The Legal Treatment of Cohabitation in Poland and the United States

Margaret Ryznar, U.S. Court of Appeals for the Eighth Circuit
Anna Stępień-Sporek

Available at: https://works.bepress.com/margaret_ryznar/10/
THE LEGAL TREATMENT OF COHABITATION IN POLAND AND THE UNITED STATES

By Anna Stępień-Sporek* and Margaret Ryznar**

ABSTRACT

The increasing popularity of cohabitation, as manifested in the recent American and Polish censuses, has introduced various issues to the courts and legislatures in each country—among the most important being the protection of cohabitants after an unsuccessful cohabitation. However, neither country has recognized a comprehensive law on cohabitation, instead permitting cohabitation agreements and unjust enrichment theories to govern the termination of the cohabitation. Many issues, furthermore, are treated collaterally by the law through, for example, paternity laws. Although there are certain disadvantages to such an approach to cohabitation, these shortfalls need to be balanced against the consequences of the increased regulation of cohabitation. This Article considers these various issues, offering a comparative perspective to the discussion regarding cohabitation law.

I. INTRODUCTION

The dynamic nature of family law is well illustrated by the issue of cohabitation. In some corners, discouraged, in others, favored—cohabitation, or the residential union of two romantic partners outside of marriage, has encountered many different social, legislative, and judicial reactions. The opportunity for these reactions has only increased with the growing popularity of cohabitation among couples.

With rising rates of cohabitation among couples, it is important to further survey the law relating to cohabitation,1

* Associate Professor of Law, University of Gdańsk School of Law, Poland. Doctor and Master of Law, University of Gdańsk.
** Associate at Cadwalader, Wickersham & Taft LLP. J.D., Notre Dame Law School; M.A. European Studies, Jagiellonian University; B.A. Economics, English Language & Literature, Political Science, and Law, Letters, & Society, University of Chicago. The views expressed in this Article are those of the authors alone.
1 Cohabitation has been the subject of academic scholarship, but not of significant legal change. For a sampling of the literature on cohabitation, see Marsha Garrison, Nonmarital Cohabitation: Social Revolution and Legal Regulation, 42
particularly that governing the end of a cohabitation, which can be triggered by a cohabitant’s death or the breakup of the relationship.\(^2\) This is not an uncommon occurrence: only 10% of cohabitants who do not marry within five years remain together.\(^3\)

Upon the end of a relationship between cohabitants, many concerns arise, including property division. Issues related to child-bearing might also appear—33.8% of births in the United States in 2002 were nonmarital, many the result of cohabitation.\(^4\) The absence of a comprehensive law on cohabitation, however, means that many of these problems are only collaterally addressed by the law through, for example, paternity or contract law. This collateral approach is typically triggered only upon the end of the relationship, when legal resolution and intervention is often necessary to wind down the relationship. The necessity of comprehensive legal regulation of cohabitation during the relationship, however, is the subject of both great debate and this Article.

Nonetheless, despite this dynamic discussion on cohabitation,\(^5\) the law on cohabitation has remained static in recent years. There may be numerous reasons for this, including the fact that many cohabitations intend to exist outside the law. Furthermore, perhaps even more so than marriage, cohabitations are difficult to characterize—even the levels of relationship commitment differ among couples, some of whom are same-sex.\(^6\)

---

\(^2\) Cohabitation, by current definition, falls outside legal regulation. This would likely remain uncontroversial if cohabitations were uniformly successful and therefore never triggered the issues attendant to the breakup of a relationship. See infra note 121 and accompanying text.

\(^3\) Garrison, *Nonmarital Cohabitation*, supra note 1, at 322. However, “approximately 60% of all U.S. cohabitants and 70% of those in a first, premarital cohabitation marry within five years.” *Id.* at 322.

\(^4\) This is as opposed to only 3.8% of nonmarital births in the U.S. in 1940. Garrison, *Nonmarital Cohabitation*, supra note 1, at 314.


\(^6\) Marsha Garrison notes the various types of cohabitation types, from negligible commitment, to a step in the marriage process, to informal marriage. Garrison, *Nonmarital Cohabitation*, supra note 1, at 323.
Given the resilience of the issues surrounding cohabitation, a comparative analysis might offer a new perspective. This Article therefore considers heterosexual cohabitation in Poland and the United States. These two countries have been selected for analysis because, despite their lack of coherent law on cohabitation, they have each encountered and dealt with the issues arising from such relationships. They have done so differently, offering the opportunity for comparative analysis.

Accordingly, Part II of this Article begins by surveying American law on cohabitation, while Part III does the same for Polish law. Part IV compares and analyzes the issues arising from cohabitations in both countries, offering concluding thoughts on the legal treatment of nonmarital cohabitation given that many of these relationships intend to exist outside of legal regulation.

---

7 For a discussion of these various issues in same-sex relationships, see, for example, Symposium, Breaking With Tradition: New Frontiers for Same-Sex Marriage, 17 YALE J.L. & FEMINISM 65 (2005); Symposium, Can Anyone Show Just Cause Why These Two Should Not Be Lawfully Joined Together?, 38 NEW ENG. L. REV. 487 (2004); Same-Sex Marriage Symposium Issue, 18 BYU J. PUB. L. 273 (2004); American Bar Association Section of Family Law, A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, 38 FAM. L.Q. 339 (2004). For a discussion of the legal remedies following the breakup of a same-sex cohabitation, see, for example, Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001).


9 “There are several [legal] approaches [to cohabitation] that can be taken, for example: laissez faire, leaving the parties to rely on the general law for any remedy; an ‘opt-in’ scheme, which enables parties to jointly sign up to a legislatively determined regime (or perhaps to choose from more than one option); a special statutory scheme that is imposed on the parties, possibly with an opt-out mechanism; or the equation of unmarried relationships with marriage (and civil unions or registered partnerships if they exist in the country).” Bill Atkin, Reflections on “De Facto Relationships” in Recent New Zealand Legislation, 39 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 793, 793-94 (2009). But see infra note 139.
II. THE LEGAL TREATMENT OF COHABITATION IN THE STATES

Cohabitation in the United States is largely a legally unprotected status that confers no rights or obligations on cohabitants, despite some initial case law on the topic in the 1970’s that made inroads into the judicial recognition of cohabitation. Nonetheless, cohabitation, in both its rights and obligations, remains separate and legally distinct from marriage in the United States. Notably, its rates have dramatically increased over the past five decades. Despite this dynamic increase of cohabitation, however, its legal treatment has remained relatively static in recent years.

A. Background on Cohabitation in the United States

Cohabitation has traditionally been discouraged by most states’ laws, especially prior to the 1970’s. This discouragement manifested itself both in social disapproval and in the lack of remedies upon the dissolution of the cohabiting relationship. As is often the case, it is unclear whether the law influenced social attitudes against cohabitation or vice versa.

Much of the opposition to cohabitation has been rooted in public policy reasons, which range from the disapproval of sexual relationships outside of marriage to concern for women and children

---

10 It is not easy to define “cohabitation.” See infra notes 106-08 and accompanying text. But see infra notes 56, 109 and accompanying text.
11 For the argument that Marvin v. Marvin, although progressive on the topic of cohabitation, failed to open the floodgates to cohabitant claimants and failed to increase the success of these claimants, see Garrison, Nonmarital Cohabitation, supra note 1, at 322. This is not to say that Marvin has been ignored. See Kohm & Groen, supra note 5, at 266 n.43 (“Included among the states which have followed the Marvin approach are Minnesota (Carlson v. Olson, 256 N.W.2d 249 (1977)) and New Jersey (Koslowski v. Koslowski, 403 A.2d 902 (1979)). Other states have accepted some, but not all of the grounds for recovery sanctioned by Marvin. See, e.g., Marone v. Marone, 50 N.Y.2d 481 (1980); Tapley v. Tapley, 122 N.H. 727 (1982). Some states follow minimal aspects of Marvin. See, e.g., MINN. STAT. § 513.075 (2004); TEX. FAM. CODE ANN. § 1.108 (Vernon 1998).”)
12 See, e.g., Schwegmann v. Schwegmann, 441 So. 2d 316, 324 (La. Ct. App. 1983) (noting Louisiana’s interest in discouraging “relationships which serve to erode the cornerstone of society, i.e., the family.”); Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979) (rejecting the contract claims between unmarried cohabitants due to a public policy “disfavoring private contractual alternatives to marriage.”).
of unstable cohabitations. Many commentators have further pointed to research suggesting the significant shortcomings of cohabitations when compared to marriage, especially in terms of the partners' benefits from these relationships.

This disapproval of cohabitation has meant a very short history of cohabitation in the United States. Not until the 1970’s did cohabitation begin to more frequently appear both in society and in the literature, before which it was “statistically and socially invisible.” Several factors may have influenced the drastic, including shifting views of marital and non-marital relationships.

Whichever the reason, however, there is no question that the recent increase of cohabitation has been dramatic: there were fewer than 500,000 opposite-sex cohabiting couples in 1960, but there were 4.9 million couples cohabiting in 2000. Despite this increase of

---

13 See, e.g., Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) (“Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor.”). For recommendations on how to protect children from the full consequences of a failed cohabitation, see Israel L. Kunin & James M. Davis, Pitfalls and Promises: Cohabitation, Marriage and Domestic Partnerships: Article: Protecting Children and the Custodial Rights of Co-Habitants, 22 J. AM. ACAD. MATRIMONIAL LAW. 29 (2009). See also supra note 12 and infra note 134.

14 William C. Duncan, The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation, 82 OR. L. REV. 1001, 1005-13 (outlining research suggesting that cohabitants are less faithful to each other, less happy, less wealthy, and less stable than married couples). See also Brinig & Nock, supra note 1, at 403 (noting that cohabitation reduces the partners’ chances of future marital success).

15 Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 J. L. FAM. STUD. 1, 4 (2007) (citing Kathleen Kiernan, European Perspectives on Union Formation, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 40, 42 (Linda J. Waite ed., 2000) (“It was statistically invisible both because it was not very common and because it could not be reliably studied until large-scale surveys and longitudinal studies were undertaken. And it was socially invisible because, as I describe below, the phenomenon was largely confined to lower-income and less-educated people.”)). Sociologist Eleanor Macklin determined 1966-1975 as the point at which cohabitation gained greater social acceptance. Eleanor D. Macklin, Nonmarital Heterosexual Cohabitation: An Overview, in CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES 49, 52 (Eleanor D. Macklin & Roger H. Rubin eds., 1983).

16 For speculation on these factors, see, for example, infra note 49.

17 Bowman, supra note 15, at 7.
cohabitation in recent years, however, American law has not comprehensively addressed cohabitation, instead adopting the piecemeal approach that is considered next. The possible reasons for this cautious approach—not least that many cohabitations intend to exist outside legal regulation—are considered in Part IV.

B. American Law Regarding Cohabitation

Family law predominantly falls within the domain of the states and there is no one consistent legal approach to cohabitation among the states. However, California’s approach, outlined in the watershed case, *Marvin v. Marvin*, now embodies the approach of most states.

*Marvin* concerned a Hollywood couple’s six-year cohabiting relationship. Upon the end of the relationship, Michelle Marvin brought suit against Lee Marvin for declaratory relief, asking the court to determine her contract and property rights. These claims were based on an alleged oral promise between the Marvins that Michelle would render services to Lee as companion, homemaker, housekeeper and cook, surrendering her career as an entertainer and singer, while, in exchange, Lee would provide financial support for the rest of her life. Shortly after the relationship ended, however, Lee stopped supporting her, prompting Michelle to bring a lawsuit for continued support.

In overruling the lower court, the California Supreme Court held that the terms of the contract as alleged by Michelle did not rely upon any unlawful consideration, providing a basis for declaratory

---

18 See, e.g., Moore v. Sims, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”). Justice Antonin Scalia, however, has expressed concern about the federalization of American family law: “I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.” Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).
20 Garrison, *Nonmarital Cohabitation, supra* note 1, at 315.
21 *Marvin*, 557 P.2d at 110.
22 *Id.* at 111.
23 *Id.* at 110.
24 *Id.*
relief.25 The court further held that express contracts between nonmarital partners should be judicially enforced unless explicitly founded on the consideration of meretricious sexual services.26 The court also concluded that if cohabitants lacked an express contract, the court should inquire into the conduct of the parties to determine whether that conduct demonstrated an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.27 To resolve such cases, the Marvin court suggested the use of the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts.28

Given the previously strong public policy reasons against both the acknowledgement of cohabitations and the enforcement of cohabitation agreements,29 the Marvin case was relatively radical at its time.30 At the same time, however, Marvin was not the limitless sanction of cohabitation remedies as often portrayed. Instead, Michele received little relief from the subsequent remand and appeal.31 Furthermore, the California Supreme Court’s opinion included language that could constrict cohabitants’ freedom by allowing courts to inquire into the parties’ “conduct” and “the nature of their relationship.”32

On the opposite end of the spectrum from Marvin, there is Hewitt v. Hewitt.33 In that case, the Illinois Supreme Court held that a cohabitation did not trigger any property rights. The court noted, “The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the

25 Id. at 116.
26 Id. at 122.
27 Id.
28 Id. 122-23; see infra Part IV.B and infra note 122.
29 See supra Part II.A.
30 See Garrison, Nonmarital Cohabitation, supra note 1, at 315.
31 Id. at 317.
33 394 N.E.2d 1204 (Ill. 1979).
institution of marriage sanctioned by the State.”³⁴ The court decided this was not appropriate.³⁵

Nonetheless, as Marsha Garrison points out, appellate courts in at least half the states have now permitted contract claims between cohabitants, although a few have rejected recovery based on implied contract.³⁶ On the other hand, five states, including Illinois, have disallowed any relief based on a cohabiting relationship.³⁷

In any American jurisdiction, however, the legal rights and obligations of cohabitants are fewer than those of spouses.³⁸ In many states, cohabitants can jointly adopt,³⁹ qualify for protection under state domestic violence legislation,⁴⁰ and receive certain judicial remedies following their breakup.⁴¹ On the other hand, cohabitants do not have the full rights and obligations of marriage⁴² and there is

³⁴ Id.
³⁶ Garrison, Nonmarital Cohabitation, supra note 1, at 315-16.
³⁷ These include Illinois, Mississippi, Georgia, Louisiana, and Michigan. Garrison, Nonmarital Cohabitation, supra note 1, at 316.
³⁸ See infra note 42.
⁴⁰ See, e.g., FLA. STAT. ANN. 741.30 (West 2004), MINN. STAT. ANN. 518B.01 (West 2004), WIS. STAT. 813.12 (WEST 2004).
⁴² For example, the spousal privilege regarding adverse testimony and confidential communications does not extend to cohabiting couples. Katherine M. Forbes, Note, Time for a New Privilege: Allowing Unmarried Cohabitees to Claim the Spousal Testimony Privilege, 40 Suffolk U. L. Rev. 887, 887 (2007). Also, “[c]ourts seem particularly hesitant to allow cohabitational partners to recover in tort actions, such as loss of consortium.” Alisha M. Carlile, Note, Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions, 46 B.C.L. Rev 391, 392 (2005). Another tort action for which unmarried cohabitants rarely recover is bystander recovery for negligent infliction of emotional distress. Meredith E. Green, Comment, Who Knows Where the Love Grows?: Unmarried Cohabitees and Bystander Recovery for Negligent Infliction of Emotional Distress, 44 Wake Forest L. Rev. 1093 (2009). Finally, cohabitants rarely have automatic inheritance rights. Jennifer Berhorst, Note, Unmarried
no comprehensive law on cohabitation, with many issues arising from the cohabitation being dealt with by the law collaterally. Many states have continued to outlaw fornication and cohabitation. Finally, the cohabitation of an ex-spouse creates grounds to end alimony.

In the face of this piecemeal legal approach of most states, the influential American Law Institute proposed ALI Principles on the subject of cohabitation as a model for state legislation in 2001. These principles defined domestic partners as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.” Importantly, the principles would recognize a domestic partnership status and grant legal implications for the termination of a cohabitation similar to those upon the dissolution of marriage. However, these principles have not catalyzed states to pass comprehensive state law on cohabitation and have been criticized.

In sum, American law on cohabitation is a patchwork of provisions that differ from state to state, with the result that most issues arising from cohabitations are dealt with by the law on a collateral basis, whether through paternity or contract law. A parallel situation has arisen in foreign countries that likewise lack a comprehensive law on cohabitation, such as Poland—considered next.

Cohabiting Couples: A Proposal for Inheritance Rights under Missouri Law, 76 UMKC L. REV. 1131 (2008). These are only a few examples of the marital privileges and obligations that cohabitants lack.

43 See, e.g., FLA. STAT. § 798.02 (2010); N.C. GEN. STAT. § 14-184 (2010); VA. CODE ANN. § 18.2-345 (2010). See also Margaret M. Mahoney, Forces Shaping the Law of Cohabitation For Opposite Sex Couples, 7 J. L. FAM. STUD. 135 (2005).
46 Id.
47 Id.
48 For a criticism of these principles, see, for example, Westfall, supra note 32, at 1467. But see Strasser, A Small Step Forward: The ALI Domestic Partners Recommendation, supra note 35.
III. THE POLISH STANCE ON COHABITATION

One of the key examples of the evolution of family law was the change of the traditional type of family wherein the husband is the bread winner and the wife is the homemaker. This evolution of marriage to adjust to people’s preferences and realities, however, has not stopped the increase of cohabitations in replacing marriages in Poland. Therefore, it is important to evaluate the background and legal status of these types of relationships in Poland as they increase in prominence.

A. Background on Cohabitation in Poland

In Poland, cohabitation is more common today than a few years ago, but not as popular as in other countries. Nonetheless, although cohabitation remains more of a social phenomenon than a legal institution, every year more people decide to cohabit because they do not want their relationship governed by law, nor do they want to obey the given rules—preferring the possibility of

49 Also changing has been society’s perception of marriage. Jared Richards, Note, Turning a Blind Eye to Unmarried Cohabitants: A Look at How Utah Laws Affect Traditional Protections, 2007 UTAH L. REV. 215, 216 (2007) (“A number of social factors such as women’s suffrage, mobility, the civil rights movement, reproductive technology, and divorce reform, have shaped the way we view marriage.”).

50 One of the types of cohabitation is a religious marriage, i.e., a marriage made in the church under church law, but not necessarily in the Roman Catholic Church—it can be any church. In Poland, there are therefore two forms of getting married. Future spouses can choose a civil marriage and a religious marriage with civil consequences—only these marriages are recognized by law. Religious marriages, without civil consequences, are treated under Polish law as unmarried cohabitations. See, e.g., TADEUSZ SMYCZYŃSKI, PRAWO RODZINNE I OPIEKUŃCZE 28-40 (2009). Meanwhile, religious marriages are also known as “de facto marriages” (małżeństwa faktyczne). See Miroslaw Nazar, Prawo Rodzinne i Opiekuńcze, in SYSTEM PRAWA PRYWATNEGO 933 (2009).

51 The level of so-called informal marriages grew from 1.3 % of all marriages in 1988 to 2.2 % in 2002. See Monika Młynarska & Laura Bernardi, Meaning and Attitudes Attached to Cohabitation in Poland, 16 DEMOGRAPHIC RESEARCH 520-554 (2007). For corresponding American data, see Marsha Garrison, Nonmarital Cohabitation, supra note 1, at 313. Professor Garrison reported that in the United States, between 1970 and 2000, the number of cohabitations rose almost ten-fold—from 523,000 to 4,880,000.

52 For data concerning cohabitations, see, for example, Kathleen Kiernan, Unmarried Cohabitation and Parenthood in Britain and Europe, 26 LAW & POLICY 33-55 (2004).
establishing their own rules. This does not necessarily mean, however, that the law on marriage is inflexible or that it deprives spouses of the freedom to create the rules concerning their relations. Nor is it harsh or difficult to divorce. Nonetheless, many cohabiting couples desire to avoid the legal consequences of marriage.

The term “cohabitation” was originally used to name the relationship between a woman and a man, but nowadays also applies to gay and lesbian couples. Rather surprisingly, no Polish legislation uses the terms “cohabitation” or “concubinage,” instead using the terms “close persons,” or people “being in de facto relationships,” “living together,” “being in intimate relations,” or “actually cohabiting.”

Of course, cohabiting relationships are various—the extent and the level of intimacy in such relationships can differ. Some cohabitants are so intimate that they may not differ from spouses; for

---

53 “An important reason why marriage is controversial is that it is in decline. All across the industrialized world, young adults are marrying later and increasing numbers may not marry at all. Those who do marry face a relatively high probability that their relationships will terminate in divorce. As a result of these convergent trends, today’s adults spend, on average, a smaller proportion of their adult lives within a marital household than did their ancestors.” Marsha Garrison, Reviving Marriage: Could We? Should We?, 10 J. L. FAM. STUD. 279, 282 (2008).


55 In this context, the term “cohabitation” is more appropriate for the relationships of heterosexual and homosexual couples then the term “concubinage.” The opinion in Poland regarding whether the term “concubinage (konkubinat)” should be used to refer to same-sex couples is divided. Interestingly, the official translation of the French Civil Code uses the term “concubinage” to refer to both opposite- and same-sex couples. French Civil Code, available at http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=355.

56 See the definition given by Wanda Stojanowska, who wrote that cohabitation is “a real union between a man and a woman who live together in a way parallel to married life without being married.” Wanda Stojanowska, Poland: Cohabitation, 27 J. FAM. L. 275 (1988-1989).

57 Smyczyński, supra note 54, at 462. It should be added, however, that there are some doubts regarding this definition. See Mirosław Nazar in: 11 SYSTEM PRAWA PRYWATNEGO. PRAWO RODZINNE I OPIEKUNCZE 909-10 (2009).

58 There is only one act using this term – ustawa z 22 stycznia 1999 r. o ochronie informacji niejawnych (Classified Information Protection Act of 22nd January 1999 - Dz. U. z 2005 r., nr 196, poz. 1631 ze zm.).
example, their personal and property relations are the same as between spouses. On the other hand, there are cohabitants whose personal relations are very strong, but not their property relations. Although the property relations of cohabitants do not have prevailing meaning, it cannot be denied that such relations could cement the relationship.  

Nonetheless, the common point between these two extreme models of cohabitation is a relationship with the presumption of long-lasting cohabitation, despite the lack of formal basis. The crucial feature of cohabitation is therefore the permanent consent of being together—temporary relationships and accidental acquaintances are not cohabitations. The lack of this consent at any moment of the relationship causes its breakdown. In marriage, however, such consent to be together is important at wedlock, but its latter absence does not end the marriage—additional circumstances must arise for a spouse to file a lawsuit for divorce.

The key element of cohabitation is the common home. The temporary separation of cohabitants caused by extraordinary circumstances, however, does not preclude the couple from being cohabitants. Furthermore, two-homes cohabitations are possible when cohabitants have two homes but their relationship is based on commitment, co-acting, mutual help, and the commitment of both parties’ activity to the fulfilment of their common needs.

At the moment, the legal status of same-sex couples is similar to opposite-sex cohabitants—cohabitations are not legally recognized and such unions are rare. Although Poland’s neighbor Germany has introduced law regarding same-sex couples, Poland

---

59 See the decision of The Supreme Court of 30th January 1986 (III CZP 79/85).
60 This feature of cohabitation is not, however, highlighted in the law concerning cohabitation.
61 See art. 56 KRO.
63 See Nazar, supra note 57, at 918.
64 However, this approach is criticized. See, e.g., Michal Plachta, O Prawie Odmowy Zenznań Osoby Najблиższej, 10 PAŃSTWO I PRAWO 66 ff (1988).
65 See Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften vom 16.2.2001, verkündet in Jahrgang 2001 Nr. 9 vom 22.2.2001. England has also been considering cohabitation legislation. See infra note 105; see also R.J. Probert, A Review of Cohabitation:
has not yet done so. Currently, the Constitution of Republic of Poland states that marriage is a relationship between a woman and a man.\(^6^6\) Same-sex couples therefore could not be married without a change to the Constitution.\(^6^7\) One possible solution is to decide that the appellation “marriage” will not be used to describe such relationships.\(^6^8\) Nonetheless, with regard to both same-sex and opposite-sex cohabitation, no comprehensive regulation currently exists in Poland.

**B. The Law Regarding Cohabitation in Poland**

In Poland, there is no law introducing negative consequences to cohabitation,\(^6^9\) which is in accordance with Recommendation N° R(88)3 of the Committee of Ministers to Member States on the validity of contracts between persons living together as unmarried couples and their testamentary dispositions.\(^7^0\) This approach to cohabitation may be described as neutral and pragmatic.\(^7^1\)

Nonetheless, Polish law generally remains indifferent to the set up and break down of cohabitations. However, given the increase of cohabitations, Polish legislators have given cohabitants some rights. In certain situations, cohabitants receive protection “based on social, moral, and human consideration.”\(^7^2\) Many of the legal consequences of cohabitation, however, are the result of a close relation between the partners, a common home, the maintenance of a common household, or a common livelihood.

---

66 See art. 18. According to this provision “marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland” (http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm).


68 Using another term, but giving same-sex couples the same rights as spouses, could permit circumvention of the law. See Nazar, *supra* note 57, at 946.

69 Living in either heterosexual or homosexual cohabitation is not forbidden by law.

70 The recommendation was adopted by the Committee of Ministers on 7 March 1988, at the 415th meeting of the Ministers’ Deputies.


72 Stojanowska, *supra* note 56, at 278.
It is significant that the Polish Supreme Court (Sąd Najwyższy) noted that cohabitation has a permanent place in the system of moral standards and principles in modern society, implying the necessity of taking cohabitations into account when interpreting legislation that uses terms such as “member of family” or “close person.”

Nonetheless, this statement should be supplemented with reservations—according to KRO, “family” consists of spouses and their children. Some provisions expand this definition to further relatives, but cohabitants, according to KRO, are not a family. They can be treated as a family only in other situations than those mentioned in KRO, and the conclusion that cohabitants are family could be derived only after a complex examination of the features of the given relationship. Another important observation is that KRO regulates relations between parents and children even in the context of cohabitants’ rights—this regulation is not connected with the status of parents as married or unmarried.

Polish regulations on cohabitations can be divided into four groups. The first one consists of provisions taking into account people living together in an intimate relationship. The second one includes provisions using the term “close person” or “closest person.” Importantly, these provisions include the guaranteed right of refusal to testify in a criminal case against a cohabitant and the

---

73 See the decision of The Supreme Court of 13th April 2005, IV CK 648/04. In this decision, the Court confirmed the opinion that art. 446 § 3 KC should be applied to cohabitants. This provision guarantees that, upon the death of a person as a result of tort, “the closest family members,” whom the deceased voluntarily and permanently provided with means of substance, may demand an annuity from the person obliged to redress the damage.


75 Szlęzak, Cohabitation Without Marriage, supra note 71.


77 See, e.g., art. 446 § 2 KC; art. 908 § 3 KC.

78 See art. 115 § 11 KK.

79 Notably, the prevailing opinion is that a cohabitant is not a “close person” according to the Kodeks postępowania cywilnego (Code of Civil Procedure of 17th November 1964) and therefore has no privilege to refuse to testify. See Tadeusz
protected right to occupy an apartment.\textsuperscript{80} The third group of regulations on cohabitations takes into consideration the keeping of a common household.\textsuperscript{81} Finally, the last group of provisions uses terms “family” and “member of a family” in a broader sense and differently from the meanings used in KRO.\textsuperscript{82} Due to a wider definition of “close persons,” in criminal law, cohabitants have a well-developed set of rights.\textsuperscript{83} Nonetheless, cohabitation is not a basis for awarding alimony between cohabitants.\textsuperscript{84} Specifically, cohabitation is not a legal union and such a de facto union does not bear obligations of alimony between partners.\textsuperscript{85}

These various regulations on cohabitations do not mean, however, that cohabitants have the same rights as spouses. These rights would be especially important in the law of succession and at the breakdown of the cohabiting relationship. However, at the breakdown of a cohabitation, Polish courts have decided not to apply the rules governing divorces,\textsuperscript{86} and have also decided that the regulation of KRO on the breakdown of marriage does not cover cohabitation. It is not possible to apply these rules because there is no gap in the regulation.\textsuperscript{87} In fact, cohabitations are outside of

\textsuperscript{80} According to art. 691 KC, a “close person” becomes ex lege lessees upon the death of a person renting an apartment. However, one condition must be fulfilled: the close person must have lived with the deceased person continuously up to his or her death.

\textsuperscript{81} See, e.g., art. 827 § 3 KC; art. 828 § 3 KC.

\textsuperscript{82} See, e.g., art. 6 pkt 14 ustawy z dnia 12 marca 2004 r. o pomocy społecznej (Social Assistance Act of 12th March 2004) and art. 111 § 3 ustawy z dnia 29 sierpnia 1997 r. – Ordynacja Podatkowa (Tax Law of 29th August 1997).

\textsuperscript{83} See, e.g., art. 52 KK; art. 58 KK; art. 61 KK; art. 63 § 1 KK; art. 182 KK; art. 183 § 1 KK; art. 183 § 2; art. 184 KK; art. 191 § 3 KK; art. 261 § 1 KK; art. 542 § 2 KK.

\textsuperscript{84} Nazar, supra note 57, at 924.

\textsuperscript{85} Stojanowska, supra note 56.

\textsuperscript{86} See, for example, the decision of The Supreme Court of 2nd July 1955, II CO 7/55.

\textsuperscript{87} Sometimes it is considered permissible to make an analogy to the case of the breakdown of a religious marriage (see MIROSŁAW NAZAR, ROZLICZENIA MAJĄTKOWE KONKUBENTÓW 52 (1993)), but this is not a common opinion and in
regulation. Laws using *expressis verbis* the terms “marriage” or “spouses” cannot be used in any case as the source of rights for cohabitants.

In Poland, there was no watershed case on cohabitation, like the *Marvin* case in the United States. Perhaps such a case could shift the status of cohabitants in Poland, but cases regarding remedies for cohabitations are rather rare in the courts, although it is possible to find some decisions of the Supreme Court regarding the property consequences upon the termination of cohabitation. The majority opinion is that cohabitants may enter into typical contracts (*contractus nominatus*) or other contracts (*contractus innominatus*) so long as they are within the confines of the freedom of contract. Such contracts do not have effects in relation to third parties even if they are informed of the contracts—this is one of the features distinguishing contracts of cohabitants from marital agreements.

Cohabitation certainly does not limit the freedom of contract and cohabitants can regulate their rights and duties using contracts not forbidden by law. Such contracts may be connected with the personal relations of cohabitants. However, these relations often determine the provisions of the contracts concluded by cohabitants. Cohabitants can also make an agreement concerning the distribution of their property when the cohabitation is terminated. Such a contract is not recognized by the law, but can nonetheless be created

---

88 See the decision of Sąd Apelacyjny (the Appeal Court) in Warsaw from 8th October 1997 (I ACa 648/97).
89 *Marvin v. Marvin*, 557 P.2d 106, 121-22 (Cal. 1976); see also supra Part II.B.
90 Szłęzak, *Cohabitation Without Marriage in Poland*, supra note 71, at 6. See *infra* note 95.
91 For a discussion of this concept, see Margaret Ryznar & Anna Stępień-Sporek, *To Have and to Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAPMAN LAW REVIEW 52, 59 (2009).
92 See the decision of the Supreme Court of 30th January 1970, III CZP 62/69.
93 Personal bonds between cohabitants are an argument for questioning the possibility of using general rules of contracts to cohabitations. For further details, see Brunon Paul, *Koncepcja Rozliczeń Majątkowych Między Konkubentami*, 3 PRZEGLĄD SĄDOWY 40 (2003).
94 Sometimes personal relations between cohabitants are so strong that performances of cohabitants can be qualified as gratitude and courtesy services. The dominant opinion, however, is that performances of cohabitants are non-gratuitous. See Nazar, *infra* note 57, at 956.
by parties within the frames of freedom of contract. This may be a kind of a framework agreement similar to that contract concluded by entrepreneurs. Partners may introduce the rules regarding their duties in the household and toward children, their common expenses, or the place of their home. However, the contract would be void if contrary to the general regulations in force or the principles of community life.  

Unjust enrichment is another theory used by Polish courts in dealing with the termination of a cohabitation. Although this doctrine can be used, contributing money and goods to a cohabitant during the cohabitation is justified even though there is not any legal basis for such contributions. In one of the cases concerning cohabitants, for example, the Supreme Court in Poland decided to apply the rules of joint-ownership and its dissolution, but this is an isolated opinion. It is impossible to introduce a presumption that everything that is acquired by one cohabitant is the subject of joint-ownership of both cohabitants. Furthermore, the expenditures made so as to improve the property of the other cohabitant can be not treated as a title to purchase a share in co-ownership.

Nonetheless, one of the most significant problem for cohabitants is the death intestacy. The surviving cohabitant is deprived of everything because only family members such as children, spouses, parents, brothers, sisters, grandparents, and stepchildren are successors. The successor is also a local community and the State Treasury. A cohabitant, as a “close person” who lived with the deceased up until the day of death, is entitled to retain the use of the dwelling and its household equipment for a period of three months from the day of the death. The source of much litigation is the division of assets when the cohabitant is a co-owner. Nonetheless, the consequences of succession law can be changed by

95 See supra note 90, infra note 128, and accompanying text.
96 See, for example, the decisions of the Supreme Court of 30th September 1966, III PZP 28/66; of 30th January 1970, III CZP 62/69; of 27th June 1996, III CZP 70/96; of 26th June 1974, III CRN 132/74; of 16th May 2000, V CKN 32/00; of 7th May 2009. See also infra notes 122-25 and accompanying text.
97 See the decision of the Supreme Court of 30th January 1986, III CZP 79/85; see also Szlęzak, Cohabitation Without Marriage in Poland, supra note 71, at 9.
98 The order of succession is crucial. Those successors are divided into groups and the next group come into inheritance when the previous one can not inherit or does not want to inherit. See art. 931-940 KC.
99 Art. 923 KC.
a well-prepared will.\textsuperscript{100} This is possible because, in Poland, the same principles are applied to testamentary dispositions of cohabitants as to other persons. Of course, the surviving cohabitant should take into consideration the legitim.\textsuperscript{101}

In sum, cohabitation in Poland has been increasing, although not as much as in other countries. Any nonnegligible number of cohabitations, however, forces courts to deal with important issues upon the termination of the cohabitation and the protection of the cohabitants.

IV. COMPARATIVE LESSONS REGARDING COHABITATION

As evidenced by the preceding consideration of cohabitations in both the United States and Poland, the primary inquiry into the legal treatment of these relationships is whether they should be regulated by law. The ensuing debate, however, reveals that among the most important considerations is the protection of cohabitants upon the termination of a cohabitation. This goal has been addressed, to varying extents, by the use of cohabitation agreements and the theory of unjust enrichment. The shortfalls of these approaches, however, need to be balanced against the consequences of the increased regulation of cohabitation.

A. The Legal Regulation of Cohabitation

The push behind the legal regulation of cohabitation, and the imposition of marriage-like expectations, may reveal a pro-marriage inclination previously exhibited by a quickness to classify cohabiting relationships as common law marriages.\textsuperscript{102} On the other hand, perhaps legal recognition of cohabiting relationships undermines marriage by conflating the two differing levels of commitment,

\begin{footnotes}
\item[100] See the above mentioned Recommendation N° R(88)3.
\item[101] Legitim is a monetary claim that the testator’s descendants—the surviving spouse and parents of the testator who would be the heirs under an intestacy—have to the successor appointed in the will (legitim, zachowek). This claim amounts to one half of the value of the part that the entitled person would have taken in intestacy. As a rule, the legitim is detached from the financial situation of the entitled persons. It should be added, however, that a person who is permanently incapable of work or is a minor receives a fraction that amounts to two-thirds of the part in intestacy. The legitim is not based on the needs of the entitled persons.
\item[102] For further background on common law marriage, see infra note 114. The primary distinction between cohabitation and common law marriage is that in the latter, couples hold themselves out to be married.
\end{footnotes}
meanwhile obviating the need to marry to gain legal benefits. In this way, the law may have the potential to influence the behavior of couples to not marry.

Whichever the case, however, the preparation of regulation of cohabitation is very complex. Cohabitations are *ex definitione* outside of any regulation—an argument in favor of leaving the status unregulated. Furthermore, it is problematic to formulate law on cohabitation given the difficulty of determining an authoritative definition of cohabitation—including the necessary timeframe.

---


104 But see Bowman, supra note 15, at 38-43 (arguing that marriage is so well-ingrained and appreciated in American society that legislating on cohabitation has no impact on it); Garrison, *Reviving Marriage*, supra note 1, at 284, 287 (noting that “it would be premature to write an obituary for marriage,” “marriage remains an important life goal for most Americans,” and “overwhelmingly, young Americans assert that they would be ‘more economically secure, have more emotional security, a better sex life, and a higher standard of living’ if they were married.”). Professor Garrison also suggests that it might be possible that cohabitation is delaying, but not replacing, marriage. Garrison, *Reviving Marriage*, supra note 1, at 285.


triggering a cohabitation, the starting point of the cohabitation, and the depth of the cohabitation.\textsuperscript{107}

The most important issue is therefore to construct the definition of cohabitation. Although the relationships of cohabitants can widely differ,\textsuperscript{108} there are some common features that should be used in the definition. In some countries, such definitions exist so that doubts regarding terminology are not obstacles to legislation.\textsuperscript{109} Those feature should be expressly outlined, which is significant especially in Poland—a civil law country where precedents are not a source of law and do not have binding force, being only guidelines. In any proposed definition, the stability and continuity of the relationship should be considered. Nonetheless, such a standard would give judges a wide margin of discretion, which sometimes can permit bias when the judge holds a strong belief that only marriage creates rights and that cohabitation is undesirable.

There are demands made by representatives of doctrine to regulate the rights of cohabitants. Significantly, cohabitants want to be given rights without duties,\textsuperscript{110} which could be controversial and the source of many problems. For example, spouses could feel unfairly treated because marriage means both rights and duties.\textsuperscript{111}

If cohabitants want to avoid involving the law in their relationship, however, any potential regulation could inevitably result in another set of relationships. Specifically, the result might be the existence of both cohabitations regulated by law and those sufficiently different to avoid legal regulation.\textsuperscript{112} Furthermore, the regulation of cohabitations could weaken the institution of marriage because some couples, taking into account the prospective rights of

\textsuperscript{107} Compare the problems mentioned in Stroud v. Stroud, 641 SE2d 142 (Va App 2007).
\textsuperscript{108} See supra note 6 and accompanying text.
\textsuperscript{109} Cohabitation was legally defined in Hungary in 1977. For further details about cohabitation in Hungary, see Orsolya Szeibert-Erdős, \textit{Same-Sex Partners in Hungary. Cohabitation and Registered Partnership}, 4 UTRECHT LAW REVIEW, 212-221 (2008).
\textsuperscript{110} Smyczyński, \textit{Czy Potrzebna Jest Regulacja Prawna Pożycia Konkubenckiego}, supra note 54, at 462.
\textsuperscript{111} This is another way the law on cohabitation could be perceived to discourage marriage. See also supra note 104 and accompanying text.
\textsuperscript{112} For example, if cohabitation legislation is triggered by a three-year cohabitation, many cohabitations would end by that mark, especially if cohabitants are well-informed of the law.
cohabitants, could decide to stay in cohabitations. In this way, the legislator would promote such relationships.\footnote{See supra notes 103-04 and accompanying text.}

Nonetheless, one primary argument for the regulation of cohabitation is that such regulation would protect the more vulnerable partner from unmet expectations and exploitation. According to this argument, if one partner contributes nontangible value to the cohabitating relationship, this contribution might not be recognized by the courts. In many contexts, this reasoning intends to protect women from leaving the relationship with less than they contributed.\footnote{It has been suggested that women may not be able to bargain as aggressively and therefore need judicial protection. Andrew J. Cherlin, Toward a New Home Economics of Union Formation, in The Ties That Bind: Perspectives on Marriage and Cohabitation 133 (“[W]omen do not bargain as far toward the margins of their power as men do.” (quoting Paula England & Barbara Stanek Kilbourne, Markets, Marriages, and Other Mates: The Problem of Power, in Beyond the Marketplace 163, 171 (Roger Friedland & A.F. Robertson eds., 1990))). This may have been the reasoning, in part, behind imposing common law marriage on certain cohabiting couples. See, e.g., Jennifer Thomas, Comment, Common Law Marriage, 22 J. Am. Acad. Matrimonial Law 151, 157 (2009). However, the question is whether the reduction of a woman to a skill set is advancing women in relationships. For example, the courts have not permitted agreements for one partner to be “a lover, companion, homemaker, traveling companion, and cook” because of its resemblance to a sex-for-hire contract. Garrison, Nonmarital Cohabitation, supra note 1, at 319.} However, cohabitation agreements and the theory of unjust enrichment may achieve these goals without changing the unregulated nature of cohabitation. These substitutes for legal regulation of cohabitations are considered next.

B. Alternative Legal Protections of Cohabitants

Cohabitation is a social phenomenon,\footnote{Nowadays it is not an “undesired phenomenon,” although legislators promote marriage and give spouses more rights. See Szlęzak, Cohabitation Without Marriage in Poland, supra note 71, at 4.} which may be a basis for legal recognition. However, this does not mean that complete and developed regulation is necessary. In fact, although rates of cohabitation are increasing, they might be increasing precisely due to the lack of legal regulation of the status. In any case, cohabitation should not be treated the same as marriage and these two institutions should not be concurrent. Instead, the cautious approach is warranted and regulation should reach only as far as the basic
protection of cohabitants is necessary.\textsuperscript{116} Any additional consequences of cohabitations should be left to the cohabitants to determine. Using the freedom of contract, they could construct their relationship in a way that fulfils their expectations and is not forbidden by law. They may also structure their property holdings through joint ownership.\textsuperscript{117}

In fact, given the relatively small number of cohabitants,\textsuperscript{118} resources might better be spent developing the contractual framework for agreements between cohabitants and general rules, instead of a comprehensive legal framework governing cohabitations. This is especially true given that the Recommendation of the Committee of Ministers states that “many problems concerning persons living together as an unmarried couple may be resolved by the conclusion of contracts between such persons.”\textsuperscript{119} Importantly, there are no obstacles, in either the Polish or American legal systems, to applying contract law to cohabitations.\textsuperscript{120}

Of course, when a cohabitation proceeds smoothly, nobody is concerned with the consequences of a hypothetical breakdown of the relationship, especially given that the cohabitants do not want the law involved in their relationship. However, when the relationship fails, cohabitants attempt to find any legal basis for receiving

\textsuperscript{116} For arguments in favor of a cautious approach in regulating cohabitations, see Garrison, \textit{supra} note 1. Nonetheless, cohabitants have been left largely unprotected by the law. One commentator notes, “The National Conference of Commissioners on Uniform State Laws and state legislatures should respond to the widely felt need for greater certainty and predictability in this area by specifying the circumstances under which cohabitants have claims against each other when their relationship ends and the manner in which such claims can be modified or eliminated. For example, compensation may be appropriate for a cohabitant who pays for education or training of the other party.” Westfall, \textit{supra} note 32, at 1490.

\textsuperscript{117} Title and ownership would therefore be in both cohabitants.

\textsuperscript{118} According to the National Census of 2002, cohabitants composed only 1.8 \% of families. Single parents were more prevalent—they composed 19.4 \% of families. These statistical data were collected 8 years ago and the situation has changed a bit since then, but cohabitation is still not prevalent. However, this does not mean that it should not be mentioned at all. Furthermore, those data could be misleading because some people conceal cohabitation in order to avoid losing privileges for single parents. They declare being single parents despite being cohabitants. These kinds of privileges were given as an example of reasons for cohabitation in Poland even 25 years ago. See Stojanowska, \textit{supra} note 56, at 279.

\textsuperscript{119} Recommendation of the Committee of Ministers, \textit{supra} note 70.

\textsuperscript{120} Szlęzak, \textit{Cohabitation Without Marriage in Poland}, \textit{supra} note 71.
compensation from their former partners for their outlays, work in the household, help in an enterprise, or other expenses made during the cohabitation.\textsuperscript{121}

If no agreement or joint ownership exists between the cohabitants, courts often use the theory of unjust enrichment in awarding parties compensation for a failed cohabitation.\textsuperscript{122} The theory of unjust enrichment essentially permits the court to order restitution in an unjust situation wherein the defendant has obtained a benefit at the plaintiff’s expense.\textsuperscript{123} The court therefore must evaluate the cohabitation and award compensation based on its judgment of the relationship—no doubt a difficult task for courts,\textsuperscript{124} but not entirely different from those decisions made during divorce proceedings.\textsuperscript{125}

To limit this judicial discretion, couples entering into cohabitations are therefore well-advised to seek a cohabitation agreement that establishes the consequences of the relationship, such as property division upon the end of the cohabitation.\textsuperscript{126} This is especially important if the partners do not hold property jointly.\textsuperscript{127} Of course, couples must be mindful of public policy limits to the
judicial enforcement of these agreements. Nonetheless, the cohabitation contract is similar to marital agreements in that it introduces the general rules on property of spouses and does not cause the transfer of specific goods to other kind of property. Instead, the contract organizes property relations between the cohabitants.

Such cohabitation contracts, however, are not a basis for specific performance. Instead, they show the aims of partners and explain why the partners decided to perform in this or that way. If this objective was not reached, the rules on return of undue benefit are applied.

Nonetheless, these contracts may be controversial because it is not possible to use rules regarding marriage to cohabitations. Permitting the possibility of concluding such contracts may simply lead to circumvention of this prohibition. This is why some commentators suggest that cohabitants should not be allowed to create, through a cohabitation contract, the same or similar property regimes as the marital property regimes. Furthermore, until recently, in the United States, such contracts were held unenforceable as against public policy, which encouraged marriage and discouraged contracts for sexual relations.

The practical problem today, of course, is the rarity with which cohabitants enter into written agreements, even if it is a typical contract. In Poland, more so than in the United States, cohabitation agreements are not popular and are concluded very rarely, often only when the cohabitants are lawyers or have substantial assets.

---

128 See supra notes 95, 114 and accompanying text, as well as Part II.A.
129 For the meaning of marital agreements in Poland, see Ryznar & Stępień-Sporek, supra note 91.
130 See Nazar, supra note 57, at 958.
131 See the decision of the Supreme Court of 12th January 2006, II CK342/05. According to this decision, it is possible to get back money and goods given to a former partner if a plaintiff succeeds proving that donations were made because the former partner gave him basis to be convinced that their relationship would be long-lasting.
132 See further remarks about unjustified enrichment. See supra notes 96, 122-25 and accompanying text.
Furthermore, upon the termination of cohabitation, it is hard to have clear proof of the existence of a contract between cohabitants, as well as its terms. In such a case, cohabitants in Poland turn to art. 60 § 1 KC, which states that the intention of a person performing a legal transaction may be expressed by any means that sufficiently reveals his or her intention and a declaration of intent can be made by electronic means. In other words, the cohabitants try to prove that the conduct of their ex-partners implied a contract. However, such proof fails when the contract needs a special form to be valid—such as the notarial deed. When the proof is successful, however, the court uses rules based on the contract. The civil-law partnership is one of the most significant contracts, but sometimes courts are reluctant to apply its rules.

The transfer of goods between cohabitants, in many situations, is actually a contract of donation. In this context, the possibility to revoke a donation is essential. It may be done if the donee has been guilty of flagrant ingratitude toward the donor. The lack of the definition of “ingratitude” allows the inclusion of cases when a donee has, without just cause, left his or her partner. However, it is very controversial because of the key feature of cohabitation is that it can be terminated at any time by any party without the risk of negative consequences. Nonetheless, cohabitation agreements and the unjust enrichment doctrine continue to provide alternatives to the comprehensive legal regulation of cohabitation.

V. CONCLUSION

The increase of cohabitations in many societies, as illustrated by the experiences of the United States and Poland, has exposed courts and legislatures to many issues. Among the most important of

135 Compare Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979) (rejecting the contract claims between unmarried cohabitants due to a public policy “disfavoring private contractual alternatives to marriage.”); supra notes 27, 36 and accompanying text.


137 Art. 898 § 1 KC.

138 Szlęzak, Cohabitation Without Marriage in Poland, supra note 71, at 7.
these has been the protection of cohabitants after an unsuccessful cohabitation. However, neither country has recognized the application of a comprehensive law on cohabitation, instead permitting cohabitation agreements and entertaining theories of unjust enrichment. Many issues, such as the financial support of any resulting children, are treated collaterally by the law through, for example, paternity laws.

Although there are certain disadvantages to such an approach to cohabitation, these shortfalls need to be balanced against the consequences of the increased regulation of cohabitation. Specifically, many of these relationships intend to exist outside the domain of the law.\(^{139}\) Furthermore, should the law extend to cohabitations, another relationship status would develop to avoid legal regulation. The result is that only in marriage do partners currently seek and receive maximum rights and obligations.\(^{140}\) Cohabitants, on the other hand, accept fewer rights and obligations, as well as less clarity as the debate on cohabitation law continues.

\(^{139}\) When it comes to the potential legal treatment of cohabitations, “we find two extremes: cohabitants have little or no rights, or they have duties imposed upon and imputed to them as if they are married, when they have chosen not to marry.” Both have obvious disadvantages. Kohm & Groen, supra note 5, at 267. But see supra note 9.

\(^{140}\) See supra note 42.