COHABITANTS IN PRIVATE LAW: TRUST, FRUSTRATION AND UNJUST ENRICHMENT IN ENGLAND, GERMANY AND CANADA

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Abstract Neither in England, nor in Germany, nor in all Canadian provinces, does the law provide specific rules for the redistribution of property for unmarried cohabitants after the breakdown of their relationship. Instead, courts apply the law of trusts, contract and unjust enrichment with an eye to the characteristics of intimate relationships, as, for example, in decisions like the English *Jones v Kernott* ([2011] UKSC 53) and the Canadian *Kerr v Baranow* (2011 SCC 10). This article compares English, Canadian, and German case law and evaluates it both from a doctrinal perspective and as a part of a general approach towards cohabitation. The article concludes with an appeal for legislative action that strikes the right balance between party autonomy and protection of the weaker party.

Keywords: Canadian law, cohabitation, contract, English law, German law, trust, unjust enrichment.

I. INTRODUCTION

Setting up home together is a major step in a relationship. Traditionally, couples took that step after their wedding. Today, however, in Western countries, more and more couples cohabit[1] and have children without getting married.[2] In Canada in 2006, 17.9 per cent of couples were cohabiting outside marriage, with the numbers in Quebec being particularly high (34.6 per cent).[3]

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[1] On the influence of housing law for the development of family law see A Barlow, Family Law and Housing Law: A Symbiotic Relationship?' in R Probert (ed), *Family Life and the Law* (Ashgate 2007) 11–27.

[2] For a history of cohabitation and the current situation in the US see E Pleck, *Not Just Roommates* (University of Chicago Press 2012); for statistical material about European countries see T Nazio, *Cohabitation, Family and Society* (Routledge 2008) 17–18; for Australia see J Healy, *Marriage and Cohabitation: Issues in Society* (Spinney 2010) and for Canada see Z Wu, *Cohabitation* (OUP Canada 2000).

[3] Institute du Marriage et de la Familie Canada, <http://www.imfcanada.org/fact-sheet/canadian-cohabitation> accessed 14 February 2013. See for an explanation B Laplante, 'The Rise of Cohabitation in Quebec: Power of Religion and Power over Religion' (2006) 31 Canadian

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In Germany in 2010, 11.01 per cent of couples cohabited without getting married (or registering a civil partnership).[4] In Great Britain in 2010, 15.3 per cent of cohabiting couples were unmarried.[5]

With the rising number of cohabitants, the question of how the law should treat such relationships becomes more and more pressing.[6] There are rules to ensure the maintenance and wellbeing of children which apply to those born to both married and unmarried parents, for example, under the Children Act 1989 in England, or section 31 of the Ontario Family Law Act 1990, or in Germany under sections 1601, 1602 of the German Civil Code (BGB). However, the rules that govern the redistribution of the property of married couples on divorce are mirrored only rarely in the equivalent provisions for cohabitants.

In Canada, since the 1970s provincial legislation has granted rights to spousal support to cohabitants who have lived together for a certain period of time, as for example in the Family Relations Act of British Columbia of 1972, or sections 29, 30 of the Ontario Family Law Act 1990. Alberta only granted such rights in 2002.[7] Quebec is the last province not to introduce financial rights for former cohabitants. On 25 January 2013, by a majority of five, the Supreme Court of Canada held in *Quebec (Attorney General) v A* that the province is not constitutionally obliged to do so.[8] Some Canadian provinces, such as Manitoba and Saskatchewan, also introduced rules on the redistribution of family property.[9]

Other legislatures, in England, Germany and some provinces in Canada, still hesitate, however, to provide statutory rules on the redistribution of property for cohabitants following the breakdown of the relationship. This hesitation is especially pronounced in English law; in September 2011, the government decided not to take forward the suggestions of the Law Commission[10] for

Journal of Sociology 1; see also the discussion in *Quebec (Attorney General) v A* 2013 SCC 5 at [125–34].

[4] Statistisches Bundesamt, Statistisches Jahrbuch 2011, Table 2.16, <https://www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Bevoelkerung.pdf?__blob=publicationFile> accessed 14 February 2013.

[5] C Fairbairn, '"Common law marriage" and Cohabitation' (Library House of Commons, Home Affairs Section 2012) 3. <http://www.parliament.uk/briefing-papers/SN03372> accessed 14 February 2013.

[6] There is no space to do justice to the academic writing on the subject, but see A Barlow and G James, 'Regulating Marriage and Cohabitation in 21st Century Britain' 2004 MLR 143–67; JM Scherpe and N Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften: The Legal Status of Cohabitants* (Mohr Siebeck 2005); N Dethloff, 'Gutachten A für den 67. Deutschen Juristentag' *Deutscher Juristentag, Verhandlungen des 67. Deutschen Juristentages Erfurt 2008* (CH Beck 2008) vol 1; R Leckey, 'Cohabitation and Comparative Method' (2009) 72 MLR 48–72.

[7] See a list *Quebec (Attorney General) v A* 2013 SCC 5 at [280].

[8] 2013 SCC 5.

[9] *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, SS 2001, c 51; *Common Law Partners' Property and Related Amendments Act*, SM 2002, c 48.

[10] Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown (2007) (LC307) <http://lawcommission.justice.govuk/docs/lc307_Cohabitation.pdf> accessed 13 February 2013.

legislation.[11] However, questions of entitlement to jointly accumulated wealth need to be answered just as much when a cohabitational relationship ends as in the case of a divorce. With the increasing acceptance of unmarried cohabitation, many legal systems face the problem of how to untangle financial rights when such relationships break down.

No problems arise if the parties have established in an agreement, adapted to changing circumstances and 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. Only rarely, however, are such detailed agreements drawn up. Research shows that most couples, irrespective of whether they pool their resources, keep their funds separate or have a mixed arrangement,[12] fail to discuss financial matters or take legal advice.[13] When times are good, each partner might contribute according to his or her abilities and earning power towards living expenses and the acquisition of more valuable items, such as the family home, without thinking of the legal consequences. Parties in a happy relationship might regard precise calculations and distinguishing between each other in such ways as mean and pedantic.[14] Waite LJ in *Midland Bank v Cooke* said that, 'For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together.'[15] Thus, for some couples, the relationship is a 'law-free zone',[16] into which courts are forced to inject some law in the event of crisis.

This article considers how courts in England, Canada and Germany have decided on the property rights and financial claims of former cohabitants. The article concentrates on the different doctrinal approaches that the courts have developed. It does not, however, discuss rights granted in favour of a couple's children, which might also benefit a former cohabitant, as, for example, provisions made under the Children Act 1989 Schedule 1,[17] or rights to support under section 1615 l BGB which enable a parent to take care of a child under three years old without working. The different provincial statutory regimes in Canada will not be addressed either, since the aim of the article is to identify how private law is used by courts in these three different legal systems

[11] <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110906-wms0001.htm> accessed 7 June 2012; see the Supreme Courts' comments in *Gow v Grant* [2012] UKSC 29 at [44–56].

[12] For different financial arrangements used in relationships (which, however, only rarely seem to have been chosen consciously) see C Burgoyne and S Sonnenberg, 'Financial Practices in Cohabitating Heterosexual Couples' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 89, 95–100.

[13] G Douglas, J Pearce and H Woodward, 'Money Property, Cohabitation and Separation' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 139, 142–7.

[14] B Dauner-Lieb, 'Die höchstrichterliche Rechtsprechung zur Ehegatteninnengesellschaft – offene Fragen zum Verhältnis von Güterrecht und Gesellschaftsrecht' (2009) Familie und Recht 361, 363.

[15] [1995] 4 All ER 562, 575.

[16] B Dauner-Lieb (n 14) 361, 364; R Hepting, *Ehevereinbarungen* (CH Beck 1984) 200–26.

[17] J Herring, *Family Law* (5th edn, Pearson Longman 2011) 200–4.

to address the comparable problem[18] of what (if any) special rules should govern the acquisition of property rights by cohabitants. Such an approach, which focuses on the legal tools used in the different legal systems to adress essentially the same problem, might be described as the 'functionalist approach' of comparative law, as applied, for example, by Zweigert and Kötz.[19] This approach has been criticized for neglecting cultural and doctrinal peculiarities and concluding too easily that different legal systems essentially reach the same results.[20] In order to minimize this risk, cultural and social differences are cautiously addressed. Canada, England and Germany are Western countries with a broadly similar incidence of unmarried cohabitation as a social phenomenon. Germany is a traditional civil-law country with a civil code drafted in the nineteenth century, at a time when unmarried cohabitation was considered immoral. England and Canada, apart from Quebec, are common-law countries. Despite this common legal tradition, however, this article finds that the English and German approaches share more characteristics in their general approach to cohabitation than the English and Canadian courts. Canada, with its influential Charter of Rights and Freedoms, has taken a more liberal approach to cohabitation than the more conservative English and German courts.

Differences in the courts' doctrinal approaches and results are also stressed. England and Canada,[21] as common-law jurisdictions, rely on the constructive trust and the common-law conception of unjust enrichment respectively. In Germany, on the other hand, concepts of implied partnerships, family-specific contracts and unjust enrichment are drawn upon to address the problem. This article argues that, despite these doctrinal differences, English and German courts share a general approach to cohabitation which is significantly different from the approach adopted by courts in Canada. It identifies the choice faced by each jurisdiction as being between an autonomy-oriented approach, implementing intentions imputed or inferred from the parties' conduct, and an enrichment-oriented approach, awarding remedies in order to reverse contributions made towards the partnership that still enrich the former partner. However, in each jurisdiction, the private law conceptions of intention and enrichment used by the courts are shown to be ill-suited to resolve the specific problems of parties in intimate long-term relationships. It is concluded that the best way forward would be to introduce specific statutory schemes in all three legal systems, finding the right balance between party autonomy and the need

[18] For a comparison of German and English law see A Sanders, 'Vermögensausgleich bei Solidargemeinschaften: Trust, (Ehegatten) Innengesellschaft und Bereicherungsrecht in Deutschland und England' (2011) Zeitschrift für Europäisches Privatrecht 65–92.

[19] K Zweigert and H Kötz, *An Introduction to Comparative Law* (trans T Weir) (3rd edn, OUP 1998) 34–5, 44.

[20] Leckey (n 6) 48–72; R Hyland, *Gifts: A Study in Comparative Law* (OUP 2009) 63–125; R Michaels, 'Functional Method' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 339–83.

[21] Apart from Quebec.

to protect of the weaker party. The final section of the article offers some brief thoughts on how a legislative solution might strike such a balance.

II. THE ENGLISH CONSTRUCTIVE TRUST

In English law, the family home has special significance in cohabitational disputes. Home ownership is important in England. It conveys social status and often provides a very valuable investment. Especially in Greater London, the rise of house prices over the last decades has been striking,[22] a development that might have increased the willingness of former cohabitants to litigate.

English courts distinguish between cases of sole and joint registration of the family home:

(1) If only one partner of the (married or merely cohabiting) couple,[23] is the registered proprietor of title to the family home, the question is whether the other partner has a beneficial interest under a trust. If the acquisition of such a beneficial interest is established, the size of this interest needs to be determined (quantification).[24]
(2) If both partners are registered as proprietors, the question is whether (acquisition) and if so to what extent (quantification) the terms of any trust of the family home are at variance with the legal title, eg, if the parties share equally or according to their contributions made to the purchase price.

The first family home cases addressed the first question. The starting point of the development of the trust of the family home was the presumed intention resulting trust.[25] If a person contributed to the purchase price of another person's property, it was presumed that a trust in favour of the contributing party came into existence unless evidence showed that the contributing party had intended a gift.[26] The family constructive trust developed after decisions such as *Pettitt v Pettitt*[27] and *Gissing v Gissing*.[28] The case law then distinguished between situations where a partner made direct contributions to the purchase price and was awarded an interest under a resulting trust, and those where a constructive trusts was imposed. A constructive trust,[29] the courts held, was based on the common intention of the parties and detrimental

[22] P Sparkes, 'How Beneficial Interests Stack up' (2011) Conveyancer 156–63.

[23] The regime applies to both married as well as cohabiting couples. It has however, more practical importance for cohabitants as there is no statutory regime for cohabitants like the Matrimonial Causes Act 1973 that allows judges to redistribute property on divorce, see *Stack v Dowden* [2007] UKHL 17 at [43, 100].

[24] See *CPS v Piper* [2011] EWHC 3570.

[25] *Crisp v Mullings* [1976] 2 EGLR 103; *Marsh v von Sternberg* [1986] 1 FLR.

[26] *Dyer v Dyer* (1788) 2 Cox Eq 92; see on resulting trust W Swadling, 'Explaining Resulting Trusts (2008) 124 LQR 72–102.

[27] [1970] AC 777.

[28] [1971] AC 886.

[29] The trust is referred to as constructive rather than express because of the formality requirement in section 53(1)(b) LPA 1925 and the exception in section 53(2); W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 Current Legal Problems 399.

reliance based on the existence of a trust, demonstrated by indirect contributions to the purchase price or renovation work.[30] Home-making and caring for children alone, however, was not enough.[31] Whether the intention required of the parties needed to be expressed, inferred or even imputed in the light of the subsequent development of the relationship was clear neither in the case law nor the academic literature. In 1991, in *Lloyds Bank v Rosset*,[32] the House of Lords attempted to clarify the issue. Lord Bridge said that proof was required that the parties had, however unclearly, reached an 'agreement, arrangement or understanding' that the property was to be shared beneficially.[33] Absent an agreement, the only conduct of the parties which could be adjudged to show a common intention to share beneficially was direct contributions to the purchase price or payments of mortgage instalments.[34]

The second question,[35] how to quantify the shares of a jointly registered couple, was addressed by the House of Lords in the decision of *Stack v Dowden*[36] in 2007. The question was whether the party who had made a greater contribution to the purchase price of the house could claim a beneficial interest which exceeded the equal sharing of the beneficial interest indicated by joint registration.[37] The House of Lords, by a majority, held that where the couple was registered jointly it would be only in exceptional[38] situations that an interest under a trust would be different from the parties' legal interests. The law had 'moved on' from the traditional resulting trust in family home cases.[39] Nevertheless, Ms Dowden, who had undoubtedly made greater contributions to the purchase price, received a 65 per cent share. This decision was apparently based on a common intention of the parties. When explaining that many factors other than financial factors might be relevant when divining the parties' true intentions, Baroness Hale remarked that 'in law, context is everything, and the domestic context is very different from the commercial world'.[40] She went on to say that 'the search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it'.[41] Only Lord Neuberger,

[30] *Grant v Edwards* [1986] Ch 638; *Eves v Eves* [1975] 1 WLR 1338.

[31] *Burns v Burns* [1984] 2 WLR 582; critical L Flynn and A Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance' (1995) 3 Feminist Legal Studies 105–21.

[32] [1991] 1 AC 107.

[33] *Hammond v Mitchell* [1991] 1 WLR 1127.

[34] *Lloyds Bank v Rosset* [1991] 1 AC 107, 132–3; see also Arden LJ analysis of *Oxley v Hiscock* in *Lightfoot v Lightfoot-Brown* [2005] EWCA Civ 201 at [27].

[35] *Oxley v Hiscock* [2004] 3 All ER 703, [69]; see also *Midland Bank v Cooke* [1995] 4 All ER 562; *Springette v Defoe* (1992) 24 HLR 552; *Goodman v Gallant* [1986] 2 WLR 236.

[36] [2007] UKHL 17; see *Abbott v Abbott* [2007] UKPC 53.

[37] See also *Walker v Hall* [1984] FLR 126; *Springette v Defoe* [1992] 2 FLR 388; *Huntingford v Hobbs* [1993] 1 FLR 736.

[38] *Stack v Dowden* [2007] UKHL 17 at [68] per Baroness Hale.

[39] ibid [56–70, esp. 60] per Baroness Hale and at 31 per Lord Walker.

[40] ibid [69].

[41] ibid [60]; S Gardner, 'Family Property Today' (2008) 124 LQR 422, 424; Douglas, Pearce and Woodward (n 13) 139, doubt that the factors chosen by her Ladyship are helpful.

dissenting, disagreed with the idea of imputing an intention.[42] Thus, the question whether and what kind of agreement the parties had reached with respect to their property is of decisive importance for the court. This approach will be described as 'autonomy-oriented'.

The academic response to *Stack* was mixed.[43] The decision was criticized[44] by Swadling as abandoning established trust law[45] in favour of imprecise, fictitious agreements.[46] Sir Terence Etherton,[47] now a Lord Justice of the Court of Appeal, regretted the lack of a principled approach, in contrast to cases in the commercial context such as *Yeoman's Row Management v Cobbe*.[48] Hopkins remarked that the decision had introduced a context specific, policy orientated approach.[49] McFarlane suggested that it would be preferable to apply the doctrine of proprietary estoppel[50] rather than use fictitious agreements.[51] Harding argued that *Stack* could be defended from a communitarian perspective. In focusing on the parties' intentions rather than developing a quasi-statutory scheme, which should be left to the legislator, the court observed its proper role in a democratic society.[52] Judged from a liberal rather than communitarian perspective, however, Harding argued that the decision was nevertheless flawed because it failed to provide claims in unjust enrichment to distribute the transferred wealth properly. All these commentators discussed the role the court places on the parties' agreements, arguing that an autonomy-oriented approach focusing on the consent of the parties requires there to be an agreement between the parties on the sharing of their property. This, however, was strongly doubted by many commentators. Pawlowski, for example, argued that the House of Lords should develop a quasi-statutory scheme that focused on the special requirements of family relationships rather than property law rules.[53]

[42] *Stack v Dowden* [2007] UKHL 17 at [125].

[43] Cautiously approving K Gray and S Gray, *Land Law* (6th edn, OUP 2009) 7-072; N Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310, 336–7.

[44] M Dixon, 'The Never-Ending Story: Co-Ownership after *Stack v Dowden*' (2007) 71 Conveyancer 456–61; N Piska, 'Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*' (2008) MLR 120.

[45] W Swadling, 'Case Comment: The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed' (2007) 123 LQR 511–17.

[46] Gardner (n 41) 422–44, 425; T Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 CLJ 265, 279.

[47] T Etherton, 'Constructive Trust and Proprietary Estoppels: The Search for Clarity and Principle' (2009) 73 Conveyancer 104–26.

[48] [2008] UKHL 55.

[49] Hopkins (n 43) 310, 336–7.

[50] This very interesting approach will not be discussed in detail in this article which focuses on the approaches applied by the courts in most cases.

[51] B McFarlane, *The Structure of Property Law* (Hart 2008) 767–81.

[52] M Harding, 'Defending *Stack v Dowden*' (2009) 73 Conveyancer 309, 321–2.

[53] M Pawlowski, 'Beneficial Entitlement: No Longer Doing Justice?' (2007) 71 Conveyancer 354, 364.

The lower courts acted cautiously[54] and gave permission to appeal in *Jones v Kernott*. Clarification, especially of the question whether *Stack* allowed the imputation of intention to share, was keenly awaited.[55] Gardner and Davidson claimed that if *Stack*'s common intention could be invented for the parties, then the Supreme Court should expressly say so, and they suggested a new approach:[56] the court should differentiate between those couples who lived in a materially communal relationship and other couples who kept their money separate. The former couples should be essentially treated as if they were married.[57]

In *Jones v Kernott*,[58] the couple had been registered as joint proprietors of the title when the property was purchased. Later, however, they separated and Mr Kernott acquired another property while Ms Jones paid off the mortgage on the first property so that effectively she had contributed 90 per cent of the purchase price. Fifteen years after their separation, the question of how their respective shares should be quantified reached the courts. The Court of Appeal decided Mr Kernott held a 50 per cent beneficial interest because the couple had intended to share the house in equal shares at the time of registration and had not changed their intentions later, despite their separation.

The Supreme Court allowed Ms Jones' appeal, upholding the decision of the trial judge and took the opportunity to revisit and clarify *Stack.* Baroness Hale and Lord Walker explicitly abandoned the presumed intention resulting trust for houses and flats registered in the joint names of a couple.[59] In such cases, there was a presumption that the parties intended to share the interest in land equally[60] both at law and in equity, irrespective of the contributions each made to the purchase price. This 'presumption of equal sharing', however, could be rebutted by evidence of a contrary intention[61] expressed or inferred.[62] However, to justify such a rebuttal, the facts had to be very unusual as parties in an intimate relationship did not normally intend to demand compensation for their contributions, which were also very difficult to keep track of. In *Jones*, the majority—Lady Hale, Lord Walker and Lord Collins—held that such an intention could be inferred from the actions of Ms Jones and Mr Kernott. The 'ambulatory trust'[63] of equal shares established at the time of registration had changed over time with the parties' intentions. Lord Collins remarked that the

[54] *James v Thomas* [2007] EWCA Civ 1212; *Morris v Morris & Ors* [2008] EWCA Civ 257; *Fowler v Barron* [2008] EWCA Civ 377.

[55] S Bridge, 'Case Comment: *Jones v Kernott*: Fairness in the Shared Home: The Forbidden Territory or the Promised Land' (2010) 74 Conveyancer 324, 329; N Piska, 'Ambulatory Trusts and the Family Home: *Jones v Kernot*' (2010) 24 TLI 87.

[56] S Gardner and KM Davidson, 'The Future of Stack v Dowden' 127 LQR (2011) 13, 14.

[57] ibid 13, 17–19.

[58] [2011] UKSC 53.

[59] With a possible exception of cohabitants who are also business partner *Jones v Kernott* [2011] UKSC 53 [31].

[60] A Briggs, 'Co-Ownership and an Equitable Non Sequitur' (2012) 128 LQR 183–4 criticized the usage of the term 'joint tenants in equity' at 43.

[61] *Jones v Kernott* [2011]UKSC 53 at [25].

[62] ibid [31].

[63] ibid [14] referring to *Stack v Dowden* [2007] UKHL 17 at [62].

distinction between inferring and imputing an agreement was, in any event, a small one.[64] The minority, Lord Wilson and Lord Kerr, concurred with the result but doubted that the evidence supported an intention not to share the beneficial interest equally. Such an intention had to be imputed in order to do justice.[65] The minority did not explain how a 90:10 split could be justified by means of imputation, an omission Gardener and Davidson explained by arguing that a materially communal relationship should essentially be treated like a marriage. Adding together the value of both the properties Ms Jones and Mr Kernott purchased, Ms Jones had received roughly a 50 per cent share, a result she might well have received in a divorce.[66]

The majority, however, assumed that imputing an intention was permissible in relation to the quantification of the respective beneficial interests. Once the 'presumption of equality' established by joint registration had been rebutted by proof of a different intention, courts should look primarily for actual shared intentions, either expressed or inferred, to determine the relative shares.[67] If it was then impossible to infer an intention with respect to the relative shares, the court could impute such intention.[68]

Whether, and, if so, to what extent, these principles are to be applied to cases where the title was in the name of one party alone, remains to be seen. In particular, it is unclear what role a contribution to the purchase price should play and whether the law as stated in *Lloyds Bank v Rosset*[69] is to be modified. Lady Hale and Lord Walker acknowledged the desirability of a single regime[70] applicable to single-name as well as joint-name cases.[71] However, they went on to explain that the starting point in sole name cases was different because the non-registered party had to prove a beneficial interest while the jointly registered partner had only to bring proof that the beneficial interest should be shared in a different manner than would have been suggested by joint registration.[72] Nevertheless, it was argued that the two-step approach—of (1) proving an expressed or inferred intention to share a property interest either at all, or in manner different to that suggested by joint registration, and (2) quantifying according to an expressed, inferred or imputed intention—was essentially the same in both single-name cases like *Oxley v Hiscock*[73] and joint name cases such as *Stack* and *Jones*.[74] Mee criticized *Jones* for using two

[64] ibid [65–6].

[65] ibid at [65] Lord Kerr stressed the importance to keep imputing and inferring apart conceptually, at [75, 77]; at [78] per Lord Wilson.

[66] S Gardner and KM Davidson, 'The Supreme Court on Family Homes' (2012) 128 LQR 178, 180–1.

[67] *Jones v Kernott* [2011]UKSC 53 at 34 per Lady Hale, and Lord Walker.

[68] ibid [31, 47].

[69] [1991] 1 AC 107.

[70] Gardner and Davidson (n 56) 13, 15.

[71] *Jones v Kernott* [2011] UKSC 53 at [16].

[72] ibid [16, 17, 52].

[73] *Oxley v Hiscock* [2004] 3 All ER 703.

[74] Gardner and Davidson (n 66) 178; see already J Roche, 'Kernott, Stack, and Oxley Made Simple: A Practitioner's View' (2011) 75 Conveyancer 123.

artificial forms of intention.[75] In his view, the law was not settled after *Jones*, since neither single-name cases nor the future of the resulting trust in non-domestic situations were clear yet.[76] Again, as with *Stack*, the details of the court's autonomy-oriented approach were discussed and questioned, with commentators differing on whether, and to what extent, a court might supplement the parties' intentions by reference to fairness-oriented factors derived from the parties' actual relationship.[77]

III. CANADA—JOINT FAMILY VENTURES AND UNJUST ENRICHMENT

In Canada, as in England, the resulting trust formed the starting point of the case law on domestic disputes. Later, however, Canadian courts developed an approach that focused on the overall wealth accumulated by the cohabitants, and not merely on the family home, as was the case in England and Wales.

Relying on Lord Diplock's speech in *Gissing v Gissing,* Martland J in 1975 in *Murdoch v Murdoch*, speaking for the majority, said that, absent financial contribution, a trust could also arise 'where a court was satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was to be shared'.[78] The approach was followed by the majority in *Rathwell v Rathwell,* even though it was said that a contribution could evidence the common intention to share the property in question,[79] which slightly blurred the distinction between the classic resulting trust and the 'common intention resulting trust',[80] the Canadian term for the English constructive trust.

In 1980, in *Pettkus v Becker*[81] the development of the common intention resulting trust ended, however, and the law of unjust enrichment became the decisive legal tool in cohabitational disputes. The Canadian law of unjust enrichment began with a traditional common law 'unjust factor' approach, where a successful claim in restitution requires there to be a reason justifying restitution, for example, that the claimant made a mistake when transferring a benefit to the defendant.[82] In *Pettkus v Becker*,[83] where an unmarried couple had built a successful beekeeping business, however, the Supreme Court held that an obligation triggered by the defendant's unjust enrichment could arise where the defendant had been enriched, the plaintiff had suffered a

[75] J Mee, 'Case Comment – *Jones v Kernott*: inferring and imputing in Essex' (2012) 76 Conveyancer 167, 178–80.

[76] J Mee ibid 180; see also critically R George, 'Case Comment – Cohabitant's Property Rights: When Is Fair Fair?' (2012) 71 CLJ 39–42.

[77] See also M Pawlowski, 'Case Comment – Imputed Intention and Joint Ownership: A Return to Common Sense: *Jones v Kernott*' (2012) 76 Conveyancer 149–58; M Yip, 'The Rules Applying to Unmarried Cohabitants' Family Home: *Jones v Kernott*' (2012) 76 Conveyancer 159, 165–7.

[78] *Murdoch v Murdoch* [1975] 1 SCR 423, 438.

[79] *Rathwell v Rathwell* [1978] 2 SCR 436, 452, 474; see also Abella J in *Quebec (Attorney General) v A* 2013 SCC 5 at [310–11]

[80] See *Kerr v Baranow* 2011 SCC 10 at [22].

[81] [1980] 2 SCR 834.

[82] A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 86–95.

[83] [1980] 2 SCR 834.

corresponding deprivation and there was 'no juristic reason' for the enrichment.[84] This approach comes closer to the civilian approach to unjust enrichment than the unjust factor model.[85]

In the 1993 decision of *Peter v Beblow*, where a woman moved in with her partner and took over the chores formerly performed by a professional housekeeper, the Supreme Court held that domestic services could constitute an enrichment in a claim for unjust enrichment, since neither a spouse nor domestic partner has a duty to provide home-making services. The Court rejected the view that such services were performed merely because of 'natural love and affection', since such a view would devalue such valuable contributions to the family economy.[86] Speaking for the majority, MacLachlin J (as she then was) stated that 'since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment.'[87]

This approach was not confined to domestic disputes. In 2004 the Canadian Supreme Court declared in *Garland v Consumers' Gas Co*[88] that the 'no juristic reason' approach was the right approach for all unjust enrichment cases in Canadian law. Nevertheless, the debate over the general direction Canadian law should take was not completely over.[89] In the 2009 case of *BMP Global Distribution Inc v Bank of Nova Scotia*,[90] the Supreme Court did not allude to *Garland* nor to the notion of 'juristic reason' but resolved the case by applying the unjust factor of mistake and the English decision of *Barclays Bank v Simms*.[91] However, in *Kerr v Baranow* (2011), another domestic relationship case, the Supreme Court confirmed its commitment to the juristic reason approach. A claim in unjust enrichment required, first, an enrichment[92] of the defendant which, second, corresponded to a deprivation of the claimant.[93] Third, there must be no reason in law or justice for the defendant's enrichment.[94] There was no continuing role for the common intention resulting trust in family home cases, the court held,[95] since unjust enrichment offered a more principled and less artificial basis to address the problems arising out of domestic partnership.

The remedies the Supreme Court awarded in *Kerr v Baranow* deserve special attention. Prior to that case, Canadian decisions had awarded monetary

[84] Dickson, J —as he then was—had used the phrase first in his minority opinion in *Rathwell v Rathwell* [1978] 2 SCR 436.

[85] See L Smith, 'The Mystery of 'Juristic Reason' (2000) Supr Court L Rev (2d) 12, 211–44; L Smith, 'Demystifying Juristic Reasons' (2007) 45 Canadian Business Law Journal 281–304; M McInnes 'The Test of Unjust Enrichment in Canada' (2007) 123 LQR 34, 37; CDL Hunt, 'Unjust Enrichment Understood as Absence of Basis: A Critical Evaluation with Lessons from Canada' (2009) Oxford University Comparative Law Forum <http://ouclf.iuscomp.org/articles/hunt.shtml> accessed 14 February 2013, part III.

[86] [1993] 1 SCR 980, 989–95.

[87] ibid 980, 989.

[88] [2004] 1 SCR, 629 SCC.

[89] Hunt (n 85).

[90] [2009] SCC 15.

[91] [1980] QB 677.

[92] *Kerr v Baranow* 2011 SCC 10 at [36–8].

[93] ibid [39].

[94] ibid [40–5].

[95] ibid [15–29].

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relief calculated on a *quantum meruit* basis, which meant that a cohabitant received a payment calculated in relation to the market value of services delivered during the partnership. The other remedy awarded by the courts was proprietary relief in the form of a beneficial interest under a remedial constructive trust of specific assets.[96] However, in *Vanasse v Seguin*, decided with *Kerr v Baranow*, the Supreme Court restored the decision of the trial judge to award the homemaker partner a monetary claim for half the wealth her partner had accumulated during the relationship, including the proceeds of the profitable sale of his business.[97] Cromwell J explained this unanimous decision by reference to the nature of the relationship. While there might be situations where the parties considered each other as essentially hired help, in which case a *quantum meruit* would be appropriate, in other relationships the parties created a 'joint family venture' in which to share life's benefits and burdens. Cromwell J named a number of non-exhaustive indicia to detect such joint family ventures including (1) mutual efforts for the relationship; (2) economic integration of the resources of both partners; (3) an actual intent to share property; and (4) priority given to the family over career opportunities in order to disburden the other partner.[98]

The remedy had to respect the underlying premise of the relationship and thus award a proportional share of the wealth accumulated by joint efforts. As regards the legitimacy of this approach, Cromwell J said that

> it is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.[99]

Lower remarked that this approach focused on the actual relationship rather than the common intention stressed by English courts, and is close to what Gardner had suggested for English law. While the Canadian approach was less artificial than the English, however, it might not bring more certainty.[100] Though the court's reasoning might have merit from a fairness-oriented policy perspective, McInnes criticized it for not being justifiable from an unjust enrichment perspective. The function of unjust enrichment was to trigger restitution and to restore a specific benefit to the plaintiff. Therefore, unjust enrichment could not justify a share in the profits which a former partner had

[96] ibid [47–53, 55–7]; M McInnes, 'Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada' (2011) 127 LQR 339, 341–2.
[97] *Kerr v Baranow* 2011 SCC 10 at [140, 155–60].
[98] ibid [87–100].
[99] ibid [84].
[100] M Lower, 'Case Comment – The Constructive Trust: From Common Intention to Relationship? *Kerr v Baranow*' (2011) 75 Conveyancer 515, 520–1.

accumulated without there being proof of a causal link between the work constituting the benefit and the specific profits obtained.[101]

IV. GERMAN PARTNERSHIPS, CONTRACTS AND UNJUST ENRICHMENT

The trust has no real equivalent in German law.[102] Cohabitants only have property rights in land when both are registered. With respect to chattels, however, joint financial contributions are an important indication that the parties have established a common title, with shares relative to their financial contributions[103]—an approach roughly comparable to the classic presumed intention resulting trust. Nevertheless, German courts have concentrated on the law of contract and unjust enrichment when deciding cohabitational disputes rather than on property law. German courts first developed a number of tools that allowed claims between spouses beyond the scope of the marital property regime. Only since 2008 have such tools been applied to both cohabitants and spouses.

A. Implied Partnerships

The first instrument used in cohabitational disputes was the 'implied partnership'. In German law, a partnership is concluded by contractual agreement, which, like other contracts,[104] can be formed without the partners explicitly expressing their intentions. Unlike in England,[105] a partnership can be easily created for all economic and non-economic purposes. Thus, couples may create partnerships for various purposes, including the purchase of a house.

[101] McInnes (n 96) 339, 342.

[102] Comparative work on the trust has always had a great fascination for German lawyers H Kötz, *Trust und Treuhand* (Vandenhoeck and Ruprecht 1963); Zweigert and Kötz (n 19) 188–9; the German law of the Treuhandverhältnis has often been the subject of comparative research as well F Beyerle, *Die Treuhand im Grundriss des deutschen Privatrechts* (Böhlaus 1932); W Siebert, *Das rechtsgeschäftliche Treuhandverhältnis* (Elwert 1933); H Coing, *Die Treuhand kraft privaten Rechtsgeschäfts* (CH Beck 1973); U Blaurock, *Unterbeteiligung und Treuhand an Gesellschaftsanteilen* (Nomos 1981); A Westebbe, *Die Stiftungstreuhand* (Nomos 1993); M Bachner, *Der Constructive Trust* (Dissertation Eigendruck 1995); S Grundmann, *Der Treuhandvertrag* (CH Beck 1997); G Bitter, *Rechtsträgerschaft für fremde Rechnung* (Mohr Siebeck 2006); M Löhnig, *Treuhand* (Mohr Siebeck 2006); R Becker, *Die fiducie von Québec und der trust* (Mohr Siebeck 2007).

[103] OLG Köln, Neue Juristische Wochenschrift RR 1996, 1411; M Wellenhofer, 'Nach § 1302' in *Münchener Kommentar Bürgerliches Gesetzbuch, Familienrecht I* (5th edn, CH Beck 2010) para 28.

[104] P Ulmer, '§ 705' in *Münchener Kommentar Bürgerliches Gesetzbuch* (5th edn, CH Beck 2009) paras 275–83.

[105] Section 1(1) Partnership Act 1890. Business relationships between spouses or family members have proved difficult for the courts *Taylor v Mazorriaga* [1999] EWCA Civ 1393; *Ravindran v Rasanagayam* [2001] EWCA Civ 365.

In its decision of 20 December 1952,[106] the *Bundesgerichtshof*, the highest court for civil cases, used partnership law as an interim solution for marital property law. Article 3(2) of the German constitution of 1949 required the law to respect gender equality. However, the marital property regime of 1900, which was still in force, gave the husband power to administer his wife's property. The *Bundesgerichtshof* held that a couple who ran a hotel together had concluded a partnership and were thus partners with equal rights to the management and profits of the hotel. It was not denied, however, that the parties had never thought of establishing a partnership or brought it to the attention of third parties, as business people would have done. Though creating a partnership which only the partners themselves know of is possible under German law *(Innengesellschaft)*,[107] the decision can be interpreted as an act of judicial law-making rather than judicial interpretation, because the court assumed there to be an intention to form a partnership where it was obvious that the parties had never thought of establishing one.

After the introduction of the new marital property regime in 1958, the *Bundesgerichtshof* did not abandon the implied marital partnership.[108] In 1965, the *Bundesgerichtshof* decided the first case involving a cohabiting couple.[109] Like Janet Eves, who used a 14 lb sledgehammer to improve the house in which she lived with her partner,[110] the claimaint put considerable energy into land registered in her married partner's name alone, cleaning over 6000 stones from houses destroyed in air raids in order to use them to build a house. When he died, she sued his widow to whom the house had passed on intestacy for half the value of the house. The *Bundesgerichtshof* granted her claim, holding that the parties, in agreeing to pursue a joint purpose, had formed a partnership. The woman was thus entitled to the value of her share in the partnership.

In a decision of 8 July 1996, the court went further, expressly holding that claims in partnership law could be brought even where no implicit intention to form a partnership could be found. The only precondition was the joint intention to purchase something of value that should belong to both partners economically, if not legally, for the duration of their relationship.[111]

The implied partnership was heavily criticized by academic writers for disregarding established partnership law principles by inventing non-existent partnership agreements.[112] Responding to this criticism, the *Bundesgerichtshof*

[106] BGHZ 8, 249.

[107] Ulmer (n 104) paras 275–88.

[108] BGH (1960) Neue Juristische Wochenschrift 58; 104; BGHZ 31, 197, 200–201; 84, 361, 367; BGH (1989) Zeitschrift für das gesamte Familienrecht 147, 148; BGH (1999) Neue Juristische Wochenschrift 2962; BGH (2006) Neue Juristische Wochenschrift 126.

[109] BGH (1965) Wertpapiermitteilungen 793.

[110] *Eves v Eves* [1975] 1 WLR 1338.

[111] BGH (1996) Neue Juristische Wochenschrift RR 1473, confirmed in BGH (1997) Neue Juristische Wochenschrift 3371; BGH (2005) Neue Juristische Wochenschrift RR 1089, 1091.

[112] B Dauner-Lieb (n 14) 361–6; A Bruch, 'Zuwendungen unter Ehegatten: ein Überblick über Abgrenzungsfragen und Gestaltungsmöglichkeiten' (2008) Mitteilungen der Bayrischen Notarkammer 173–82: H Grziwotz, 'Die zweite Spur: ein (neuer) Weg zur Gerechtigkeit

limited the scope of implied partnerships in 2005.[113] The mere intention to purchase or create something of joint economic value was not sufficient. Rather, an express or implied partnership agreement was required.[114] Moreover, there should be doubts about the conclusion of a partnership, the court held, if the parties pursue a purpose which many couples pursue as an essential part of their relationships, for example, building a family home.[115] If the couple runs a business together, it is more likely that the court will find that a partnership agreement has been concluded.

B. Family Specific Contracts and Unjust Enrichment

The *Bundesgerichtshof* developed further tools to allow claims between spouses outside of matrimonial property law, which, however, were not initially applied to cohabitants.

At first, property or money given by one spouse to the other was considered a gift.[116] The law of gifts provided a legal basis, so that claims in unjust enrichment were barred. Moreover, the law of gifts provides that gifts can only be recovered under very narrow sets of circumstances. For reasons to be discussed below, the court did not aim to allow restitution on the basis of unjust enrichment, but according to general contract law. To allow recovery of valuable benefits after the relationship had failed, the *Bundesgerichtshof* developed the doctrine of 'marriage-related benefits' *(unbenannte* or *ehebedingte Zuwendung)*. This doctrine holds that if one spouse confers money, land or other valuable property on the other, such benefits are not gifts but are considered to be contributions to the security, preservation and organization of the parties' marriage, in accordance with an implied contractual agreement specific to marital relationships. Whether such an agreement created

zwischen Ehegatten' (2000) Deutsche Notar-Zeitschrift 486–98; M Haußleiter, 'Zum Ausgleichsanspruch bei einer Ehegatteninnengesellschaft neben einem Anspruch auf Zugewinnausgleich' (2006) Neue Juristische Wochenschrift 2741–73; U Haas, 'Ehegatteninnengesellschaft und familienrechtlicher Vertrag sui generis?' (2002) Zeitschrift für das gesamte Familienrecht 205–11; T Herr, *Kritik der konkludenten Eheinnengesellschaft* (Deutscher Anwaltverlag 2008); W Kogel, 'Zugewinn oder Ehegatteninnengesellschaft? Eine Gratwanderung in der Vermögensauseinandersetzung' (2006) Zeitschrift für das gesamte Familienrecht 1799–1805.

[113] BGHZ 165, 1, 10.

[114] ibid.

[115] BGHZ 177, 193, 201, confirmed in BGH (2011) Neue Juristische Wochenschrift, 2880, 2881.

[116] In a 2010 decision concerning donations of parents in law, the *Bundesgerichtshof* has applied section 313 BGB to the law of gifts BGHZ 184, 190. Whether the law of gifts will take on a new importance for transfers between spouses remains to be seen, critical M Braeuer, 'Zuwendungen innerhalb der Familie und gesetzlicher Zugewinnausgleich' (2011) Familie Partnerschaft Recht, 75, 77–8; T Herr, 'Die neue Schwiegerelternrechtsprechung des BGH: mehr Dogmatik im Nebengüterrecht?' (2010) Familienrechtsberater 308–12 cautiously positive W Kogel, 'Rechtsprechungsänderung zu den schwiegerelterlichen Zuwendungen – der vorprogrammierte Gau im Zugewinnausgleich' (2010) Familienrechtsberater 309–14; B Schmitz, 'Anmerkung' (2010) Neue Juristische Wochenschrift 2207–8; G Langenfeld, 'Anmerkung' (2010) Zeitschrift für Erbrecht und Vermögensnachfolge 376–7.

an enforceable claim[117] or whether it simply provided a legal basis for the benefits to be transferred and so bar a claim in unjust enrichment[118] remained unclear. More important, however, was the conclusion that the general principles of contract law could be applied to such a contract, including *Wegfall der Geschäftsgrundlage*, a doctrine that can—though imperfectly—be compared to the doctrine of frustration in English law.

The principle of *Wegfall der Geschäftsgrundlage*, section 313 BGB,[119] states that a contract can be rescinded or adjusted if the circumstances or assumptions underlying the contract have developed differently than the parties thought. To allow the claim, this development must have put an unbearable burden on the claimant. The question of what constitutes an 'unbearable burden' is answered with regard to the individual circumstances of each case, such as, for example, how the parties distributed risks in their agreement, whether the development could have been foreseen and the general principle of *Treu und Glauben*, which basically says that a minimum standard of fairness must be respected in all contractual relationships.[120] Applying the *Wegfall der Geschäftsgrundlage*, described here as the 'German doctrine of frustration', courts were free to find evidence that the parties had transferred property because of the underlying assumption that their relationship would endure. If the marriage failed, this assumption underlying the contract was frustrated, and the benefit could be recovered, insofar as fairness required.[121]

The legal construct of 'marriage-related benefits' is today applied with respect to transfers of land, valuable chattels, or cash, though not with respect to services.[122] To be able to give reimbursement for services, the courts developed something further, the 'family specific cooperation agreement' *(familienrechtlicher Kooperationsvertrag)*.[123] If a spouse provides extensive services, for example, by building a house or working in the partner's business,

[117] BGH (2003) Zeitschrift für das gesamte Familienrecht, 230; R Wever, *Vermögensauseinandersetzung der Ehegatten außerhalb des Güterrechts* (5th edn, Gieseking 2009) n. 417.

[118] HE Sandweg, 'Ehebedingte Zuwendungen und ihre Drittwirkung' (1989) Neue Juristische Wochenschrift 1965–74.

[119] Section 313(1) reads: 'If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot be reasonably be expected that a party should continue to be bound by the contract in its unaltered form.' Translation by Dannemann (n 134) 301–2. For a historic perspective see R Mayer-Pritzl, '§§ 313–314 Störung der Geschäftsgrundlage' in *Historisch Kritischer Kommentar zum BGB Vol II (2), §§ 305–432* (Mohr Siebeck 2007) paras 305–432.

[120] With references to the case law GH Roth '§ 242' in *Münchener Kommentar Bürgerliches Gesetzbuch* (5th edn, CH Beck 2007) paras 57–70.

[121] BGH (1997) Zeitschrift für das gesamte Familienrecht 933, 934; BGH Zeitschrift für das gesamte Familienrecht (1990) 600, 601; BGHZ 84, 361, 365; BGH Deutsche Notar-Zeitschrift (1992) 439, 440.

[122] M Lieb, *Die Ehegattenmitarbeit* (Mohr Siebeck 1970) 130.

[123] BGH (1982) Neue Juristische Wochenschrift 2236.

such services are assumed to be provided as contributions to family life and delivered on the basis of an implied 'family-specific cooperation agreement'. When the marriage fails, the purpose of this agreement was again frustrated and the value of the service could be recovered according to the same German principles of frustration described above. The amount of the spouse's claim is to be determined in the light of the individual circumstances of the case, including the character of the respective services, the duration of the marriage, and the financial circumstances of the couple. This way, the most that a spouse can receive is the market value of his or her services. Moreover, a claim will only to be granted where the distribution according to the marital property regime would cause an unacceptably unfair result, as, for example, might be the case if the couple had concluded a nuptial agreement that excluded a sharing of property.

C. (Almost) the Same Law for Cohabitants and Married Couples

Claims based on family-specific contracts were not allowed in favour of cohabitants for many years. Thus, in 1980 the *Bundesgerichtshof* held that, partnership law apart, no claims between cohabitants were possible. An unmarried couple did not form a legal union, since the couple had decided not to get married. To grant a claim for restitution in respect of expenses incurred for the couple would conflict with their wish to lead a personal, non-legal relationship.[124]

Academic writers criticized this decision, arguing that the personal character of the relationship should not place it outside the law.[125] In its decision of 9 July 2008, the *Bundersgerichtshof* agreed and changed its case law.[126] As with married couples,[127] claims under the German doctrine of frustration should be possible for cohabitants.[128] Marriage was not necessarily any more stable than cohabitation, and the expectation that the unmarried relationship would endure could form an underlying assumption, which could be subject to frustration under section 313 BGB and thus justify restitution. Cohabitants and spouses alike could conclude family-specific contracts in order to make contributions for the joint purchase of valuable goods or houses with the underlying assumption that their relationship would last. In this context, however, marriage-related benefits *(ehebedingte Zuwendung)* were renamed community-related benefits

[124] BGHZ 77, 55, 58 confirmed by BGH (1992) Neue Juristische Wochenschrift 906, 907.

[125] Critical W Schulz, 'Vermögensauseinandersetzung der nichtehelichen Lebensgemeinschaft' (2007) Zeitschrift für das gesamte Familienrecht 593–7, 595–7.

[126] BGHZ 177, 193.

[127] The decision frequently refers to the case law on married couples living in a regime of separation of property BGHZ 177, 193, 208–12.

[128] BGHZ 177, 193, 208–10; critical J Gernhuber, 'Die Mitarbeit der Ehegatten im Zeichen der Gleichberechtigung' (1958) Zeitschrift für das gesamte Familienrecht 243, 246; M Lieb, '§ 812' *Münchener Kommentar Bürgerliches Gesetzbuch* (CH Beck 2004) paras 217–18.

(gemeinschaftsbezogene Zuwendung).[129] However, no restitution will be granted for contributions made in respect of the day-to-day expenses of the relationship, 'which only make daily life possible',[130] such as, for example, rent.[131] Courts distinguish between expenses that are spent and those which contribute to creating something of lasting financial value.[132] Under this approach, payments of the mortgage would trigger a claim, whereas expenditure on food and holidays or caring for the home and children do not. This approach is criticized as discriminating against the (usually female) homemaker.[133]

The 'German doctrine of frustration' found in section 313 BGB allows restitution but is not part of the law of unjust enrichment, which is contained in sections 812–22 BGB. However, since 2008 a claim in unjust enrichment for restitution of the whole benefit transferred is considered possible (*condictio ob rem*, section 812(1) sentence 2, second alternative BGB)[134] in domestic disputes between former cohabitants. The German law of unjust enrichment generally follows an absence of basis approach. The *condictio indebiti,* governed by section 812(1) sentence 1st alternative BGB, provides that restitution is available when an enrichment is received without legal basis. So, for example, a payment made to satisfy a non-existent debt can be recovered. Contributions in the family context, however, are assumed to have a legal basis, whether it be a gift, which is understood as a contract in German law,[135] or a family-specific agreement, which would not cease or disappear retrospectively simply because the couple separated. Thus, recovery via the *condictio indebiti* was considered impossible. Moreover, such a contract also did not come to an end because of separation and divorce, so that a claim could not be granted under section 812(1) sentence 2, 1st alternative BGB, which allows the recovery of an enrichment received because of a legal basis that falls

[129] BGHZ 177, 193, 208.

[130] ibid, 193, 209.

[131] BGH (2010) Neue Juristische Wochenschrift 868.

[132] BGH (2011) Neue Juristische Wochenschrift 2880, 2882.

[133] H Grziwotz, 'Von der faktischen Lebensgemeinschaft zur Zusammenlebensgemeinschaft' (2010) Familie Partnerschaft Recht 369–71; H Grziwotz, 'Anmerkung zum Urteil des BGH vom 9.7.2008' (2008) Zeitschrift für das gesamte Familienrecht 1829–30; N Dethloff (n 6) 140–5; M Löhnig, 'Anmerkung zum Urteil des BGH vom 9.7.2008' (2009) in Deutsche Notar-Zeitschrift 59, 62. An unmarried parent who cannot work because taking care of a child can ask for maintenance, however, until the child turns three; section 1615l BGB.

[134] Section 812(1) reads: 'A person who obtains something by performance by another person [1st alternative] or in another way [2nd alternative] at the expense of this person without legal ground is bound to give it up to him [1st sentence]. The same obligation exists if the legal ground later lapses [1st alternative] or *if the result does not occur which the performance had been aimed at to produce according to the content of the legal transaction* [2nd alternative, 2nd sentence, *condictio ob rem*].' Translation by G Dannemann, *The German Law of Unjustified Enrichment and Restitution* (OUP 2009) 308 (indication for alternative, sentence and *condictio ob rem* added). BGHZ 177, 193, 206–7; BGH *Zeitschrift für das gesamte Familienrecht* (2009) 849, 850–1; Lieb (n 128) para 119, fn. 51. Unjust enrichment will be discussed in detail below.

[135] RGZ 111, 151; T Krebs, *Restitution at the Crossroads: A Comparative Study* (Routledge Cavendish 2000) 76–9; G Dannemann, 'Unjust Enrichment as Absence of Basis: Can English Law Cope?' in *Mapping the Law* (OUP 2006) 363–77.

away later. The *condictio ob rem* allows the recovery of enrichments conferred on the basis of a shared purpose, or a purpose of which both parties were aware, and which failed.[136] Such a purpose can exist in relation to benefits transferred between cohabitants or between in-laws. Spouses, however, are assumed not to share such purposes since their joint life is regulated by matrimonial law. The *condictio ob rem* with its prerequisite of a joint assumption of both parties that later fails is roughly comparable to the unjust factor of failure of consideration in English law. However, while the *condictio ob rem* has its main or only application[137] outside contract law, failure of consideration is used in English law in both contractual and non-contractual relationships.[138]

With its focus on agreements, German courts apply an autonomy-oriented approach. Commentators have long criticized the elaborate doctrinal constructions of the *Bundesgerichtshofs* as essentially fairness-orientated. Real agreements, it is argued, almost never exist. Gernhuber and Coester-Waltjen have argued that finding implied partnerships[139] and family-specific contracts to be pure fictions.[140] Though cohabitants could, of course, establish partnerships and conclude contracts, it would be wrong for courts to imply they did so for reasons of fairness.[141] In almost all cases, the courts had 'discovered' partnerships to the surprise of the parties purely in order to ensure a fair result.[142] Leitmeier criticized restitution in accordance with the doctrine of frustration and the *condictio ob rem* as being all about good faith and fairness.[143]

V. SIMILARITIES: PRIVATE LAW IN FAMILY CONTEXT

In all three legal systems, courts use legal devices usually applied outside family law in situations where people have combined their efforts and resources in a personal relationship without clear agreements. In the process, courts grapple with approaches which stress the intentions of the parties, which aim at ensuring fairness, or which try to provide compensation or restitution for

[136] G Dannemann (n 134) 45–9.

[137] See on the debate on the application of the *condictio ob rem* Dannemann ibid, 45–9.

[138] At least, a statement of Viscount Simon LC in *Fibrosa Spolka Akejna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48 can be interpreted this way. See also *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516; Burrows (n 82) 320–1, 398–9.

[139] J Gernhuber and D Coester-Waltjen, *Familienrecht* (6th edn, CH Beck 2010) section 20, para 27; Lieb (n 122) 40–9; P Ulmer, 'Vor § 705' in *Münchener Kommentar Bürgerliches Gesetzbuch* (5th edn, CH Beck 2009) para 76.

[140] Gernhuber and Coester-Waltjen (n 139) section 19, Rn 89.

[141] Lieb (n 122) 52.

[142] J Gernhuber 'Die Mitarbeit der Ehegatten im Zeichen der Gleichberechtigung' (1958) Zeitschrift für das gesamte Familienrecht 243, 245; see also Dauner-Lieb (n 14) 361, 362; Gernhuber and Coester-Waltjen (n 139) section 20, para 27; Wever (n 117) 628, 643.

[143] L Leitmeier, 'Die Zweckkondiktion – eigentlich Treu und Glauben?' (2010) Neue Juristische Wochenschrift 2006.

contributions to the partnership that continue to enrich the other partner once the relationship has ended.

Commentators in all three countries have criticized the courts for using purely fairness-oriented tools and for having introduced case law that provides quasi-statutory regimes for failed unmarried relationships. Karsten Schmidt criticized the implied partnership as simply a substitute for a marital property regime for unmarried couples (*Güterrechtssurrogat*).[144] Lower has pointed out that the Canadian focus on the specific relationship hints at an attempt to create a judicially fashioned regime to replicate what is available at divorce.[145] Mee argued that *Jones* was imposing a special regime on 'domestic' relationships which used two artificial forms of intentions.[146] The UK Supreme Court in *Jones* praised the valuable work of the Law Commission while realistically stating that no action should be expected from the legislature, with the result that courts themselves had to find answers to the pressing problems.[147] Thus, in all three legal systems, it could be argued that the case law developed by the courts was a substitute for a non-existence of a family law regime for cohabitants.

As appealing as this argument is, however, it must be taken with a pinch of salt. Though the case law might function as substitute for a statutory regime, it is doubtful whether all judges working on domestic disputes had such far-reaching ideas. Moreover, in Germany, as we have seen, the legal tools used for cohabitants are also used for married couples. In England, the constructive trust is used between married couples who are not divorcing, in order to ascertain the rights of third parties, such as, for example, the debtors of one spouse.[148] Thus, courts have adopted special private law rules for intimate relationships in general. Where there is a lack of specific family-law rules, or where their application leads to results which judges consider unfair, be it for cohabitants or married partners who have concluded a nuptial agreement, the courts step in. It might be suggested, however, that the assumption of both the courts and legal scholars that cohabitation and marriage require the same private law rules has formed an important step in the legal recognition of unmarried relationships. The fact that German courts grant claims in unjust enrichment only to cohabitants and not spouses might suggest that the development is not yet complete in Germany.

The use of private law in the family law context is an interesting phenonmenon, given that our legal systems usually consider family law to be a distinct area of law.[149] In all three legal systems, however, the courts have applied the law slightly differently in the family context than they would

[144] K Schmidt, *Gesellschaftsrecht* (4th edn, Heymanns 2002) 1731, fn 20.
[145] Lower (n 100) 515, 520–1.
[146] Mee (n 75) 167, 178–80.
[147] *Jones v Kernott* [2011] UKSC 53 at [35, 57]; see also *Gow v Grant* [2012] UKSC 29 at [44–56].
[148] *Midland Bank v Cooke* [1995] 2 All ER 562.
[149] On 'family law exceptionalism' see the special issue of the (2010) 58 American Journal of Comparative Law 753 edited by J Halley and K Rittich.

have done in the commercial context.[150] In *Stack v Dowden* Baroness Hale remarked that 'in law, context is everything, the domestic context is very different from the commercial world.' Commentators have claimed that *Stack* has a 'weak communitarian flavour'[151] and adopts a 'context-specific approach'.[152] At least at the quantification stage, considerations of fairness and the whole course of dealings of the parties in relation to the property is used to infer or impute an agreement.

The Canadian Supreme Court has also held in *Peter v Beblow*[153] and *Kerr v Baranow*[154] that the family context required a different approach than the commercial context.

Even the German *Bundesgerichtshof*, which seldom engages in discussions of a non-doctrinal character and never acknowledges sociological research, applied a context-specific approach by developing family-specific contracts and partnerships.

VI. DIFFERENCES

Despite similarities in function and approach, the doctrinal approaches used in England, Canada and Germany differ considerably when studied in detail. The differences start with remedies. While German and Canadian courts prefer to provide monetary remedies, English courts concentrate on beneficial interests in specific rights to land. Thus, while a successful English claimant has a beneficial interest that is relatively secure should the former partner become insolvent, German and most Canadian claimants do not have the same security. While German claims are calculated in relation to the value of specific contributions to the partnership and fairness-orientated considerations, the Canadian approach of the 'joint family venture' allows the taking of a broader picture of the relationship and the wealth accumulated together.

The legal instruments used also vary considerably. German courts refer to a dazzling arsenal of contracts, agreements and joint intentions,[155] while English and Canadian courts use only one legal instrument each, the constructive trust and unjust enrichment. German and English courts, on the one hand, focus on the parties' intentions, requiring contracts and shared purposes, as in Germany, or joint intentions to share a beneficial interests in a piece of land, as in

[150] For English law see Etherton (n 47) 104–26.
[151] Harding (n 52) 309, 314.
[152] Hopkins (n 43) 310, 316–18.
[153] *Peter v Beblow* [1993] 1 SCR 980, 997.
[154] *Kerr v Baranow* 2011 SCC 10 at [34, 35].
[155] BGH (1999) Zeitschrift für das gesamte Familienrecht 1580; BGH (1997) Zeitschrift für das gesamte Familienrecht 933; BGHZ 127, 50,52; BGHZ 84, 361, 365, 368–369; BGH Zeitschrift für das gesamte Familienrecht (1988) 481; BGH (1990) Zeitschrift für das gesamte Familienrecht 855, 856; BGH (1972) Neue Juristische Wochenschrift 1972, 580; BGH Neue Juristische Wochenschrift (1974) 1554; the literature produced by both academics and practitioners is massive in this area. See only Wever (n 117); D Schwab and M Hahne, *Familienrecht im Brennpunkt* (Gieseking 2004); W Kogel, '§ 19' *Münchener Anwaltshandbuch Familienrecht* (CH Beck 2002); Dauner-Lieb (n 14) 361–6.

England. Canadian courts on the other hand concentrate on the actual relationship of the couple[156] and benefits provided by one partner that still enrich the other.

The distinction between civil and common law first comes to mind to explain such differences. Germany is a civil law system. England is the 'motherland' of the common law. Canada has absorbed influences from both systems, especially in Quebec. Outside Quebec, there is a strong common law influence. In relation to the discourse on cohabitation in Canada, Leckey has cautiously observed that common law systems adopt a more functionalist approach, focusing on the realities of cohabitational relationships and their functional similarities with marriage, while civil law Quebec takes a more formalist, autonomy-oriented approach to cohabitation, focusing on the couple's decision not to get married.[157]

The cautious approach to cohabitation in Germany fits this description of a civil law approach. The assumption that granting rights to cohabitants would infringe the autonomy of parties who choose not to get married is common in Germany as well. At first, German courts even moved cohabitants out of the legal arena altogether in order to respect their (alleged) decision not to form a legally relevant union. This might reflect German legal culture. Contracts and private autonomy in the marital context have always been considered important.[158] Moreover, Article 6 of the German constitution, the Basic Law, states that 'marriage and family shall enjoy the special protection of the state.'[159] Though 'special protection' does not constitute a constitutional duty to treat other legitimate family forms necessarily worse than married couples,[160] this is frequently interpreted to mean that it would be unconstitutional to grant cohabitants the same rights as spouses.[161] The constitution, does not, however, forbid the courts or the legislator to grant cohabitants certain rights in order to provide some degree of protection.[162] In this context, the

[156] *Kerr v Baranow* 2011 SCC 10 at [84].

[157] R Leckey (n 6) 48–72.

[158] A Sanders, 'Private Autonomy and Marital Property Agreements' (2010) 59 ICLQ 571–92.

[159] For an English introduction to the German constitutional law of marriage see A Sanders, 'Marriage, Same-Sex Partnership, and the German Constitution' 13 German Law Journal (2012) 911, 915–23; <http://www.germanlawjournal.com/index.php?pageID=11&artID=1448> accessed 10 December 2012.

[160] BVerfGE 105, 313, 348–50; for an English translation of the decision that accepted the civil partnership for homosexual couples as constitutional see <http://www.bundesverfassungsgericht.de/entscheidungen/fs20020717_1bvf000101en.html> accessed 7 December 2012.

[161] BVerfGE 9, 20; BVerfGE 29, 166, 176; BVerfGE 105, 313, 350; <http://www.bundesverfassungsgericht.de/entscheidungen/fs20020717_1bvf000101en.html> accessed 7 December 2012 at [103]: 'The duty of the state to promote marriage must orient itself towards the protective purpose of art 6.1 of the Basic Law. If the legislature itself, in creating norms, contributed to marriage losing its function, it would violate the requirement of promotion under art 6.1 of the Basic Law. Such a danger might exist if the legislature created another institution in competition with marriage, with the same function, and, for example, gave it the same rights and lesser duties, so that the two institutions were interchangeable.' M Badura, 'Art. 6 Abs. 1' in T Maunz and G Dürig (eds), Grundgesetzkommentar Art. 6 Abs. 1 para 55 (CH Beck 2012).

[162] BVerfGE 6, 15.

decision of the *Bundesgerichtshof* to apply private law almost equally to cohabitants and spouses is a big step towards bridging the gap between marriage and cohabitation.

Though a common law country, the English legislature is almost as hesitant as its German counterpart to introduce rights to spousal support and property distribution for cohabitants. In *Jones* and *Stack*, the focus was primarily on the parties' intentions. Their specific relationship is given more consideration than in German courts when it is looked at to determine those intentions.

In Canada, the background of the decisions discussed in this article is different again to that in England and Germany. There is extensive legislation on cohabitation in all provinces except Quebec. Moreover, unlike in Germany, where constitutional law might bar treating spouses and cohabitants alike, in Canada, where constitutional law also profoundly influences the legal system,[163] the exclusion of cohabitants from spousal rights has been discussed as a possible instance of discrimination for a long time.[164] In the 2013 decision of *Quebec (Attorney General) v A*, a mere five to four majority considered the exclusion of *de facto spouses* from any spousal rights constitutional.[165] This legal environment might encourage Canadian courts today to adopt a bolder, more functional approach than courts in Germany and England, as well as focusing on the realities of the relationship rather than on allegedly autonomous agreements.

It is doubtful whether it is appropriate, however, to describe an approach, such as the Canadian, that focuses on contributions as necessarily more functionalist and relationship-orientated. In *Jones*,[166] the contribution-oriented approach of the resulting trust was considered adequate only for a business relationship, where partners keep track of their contributions in order not to be short-changed. Moreover, the doctrinal tools developed in the three countries are not as clear-cut. German and English courts pay attention to contributions as well. Nevertheless, the destinction between autonomy-oriented approaches and enrichment-oriented approaches provides a useful starting point for discussing the doctrinal solutions more thoroughly.

VII. AUTONOMY

In England and Germany, courts use legal rules that are based on the parties' joint intention to share. Enforcing a common intention or contractual agreement to share despite their not being married, however, does not disrespect the (allegedly conscious) decision not get married but shows respect

[163] For a critical evaluation see C Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd edn, OUP 2001) chaps 3–5; For the influence of constitutional law in Germany see D Kommers and R Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012).

[164] *Miron v Trudel* [1995] 2 SCR 418; *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325. [165] 2013 SCC 5. [166] *Jones v Kernott* [2011] UKSC 53 at [31].

for the parties' autonomy. As Gardner and Davidson put it, the attraction of referring to the genuine agreements of the parties is that 'it accords the parties control over their own affairs.'[167]

Courts in both Germany and England have looked for indications that the parties have come to an agreement even where they fail to express it, orally or in writing. Contracts, partnerships and trusts can, of course, be created even by laymen who do not know what they are doing but have a clear idea of what they want. This is difficult in domestic situations, however, where the partners have no or very different, often unexpressed and changing ideas. Research has shown that couples do not often discuss financal or legal matters at all[168] and only rarely form agreements and common intentions. Even when it comes to decisions of considerable importance, for example, the purchase of a house, cohabitants often seem unable to discuss the issue at all and do not take legal advice.[169] These findings cast serious doubt on all autonomy-oriented solutions. The less clear the understanding of the couples in question, the more the courts tend to impute intentions that the parties never actually had, rather than infer their real intentions from their conduct. The search for actual agreements becomes overshadowed by the search for fairness. As discussed above, this phenomenon has been criticized by commentators in Canada, England and Germany.

In both England and Germany, courts oscillate between approaches which either stress the importance of the parties' actual intentions or assume intentions to share with an eye to fairness and the way the parties actually lived and organized their relationship. The German arsenal of contracts, partnerships and underlying assumptions seems so artificial that hardly any couple could form the necessary intentions without the retrospective help of a court. The problem of how to infer the 'right' intention is also evident in the English decisions of *Stack v Dowden* and *Jones v Kernott*, especially in the dissenting opinions in both decisions. Problems with an autonomy-orientated approach were also expressed in the Canadian case *Kerr v Baranow*. The notion of a common intention, Cromwell J held, could be highly artificial and the search for such an intention 'easily become a mere vehicle and formula for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties'.[170]

Moreover, if courts focused on the parties' true intentions, those would have to be enforced even if they were terribly unfair. However, so far, courts have not detected unfair intentions, which might suggest that the sincerity of the courts' commitment to autonomy in this area can be doubted. Indeed, Gardner

[167] Gardner and Davidson (n 56) 13, 15.

[168] J Lewis, R Tennant and J Taylor 'Financial Arrangements on the Breakdown of Cohabitation' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 161, 165.

[169] Douglas, Pearce and Woodward (n 13) 139, 142–7.

[170] *Kerr v Baranow* 2011 SCC 10 at 26, referring to Dickson J in *Pettkus v Becker* [1980] 2 SCR 834, 834–844.

and Davidson have questioned the importance of genuine common intentions in the domestic setting generally. In cases of an enduring economic partnership, the family constructive trust could give effect to the 'implications of the parties' relationship'.[171] A genuine intention should not prevail over the implications of the actual family relationship.[172]

The problem with the approach of Gardner and Davidson, however, is that it allows judges to modify contract and trust law to create a non-marital property law for cohabitants based on something that is not an agreement according to classical contract or trust law. Something like that, as desirable as it might be, might better be introduced by the legislator, rather than the courts.[173]

VIII. ENRICHMENT

Another way of justifying claims is to allow for the recovery of contributions made to the partnership which continue to enrich the former partner after separation. This approach can be detected in parts of the classic resulting trust analysis as well. In Germany and Canada, as well as in Scotland[174] and Australia,[175] the law of unjust enrichment is a well-established solution to cohabitation disputes. By contrast, in England, the law of unjust enrichment has yet to make an appearance in this area. However, following *Stack v Dowden*, Gardner and Sir Terence Etherton have argued that unjust enrichment should be used as a new doctrinal basis for family homes cases.[176] For a court to hold that the unjust enrichment of one partner could trigger an interest under a trust[177] is alien to a German lawyer, but is thought possible by many English commentators.[178] In Canada, remedial constructive trusts are granted by the courts. However, even if English and Canadian courts would only award claims in money rather than decide on beneficial interests, it is unlikely that the

[171] Gardner (n 41) 422–40; see also Abella J in *Quebec (Attorney General) v A* 2013 SCC 5 at [310–311].

[172] Gardner and Davidson (n 66) 178–82; for a comparative view see JM Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012).

[173] Harding (n 52) 309, 321–2; see also Mee (n 75) 167, 179.

[174] *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117.

[175] *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Muschinski v Dodds* (1985) 160 CLR 583.

[176] Gardner (n 41) 421, 437; Etherton (n 46) 265–87.

[177] Even if a right under a trust is not described as a property right—a right against a thing—but as a right against a right; McFarlane (n 51) 23–32.

[178] Case law and academic writing about this question is too extensive to give full credit to the discussion. See only Burrows (n 82) 168–98; Swadling (n 26) 72–102; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 180–204; P Millett, '*Jones v Jones*: Property or Unjust Enrichment' in A Burrows and Lord Roger of Earlsferry (eds), *Mapping the Law* (OUP 2006) 265–75; G Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP 2006) 11–18, 105–6, 569–76; B Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' 68 CLJ (2009) 324–69; P Jaffey, *The Nature and Scope of Restitution* (Hart 2000); C Webb, 'What is Unjust Enrichment?' 29 OJLS 215–43. A proprietary response to failure of consideration, however, is not considered appropriate even by most commentators who embrace proprietary responses to unjust enrichment. This point will be discussed below.

law of unjust enrichment could form a new universal as well as doctrinally sound justification for domestic relationships. First, neither an 'absence of basis' nor an 'unjust factor' approach can be adequately applied to domestic cases. Moreover, unjust enrichment cannot provide adequate solutions for long-term relationships.

A. Absence of Basis?

While English law traditionally follows an unjust factor approach, which requires a reason for restitution, such as, for example, that a payment was made because of a mistake, the late Peter Birks argued that English law had developed its own absence of basis approach.[179] Sir Terence Etherton argues that an absence of basis approach could easily explain a family constructive trust, because contributions to the family and the family home were clearly made without legal basis and we have seen how, the Supreme Court of Canada held in *Peter v Beblow*[180] that there was no juristic reason for these contributions since cohabitants were not obliged to provide services to the family. However, the question of what the juristic reason might have been was not even discussed. The German experience, however, shows that the doctrinal character of such contributions and their legal bases cannot be left at large. Otherwise, the law of unjust enrichment could be turned into a purely fairness-oriented device.

As long as transfers between spouses were considered gifts in Germany, restitution due to absence of basis was not possible purely because the relationship had broken down. In England, even those academics who support an absence of basis approach consider 'gift' to be a legal basis.[181] When the gift-analysis was abandoned in Germany, another legal basis had to be found, otherwise each contribution would have been recoverable the moment it was made. Such an analysis would, for example, have led to problems with respect to limitation periods. As long as the couple was living together, the claim would constantly change with every service each party provided for the other, creating a kind of 'ambulatory enrichment claim'. Moreover, a debtor of one partner could claim those rights in unjust enrichment against the other partner

[179] Birks (n 178) 129–160; S Meier, *Irrtum und Zweckverfehlung* (Mohr Siebeck 1999); S. Meier (2006) 'No Basis: A Comparative View' in A Burrows and Lord Roger of Earlsferry (eds), *Mapping the Law* (OUP 2006) 343–61; TA Baloch, 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636–53, cautious B Häcker, 'Still at the Crossroads' (2007) 123 LQR 177, 182; critical T Krebs, 'In Defence of Unjust Factors' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 76–100; Burrows (n 82) 86–116; A Sanders, 'Absence of Basis: A German Perspective' in S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart 2013) 213; see for a Canadian perspective McInnes (n 85) 34–61, 37; Smith (n 85) 12, 211–44 the courts have left the question open; see Lord Walker of Gestingthorpe in *Deutsche Morgan Grenfell Group PLC v IRC* [2006] UKHL 19 [150]; less favourable: *FII v CIR* [2012] UKSC 19 at [162] per Lord Sumption.

[180] [1993] 1 SCR 980, 989.

[181] Dannemann (n 135) 363–77.

in court to cover debts. It will be interesting to see whether the question of when and how the claim in unjust enrichment arises will ever be relevant for a Canadian court.

To avoid such a free-floating claim, in Germany, the family-specific contract was developed, not only to allow for the application of the principle of frustration but also to provide a legal basis for relationship-related benefits and services. Under this principle, restitution is only possible once the relationship has broken down because only then is the assumption underlying the contract frustrated. It is doubtful that the German analysis of a contribution made because of a family-specific agreement would be convincing for an English or Canadian lawyer, however. English law does not easily assume that members of a family have concluded contracts, on the ground that they usually lack the intention to create legal relations.[182] Moreover, it would be difficult to detect consideration in such cases. Finally, it cannot be denied that this construction is highly artificial and might, rather, form an argument for English law not to move to an absence of basis approach at all. Though the German construction might not be attractive from a Canadian perspective either, it should help raise the question of what a juristic reason between cohabitants should be. With an eye to the overall concept of unjust enrichment, it should be discussed if there is no juristic reason from the beginning or if there is one that falls away later.

B. Unjust Factor?

If a traditional unjust factor approach as used in England and formerly used in Canada was applied to cohabitation cases, a suitable unjust factor would have to be articulated. General ideas of fairness would certainly not be enough and provide no advantage compared to the established constructive trust analysis in England, even if courts awarded monetary claims in the future and not discover beneficial interests.

It is unlikely that the relevant contribution to the purchase of a home could be said to have been made by mistake, because cohabitants usually know that their partner has no right to their payments. Rather, they are made in the shared hope that the relationship will endure and that both parties will benefit from the investment. If the relationship fails, it cannot be said that a mistake in the legal sense was made. Even if one agrees with the English approach that gifts should be easier to recover than payments made under a contract,[183] it would give the law of unjust enrichment a precariously broad scope to protect mere hopes.

German law provides the *condictio ob rem* to allow restitution for an enrichment that the claimant was not legally obliged to make but which was

[182] *Balfour v Balfour* 2 KB [1919] 571; D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 232–3; PS Atiyah, *An Introduction to the Law of Contract* (5th edn, OUP 1995) 156; E McKendrick, *Contract Law* (5th edn, OUP 2012) 269–82.

[183] Burrows (n 82) 214–217; Krebs (n 135) 76; Hang Wu Tang, 'Restitution for Mistaken Gifts' (2004) 20 JCL 1–28.

made because of an expectation that later failed.[184] Though the scope of the claims is slightly different, the *condictio ob rem* is comparable to the English unjust factor of failure of consideration, which shows that even German law does not follow a pure absence of basis approach. Restitution according to section 313 BGB, the doctrine of frustration, is not considered a response to unjust enrichment in German law. In England, failure of consideration has so far not been considered in the family context. However, even if it was, such analysis of the family constructive trust, as a response to failure of consideration, would run into serious problems. On the one hand, Birks, who argued that interests under trusts can be triggered by the trustee's unjust enrichment, only did so where the enrichment was unjust from the moment of receipt (*initial, not subsequent failure*).[185] However, under a failure of consideration[186] analysis, the enrichment becomes unjust only later, at the point when the relationship fails. Burrows, on the other hand, asks if the claimant had taken the risk of the defendant's insolvency.[187] Applying this analysis, an interest under a trust should also be denied because, at the time contributions were made, the claimant assumed that a durable relationship existed which involved sharing expenses and risks. In that situation, one must assume that a risk of the other's insolvency was taken on as well.

Even if English courts only awarded monetary remedies, an unjust enrichment analysis would not provide a convincing solution. For failure of consideration[188] and for the German *condictio ob rem*,[189] it is not enough that the claimant alone hopes that the defendant behaves in a particular way. There must instead be a shared understanding which links the benefit to the expectation. Because some sort of agreement or understanding must be detected in order to fulfil this requirement, this brings us back to the problems of the 'autonomy-approach' discussed above. This precondition was stressed by the *Bundesgerichtshof* in 2009.[190] A general hope and trust in the stability of the relationship was not sufficient for the court to find an understanding of such a nature as to justify a claim in unjust enrichment. Thus, Lieb forcefully argued that the *condictio ob rem* is unsuitable for ordering restitution in family cases since, in the majority of cases, such an understanding would not be

[184] See U Haas and M Holla, 'Die enttäuschte Erberwartung' (2002) Zeitschrift für Erbrecht und Vermögensnachfolge 169–70; it is not clear if the *condictio ob rem* can be applied at all if there is a contractual agreement between the parties. See with references to other literature and caselaw M Schwab, '§ 812' *Münchener Kommentar Bürgerliches Gesetzbuch* (5th edn, CH Beck 2009) para 377.

[185] Birks (n 178) 181–2; see also R Chambers, *Resulting Trusts* (OUP 1997) 110, 155–70.

[186] Chambers (n 185) 162; see for a summary of this position Burrows (n 82) 174–5.

[187] Burrows (n 82) 176–9; J Edelman and E Bant, *Unjust Enrichment in Australia* (OUP 2006) 70–72, 399–402.

[188] Burrows (n 82) 398.

[189] BGHZ 115, 261, 263–4; G Welker, *Bereicherungsausgleich wegen Zweckverfehlung* (CH Beck 1974) 110–11; Lieb (n 128) paras 217–18.

[190] BGH *Zeitschrift für das gesamte Familienrecht* (2009) 849, 850.

present.[191] An understanding or agreement specific enough to justify the application of the *condictio ob rem* in Germany, or to allow for a monetary claim because of failure of consideration would probably be enough for an English court to find in favour of the creation of a family constructive trust. This analysis explains not only why an unjust enrichment approach would not be preferable for English law but also why the German *condictio ob rem* might not lead very far either.

C. Remedies and Long-Term Relationships

There are even more problems with an unjust enrichment approach. The first is that it requires courts to determine what should count as a valuable contribution worthy of recovery. In England, following the retirement of Lord Denning in 1982, courts have not awarded beneficial rights in response to home-making.[192] In Germany, only direct contributions to the purchase price of property that continue to enrich the other party after separation trigger claims for reimbursement. German law does not allow restitution for contributions for everyday expenses or for home-making.[193] Canadian law, on the contrary, considers home-making a valuable benefit.[194] The Canadian perspective seems more convincing, at least in cases where the value of home-making can be quantified. The German approach discriminates against the homemaker and devalues services essential to the family. That they might have been done 'for love' does not mean they are worthless. But even if that problem could be overcome, we would still need to assign an adequate economic value for home-making. As in matrimonial law, this could be determined in relation to the income of the breadwinner. This would reflect the notion of a partnership of equals but would mean that the home-making of a billionaire's partner would be much more valuable than that of a poor person's partner. In order to achieve a more objective result, courts could look at the market prices for such services. This, however, would treat the partner as a hired nanny, cook, or cleaning person, a result that would fail to recognize the parties' joint efforts.[195] Moreover, applying this approach would not always help homemakers, since courts would have to allow counter-claims for the breadwinner's expenses for rent and food as well. If the couple led a luxurious lifestyle and the homemaker's services were evaluated like those of a cleaner, she might accumulate debts despite her services during the relationship.

[191] Lieb (n 122) 116–17; cautious N Dethloff, 'Anmerkung' (2009) Juristenzeitung, 418, 419; more optimistic C Sorge, 'Condictio ob rem und Rückabwicklung gemeinschaftsbezogener Zuwendungen in nichtehelichen Lebensgemeinschaften' (2011) Juristenzeitung 660–8.

[192] *Burns v Burns* [1984] 2 WLR 582.

[193] BGHZ 177, 193, 202, 204; critical H Grziwotz, 'Anmerkung zum Urteil des BGH vom 9.7.2008' (2008) Zeitschrift für das gesamte Familienrecht 1829–31. 1830); Dethloff (n 6) 140–5.

[194] *Peter v Beblow* [1993] 1 SCR 980, 989–995.

[195] *Kerr v Baranow* 2011 SCC 10 at [59–69].

Moreover, it is questionable whether the rules of unjust enrichment are fit to be applied to long-term relationships. Cohabitation can be like marriage, a long-term relationship during which parties contribute and consume according to their changing needs and abilities. The partner who contributed money to buy a house might need intensive care after a stroke, as in *Kerr v Baranow*. A partner who has paid all family expenses may lose her job so that the homemaker needs to go back to work. The longer the partnership lasts, the more difficult it is to trace different contributions and translate them into claims and counter-claims. The 'joint family venture' of the Canadian Supreme Court dispenses with the 'artificial balance sheet approach'[196] by allowing a claim to a proportionate share of the accumulated wealth. However, under the established law of unjust enrichment, it is not possible to award a share in the partner's wealth; rather, a specific enrichment needs to be given up.[197] This shows again that unjust enrichment is not fit to be used in a long-term relationship. The joint family venture, as meritorious as the subject is from a policy perspective, seems alien from a doctrinal perspective and moves the law of unjust enrichment too much into a direction of fairness.

IX. WHERE NOW? LEGISLATIVE SOLUTIONS

The solutions developed by German, Canadian and English courts vary considerably in their doctrinal approach and it seems unlikely that adopting the approach of another legal system would improve the situation. Each approach is deeply entrenched in the legal and social culture and reflects in some way the general approach to cohabitation—either stressing the autonomous intentions of the parties or their contributions to the relationship.

To date, a completely convincing doctrinal solution has not been found. The reason might well be that the private law rules presently applied were not developed to fit the characteristics and needs of long-term personal relationships. The private law rules applied by the courts so far focus on agreements truly concluded and enrichments actually conferred, but it is the development of the relationship over time and its economic effects which need to be in the spotlight.

Courts could develop specific rules for family relationships, making it clear that they are modifying the traditional rules of trusts, contracts and unjust enrichment in order to meet the needs of unmarried cohabitants. It is questionable, however, if such an approach[198] is the best way forward. It would be preferable for legislatures to provide specific statutory rules outside the established common law rules of trusts, contract and unjust enrichment, and the nineteenth-century contract and unjust enrichment rules of the German civil code.

[196] ibid [69].
[197] McInnes (n 96) 339, 342.
[198] Harding would describe it as 'communitarian' Harding (n 52) 309, 321–2.

This is not to say that in the absence of legislative action[199] courts must not address the problem. In the three jurisdictions considered in this article, courts do not violate constitutional law and the rights of the legislature by developing case law on the property rights of former cohabitants. In Canada and England, both common law systems, case law is an important source of law. Though it was formerly assumed that judges do not create but rather pronounce the law,[200] it seems the universal position in common law jurisdictions today that judges are meant not only to resolve the particular dispute before them but also to create law when doing so.[201]

Germany, however, is a civil law jurisdiction that does not accept that judicial decisions constitute binding precedents.[202] Nevertheless, developing private law by the interpretation of statutory rules in *de facto* binding precedents is considered an important function of Germany's highest courts. In a decision of 11 July 2012, the German Constitutional Court held that the development of the law by the courts is not an infringement of constitutional law as long as courts do not contradict legislative intent.[203] The older a statute, the more necessary an adjustment by means of case law.[204] It is a matter of debate, whether the rules the courts create by interpreting statutory law can be considered 'law'[205] and if, given the absence of a rule of binding precedent, people may rely on previous decisions.[206] Whatever label one may put on the case law on cohabitation, and whatever position one might take with respect to

[199] The UK Supreme Court also demands legislative action *Gow v Grant* [2012] UKSC 29 at [44–56].

[200] See, for example, Lord Browne Wilkinson in *Kleinwort Benson LTD. v Lincoln City Council* [1998] 4 All ER 513 per Lord Browne-Wilkinson: 'The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said, a fairy tale in which no-one any longer believes. In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world.' See also US Supreme Court Justice Storey in *Swift v Tyson* 41. U.S. (16 Pet.) 1, 18 (1834) critical Justice Holmes *Erie RR v Tompkins* 304 U.S. 64, 78 (1938).

[201] MA Eisenberg, *The Nature of the Common Law* (Harvard University Press 1988) 4; A Barak, *The Judge in a Democracy* (Princeton University Press 2008) 155–8; L Alexander and E Sherwin, 'Judges as Rule Makers' in D Edlin (ed), *Common Law Theory* (CUP 2007) 27; J Gardner, 'Some Types of Law' in D Edlin (ed), *Common Law Theory* (CUP 2007) 51, 72–5.

[202] See for the differences and similarities of legal interpretation in Germany and England S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent I/II* (Mohr Siebeck 2001).

[203] BVerfG (2012) Juristenzeitung 1065, 1068–70—Delisting decision. See also BVerfGE 34, 269 (1973); BVerfGE 82, 6, 11–14 (1990); BVerfGE 128, 193, 210 (2011).

[204] JG Sauveplanne, 'Codified and Judgemade Law' in Koninklijke Nederlandse Akademie van Wetenschappen (ed) Mededelingen (B V Noord-Hollandsche Uotgevers Maatschappij 1982) 93, 111–20, 127.

[205] A Goetz, 'Das Delisting-Urteil des BVerfG-freie Bahn für Erleichterungen des Börsenrückzugs?' (2012) BB, 2767, 2768; M Jachmann, 'Art. 95 GG' in T Maunz and G Dürig (eds), *Grundgesetz Kommentar* (66th edn, CH Beck, 2012) n. 15.

[206] L Brocker 'Rechtsprechungsänderung und Vertrauensschutz' (2012) Neue Juristische Wochenschrift 2996.

its doctrinal quality,[207] however, it is submitted that it does not violate constitutional law. Given that the German Civil Code was drafted in the nineteenth century, at a time when unmarried cohabitation was considered unacceptable, developing rules for cohabitants can be regarded as a constitutionally acceptable adjustment to modern developments.

However, although the courts' creation of case law relating to unmarried cohabitants is not an unconstitutional usurpation of the legislature's power, it is argued that a specific statutory regime would be preferable to judge-made law in all three legal systems. Judges are not ideal lawmakers. Their decision-making is focused on deciding the case before them.[208] Only the legislature can properly weigh the different values, policy options and their implications for individuals and the community.[209] Moreover, research rightly stresses the diversity of cohabiting couples.[210] For some couples, informal cohabitation constitutes a functional equivalent of marriage, for others it is a precursor to the commitment of marriage. It would be desirable for the law to provide a comprehensive framework of rules covering such different cases, informed by consultation and research—something that a court lacks the resources to do and to which the procedural constraints of bilateral litigation do not readily lend themselves. Moreover, though there is no constitutional duty for parliamentarians to legislate on the specific issue of cohabitation,[211] politically, it seems desirable that the people's elected representatives engage in important issues themselves.[212] Unmarried cohabitation is such an important issue. It is time for the legislator to tackle the problem of unmarried cohabitation as a whole, ensuring the public debate necessary in a democratic society. Marital property, maintenance and child custody is regulated by statute in Canada, Germany and England. The law of unmarried cohabitants should also be regulated by specific statutory provisions.

In Canada, after the decision in *Quebec (Attorney General) v A*[213] was handed down on 25 January 2013, legislative action, not a court decision, will set out the way forward as well. The former partner of a wealthy entrepreneur argued that the exclusion of cohabitants from spousal rights in Quebec law amounts to discrimination under section 15 of the Canadian Charter of Rights and Freedoms. While a majority of five justices considered the exclusion of *de facto* spouses from spousal rights to be an infringement of section 15 of the Charter, a majority of five justices decided that the Quebec law was constitutional. McLachlin CJ, who considered the approach of Quebec an

[207] The Federal Constitutional Court has stressed that the doctrinal quality of case law is not a question of constitutional law; BVerfG (2012) Juristenzeitung 1065, 1069.

[208] Alexander and Sherwin (n 201) 27, 33.

[209] Harding (n 52) 309, 317–18 referring to Dworkin's distinction between policy and principle; R Dworkin, *Taking Rights Seriously* (Duckworth 1977) Chap 4.

[210] Pleck (n 2) 229–230; Burgoyne and Sonnenberg (n 12) 89, 93–94, 105; Douglas, Pearce and Woodward (n 13) 139, 149–51.

[211] Within the European Union though, there can be a duty to transpose a directive into national law.

[212] Harding (n 52) 309, 321–2.

[213] 2013 SCC 5.

infringement of section 15 but justified under section 1 of the Charter, was the only justice who voted with the majority on both issues. The majority, accepting freedom of choice and party autonomy as important policy considerations,[214] considered Quebec law that leaves it to cohabiting couple to create rights by marriage or the conclusion of a cohabitation agreement, constitutional. However, the decision does not make legislative action in Quebec unnecessary, quite the opposite. Abella J, speaking for the minority, raised important problems about the actual limits of freedom of choice and the economic disadvantages many cohabiting partners, especially women, face.[215] Such economic disadvantages made the introduction of marital rights and constructive trusts in favour of divorced women necessary and were just as important after the breakdown of an informal relationship.[216] Now, however, the legislature, not the Supreme Court should decide on the rights of cohabitants in Quebec.[217]

Many suggestions have already been made as to how to regulate the rights of unmarried cohabitants.[218] In some legal systems, statutory rules are already in force, as for example in New Zealand,[219] New South Wales in Australia,[220] Scotland,[221] and Ireland.[222] Only some brief thoughts will be added here. The first problem faced by legislation on unmarried cohabitants is determining the point at which a statutory regime should become applicable. Unlike married couples or civil partners, informal cohabitants do not register their union and would probably not do so even if an alternative regime, like the French PACS,[223] were to be offered. The birth of a child, however—a crucial turning point for any relationship—might be taken as a starting point. If the couple has no children, legislation could become applicable after the couple has lived together for a minimum number of years, as the Law Commission has suggested.[224] However, some legal regimes, such as the Scottish Family Law (Scotland) Act 2006, lack such a minimum duration requirement and have not experienced any problems because of it. Properly tailored requirements for

[214] 2013 SCC 5 at [248–61, 271–73, 413, 422, 435].
[215] *Quebec (Attorney General) v A* 2013 SCC 5 at [283–381] per Abella J.
[216] ibid [291–311] per Abella J.
[217] ibid [278] per LeBel J and at [449] per McLachlin CJ.
[218] See only Law Commission (n 10); I Schwenzer and M Dimsey, *Model Family Code from a Global Perspective* (Intersentia 2006); Dethloff (n 6) 131.
[219] Property (Relationships) Act 1976, as of 2009 <http://www.legislation.govt.nz/act/public/1976/0166/latest/DLM440945.html> accessed 7 December 2012.
[220] Property (Relationships) Act 1984, as of 2011 <http://www.austlii.edu.au/au/legis/nsw/consol_act/pa1984298/> accessed 7 December 2012.
[221] Family Law (Scotland) Act 2006 <http://www.legislation.govuk/asp/2006/2/pdfs/asp_20060002_en.pdf> accessed 7 December 2012.
[222] Part 15 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 <http://www.irishstatutebook.ie/2010/en/act/pub/0024/index.html> accessed 7 December 2012.
[223] A registered civil partnership is available to same sex as well as mixed sex couples and provides certain rights, though not the same level of protection as marriage.
[224] Law Commission (n 10).

financial remedies seem to be enough to ensure that a regime is not applied too broadly.[225]

Next, the rights cohabitants should enjoy need to be discussed. One could apply the same regime for married and unmarried couples. In Germany, as discussed above, it would be doubtful if such a statute would be constitutional. Leaving German constitutional law aside, the most common argument brought forward against applying marital law to cohabitants is that if couples have decided not to get married it would be wrong to force them into the same legal framework. In the Supreme Court of Canada decision in *Miron v Trudel*,[226] by Abella J in *Quebec (Attorney General) v A*[227] as well as in recent research, serious objections against this 'autonomy argument' have been expressed. Couples often make no conscious choice not to get married, or are mistaken about the rights of unmarried cohabitants.[228] Sometimes, the economically stronger partner, often the man, refuses to get married.[229]

As important as these findings are, however, autonomy should not be disregarded completely. The ability to decide one's own affairs responsibly and independently is not only important in all areas of law, including family law, but in human life in general.[230] To treat cohabitants and spouses alike in every situation would fail to respect the fact that for whatever reason unmarried partners have not chosen to marry. In *Quebec (Attorney General) v A*, the majority also stressed the importance of freedom of choice and party autonomy as policy considerations.[231] In order to strike the right balance between necessary protection and party autonomy, it is crucial to determine the situations in which unmarried cohabitants require protection. In this context, again, the diversity of cohabiting couples needs to be kept in mind.

Two areas can be identified where the legislature should, however, step in. First, the question of whether a couple is married should not affect their children.[232] Thus, for example, rights to maintenance or the right to stay in the family home[233] should be the same for married and unmarried parents as long as the couple's children benefit directly from it.

[225] F Wasoff, J Miles and E Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law Scotland Act 2006* (CRFR 2011) 21, 51 <http://www.crfr.ac.uk/reports/Cohabitation%20final%20report.pdf> accessed 12 December 2012. See also J Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 CLJ 492, 494.

[226] *Miron v Trudel* [1995] 2 SCR 418, 498.

[227] 2013 SCC 4 at [334, 373–5].

[228] Law Commission (n 10) 9.

[229] See with further references M Antokolskaia, 'Economic Consequences of Informal Heterosexual Cohabitation from a Comparative Perspective: Respect Parties' Autonomy or Protection of the Weaker Party' in A Verbeke et al (eds), *Confronting the Frontiers of Family and Succession Law* (Intersentia 2012) 41, 48–9.

[230] Sanders (n 158) 571.

[231] 2013 SCC 5 [248–61, 271–3, 413, 422, 435]; see also *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 at [54, 57].

[232] Since a couple with a child forms a family, which is protected under art 6(1) of the German constitution like marriage, no constitutional problems should prevent German regulation in this context.

[233] A problem the couple in *Quebec (Attorney General) v A* 2013 SCC 5 settled outside of court, at [6].

Second, autonomy cannot justify the exploitation of a weaker party. How this protection should be ensured, is a matter of debate. The same principles as in marital property law—compensation, needs and sharing[234]—must be considered with regard to cohabitation. Barlow has favoured an approach that provides rights in order to fulfil the former partner's needs.[235] The Law Commission for England and Wales,[236] section 28 of the Family Act (Scotland) 2006,[237] and also Schwenzer and Dimsey[238] proposed a legislative scheme that focuses on compensating economic advantages and disadvantages caused by the relationship. Relevant disadvantages could, for example, be losses in income and pension rights suffered because one cohabitant, typically the woman,[239] reduced her paid work in order to concentrate on raising children and home-making. The birth of a child often results in a loss of income and financial independence for the mother.[240] This burden should be borne by both parents. Moreover, couples often start pooling their financial resources when a child is born,[241] acting like an economic unit in the same manner as spouses. This responsibility assumed during the relationship should not end completely when the relationship breaks down. A person who made contributions to the joint home, be it in buying food, taking care of the home or family or financial contributions, should receive some compensation for this expense because his or her partner derived an economic advantage from the relationship.

However, it is questionable whether someone who cannot work due to ill health should be supported by their former partner in situations where the person would have fallen ill anyway, irrespective of any question of advantage or disadvantage as a result of the relationship. Caring for people who can no longer work is the responsibility of the community rather than a former cohabitant, who might have a moral but not a legal obligation to help. With their marriage vows, spouses promise to take care of each other and can thus be asked to support each other even after a divorce. Cohabitants, for whatever reason, have not taken this step.

[234] *White v White* [2001] 1 AC 596; *Miller v Miller, McFarlane v McFarlane* [2001] UKHL 24; J Miles and R Probert, 'Sharing Lives, Dividing Assets' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 3, 7.

[235] A Barlow, 'Legal Rationality and Family Property' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 303, 317–19.

[236] Law Commission (n 10).

[237] Family Law (Scotland) Act 2006 <http://www.legislation.govuk/asp/2006/2/pdfs/asp_20060002_en.pdf> accessed 7 December 2012. See for empirical reasearch on the legislation and its implications for reform in England and Wales Wasoff, Miles and Mordaunt (n 225). See also *Gow v Grant* [2012] UKSC 29, J Miles 'Cohabitation: Lessons for the South from North of the Border?' 71 CLJ (2012) 492–5.

[238] Schwenzer and Dimsey (n 218).

[239] On gender inequalities in relation to paid and unpaid work: J Scott and S Dex, 'Paid and Unpaid Work' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 41–57.

[240] A Finney, 'The Role of Personal Relationships in Borrowing, Saving and Over-indebtedness' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart 2009) 107, 125.

[241] Burgoyne and Sonnenberg (n 12) 89, 97.

Thus, the approaches of the Family Act (Scotland) 2006 and the Law Commission seem promising. They allow an adequate allocation of the economic risks of the partnership by preventing the exploitation of the other partner, while acknowledging some differences between marriage and cohabitation. This approach acknowledges the worth of financial contributions as well as taking care of children or a sick partner, something that would be very difficult to achieve through the application of unjust enrichment or trust law. In order to resolve cases concerning jointly bought property, financial expenses on the purchase or renovation of that property that still enrich the other partner could also be compensated.

However, not every disadvantage and financial contribution to the relationship requires compensation. They are also extremely difficult to calculate correctly. Thus, as in marriage law in England, the judge requires some discretion when making a decision. Still, this discretionary decision-making would be different from today's case law. Fair compensation could be granted according to a number of factors as in the schemes in force not only in many Canadian provinces but also in New South Wales in Australia,[242] Scotland,[243] and Ireland.[244] Such discretionary schemes are widely accepted in common law systems. In Germany, where judicial discretion in family law is less common, such a scheme would probably be described as alien to German legal tradition. However, such criticism would not be accurate. The case law applied in Germany today has already introduced a quasi-discretionary scheme. A scheme that set out some relevant factors for judges to take into account when deciding cases, rather than leaving them with contracts and unjust enrichment, would be a big step forward.

Another important question would be whether the new legislative scheme should provide for the possibility of opting out. Marital property agreements become increasingly important for married couples in England,[245] Canada[246] and Germany.[247] It would seem that cohabitants, just like spouses, should have the opportunity to negotiate the terms of their relationship. However, as with marital property agreements, adequate protection of the weaker party is necessary to ensure that new safeguards are not bargained away.

[242] Property (Relationships) Act 1984, as of 2011 <http://www.austlii.edu.au/au/legis/nsw/consol_act/pa1984298/> accessed 7 December 2012.

[243] Family Law (Scotland) Act 2006 <http://www.legislation.govuk/asp/2006/2/pdfs/asp_20060002_en.pdf> accessed 7 December 2012.

[244] Part 15 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 <http://www.irishstatutebook.ie/2010/en/act/pub/0024/index.html> accessed 7 December 2012.

[245] See *Radmacher v Granatino* [2010] UKSC 42.

[246] See *Hartshorne v Hartshorne* [2004] 1 SCR 550, 2004 SCC 22.

[247] For a comparative view of prenuptial agreements see Scherpe (n 172); Sanders (n 158) 571–603.

X. CONCLUSION

Canadian, English and German courts have developed different approaches when deciding cases on the property rights of cohabitants. The law of unjust enrichment, trusts, partnership and contract are all applied. The comparison given above may make us more aware of the similarities between, and difficulties of, the approaches that have been taken. A completely convincing doctrinal solution has not yet been found. Though the development of the law by courts is accepted not only in common law systems such as Canada and England but also in Germany, the time is ripe for a legislative solution in the form of a specific statutory scheme that ensures a proper balance between party autonomy and the function and needs of the relationship. It is time that not only our courts, but also our societies accepted their responsibilities to regulate cohabitation by specific statutory regimes drafted and agreed upon by our elected representatives.