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# CONFERENCE PROCEEDINGS CONTENTS

## SECTION POLITICAL SCIENCE



## SECTION LAW

# CIVIL PARTNERSHIPS: THE EU FRAMEWORK FOR CROSS-BORDER COUPLES AND THE RECENT LEGISLATIVE REFORM IN THE UK

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## ABSTRACT

The EU Regulation 2016/1004, entered into force on 29th January 2019, regulates the property consequences of cross-border couples in registered partnerships and recognizes to the partners the same rights of married couples. Registered partnerships initially originated often for the legal recognition of same-sex couples, as the European Court of Human Rights required countries to ensure them specific rights, but not necessarily to recognize same-sex marriage. As a result, nowadays we have a complex taxonomy of legally-recognized couples in Europe. After legalizing same-sex marriages, some states abolished registered partnerships, but most of them conserved both. Early this year, England and Wales approved the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act, which solved a legal problem: after the legalization of same-sex marriage in 2014, same-sex couples, in fact, could decide to marry or to enter a civil partnership, while an opposite-sex couple only had one chance, marriage. Overcoming this legal anomaly is especially important for foreign, opposite-sex couples that entered in a registered partnership in their own country, and then moved to England or Wales. On the other hand, it introduced the risk of limping the status of registered partnerships in countries that abolished, or never adopted, registered partnerships. The autonomy of the parties recognized by the EU Regulation 2016/1004 to cross-border couples entered in registered partnerships can avoid the risk of a legal vacuum in the field of the property consequences.

**Keywords**: Registered partnership, cross-border couple, same-sex marriage, property regime, limping status.

## INTRODUCTION

The legislative process that led to the entry into force of the EU Regulations 2016/1103 and 2016/1004 on 29 January 2019 has been particularly long and complex, as the regulation on the property regime of marriage had to be carried out in parallel with respect to the one on property consequences of registered partnership. Such a delay – the process started in 2010 with the EU Citizenship Report 2010 "Dismantling the obstacles to EU citizens' rights" - finds its logical explanation in the legislative divergence between the EU Member States about marriage and civil partnership, the reluctance that some Member States have towards recognition of same-sex unions, as well as the difficulty that has involved the necessary processing as a "package" of both the two Regulations. All these issues would have determined the lack of unanimity in the adoption of a common regulation - as provided in art. 81.3 of the Treaty on the Functioning of the European

Union (TFEU) for this area - and explain the recourse to the enhanced cooperation procedure, ending with its approval by eighteen Member States.

It is a matter of fact that same-sex marriage and registered partnership are central issues in family law nowadays. The European Court of Human Rights (ECtHR) opted for an extensive interpretation of art. 8 of the European Convention of Human Rights (ECHR), moving beyond the idea of traditional family. This evolution can be noticed considering some decisions of the ECtHR, particularly *Schalk and Kopf v. Austria, Hämäläinen v. Finland, Oliari and Others v. Italy,* and *Gas and Dubois v. France.* The Court expressed a clear principle: the ECHR does not ask the Member States to recognize same-sex marriage; it requires, on the contrary, to ensure to same-sex couples specific rights. Each state will be free to achieve this goal through a marriage or a form of civil partnership. This framework, on the plane of private international law, explains the complex taxonomy regarding all forms of legally recognized couples. Registered partnership originated mainly in order to recognize and give a regulation to same-sex unions. Its presence and discipline vary from one country to the other. Marriage is a "quasi-universal": all states have marriage for opposite-sex couples, and several of them allow opposite and same-sex couples to marry [1]. The same cannot be said for registered partnerships. Some state have registered partnerships, while others do not have registered partnerships. Some allow opposite and same-sex couples to enter a registered partnership, others reserve registered partnerships to same-sex couples. Some, among the states that adopted registered partnerships, apply to them substantially the same discipline of marriage, others apply a less rigorous discipline.

## 1. THE RECENT LEGISLATIVE REFORM IN THE UK

With regard to registered partnerships, the UK can be considered an interesting scenario, as England and Wales recently faced and solved a new problem, at the moment still unresolved in Scotland. Furthermore, this problem can reappear in the future in other contexts. In England and Wales, until the approval of the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019, same-sex couples that wanted to formalize their *status* could choose between two options: marriage and civil partnership. Opposite-sex couples only had one choice: marriage [2]. This manifest disparity was the result of the Parliament's decision [3] of extending marriage to same-sex couples with the Marriage (Same Sex Couples) Act of 2013, without simultaneously abolishing the Civil Partnership Act of 2004 [4], or extending its provisions to opposite-sex couples. The fact that many civil partners did not convert them in same-sex marriages after 2014 shows that registered partnerships possess a meaning and a special value [5]; also for opposite-sex couples the need for an "equal civil partnerships", supported by a vibrant campaign, was diffused. An opposite-sex couple who wished to register a civil partnership, Rebecca Steinfeld and Charles Keidan, challenged the disparity of treatment. They went to their local registry office, and were reputed disqualified to enter a civil partnership, reserved by law to same-sex couples. They initiated so a judicial review proceeding on the basis that the English law discriminated unlawfully in its treatment of opposite-sex couples compared to the treatment of same-sex couples. Their claim was rejected by the High Court and by the Court of Appeal [6], but it was finally upheld by the Supreme Court. The Supreme Court stated that the Marriage (Same Sex Couples) Act of 2013 should have been accompanied concomitantly by the abolition of civil partnership, or by its extension to opposite-sex couples. The Supreme Court pointed out a "manifest inequality of treatment" [*R (on the*

*application of Steinfeld and Keidan) v Secretary of State for International Development*, at 3] and declared the incompatibility under section 4 of the Human Rights Act of 1998 of sections 1 and 3 of Civil Partnership Act of 2004, that prohibited an opposite-sex couple to entering into a civil partnership. This provision was openly conflicting with Article 14, in conjunction to Article 8, of the ECHR. Though the Supreme Court could not force the Government to act immediately, it made clear that discrimination was taking place and exerted a pressure upon the government to reform the civil partnerships [7]. In response to those initiatives, the UK Government recognized the need of adopting a legislation to extend partnership to opposite-sex couples, and on 15 March 2019 it finally approved the Civil Partnerships, Marriages and Deaths (Registration etc) Bill. The bill received Royal Assent on 26 March 2019 and the legislation came into effect on 26 May 2019. It is necessary to stress that the opposite-sex couples that decided to opt for cohabitation instead of marriage, could have had ideological objections to marriage. In that case they were necessarily excluded from the benefits of marriage, unlike same-sex couples. The approval of the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act of 2019 allows heterosexual couples in England and Wales to enter a civil partnership, extending the rights currently only afforded to same-sex couples. These rights of the parties of a civil partnership are substantially equivalent to the ones guaranteed by marriage.

The evolution of civil partnership regulation in England and Wales represents a paradigmatic example. A lawmaking process in comparable situations needs an initial assessment: it is required to evaluate the necessity to adopt and/or maintain civil partnership in a legal system. In this regard, we must relate to marriage. In a theoretical perspective we could say that, in case a legal system allows both opposite-sex marriage and same-sex marriage, we do not need other forms of legally-recognized relationships. If a couple wants special recognition, duties and privileges, they can decide to marry. If, on the contrary, two persons want to live together on the assumption that their relationship is flexible, they can choose cohabitation. Marriage can offer better protection to the weakest party of the relationship and it undoubtedly is a social model deeply rooted in the society. Unfortunately the evolution of marriage in the last decades has not been linear. In most countries, before allowing marriage for same-sex couples, registered partnership was adopted. Sometimes this legally-recognized partnership was reserved to same-sex couples, such as in England and Wales; other times it was opened to same and opposite-sex couples. For this historical reason, it is now hard to imagine to abolish the intermediate model of "registered partnership" from a legal system, even when it is just allowed to same-sex couples. The complex situation that England and Wales had to face in the last few years could in the future reappear in other legal systems. The Supreme Court decision expressed a general principle: we cannot discriminate opposite-sex couples, denying them the same options enjoyed by same-sex couples. That is true even under the assumption that the "special" rights recognized to same-sex couples were originated by a previous discrimination, like the preclusion of marriage. The measures that the Parliament adopted could be a model in similar situations in other countries.

## 2. IMPLICATIONS IN PRIVATE INTERNATIONAL LAW

The approval of the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act of 2019 fills a gap in English private international law, namely the absence of any mechanism for recognition of overseas opposite-sex registered partnerships and their highly undesirable limping status [8]. But, while the extension of the Civil Partnership Act of 2004 to opposite-sex couples would resolve these internal problems, the availability of opposite-sex registered partnership in England and Wales could cause new external problems related to their limping *status*. English opposite-sex and same-sex registered partners will probably encounter obstacles to the recognition of their partnership if they travel [9] to countries where this legal institution is unknown to domestic family law. While in several states in Europe, including Estonia, France, Greece, Malta, and the Netherlands, opposite-sex and same-sex couples are enabled to enter a registered partnership, other states, such as Finland and Sweden, abolished the institution of registered partnership at the time of introducing same-sex marriage. English registered partners – both same-sex and opposite-sex - could evade their responsibilities by moving to foreign jurisdictions which do not recognize their partnership, leaving dependent partners without judicial remedies. This provides a clear evidence for the need of regulating cross-border partnerships according to the principles of the universal application and of the unity of the applicable law.

Registered partnerships, that have a taxonomy much more complicate than marriage, and that unlike marriage, have no general diffusion all over the world, risk to be confined to a legal vacuum. This vacuum could originate a lack of protection for the weakest party. The risk of "evasive forum shopping" [10], is seriously conceivable. A UK citizen, in case of dissolution of his or her partnership, could decide to move to a country that has no registered partnerships, and the dependent partner's claims would not be recognized by the court of that country, nor the decision of a UK court would be applied in that country, except in the case of a specific convention between the two countries. At this moment in time, the few ones that can avoid this risk are cross-border registered partners. According to the aforementioned EU Regulation 2016/1104 of 24 June 2016, they can regulate in advance, with agreement, jurisdiction, applicable law, and property regime of the partnership. In the case of a break down of their relationship, legal certainty will be guaranteed. To avoid the aforementioned risk of a legal vacuum, in case the registered partnership is not recognized in a certain Member State, there is a specific provision about jurisdiction at Article 9, that differs from the correspondent Article 9 of the Regulation 2016/1103, dealing with marriage [11]. In case of registered partnerships, the *forum non conveniens* principle is admitted, but the parties will be guaranteed by the provision of alternative and subsidiary competence. Of course the procedure is merely voluntaristic, as the agreement is based on the autonomy of the parties. But, what is most important is that, as the EU Regulation is based on principles of universal application and unity of the applicable law, despite the fact that the UK is not one of the eighteen countries that are parties to the Regulation, the UK law can be applied in foreign courts, if that corresponds to the choice of the parties. Third countries, as a matter of principle, are not excluded from the application of the Regulation.

## CONCLUSION

The approval of the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act of 2019 can be considered a paradigmatic epilogue of the evolution of the notion of "registered partnership". As several countries in Europe adopted same-sex registered partnership and opted to permit marriage only to opposite-sex couples, some of them could grant in the future marriage to same-sex couples, without reforming the regulation of civil partnerships. In that case, they would find themselves in the same situation of England and Wales in recent years: they will have to manage the issue by either extending same-sex registered partnerships to opposite-sex couples, or by abolishing them at all. The extension of registered partnership to opposite-sex couples seems to be the most pragmatic and effective solution, even if a formal approach would maybe suggest to simplify the frame reducing all the forms of legally-recognized couples to a flexible model of marriage, opened to all sexes. As pointed out, such a complex situation has significant implications in private international law: in a modern, globalized society people move frequently from one state to another for different reasons. Furthermore, in such a dynamic scenario, the risk that registered partnerships in certain foreign states would be confined to a legal vacuum, is likely to originate "forum shopping", is real and tangible. Cross-border couples, increasingly common in EU, can avoid these risks thanks to the provisions of EU Regulation 2016/1104 of 24 June 2016, that permits to regulate in advance, by agreement, the jurisdiction, the applicable law, and the property regime of the partnership. Although the Regulation allows for the principle of *forum non conveniens*, the parties will be guaranteed by the provision (art. 9) of an alternative and subsidiary competence.

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