

Property Relations Between Unmarried Cohabitants in International Family Law

Anatolij Pashynskiy

PhD student in International Law
Institute of International Relations
of Taras Shevchenko National University of Kyiv
Senior associate at Vasil Kisiil & Partners law firm
01054, Ukraine, Kyiv, Bohdan Khmelnytsky Str. 17/52A, floor 6
Tel.: +38 096 29 33 165
E-mail: <pashynskiy@vkkp.ua>

This article is about the legal regulation of property relations between unmarried cohabitants in national legislation and the attempts to govern the said issues on the international level. The paper classifies states into groups based on their legal approach to unmarried cohabitation with examples from domestic legislation and court practice. The paper highlights the problem of absence of international conventions and national conflict of law rules on the matter and offers solutions to these issues.

Keywords: international family law, unmarried cohabitation, property relations, conflict of laws, *de facto* unions.

Nesutsituokusių sugyventinių turiniai santykiai pagal tarptautinę šeimos teisę

Šis straipsnis yra apie nesutsituokusių sugyventinių santykių teisinę reguliavimą nacionaliniuose įstatymuose ir bandymus minėtą klausimą spręsti tarptautiniu lygmeniu. Straipsnyje valstybės suskirstomos į grupes, remiantis jų teisiniu požiūriu į nesutsituokusiųjų sugyvenimą, taip pat vidaus įstatymų ir teismų praktikos pavyzdžiais. Straipsnyje akcentuojama tarptautinių konvencijų ir nacionalinių teisės normų kolizijos taisyklių šiuo klausimu nebuvimo problema ir siūlomi jos sprendimai.

Pagrindiniai žodžiai: tarptautinė šeimos teisė, nesutsituokusiųjų sugyvenimas, turiniai santykiai, įstatymų kolizijos, *de facto* sąjungos.

Introduction

Liberalization in all spheres of social life has been one of the hallmarks of human development for the last 50 years. Traditional views on family life that were formed for centuries under the influence of religious canons and moral imperatives gradually began to give way to new notions which discard the need to formalize relationships between couples. Nowadays, the percentage of people who cohabit without marriage is drastically increasing. For instance, in the USA premarital cohabitation has increased from 10% in 1970 to over 60% after 2000 (Rosenfeld, Roesler, 2018, p. 42–58). According to scientific predictions, in 2031 one in every four couples will cohabit as family without officially registering

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their marriage (Permanent Bureau of the Hague Conference..., 2015, p. 4). As it often happens, the law is unable to keep up with the rapid development of new social relations. Unmarried cohabitation is insufficiently governed by national law even in developed European countries. Moreover, due to globalization unmarried cohabitation frequently includes a foreign element which undoubtedly presents new challenges to private international law.

The subject matter of this article are property relations between unmarried cohabitants in international family law. The author primarily employs the comparative method to contrast the national legal framework of states on unmarried cohabitation as well as other general scientific methods (dialectical, logical, historical etc.) to produce a solid scientific outcome. The purpose of this article is to compare the legal framework for property relations between unmarried cohabitants in various countries of the world as well as to discuss the development of the said issue in private international law. The paper also aims to propose rules for resolving conflicts of laws in unmarried cohabitation with a foreign element.

The issue of property relations in unmarried cohabitation was the focus of legislative projects of the Hague Conference on Private International Law (HCCH) and the Commission on European Family Law (CEFL). In the recent years these institutions sent questionnaires to member states in order to gather information on their legal approach to unmarried cohabitation. Various matters of cohabitation outside marriage from the standpoint of international family law were highlighted in the works of K. Boele-Woelki, A. Fuchs, R. Leckey, Y. Favier, A. Sanders, K. McK Norrie, P. Wautelet, D. Nkounkou, I. Curry-Sumner, A. Bucher and other prominent European scholars. In Lithuania, the matters of property relations in couples were researched by Inga Kudinavičiūtė-Michailovienė, V. Mikelenas and others. In Ukraine, various issues of cohabitation were reviewed by Z. Romovska, A. Antokolska, V. Kisil and V. Kalakura.

1. Classification of states based on their legal approach to property relations between unmarried cohabitants

The legal consequences of cohabitation outside marriage vary from country to country. While some states have a comprehensive legal framework governing *de facto* marriages, others refuse to officially recognize this concept and address it in their national legislation. Regarding the legal approach to issues of cohabitation outside marriage countries may generally be divided into three groups as follows.

The first group is the most major one and comprises states which do not govern the relations of unmarried cohabitation in any way or recognize only minor legal consequences of such relations which do not concern property regimes, maintenance or inheritance. This group involves developing countries of Africa and Asia as well as numerous European democracies (Austria, Belgium, Bulgaria, Denmark, Estonia, France, Germany, Greece, Lithuania, Poland, Slovakia, Slovenia, Switzerland etc.).

In these states, cohabitants are not subject to common property regime, have no obligations regarding financial support towards one another and inheritance them generally occurs only through will. However, several European states from this group have certain provisions in civil or social security law regarding unmarried cohabitation. For instance, in Austria after the death of one partner the surviving partner is entitled to become a successor to a tenancy agreement (Linder, 2011, p. 1099). In Denmark the income of both cohabiting partners is considered when calculating certain social benefits (Ministry of Social Affairs and the Interior of Denmark, undated, p. 14). In France in terms of social security benefits a cohabiting partner is treated in the same way as a spouse (Ferrand, Francoz-Terminal, 2015, p. 3).

Moreover, due to the rising rate of cohabitation without marriage domestic courts of states from group one often try to find an equitable solution in property disputes between cohabitants by applying general provisions of civil law such as unjust enrichment or joint partnership. Such claims are lodged in the framework of civil (contract, corporate) law rather than family law and are resolved by courts on an *ad hoc* basis. For example, in Austria, in the division of property cases between unmarried cohabitants, courts may use analogies with civil law associations, donations, unjust enrichment and service contracts (Roth, Reith, 2015, p. 4). In Lithuania the Supreme Court considers property relations of unmarried couples as relations between parties to the agreement on joint activities (partnership) (Ruling of the Supreme Court of Lithuania [2016] 3K-3-72-686/2016). In fact, in one of its landmark rulings, the Supreme Court of Lithuania established that in order to recognize joint activities (partnership), non-married partners should have persistent cohabitation, manage property jointly and contribute to the creation of common assets with their financial and work input (Ruling of the Supreme Court of Lithuania [2011] 3K-3-134/2011). In England unmarried cohabitants may file a civil claim under the Trusts of Land and Appointment of Trustees Act (1996) and demand their share in the partner's property by claiming an ancillary declaration of trust took place at the moment of asset purchase (Bull, 2020). In contrast, some national courts take a completely different stance towards *de facto* cohabitation. For instance, the Supreme Court of Greece describes unmarried cohabitation as a notion "located on the margins of legal life" and refuses to apply provisions on unjust enrichment to such relations (Judgement of the Supreme Court of Greece (Areios Pagos) [2008] 874/2008). The Supreme Court of the Republic of Estonia directly stated that extramarital obligations do not entail similar obligations as marriage, including mutual support and arrangements regarding the common household (Decisions of the Civil Chamber of the Supreme Court of the Republic of Estonia [2014] 3-2-1-109-14).

However, some states from the first group recognized the importance of governing unmarried cohabitation for the common good and are on their way to developing legislation on the legal consequences of such relations. For instance, in the UK a comprehensive Cohabitation Rights Bill passed first reading in the House of Lords on February 2020.

The second major group in our classification is represented by states which recognize certain consequences of unmarried cohabitation in the sphere of property regimes, maintenance and/or inheritance but have not yet adopted elaborate legislation to comprehensively govern these relations. This group comprises states such as the Czech Republic, Mexico, Paraguay and others.

Some of those states have regulations only regarding inheritance, while other also govern issues related to the division of property and maintenance. A good instance of the first subgroup is the Czech Republic where cohabitants fall under the third class of heirs together with the children after the spouse (1st class) and parents (2nd class) of the deceased (Civil Code Of The Czech Republic, 2012). Another example is Mexico where all rules of inheritance for married couples apply automatically to concubines, although all property obtained in the *de facto* marriage is considered separate (External Assessor of Foreign Affairs Secretariat, undated, p. 12).

Certain states from the second group went further and laid down a legal framework for the division of property after the break-up of unmarried cohabitation. For instance, in Paraguay all assets accumulated during unmarried cohabitation are subject to the classic community property regime in case the parties cohabited together as a family for more than 4 years (Ministry of Foreign Affairs of Paraguay, undated, p. 15). In Ireland cohabitants that meet the necessary conditions regarding duration of the relationship in the event of breakup may seek redress in court in the form of compensatory maintenance order, a property adjustment order a pension adjustment order or an order for the provision from the estate of the other cohabitant (Shannon, 2015).

The third group is represented by states where unmarried cohabitation is governed in detail by a vast array of provisions of the civil/family code or even by a separate law. This group includes Croatia, Hungary, Finland, Ukraine as well as some exotic entities such as the Special administrative region of Macau (China).

Croatia is among the few states where cohabitation (common-law marriage) is mentioned in the Constitution. Under Article 61 (3) of the Constitution of the Republic of Croatia “marriage and legal relations in marriage, common-law marriage and family shall be regulated by law”. The Family Act states that property consequences of cohabitation are identical to those of a marital union and all the provisions regarding marriage are applicable to the former *mutatis mutandis*. However, the legal effects of cohabitation apply only to a relationship between an unmarried man and woman which lasts at least 3 years or less if partners have a common child born or if the relationship has been succeeded by marriage. Cohabitation and marriage are considered legally equal not only in the area of family law, but in inheritance, social security, and pensions law (Rešetar, Lucić, 2020, p. 2–3).

In Hungary cohabitation is governed within the framework of two books of the Civil Code. According to the definition laid down in Article 6:514 of the Civil Code, cohabitants are two persons living together outside of wedlock in an emotional and financial community in the same household. Cohabitants are permitted by law to enter into a special agreement to regulate their property relations. In the event of absence of such agreement, a default property regime is applied. The law also stipulates maintenance obligations towards the former cohabitant and governs the use of the common dwelling after termination of cohabitation. The right of maintenance and the right to request a judicial decision on the use of common dwelling may apply if cohabitation lasted for at least one year and the parties had a common child.

In Finland there are over 70 statutes across all administrative sectors which include reference to cohabiting couples (Silvola, 2015, p. 1). In 2011 a separate Law on the Dissolution of the Household of Cohabiting Partners was adopted. The Law governs the property relations between unmarried couples and is applicable to both to homo- and heterosexual couples. The Law considers a couple to be cohabiting partners if they currently live in a relationship in a shared household and (1) have lived in a shared household for at least 5 years or (2) have or have had a joint child or joint parental responsibility for a child (Act on the Dissolution of the Household of Cohabiting Partners, 2011). Nevertheless, a married person shall not be considered a cohabiting partner. The Law sets forth a presumed common property regime for movable property unless an agreement or other circumstances suggest otherwise. Property division may take place when cohabitation ends and may be performed either in a separation deed or by an estate distributor appointed by the court. Moreover, every party is entitled to file a court claim regarding compensation if he/she believes the division of property has caused the unjust enrichment of the other cohabitant. The parties are not obliged to support each other by law and have no inheritance rights towards one another. However, if the surviving cohabitant after the death of its significant other requires financial support to secure his/her livelihood, such cohabitant may receive support from the estate of the deceased in the form of money, other property or usufruct (Ministry of Justice of Finland, undated, p. 14–15).

In Ukraine the term unmarried cohabitation (“cohabiting as a family”) appeared in legislation in 2004 when the new Family Code of Ukraine entered into force. Under Article 74 of the Family Code of Ukraine if man and woman cohabit together as a family but are not officially married with each other or any other person, the property obtained by them in the course of cohabitation shall be considered common unless a written agreement between them provides otherwise. The Supreme Court of Ukraine specified that the provisions of this article envisage only cases where the man and the woman are not

married (i.e. to third parties) and have established a “stable relations inherent to spouses” (Resolution of the Plenum of the Supreme Court of Ukraine dated 21.12.2007 No.11). When hearing cases of the division of property between unmarried cohabitants Ukrainian, courts establish whether the parties had common life, household and budget, and whether their relations had a family-like nature. Court practice suggests that the judiciary considers the following as proof of family cohabitation: witness statements, documents that prove an established household (e.g. joint payment of bills), photographs, common vacations, church engagements etc. However, all these proofs are not taken into consideration if the parties were not cohabiting together. In a recent landmark case, the Supreme Court of Ukraine discarded strong evidence suggesting close intimate relations between a couple and did not recognize the existence of “cohabitation as a family” because the parties lived separately in different countries (Ruling of the Supreme Court of Ukraine in case No.6-97тс11 dated 20.02.2012). Article 91 of the Family Code also stipulates that if an unmarried man and woman lived as a family “for a substantial amount of time”, the party that became disabled during their cohabitation is entitled to maintenance. Unmarried couples are also granted inheritance rights: under Article 1264 of the Civil Code of Ukraine a person that cohabited as a family with the deceased for at least 5 years is in the fourth line of inheritance by law.

In Macau the Civil Code contains a special chapter devoted to *de facto* marital unions. Such unions are defined as relations between two persons living voluntarily in the manner and conditions similar to marriage. A couple must meet certain conditions to fall within the category of a *de facto* marriage: they should be of different sex, both over 18 years old, unmarried and sharing a single “bed and board” (Legal Affairs Bureau of Macao Special Administrative Region of the People’s Republic of China, undated, p. 17–18). If such conditions are met, all the legislation regarding registered marriages shall apply to such unmarried cohabitation *mutatis mutandis*. However, some restrictions exist in the case of inheritance: unlike spouses, cohabitants are in the third line of inheritance and inherit property only if they lived with the deceased as a family for over 4 years. Meanwhile, in the whole People’s Republic of China, there are no special legislative provisions that govern unmarried cohabitation. Nonetheless, court practice that recognizes property consequences of *de facto* marriages is emerging. Namely, in 1989 the Supreme People’s Court of China ruled that some legal assumptions regarding official marriages are also applicable to unmarried cohabitation (Ministry of Foreign Affairs of China, undated, p. 11–12). From that point Chinese court apply the community property regime on debts and assets accumulated during cohabitation on an *ad hoc* basis.

2. International law and unmarried cohabitation with a foreign element

The problem of legal regulation of unmarried cohabitation exists not only on the national but also on the international level. One of the major challenges for contemporary international family law is the appearance of a foreign element in unmarried couples. As stated above, most states do not recognize the legal notion of unmarried cohabitation or recognize it only for a limited number of purposes, hence the cohabitants have no determined legal status. Naturally, in such states the question of resolving conflicts of laws in the presence of a foreign element in *de facto* marriages does not arise because the legal institute of unmarried cohabitation is non-existent. Furthermore, even states that define unmarried cohabitation in its national legislation do not enshrine specific conflict of law rules for such relations.

The question of law applicable to unmarried couples was first raised at the international level by the Permanent Bureau of the HCCH in the 1980s. However, as of today the HCCH or any other international organization did not succeed in drafting a universal international convention stipulating universal material

norms regarding unmarried cohabitation or providing relevant conflict of law rules. The reason behind this was the failure of different states to arrive at a common understanding on the basic principles of the legal institute of unmarried cohabitation and its correspondence with domestic public order.

Regional efforts to come to common grounds on the issue of unmarried cohabitation have also come to a standstill. There are no regional agreements regarding conflict of laws in property relations between unmarried partners in any region of the world. In addition, the issue of unmarried cohabitation remains unaddressed at the level of EU law. Despite numerous discussions on the topic, cohabitation outside marriage was left out from EU Council Regulation 2016/1104 of 24 June 2016, which instead focused on the property consequences of registered partnerships. However, recent activities of the Commission on European Family Law (CEFL) suggest that the issue of unmarried cohabitation remains on the EU agenda. In August 2019, the CEFL published its fifth set of Principles of European Family Law regarding the property, maintenance and succession rights of couples in *de facto* unions (Boele-Woelki *et al.*, 2019). These principles contain a set of rules on property relations of unmarried cohabitants, which are intended to serve as an inspiration for national legislators of EU member states.

3. Conflict of law rules to resolve property issues of unmarried cohabitation

The perspective of adopting an international convention with universal material norms to govern property relations in unmarried unions currently seems improbable due to major differences between states. However, considering the pressing need for rules to resolve conflicts of law in unmarried cohabitation with a foreign element, let us consider the possible variants of determining the law applicable to the fact of emergence of unmarried cohabitation and its property consequences.

The author believes that in order to determine the mere fact of emergence and existence of *de facto* marriage one should apply the conflict of law rule on common citizenship of the parties (*lex patriae*), and in the event of its absence – the parties' last common place of residence (*lex domicilii*). The rule of common citizenship arises from the principle of closest connection, while the supplementary *lex domicilii* rule is suggested by the very nature of the relations. The conflict of law rule on the application of the law of the state where cohabitation was established is less suitable, because the issue of determining the place of emergence of such relations may be quite problematic due to the absence of an act formalizing the relations. Indeed, situations may occur where the law of state to which *lex patriae* or *lex domicilii* principles refer will not have no legal institute of unmarried cohabitation. The reason behind this is that the legal notion of unmarried cohabitation is not yet universally recognized by states on the national level. However, this statement will be true for practically any conflict of law rule one might propose for unmarried cohabitation.

Determining the law applicable to property consequences of unmarried cohabitation poses yet another problem for international family law. The primary choice here, as in most civil-law relations, is *lex voluntatis*. Cohabitants should be allowed to choose the law applicable to their property relations if there is a foreign element in such relations. However, there are no prenuptial agreements in *de facto* marriages, which makes the choice of law in such relations less likely. Moreover, the very nature of unmarried cohabitation is that it requires no formalization or paperwork, hence the parties are much less likely to enter into formal agreements of any kind, including agreements on the choice of law. Therefore, a supplementary conflict of law rule should be introduced. In the event of the absence of *lex voluntatis*, the author suggests applying the law of common citizenship to property relations. If the cohabitants have no common citizenship, courts should resort to the law of the country of their last common residence.

Conclusions

All states may be divided into three groups regarding their legal approach to issues of unmarried cohabitation. The first group is the largest one and includes states which contain no concept of *de facto* unions at all or govern only minor legal issues of cohabitation in their national legislation. The second group is represented by countries which recognize certain consequences of unmarried cohabitation in the sphere of property relations but have no comprehensive legislation on the issue. The third group comprises states where unmarried cohabitation is governed in detail and has legal consequences in the sphere of property regimes, maintenance and inheritance. However, practically no states in the world have introduced conflict of law norms on unmarried cohabitation.

One of the major challenges for contemporary international family law is the appearance of a foreign element in unmarried cohabiting couples. The perspective of adopting an international convention with universal norms on unmarried cohabitation is highly improbable due to the differences in opinion between states. Regional efforts to draft a regional treaty on the issue remain unfruitful.

The first step in resolving this legal vacuum should be the gradual development of national legislation to materially govern unmarried cohabitation. One may make use of the successful examples of Finland, Hungary, Ukraine or Macau which adopted detailed legislation on the issue as well as resort to the findings of prominent scholars such as the Principles developed by CEFL. The second step ought to be the development of conflict of law norms on the national level to resolve matters regarding unmarried cohabitation with a foreign element. In order to determining the fact of emergence and existence of *de facto* unions, one should apply the conflict of law rule on common citizenship of the parties (*lex patriae*), and in the event of its absence – the parties' last common place of residence (*lex domicilii*). In order to decide on property consequences of unmarried cohabitation, we propose to apply *lex voluntatis*, and in the absence of a special agreement – the law of common citizenship and the law of the country of the last common residence. Only after these measures are taken the states will be ready to proceed to the third step, i.e. working up a common approach on the international level with the help of regional and universal institutions.

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Property relations between unmarried cohabitants in international family law

Anatoliy Pashynskiy

(Institute of International Relations of Taras Shevchenko National University of Kyiv)

S u m m a r y

The number of people who cohabit without marriage is increasing every year. Based on the legal approach to issues of cohabitation outside marriage, countries may be divided into three groups. The first group comprises states which do not govern the relations of unmarried cohabitation in their national legislation. The second group is represented by states that recognize certain consequences of unmarried cohabitation in the sphere of property regimes and/or inheritance but have not yet developed elaborate legislation to govern such relations. The third group is represented by states where unmarried cohabitation is governed by a vast array of legal provisions or by a separate law.

Practically no state in the world introduced conflict of law rules to resolve property issues of *de facto* marital unions. Efforts to adopt a convention with material norms or conflict of law rules on unmarried cohabitation have yet been unsuccessful. In order to resolve the legal vacuum states should at first introduce national legislation to materially govern unmarried cohabitation, then develop domestic conflict of law rules and only afterwards proceed to drafting international conventions on the issue. The author proposes to use *lex patria* and *lex domicilii* rules to determine the law applicable to the fact of emergence of unmarried cohabitation, and *lex voluntatis*, law of common citizenship and law of the last common residence for its property consequences.

Nesituokusių sugyventinių turtiniai santykiai pagal tarptautinę šeimos teisę

Anatolij Pašinskij

(Kijevo nacionalinio Taraso Ševčenkos universiteto Tarptautinių santykių institutas)

S a n t r a u k a

Žmonių, kurie gyvena nesutuokę, skaičius kasmet auga. Remiantis teisiniu požiūriu į gyvenimo nesutuokus klausimus valstybės galima suskirstyti į tris grupes. Pirmą grupę sudaro valstybės, kurios nesutuokusių sugyventinių turtinių santykių nereglementuoja savo nacionaliniuose įstatymuose. Antrai grupei atstovauja valstybės, kurios pripažįsta tam tikrus nesutuokusių sugyventinių turtinių santykių padarinius nuosavybės režimų ir (arba) paveldėjimo srityse, tačiau dar nėra sukūrusios išsamių teisės aktų, kurie reglamentuotų tokius santykius. Trečiai grupei priklauso valstybės, kuriose nesutuokusiųjų sugyvenimą reglamentuoja daugybė teisės nuostatų arba atskiras įstatymas.

Praktiškai nė viena pasaulio valstybė neįvedė įstatymų kolizijos normų, kad išspręstų santuokinių sąjungų *de facto* nuosavybės klausimus. Kol kas nesėkmingi bandymai priimti konvenciją su materialinėmis normomis arba sukurti įstatymų kolizijos taisykles dėl nesutuokusiųjų sugyvenimo. Siekdamas pašalinti teisinį vakuumą, valstybės narės iš pradžių turėtų priimti nacionalinius įstatymus, kurie materialiai reglamentuotų nesutuokusiųjų sugyvenimą, tada sukurti vidaus įstatymų kolizijos taisykles ir tik paskui rengti tarptautines konvencijas šiuo klausimu. Autorius siūlo naudoti *lex patria* ir *lex domicilii* taisykles, kad būtų galima nustatyti įstatymą, taikytiną nesutuokusiųjų sugyvenimo atsiradimo faktui, ir *lex voluntatis*, bendros pilietybės įstatymą ir paskutinės bendros gyvenamosios vietos įstatymą dėl jo turtinių padarinių.

Anatoliy Pashynskiy is a PhD student at the Department of Private International Law in the Institute of International Relations of Taras Shevchenko National University of Kyiv (Ukraine) and a senior associate at Vasil Kisel & Partners law firm. His main areas of scientific interest include international family law and comparative family law, inter alia matters of property relations between spouses, registered partners and unmarried cohabitants.

Anatolij Pašinskij yra Kijevo nacionalinio Taraso Ševčenkos universiteto Tarptautinių santykių instituto Tarptautinės privatinės teisės katedros doktorantas ir advokatų kontoros „Vasil Kisel & Partners“ vyresnysis teisininkas. Jo pagrindinės mokslinių interesų sritys yra tarptautinė šeimos teisė ir lyginamoji šeimos teisė, *inter alia*, sutuoktinių, registruotų partnerių ir nesutuokusių sugyventinių turtinių santykių klausimai.