

ABSTRACT:
Married Against Their Will?
Moving Toward a New Liberal Theory of Cohabitation Law

By Dr. Shahar Lifshitz

This paper addresses the regulation of the economic relationship between unmarried cohabitants. It criticizes the current legal approaches to cohabitation, and ultimately offers a new legal model. The components of this discussion in the paper are as follows:

- A. The Conventional Wisdom
- B. Liberal Case against Equating Cohabitation and Marriage
- C. Counter Arguments – Imposing Marriage Law on Cohabitants
- D. The Need for a New Legal Model for Cohabitants
- E. A New Model: Integrating the Liberal Case and Counter-Arguments

A. The Conventional Wisdom

In the Western legal system there's a trend to narrow the gap between the mutual obligation of cohabitants to that of married partners. Conventional wisdom depicts this trend as liberal and progressive, while opposition to it is viewed as religious, moralistic and conservative. The new restatement on family dissolution may reflect the next liberal step, which is to totally equalize the regulation of the relationship between unmarried cohabitants and married partners.

B. Liberal Case against Equating Cohabitation and Marriage

The paper breaks with conventional wisdom by presenting a liberal case against equalizing cohabitation and marriage. It comprises two main arguments – contractual and pluralistic:

1. **The contractual argument** focuses on the partners' wishes. It holds that, in general, the level of commitment in the relationship between married couples is higher than that between that of cohabitants, and the law must reflect these differences.
Furthermore, cohabitation and the absence of a formal marriage may sometimes reflect the actual rejection of marriage laws. In that case, laws relating to marriage actually do not respect the choices of the cohabitants.

2. **The pluralistic argument** is based on modern liberal attitudes that emphasize the responsibility of the liberal state to create a variety of social institutions that offer alternative choices to individuals. This argument suggests the need to maintain a separation between the social institutions of cohabitation and legal marriage, and thus to differentiate between the legal status of married couples and that of cohabitants.

C. Counter Arguments – Imposing Marriage Law on Cohabitants

Alongside the liberal arguments against equalizing cohabitation and marriage, the paper presents two contrasting arguments which support imposing marriage law on cohabitants:

1. The first counter-argument is based on **the implied commitment inherent in long-term cohabitant relationships**, even in the absence of a formal commitment. On a sociological level, the argument rejects the premise that cohabitants intentionally reject marriage law. On a legal level, this argument is based on relational contract theory, which addresses commitments that stem from long-term relationships.
2. The second counter-argument **focuses on gender differences, including power imbalance and economic disparity**. Without imposing marriage law on cohabitants, the result may actually be injustice and even exploitation. Consequently, this argument contests **the contractual argument with extra-contractual considerations** (e.g., gender equality, justice and fairness) that justify applying marriage law to cohabitants. This counter-argument may also be based on a modern approach to contract law, which legitimately intervenes in the agreement of parties in the case of power imbalance and injustice.

D. The Need for a New Legal Model for Cohabitants

It might be argued that the counter arguments defy the liberal case against equalizing cohabitation and marriage. However, the paper offers that even if the counter arguments demonstrate that in some cases applying marriage law to cohabitants is justified, those arguments cannot support totally equating cohabitation and marriage.

Therefore, the essence of the paper's criticism on the current trend in cohabitant law, and specifically, the new restatement, is valid despite these counter arguments. However, a critique of the current trend in cohabitant law is not an end in itself. The main goal of the paper is not only to offer criticisms of the current legal discourse, but also to suggest an innovative alternative. The challenge is how to integrate the contractual and pluralistic

arguments, which oppose applying marriage law to cohabitants, with the counter-arguments, which support imposing marriage law.

E. A New Model: Integrating the Liberal Case and Counter-Arguments

The paper offers an innovative legal model, which describes a new approach to meeting this challenge. It offers the following insights:

1. Based on the pluralistic argument, cohabitation and marriage law should be distinguished.
2. While the prevailing models only address marriage law as a package deal with respect to cohabitants, the new model applies only the suitable components.
3. It also suggests which criteria should be used to determine the appropriate components of marriage law to apply to cohabitants. For example, based on the original rationale of marriage law, the paper distinguishes between those components of a contractual nature and those that are extra-contractual. Drawing on this distinction, the liberal objection to applying marriage law to cohabitants is more relevant in the context of the contractual nature components.
4. Contrary to the current legal discourse, the paper offers a distinction in approach between different types of cohabitants, such as trial marriages, postponement of legal marriage, and the desire to continue with a previously existing lifestyle. To distinguish between those types, the article suggests legal requirements addressing which cohabitants should be entitled to marriage law. The paper further argues that those legal requirements need to be adapted to the types of specific cohabitant rights (e.g., alimony, marital property).

In summary, the paper offers an alternative and innovative model for cohabitant law. Even if the reader doesn't fully agree with this model, it underscores the need for new thinking and a fresh approach to a currently flawed system.

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