

COHABITATION CONTRACTS AND CONSTRUCTIVE TRUSTS, TOOLS TO SECURE PROPERTY RIGHTS IN UNMARRIED COHABITATION IN INDIA: AN ANALYSIS

CONTRATOS DE COABITAÇÃO E FUNDAMENTOS CONSTRUTIVOS, FERRAMENTAS PARA GARANTIR DIREITOS DE PROPRIEDADE EM COABITAÇÃO SOLTEIRA NA ÍNDIA: UMA ANÁLISE

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Embora na maioria desses casos os tribunais tenham tratado do direito de manutenção da parceira, eles geralmente não se pronunciam sobre os direitos de propriedade dos parceiros. Este artigo tenta identificar a posição legal atual na Índia sobre os direitos de propriedade de coabitantes não casados. Os autores identificaram o vácuo legal e sugeriram remédios em propriedade e direito contratual. Fundos construtivos e contratos de coabitação foram identificados como ferramentas legais para combater a situação. Os autores também tentaram abordar o ceticismo do argumento de política pública que pode surgir na implementação desses remédios. O objetivo do artigo é ampliar o escopo da lei para torná-la apta a abordar a crescente realidade social da união estável.

Palavras-chave: União estável. Confianças construtivas. Contratos de coabitação. Estruturas familiares alternativas. Lei de família.

Abstract: A family is a fundamental unit of society, and analysing its forms and functions leads to creation and securing rights of its members. With the development of society, cultures have been witnessing the growth of unmarried cohabitation. India, too has seen a steady growth in such an alternate form of intimate partner relationship, witnessed in the form of increased litigation in courts as well as partial legislative recognition. Whereas in most such cases, the courts have addressed the right of maintenance of the female partner, they have usually been silent on the property rights of the partners. This paper attempts to identify the present legal position in India on the property rights of unmarried cohabitants. The authors have identified the legal vacuum and suggested remedies in property and contractual law. Constructive trusts and cohabitation contracts have been identified as legal tools to combat the situation. The authors have also tried to address the scepticism of the public policy argument that may arise in implementing these remedies. The aim of the paper is to expand the scope of the law to make it adept to address the growing social reality of unmarried cohabitation.

Keywords: Unmarried cohabitation. Constructive trusts. Cohabitation contracts. Alternate family structures. Family law.

Resumo: A família é uma unidade fundamental da sociedade, e analisando suas formas e funções leva à criação e garantia de direitos de seus membros. Com o desenvolvimento da sociedade, as culturas têm assistido ao crescimento da coabitação não casada. A Índia também tem visto um crescimento constante dessa forma alternativa de relacionamento de parceiro íntimo, testemunhado na forma de aumento de litígios nos tribunais, bem como de reconhecimento legislativo parcial.

Introduction

Property rights are key to economic development. When women have access to assets (especially those they are already the primary caretakers of), communities thrive...It allows them to invest in their families, changing outcomes for their children. Perhaps most importantly, it ensures that they can live with agency and dignity' (Arkepudi & Reteguis, 2020).

The definition of an average family has varied over time, thus resulting in different kinds of families on the basis of their formation and functioning. Marriage has traditionally been the norm for establishing a family and is thus, considered to be the foundation of society. However, with the development of society, the nature of forming families is gradually changing. Today's families are different from the traditional family in the following respects *viz.* increased fluidity, detachability, and interchangeability of family relationships; increased instances of "family behaviour" occurring outside of formal, legal family structures; and, changes within the family--changes in lines of authority and changes in attitudes about roles (FINEMAN, 2004, p. 1). These differences reflect *more* flexibility and *less* state control over the ways in which people live their intimate and family lives today. There is more room for private decision making about familial structures (Ibid. Pg. 3)

Unmarried cohabitation is a form of alternate living together, which has steadily been increasing in different parts of the world. In India too, the social reality of unmarried cohabitation has been observed. Unmarried cohabitations are analogous to a common law marriage. The four characteristics of such a relationship are that a couple is required to hold themselves out to the society as being akin to spouse; they have to be of legal age to marry; they have to be otherwise qualified to enter into a marriage, including being unmarried; and they have to voluntarily cohabit for a significant period of time. This definition was given in the landmark decision of *D Velusamy v D. Patchaimmal*. In this case, the Supreme Court of India embarked upon defining the term 'relationship in nature of marriage' found in the Protection of Women from Domestic Violence Act, 2005. It is through this law, that unmarried cohabitation has gotten statutory legitimacy in the country.

Therefore, both the judiciary as well as the legislature have recognised unmarried cohabitation as an alternate form of living together; albeit the society is yet to give full social recognition to such relationships. While some courts in India have observed in cases such as *Payal Sharma v Nari Neketan*, *Lata Singh v State of UP* and *Gulza Kumari & Ors. v State of Punjab & Ors.* that living together without marriage may be immoral but it is not illegal; the Supreme Court of India in the landmark decision of *Indra Sarma v VKV Sarma* has supported the view that living

together is neither a sin nor a crime, though socially unacceptable in India. This shows the growing acceptance of unmarried cohabitation in the legislative and judicial landscape of the country.

With growing number of instances of unmarried cohabitation in India, it is imperative to address the rights and responsibilities of such couples towards each other. Since unmarried cohabitation is a relationship of affect, physical intimacy and sharing of economic resources, it resembles marriage in many ways. A few rights that can be said to be common between marriage and unmarried cohabitation are the right to companionship, right to cohabitation, right to maintenance, and right to property. Though all of these rights are important for ensuring a meaningful life for people who choose to enter in such relationships, the focus of this paper is on the property rights of the partners.

The right to property is a basic human right in every welfare state. Ownership and access to property leads to a meaningful life as it consists of decision-making authority (BAKER, 1986, p. 749). These decisions are with respect to use and disposal of the property. As a right in rem, as long as one is a lawful owner of a property, all other persons are bound by the decisions of the owner. Denial of property rights subordinates one to others and therefore should be deemed unacceptable. This form of subordination is inconsistent with the notion of equality. Secured property rights also provide limited protection to people from unjust exploitation. Right in property which is used for productive purposes leads to welfare of the owner of the property as well as the society in general.

Property is a bundle of rights and can be created through acquisition; by virtue of birth; through a testament or disposition in one's favour; or, inheritance from a deceased person. In case of matrimony, states have hard law in place that provide for distribution of matrimonial property. However, there is no statutory protection for property acquired by cohabiting couples in many jurisdictions. Unmarried cohabitations or de facto unions are not registered and often do not give rise to any rights. Some jurisdictions, however, recognize de facto unions and establish equal rights and responsibilities for them that can vary in scope and depth (General Recommendation on Article 16, CEDAW, Para 23)¹

The need for attaching legal consequences on matters of property is to protect the vulnerable party. Women often do not enjoy economic gains of a family equally to the other members, and usually bear greater cost upon the breakdown of the relationship. This is even more prominent when the state provides little or no economic safety upon relationship

¹ General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women Economic consequences of marriage, family relations and their dissolution, Para 23

breakdown (Ibid). Therefore, securing rights of couples in unmarried cohabitation not only safeguards human rights but also women's rights.

1. Methodology

This study is exploratory in nature. The authors have analysed the need for securing the property rights of unmarried cohabitants through a historical understanding of the institution of marriage and the functions it performs. In this backdrop, the authors have analysed the present statutory framework in India governing unmarried cohabitation. The suggestions given by the authors have been inspired from analysis of cases and different case studies of unmarried cohabitations in the United Kingdom and the United States of America. The authors have analysed principles of family law, contractual law and equity to offer cogent solutions in the form of cohabitation contracts and constructive trusts.

2. Results and Discussion

In India, the law of inheritance is governed by the personal status laws that apply to people on the basis of their religion. India is a country dominated by primarily three religious groups- Hindus, Muslims and Christians. Their religious rules governing devolution of property have been codified and can be found in the Hindu Succession Act, 1956 and Indian Succession Act, 1925. The personal status law of Muslims governing distribution of property, has however, not yet been codified. The religious laws do not provide for distribution of property to unmarried cohabitation partners because these laws recognise couple formation only through marriage.

Property distribution in unmarried cohabitation is a grey area in India. Such relationships can dissolve either by separation or death of a partner. At such time, distribution of property will happen between the parties. Similar to the absence of right of cohabiting partners with respect to succession to property, the law in India is also silent in its application on distribution of property acquired by the cohabiting partners during the course of their relationship.

3.1 TESTAMENTARY SUCCESSION

Testamentary succession in India is governed by the Indian Succession Act, 1925. Through a plethora of cases, it is well settled that a testamentary succession in favour of the legatee will be upheld by the succession court if it fulfils all the requirements of a valid testament i.e., it was duly executed and attested. Further, there should not be any suspicious circumstances surrounding the execution of the will, and the will should be the last testamentary disposition of the testator.

The courts in India have held that some of the factors which may be used to determine the validity of a testament are, proof of genuineness of the signature or mark of the testator; mental capacity of the testator to execute the will; level of testator's comprehension of the nature and consequence of the disposition; exclusion of natural heirs without assigning any reason; and, incorrect information regarding relatives. When the testament is in favour of the surviving partner and these factors are established, the will can be executed.

Concern, however, arises when the deceased dies intestate. Non-testamentary succession is a subject matter of the personal status law of the parties. As per these personal status laws, 'spouse' has been recognised as an inheritor to the property of the deceased. The definition of spouse has to be read in light of the laws governing the marriage of the parties. When two persons solemnize their marriage according to the essential marriage ceremonies of the religion or custom applicable to them, they get the status of spouse for the purpose of succession laws. This interpretation leads to disentitlement of a surviving cohabiting partner in inheritance matters revolving around unmarried cohabitation. Since inheritance to property involves rival claims between natural heirs and a cohabitee, the courts apply the personal status laws of the deceased cohabitant.

3.2 COHABITATION CONTRACTS

At the time of dissolution of unmarried cohabitation, two types of properties are part of the joint estate of the couple; those that are acquired before the relationship and pooled together and those that are acquired together after entering into the relationship. It is not too uncommon to hear of instances where ownership and management of these properties are vested in separate persons in the relationship. Such divestiture can present problems. For instance, in an interview, the female cohabitant partner highlighted how she had contributed to the common household of

her and her partner, both monetarily as well as by taking care of the house. However, the ownership of the property vested with the male partner. At the time of sale of the house, all the proceeds were deposited in his account, virtually leaving the female partner without any asset to fall back upon in case the couple separated. While the male partner kept assuring that 'he will take care of her', yet upon final separation he left her no choice but to leave the house and the relationship.

This is very similar to the landmark case of *Marvin v Marvin* wherein October 1964 the plaintiff and the defendant "entered into an oral agreement" that while the parties lived together, they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts, whether individual or combined. Furthermore, they agreed to hold themselves out to the general public as husband and wife and that plaintiff would further render her services as a companion, homemaker, housekeeper and cook to the defendant. Shortly thereafter the plaintiff agreed to give up her lucrative career as an entertainer and singer in order to devote her full time to the defendant as a companion, homemaker, housekeeper and cook. In return the defendant agreed to provide for all of plaintiff's financial support and needs for the rest of her life. The couple lived together from 1964 through to 1970, after which the defendant compelled the plaintiff to leave his household. Though he continued to support her till 1971, he stopped thereafter. During the time they lived together, they acquired substantial property in the defendant's name.

Cohabitation contracts can help to resolve such cases. These contracts rest on the principle of community of property i.e., all property acquired during the relationship is equally the property of both partners and at the time of separation must be equally divided between them. Cohabitation contracts can specify that the properties be divided equally, or, in a pre-decided manner, between the cohabitants. Therefore, such contracts execute the implied or express promises of cohabitation. responsibilities upon death or separation and at breakup of the relationship. 'A relationship may well be made more stable and secure when a contract triggers a frank discussion of unmarried partners' commitment and if incentives are incorporated into to the agreement acknowledging each partner's rights and responsibilities.' (HANNAH, 2010. p. 29)

3.2.1 Contents of a Cohabitation Agreement

A cohabitation agreement should include a disclosure of each partners' assets and liabilities. It must specify how parties intend to deal with property owned before the relationship as well as that acquired afterwards. Naturally, the aim of any cohabitation contract should be protection of the rights of cohabiting partners upon dissolution of the relationship, either by

death or dissolution. In such a scenario, the drafting of the agreement should be such that the property vests in the surviving partner, or is shared only between them, excluding the claims of natural heirs of either partner. A common tool utilised to ensure that property is shared only among the cohabiting partners and not by the legal heirs is to create joint tenancy rights in the properties acquired during the relationship. As a joint tenancy will imply that each of the partners owns the property as a whole, upon the death of one joint tenant her/his share in the property passes to the other by application of the rule of survivorship. The property does not pass to the legal heirs of the deceased (Ibid, p. 30; GUPTA, 2009). Matters other than property that can form part of such agreement are support, custody or visitation rights for children born during the relationship and determination of health care insurance responsibility, payment of debts before and during the relationship. Inclusion of such clauses will make the agreement holistic and truly lead to protection of the rights of unmarried cohabitants.

3.2.2 Cohabitation contracts and public policy

Cohabitation contracts are often opposed for violating public policy. There are two public policy aspects implicit in the proposition of legally accepting the validity of cohabitation contracts- the execution of such contracts can lead to dissolution of the institution of marriage, and an increase in cohabitation (OLDHAM & CAUDILL, 1984, p. 118); and, these contracts may be based on meretricious agreements. Meretricious agreements are those agreements where the partners to the relationship contract to pay for the performance of sexual services and such contract amounts to prostitution. Therefore, it is illegal. As a result, many courts in the USA follow the approach that cohabitation contracts are enforceable unless sex is a part of the consideration. (Ibid. p. 114)

An unmarried cohabitation, however, is a wholly different way of living. Cohabitation relationships often involve incidents of marriage such as emotional and physical exclusivity of partners; expectations of a permanent relationship; stability and similar phenomena. Some partners may even commingle their assets, incomes, financial burdens and have children (NEWCOMB, 1979). As laid down in *Marvin v Marvin*, adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

The nature of unmarried cohabitation also shows that it is functionally similar to marriage. The nature of families is changing globally. "Family" is neither a term "with a unitary historical significance" nor a "monolithic and unchanging" institution. (KATZ, p. 1027). Privacy is a significant aspect of forming unions either of marriage or those that resemble marriage. Indian courts have recognised the societal reality of people living together in India and even upheld them on the constitutional principles of autonomy and privacy. Indian courts have also held that public good and public mischief are twin touchstones of public policy. An agreement should be held to be against public policy when going by prevailing social value, it has tendency to injure public welfare. (Gherulal Prakash v Mahadeodas Maiya). Therefore, if on one hand the state recognises unmarried cohabitation, denying safeguards to property by declaring such contracts unenforceable would amount to denying justice to parties, especially the economically weaker party.

Moreover, at present there is no quantitative data in India that can lead to a conclusion that execution of cohabitation agreements can lead to a dissolution of marriage and increase in cohabitation. In fact, India has one of the lowest divorce rates in the world at 1.1 percent (UN Women). In a study conducted on durability of marriages in India, describes the reasons for separation or divorce between married couples as the age at which partners get married; level of education; childbearing and having sons; as well as notions of romantic love, emotional physical and cognitive intimacy. (DOMMARAJU, 2016). These factors of separation are not exclusive to marriage as an institution and can even be observed in unmarried cohabitation.

3.3 COHABITATION AND CONSTRUCTIVE TRUST

When there is no express agreement between cohabitants dealing with disposal and distribution of their properties, constructive trust can be a useful tool to determine rights in property at the time of dissolution of the relationship. A constructive trust is an equitable doctrine that imposes liability upon the person who is otherwise unjustly enriched to transfer the property to the aggrieved person. It is a fiduciary duty owed by cohabitating partners towards each other, where intention as to ownership is usually attributed to the parties (Stack v Dowden).

Constructive trust is useful in cases where property has been acquired during the relationship and the ownership and management of the property are divested from each other. The courts in such cases, determine the distribution of the property based on the fact that the party with title accepted the contributions of the other party (Pettit v Pettit). Constructive trust is

based upon the common intention of the parties at the time of acquisition of the property and the breach of faith if the partner in whose name title was taken refuses to give effect to such common intention (Stenger, 1988). This common intention is determined from the conduct of the parties, for instance, when the partner in whom legal title is not vested has done something to facilitate the acquisition of property (*Gissing v Gissing*).

In the *Gissing* case the court held that it can also look into contributions to the down payment, to the mortgage instalments, or to other household expenses that allowed the other spouse to have funds available for the mortgage instalments of the suit property. Other factors that signify common intention include but are not limited to how parties arrange their finances—separately, together or a combination of both, whether they have children and how the household expenses and outgoings over the property are discharged. This principle has been enunciated in the much known decision of *Stack v Dowden*.

Therefore, in order to establish common intention, contributions may or not be financial. In the gendered division of labour that is often observed in families, inclusion of non-monetary contributions by women is essential. Even now, the participation of women in the workforce is less than that of men. Sometimes, women who decide to cohabit (just like marriage) may give up their careers or there may be a voluntary or imposed break on their careers due to pregnancy. As early as 1930s the Working Committee of the Congress (now, the Indian National Congress) had deliberated upon the issue of unpaid labour of the wife in the household and recommended that as compensation for the same the woman should get absolute control over a part of the family income and an inalienable right to share in the husband's property (BANERJEE, 1998). In fact, Indian women do the most unpaid care and domestic work of any country globally (SANGHERA, 2019) and Indian women's unpaid work is equivalent to 3.1% of the GDP of the country (Ibid.). Therefore, such a broadened understanding of contributions to the properties of cohabitants is a positive development.

Alongwith common intention, courts also assess detrimental reliance. Detrimental reliance deals with reasonable expectations and implies that the aggrieved party relied on the common intention to take up a course of action that turned out to be detrimental for her. In India, such a defence has been commonly observed in cases of promissory estoppel and is based on the theory that the aggrieved person has been misled or has been placed in a worse situation.

The constructive trust doctrine can also be applied to a class of live-in relationships called concurrent relationships. In such cases, one of the partners in the cohabitation relationship, is already married. If this married partner is the man, the female partner gets the

status of mistress or concubine. In India, this was factual matrix of the leading case of *Indra Sarma v VKV Sarma*. In this case the appellant and the respondent were working together. While the male partner was already married and had two children, the female partner was not. The two even started a business together from which both were earning, but eventually the male partner started carrying on the business with his son, thereby depriving her of earnings. He even took a loan from her and refused to repay it. Though the court could not provide any remedy to the aggrieved woman because of limited scope of the law, it recognised the need for incorporating constructive trust as a remedy for such cases.

Instances of such dependency and vulnerability in cohabitation are common. Therefore, once the courts are satisfied with the requirements of common intention and detrimental reliance, the claims of the cohabitants can be quantified.

3. Conclusion

Separation of a cohabitating couple can be peaceful or may be ridden with animosity. In either case, if the property rights are not determined, it can lead to the dependant partner becoming further poor. Peaceful settlement of such cases is only possible when the real intention of the parties, whether expressed or implied, is understood. These intentions can be gauged from cohabitation contracts, or in their absence, from the fiduciary duty owed by the partners towards each other, through constructive trusts.

Both partners to the cohabitation have a beneficial interest in the property that is acquired during their relationship. Therefore, a fair settlement of the properties between the two is essential for ensuring substantive equality in the society. It reduces the instances of unjust enrichment, especially in cases where the dependant partner has contributed through non-monetary actions. Ensuring such settlement will further help to achieve the basic constitutional tenets of social and economic justice.

Imposition of economic obligations upon persons who have consciously chosen to avoid matrimony may seem unjust. However, such arrangements between parties can be held to be matters of property and contractual rights. The present legal framework in India is silent on property arrangement of cohabitants. Alongwith the expansion of family law to recognise unmarried cohabitation, property and contractual law must also be expanded. Cohabitation contracts and constructive trust are remedies that will help in safeguarding the rights of unmarried cohabitants.

Matters of public policy and intention of parties can be put to rest through a proper application of these principles and contractual arrangements by the courts. The social reality of unmarried cohabitation cannot be ignored and as a duty of the welfare state, the rights of cohabitating partners must be secured.

References

Journal articles:

Arkepudi N. and Reteguis N. (2020). Women's property rights are the key to economic development. *World Bank*. [Online URL: <https://blogs.worldbank.org/developmenttalk/womens-property-rights-are-key-economic-development>] accessed on July 9, 2022.

Baker, E. (1986). Property and its relation to constitutionally protected liberty. *University of Pennsylvania Law Review*. 134(4). 741-816.

Banerjee, N. (1998). Whatever happened to the dreams of modernity? the Nehruvian era and woman's position. *Economic and Political Weekly*. 33(17). WS2-WS7.

Dommaraju, P. (2016). Divorce and Separation in India. *Population and Development Review*. 42(2).195-223

Fineman M. (2004). Progress and progression in family Law. *University of Chicago Legal Forum*. 1: 1-25

Gupta A. (2009, February 22). Joint ownership of property. *Economic Times*. [Online URL: <https://economictimes.indiatimes.com/joint-ownership-of-property/articleshow/4167937.cms?from=mdr>] accessed on July 5, 2022.

Halley, J. (2011). What is family law?: a genealogy Part I. *Yale Journal of Law and the Humanities*. 1-109.

Hannah, J. (2010). The law & living together: A cohabitation agreement is essential protection for unmarried couples. *Family Advocate*. 32(3). 28-32.

James E. (1952). *Marriage and society*. Hutchinson University Press.

Katz, S. (1979). Legal History and Family History: The Child, the Family, and the State. *Boston College Law Review*. 21. 1025-1036.

Newcomb, P. (1979). Cohabitation in America: an assessment of consequences. *Journal of Marriage and Family*. 43 (3). 597-603.

Oldham & Caudill. (1984). A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts between Cohabitants. *Family Law Quarterly*. 18(1). 93-141.

Sanghera, T. (2019, March 30). How unpaid work is keeping India's women away from increasing inequality. *Business Standard*. [Online URL: <https://www.business-standard.com/article/current-affairs/how-unpaid-work-is-keeping-india-s-women-away-from->

[increasing-inequality-119033000605_1.html](#)] accessed on January 3, 2023.

Stenger, R. (1988). Cohabitants and constructive trust: a comparative approach. *Journal of Family Law*. 27 (2). 373-452.

Witherspoon Institute (2006). *Marriage and the Public Good: Ten Principles*. Princeton. [Online URL: <http://www.laikos.org/PublicGood.pdf>.] accessed on January 10, 2023.

Cases:

Badri Prasad v Dy. Director of Consolidation and others AIR 1978 SC 1557

Gissing v Gissing [1971] AC 886

Gherulal Prakash v Mahadeodas Maiya & Ors. 1959 AIR SC 781

Gulza Kumari & Ors. v State of Punjab & Ors. PLR (2021) 202 P&H 711 (2).

Indra Sarma v VKV Sarma (2013) 15 SCC 755

Lata Singh v State of UP (2006) 5 SCC 475

Marvin v Marvin 18 Cal. 3d 660

Payal Sharma v Nari Neketan AIR 2001 All 254

Pettit v Pettit [1970] AC 777

Stack v Dowden [2007] 2 UKHL 17

State v Manu Gopal (2019) Delhi District Court, S.C. No. 456/2017

Reports:

UN Women, Progress of the World's Women 2019-2020: Families in a Changing World.

Interviews:

Ms. Sandra Williamson on 'Why you may need a cohabitation contract' [Online URL: https://www.youtube.com/watch?v=Ugj2iL_gjFU]