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THREE DIFFERENT LEGAL ATTITUDES TOWARDS NON-MARITAL COHABITATION IN EUROPE

Abstract

The rising number of people “just living together”, people who are neither married nor in registered partnerships, clearly demonstrates that non-marital unions can no longer be ignored. To obtain an accurate picture of the situation of non-marital partners it was essential to conduct comparative research of multiple legal orders. This analysis threw a new light (at least from the Polish standpoint) on possible solutions to the problem of the regulation of legal aspects of “living together”. It appears that three different legal attitudes towards non-marital cohabitation may be distinguished in Europe. Firstly, there are legal orders in which by virtue of an explicit reference by the legislator – the regulations on marriage are applied to cohabitation (quasi-marriage cohabitation). Secondly, there also exist countries in which a law was adopted regulating selected aspects of actual cohabitation (implied model of cohabitation). And thirdly, there are legal orders in which any cohabitant-oriented legal regime exists.

Keywords

cohabitation – non-marital union – registered partnership – comparative law – family law

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INTRODUCTION

As the incidence of extramarital relationships increases, the so-called “complex system of regulating cohabitation”¹ becomes more widespread. The “spectrum of juridical forms defining the common life of two people, assuming the different degree and intensity of their community”² is widening. It should be understood as the occurrence of various legally relevant relationships within one legal system. These range from marriages (homosexual and heterosexual) and registered partnerships, through “contractual cohabitation” to regulations which link the legal effects to the very fact of cohabitation in a legally defined manner (presumptive, default, factual model).³

The aim of this study is to answer the question of how European legislators are responding to the phenomenon of non-marital cohabitation, which should be understood as an informal, monogamous, intimate relationship of a lasting and stable nature between two persons who live together and share a household. *Mutatis mutandis*, it is a union similar in its “terms and conditions” to marriage in which persons are linked by a spiritual, intimate, and economic bond (*consortium vitae*).

Owing to such defined field of research, formal unions – marriage and registered partnerships – and status-oriented legislation will not be the subject of further interest. The analysis will also not cover the contractual models of cohabitation, such as those found in France (in the form of *Pacte civil de solidarité* – PACS),⁴ Belgium (*cohabitation légale; wettelijke samenwoning*)⁵ or Greece.⁶ In order for the legal effects indicat-

¹ J. Pawliczak, “Szkocki model regulacji konkubinatu”, *Kwartalnik Prawa Prywatnego*, 2010, Issue 3, p. 716.

² M. Świdorska, “Cywilny pakt solidarności w prawie cywilnym Francji”, *Państwo i Prawo*, 2001, Issue 1, p. 75.

³ J. Pawliczak, *supra* note 2, p. 716.

⁴ Loi relative au pacte civil de solidarité, 15.11.1999, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000761717> [last accessed 30.6.2021].

⁵ Loi instaurant la cohabitation légale, 23.11.1998, available at: <http://www.ejustice.just.fgov.be/eli/loi/1998/11/23/1998010076/justel> [last accessed 30.6.2021].

⁶ Νόμος 3719/2008 Μεταρρυθμίσεις για την οικογένεια, το παιδί, την κοινωνία και άλλες διατάξεις modified by Νόμος 4356/2015 Σύμφωνο συμβίωσης, άσκηση δικαιωμάτων, ποινικές και άλλες διατάξεις, available at: <https://www.kodiko.gr/nomothesia/document/140974/nomos-4356-2015> [last accessed 30.6.2021].

ed in these acts to occur, it is necessary to enter into a specified, named contract (*contractus nominatus*). Thus, the legal protection granted by the law does not derive from the mere fact of cohabitation. An active attitude of the persons concerned is required. Therefore, these unions are a subtype of registered partnerships,⁷ formal relationships, not cohabitation understood as a *de facto* and informal relationship.

It would be wrong to assume that European legislators refer to informal unions in the same way and still treat them as legally indifferent (repeating after Napoleon: *Les concubins se passent de la loi, la loi se désintéresse d'eux*). At least several divisions have been proposed in the doctrine, reflecting the position taken by legislators on non-marital cohabitation. A distinction has been made between, for example: (1) the "opt-in" model, where protection is granted on condition that cohabitants take certain steps – e.g. enter into a cohabitation agreement; (2) the implicit model with an "opt-out" option; (3) the assimilation model, where the situation of cohabitants and spouses at the moment of, for example, the termination of the relationship is analogous; (4) the diversification model, where cohabitants are entitled only to strictly defined rights shaped independently of those of spouses.⁸ The registration model, the implicit model and the contractual model were also proposed.⁹

In my opinion, it is possible to suggest a division of legal orders into those in which (1) by virtue of an explicit reference of the legislator – the regulations on marriage are applied to cohabitation (*quasi-marriage cohabitation*); (2) those, in which a law was adopted regulating selected aspects of actual cohabitation (implied model of cohabitation) and (3) those, in which any cohabitant-oriented legal regime exists. The last division will set the framework for further considerations.

The legislator's choice of one of these three models is the result of balancing three values – the protection of marriage, the protection of human autonomy and the right to choose, and the need to protect the

⁷ J. Pawliczak, *Zarejestrowany związek partnerski a małżeństwo*, Wolters Kluwer, 2014, p. 92.

⁸ J. Miles, "Unmarried Cohabitation in a European Perspective", in J. Scherpe (ed.), *European Family Law. Volume III. Family Law in a European Perspective*, Elgar, 2016, p. 93.

⁹ S. Bulloch, D. Headrick, "Cross-jurisdictional Comparison of Legal Provisions for Nonmarital Cohabiting Couples", *Research Findings*, 2005, Issue 55, p. 2, available at: <https://www2.gov.scot/resource/doc/36496/0029535.pdf>.

weaker side of the relationship.¹⁰ This search for the “golden mean” takes place between two extremes: on the one hand, viewing extra-marital relationships as a moral danger that should be eliminated, and on the other hand, full equality in law of marriage and informal union.¹¹ Moreover, the legislator’s preference for either of the indicated models reflects the way in which cohabitation is classified: either as an institution of family law or civil law. Classification of cohabitation as a family-law relationship is first of all evidenced by appropriate application of the provisions on marriage to cohabitation. Moreover, in laws on cohabitation, solutions characteristic of family law may be used (e.g. qualification of work provided in a household as a way of contribution to the acquisition of property equal to monetary contribution). Alternatively, provisions concerning *de facto* unions are included in family law acts (e.g. Scotland, Slovenia). When the relationship between cohabitants is perceived through the prism of civil law and, to property settlements, the provisions on civil partnership or unjust enrichment apply, it may be questionable whether this is a civil law or family law relationship. However, a solution adopted in Macedonia may be a certain matter of curiosity. Despite the identical treatment of cohabitants and spouses with regard to alimony and property acquired during the relationship (Article 13 of the Macedonian Family Code¹²), cohabitants – just like spouses – will not form a family if they are childless. According to Article 2 of the Family Code, a family is a community of life between parents and children and other relatives who live in a common household. The family is therefore created as a result of the birth of a child or adoption.

In the following three sections, the main assumptions of each of the three models will be explained.

¹⁰ J. Miles, *supra* note 9, p. 94.

¹¹ I.M. Pedersen, “Danish law relating to non-marital relationships”, *The International and Comparative Law Quarterly*, 1979, Issue 28:1, p. 127.

¹² Закон за семејството, 22.12.1992, available at: <https://www.mtsp.gov.mk/zakoni.nspix> [last accessed 30.6.2021].

I. APPROPRIATE APPLICATION OF THE LAW ON MARRIAGE TO COHABITATION (*QUASI-MARITAL COHABITATION*)

In some legal orders it is possible to apply *mutatis mutandis* – usually on the basis of an explicit statutory reference – the law on marriage to stable non-marital unions which as a rule last for a predetermined statutory period of time (“*quasi-marital*” cohabitation). Consequently, cohabiting couples are granted the same rights and obligations as spouses. However, it would be wrong to assume that this is all rights and obligations in every case. Therefore, within this type of cohabitation, additional sub-types can be distinguished, taking into account the scope of application of marriage laws to cohabitation. This begins with the recognition of cohabitants as spouses (common-law marriage), through granting them on the basis of explicit statutory empowerment almost all rights vested in spouses on the grounds of family law and ending with references only to strictly specified provisions, e.g. in the scope of alimony, inheritance, or division of property accumulated during the relationship.

Sometimes, as already mentioned above, the legal effects of cohabitation are almost identical to those of a marriage concluded before a competent official. It may be even argued that cohabitants, after a certain period of time, “become” spouses (marriage by “seizure”) because of at least the way of “exit” from such a relationship, which is divorce. The most far-reaching protection is afforded to unmarried couples in states which recognise common-law marriage.¹³ In order to be valid,

¹³ Common-law marriage states in 2021: Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas. available at: <http://worldpopulationreview.com/states/common-law-marriage-states/> [last accessed 30.6.2021].

In England and Wales almost half of the people mistakenly believe that unmarried couples who live together have a common law marriage and enjoy the same rights as couples that are legally married. National Centre for Social Research, “Almost half of us mistakenly believe that common law marriage exists”, 22.01.2019 r., available at: <http://natcen.ac.uk/news-media/press-releases/2019/january/almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists/> [last accessed 30.6.2021]. About roots of common-law marriage writes: W. Müller-Freienfels, “Legal problems concerning unmarried couples”, in *Proceedings of the Eleventh Colloquy on European Law. Messina, 8–10 July 1981. Legal Problems Concerning Unmarried Couples*, Council of Europe, 1982, p. 81.

such a marriage does not need to be formalised. To be a common-law spouse (as it is the case in some states of the USA) a man and a woman have to live together “as husband and wife”, to appear before third parties as married persons and to have a real and mutual intention to get married.¹⁴ Thus, the Roman principle of *consensus facit nuptias* is applied.¹⁵ It should be noted, however, that the institution of common-law marriage will not be an answer to the problems of persons who consciously opt out of marriage. After all, a fundamental requirement for the existence of such a marriage is for the parties to present themselves to third parties as husband and wife.¹⁶

In continental European law, perhaps to the greatest extent marriage regulations are applied to cohabitants in Croatian and Slovenian law.

According to Article 11 of the Croatian Family Code 2015,¹⁷ unmarried cohabitation is a community of life between an unmarried man and an unmarried woman that has lasted for at least three years, or fewer if the cohabitants have a child together. The legal effects of cohabitation and marriage – both in terms of personal and property relations – do not differ. Consequently, as soon as the cohabitation is established, a community of property is created between the cohabitants, which includes e.g. collected remuneration for work and other income from gainful activity (regardless of whether it was carried out jointly or by each of them separately), benefits derived from intellectual property rights and related rights collected during the relationship. The shares of each cohabitant in joint property are equal, unless otherwise agreed (Article 36 § 1-3 in conjunction with Article 11 § 2 of the Croatian Family Code). Co-

¹⁴ J. Thomas, “Common Law Marriage. Comment”, *Journal of the American Academy of Matrimonial Lawyers*, 2009, Issue 22, p. 157-160.

¹⁵ See *Meister v. Moore* (1877): „That such a contract (*per verba praesenti*) constitutes a marriage at common law that can be no doubt, in view of the adjudications made in this country, from its earliest settlement to the present day (...) Marriage is everywhere regarded as a civil contract”; available at: <https://supreme.justia.com/cases/federal/us/96/76/> [last accessed 30.6.2021].

¹⁶ From a historical perspective, one should also mention the Code on Marriage, Family and Guardianship (*Кодекс законов о браке, семье и опеке РСФСР*) adopted in Soviet Russia in 1926, in the version in force until 1944 which abolished the compulsory registration of marriages and made the effects of registered and unregistered marriages equal.

¹⁷ *Obiteljski zakon*, 18.09.2005, available at: <https://www.zakon.hr/z/88/Obiteljski-zakon> [last accessed 30.6.2021].

habitants are also obliged to assist each other, to be loyal, to respect each other and to maintain a harmonious relationship (Art. 31 § 2 in conjunction with Art. 11 § 2 Croatian Family Code).

In Slovenia, both marriage and cohabitation were regulated until recently by the 1976 Marriage and Family Relations Act,¹⁸ which was in force until 15 April 2019.¹⁹ This has been replaced by the provisions of the Family Code of 23 March 2017, as well as by the amended Succession Act 1976.²⁰ However, the adoption of the new legislation has not affected the position of cohabitants. According to the previously applicable Article 12 of the 1976 Act and the current Article 4 of the 2017 Code and Article 4a of the Succession Act, a man and a woman who are not married, but who form a community lasting for a certain/prolonged period of time, are subjects of all the legal effects provided by law for marriage, provided that the marriage between such persons would not be invalid (*ergo* – there are no marriage impediments between the cohabitants, for example).²¹ Therefore, the distinction between formal and *de facto* relationships is blurred on the grounds of family and inheritance law. The *de facto* cohabitation “as husband and wife” becomes a way of obtaining certain status.²²

A much narrower scope of reference to matrimonial regulation – because limited only to the provisions on maintenance and on property acquired during the relationship – may be found in the family law of

¹⁸ Zakon o zakonski zvezi in družinskih razmerjih, 4.06.1976, available at: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2004-01-3093/zakon-o-zakonski-zvezi-in-druzinskih-razmerjih-uradno-precisceno-besedilo-zzzdr-upb1> [last accessed 30.6.2021].

¹⁹ On 15.04.2019 new family code (Družinski zakonik) entered into force; Družinski zakonik, 23.03.2017, available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7556> [last accessed 30.6.2021].

²⁰ Zakon o dedovanju, 26.05.1976, available at: <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO317> [last accessed 30.6.2021].

²¹ Further: M. Gec-Korošec, P. Kraljic, “The Influence of Validly Established Cohabitation on Legal Regulation between Cohabitants on Slovene Law”, *International Survey of Family Law*, 2001, p. 383–396; M. Gec-Korošec, V. Rijavec, “Slovenia: Post-Independence Changes in Family Law Regulation”, *University of Louisville Journal of Family Law*, 1994–1995, Issue 33:2, p. 485–494.

²² M. Bonini-Baraldi, “Variations on the Theme of Status, Contract and Sexuality: An Italian Perspective on the Circulation Models”, in K. Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, 2003, p. 303.

Macedonia,²³ the Federation of Bosnia and Herzegovina,²⁴ and Serbia.²⁵ In these legal orders, for example, property acquired by at least one cohabitant during the relationship (except for, *inter alia*, items acquired by inheritance or donation) is a cohabitant joint ownership, cohabitants are jointly and severally liable for any liabilities incurred by either of them in matters resulting from meeting the needs of the family, or one of the cohabitants may request – within a year from the termination of the relationship – that the other one provides him/her with maintenance for a period of, as a rule, five years.²⁶

It also happens that the legal effects of marriage and cohabitation are equalised only with regard to the division of joint property or inheritance. With regard to other relevant issues, regulations dedicated only to cohabitants are passed. This is the case, for example, in Ukrainian law. Article 74 of the Family Code of Ukraine 2002²⁷ regulates the property relations between cohabitants during their relationship on the same basis as in the case of spouses. It means that if a woman and man live as a family, but are not married to each other or to any other person, property acquired during their cohabitation belongs to them as joint property and is subject to the provisions relating to marital co-ownership, unless otherwise provided for by written agreement between them. At the same time, a cohabitant is entitled to intestate succession, not in the first group as a spouse (Art. 1261 of the Civil Code of Ukraine)²⁸, but in the fourth group as a person who lived with the testator as a family for at least five years counting backwards from the opening of the succession (Art. 1264 of the Civil Code of Ukraine).

²³ Закон за семејството, 22.12.1992, Art. 13, available at: https://Ener.gov.mk/Default.aspx?Item=Pub_regulation&Subitem=View_reg_detail&Itemid=31897 [last accessed 30.6.2021].

²⁴ Porodični zakon Federacije Bosne i Hercegovine, 3.03.2005, Art. 230 and 263, available at: <http://www.fbihvlada.gov.ba/bosanski/zakoni/2005/zakoni/25bos.pdf> [last accessed 30.6.2021].

²⁵ Породични закон, 17.02.2005, Art. 152 and 191, available at: <https://www.minrzs.gov.rs/sites/default/files/2018-11/Porodicni%20zakon.pdf> [last accessed 30.6.2021].

²⁶ D. Mickovikj, A. Ristov, "The Legal Regulation of Nonmarital Cohabitation in Macedonian Family Law", *International Survey of Family Law*, 2012, p. 190–196.

²⁷ Сімейний кодекс України, 10.01.2002, available at: <https://zakon.rada.gov.ua/rada/show/ru/2947-14/> [last accessed 30.6.2021].

²⁸ Цивільний кодекс України, 16.01.2003, available at: <https://zakon.rada.gov.ua/rada/show/ru/435-15> [last accessed 30.6.2021].

The fact that legislators opted for analogous application of the provisions on marriage to cohabitation results, as it seems, from the acceptance of the functional approach to family and legal relations. The truth is that in everyday life there are no visible differences between marriage and non-marital cohabitation and that is why almost equal treatment may be justified (rule „one fits all” is defensible).²⁹ Marriage and cohabitation pursue similar aims. It is, for example, the creation of a family home and a common, mutually satisfying family economic system, as well as the agreement of an appropriate division of roles. Furthermore, both spouses and cohabitants strive for a successful physical relationship, develop a common philosophy of life as a couple, create an intellectual and communicative community and a network of relations with relatives, friends, neighbours, organisations, and institutions.³⁰ What is more, in the light of the conducted research, in social opinion it is not so much the marriage that is perceived as a trigger for legal rights, but the birth of a child – regardless of whether in a formal or informal relationship.³¹

II. ADOPTION OF LAWS DEDICATED TO COHABITANTS

After the year 2000, more and more often “piecemeal” regulations concerning people “just living together” are being replaced by tailor-made legal acts regulating directly their rights and obligations.³² This legal

²⁹ Zob. np. M. Minow, “Redefining Families: Who’s In and Who’s Out?”, *University of Colorado Law Review*, 1991, Issue 62:2, p. 269–285; M.C. Regan, Jr., “Unmarried Partners and the Legacy of *Marvin v. Marvin*: Calibrated Commitment. The Legal Treatment of Marriage and Cohabitation”, *Notre Dame Law Review*, 2001, Issue 76:5, p. 1435–1466; F.E. Olsen, “The Politics of Family Law”, *Law & Inequality: A Journal of Theory and Practice*, 1984, Issue 2:1, p. 1–19.

³⁰ K. Slany, *Alternatywne formy życia małżeńsko-rodzinnego w ponowoczesnym świecie*, Nomos, 2008, p. 137–138; J. Miles, “Financial Relief between Cohabitants on Separation: Options for European Jurisdictions”, in K. Boele-Woelki, T. Sverdrup (eds.), *European Challenges in Contemporary Family Law*, Intersentia, 2008, p. 280.

³¹ A. Barlow, “Cohabiting relationships, money and property: The legal backdrop”, *The Journal of Socio-Economics*, 2008, Issue 37, p. 517.

³² See also: D. Bradley, “Regulation of Unmarried Cohabitation in West-European Jurisdictions – Determinants of Legal Policy”, *IJLPF* 2001, Issue 15:1, p. 23; R. Prob-

model of cohabitation is sometimes called unregistered cohabitation,³³ cohabitation protection arising by operation of law,³⁴ *para*-marriage, or *pseudo*-marriage.³⁵ Such a solution was adopted e.g. in Norway,³⁶ Sweden,³⁷ Finland,³⁸ Ireland,³⁹ Scotland,⁴⁰ Italy,⁴¹ Malta,⁴² Lithuania⁴³ and some Spanish autonomous communities – Navarre,⁴⁴ Catalonia.⁴⁵

ert, A. Barlow, “Cohabitants and the law: recent European reforms”, *Deutsches und Europaisches Familienrecht* 2000, Issue 2, p. 76.

³³ R. Wintemute, “Conclusion”, in R. Wintemute, M. Andenas (eds.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law*, Bloomsbury Publishing, 2001, p. 764.

³⁴ C. Forder, “European Models of Domestic Partnership Laws: The Field of Choice”, *Canadian Journal of Family Law*, 2000, Issue 17, p. 376.

³⁵ K. Waaldijk, “Taking Same-Sex Partnerships Seriously: European Experiences as British Perspectives?”, *International Family Law*, 2003, p. 87; K. Waaldijk, “Others may follow: the introduction of marriage, quasi-marriage and semi-marriage for same-sex couples in European countries”, *Judicial Studies Institute Journal*, 2005, Issue 5:1, p. 104.

³⁶ Lov om rett til felles bolig og innbo når husstandsfellesskap opphører [husstandsfellesskapsloven], 4.7.1991, available at: <https://lovdata.no/dokument/NL/lov/1991-07-04-45> [last accessed 30.6.2021].

³⁷ Sambolag (2003:376), 12.6.2003, available at: <https://lagen.nu/2003:376> [last accessed 30.6.2021].

³⁸ Lag om oppløsning av sambors gemensamma hushåll, 14.1.2011, available at: <https://www.finlex.fi/sv/laki/ajantasa/2011/20110026> [last accessed 30.6.2021].

³⁹ Art. 171-207 of Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, 19.7.2010, available at: <http://www.irishstatutebook.ie/eli/2010/act/24/section/172/enacted/en/html> [last accessed 30.6.2021].

⁴⁰ Sec. 25-30 of Family Law (Scotland) Act 2006, available at: <https://www.legislation.gov.uk/asp/2006/2/crossheading/cohabitation> [last accessed 30.6.2021].

⁴¹ Legge n. 76 Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, 20.5.2016, available at: <https://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg> [last accessed 30.6.2021].

⁴² Act No. XV of 2017, Cohabitation Act, 7.4.2017 available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28387&l=1> [last accessed 30.6.2021].

⁴³ Art. 3.229-3.235 of Lietuvos Respublikos civilinis kodeksas, 18.7.2000, available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.107687> [last accessed 30.6.2021].

⁴⁴ Ley Foral 6/2000, para la igualdad jurídica de las parejas estables, 3.7.2000, available at: <https://www.boe.es/buscar/pdf/2000/BOE-A-2000-16373-consolidado.pdf> [last accessed 30.6.2021].

⁴⁵ Efectos de la extinción de la pareja estable, Código Civil de Cataluña, 29.7.2011, available at: <https://www.boe.es/buscar/pdf/2010/BOE-A-2010-13312-consolidado.pdf> [last accessed 30.6.2021].

The legal acts adopted in the abovementioned states are neither a comprehensive regulation of the legal situation of persons in “unmarried” relationships, nor do they create a new form of formal relationship. They merely derive certain legal effects from the fact of living together as if they were married.⁴⁶ This “living together” should in principle either last for a certain period of time (e.g. three years) or be connected with the fact of having a child together. Thus, legal effects will arise even in the absence of the knowledge and will of the persons in a relationship. Of course, cohabitants have the possibility to conclude an agreement excluding the legal effects of cohabitation laws (“opt-out’). However, whether due to low legal awareness and lack of knowledge, or an incorrect assessment of their own legal situation, this is extremely rare in practice.⁴⁷

Sometimes the acquisition of certain rights by the cohabitants depends on either the disclosure of the relationship in a private document (drawing up a cohabitation agreement subject to the general rules of contract law), or on registration in an appropriate register (e.g. in Malta – Register of Cohabitations; in the Basque Country – Registro de Parejas de Hecho de la Comunidad Autónoma del País Vasco). However, such an entry does not have the effect of changing the status of the relationship from *de facto* to formal, and sometimes has a purely evidential value (French *certificat de concubinage*).

The enactment of cohabitation laws is not only intended to “modernise” family law.⁴⁸ Above all, when cohabitation breaks down, it serves to protect the weaker party and eliminates the injustices caused by the discrepancy between the actual “balance of power” in the relationship and the legal perception of that relationship.⁴⁹ It also means that the

⁴⁶ M. Garrison, “Cohabitant obligations: Contract versus status”, in K. Boele-Woelki, J. K. Miles, J. M. Scherpe (eds.), *The Future of Family Property in Europe*, Intersentia, 2011, p. 119.

⁴⁷ C. Sörgjerd, “Neutrality: The Death or the Revival of the Traditional Family? Regulating Informal Partnerships in Sweden”, in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, Intersentia, 2005, p. 345.

⁴⁸ J. Miles, “Unmarried Cohabitation in a European Perspective”, in J. Scherpe (ed.), *European Family Law. Volume III. Family Law in a European Perspective*, Elgar, 2016, p. 108.

⁴⁹ See e.g.: Law Commission for England and Wales, *Cohabitation: The Financial Consequences of Relationship Breakdown*, 2007, Law Com No 307, p. 42–43, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attach->

state „sees” cohabitants and „feels” the need to protect the weaker party, but not in the same way as if they were married or had registered their partnerships. “It should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair”.⁵⁰ It is particularly concerned with the situation of the cohabitant who is involved in the upbringing of the children and reduces his or her professional activity, or devotes himself or herself entirely to household work.⁵¹ At the same time, owing to the limited subjective scope of cohabitation laws, they do not weaken the institution of marriage.⁵² They also do not constitute a threat or competition for registered unions – the addressees of the cohabitation acts are people who are not interested in institutional forms of living.

When looking for – on the one hand – a justification for the adoption of a cohabitation law and – on the other hand – a model personal scope and subject matter of such a regulation, it is worth referring to the Swedish draft of the 2003 Cohabitation Act (Regeringens proposition 2002/03:80), which is accompanied by an extremely extensive explanation (the document is 171 pages long).⁵³ According to the explana-

ment_data/file/228881/7182.pdf [last accessed 30.6.2021]; Ontario Legislative Assembly. Debates, 9.06.1994, p. 4978, cited by: W. Holland, “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation”, *Canadian Journal Family Law*, 2000, Issue 17, p. 128.

⁵⁰ Scottish Law Commission, *Report on Family Law*, Edinburgh 1992, Scot Law Com No 135, para 16.1, available at: <https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf> [last accessed 30.6.2021].

⁵¹ W.M. Schrama, “The Dutch Approach to Informal Lifestyles: Family Function over Family Form?”, *IJLPF*, 2008, Issue 22, p. 321–322; M. Martín-Casals, “Mixing-Up Models of Living Together. “Opting-In”, “Opting-Out” and Self-Determination of Opposite-Sex Couples in the Catalan and Other Spanish Partnership Acts”, in M. Martín-Casals, J. Ribot (eds.), *The Role of Self-determination in the Modernisation of Family Law in Europe. Papers presented at the 2003 European Regional Conference of the International Society of Family Law*, Girona: Documenta Universitaria, 2006, p. 300; J.M. Scherpe, “The Legal Status of Cohabitants – Requirements for Legal Recognition”, in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, Intersentia, 2005, p. 289.

⁵² J. Pawliczak, *supra* note 2, p. 698; N. Dethloff, “New models of partnership: the financial consequences of separation”, *ERA Forum*, 2011, Issue 12, p. 96.

⁵³ See Spanish explanatory memorandum: Regeringens proposition 2002/03:80, 13.03.2003, available at: <https://data.riksdagen.se/fil/E6E9EA72-8C1A-48F5-9ECD-F0AB9FE0DDC9> [last accessed 30.6.2021]; Å. Saldeen, “Sweden. Cohabitation outside marriage or partnership”, *International Survey of Family Law*, 2005, p. 505.

tory memorandum, when drafting the law on cohabitation, it should be borne in mind that it will apply to persons who have not in any way explicitly expressed their wish to be subjected to it (in contrast to the law on marriage or registered partnerships). Owing to the fact that both marriage and registered partnerships are institutions superior to cohabitation, the “cohabitation” provisions should not lead to the creation of a “second-class marriage”. The subject matter of regulation should be limited only to problems of a financial nature and to those cases where there is a need to protect the weaker party. Where, however, there is a need for legal regulation, it should be modelled on “matrimonial” law as far as possible. Therefore, in order to protect the autonomy of the persons in the relationship, on the one hand, and the need to protect the weaker party, on the other hand, it would be advisable to limit the material scope of these regulations to rudimentary matters. This is, in principle, what is happening.

Analysing the cohabitation laws operating in Europe, one should come to the conclusion that they serve primarily to resolve conflicts arising when the relationship ends, either as a result of an autonomous decision of the cohabitants or as a result of the death of one of them.⁵⁴ They essentially address three issues. Firstly, owing to them a cohabitant is entitled to reimbursement of expenses and expenditures of a monetary and non-monetary nature in connection with the acquisition, maintenance, and improvement of property owned jointly by the cohabitants or by only one of them. They may also provide a legal basis for compensating unpaid domestic work and childcare (e.g. so-called *compensatio económica* in Navarre or New South Wales). Secondly, they sometimes impose maintenance obligations on cohabitants (so-called custodial maintenance and rehabilitative maintenance in New South Wales). Thirdly, they may contain provisions concerning the family home which was the former joint residence of the cohabitants (in Sweden, the Netherlands).

⁵⁴ M. Martín-Casals, “Mixing-Up Models of Living Together. “Opting-In”, “Opting-Out” and Self-Determination of Opposite-Sex Couples in the Catalan and Other Spanish Partnership Acts”, in M. Martín-Casals, J. Ribot (eds.), *The Role of Self-determination in the Modernisation of Family Law in Europe. Papers presented at the 2003 European Regional Conference of the International Society of Family Law*, Girona: Documenta Universitaria, 2006, p. 292.

Owing to the fact that these constructs are typical of matrimonial law, the “cohabitation” laws are either a part of family codes (Catalonia, Scotland, Lithuania), or duplicate the solutions adopted therein (either *expressis verbis* in the law as in Portugal, or matrimonial law is applied accordingly to cohabitants)⁵⁵. Family law provisions, after all, to the greatest extent take into account the specificity of life in a relationship.

The introduction of cohabitation laws into the legal order is supported by at least several important arguments. Firstly, in the absence of a “cohabitation” law, the provisions of the law of obligations or the law of property are applied to resolve cohabitants’ disputes, taking into account the economic interest and assuming that each of the parties acts only in its own interest. Thus, the existence of a spiritual, intimate, and economic bond between cohabitants is ignored, whereas it is the relations of an emotional nature that determine the behaviour of cohabitants in the financial aspect, and not the *quid pro quo* rule.⁵⁶ Consequently, the effects of applying the general rules of property law or contract law are not only difficult to predict, but it also may happen that one of the cohabitants is unjustifiably left with “nothing”.⁵⁷ Even if cohabitants decided to regulate their mutual relations by traditional contractual agreements (*contractus nominatus* and *contractus innominatus*), their scope would be limited exclusively to relations of an economic nature, leaving aside the “personal aspect of the economic bond”.⁵⁸

⁵⁵ N. Dethloff, “New models of partnership: the financial consequences of separation”, *ERA Forum*, 2011, Issue 12, p. 100.

⁵⁶ W.M. Schrama, “General Lessons for Europe Based on a Comparison of the Legal Status of Non-Marital Cohabitants in the Netherlands and Germany”, in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, Intersentia, 2005, p. 263; J. Pawliczak, Opinia prawna na temat potrzeby oraz dopuszczalności instytucjonalizacji związków partnerskich osób tej samej płci (w świetle prawa cywilnego oraz konstytucyjnego), p. 8, available at: http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_Potrzeba%20instytucjonalizacji%20zwiakow%20partnerskich%20osob%20tej%20samej%20plci.pdf [last accessed 30.6.2021].

⁵⁷ G. Lind, “Common Law Marriage. A Legal Institution for Cohabitation”, Oxford University Press, 2008, p. 827, supra 155.

⁵⁸ B. Paul, “Koncepcje rozliczeń majątkowych między konkubentami”, *Przegląd Sądowy*, 2003, Issue 3, p. 41; J. Pawliczak, Opinia prawna na temat potrzeby oraz dopuszczalności instytucjonalizacji związków partnerskich osób tej samej płci (w świetle prawa cywilnego oraz konstytucyjnego), p. 8, available at: http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_Potrzeba%20instytucjonalizacji%20zwiakow%20partner-

Secondly, it is sometimes argued that cohabitants wish to operate in a legal vacuum (*rechtsfreier Raum*), so that ascribing legal significance to the mere fact of living in a stable *de facto* relationship for a certain period of time violates their autonomy. This thesis cannot be fully agreed with. It may be, after all, that cohabitants reject only the “marital” consequences and not “all” the legal consequences of living together.⁵⁹ It should also be borne in mind that entering into marriage is not an autonomous, individual decision of only one person. Therefore, the reluctance of one of the cohabitants to get married, his/her taking advantage of his/her stronger position or the impossibility of getting married (due to the existence of, for example, marital impediments), affects the rights and obligations of the other one.⁶⁰ Moreover, it may be argued that the lack of institutionalisation of non-marital cohabitation may be a result not so much of unwillingness to enter into formal unions, but of the unawareness of the legal consequences of being in an informal relationship.⁶¹

Thirdly, the enactment of provisions dedicated directly to cohabitants ensures relative legal certainty, prevents inconsistencies in jurisprudence, and limits the abuse or distortion of legal institutions. The practice of adopting a cohabitant in France in order to improve his/her situation under the inheritance law,⁶² or the so-called death bed marriages (entered into only to comprehensively regulate the legal situation of one cohabitant in the event of death of the other) may serve as an example of such practices.

Fourthly, owing to the lack of – as a rule – reference in cohabitation laws to the application of the provisions on marital impediments, as

skich%20osob%20tej%20samej%20plci.pdf [last accessed 30.6.2021]; M. Nazar, *Rozliczenia majątkowe konkubentów*, Lubelskie Wydawnictwo Prawnicze, 1993, p. 56.

⁵⁹ J.M. Scherpe, “Organic European Family Law”, in J.M. Scherpe (ed.), *European Family Law. Volume IV. The Present and Future of European Family Law*, Elgar 2016, p. 74.

⁶⁰ C. Forder, “European Models of Domestic Partnership Laws: The Field of Choice”, *Canadian Journal of Family Law*, 2000, Issue 17, p. 381. See also S. Lifshitz, “A Liberal Analysis of Western Cohabitation Law”, in B. Verschraegen (ed.), *Family Finances*, Jan Sramek Verlag, 2009, p. 311.

⁶¹ M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective*, Intersentia, 2006, p. 378.

⁶² K. Pfeifer-Chomiczewska, “Adopcja prosta – kontrowersyjny sposób na stworzenie więzi prawnej między konkubentami. Analiza prawa francuskiego”, *Miscellanea Historico-Iuridica*, 2014, Issue XIII:2, p. 320.

well as the “reluctance” to construct such provisions in these acts (Portugal and Extremadura are exceptions), the regulations dedicated to cohabitants may be beneficial to persons who are not able to marry each other, but live in stable and permanent *de facto* unions.

Fifthly, it cannot be agreed that the adoption of cohabitation laws has a negative impact on the marriage rate.⁶³ Sweden may serve as an example, as it is possible to make long-term observations on the impact of cohabitation laws on the marriage rate.

In the 1960s and 1970s, Sweden experienced a significant decline in the number of marriages *per* thousand citizens – from 7.8 in 1966 to 4.7 in 1973. In 1973 the first tailor-made legal act for cohabitants was passed (Lag 1973:651 om ogifta samboendes gemensamma bostad). For three consecutive years the number of marriages increased and was respectively – 5.5 in 1974, 5.4 in 1975 and 1976. In 1987, another cohabitation act was enacted (Lag 1987:232 om sambors gemensamma hem) which gave cohabitants wider rights. However, there was no significant impact on the number of formal unions. A deviation from the rule was noted only in 1989, when the number of marriages increased to 12.8. The reason for the change – mainly – was media reports on the probable loss of pensions by unmarried persons, not the new regulation.⁶⁴ Already a year later – in 1990 – the number of marriages fell sharply to 4.7 *per* thousand people. “The climax” came in 1998, when only 3.6 marriages *per* thousand people were recorded. Since then, there has been a consistent increase in interest in formalising the union. Since 2006, more than 5 marriages *per* thousand people have been recorded regularly. This trend has not been altered by the subsequent cohabitation law of 2003 (Sambolag). In 2017, there were 5.2 marriages *per* thousand people.⁶⁵ Therefore, it appears that the legislator *per se* has virtually no influence over the marriage rate, which – as it seems – depends on certain habits in society. The

⁶³ A. Agell, “Family Forms and Legal Policies. A Comparative View from a Swedish Observer”, *Scandinavian Studies in Law*, 1999, Issue 38, p. 205.

⁶⁴ G. Lind, *Common Law Marriage. A Legal Institution for Cohabitation*, Oxford University Press, 2008, p. 783; G. Lind, “The Development of Cohabitation and Cohabitation Law in the Nordic Countries”, in J. Asland, M. Brattström, G. Lind, I. Lund-Andersen, A. Singer, T. Sverdrup, *Nordic Cohabitation Law*, Intersentia, 2015, p. 3.

⁶⁵ OECD, *Family Database: By country – The Structure of families. Sweden*, available at: <https://stats.oecd.org/index.aspx?queryid=68249#> [last accessed 30.6.2021].

real impact on cohabitants' willingness to formalise relationship may have been instruments of tax or social law, and not family law.⁶⁶

III. NO SPECIAL (COHABITATION) LEGAL REGIME

According to many legislators (e.g. Polish, German, or French), there is no need to create new legal regulations for persons living in *de facto* unions. The justification for this varies. The most common explanation is that heterosexual persons can always enter into marriage (in France additionally PACS) and homosexual persons – either marriage (France, Germany) or registered partnership (PACS in France). Those who do not choose to institutionalise their relationship may enter into a contract (implicit or explicit) governed by the general rules of contract law.⁶⁷ Owing to the fact that they cohabit and are connected by close emotional ties, also the provisions referring to e.g. family or close person will apply (so-called piecemeal recognition of cohabitants' rights).⁶⁸ Moreover, cohabitants may assert their rights using certain institutions of the property law, provisions on unjustified enrichment, civil partnership, labour law, tort law, which, however, each time will require proving the existence of additional prerequisites (e.g. pecuniary contribution to the acquisition of property, agreement as to the intended purpose of the performance, common economic purpose).

The arguments of those against creating a legal framework for cohabitation can be divided into three groups.

Firstly, the outstanding heterogeneity of extra-marital relationships is pointed out, which results above all in definitional difficulties and problems in the correct qualification of a specific relationship. This applies especially to the need to prove the existence of an intimate bond, which plays an essential role and distinguishes cohabitation from, for

⁶⁶ A. Agell, "Family Forms and Legal Policies. A Comparative View from a Swedish Observer", *Scandinavian Studies in Law*, 1999, Issue 38, p. 206.

⁶⁷ C.I. Asua González, "Succession Rights and Unmarried Couples in Spanish Law", *Oñati Socio-legal Series*, 2014, Issue 4:2, p. 193.

⁶⁸ B. Rodríguez Ruiz, "Recognizing the rights of unmarried cohabitants in Spain: Why not treat them like married couples?", *International Journal of Constitutional Law*, 2004, Issue 2:4, p. 670.

example, friendship. Moreover, a retrospective analysis of the relationship, aimed at assessing its nature and duration (sometimes measured precisely in years) may in fact lead to unpredictable results, which are often contrary to the will of the parties concerned and their sense of justice. Not all relationships are similar to marriage and, especially in their initial phase, it is difficult to predict their ultimate nature.⁶⁹ And the scope of rights to which cohabitants are entitled will depend on the *ex post* qualification made by the court based on statutory grounds.⁷⁰ As signalled earlier, cohabitation laws will apply to relationships lacking an element “clarifying” their status. A solution to these problems would be to link the rights of persons in non-marital unions to the satisfaction of the requirements for registration of the relationship. However, combining certain cohabitants’ rights with the formal act of registration would be contrary to the assumption of the protective function of such laws and would create the impression of the existence of a “second-class marriage”.⁷¹

Secondly, with the spreading phenomenon of marriage equality, of various forms of registered partnerships and with the liberalisation of divorce procedures (worth mentioning are e.g. notarial or administrative divorces which exist in Spain, Romania, France, Slovenia, Latvia, Estonia, Ukraine, Portugal, Denmark, Russia), it is possible to defend the thesis that cohabitants are persons who are in no way interested in special protection.⁷² Therefore, existing legal instruments are fully sufficient. Combining legal consequences with mere marriage-like cohabitation would be a violation of individual dignity, autonomy, privacy,

⁶⁹ I.M. Pedersen, “Danish law relating to non-marital relationships”, *The International and Comparative Law Quarterly*, 1979, Issue 28:1, p. 119.

⁷⁰ M. Garrison, “Cohabitant obligations: Contract versus status”, in K. Boele-Woelki, J.K. Miles, J.M. Scherpe (eds.), *The Future of Family Property in Europe*, Intersentia, 2011, p. 124.

⁷¹ See Spanish explanatory memorandum: Regeringens proposition 2002/03:80, 13.03.2003, available at: <https://data.riksdagen.se/fil/E6E9EA72-8C1A-48F5-9ECD-F0AB9FE0DDC9> [last accessed 30.6.2021]; E. Ryrstedt, “Legal Status of Cohabitants in Sweden”, in J.M. Scherpe, N. Yassari, *Die Rechtsstellung nichtehelicher Lebensgemeinschaften / The Legal Status of Cohabitants*, Mohr Siebeck, 2005, p. 419–420.

⁷² See Spanish Supreme Court ruling: STS 611/2005, 12.09.2005, available at: <https://supremo.vlex.es/vid/ruptura-union-paramatrimonial-ba-97-18432548> [last accessed 30.6.2021].

and the right to self-determination.⁷³ For as John Stuart Mill argued, “If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode”.⁷⁴

Thirdly, the excessive paternalism of the legislator towards the cohabitant who devotes himself/herself to raising children and unpaid domestic work (essentially the woman, as was clearly pointed out during the legislative work on the New Zealand regulation⁷⁵) perpetuates harmful stereotypes about the position of women in relationships – their weakness, dependence, irrationality.⁷⁶

CONCLUSIONS

In my opinion, creating regulations dedicated to people living in informal unions, which would link the legal effects to the very fact of living in a marriage-like relationship, and not to the fulfilment of certain formal requirements, deserves approval. It is an oversimplification to assume that, since it is possible to get married (and possibly to register a partnership), there is no justification to introduce cohabitation laws because the free choice of individuals should be respected. The question should not be whether the couple has a free choice and decides to live in a cohabiting relationship, but whether each of the persons forming this relationship has a choice and being in an informal relationship (with all

⁷³ R.L. Deech, “The Case against Legal Recognition of Cohabitation”, *International and Comparative Law Quarterly*, 1980, Issue 29:2&3, p. 480.

⁷⁴ J.S. Mill, *On Liberty*, Batoche Books, 2001, p. 63, available at: <https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf> [last accessed 30.6.2021].

⁷⁵ S. Birks, *LEANZ Seminar on the Property Relationships Act*, 6.08.2001: „the focus on debate on the property provisions of the Property Relationships Bill was essentially on the situation of women in existing relationships”.

⁷⁶ M. Garrison, “Cohabitant obligations: Contract versus status”, in K. Boele-Woelki, J.K. Miles, J.M. Scherpe (eds.), *The Future of Family Property in Europe*, Intersentia, 2011, p. 131. More on this topic: R.L. Deech, “The Case against Legal Recognition of Cohabitation”, *International and Comparative Law Quarterly*, 1980, Issue 29:2&3, p. 485–491; K. O’Donovan, “Legal Marriage – Who Needs It?”, *Modern Law Review*, 1984, Issue 47, p. 117–118; S. Lifshitz, “A Liberal Analysis of Western Cohabitation Law”, in B. Verschraegen (ed.), *Family Finances*, Jan Sramek Verlag, 2009, p. 318.

the consequences that this implies) is also their conscious decision. Research carried out in countries with registered partnerships shows that they are most often formed by well-educated people with a stable financial situation and not by those who are most in need of protection when the relationship ends.⁷⁷

The scope of such a cohabitation law should be the result of a balancing of two opposing values by the law-making authorities. On the one hand, a liberal policy that respects the autonomy of those in a relationship and their choice to be “outside the law”. On the other hand, a paternalistic approach in which the need to protect the weaker persons in the relationship comes to the fore. The only, as it seems, acceptable compromise consists in providing statutory protection for cohabitants only at a basic level (e.g. following the Swedish example – regulate the legal consequences of the termination of a relationship). In order to obtain broader protection, cohabitants would have to take steps to formalise their relationship.

⁷⁷ J.M. Scherpe, “Organic European Family Law”, in J.M. Scherpe (ed.), *The Present and Future of European Family Law*, Elgar 2016, p. 71.