

COHABITATION AND LAW – EUROPEAN PERSPECTIVES

Dr Jens M. Scherpe, University of Cambridge

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Cohabitation – Civil Partnership – Marriage

LEGAL REGIMES FOR ADULT RELATIONSHIPS – 6 DIFFERENT MODELS

A.

Marriage (opposite-sex couples only)	Registered / Civil Partnership (same-sex couples only)
Informal Cohabitation	
Cohabitation without legal effects	

Examples: *Denmark, Finland, Iceland, Germany, Hungary, U.K.¹, Switzerland, Vermont*

B.

Marriage (both opposite- and same-sex couples)
Registered Partnership/Formal Cohabitation
Informal Cohabitation
Cohabitation without legal effects

Examples: *Netherlands, Belgium, South Africa²*

C.

Marriage	<i>No functional equivalent for same-sex couples</i>
Registered Partnership/Formal Cohabitation	
Informal Cohabitation	
Cohabitation without legal effects	

Example: *France, New Zealand³*

D.

Marriage	<i>No functional equivalent for same-sex couples</i>
Informal Cohabitation	
Cohabitation without legal effects	

Examples: *Portugal, Croatia⁵*

E.

Marriage
Informal Cohabitation
Cohabitation without legal effects

Examples: *Norway, Sweden, Iowa, Massachusetts⁴*

F.

Marriage	<i>No functional equivalent for same-sex couples</i>
Registered Partnership/Formal Cohabitation	<i>No functional equivalent for same-sex couples</i>
Informal Cohabitation	
Cohabitation without legal effects	

Example: *Greece*

Some remarks on the terminology used:

Most authors include *all* forms of formalised relationships that are not marriage in the term ‘registered partnership’, irrespective of the content of the legal regime. If understood this way,

¹ The Civil Partnership Act applies (albeit with variations) in *England & Wales, Scotland* and *Northern Ireland*.

² While *Spain* has opened up marriage, the existing registered partnership regimes only exist on state level (autonomous communities) and vary greatly from state to state, so it would not be entirely correct to list *Spain* here.

³ This also was the situation in the *Netherlands* and *Belgium* *before* the opening up marriage to same-sex couples.

⁴ *California* only allowed same-sex marriages for a brief period of time.

⁵ Many other countries have legal recognition of informal cohabitation, including same-sex cohabitants, at least for some legal purposes, but this chart only refers to those who have an *express* legal regime in place for such purposes.

‘registered partnership’ includes what on this handout is (also) referred to as ‘formal cohabitation’ as well as civil unions (e.g. *New Zealand, Quebec*) and civil partnerships (*United Kingdom*), eingetragene Lebenspartnerschaften (Germany) etc.

If, however, registered partnership is understood as a term restricted to describing legal regimes that are *functional equivalents* of marriage, then legal regimes of a narrower legal scope have been described as ‘formal cohabitation’ or ‘formalised cohabitation’ to make the difference clear.

Choosing an appropriate term is almost rendered impossible when the possibility exists (as it does in some jurisdictions) that couples who would not (yet) be eligible for an existing regime for *informal* cohabitants can sign up to this regime by taking out a formal act/registering!

BRIEF ANALYSIS OF THE MODELS

One way of seeing registered partnership is that it is the *functional equivalent* of marriage for same-sex couples (Model A.):

<i>Opp.-sex</i>	<i>Same-sex</i>
Marriage	RP
(Informal) Cohabitation	

This is the model existing e.g. in *Denmark, Finland, Iceland, Germany, Hungary, Switzerland and the United Kingdom*. Here the issue of discrimination can only be raised with regard to the ‘label’: while there are little differences as to legal consequence, the name of the union is different. This was held not to be a breach of the ECHR in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), but the discrimination argument is central to the continuing discussion in the Nordic countries and has led to the recent changes in *Norway* and *Sweden*. In those countries Model A. existed but was abolished in 2009 and Model E. was introduced.

The other way of seeing registered partnership (RP) is this:

<i>Opp.-sex</i>	<i>Same-sex</i>
Marriage	
	RP
(Informal) Cohabitation	

This view requires that registered partnership is seen as something fundamentally different from marriage, maybe even something of ‘less value’. Therefore it is placed on a lower level, beneath marriage.

The grey areas mark what could be seen as discriminatory

- 1) because marriage is not open to same-sex couples, and
- 2) because registered partnership is not open to opposite-sex couples.

Opening up registered partnership to opposite-sex couples leads to Model C.:

<i>Opp.-sex</i>	<i>Same-sex</i>
Marriage	
RP	
(Informal) Cohabitation	

This is the model existing e.g. in *France* and *New Zealand*. The *Netherlands* and *Belgium* used to have the same model, but later opened up marriage to same-sex couples as well – essentially to end the discrimination of same-sex couples (see below).

The first criticism that can be raised is whether this model *really* serves the needs of the couples involved. It is a one-size-fits-all solution for couples

- 1) who do not want to marry (or at least have not married, but could), and
- 2) who cannot marry as they are of the same sex.

The interests of groups 1) and 2) will often differ; therefore, perhaps, different regimes should be available. Many couples will choose not to marry because that legal regime does not fit their needs, because it is too tight. So a registered partnership with wide-ranging legal consequences might not be attractive to them, as they want a legal regime that is less intense in its consequences (like the *French* model, the PACS); this, of course will also be true for some, but not all same-sex couples. Such a model, on the other hand, would not suit those couples who cannot marry (because they are of the same sex) but actually want a wide-ranging legal regime to apply to their relationship with legal consequences that resembles marriage; this, of course, could also be true for some opposite-sex couples who do not want to marry.

The second criticism is that same-sex couples are discriminated against in this model. The grey area marks what can be seen as discriminatory: No marriage is possible for same-sex couples. Effectively, opposite-sex couples can choose between *two* formalised models, same-sex couples only have *one* model that they can choose. This has led to the *Netherlands*, *Belgium* and *South Africa* allowing both marriage AND registered partnership to all couples, leading to Model B.