attempt to resolve issues before couples are allowed to make a court application following relationship breakdown (Children and Families Act 2014, s 10(1)).

⁶⁶ C Frantz and H Dagan 'Properties of marriage' (2004) 104 *Columbia Law Review* 75. For a contrasting view see A Gilbert *British Conservatism and the Legal Regulation of Intimate Relationships* (Oxford: Hart Publishing, 2018) for a discussion of the fact that consent to state interference being an implicit consequence of marriage has raised concerns from those who believe that marriage should be 'a contract between two autonomous individuals'. It should be noted that there has been a shift towards autonomy on divorce, as seen by the introduction of no-fault divorce by the Divorce, Dissolution and Separation Act 2020 and the recognition by the Supreme Court that prenuptial agreements can be legally enforced in *Radmacher v Granatino* [2010] UKSC 42.

⁶⁷ Sutherland, above n 15, at 146.

⁶⁸ J Eekelaar 'Evaluating legal regulation of family behaviour' (2010) 1 *International Journal of the Jurisprudence of the Family* 17 at 22.

people who have refrained from marriage' has been repeatedly promulgated by Baroness Deech.⁶⁹ The extension of civil partnerships to different-sex couples⁷⁰ and the introduction of no-fault divorce⁷¹ strengthens this argument as formalisation is now more accessible for those who choose it.⁷²

It must be noted, however, that the continued prevalence of the 'common law marriage' myth – where nearly half of those living in England and Wales wrongly believe that cohabitants can attain a 'common law marriage' after living together for a certain amount of time and subsequently benefit from the same rights as spouses⁷³ – undermines the notion that couples have autonomously opted to live in a relationship type free from state regulation. Autonomy arguments also fail to account for 'uneven couples' – where one party wants to marry but the other does not⁷⁴ – or those who plan to marry in the future, but the relationship breaks down or one partner dies before this happens.⁷⁵

Ultimately, as argued by Scherpe, 'almost all legal rules are – and are meant to be – infringements on autonomy'.⁷⁶ While arguments that the need to introduce legislation to protect cohabitants on relationship breakdown or bereavement are persuasive, it may be pointed out that autonomy is not necessarily the antithesis to legislative intervention. Instead, the balancing of the state's interference with the autonomy of cohabitants should be considered when determining the appropriate mechanisms for protection. Recommendations for reform generally propose that any legislative scheme for cohabitants should be an opt-out scheme with qualifying cohabitants automatically conferred rights and obligations,⁷⁷ leaving cohabitants 'free to make their own financial arrangements'.⁷⁸ The ability of cohabitants to opt-out straightforwardly without having to seek legal advice would preserve the autonomy of cohabitants while simultaneously ensuring their protection. Therefore, autonomy arguments should not hinder the introduction of cohabitation reform or justify state inaction.

The autonomy/interference dichotomy identified above could also provide an explanation as to why there is yet to be meaningful engagement with the adoption of a human rights framing in the cohabitation context. The perception that couples are not formalising because they choose not to, especially following the expansion of civil partnerships, can dilute human rights-based arguments for reform as couples are no longer excluded from specific registration regimes. Moreover, it could be said that regulating the family through a human rights framework may result in 'penetrating the veil of family privacy' in a way that reduces the family unit into its 'constituent parts'.⁷⁹ Baroness Deech has argued that family law should 'safeguard personal autonomy'.⁸⁰ Instead, the inference is that a reliance on

⁶⁹Hansard, HL Deb vol 757, col 2072, 12 December 2014. See also Hansard, HL Deb vol 739, col 1665, 19 October 2012; Deech, above n 46, at 39.

⁷⁰The Civil Partnership (Opposite-Sex Couples) Regulations 2019, SI 2019/1458.

⁷¹Divorce, Dissolution and Separation Act 2020.

⁷²Baroness Deech, above n 33.

⁷³J Curtice et al (eds) *British Social Attitudes: The 36th Report* (The National Centre for Social Research 2019), available at https://natcen.ac.uk/sites/default/files/2023-08/BSA_36.pdf (last accessed 29 April 2026). For a history for the myth see R Probert 'Common-law marriage: myths and misunderstandings' (2008) 20(1) *Child and Family Law Quarterly* 21.

⁷⁴Barlow and Smithson, above n 39.

⁷⁵The average age of marriage has been steadily increasing for decades and can point to the fact that many couples may be delaying marriage, rather than making an autonomous choice not to marry. See Office for National Statistics 'Marriages in England and Wales: 2023' (ONS, 18 November 2025), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2023#main-points> (last accessed 23 April 2026).

⁷⁶Women and Equalities Committee 'Written evidence submitted by Professor Jens Scherpe' [HAB0385], available at <https://committees.parliament.uk/writtenevidence/43563/pdf/> accessed 10 December 2022.

⁷⁷Law Commission, above n 6; Women and Equalities Committee, above n 10.

⁷⁸Women and Equalities Committee, above n 10, at [60]. It should be noted that safeguards were included in the opt-out recommendation to allow the court to set aside an opt-out agreement if not doing so would cause 'manifest unfairness'. Both Ireland, through s 202 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, and Scotland allow parties to opt out of the provisions through enforceable cohabitation agreements. See J Miles et al 'Cohabitation: lessons from research north of the border?' (2011) 23(3) *Child and Family Law Quarterly* 302 for a discussion on the position in Scotland.

⁷⁹Diduck, above n 64, pp 37–38.

⁸⁰Written evidence by Baroness Deech, above n 33.

human rights argumentation to increase the likelihood of legislative reform can dismantle the autonomy of individuals and impact their ‘freedom to choose a way of living’.⁸¹

Crucially, as has been demonstrated, the autonomy argument is inherently flawed and fails to reflect the realities of cohabitants. While in other contexts, the preference for autonomy may conflict with the state interference resulting from human rights considerations, in the cohabitation context this interference is necessary to address the current injustices facing cohabitants.

Since the debate is already influenced by different frames, the omission of a human rights frame may seem inconsequential. However, the current debate is at risk of stagnating. The articulation of the need for cohabitation reform using the above frames is yet to result in meaningful legal change. Many of the economic and social arguments have remained the same since the Law Commission’s 2007 proposals. The recent report by the Women and Equalities Committee engaged with the same lines of argumentation. It is positive that the Labour Government has pledged to consult on cohabitation reform, but progress in this area needs safeguarding. Until the law is changed, those advocating for reform should continue to explore how the debate can be strengthened to ensure that the government commit to its promises to reform the law surrounding cohabitation.

4. Merits of a human rights framing

This paper will conclude that a human rights framing would be beneficial in the cohabitation context. To demonstrate this, its primary focus is on refuting the possible disadvantages of a human rights narrative, as negative reasoning often carries greater persuasive weight than positive outcomes – especially in politicised contexts. However, this analysis should be considered against the backdrop of the positive impact that a human rights narrative can have on social movements advocating for legal reform. Unlike the disadvantages of a human rights framing explored below, listing the disparate ways in which this framing can inspire social movements fails to capture its nature. In short, the benefit of this frame ultimately stems from its expansiveness, its ability to unify different social movements by the adoption of recognised aims and beliefs and its identification of the state as duty-bearers.⁸²

The potential of human rights to bolster social movements is well-documented, but this will not be possible unless such a framing is adopted. To strengthen the likelihood of this happening, this paper will rebut potential disadvantages that are often levelled at a reliance by social movements on human rights and show that, in the cohabitation context, these disadvantages cannot withstand scrutiny. The disadvantages below do not represent an exhaustive list. There will be other drawbacks to using human rights which are unique to specific social movements. However, this paper explores a range of disadvantages which illustrate the different ways in which an engagement with human rights can hinder calls for reform in this context.

(a) Displacement thesis

A first potential disadvantage of a human rights framing is what is referred to as the displacement thesis. The displacement thesis is concerned that a human rights framing threatens to ‘undermine movements for radical social change by tempering their ambitions and limited their horizons to a narrow set of legal demands’.⁸³ It can force proponents for reform to identify specific instances of differential treatment as

⁸¹Ibid.

⁸²Benford and Snow, above n 18, at 614. Further benefits of a human rights framing have been articulated in reference to a number of contexts: B Sutton and E Borland ‘Abortion and human rights for women in Argentina’ (2019) 40(2) *Frontiers: A Journal of Women Studies* 27; A Ayala and BM Meier ‘A human rights approach to the health implications of food and nutrition security’ (2017) 38(10) *Public Health Reviews* 1; M Broberg and H-O Sano ‘Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences’ (2018) 22(5) *International Journal of Human Rights* 664.

⁸³P O’Connell ‘Human rights: contesting the displacement thesis’ (2018) 69(1) *Northern Ireland Legal Quarterly* 19 at 20.

opposed to focusing on larger, structural change. Brown argues that human rights has its own ‘particular imagine of justice’ which ‘displaces, competes with, refuses, or rejects other political projects’.⁸⁴ As a result, O’Connell recognises that there can be an ‘apprehension’ that can accompany attempts to frame social movements as a human rights issue.⁸⁵ A more balanced approach towards the displacement thesis is offered by Kennedy, who recognises that a human rights framing can be used to ‘leverage interests in other issues’ but could also ‘close off broader inquiries’.⁸⁶

While this understanding of a human rights framing may be detrimental in other social movements, it is argued that this does not reflect the engagement of human rights in this context. In the UK, for example, there are over 3.5 million cohabitants.⁸⁷ Similar numbers have been noted in other European states. Society already accepts cohabitation, with many falsely believing cohabitants already have legal protections.⁸⁸ The calls for cohabitation reform are centred on legal demands, not societal, structural change. Notwithstanding the fact that some political parties still see formalised relationships as the ideal relationship type,⁸⁹ the increasing prevalence of cohabitation implies that the societal change has already occurred. The legal change is yet to occur. For this reason, the development of a human rights discourse to achieve legal reform will not undermine any fledgling social movement.

In addition to the displacement thesis having little relevance in the cohabitation context, the concept itself has been subject to criticism. O’Connell relies on various examples, including a right to racial equality in the US, to evidence that social movements can – and have – been empowered by a human rights framing.⁹⁰ Through this exploration, O’Connell concludes that ‘the mobilisation of human rights by social movements ... need not mean they will be led down a political or strategic blind alley’.⁹¹ Fears that a human rights framing narrows claims and overlooks wider structural issues owing to its focus on legal reforms are not necessarily justified. As seen in the cohabitation context, the focus should be on legal change to align with the social change that has already occurred.

(b) Lack of diversity in solutions

Alongside ‘crowd[ing] out other ways of understanding harm’,⁹² the focus on legal arguments could influence the identification of appropriate solutions. Human rights arguments focus on the role of the state. If there has been an infringement, an alteration to or an introduction of legislative provisions is a necessary remedy. As a result, a human rights framing is primarily concerned with legal solutions. It can be argued that this focus ‘delegitimises remedies in the domain of private law and nonstate action’.⁹³ This focus on legislative solutions has been criticised by opponents to cohabitation reform owing to the autonomy arguments explored above. However, as has been demonstrated, the autonomy argument falsely assumes that all cohabitants have actively chosen not to formalise their relationship.

It must be acknowledged that other methods of protecting cohabitants have been attempted. One such method is the use of cohabitation agreements. These agreements are legal contracts allowing

⁸⁴W Brown ‘“The most we can hope for ...”: human rights and the politics of fatalism’ (2004) 103 *South Atlantic Quarterly* 451 at 453.

⁸⁵O’Connell, above n 83, at 20.

⁸⁶D Kennedy ‘The international human rights movement: part of the problem?’ (2002) 15 *Harvard Human Rights Journal* 101 at 103.

⁸⁷Office for National Statistics ‘Families and households in the UK: 2023’ (ONS, 8 May 2024), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2023> (last accessed 23 April 2026).

⁸⁸J Curtice et al *British Social Attitudes: The 36th Report* (The National Centre for Social Research, 2019).

⁸⁹See E van Acker ‘Disconnected relationship values and marriage policies in England’ (2016) 38(1) *Journal of Social Welfare and Family Law* 36 for a greater discussion of the Conservative Party’s pro-marriage policy.

⁹⁰O’Connell, above n 83, at 20.

⁹¹*Ibid.*, at 33.

⁹²Kennedy, above n 86, at 108.

⁹³*Ibid.*, at 109.

cohabitants to organise their assets and finances and are enforceable through contract law if they are in the form of a deed.⁹⁴ It is argued that there are three reasons why these agreements fail to provide an adequate solution for cohabitants. First, while cohabitation agreements are available to cohabitants, Thompson submits that these agreements are only appropriate 'if the parties are aware of what their rights are'.⁹⁵ The prevalence of the 'common law marriage' myth therefore threatens the usefulness of cohabitation agreements. Secondly, for those parties who are aware of their legal position, legal pragmatism may conflict with the romanticism of embarking on a life together. In *Midland Bank v Cooke*, Waite LJ commented that 'for a couple embarking on a serious relationship, the discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together'.⁹⁶ If parties have approached the agreement of contractual terms cautiously, not wanting to insult or upset their partner, the effectiveness of agreements in reflecting parties intentions is impacted. Thirdly, if parties do enter into a cohabitation agreement, the formality of contract law means that to ensure a fair and intended outcome, cohabitants should periodically revisit the agreement, taking into account changes in circumstances as the relationship develops. Reflecting on the practical use of contract law by cohabitants, Sanders submits that 'no problems arise if the parties have established in an agreement, adapted to changing circumstances which can be proven in court, who owns what and how a party who has helped the other accumulate or improve assets is to be rewarded'.⁹⁷ In these circumstances cohabitation agreements could be a useful recourse, but as Sanders concludes, 'only rarely, however, are such detailed agreements drawn up'.⁹⁸ Questions have also been raised about the appropriateness of contract law mechanisms to respond to informal relationships where obligations and expectations emerge over time.⁹⁹

Beyond using contract law, there have been attempts to protect cohabitants through education. In 2004, the Living Together Campaign, funded by the Ministry of Justice, launched a website to inform cohabitants of their legal position. In evaluating the effectiveness of the campaign, Barlow, Burgoyne and Smithson concluded that, although the website was useful in disseminating information, 'it is not prompting cohabitants into immediate action'.¹⁰⁰ Reasons for this included that some parties to the relationship did not want a cohabitation arrangement, some felt uncomfortable discussing this with a partner, others felt optimistic that an arrangement was not needed and affairs would be organised fairly on separation, and some did not want the cost of legal action. Barlow et al ultimately recommended that while reform should allow for cohabitation agreements, it should 'primarily' provide 'a presumptive scheme giving cohabitants ... automatic rights and obligations akin to marriage from which couples can opt out'.¹⁰¹ In 2022, the UK Government expressed a preference for cohabitants to be informed about their legal position through awareness campaigns as opposed to legal intervention.¹⁰² While the Women and Equalities Committee did recommend that the government should conduct an awareness campaign,

⁹⁴ Contracts between cohabitants were historically unenforceable as they were seen as contrary to public policy as they were deemed to promote sexual immorality. Courts now distinguish between contracts where sexual relations are used as consideration and those which regulate the finances of cohabiting relationships. See E Peel and GH Treitel *The Law of Contract* (London: Sweet & Maxwell, 13th edn, 2011) p 490; R Probert 'Cohabitation contracts and Swedish sex slaves' (2004) 16 *Child and Family Law Quarterly* 453; *Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837 at [22].

⁹⁵ Women and Equalities Committee 'Written evidence submitted by Dr Sharon Thompson' [HAB0342], available at <https://committees.parliament.uk/writtenevidence/37669/pdf/> (last accessed 23 April 2026).

⁹⁶ *Midland Bank v Cooke* [1995] 4 All ER 562, (1995) 27 HLR 733.

⁹⁷ A Sanders 'Cohabitants in private law: trust, frustration and unjust enrichment in England, Germany and Canada' (2013) 62(3) *International & Comparative Law Quarterly* 628 at 631.

⁹⁸ *Ibid.*

⁹⁹ J Wightman 'Intimate relationships, relational contract theory and the reach of contract' (2000) 8 *Feminist Legal Studies* 93; E Kingdom 'Cohabitation contracts and the democratization of personal relations' (2000) 8 *Feminist Legal Studies* 5.

¹⁰⁰ A Barlow et al 'The living together campaign – the impact on cohabitants' [2007] *Family Law* 165.

¹⁰¹ *Ibid.*

¹⁰² Women and Equalities Committee 'Oral evidence: the rights of cohabiting partners' (HC 130, 2 February 2022) Q148 and Q161.

this was coupled with a recommendation for legislative intervention owing to the concerns about the campaign's effectiveness.

A human rights framing is aimed at securing legal reform. Attempts have been made to address the economic disadvantages facing cohabitants without the need for state intervention, but these have been unsuccessful. Therefore, while this focus on legal solutions could be perceived as a negative consequence of such a framing, in the cohabitation context there is a need for state intervention.

(c) Reliance on litigation

A legal approach can also prompt an increased reliance on strategic litigation to achieve change. Strategic litigation often takes the form of test cases brought by campaign groups. As recognised by Lord Reed in *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions*, there has been an increased popularity of such cases.¹⁰³ This reliance on litigation has, however, been criticised. Hunt has identified that 'those who are hostile towards rights-based strategies tend to conflate "rights" with "litigation"'.¹⁰⁴ In launching litigation to achieve their aims, activists are seeking to 'persuade judges, and in some cases juries, to support the movement group's legally-defined goals'.¹⁰⁵ While this can result in legal change, it has been argued that using litigation as *the* mechanism to achieve social change threatens to reduce complex social issues down to isolated legal issues for the purpose of the litigation.¹⁰⁶ This can result in 'hollow victories' which have no widespread consequences beyond the successful challenge to specific provisions.¹⁰⁷

While potentially problematic for other social movements, a focus on litigation does not disadvantage calls for cohabitation reform. Instead, litigation could be a useful tool for cohabitants challenging their legal position. Litigation has been at the forefront of the creation of a rights-based strategy to achieve greater protections for cohabitants.¹⁰⁸ Despite this, it should be recognised that it is unlikely that any bespoke scheme of legal protections for cohabitants will be introduced through litigation, owing to the limitations of rights-based arguments in this context.¹⁰⁹ The litigation that has been successful domestically has focused on challenging specific instances of discrimination in areas including pensions,¹¹⁰ bereavement benefits,¹¹¹ and bereavement damages.¹¹² Following these cases, the law has been amended to rectify the discrimination.¹¹³ This may not address the wider vulnerabilities facing cohabitants, but it encapsulates the 'salami-slicing' approach towards achieving substantial reform through piecemeal, palatable changes, which Lady Hale identified as key to reforming family law.¹¹⁴ An increasing alignment between the legal position of spouses and cohabitants in some areas makes it more difficult for the

¹⁰³*R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428 at [162].

¹⁰⁴A Hunt 'Rights and social movements: counter-hegemonic strategies' (1990) 17(3) *Journal of Law and Society* 309 at 317.

¹⁰⁵SA Boucher and HJ McCammon 'Social movements and litigation' in DA Snow et al (eds) *The Wiley Blackwell Companion to Social Movements* (Wiley Blackwell, 2nd edn, 2018) p 307.

¹⁰⁶Hunt, above n 104, at 319.

¹⁰⁷*Ibid.*

¹⁰⁸*McLaughlin*, above n 16; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust*, above n 16; *Brewster v Northern Ireland Local Government Officers' Superannuation Committee* above n 16; *R (on the application of Jackson) v Secretary of State for Work and Pensions*, above n 16; *Langford v Secretary of State for Defence*, above n 16.

¹⁰⁹Rodway 'Invoking human rights to protect unmarried couples', above n 51.

¹¹⁰*Brewster v Northern Ireland Local Government Officers' Superannuation Committee*, above n 16; *Langford v Secretary of State for Defence*, above n 16.

¹¹¹*McLaughlin*, above n 16.

¹¹²*Smith v Lancashire Teaching Hospitals NHS Foundation Trust*, above n 16.

¹¹³Fatal Accidents Act 1976 (Remedial) Order 2020, SI 2020/1023; Bereavement Benefits (Remedial) Order 2023, SI 2023/134; HM Treasury wrote to public pension schemes stating that 'cases previously refused solely because of a lack of nomination form should be recognised and schemes should pay survivor benefits [to cohabitants]': D Thurley *Occupational pensions – survivors' benefits for cohabitants* (House of Commons Library Briefing Paper CBP-6348, 2020).

¹¹⁴B Hale 'Unmarried couples in family law' (2004) *Family Law* 419 at 423.

government to justify maintaining differences in others. While a reliance on litigation may not achieve widespread reform, it is a useful tool for cohabitants who are seeking to advance their legal position.

Strategic litigation can also strengthen calls for reform with legal accountability. King has identified numerous benefits to legal accountability which ‘can provide a good dispute resolution mechanism for some classes of disputes’.¹¹⁵ The first is that successful litigation ‘compels the state to address the issue’.¹¹⁶ In the cohabitation context, this is evident in how the government rectified instances of discrimination facing cohabitants once it had been alerted to it by the courts.¹¹⁷ If the courts decide to issue a declaration of incompatibility,¹¹⁸ this ‘does not affect the validity, continuing operation or enforcement’ of the impugned legislation.¹¹⁹ Instead, it creates a dialogue between the judiciary and Parliament. This either prompts legislative reform to ensure the law is Convention-compatible or issue a determination that the provision can be justified despite the declaration of incompatibility.¹²⁰ Either way, it would require the government to ‘address the issue’.¹²¹

A reliance on litigation to achieve legal reform may be seen as a negative of a human rights framing by some. However, in the cohabitation context, litigation has proven a useful tool to prompt reform. It may be that future claims proceed to challenge remaining differences in treatment between spouses and cohabitants.¹²²

(d) Attracting competing claims

A negative consequence of engaging human rights arguments to attempt social or legal change is that it can attract counterclaims by opponents to the movement. This has been seen in the debates surrounding abortion rights. Although human rights have been weaponised in attempts to secure greater access to abortion, these arguments have been met with counterclaims that increased access could infringe ‘fathers’ rights’¹²³ or the rights of the foetus or embryo.¹²⁴ This competing use of human rights to either support or oppose reform is also identifiable within the cohabitation context. In contrast to the claims made in this paper that the lack of protections for cohabitants is an equalities issue, Baroness Deech has consistently relied on the ECHR to oppose increased protections for unmarried couples, arguing that extending legal protections on relationship breakdown could infringe Article 8 by inflicting legal obligations on unwilling partners.¹²⁵

Although not a direct comparator as it was not launched as counter litigation, the position in Navarra, one of the seven Autonomous Communities in Spain, could illuminate how competing claims could be structured. Introduced in 2000, the law in Navarra assimilated the position of spouses and cohabitants following the death of a partner and granted cohabitants automatic succession rights, provided the partner met certain requirements.¹²⁶ Crucially, cohabitants were unable to opt-out. Litigation was launched before the Spanish Constitutional Court on the basis that the measures violated the

¹¹⁵J King ‘Judging social rights’ (Cambridge: Cambridge University Press, 2012) p 60.

¹¹⁶*Ibid.*

¹¹⁷Fatal Accidents Act 1976 (Remedial) Order 2020, SI 2020/1023; Bereavement Benefits (Remedial) Order 2023, SI 2023/134.

¹¹⁸The Supreme Court has recognised that there are circumstances where a declaration should not be issued, despite agreeing that the law should be reviewed and reconsidered by Parliament. This was the case in *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

¹¹⁹C Crawford ‘Dialogue and declarations of incompatibility under section 4 of the Human Rights Act 1998’ (2013) 25 Denning Law Journal 43 at 45.

¹²⁰A Young *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2009) p 10.

¹²¹King, above n 115, p 60.

¹²²Rodway ‘Maternity allowance’, above n 51.

¹²³Hunt, above n 104, at 322.

¹²⁴Sutton and Borland, above n 82, at 46.

¹²⁵Deech, above n 46.

¹²⁶To qualify for these protections, cohabitants must have lived together for a year, have children together, or have expressed their consent in the form of a public document. See CI Asua Gonzalez ‘Succession rights and unmarried couples in Spanish law’ (2014) 4(2) Onati Socio-Legal Studies 176 at 181.

fundamental right to free development of personality and infringed the autonomy of cohabitants. The Court accepted these arguments, and the law was declared unconstitutional.

Strasbourg grants states a margin of appreciation ‘to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal measures’.¹²⁷ This is to ensure that the Convention respects national cultural traditions and policies within each specific state. This discretion, paired with the fact that there is no emerging consensus across Europe to protect cohabitants,¹²⁸ can explain why Strasbourg has yet to depart from *Shackell v United Kingdom* and conclude that it is no longer justifiable to exclude cohabitants from legal protections reserved for spouses. While there is no domestic margin of appreciation,¹²⁹ domestic courts have also recognised that governments are best placed to make decisions of sensitive social policy, owing to the need for political accountability.¹³⁰ As a result, while governments can choose not to introduce a scheme of legal protections for cohabitants, they similarly have the authority to introduce such reforms. While the proportionality of these protections could be assessed under Article 8, if the government can demonstrate that they have attempted to balance the need to protect cohabitants who do not realise they have no economic entitlements from their partner and those who choose not to formalise their relationship to avoid such liabilities, the decision to introduce protections will be justifiable under Article 8. An opt-out model should satisfy an Article 8 proportionality analysis.

Therefore, while the engagement of a human rights framing to secure greater protections for cohabitants could prompt a similar engagement to challenge these protections, this is not necessarily a disadvantage of a reliance on human rights. Instead, it places human rights considerations at the centre of the debate surrounding the appropriate level of protections to ensure that any reforms do not infringe the rights of both proponents and opponents of increased protections.

(e) Reinforcing stereotypes

The next potential consequence is not a direct result of adopting an inherently legal framing but is concerned with the way human rights issues are articulated. It has been argued by Brems and Timmer that stereotyping – the act of ‘assign[ing] certain roles and characteristics to a group’¹³¹ – is in itself a human rights issue.¹³² Ironically, a human rights framing may entrench stereotypical views of those that the framing is attempting to benefit. Human rights law requires the identification of a victim.¹³³ This will inevitably involve relying on language of victimisation and stereotypes to expose the human rights concerns affecting a particular group of people. Referencing the women’s rights movement, Kennedy argues that a reliance on human rights ‘increases the incidence of descriptions of women as mothers-on-pedestals or victimized care givers’.¹³⁴ In the cohabitation context, this would require exploiting similar stereotypes.

¹²⁷ *Şerife Yiğit v Turkey* Application No 3976/05, Merits and Just Satisfaction, 2 November 2010 [72].

¹²⁸ See Commission on European Family Law ‘Informal relationship reports by jurisdiction’ (Commission on European Family Law) available at <http://ceflonline.net/informal-relationships-reports-by-jurisdiction/> (last accessed 23 April 2026) for detailed reports on each European jurisdiction’s approach towards cohabitation.

¹²⁹ *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 at [33], [118]; *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, [2018] 3 WLR 415 at [28].

¹³⁰ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153; *R (Pro-Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2002] EWCA Civ 297; *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions*, above n 103.

¹³¹ E Brems and A Timmer *Stereotypes and Human Rights Law* (Cambridge: Intersentia, 2017) p 1.

¹³² *Ibid.*

¹³³ Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No 11 and No 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No 005, Art 34. See ME Villiger *Handbook on the European Convention on Human Rights* (Leiden: Brill, 2023) for an understanding of the Strasbourg Court’s approach to the meaning of ‘victim’.

¹³⁴ Kennedy, above n 86, at 105.

The stereotypical cohabitant in need of increased protections is Mrs Burns – a well-known figure in family law debates emerging from *Burns*, the facts of which were explained above. Auchmuty observes that Mrs Burns ‘pops up everywhere in family law descriptions of the way cohabitants are treated in property law’.¹³⁵ Auchmuty’s view is that Mrs Burns’ story amounts to an ‘atrocity tale’¹³⁶ – an extreme example of an unfortunate individual who ‘believing they had rights as cohabitants ... were sadly disillusioned when the relationship ended’.¹³⁷ It is, therefore, not reflective of the average cohabitant and should not form the basis of legal reform.¹³⁸ Bottomley agrees that the ‘continued use of the figure of Mrs Burns distorts issues raised by contemporary cohabitation patterns’ and can paint a ‘rather out of date picture’.¹³⁹

Despite this, although a ‘Mrs Burns’ scenario, with women staying at home to raise the children and making no financial contributions, is no longer typical,¹⁴⁰ it still occurs.¹⁴¹ Moreover, despite an increasing alignment of equality between men and women in the workplace, women still face a disproportionate financial loss following divorce when compared with men, owing to ‘their traditional role as home-maker and child-carer’.¹⁴² The gendered effects of divorce have been recognised by the judiciary. In *Miller v Miller; McFarlane v McFarlane*,¹⁴³ Lord Hope recognised how a career break taken to concentrate on having a child or raising a family may be temporary but the consequences of this can be ‘irrecoverable’.¹⁴⁴ While the homemaking partner is contributing to the family unit, they are not accruing any ‘appreciable assets’ whereas the working party is.¹⁴⁵ In her written evidence to the Women and Equalities Committee, Anna Heenan highlighted how the ‘division of childcare responsibilities in families has unequal financial consequences’, such as hindering career progression, which can impact future expected earnings.¹⁴⁶ The economic implications of undertaking different roles in a relationship will be exacerbated when the relationship ends and the parties’ ability to support themselves is impeded.¹⁴⁷ There is plenty of evidence to indicate that women are still disproportionately financially impacted on divorce, often as a result of child-care responsibilities.¹⁴⁸ For cohabitants who have no recourse to redistributive provisions on relationship breakdown, these economic impacts may be more severe.

Framing cohabitation reform as a human rights issue is reliant on showing how one group in society is disadvantaged when compared with another. To do this effectively and convincingly, a reliance on

¹³⁵ Auchmuty, above n 30, at 314.

¹³⁶ *Ibid*, at 307.

¹³⁷ *Ibid*, at 313.

¹³⁸ *Ibid*, at 307.

¹³⁹ Bottomley, above n 32, at 194.

¹⁴⁰ *Ibid*; R Probert ‘Trusts and the modern woman – establishing an interest in the family home’ (2001) 13 Child and Family Law Quarterly 275.

¹⁴¹ G Douglas et al ‘Cohabitants, property and the law: a study of injustice’ (2009) 72(1) Modern Law Review 24. There is a debate as to whether, if litigated today, the outcome would be the same. While Miles argues it would be, Bottomley, Gardner and Auchmuty argue that the outcome would be more beneficial to Mrs Burns: J Miles ‘Cohabitation: lessons for the South from North of the border?’ (2012) 71 Cambridge Law Journal 492; Bottomley, above n 32; S Gardner ‘Problems in family property’ (2013) 72(2) Cambridge Law Journal 301 and Auchmuty, above n 30.

¹⁴² *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [13]. See also S Wong ‘Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?’ (1998) 18 Legal Studies 369; A Barlow and C Lind ‘A matter of trust: the allocation of rights in the family home’ (1999) 19 Legal Studies 468.

¹⁴³ *Miller v Miller; McFarlane v McFarlane*, *ibid*.

¹⁴⁴ *Ibid*, at [118].

¹⁴⁵ T Sverdrup ‘Statutory regulation of cohabiting relationships in the Nordic countries: recent developments and future challenges’ in K Boele-Woelki et al (eds) *Family Law and Culture in Europe* (Leiden: Intersentia, 2014) p 66.

¹⁴⁶ Women and Equalities Committee ‘Written evidence submitted by Dr Anna Heenan’ [HAB0286] available at <https://committees.parliament.uk/writtenevidence/37600/pdf/> (last accessed 23 April 2026).

¹⁴⁷ A Heenan ‘An (un)equal start on the road to independent living: what does fairness mean in big money cases?’ (2018) 41(3) Journal of Social Welfare and Family Law 362 at 362.

¹⁴⁸ J Miles and E Hitchings ‘Financial remedy outcomes on divorce in England and Wales: not a “meal ticket for life”’ (2018) 31(1&2) Australian Journal of Family Law 43; S Jarvis and SP Jenkins ‘Marital splits and income changes: evidence from the British Household Panel Survey’ (1999) 53 Population Studies 237.

stereotypes of the female homemaker and the ‘atrocity tales’ of Mrs Burns and others who have faced similar circumstances is necessary. While this may be detrimental to those to do not conform to the stereotype of a ‘homemaker’, it can expose the extreme consequences that an absence of protections can have. It is arguably the most persuasive line of argumentation.

5. Cohabitants, human rights, and the judiciary

The adoption of a human rights framing in the cohabitation context is not unsubstantiated. This paper is not attempting to make the initial connection between human rights and cohabitation reform. This has already been established by a judicial recognition that excluding cohabitants from benefits reserved for spouses can infringe human rights. This legal recognition has laid the groundwork for framing the debate through a human rights lens.

An early indicator of the direct impact that human rights could have was seen in *Marckx v Belgium*.¹⁴⁹ In *Marckx*, the Strasbourg Court was asked to determine whether a law limiting the inheritance entitlement of a child born to unmarried parents infringed Article 14 when read with Article 8 and Article 1 of the First Protocol (protection of property). Although Belgium tried to justify the differential treatment with the legitimate aims of protecting the ‘traditional family’ and protecting the unmarried mother from unwanted legal ties to their child, these arguments were rejected owing to the fact that ‘the interest of an “illegitimate” child ... is no less than that of a “legitimate” child’.¹⁵⁰

At a Strasbourg level, there have been other attempts by cohabitants to successfully rely on human rights to challenge their exclusion from certain benefits. However, the Strasbourg Court has confirmed that states are not infringing human rights by excluding cohabitants from spousal tax benefits,¹⁵¹ bereavement benefits,¹⁵² redistributive provisions following relationship breakdown,¹⁵³ and inheritance tax exemptions.¹⁵⁴ Despite this, as explored above, domestic courts have recognised that the exclusion of cohabitants from benefits reserved for spouses can infringe human rights. This growing body of domestic case law can serve to legitimise the framing of the cohabitation debate as a human rights issue. Arguments that the absence of legal protections for cohabitants infringes their human rights are not abstract or unrealistic. They are grounded in a judicial recognition that human rights are a relevant consideration.

This same successful engagement with human rights argumentation has not yet occurred at Strasbourg.¹⁵⁵ As a result, when considering the development of a wider human rights narrative inspiring cohabitation reform in other European jurisdictions, there is an absence of judicial authority to bolster the use of human rights. Although this may slow the development of a human rights narrative outside of England and Wales, the above analysis is generally not specific to this jurisdiction. While some of the disadvantages of a human rights framing are analysed from the domestic perspective, there is no reason why a similar framing could not occur in other jurisdictions.

Although the above cases may be limited to disparate examples of differences in treatment that have amounted to an infringement of Article 14, they provide an insight into how differences in treatment between spouses and cohabitants can amount to human rights infringements. It has been argued that ongoing differences in treatment may also amount to an infringement of Article 14 and, if litigated, would likely add to the growing body of successful challenges by cohabitants.¹⁵⁶ These cases provide a

¹⁴⁹ *Marckx v Belgium* Application No 6833/74, Merits and Just Satisfaction, 13 June 1979.

¹⁵⁰ *Ibid*, at [39].

¹⁵¹ *Lindsay v United Kingdom*, above n 54.

¹⁵² *Shackell v United Kingdom*, above n 54.

¹⁵³ *Saucedo Gómez v Spain*, above n 54.

¹⁵⁴ *Burden v United Kingdom*, above n 54.

¹⁵⁵ See H Rodway ‘Invoking human rights to protect unmarried couples’, above n 51, for a discussion of the limitations of Art 14 in this context.

¹⁵⁶ Rodway, above n 26; Rodway ‘Maternity allowance’, above n 51.

legal foundation to the arguments advanced in this argument and show that the cohabitation debate is primed for a wider human rights framing.

6. Human rights framing in practice

This paper has explored why the adoption of a human rights frame in this context is needed and evidenced how the cohabitation debate is primed for such. It concludes by proposing what this framing may look like in practice. It is argued that advocates for reform should use both legal and normative frameworks to ground abstract discussions of cohabitation reform in human rights obligations to galvanise calls for reform and place increasing pressure on the government.

While there is no explicit recognition of the right for legal protection for cohabitants under human rights law, the European Convention on Human Rights, specifically Article 14, has provided a legal framework for cohabitants to successfully challenge differences in treatment between themselves and spouses. Despite this, as noted above, there has been a limited engagement with such cases by those advocating for reform. Moreover, in its report, the Women and Equalities Committee omitted to explore in any depth the recognition by the UK Supreme Court that the exclusion of cohabitants from a social security benefit reserved for spouses infringed Article 14 of the ECHR. As the Bereavement Benefits (Remedial) Order 2023 SI 2023/134 was being finalised, it may be that the issue identified by the Court was understood by the Committee as resolved. It is disappointing that the possibility of any further Article 14 infringements stemming from the absence of legal protections was not acknowledged. This failure to recognise potential human rights infringements was also reflected in the written submissions to the Committee. In 215 submissions, which included evidence from academics, practitioners and the public, there was no detailed reference to concerns that the legal position of cohabitants potentially infringed human rights legislation.

When discussing the need for reform, the debate is generally focused on economic, social and feminist concerns. Going forward, this need should be articulated with reference to case law which has resulted in a judicial recognition of human rights infringements. Moreover, more should be done to emphasise the likelihood that ongoing differences in treatment may similarly be found to infringe human rights if litigated. Strategic litigation and campaign-backed test cases could provide a route for these concerns to be explored before the courts. With previous recognitions by the judiciary of rights infringements in mind, the threat of strategic litigation challenging existing differences in treatment could place pressure on the government to engage with reform or risk being found to have infringed Article 14 again.

Alongside engagement with legal frameworks, using normative frameworks of human rights language would facilitate the reframing of the cohabitation debate. Advocates for reform should engage further with language derived from human rights law and use this language when articulating the need for reform. Language derived from human rights law can be both explicit and implicit.¹⁵⁷ In this context, examples of explicit human rights language – ‘that which identifies explicit state duties’¹⁵⁸ – would include references to the rights of cohabitants under the ECHR or other human rights instruments. It would see calls for reform engage further with states’ obligations to protect human rights and explore in greater detail how the current position of cohabitants fails to uphold these obligations. There is an overlap between the use of explicit human rights language such as this and an engagement with the legal framework surrounding the human rights of cohabitants. Since Strasbourg has not been as willing as domestic courts to recognise an infringement of Convention rights resulting from differential treatment between spouses and cohabitants, explicit human rights language is arguably more pertinent in domestic campaigns for reform. Using explicit human rights language can be useful to provide legal legitimacy to calls for reform and to forge a link between disparate instances of differential treatment. However, using

¹⁵⁷ K Perehudoff et al ‘A needle in a haystack? Human rights framing at the World Trade Organization for access to COVID-19 vaccines’ (2022) 24 Health & Human Rights 141.

¹⁵⁸ *Ibid*, at 145.

implicit human rights language is also advisable to ensure that arguments for reform are accessible to those without legal knowledge.

Implicit human rights language – normative use of rights without identifying any specific legal rights, obligations or instruments – could be more influential at the early stages of developing a human rights framing. Implicit language in this context could refer to terms such as ‘discrimination’ and ‘equality’. As explored above, occasional and sporadic use of these terms can be identified in the current discourse. However, it is argued that advocates for reform should begin to use these terms more consistently when explaining the current position of cohabitants when compared with spouses. Even without explicit reference to specific human rights provisions, repeated and consistent reference to the possibility that the difference in treatment creates inequality between spouses and cohabitants and discriminates against cohabitants has the potential to shift perceptions of the issue and aid a gradual reframing as a human rights concern.

Conclusion

The adoption of a human rights framing by social movements is not a new concept. However, this has not yet occurred in the cohabitation context. This paper has put forward the case for the development of a human rights framing of the cohabitation debate to draw attention to the ongoing legal disadvantages facing cohabitants and to continue to place pressure on the government. This has included a review of the current discourse, explaining why there is an absence of an engagement with human rights, analysing and ultimately dismissing potential disadvantages of a human rights framing, evidencing how a judicial recognition of human rights infringements provides a legal legitimacy to relevance of human rights and, finally, submitting what such a framing could look like in practice.

Both in England and Wales, and other European jurisdictions,¹⁵⁹ there is an absence of protections for cohabitants. The current discourse is failing to recognise the intrinsic value of human rights to the cohabitation debate and the role they can play. Until comprehensive reforms are introduced, there is a clear need to increase pressure on governments and galvanise calls for reform. The adoption of a human rights framing provides a strategic and powerful opportunity for proponents of cohabitation reform to achieve this.

¹⁵⁹Commission on European Family Law, above n 128.