



Right To Succession of Cohabitees: A Study

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Abstract

Many thinkers have said that law both initiates social change and reacts to it and while Cohabitation has become a major social change since the beginning of the twenty-first century, the law has not followed in many countries. But some countries have made the link between the law and the society's needs and naturally, they become the reference by which other countries will emulate in the future. In that regard, this research paper intends to, more specifically, study the succession rights of cohabitees in Canada and Europe and then proceed to examine the legal scenario of cohabitation in India so as to identify a suitable legal framework for this country. The scope of this paper extends to study of succession rights in the provinces of Canada and the following European countries: Albania, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Russia, Scotland, Slovakia, Slovenia, Spain, Sweden and Switzerland. Only the countries granting succession rights have been elaborated. The scenario of cohabitation in India has been briefly dealt with, studying only the most relevant aspects and the suggestions provided in this paper are limited by the countries studied.

KEYWORDS: Cohabitation, Succession Rights, Family Law, Relationship, Common Law, Civil Code, Cohabitee, Partners.

1. Introduction

Cohabitation is generally seen by society as an act by two individuals who shrugged off the responsibilities of a real marriage and is treated as something informal or casual. While on the other hand, succession rights are something that is seen as a serious matter, something that is generally possessed by the blood relatives or a spouse by wedlock. One may wonder, on the face of it, how these two concepts are linked to one another, how succession rights can be awarded to cohabitees. While this paper shall not dive deeply into this question, it will only briefly deal with how a significant amount of research conducted shows that cohabitation can also indeed be a serious matter with high levels of commitment. Most importantly, however, the purpose of this paper is to study the countries of Canada and Europe and understand how they have granted succession rights to their cohabiting citizens. The paper then examines the legal scenario of cohabitation in India with a study of cases and statutes, so as to conclude with suggestions on which of the country's cohabitation laws studied would be the most apt to provide a legal framework for the Republic of India.

The aim of this paper is to study the succession rights of cohabitees in Canada and Europe and then proceed to examine the legal scenario of cohabitation in India, so as to identify a suitable legal framework for India. The scope of this paper extends to study of succession rights in the provinces of Canada and the following European countries Albania, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Russia, Scotland, Slovakia, Slovenia, Spain, Sweden and Switzerland. The countries only granting succession rights have been elaborated in this paper. The scenario of cohabitation in India has only briefly been dealt with, studying only the most relevant aspects. The suggestions provided in this paper are limited by only the countries studied.

2. Defining “Cohabitation” for Succession Rights

The Black Law Dictionary defines Cohabitation as *living together; living together as husband and wife. Cohabitation means having the same habitation. not a sojourn, a habit of visiting or remaining for a time; there must be something more than mere meretricious intercourse.*¹ This highlights three important factors in order to constitute a cohabitation which is (1) living as husband and wife (2) living together and (3) having intimate and meaningful sexual relations.

Researchers have tried to define this concept by describing it as an “alternative to marriage”, “prelude to marriage” or “alternative to being single”, it has been mostly commonly, as we can see, has been compared with Marriage.² This may be considered a fair comparison, as cohabitators and married couples have many fundamental similarities, which may be why many countries grant them the same rights as married partners subject to specific conditions, like the duration of the relationship.³ However, there are others who cohabit for the sake of convenience, be it economic or intimate, with no intention to live as husband and wife, these are generally those who consider cohabitation as an alternative to being single.⁴ This would most certainly, for the sake of reference, at least in this paper, create a binary distinction that is “cohabitation with commitment” and “cohabitation for convenience”.

In a research study of 120 cohabiting heterosexual couples living in the United States of America, where three factors were considered being time spent together, convenience (mostly in financial terms) and testing the relationship for marriage.⁵ It was seen here that the desire to spend more time with her or his partner ranked the highest, while testing the relationship for marriage the least. It also came to a conclusion that those with Higher relationship confidence(individuals’ sense of confidence in the quality and stability of their relationships) and

¹ *Cohabitation*, Black’s Law Dictionary (2nd ed. 1981)

² Perelli-Harris, Brienna, et al., *Towards a New Understanding of Cohabitation: Insights from Focus Group Research across Europe and Australia*, 2014 Demo. Research 1043–1078.

³ *Id.*

⁴ *Id.*

⁵ Rhoades, Galena K et al., *Couples Reasons for Cohabitation: Associations with Individual Well-Being and Relationship Quality*, 2009 J. Fam. Issues 233-258.

Dedication(an intrinsic desire to be with one’s partner into the future) were significantly associated with the degree to which both men and women were cohabiting because they wanted more time or intimacy with their partners.⁶ It would be reasonable to say that such partners would be most likely to have kids of their own but even if not would be the most deserving of the right to succession for the surviving cohabitee.

The research collated with the definitions of cohabitation in various countries (as it will be seen in the following sections) that provide succession rights to their cohabiting citizens, most of them identify the long time period, commitment and the nature of permanency to be significant necessities to be granted succession rights. Some countries went to an extent to say that cohabitees have to acknowledge each other as husband and wife, as well as by the society in order to be granted succession rights, with no consideration of the duration of their relationship.⁷ Therefore, it seems that “cohabitation with commitment” that possess certain characteristics mentioned above, are the ones that qualify to hold succession rights.

The paper shall now proceed to study the various cohabitation laws in Canada and certain countries of Europe.

3. The Scenario in Canada

In Canada, cohabiting couples are assigned different names depending on the Province the couples are staying. Along with the different names, the time-period and other criteria in order to be considered for succession rights also vary.

The Provinces of Nova Scotia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island, Ontario and Quebec have not been dealt with as they do not provide for succession rights for cohabitees or require some form of registration.

3.1. ALBERTA

⁶ *Id.*

⁷ Edra J. Pollin, *When Does Cohabitation Become A Common Law Marriage?*, HUFF POST (March 6, 2012, 12:24 PM), https://www.huffpost.com/entry/when-does-cohabitation-be_b_1184994

In Alberta, cohabiting couples are referred to as “Adult Interdependent Partners” by the *Adult Interdependent Relationships Act* (hereinafter referred to as “AIRA”) since June 2003. In order to be recognised as one, Section 3 of the AIRA requires that the relationship has some permanence, such as having a child by birth or adoption and the person has lived with the other person in a *relationship of interdependence* for a continuous period of 3 years. The term “relationship of interdependence” is defined under Section 1(2) of the AIRA, which means that the two persons share one another’s life, they are emotionally committed to one another and function as an economic and domestic unit. The term adult interdependent partner has been added in the *Wills and Succession Act, 2010* by amendment and hence under Section 60 of the respective Act grants the adult interdependent partner the entirety of the intestate estate left behind in the event of death of his/her partner.

3.2. BRITISH COLUMBIA.

This Province in Canada doesn’t follow the usual nomenclature of referring to cohabitees as common-law couples. The definition of *spouse* in the *Family Law Act, 2011* and *Wills, Estates and Succession Act, 2009* of the Province includes unmarried couples or more specifically called marriage-like relationships. The case *Takacs v. Gallo*⁸, the Court laid down certain considerations which include eating together, sleeping under the same roof, participating collectively in community activities, buying gifts for one another on occasions, conduct towards their respective parents, how they saw their relationship, etc. in essence whether there is a uniqueness in the relationship and degree of commitment. The legislative enactments on the other hand mandate for at least two years of living together.

Therefore, as even unmarried spouses are considered as spouses, the cohabitees shall have the same succession rights as married spouses. By virtue of *Part 3 - When a Person Dies Without a Will* of *Wills, Estates and Succession Act, 2009*, the intestate estate would be distributed to the surviving cohabitee if no descendants and all other provisions related would be applicable to him/her.

⁸ 1998 CanLII 6428 (BCCA)

3.2. SASKATCHEWAN

This Province is the only jurisdiction in Canada which does not provide for a separate category for cohabittees.⁹ Instead, the word “spouse” has been redefined to include cohabitee in certain legislations, for others which the government is of the view that the courts would consider this wider definition for them as well. Therefore, in this province, if 2 people cohabit with one another continuously for not less than 2 years then they would fall under the meaning of spouse¹⁰ and acquire all the rights and liabilities of spouses, including succession rights on the death of a cohabitee.

4. THE SCENARIO IN EUROPE

While Europe is directing its efforts to bring harmonization of family law in all the countries of Europe through leading organisations like the Commission on European Family Law. We are yet to see any materialisation of such effort anytime soon as the countries, at present, either do not recognise succession rights for cohabittees or have established their own mechanism to deal with such (this is elaborated in this section of the research paper).

Albania, Austria, Belgium, Bulgaria, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Spain, Sweden and Switzerland do not grant succession rights for cohabittees or grants them only after registration or agreements of cohabitation is done

4.1. CROATIA

The Croatian Family Act defines cohabitation as a relationship between an unmarried woman and man, which lasts for at least three years, in case the partners have a common child or if their relationship has been succeeded by marriage, the time required would be even lesser. However,

⁹Common Law Review Panel, *OPINION ON COMMON-LAW RELATIONSHIPS OF JENNIFER A. COOPER*, MANITOBA (Dec. 31, 2001),

<https://www.gov.mb.ca/justice/publications/pubs/commonlawreviewpanel/vol1/5d.html>.

¹⁰ The Intestate Succession Act, 2019, SS 2019, c I-13.2 (Can.).

this definition of cohabitee changes from legislation to legislation. When we look at the Inheritance Act, it defines it as a union which lasts for a longer period of time subject to the condition that all the requirements for the conclusion of a valid marriage have been fulfilled, which are basically having reached the age of majority, possessing reasoning ability, the absence of consanguinity and in free marital status.¹¹ Article 8 of the Inheritance Act treats the cohabiting couples in the same manner as a spouse and is therefore entitled to the same succession rights as the spouse.

4.2. CZECH REPUBLIC

Cohabitation is not recognised in Czech Republic per se, however they fall under the ambit of “close person” as defined under the Civil Code.¹² When it comes to inheritance, there exists six grades of heirs, the spouse and her children form the first grade.¹³ A cohabitee is however not formally present in any of the grades but can fall under the second or third grade if he/she lived at least one year prior to the deceased's death and cared for the common household or was dependent for maintenance on the deceased.¹⁴ This means that however, if there are children, then the cohabitee would not inherit any property at all, therefore the chances of inheritance are slim in this country.¹⁵

4.3. IRELAND

In Ireland, there exists not only the status of a cohabitant but also a “qualified cohabitant”. In order to be identified as a cohabitant, the length of the period during which they have been living together, nature of their relationship during that period and the nature and extent of any financial arrangements for subsisting or the presence of a dependent child are all considered.¹⁶ But in

¹¹ Branka Rešetar & Nataša Lucić, *NATIONAL REPORT: CROATIA*, CEFL (Jan. 2015) <http://ceflonline.net/wp-content/uploads/Croatia-IR1.pdf>.

¹² Obdanský Zikonik [Civil Code] s.22(1) (Czech).

¹³ Milana Hrusaková, *NATIONAL REPORT: CZECH REPUBLIC*, CEFL (Jun. 2015) <http://ceflonline.net/wp-content/uploads/Czech-Republic-IR.pdf>.

¹⁴ *Id.*

¹⁵ Obdanský Zikonik [Civil Code] s.1635 (Czech).

¹⁶ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24) (Ir.) s. 172(2), <http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html>.

order to satisfy as a “qualified cohabitant”, one must be in a relationship of cohabitation with another adult and he/she must immediately before the time that that relationship ended, whether through death or otherwise, must be living with the other adult for a period of 2 years or more, if they have a dependent child or 5 years or more in any other case.¹⁷

It is to be noted that in this system, the Court is given wide discretionary powers and the same goes for the succession rights for the cohabitant as well. The qualified cohabitant must apply for an order by the Court within the prescribed time after the death of her/his cohabitant, so as to get his/her share in the “net estate”¹⁸, which means the remains of the deceased estate after all the liabilities are cleared with regards to that estate and after providing for any surviving spouse or partner under the Succession Act of 1965.

4.4. RUSSIA

A cohabitee in Russia does not have the right to inherit property in all cases. In fact, there is no such legal recognition of any sort of a cohabitation relationship.¹⁹ However, if one can prove that he/she had cohabited with the deceased for at least a year and was dependent on him/her, she or he acquires the status of a “disabled dependent”.²⁰ This status allows for the equal inheritance along with other heirs present in the category.²¹

4.5. SCOTLAND

In Scotland, a cohabitant is defined as “man and a woman who are (or were) living together as if they were husband and wife; or two persons of the same sex who are (or were) living together as if they were civil partners.”²² Similar to the provisions in Ireland, It also provides for certain criteria for the Courts to use in order to determine whether these two persons are cohabitants, this

¹⁷ See *Id.* s. 172(5).

¹⁸ See *Id.* s. 194.

¹⁹ Masha Antokolskaia, *NATIONAL REPORT: RUSSIA*, CEFL (Jan 2015), <http://ceflonline.net/wp-content/uploads/Russia-IR.pdf>.

²⁰ GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] Art. 1148 (Russ.).

²¹ *Id.*

²² Family Law (Scotland) Act 2006, (ASP 2) § 25.

includes the length of the period during which they have been living together, nature of their relationship during that period and the nature and extent of any financial arrangements subsisting.²³

Section 29 of the Family Law (Scotland) Act 2006, however, is of the most importance with respect to the research paper at hand. This section applies where a cohabitant of Scotland dies intestate while he/she is cohabiting with another cohabitant i.e. the survivor.²⁴ This “survivor” may then apply to the local civil courts(a sheriff) or the supreme civil court(Court of Session) on the doing of which the Court would take regard of the size and nature of the deceased net intestate estate, the benefits that may be received by the survivor, if there are any rights against or claims on the deceased’s net estate and any other matters relevant.²⁵ After that is done, the Court would make an order for the payment of a capital sum as specified in the order and also may make an order for the transfer of such property from the estate and may also make any other interim orders.²⁶ There, however, exists a proviso here which states that the above mentioned orders shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased.²⁷

4.6. SLOVAKIA

The situation in Slovakia is much akin to that of the Czech Republic and Russia. One can inherit property if that person has been cohabiting with the deceased for at least 1 year before his/her death while looking after the common household or is dependent on the deceased.²⁸ However, this can only take place, if the deceased has no descendants.

4.7. SLOVENIA

²³ *Id.*

²⁴ *See Id.* § 29.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ OBCIANSKY ZAKONNIK [Civil Code] § 474 (Slovak.).

In this country, cohabitant relationship is referred to as an “extramarital union”. It is defined as a union of man and woman that lasts for a longer period of time and who have not concluded a marriage.²⁹ But this definition is subject to different legislations. The law here recognises them to be in such a relationship whether they intend to be in one or not, therefore staying together for a long period of time automatically makes you a couple in an extramarital union.³⁰ Being in this form of relationship entails you to the same rights and liabilities as that of a married spouse, hence the same rights to succession, which in this case is the first order of inheritance along with the children

5. The Legal Scenario in India

A cohabitation in India is colloquially called a “live-in” relationship. The legislative recognition for such relationship has been provided for in the *Protection of Women from Domestic Violence Act, 2005* under Section 2(f) of the Act which states the meaning of a "domestic relationship" as *a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family*. The keywords that are to be considered in the light of this research paper are “a relationship in the nature of marriage”. These words would be the foundation stone for the development of cohabitation laws in India. The first case in which the Supreme Court recognised live in relationship and interpreted as a valid marriage was in *Badri Prasad vs. Dy. Director of Consolidation*³¹ in 1978. The Court also took the stance that if the partners have lived together for a long time, then they will be presumed to be married and the burden is on them to prove otherwise.³²

But what is pertinent to our study is regarding the succession rights of these partners in a live-in or a domestic relationship. It is settled law that only the female is entitled to maintenance from

²⁹ KAZENSKI ZAKONIK [Criminal Code] art.126(6) (Slovn.).

³⁰ Barbara Novak, *NATIONAL REPORT: SLOVENIA*, CEFL (Feb. 2014), <http://ceflonline.net/wp-content/uploads/Slovenia-IR.pdf>.

³¹ AIR 1978 SC 1557

³² *Id.*

her partner if she is unable to maintain herself.³³ It has also been affirmed by a number of cases that the child born out of a live-in relationship would be considered legitimate and hold inheritance rights similar to that of a child born out of wedlock.³⁴ These two grounds hold a lot of scope in deciding the inheritance rights of cohabitees in the live-in relationship, but presently there is no clear law providing for the same. However, a precedent was set in *Vidyadhari & Ors vs Sukhrana Bai & Ors*³⁵, where a succession certificate was granted to the woman who was in a live-in relationship with the deceased even though he was legally wedded to another woman. The cohabitee had lived with the deceased for a long period of time, had four children with him and was also nominated by him in the provident funds and life insurance policies and it was on these grounds that the Supreme Court granted her the right to succession. This judgment presently provides the traction for this idea to materialize and judgments as recent as 2018 quite actively refer to it.

6. Conclusion and Suggestions

While a Saskatchewan form of seems quite farfetched to be replicated in India, out of all the countries examined in this study, the researcher is of the opinion that the Ireland system in dealing with cohabitees legally, with a few alterations, would be the most suitable for the Indian subcontinent. Just like India, Ireland follows the common law system with a written Constitution. The Courts are also given a fair number of discretionary powers in both the countries. In the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* of Ireland the “Courts” are defined as High Courts or District Courts or Circuit Courts for the purpose of Part-15 dealing with cohabitation, where the Court would determine on the basis of the criteria set by the respective legislation. India, in the researcher’s opinion, would do well to formulate a legislation on the lines of the Ireland legislation and import the terms such as “*qualified cohabitant*”, which is a term that has already been taking shape in India as seen in the *Vidyadhari & Ors vs Sukhrana Bai & Ors* judgment.

³³ Section 20(1)(d), Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 1992 (India)

³⁴ Rebecca Furtado, *Rights Of Child Born Out Of A Live-in Relationship*, IPLEADERS (Jul. 13, 2016), https://blog.ipleaders.in/rights-child-born-live-relationship/#_ftn1

³⁵ AIR 2008 SC 1420

It is hoped that India would soon follow the countries that have granted succession rights to their cohabiting citizens. The Indian society, especially in the urban areas, is undergoing a rapid change and now with decriminalisation of homosexuality, for whom cohabitation would be the best form of relationship to be in a union, the country must act quickly to meet the needs of the society.