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## The Rights of Cohabitants in the United Kingdom: A Comparative Analysis of Legal Protections for Spouses and Civil Partners

Tharinsa Gamage<sup>1\*</sup>

<sup>1</sup>Department of Legal Studies, NSBM Green University, Homagama, 10200, Sri Lanka

Corresponding author \*: [tharinsa.g@nsbm.ac.lk](mailto:tharinsa.g@nsbm.ac.lk)

### Abstract

Despite the emerging trend of cohabitation, cohabitants enjoy a limited array of rights when compared to the position of spouses and civil partners in the United Kingdom (UK). This research is centred to address the disparity in legal protections between cohabitants, spouses, and civil partners by examining how current laws fail to provide equitable rights for cohabitants compared to those in formalized relationships in the UK. The methodology follows library-based desk research by accommodating comparative legal analysis enriched with in-depth examination of existing UK laws related to cohabitants, spouses, and civil partners, in identifying key legal disparities. This article delves in to the loopholes in the reforms introduced to restructure the laws on the rights of cohabitants mainly for not attaining the implementation stage. The analysis of the other jurisdictions including Scotland, Australia, New Zealand, Spain, Germany, France, and Northern Ireland evidenced cohabitants enjoying the rights equivalent to spouses and civil partners. In placing cohabitants in the legal arena as spouses and civil partners, this paper recommends the introduction of a Hybrid scheme, a combination of opt-in and opt-out schemes followed in the said jurisdictions. This scheme will entail proper provisions in the regard of a series of rights that cohabitants were distanced from the present legal system of the United Kingdom.

**Keywords:** Civil Partners; Cohabitants; Spouses; Opt-in; Opt-out

### 1. Introduction

The union of two individuals is the building block in the continuation of human species irrespective of their gender or the nature of intimate relationship. In spheres of marriage and civil partnership, cohabitation is recognized as the fastest-growing non-formalized family type. Statistics from Government Actuary's Department suggest an increase of 3.8 million cohabiting

couples by 2031.<sup>1</sup> Despite its social predilection, cohabitants strive hard to fall within an established legal definition. Lady Hale declared that cohabitants 'do not define themselves'.<sup>2</sup> Among various statutory attempts, reference could be sketched from DVMPA,<sup>3</sup> which outlined the latitude of cohabitants to heterosexual couples. The upgraded definition in Adoption and Children Act<sup>4</sup> has interpreted cohabitation as a conjugal relationship. Similarly, Family Law Act<sup>5</sup> extended the definition of cohabitation to unmarried persons.

Despite statutory interpretations, there are determiners for cohabitation.<sup>6</sup> In *Lopez*,<sup>7</sup> 'permanence' instituted cohabitation within a family. Nevertheless, identification of this association was limited to heterosexuals. As demonstrated in *Fitzpatrick*,<sup>8</sup> homogeneous cohabitants were not treated as family members. In recent years, there has been a tendency to diagnose homosexual cohabitants. In *Ghaidan*,<sup>9</sup> scope of Article 8<sup>10</sup> was cogitated in extending recognition to same-sex couples. Conversely, marriage is the voluntary monogamous union of heterosexuals for life.<sup>11</sup> After 2014, by section 1,<sup>12</sup> the concept of marriage comprises homosexual couples. Civil partners, on the other hand, are governed by Civil Partnership Act,<sup>13</sup> which delineated as a registered relationship of homogenous individuals. The extension of civil partnership to different-sex couples evolved from the case of *R v Secretary State*.<sup>14</sup>

## 2. Research Methodology

This paper adopted qualitative research paradigm where researcher utilized an extensive desk research approach, carefully examining qualitative material taken from primary and secondary legal sources, laws, regulations, and precedents. This paper adopted a doctrinal research methodology where the black letter approach is used to review the primary and secondary sources. This study encompasses both applied and doctrinal research, integrating theoretical frameworks in the analyzation of possible reforms. It has undertaken an epistemological analysis

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<sup>1</sup> Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006).

<sup>2</sup> Brenda Hale, 'Unmarried Couples in Family Law' [2004] Family Law 419.

<sup>3</sup> Domestic Violence and Matrimonial Proceedings Act 1976, s 1(2).

<sup>4</sup> Adoption and Children Act 2002, s 144(4)(b).

<sup>5</sup> Family Law Act 1996, s 62(1)(a).

<sup>6</sup> *Kimber v Kimber* [2000] 1 FLR 383.

<sup>7</sup> *Chios Property Investment Ltd v Lopez* [1987] EWCA Civ J1028.

<sup>8</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2000] 1 FCR 21.

<sup>9</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>10</sup> Human Rights Act 1998, sch 1.

<sup>11</sup> *Hyde v Hyde* [1866] LR 1 P & D 130.

<sup>12</sup> Marriage (Same Sex Couples) Act 2013, s 1(1).

<sup>13</sup> Civil Partnership Act 2004, s 1(1).

<sup>14</sup> *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

through legislative texts, case law, journal articles, books and various other publications. The study encompasses the comparative research methodology by utilizing the Scotland, Australia, New Zealand, Spain, Germany, France, and Northern Ireland for the efficient legislative arrangement followed to ensure the rights of cohabitants.

### 3. Is Reformation Needed?

In the discussion of reformations to cohabitation law, it is contended that a new scheme of rights for cohabitants would undermine the concept of marriage and encourage such trends<sup>15</sup> as marriage is contemplated to be firmly supported by the state.<sup>16</sup> Deech weighed the autonomy of cohabitants over reformation.<sup>17</sup> Another disagreement against reform is the impracticability of implementing reforms for cohabitation being multifaceted. Similarly, when individuals have decided to avoid marriage, it is the view that no laws should bring the same consequences through a different route, as every couple should be entitled to the option of getting married or not. It is worth considering arguments for reformation. Cohabitation is gradually counted as a valid partnering lifestyle choice.<sup>18</sup> Henceforth, it is argued that laws should be in line with social tendencies. Particularly, it is evident that cohabitants and their children are susceptible<sup>19</sup> to separation due to the limited recognition in a patchwork of laws,<sup>20</sup> compared to spouses and civil partners.

As an overview, definitions of cohabitation, marriage, and civil partnership are analogous. Herring noted this as a deficiency of the current approach as numerous statutes could not differentiate cohabitants from spouses.<sup>21</sup> There is an uprooted belief of 'common law marriage' that cohabitants are treated as married after a long period of cohabitation.<sup>22</sup> This results people suffering to their detriment.<sup>23</sup> The situation becomes worse when women as the primary carer of children, give up work<sup>24</sup> and leave without financial relief. Whether a male or female, the weaker party in the conjugal relationship needs protection of a default regime. There are proposals

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<sup>15</sup> Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

<sup>16</sup> Rachael Stretch, *Family Law* (8<sup>th</sup> edn, Routledge 2015) 37.

<sup>17</sup> Ruth Deech, 'Cohabitation' [2010] 40 *Family Law* 39.

<sup>18</sup> Anne Barlow and others, 'Cohabitation and the law: myths, money and the media' (2015) <  
<https://core.ac.uk/download/pdf/43094876.pdf> > accessed 15 November 2023.

<sup>19</sup> Mary Welstead and Susan Edwards, *Family Law* (1<sup>st</sup> edn, Oxford University Press 2006) 32.

<sup>20</sup> Stephen Cretney, *Family Law in the Twentieth Century* (1<sup>st</sup> edn, Oxford University Press 2004) 521.

<sup>21</sup> Jonathan Herring, *Family Law* (9<sup>th</sup> edn, Pearson 2019) 120.

<sup>22</sup> Anne Barlow and others, 'Family Affairs: Cohabitation, Marriage and the Law' (2002) <  
<https://ore.exeter.ac.uk/repository/bitstream/handle/10036/22732/barlow4.pdf?sequence> > accessed 14 December 2023.

<sup>23</sup> Stephen Gilmore and Lisa Glennon, *Hayes & Williams' Family Law* (7<sup>th</sup> edn, Oxford University Press 2020) 349.

<sup>24</sup> Women and Equalities Committee, *The rights of cohabiting partners* (HC 2022-08).

modified to mitigate these drawbacks, while granting cohabitants specific rights and duties succeeding their relationship breakdown.

#### 4. Reforms over years

Concerning the law on cohabitation, different reforms adapted by the Law Commission and private members would be subsequently assessed. The discussion paper, 'Sharing Homes'<sup>25</sup> executed a 'property model' through an opt-in scheme, where parties deliberately enter the regime and courts could create a statutory trust by investigating financial and nonfinancial contributions. The proposal applied when family home is occupied by two or more persons with proprietary interest. This recognized the need for prevalence of cohabitation and responded to vulnerabilities in the aspect of property division. The proposal on 'The Financial Consequences of Relationship Breakdown'<sup>26</sup> inaugurated multiple eligibility criteria with a 'qualifying contribution' to satisfy cohabitation and led the scheme to an opt-out regime on fulfillment of eligibility requirements, parties automatically fall within its horizon unless they disapprove. Law Commission made a distinction between the rights of spouses and cohabitants. Cohabitants were provided two years to claim financial remedies while excluding periodical payments in childcare matters.

The necessity of reforms arose to wipe out the vulnerabilities that cohabitants face. It is remarked that the protection delivered through these reforms is less attractive than marriage for the less attributability given by policymakers.<sup>27</sup> If implemented, the dimension covered through proposals does not exceed the margin of satisfaction. The effort seized by bills at least shows a silver line. Sharing Homes<sup>28</sup> did not cover the rights of cohabitants which it was tasked to, rather focused on modification of trust principles. The practicality of striking a balance between the 'qualifying contribution' projected in the proposal<sup>29</sup> and cohabitation is often debated as emotional care is not concerned. In light of opt-in and out schemes, opt-in scheme is observed to be a system that generates second-class marriages for couples rather than addressing the issues. Accordingly, Hayward noted marriage and civil partnership to be its other forms.<sup>30</sup> Most cohabitants fond not having state involvement but who volunteer to formalise their relationship have fallen within opt-in schemes. Cohabitants have become the subject of the opt-out scheme as long as they fulfill the eligibility criteria and are prone to the subject of a scheme that they did not voluntarily contend. Deech elaborated how couples' autonomy is cornered through an opt-out

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<sup>25</sup> Law Commission, *Sharing Homes: A Discussion Paper* (Law Com No 278, 2002).

<sup>26</sup> Financial Consequences (n 68).

<sup>27</sup> Anne Barlow and J Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' [2010].

<sup>28</sup> Sharing Homes (n 78).

<sup>29</sup> Financial Consequences (n 68).

<sup>30</sup> A Hayward, 'The Steinfeld Effect: Equal Civil Partnerships and the Construction of the Cohabitant' [2019].

scheme. She further affirmed that reforms for cohabitation create economically dependent women.<sup>31</sup> Thus, it is worth investigating the models adopted by other jurisdictions.

## 5. Other Jurisdictions

Scottish law follows an opt-out scheme where cohabitants are given the freedom to choose the applicability. The definition of cohabitants are equipped under section 25.<sup>32</sup> Importantly, a qualifying period or existence of children is disregarded in defining cohabitants. It provides cohabitants the right to households, claims against the finances of the deceased<sup>33</sup> but prevents claiming financial benefits that spouses enjoy.<sup>34</sup> It could be argued that the Scottish scheme does not imperil marriage or impose matrimonial rights on cohabitants. Scottish scheme is considered as a powerful signpost by Lady Hale.<sup>35</sup>

The concepts marriage and cohabitation are not equalized in Australia, but de facto legislative provisions draw parallels<sup>36</sup> to marriage. Cohabitation is defined as a couple on a domestic footing<sup>37</sup> and was further elaborated in *Roy*.<sup>38</sup> Homogeneous and heterogeneous cohabitants can apply for financial and property remedies under Part VIIIA,<sup>39</sup> including spousal and child maintenance. Spain elects for an opt-in scheme following the Spanish Constitution,<sup>40</sup> and regional laws for the registration of cohabitation. Although Spain lacks a specific statute that governs cohabitation, Civil Code<sup>41</sup> has placed marriage and cohabitation in equal footings. To illustrate, irrespective of marital status, parental responsibility is available, and parties can claim assets through contracts.<sup>42</sup>

France adheres to an opt-in scheme based on ad hoc recognition of cohabitation called PACS system of registered 'concubinage,' in marked difference from the English legal recognition for cohabitants. However, mothers with non-marital children are discriminated<sup>43</sup> under the French

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<sup>31</sup> Ruth Deech, 'The Case Against the Legal Recognition of Cohabitation' [1980].

<sup>32</sup> Family Law (Scotland) Act 2006, s 25(1), (2).

<sup>33</sup> *ibid* s 26, 27.

<sup>34</sup> Scottish Law Commission, *Aspects of Family Law Discussion Paper on Cohabitation* (Scot Law Com No 170, 2020).

<sup>35</sup> *Gow v Grant* [2012] UKSC 29.

<sup>36</sup> *Moby v Schuller* [2010] FLC 93-447.

<sup>37</sup> Family Law Amendment (De Facto Financial Matter and Other Measures) Act 2008, s 4AA (1).

<sup>38</sup> *Roy v Sturgeon* [1986] 11NSWLR 54.

<sup>39</sup> Family Law Amendment Act (n 93) Part VIIIA.

<sup>40</sup> Constitution of Spain 1978.

<sup>41</sup> Civil Code 1889.

<sup>42</sup> Civil Code (n 99) art 392.

<sup>43</sup> Katja Rostock, 'Marriage and Cohabitation in Western Germany and France' [2011] < [https://www.demogr.mpg.de/publications/files/4277\\_1318519041\\_1\\_Full%20Text.pdf](https://www.demogr.mpg.de/publications/files/4277_1318519041_1_Full%20Text.pdf) > accessed 19 November 2023.

legal system. Family is promoted after the introduction of Napoleonic code<sup>44</sup> and marriage is in preferred status while PACS is in the popular range. Northern Ireland has revolved around the spheres of recognizing heterosexual cohabitants and is on the stage to extend it to same-sex couples. The law seems to follow a rigorous approach to minimize state support while enhancing the privacy of couples. It is argued that deterred state support would discourage people from engaging in nonformalised relationships. The strict application of social welfare policy has been acknowledged to achieve its aims.<sup>45</sup>

## 6. Recommendations

In essence, the UK requires instant amendments when observing the position of cohabitants contrasted with spouses and civil partners in the orbits of criticisms, reforms and evaluations on other jurisdictions. A new coherent scheme, may it be opt-in, opt-out, or both, will have to meet the rights and obligations of cohabitants at the beginning and end of the relationship, without undermining marriage and civil partnership. An attempt to achieve the aforesaid aims will be considered below.

It is entailed to draw attention to the options available for the operation of the scheme. The two default options considered in reforms are Opt-out and Opt-in. **Opt-out scheme** is important as majority are unaware of the precarious position and rights of cohabitants. The argument is that rejecting marriage is not a mode of risking other partner's rights. Further, it is established that cohabitants should not be left with the responsibility to acquire legal rights, rather the state must interfere. Conversely, an **opt-in scheme** would only be applicable when people choose to register as cohabitants, when they assume certain rights and responsibilities for themselves,<sup>46</sup> where their autonomy is respected without state obligations. The analogy is drawn when cohabitants choose not to marry but to opt-in as they have chosen not to be granted the same rights that spouses are conceded. Moreover, opt-in places burden on the couple to leave. Thus, it makes a clear difference between cohabitation and marriage.

Hence, by evaluating opt-in and out schemes, it is recommended that a **hybrid scheme** that features characteristics from both schemes would be more appropriate. The hybrid approach would cater the wide scope of rights and obligations of cohabitants while ensuring state involvement when needed. Moreover, the scheme is proposed to keep cohabitants informed of their legal position than relying on various myths. In hybrid system, for cohabitants who themselves desire to be registered as a 'cohabitant' could opt-in voluntarily and be warranted to the series of rights, while others who refrain from opt-in could stay distanced. This mirrors the Partnership register that exists in France. If the couples do not opt-in, they will not grab legal

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<sup>44</sup> Napoleonic code 1804.

<sup>45</sup> Judy Walsh and Fergus Ryan, 'The Rights of De Facto Couples' [2006] < [https://www.ihrec.ie/app/uploads/2014/11/report\\_defactocouples.pdf](https://www.ihrec.ie/app/uploads/2014/11/report_defactocouples.pdf) > accessed 15 November 2023.

<sup>46</sup> Brenda Hale and others, *The Family, Law & Society: Cases and Materials* (5<sup>th</sup> edn, Butterworths LexisNexis 2002) 72.

support and will remain without falling into the scheme so that their liberalism is ensured. But in the instances of separation or death of cohabiting partner, the couples who did not opt-in, and seeking legal assistance for remedies, would be automatically inserted to the scheme disregarding their preference, following the steps of opt-out arrangement.

As the next hurdle, the hybrid scheme would require a specific definition for cohabitants as 'individuals living together equal to spouses or civil partners on a domestic basis.' Keeping the definition gender neutral without inculcating the sexual relationship would be valued. There stems no requisite of considering the length of cohabitation or the existence of children within the definition. Subsequently, it is required to consider the financial remedies that must be covered through the scheme. Thus, issue is whether cohabitants must be entitled to the benefits that spouses appreciate in terms of financial and child matters complying with MCA,<sup>47</sup> because children should not be affected by the marital status of their parents. The suggestion is to grant cohabitants the same remedies as spouses, however, with a limitation of 1 year at the time of application for those remedies. Additionally, the scheme should entail similar provisions available for spouses and civil partners to treat cohabitants equally in occupancy rights and property distribution.

## 7. Conclusion

The discussion of this study rotated around the legal recognition of cohabitation as opposed to marriage and civil partnership. The law governing cohabitation requires amendments. Analysing reforms leads to the view that proposals have not met the standard that is expected for cohabitants. This was reaffirmed when assessing model schemes from other jurisdictions. Thus, a potential hybrid scheme is presented to withstand the rights and obligations of cohabitants in an equal footing with spouses and civil partners.

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