CHAPTER V

COMPARATIVE STUDY OF SOCIO-LEGAL STATUS OF LIVE-IN RELATIONSHIP IN FRANCE, PHILIPPINES, SCOTLAND AND INDIA

5.1 INTRODUCTION

Comparative study helps in understanding the global trends of any concept. Increasing trends of non-marital relations throughout the world has forced nations to regularize these relations in accordance with their own social and cultural values. It becomes interesting to compare the nations of diverse social values and cultures as they deal with the one common emerging concept differently. It also helps the future course of any concept and its regularization. The concept of non-marital relations as have also been stated has its own different forms and names in different countries. For the purpose of our research we have chosen France, Philippines, Scotland and India because all these countries are in different level as to regularization of live-in relationship and the study of these level would give us insights that would be beneficial for India in making its future course. As the social and legal aspects of concept of non-marital relations i.e. live-in relations in India has already been elaborately discussed in Chapter-III and Chapter-IV, here in this chapter researcher have discussed the social and legal aspects of the non-marital relations in France, Philippines and Scotland only. This chapter discusses the social conditions which forced these countries to recognize and regularize such relationships and further researcher have also discussed the process of regularization of different forms of non-marital relations in these countries.

5.2 NON-MARITAL RELATIONSHIPS IN FRANCE

5.2.1 Soft-Revolution of Marriage and Cohabitation towards Pacte Civil de Solidarite(PACS)

Thirty years before the legal recognition of non-marital relationships in the form of civil solidarity pacts (Pacte Civil de Solidarite) under French Civil Code in 1999, the change of norm towards non-marital cohabitation in France had started. More than two million unmarried couples and near about forty per cent of births
outside marriage unveils the prominence of non-marital cohabiting relationships and new social auspice of family formation without marriage.\(^1\) The long, convoluted and controversial history of the progression of the legal recognition of civil solidarity pacts divulge the difficulties it faced under French society to conceive social acceptance and legal status for non-marital cohabiting couples.

Though the strict norm of marriage as only institution of family formation has been abandonment in France, however the divergence between the change in behaviours and social values of French people and the ambivalence of the legal provisions in relation to the then French viewpoint of ‘unmarried couples’ suggests that there is not yet in France unanimity about the revolution in family formation and personal life in general. France is considered as a ‘republic of reports’, and hence it is required to look into the academic debate because the public debates are increasingly induced by the thoughts, ideas and arguments of the experts and further the ideas and advice of these experts are generally considered by politicians particularly through the production of official reports.\(^2\)

There had been discourse in France since long time between family and individualism. Then in 1792, the creation of ‘civil marriage’\(^3\) was the mark of equality of citizens before the law and a secularized society. However during this period the civil marriage became a symbol of the connection between the private sphere and the republican political ideals. In a brief but historically very significant period of 1789 to 1793, all the issues relating to family were re-established as issues of individual liberty and equality and the institution of family was seen as a private sphere. However, later on radical changes were introduced and new interpretation of ‘family’ developed. The Napoleonic Code of 1804\(^4\) endorsed one unique model of family that


\(^2\) Id. at 24

\(^3\) NOTE: [Civil Registration of Marriage- Beginning in 1792, the government required civil registrars to keep marriage records. Usually these records included more information than the church marriage records that were kept during the same time.]

\(^4\) NOTE: [Napoleon in later life considered the Civil Code to be the most significant of his achievements. The Code represented a comprehensive reformation and codification of the French civil laws. Under the ancient regime more than 400 codes of laws were in place in various parts of France, with common law predominating in the north and Roman law in the south. The Revolution
contemplated family as an institution for assuring social order and as the natural foundation of society. This model of the family was cherished for more than a century and a half. The combination of marital and paternal power formulated the institution of family into a hierarchical unit. Only the institution based on marriage was considered to be a family. Though the liberal revolutionary divorce was limited but divorce was totally suspended in 1816, for almost seventy years when fault-divorce was reintroduced in 1884, until the reforms of 1975. This period made the recognition of the family identical with the traditional family. Thus it is hardly surprising that the radical changes in the patterns of family behaviour and family formation values were interpreted as ‘the passage from family to individual’ and a movement towards ‘privatization of norms’ by academic commentators. These bygone times reveal the long lasting resistance between conservative parties that were strongly influenced by Catholicism, and progressive or socialist parties, contesting the union formations in reference to individual liberty, secularism, and equality. The famous quote from Napoleon that ‘the cohabitants ignore the law, the law is not interested in protecting them either’, reveals a rather ignorant if not disparaging attitude towards cohabitation in the early days which was also followed in many other societies in the west.

overturned many of these laws. In addition, the revolutionary governments had enacted more than 14,000 pieces of legislation. Five attempts were made to codify the new laws of France during the periods of the National Convention and the Directory. Through the efforts of Napoleon the drafting the new Civil Code in an expert commission, in which Jean-Etienne-Marie Portalis took a leading role, took place in the second half of 1801. Napoleon attended in person 36 of the commission's 87 meetings. Although the draft was completed at the end of 1801, the Code was not published until 21 March 1804. The French Revolution acted as a brush which swept away a mass of local differences in France, including many of the powers who had been against codifying the laws. The result was a country in a position to -in theory - create a universal code, and a place which really needed one.

NOTE: [ The French Code Napoléon, 1804, maintained the possibility for the spouses to obtain a divorce. In 1816, during the Restoration, this possibility was brought to an end, however. The Loi Naquet, which was the direct predecessor of the current applicable law, only mentioned divorce based on fault; this situation obliged those spouses who wanted to obtain a divorce by mutual consent, to play a kind of ‘comedy’ role with a false confession of fault or false evidence dictated to a lawyer. With the evolution of a different line of thinking, the government decided to place before Parliament a Reform Act with broader and various grounds for divorce: fault, mutual consent, six years’ separation or more, or the mental insanity of one spouse for six years or more. The project was prepared by an eminent French law Professor: Jean Carbonnier. ]

6 Supra note 1 at 26-27
7 Id. at 26
Irene Thery (Director of Studies, EHESS Paris) finds that Roussel and Gokalp were among the first to discern a crucial revolution in the patterns of partnerships and union formations between couples in France. They highlighted the practice of ‘juvenile cohabitation’ or ‘marriage on a trial basis’ (mariage à l’essai), to explain the fact that the young generations wanted to delay entering marriage and having children, have liberal attitudes towards extra-marital sexuality and experiencing intimate relationship either before or without formally institutionalizing it.9 ‘However pre-marital pregnancy was still contemplated to be an indispensable cause to marry before the birth of a child. It consumed almost a decade to perceive that this practice was not merely a simple postponement of formally celebrating marriage and forming a family, but was a new way of life for a large number of couples. In the 1980s and 1990s, living together unmarried became increasingly a common practice and it was corresponding to the decreasing rate of marriage. Thus, increasing rate of young couples choose to start living in intimate relationship without getting married. They overlooked the pregnancy as an imperative reason to get married rather they have first or subsequent children out of wedlock. The transformation in the union formation is in a very different context from earlier times. During the ‘Thirty Glorieuses’ (Thirty Golden years, 1945-1975), illegitimate children, as they were then called, were vigorously disgraced. Such children were premeditated to become social misfits and delinquent, simply because these children had been abandoned by their father.’10

Non-marital cohabitation in present times is an accepted normal way to start a partnership, however, in the 1960s, only 16 per cent of intimate unions started outside marriage, though the figure increased to 87 per cent in 1990s. Since the end of the 1960s the number of marriages in France has decreased steadily. The annual number of couples entered the union of marriages was 380,000 in 1969 and it shrunked to 253,000 marriages in 1994 with a marriage rate of just above 4 marriages per thousand, the lowest rate since the World War II. Then there was a modest increase of

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9 Supra note 1 at 1
10 Id. at 2-4
10 per cent in 1996 with 280,000 marriages as a direct result of a fiscal reform\textsuperscript{11} for parents. This increase was mainly the result of parents marrying in order to legitimize children\textsuperscript{12}.

In recent decades the decreasing rate of marriage and the increasing rate of non-marital relationships are the main tendencies to which we can also include the growing practice of postponement in the first formation of partnerships. However, the constant increase in the rate of cohabitation compensating for the decrease in marriage does not portray abstinence from family life or of children.\textsuperscript{13}

After 1990, the fraction of couples living in non-married cohabitation in younger age decreased, because they form their first partnership later, and even sometimes in their parents’ home. This hold up in the setting up of first partnerships was a crucial transformation, directly connected to the social and financial status of young people, along with concerns to expand the time for studies, delay in getting the employment, the predominance of unemployment in the younger generations and non-traditional links between young and elderly generation. These transformations in the French Society make it quite apparent that unmarried cohabitation has mingled in French culture and it has also become normal to enter in intimate relationship before formal celebration of marriage, and accepted even as an alternative form of family formation. These transformations also reveal that non-marital relationships are now absolutely interspersed in French society and the children of these non-married couples are in sophisticated situations in contrast to illegitimate children of earlier times. Approximately three out of four were recognized by their father at the time of birth of child, compared to the six per cent of illegitimate children at the end of the 1960s, who were also challenged with heavy disgrace and disapproval. However the normalization process lead to the complete legal assimilation of legitimate and illegitimate children.\textsuperscript{14}

\textsuperscript{11} NOTE: [Introduction of APE. \textit{Allocation parentale d’education} (APE) which was initially granted to parents with three or more children, was extended to two-child parents. Another concept that lies at the heart of French social policies is that any living arrangement with children is considered as a family. For example, this notion is realized in the fiscal system insofar as the income tax is set not only according to the marital status but to the number of children as well. Thus, unmarried parents also benefit from this so-called family splitting.]
\textsuperscript{12} \textit{Supra} note 1 at 2
\textsuperscript{13} \textit{Ibid.}
\textsuperscript{14} \textit{Id.} at 4-6
Before 1972, illegitimate children were at a disadvantage in comparison to legitimate children, even if recognized by filiation\textsuperscript{15} by both parents. These children were precluded from all the rights and duties arising from ties to their paternal or maternal relatives, such as inheritance rights and familial assistance duties; in other words they did not belong to families of their parents and consequently had no legal perks. The right to parental inheritance was reduced, especially if the illegitimate child was in competition with a spouse or legitimate children. Only legitimation by the parents’ marriage could confer rights identical to those of other children. If one of the parent was married to another person, that parent could not officially recognize the child except through a court decision and only if he or she married the other parent after the divorce.\textsuperscript{16} Thus once the parentage of child is lawfully established such child

\textsuperscript{15} NOTE: [For a child born to a married couple, filiation is established automatically at the time of birth registration. By contrast, the filiation of the illegitimate child must, in principle, be established through recognition by each parent. Recognition can be performed at the same time as the child’s birth is registered or, in a separate document, before or after the birth. Filiation can also be decided by the court of justice, although such instances are rather rare. Legitimation almost always results from the parents’ marriage, but it can also be granted later, by court judgment, when one of the parents has not recognized the child before marriage. In some cases, recognition is performed on the day of the legitimating marriage. In France, there are generally three ways to prove filiation:

i) by giving birth to a child,

ii) by the act of recognition or

iii) by acquiring ‘apparent status’ through establishing sufficient facts that point to a bond of parentage or relationship.

Maternity is designated by the act of giving birth to a child. However, French mothers enjoy the right to give birth secretly or anonymously so as to avoid parental authority. There have been some amendments in the area of presumption of paternity lately. The latest position is that the husband is presumed to be the father if a child is born within wedlock, but this presumption of paternity would be rebutted if the husband is not designated as the father of the child at the child’s birth. However, if paternity was excluded, presumption of paternity can be restored by operation of law if ‘apparent status’ can be established between the husband and the child.

Where parentage is not established by any of the methods above, three additional means provided were:

First, only for married couples, each spouse may during the minority of the child requests to have the paternity restored by proving the husband is indeed the father. The child can initiate an action to such effect within ten years after reaching legal age.

Second, primarily for unmarried couples, both paternity and maternity can be established by acknowledgment (par la reconnaissance) made before or after the birth of the child.

Third, also primarily for unmarried couples, is by means of court procedure through proving acquisition of ‘apparent status’ (par la possession d’état).]

have the same rights and the same duties like legitimate child in relations with their father and mother. They enter into the family of each of them.\textsuperscript{17} All illegitimate children whose parentage has been lawfully established may be benefitted by legitimation.\textsuperscript{18} French civil code provides that legitimation takes place either by marriage of the parents, or on the authority of the court.\textsuperscript{19}

- **Legitimation by Marriage**

  The subsequent marriage of the parents confers legitimacy on all children born out of wedlock. Thus even the deceased children get legitimated by operation of law on the marriage of parents. However, if parentage of children was not already established, then children may be acknowledgement at the moment of celebration of the marriage, however in such a case, the officer who performs the celebration of marriage shall take note of the acknowledgement and of the legitimation in separate record for that matters.\textsuperscript{20}

- **Legitimation on the Authority of the Court**

  The benefit of legitimation may be conferred on the child on the authority of the court if it appears that a marriage between the two parents is impossible. The parent who wants to request the court for conferment of legitimation with regard to a child, then he should have the apparent status parent of such an illegitimate child.\textsuperscript{21} The petition for purposes of legitimation may be initiated by one of the two parents or

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\textsuperscript{17} Civil Code of France, Article 310-1[ All children whose parentage is lawfully established have the same rights and the same duties in their relations with their father and mother. They enter into the family of each of them.]

\textsuperscript{18} Civil Code of France, Article 329[Legitimation may benefit all illegitimate children provided that their parentage has been lawfully established.]

\textsuperscript{19} Civil Code of France, Article 330[Legitimation takes place either by marriage of the parents, or on the authority of the court.]

\textsuperscript{20} Civil Code of France, Article 331[All children born out of wedlock, ‘even deceased’ are legitimated by operation of law by the subsequent marriage of their parents. Where their parentage was not already established, those children must be the subject of an acknowledgement at the moment of celebration of the marriage. In that event, the officer of civil status who performs the celebration shall take note of the acknowledgement and of the legitimation in a separate record.]

\textsuperscript{21} Civil Code of France, Article 333[Where it appears that a marriage is impossible between the two parents, the benefit of legitimation may yet be conferred on the child on the authority of the court provided that he has, with regard to the parent who so requests, the apparent status of an illegitimate child.]
by both parents jointly before the *tribunal de grande instance.* 22 If at the time of conception, one of the parents was in bonds of a wedlock that is yet not dissolved then the petition of such parent for legitimation of child is admissible only with the consent of her or his spouse. 23 After the fulfilment of such statutory conditions the court shall pronounce the legitimation, if it considers it is justified, after receiving or inducing, if possible, the comments of the child himself, of the other parent where he or she is not a party to the petition, as well as that of the spouse of the petitioner. 24 The effects of legitimation take effect at the date of the judgment pronounced finally by court. Further it is important to note that legitimation does not have any effect with regard to the other parent than the one that made petition for legitimation of child. Legitimation does not involve change of the name of the child, unless otherwise allowed by the court. 25

Thus the complex social signification of non-married couples must be remembered when examining legal evolution of PACS. The situation of illegitimate children and unmarried fathers became a greater concern during the seventies. However it should be mentioned that already before this period, the notion of the illegitimate child was replaced in 1946 by the notion of the ‘dependent child’ in the legislation of family allowances.26

5.2.1.1 The Revolutions of 1970s

When non-marital cohabitation increased at the end of the 1960s, new legislation introduced the obligation for a non-married father, whether cohabiting or not, to recognize his child, however, in this first reform, the parental authority was

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22 Civil Code of France, Article 333-1[A petition for purposes of legitimation must be initiated by one of the two parents or by both jointly before the *tribunal de grande instance.*]

23 Civil Code of France, Article 333-2[Where one of the parents was, at the time of conception, in bonds of a wedlock which is not dissolved, his or her petition is admissible only with the consent of her or his spouse.]

24 Civil Code of France, Article 333-3[The court shall verify whether the statutory conditions are fulfilled and, after receiving or inducing, if there is occasion, the comments of the child himself, of the other parent where he or she is not a party to the petition, as well as that of the spouse of the petitioner, it shall pronounce the legitimation, if it considers it is justified.]

25 Civil Code of France, Article 333-4[A legitimation on the authority of the court takes effect at the date of the judgment which pronounces it finally. Where it took place on petition of one of the parents, it does not have any effect with regard to the other; it does not involve change of the name of the child, unless the court otherwise decides.]

26 *Supra* note 16
given only to the mother. France’s 1972 reform gave the illegitimate child a status almost identical to that of the legitimate child. It also allowed the recognition of adulterine children. The reform therefore took away much of the incentive for legitimation. The reform of 1972 introduced a very extensive legal change. It guaranteed the principle of equality between legitimate and illegitimate child by a new Article in the Civil Code that allowed the ‘natural child’ to inherit. A new Article in the Civil Code introduced the principle of equality between legitimate and illegitimate child. This reform allowed an illegitimate child to inherit its father. In case of unmarried parents, same rules apply to cohabiting and non-cohabiting parents regarding establishing filiation. To exercise parental authority over child the parents must had to recognize the child. However, the reform on parental authority established that the exercise of parental authority (exercice de l’autorité parentale) will be attributed to the mother only since this was considered to be ‘social reality’ and if the father desire to exercise parental authority, he needed to resort to a judicial procedure. It should be noted that these reforms were adopted before the increase in out-of-wedlock births. The principal impetus behind their implementation was to allow illegitimate children to have similar rights to those of legitimate children.

In 1975 the reform of divorce, introducing divorce by mutual consent, removed the connection between fault of parent and the right of custody. Custody of child had to be conferred on one or the other parent keeping in view the best interests of the child. This approach of French law indicates that in a union without legal marriage i.e. unmarried couple, French law contemplated that the child of such

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28 Supra note 16
29 NOTE: [In France all illegitimate children are called natural children. Children born of parents who could have married each other at the time the child was conceived are called simple natural children. Children born of parents who could not have married each other at the time the child was conceived are called adulterous or incestuous natural children. Only Simple natural children can be acknowledged.]
30 Civil Code of France, Art. 334(Repealed) [An illegitimate child must be acknowledged by a document drawn up before a notary when the acknowledgment did not take place in the birth record itself.]
31 Supra note 27
32 Ibid.
parents cannot have two parents with equal rights, exercising parental responsibilities. Thus towards the end of the 1970s, along with the important reform of filiation the discussion on marriage remained distinguished as at that time nobody had foreseen the incredible rise of non-married parenthood and the increase in divorce. Jean Lecanuet, the then Minister of Justice of France, elucidated in Parliament in 1975 that marriage had never been as healthy before and that the modernization of divorce will definitely reinforce marriage. However, legal changes were not considered as a revolution by society. For general people, it was nothing but just a way of being ‘human’ towards the limited situations of children born outside marriage. These legal changes were taken as a part of liberalization and modernization.33

5.2.1.2 Equality of Parenthood

The rapid family change became an unexpected factor of social coherence and proved very important in the reforms of French Civil Code in 1970s and 1980s. Because people were aware that children born without getting married would not be social and legal outcasts, large numbers of non-married couples decided to have children. This was assuredly one of the important reasons that the French ‘revolution of marriage and cohabitation’ remained a soft one. However, some complications in view of fathers’ rights and their participation in non-married and in broken relationship families emerged in the social and political agenda.34

During the decades of 1980s and 1990s the equality of parental rights and duties for parents of child increased irrespective of their situation. Such a socio-legal movement emerged because of the strong response to non-marriage in the form of affirmation of the double filiation as a family link based on the principle of indissolubility of parenthood. The introduction in the French Civil Code of the possibility of acquiring joint parental authority was the main legal reform of 1987, and further in 1993 the principle of joint parental authority was extended for all parents irrespective of their relationship status.35 In the context of the increase in non-marital births during the eighties and nineties, a second reform (1993), introduced the

33 Supra note 1 at 13
34 Id. at 13-14
35 Id. at 14
possibility of joint parental authority for couples who were not married to each other but only if parents were living together and when the father recognized his child.  

Though the reforms of 1987 and 1993 seems very appealing but have created ambiguity. The Convention on Rights of Child (1989) expresses a principle in Article 7.1\footnote{United Nations Convention on the Rights of Child (1989), Article 7 - [7.1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 7.2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.]} which states the rights of children ‘to know and be cared for by his or her parents’. This principle has not yet achieved in France. But, in France, this principle has resulted to be much more complex than it seems. On the one hand, the law enshrined equality between married and unmarried parents, between fathers and mothers but on the other hand expressed a real unwilling to give up the traditional preference for marriage. It can be highlighted through the condition to exercise parental authority by unmarried father i.e. unmarried father can exercise parental responsibility only if the parents can prove that they were living together at the moment of the legal recognition of child. We can see here how difficult it is for parents to prove who are not a couple or who have separated before the birth of child. However the divorced parents have joint parental authority as a matter of principle.\footnote{Supra note 1 at 14}

To encapsulate, the legal situation just before the debate for civil pacts (PACS) began in France was highly complex and the non-marital parenthood was understood almost akin to married parenthood despite of enduring differences, especially for children born in adultery. As far as the issues of parenthood were concerned, the main problems to ascertain were no longer between marriage and cohabitation, but over the separated and divorced parents. At the same time there was a rapidly growing movement towards a joint responsibility, and the use of new concept of principal residence emphasizing the need to choose between mother and father. The legal status of non-married cohabitants as couples remained unaffected as far as civil law was concerned and they were continued to be considered as ‘strangers’. However their social status was very contradictory.\footnote{Id. at 15}
Gradually, with the recognition of personal autonomy in the twentieth century, the law became more receptive towards non-marital cohabitation. Following the paradox of démariage, cohabitation without performing any formal celebration and registration became more and more popular among romantically involved modern couples. To them, the formal celebrations and registration and certificate of marriage may be nothing else than a piece of paper to decorate the wall. They did not recognize the need of documentation of their commitment and they preferred the liberty of getting involved and exiting a relationship burden-free. Thus following three types of motives have been identified: “pre-marital cohabitation which is most popular among young people; post-marital cohabitation where one or both partners were previously involved in a relationship that lasted for some considerable time; and long-term non-marital cohabitation in which the essence is almost identical to marriage.”

The period of this unsettled social status of these unmarried and separated parents at the same time of equal parental rights lead to the evolution of new concept of registration of civil unions. However being a Catholic country marriage was had to be norm but the French people shifted towards civil and unmarried unions. This gradual process of shift has been discussed as under:

5.2.1.3 From Marriage to Civil Union

Americans who examine the French version of the civil union, Pacte Civil de Solidarité or the PACS opines that the French are a ‘Godless Catholic nation’ who has rejected their own religion. However, the issues surrounding the PACS, and the decline of the French Catholic Church for that matter, are not so black-and-white. In order to more completely understand the genesis, implementation and popularity of the PACS, one must be familiar with the trends convoluted in French culture. The PACS deals directly with marriage, family and sexual practices in France, but also deals indirectly with the evolution of moral and religious values within the hexagon.

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40 Supra note 8
The vast majority of French citizens have been Catholic for hundreds of years. However, their relationship with the Catholic Church has been anything but ordinary. Over the years the Church has been frequently confirmed and forbidden, altered and retained, embraced and disdained. This has established a unique French brand of Catholicism that has everything to do with events such as the formation and feedback to the PACS.\textsuperscript{42}

Ashley (research scholar, Brigham Young University) finds that the institution of marriage before 1792 discussed by Irene Thery\textsuperscript{43} was much easier than the present conceptions of marriage. As early as in the 12\textsuperscript{th} century marriage was considered the most sacred of the sacraments in the Catholic Church and one of the most powerful pillars of society. It was the sacrament of uniting a man and a woman before God, and only God had the power to dissolve such a union. But to redefine marriage after the French Revolution in a society that theoretically had no religion was acutely difficult, and led to great uncertainty.\textsuperscript{44} Generally, societies that rely upon the Catholic model does not easily revamp into one that has no divine laws and morals to govern it. Marriage, an institution that has its genesis as a sacrament in a culture does not easily revolutionize into a civil contract, which may be dissolved by the very human beings who entered into it. This transformation weakens and ultimately eradicates the binding power of marriage and family life. French society’s enthusiasm with keeping private and public spheres separate had allowed the family to decay behind the wall of \textit{la vie privée}, or the private sphere. In the ancient regime, the time of the monarchy before the French Revolution, marriage was a public matter. It was performed by, displayed by and protected by society.\textsuperscript{45}

The choice to move marriage from the public to private sphere was based upon the ideal of personal liberty and individualism. Thus we can inculcate from these views that the change in marriage from sacrament to private union and then the effect of theories of private liberty and individualism further promoted the decay of marriage as a sacrament.

\textsuperscript{42} \textit{Supra} note 41 at 5  
\textsuperscript{43} \textit{Supra} note 1  
\textsuperscript{44} \textit{Supra} note 41 at 48  
\textsuperscript{45} \textit{Id.} at 49-50
5.2.1.4 A Shift towards Démariage: Popularity of PACS

In the 1960s, couples rarely lived together without being married. Since then, premarital cohabitation and consensual unions have become more widespread, although marriage has by no means disappeared. The expansion of premarital cohabitation and consensual unions in the 1970s dealt a blow to the institution of marriage, the traditional attitude of conjugality, sexuality and child bearing. However in earlier to this period, the people who engage in non-marital live-in together, intimate sexual relations outside marriage were strongly stigmatized, women especially. Marriage, the traditional foundation of conjugal life, now takes place later and later, if at all. Religious marriage was declining even steeper. While more than nine in ten first marriages in the early 1970s were celebrated religiously, the proportion was just six in ten, 35 years later in 2005.46 Since 1960s, the first observation of transformations, the union formation behaviour in France has expanded in several ways. Forms of union are now more diverse, with a decline in marriage, religious marriage especially, and, more recently, the growing popularity of PACS unions and the opening of marriage to same-sex couples. The number of intimate relationships experienced in a lifetime is also increasing.47

By enacting the provisions for the civil solidarity pact (PACS) eighteen years ago, France entered the group of nations that have officially regulated and implemented the legalization of cohabitation of same-sex couples. However, in comparison to legislations on same-sex partnerships of other European nations the French PACS exhibit a very appealing difference that it also allows heterosexual couples seeking to legally formalize their union through an alternative to marriage. Since in 2009, after the adoption of PACS, 175,000 PACS were registered out of which 95 percent were heterosexual, makes it evident that the PACS are well suited to the requirements of opposite-sex couples also. A steady increase in the number of PACS has continuously might not had been foreseen when the PACS was voted.48


47 Id. at 4

It is necessary first to understand what the PACS are, before trying to analyse its progression since it was first introduced. When the PACS was first instituted in France it appeared that it would be especially for the benefit of same-sex couples. However, homosexual couples have never represented even fifty percent of French couples who choose the civil union option. In 1999, the PACS’ inaugural year, only forty-two percent of PACS couples were homosexual. Since 1999 the number has dropped regularly each year. The first big study conducted on the evolution of the PACS in 2006 found only seven percent of PACS couples that year were same-sex couples and only twelve percent of all PACS couples were homosexual. France seems to have not only advanced LGBT rights, but also created another alternative to marriage for heterosexual couples. Most shockingly, the PACS has become more wildly popular than anyone could have anticipated.49

The PACS was anticipated as a new form of union formation to allow couples to organize their lives privately and applicable to both homosexual couples as well as heterosexual couples. The political wish to create a new form of union formation as an alternative to marriage was very much clear from the law of conferring legal status on legitimacy on such unions. The PACS is animated from the spirit of marriage. Like marriages PACS guarantees mutual support by spouses including a shared financial responsibility, allows the joint filing of taxation, after three years (as it was then in 1999) and further it also gives eligibility to social benefits available to family. However, at the same time the PACS is different and simpler than marriage for various reasons. Like marriages PACS does not include inheritance clause. The distinctions between marriage and PACS are apparent in several areas. Three of them are mentioned following:

a) “The Dissolution Proceedings: There is no legal procedure to terminate a PACS, as is the case with divorce. Another difference lies in the fact that it is possible to end the contract on individual basis;

b) Guardianship and Adoption: The PACS entail no filiation rights, and further it does not open the possibility of joint adoption;

49 Supra note 41 at 58
c) Citizenship: The PACS do not enable a foreign partner to request French citizenship, like a spouse after marriage.”

On other features of the union formation also the PACS can be said to be as an alternative status. Earlier the PACS were registered by tribunal d’instance and from November 01, 2017, by the town hall where there is no institutionalized ritual is performed for registration i.e. the process of registration of PACS does not involve exchange of consent publicly in the presence of a person having authority to officiate union formation and witnesses like in the case for a wedding ceremony. Thus considering all these reasons one can simply conclude that the PACS seem to be more privatized form of union than marriage.

Though PACS are used by contracting parties its meaning can be understood by studying PACS sociologically. There are several sociological approaches to understand the increasing fame and number of this new form of union formation institution. The subjective approach on PACS reveals that social uses of this form are not analogous. The analysis of the legal and social motivations including individual preferences, especially in terms of rituals, values and norms, bring to light the actual meaning of these new arrangements.

Sociologists see marriage as a stronger social norm than the PACS and other non-marital relationships and hence they consider that marriage as value and norm is inherent in society and need not to be promoted. Sociologists find that people choose the PACS because they find it well suited to their current situation and they are not so critical toward social norms and values like marriage and family. Some people see marriage as an ultimate commitment to that they find themselves not ready at particular time. The PACS provides them with an option of union that may be a way to experience a sort of intermediary status, with new rights. The PACS is simply a private commitment or promise for a relationship whereas marriage through ritualized ceremonies is a public commitment. Many couples refrain from giving any symbolic

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50 Supra note 48 at 3-4
52 Supra note 48 at 6
53 Id. at 7
meaning to their PACS at all and say that if PACS had provided more rights they might not have considered being in the institution of PACS. However, others consider union of marriage as the only meaningful type of institution and choose the PACS for practical reasons only. Thus the social meaning of the PACS is undeniably complicated under French conditions. Further, whether used as an option parallel to marriage, a substitute for marriage, as a means of test-driving married life, as an intimate arrangement to stay together and even as an option of non-marriage, the civil solidarity pact is a versatile arrangement the meaning of that lies much more in the multiplicity of its social uses rather than in the legislative text itself.54

‘Two surveys, Étude des relations familiales et intergénérationnelles (ERFI) i.e. Study of Family and Intergenerational Relationships, conducted by INED (National Institute for Demographic Studies) and INSEE (National Institute for Statistics and Economic Studies) in 2005 on 10,079 people aged 18 to 79, and Contexte de la sexualité en France (CSF) i.e. Context of Sexuality in France were conducted at roughly the same period by INSERM (National Institute for Health and Medical Research) and INED on a sample of 12,364 people aged 18 to 69, looks at actual PACS and inspects the basic social characteristics of people who registered their PACS between late 1999, when the PACS was introduced, and 2005, so as to perceive the causes of its unexpected success, at least for a first wave of PACS. As one of the two surveys allows comparisons with married people, PACS partners are sometimes compared to those who decided to get marry during the period 1999 to 2005. Despite their small numbers, the civil partners in the surveys exhibit socio-demographic characteristics that point to a highly specific social distribution. This suggests that the first civil unions were an expression of difference from marriage, since the choice of civil union is closely correlated with belonging to certain social groups. The idea of difference does not refer only to social positions; it also covers values and representations’.55 The PACS pioneers differ both in educational attainment and socio-occupational category, not only from those who opted for marriage instead but also from those who have entered PACS unions more recently.

54 Ibid.
55 Id. at 8
The contrasts are particularly striking for educational level, as more than sixty percent of the adults who entered a PACS union in the earliest period have a higher education qualification, compared with forty-two percent of individuals who married at around the same time.56

The income levels of civil partners are higher than married couples similarly like higher education level in each survey group (ERFI or CSF) if the analysis is restricted to age group excluding people aged 40 years and over as well as those aged less than 25 years. Generally the people aged 40 and above are rarer in the civil partnerships and further regarding people aged less than 25 years, most of them being students and unemployed make it difficult to take income into account. In both surveys, the income of people who registered a partnership in the early years stands out high.57

The better education standards of civil partners than the married couples, declaration of high income in comparison to married people, couples with both working partners and having comparatively higher occupational ranks than married spouses make the PACS registered in the early years (late 1999 to spring 2006) a type of union associated with educated, employed and financially independent people. Thus the civil unions registered in the first few years are not positioned randomly in the social space.58 However, these results are about the civil partnerships entered in first few years of passing of PACS, the number of registered unions have constantly increased since the PACS was created. The increase in number of such unions was rapid, particularly from 2005 onwards; with the reform of income tax provisions i.e. civil partners are now entitled to the same tax treatment as married partners.59

France remains predominantly a Catholic nation that values the traditional family and holds marriage in high esteem. Cultural trends may have tugged and be tugging quite violently at these traditional aspects of French culture, but yet after

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57 Supra note 48 at 12
58 Id. at 14
59 Id. at 21-22
centuries they remain. The French are arguably more passionate and protective of their own culture than almost any other Western nation. This culture, from its earliest origins, has been founded in Catholicism and families. France is still organized culturally and administratively by its ancient religious and noble family-based structures. Beautiful ancient monuments, churches, cathedrals and chateaux are found in every city and village. Even the staunchest atheist finds pride in France’s finest Church and familial architecture and history. However, another indisputable aspect of French culture is its ability to blend the pride of its past with the needs of the present. The Civil Code of France is perhaps the oldest legal document that is still in effect in the Western world, yet it has been modified over and over again to meet the present situation. Marriage has moved from a status symbol, an essential foundation of society, to an option for two persons that still provides the greatest stability on which to base a relationship and a family.

Thus the marriage in becoming an option for family formation asserts that there are other union formation mechanisms are also available to the couples. These different forms of union formation are discussed below:

5.2.2 Forms of Union Formation in France

In ascertaining whether a relationship is alike ‘family life’, aspects like ‘whether or not a couple is cohabiting’, ‘from when they are in relationship’ and ‘whether they have proved their commitment to each other by having children together or by any other means’ are all relevant. The precise legal recognition and prominence on the substance rather than form of the relationship represents a completely different attitude from that of Napoleon’s era more than hundred years ago. In light of this, both common law and civil law jurisdictions, though in different degrees, perceive the existing alternative modes of romantic relationships other than marriage and agree that some mechanisms were required to be established in order to protect these new forms of family dynamics. Noticing such growing popularity, several questions inexorably ensue and stir up much fascinating

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60 Supra note 41 at 70
61 Ibid.
62 Supra note 8 at 2
arguments; would new arrangements derogate the sanctity of the institution of marriage, whether marriage be rendered an outdated institution and concept, and how the progress of law should coordinate with these modern ways of living.\(^{63}\) Although, since 1970s demography and family sociology has expanded a great deal but very little has been explored about family change in general because most of the researches were devoted to specific aspects and the reason for this specific devotion was that a sort of explanation largely accepted that we faced ‘new behaviours’, ‘new values’, and ‘pluralization’ of the family forms.\(^{64}\)

The growth of non-marital relationships in France has been, sociologically, a smooth revolution. However, this absolute change does not mean that French people positively accepted the historical paradox of non-marriage. Ambiguity appears on any occasion when legal issues or policy issues are concerned. It appears difficult for French culture to think of marriage and cohabitation together, as the one is in complete contrast with the other. A certain social anxiety appears in this incoherence of social expression.\(^{65}\)

A very important legal change was introduced under the reform of filiation in 1972. It allowed the natural child to inherit. Though, this reform of filiation was considered as the legal acknowledgment of another form of family alongside the family based on marriage; the ‘natural family’, however, more than that, the principle of equality was guaranteed between legitimate and illegitimate child. This concept evolved after centuries’ practice of marriage as exclusive union for ‘family’. Conservative politicians and jurists remarked this to be a decisive attack on the institution of marriage. In fact, this reform was a legal compromise. Marriage as an institution had to be protected.\(^{66}\)

These legal reforms that acknowledged the liberal partnerships were further supported by the more lenient and modern stance taken by the European Court of Human Rights. In \textit{X, Y and Z v. United Kingdom}\(^{67}\), it has been provided in clear

\(^{63}\) \textit{Ibid.}

\(^{64}\) \textit{Supra} note 1 at 26-27

\(^{65}\) \textit{Id.} at 10

\(^{66}\) \textit{Id.} at 12

wordings that family life referred to in Article 8 of the European Convention on Human Rights is not confined solely to families based on marriage and may encompass other de facto relationships. Generally, all countries expressly accept the pluralism of forms of family formation by recognizing such a category either through providing for registration or through passive recognition once certain threshold requirements are met. Individual behaviours with regard to union formation have changed considerably in France over the past four decades. Marriage, once the only option, has continued its more than 30-year decline, periods of non-marital cohabitation have lengthened, ways of marrying have diversified and, for some couples, consensual unions have become a long-term choice. These changes count among the major contemporary transformations affecting family and private life. In November 1999, this diversity was further increased in France with the creation of the registered civil partnership, the *pacte civil de solidarité* known as PACS.

France became the fourteenth country to legally enable same-sex couples to get married. Both, heterosexual and homosexual couples can select from three options of relationships; marriage, legally-recognized non-marital relationship regime i.e. civil solidarity pact (*Pacte civil de solidarité*) and unregistered cohabitation (concubinage). However, France has tried to exhibit a visible gap between marriage and recognized relationship. Elucidating this demarcation enclosed by the French approach as a ‘shadow of marriage’ may have inadvertently undermined the value of such an intermediate option that confers legal status without full marriage-like burden. This ought to be a real alternate option to marriage that couples can select. However, from another view, it can be inferred that since the entitlement of the legally-recognized category is modeled after marriage, marriage is still the benchmark and its supremacy, far from being derogated, is actually assuredly stiffened. Similar to Indian society questions also arose in France that would the sacredness of institution of marriage be derogated if non-marital heterosexual relationships are legally recognized and, would marriage be depicted superseded if non-marital intimate

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68 *Supra* note 8 at 2
70 *Supra* note 8 at 18
unions are legally recognized. It is contended that the answer ought to be indisputably no if the contrast between marriage and unmarried recognized-relationship is properly managed as in the case in France. 71

This study clearly shows that there are two categories of non-marital relations in France i.e. registered cohabitation in the form of civil solidarity pacts and unregistered cohabitation which has been equalized to concubinage. As our research is restricted to non-marital relationships we will not go into the French concept of marriage and discuss the registered and unregistered cohabitation only.

5.2.2.1 Registered Cohabitation/ Civil Solidarity Pact (Pacte civil de solidarite)

On 15 November 1999, PACS was promulgated after intense debate in the National Assembly. The long, complex and controversial story of the evolution of PACS shows how tough it was for French culture to coin a legal status for non-married couples. PACS as a new probability for heterosexual as well homosexual cohabiters, is not simple to define from a legal point of view. The intermediary status, neither a union nor a contract, neither private nor public, demonstrates the ambiguity of the French way of responding to increasing cohabitation.72 It was to be a prominent furtherance and substitute over the previous certificat de concubinage notoire (certificate of living together), which had few rights and responsibilities and had been seen as having disparaging inferences. The bearings of concubinage only made some benefits extend to the other partner in a civil union.73 It is very important at the first place to took note of the fact that contractual freedom is the foundation of PACS as this relationship is officially defined as ‘a contract entered by two persons of opposite sex or same gender who have attained the age of majority, for the purposes to organize their lives in common’74. This relationship enshrines rights and responsibilities, but less than marriage. Since 2006, persons who enter in registered regime of PACS are no longer considered single in terms of their marital status; their birth records will be amended to show their status as pacsé. However, from a legal

71 Id. at 19
72 Supra note 1 at 2
73 Available at: http://dictionnaire.sensagent.leparisien.fr/Civil%20solidarity%20pact/en-en/ (Last visited on August 11, 2017)
74 Supra note 8 at 3 [NOTE: Article 515-1 of French Civil Code, “A civil covenant of solidarity is a contract entered into by two natural persons of age, of different sexes or of a same sex, to organize their common life”.]
point of view, *PACS* is a contract entered by two individuals, the contract that is stamped and registered by the clerk of the court (from November 01, 2017, by Town Hall), however the couples signing a *PACS* may undergo a formal ceremony at the city hall identical to that of civil marriage.75

Although the rights of same-sex couples were the impetus in terms of the provision of Registered Partnership and *PACS*, the approach adopted by the French government was very different.76 Internally, regarding marriage and *PACS* in France, one interpretation may be that the *PACS* was merely an outcome of the initiatives to confer legal status on homosexual couples. However, since the legalization of same-sex marriages, it can be submitted that upholding individual autonomy is perfect explanation regarding the liberal attitude French law emanates. Taken together, the fact that French government seems less keen in regulating private lives between couples and at the same time preserves and regulates the institution of *PACS* even after homosexual marriage is legalized leads one to conclude that *PACS* with its contractual nature is definitely another option available to couples, irrespective of sexual orientation, especially to those who cherishes individual liberty. This precisely is the reason that Curry-Sumner described *PACS* as a ‘weak registration scheme’. *PACS* have a narrower concept of ‘family’ and tends to primarily regulate matters between the couple77, such as the partners under *PACS* shall be bound to provide mutual material and moral aid to each other. The terms of that aid shall be fixed by the parties in covenant itself and further *PACS* make partners jointly and severally liable with regard to third parties for debts incurred by one of them for the needs of everyday life and for expenses relating to the common lodging.78

Though the progression of the law relating to intimate relationships without marriage has been equally intriguing in different jurisdictions but it is rather hard to discern a principled approach across the world.79

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75 *Supra* note 73
76 *Supra* note 8 at 4
78 Civil Code (France), Article 515-4[Partners bound by a civil covenant of solidarity shall provide mutual material and moral aid to each other. The terms of that aid shall be fixed by the covenant. Partners shall be jointly and severally liable with regard to third parties for debts incurred by one of them for the needs of everyday life and for expenses relating to the common lodging.]
79 *Supra* note 8 at 4
a) Who can Enter in Civil Solidarity

Under French Civil Code provisions relating to PACS clearly deals with matters who can and who cannot enter in a civil solidarity pact. It provides that any two persons who have attained the age of majority, of opposite sex or same gender, can form a contract which is called pacte civil de solidarité (PACS) for the purposes to organize their lives in common.  

Though French Civil Code provides clearly that couple registering PACS must be of legal age, but Arthur advocates that minors under legal age may also register a pacte with consent from, depending on age, guardian or court. However, the minimum legal age is set at eighteen to conclude non-marital registered relationship or marriage, but no exceptions have been extended to those wishing to register their non-marital relationship.  

In France the restrictions imposed upon those wishing to register a non-marital relationship are similar to those placed upon couples wishing to marry. With respect to the parties’ sex, the approach adopted by France opens non-marital registered relationship schemes to both different-sex and same-sex couples. In France this was one of the objectives of the legislature; the Governments also tried for the improvement in the conditions of heterosexual couples who choose to remain in intimate relationship without getting married.

The French approach shows the inconsistent manner with which France has addressed the issue of age requirements in relation to relationship registration. The oppressive manner with which France has dealt with the issue has simply replaced

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80 Civil Code (France), Article 515-1[A civil covenant of solidarity is a contract entered into by two natural persons of age, of different sexes or of a same sex, to organize their common life.]
81 Supra note 8 at 3
82 Civil Code (France), Article 144 [A male and a female may not contract marriage before they have completed their eighteenth year.]
83 Civil Code (France), Article 515-1
84 Civil Code (France), Article 515-2 [On pain of nullity, there may not be a civil covenant of solidarity:  
1. Between ascendants and descendants in direct line, between relatives by marriage in direct line and between collaterals until the third degree inclusive;  
2. Between two persons of whom one at least is bound by the bonds of marriage;  
3. Between two persons of whom one at least is already bound by a civil covenant of solidarity.]
86 Id. at 9
one form of discrimination with another. The precondition of an age requirement demonstrates the Governments’ motive that this form of relationship is to be dealt seriously and with commitment by adults. However the non-availability of the exceptions that are offered in the case of marriage negates the stated willingness to respect non-marital relationships.\(^{87}\) In France, to be eligible to get married one of the partners must have resided in France for continuous forty days prior to the marriage. However for \textit{PACS} requirement is not easily based on duration of stay, rather the partners must have a ‘fixed common residence’ in France, only then they can apply to registrar of the Town Hall (before Nov. 01, 2017, to the \textit{tribunal d’instance}) of that region. Further, to conclude a \textit{pacte} at a French Embassy overseas, at least one of the partners must be of French nationality.\(^{88}\)

\section*{b) Who cannot Form a Civil Solidarity Pact}

From the above discussion it is clear that who can enter into a registered partnership through civil solidarity pact, however French Civil Code also provides

\begin{itemize}
  \item \textit{Id.} at 11
  \item Civil Code (France) Article 515-3[Persons who enter into a civil solidarity pact shall make a joint declaration to the registrar of the municipality in which they fix their common residence or, in the event of serious impediment to the fixing of that residence, before the registrar of the municipality where the residence of one of the parties is located. In the event of serious impediment, the registrar will be transported to the residence or residence of one of the parties to register the civil solidarity pact. On pain of inadmissibility, the persons who conclude a civil pact of solidarity produce the convention passed between them to the registrar of civil status, which aims it before returning it to them. The registrar registers the declaration and has the publicity formalities carried out. When the agreement of civil pact of solidarity is passed by notarial act, the notary instrumentary collects the joint declaration, proceeds to the registration of the pact and makes carry out the formalities of publicity envisaged in the preceding paragraph. The agreement by which the partners modify the civil solidarity pact is handed over to the registrar or to the notary who has received the initial act in order to be registered there. Abroad, the registration of the joint declaration of a pact binding two partners, at least one of whom is of French nationality, and the formalities provided for in the third and fifth paragraphs shall be ensured by the French diplomatic and consular agents as well as those required in case of modification of the pact. 

\textbf{NOTE:}\n
In accordance with IV of Article 48 of Law No. 2016-1547 of 18 November 2016, these provisions come into force on the first day of the twelfth month following the publication of the said law. They are applicable to the civil solidarity pacts concluded from this date. They are also applicable to the declarations of amendment and dissolution of the civil solidarity pacts registered before the date provided for in the first paragraph of the said IV by the registries of the district courts. These declarations are given or sent to the registrar of the municipality of the registry office of the district court which has registered the civil solidarity pact.]
\end{itemize}
for the persons who cannot legally enter into a registered partnership. Article 515-2 of the French Civil Code provides: “On pain of nullity, there may not be a civil covenant of solidarity:

1. between ascendants and descendants in direct line, between relatives by marriage in direct line and between collaterals until the third degree inclusive;
2. between two persons of whom one at least is bound by the bonds of marriage;
3. between two persons of whom one at least is already bound by a civil covenant of solidarity.”

However, in the absence of specific exception it seems that in France prohibition on marriage based on affinity and consanguinity provided under Articles 161\(^90\), 162\(^91\) and 163\(^92\) applies to PACS also including the exception that relationship between uncle and niece or aunt and nephew may be allowed with serious reasons in accordance with Article 164\(^93\). Rule of monogamy also seems applicable for both, marriage and PACS.

c) Procedure for Registration and Dissolution of Civil Solidarity Pacts

A major difference that lies between marriages and PACS was that while the marriages were celebrated in Town Halls with at least two witnesses, the PACS were simply registered at the Court of First Instance (tribunal d’instance) by a clerk.\(^94\) The contractual nature of the French PACS and the political compromises made during the parliamentary discussions has resulted in a quasi-contractual formality procedure with

\(^{99}\) Civil Code (France) Article 515-2
\(^{90}\) Civil Code (France) Article 161 [In direct lineage, marriage is prohibited between all ascendants and descendants, legitimate or illegitimate, and the relatives by marriage in the same lineage.]
\(^{91}\) Civil Code (France) Article 162 [In collateral lineage, marriage is prohibited between legitimate or illegitimate brother and sister.]
\(^{92}\) Civil Code (France) Article 163 [Marriage is further prohibited between uncle and niece, aunt and nephew, whether the relationship be legitimate or illegitimate.]
\(^{93}\) Civil Code (France) Article 164 [Nevertheless, the President of the Republic may for serious reasons remove the prohibitions entered: (1) in Article 161 as to marriages between relatives by marriage in direct lineage where the person who created the relationship is dead; (2) in Article 163 as to marriages between uncle and niece, aunt and nephew.]
\(^{94}\) *Supra* note 8 at 6
regard the registration of PACS. Although the original PACS proposal conferred competency on the maire, this was eventually amended and competency was finally conferred on the district court clerk and thus France conferred registration competency of PACS on a different authority than that competent to celebrate marriages.\footnote{Supra note 85 at 10}

This procedure of registration would be changed from November 2017 and registration of the PACS now will take place in the town hall and no longer in the court of first instance. The bill to modernize the justice of the 21\textsuperscript{st} century has provided for the transfer to the registrar at maire (town hall) powers vested in the tribunal d’instance for PACS by private deed.\footnote{Available at: https://www.notaires.fr/en/civil-partnership-pacs (Last visited on Oct.20, 2017)}

Both parties who wish to enter into a civil solidarity pact shall make a joint declaration to the registrar of the municipality in which they fix their common residence or, in the event of serious impediment to the fixing of that residence, before the registrar of the municipality where the residence of one of the parties is located. In the event of serious impediment, the registrar will be transported to the residence or residence of one of the parties to register the civil solidarity pact. On pain of inadmissibility, the persons who conclude a civil pact of solidarity may produce the convention passed between them to the registrar of civil status, which aims it before returning it to them. Then the registrar shall register the declaration and has the publicity formalities carried out. When the agreement of civil pact of solidarity is passed by notarial act, the notary collects the joint declaration, proceeds to the registration of the pact and makes carry out the formalities of publicity.\footnote{Civil Code (France) Article 515-3} The agreement by which the partners modify the civil solidarity pact is handed over to the registrar or to the notary who has received the initial act in order to be registered there. The registration of the joint declaration of a pact may also be done abroad by two partners, at least one of whom is of French nationality. The formalities provided for registration of PACS in abroad shall be ensured by the French diplomatic and consular agent.\footnote{Civil Code (France) Article 515-3}
The French approach requires only a statement of dissolution of the *pacte* to be merely served to the court or a notary by the parties unilaterally or jointly to end a civil solidarity pact, without the court or notary playing an active role in investigating the statement. Family court (*le juge aux affaires familiales*) and *le tribunal de grande instance* in France will only involve over financial issues upon dissolution when the partners (*les pacsés*) cannot reach an agreement.\(^99\)

Generally, dissolution of PACS features the flexibility of termination of a contract in non-familial context; however, the judicial intervention is not required as the *pacte* can be dissolved by parties either jointly or unilaterally. When the partners decide by mutual agreement to put an end to the civil solidarity pact, they deliver a written joint declaration to the registry of the district court where at least one of them resides. The clerk enters this declaration on a register and ensures its preservation. When one of the partners decides to put an end to the civil solidarity pact, it means to the other party its decision and sends a copy of this service to the registry of the district court which received the initial act. When one of the partners terminates the civil solidarity pact by marrying, he informs the other by means of service and address copies of it and his birth certificate, on which mention is made of the marriage, to the Registry of the District Court which received the initial act. When the civil solidarity pact ends with the death of at least one of the partners, the survivor or any interested person sends a copy of the death certificate to the registry of the district court which has received the initial act. The clerk, who receives the declaration or acts provided for in the foregoing paragraphs, shall bear the end of the agreement in the margin of the initial act. It also has this entry entered in the margin of the register provided for in the Article 515-3 of the French Civil Code.\(^100\)

\(^99\) *Supra* note 8 at 8
\(^100\) Civil Code (France) Article 515-7[When the partners decide by mutual agreement to put an end to the civil solidarity pact, they deliver a written joint declaration to the registry of the district court where at least one of them resides. The clerk enters this declaration on a register and ensures its preservation. When one of the partners decides to put an end to the civil solidarity pact, it means to the other party its decision and sends a copy of this service to the registry of the district court which received the initial act. When one of the partners terminates the civil solidarity pact by marrying, he informs the other by means of service and address copies of it and his birth certificate, on which mention is made of the marriage, to the Registry of the District Court which received the initial act.\]
This simple administrative nature of procedure without adjudication by court or even perusal by a notary evidently upholds individual autonomy, however, this procedure may be criticized for not affording the weaker party any protection and further, the possibility of dissolution by will renders the pact more fragile than commercial contracts.\textsuperscript{101} “A civil covenant of solidarity shall come to an end, according to the circumstances:

(1) As soon as a mention is made in the margin of the initial instrument of the joint declaration;

(2) Three months after service of dissolution notice, provided that a copy of it was brought to the knowledge of the clerk of the court;

(3) On the date of the marriage or of the death of one of the partners.

Partners shall undertake themselves the liquidation of the rights and obligations resulting on their behalf from the civil covenant of solidarity. Failing an agreement, the judge shall rule on the patrimonial consequences of the breach, without prejudice to damage possibly suffered.”\textsuperscript{102}

Thus in France the non-marital registered relationship does not prohibit the parties to enter into a marriage. However, where a non-marital relationship had been registered it will automatically and immediately be terminated upon the celebration of

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\textsuperscript{101} Supra note 8 at 8

\textsuperscript{102} Civil Code (France) Article 515-7
a marriage. Thus as a result of this automatic termination rule institutions of PACS and marriage remain independent of each other. The fact that the parties cannot be involved simultaneously in a marriage and non-marital registered relationship signifies that these two institutions are independent or perhaps better said, exclusive of each other.\textsuperscript{103}

In France the rules for terminating a marriage are more stringent than the equivalent rules for dissolution of a non-marital registered relationship. These differences are of inherent nature and originated from the compromises made between various political parties during the legislative parliamentary process. As a result, the dissolution grounds of non-marital registered relationships are akin to those applicable to contracts and not the favorable matrimony principle that tends to restrict the possibilities for annulment of relationships. Nonetheless, the prerequisites that the parties while legally competent to do so must have voluntarily registered the non-marital relationship, forms one of the most essential and fundamental elements of the registration process regarding both the celebration of a marriage and the registration of non-marital relationships.\textsuperscript{104}

It is hardly surprising that while legalizing new forms of relationships, the concerned legislatures have also to deal with issues relating to their possible dissolution. This is obvious that the parties may seek dissolution of their relationship. The nature of non-marital registered relationships has inevitably avoided the religious pitfalls that may have been a source of failure for attempts to enact dissolution procedure.\textsuperscript{105} Special mention must be made of the situation in France that the celebration of a marriage also acts to dissolve any existing non-marital registered relationship.\textsuperscript{106} In France, a legal procedure must, however, be followed before the marriage takes place. The party wishing to marry is obliged to send notice of his or her decision to the other by means of a bailiff’s summons, a true copy of which must also be sent to the clerk of the district court who received the original PACS

\textsuperscript{103} Supra note 85 at 7
\textsuperscript{104} Ibid.
\textsuperscript{105} Id. at 20
\textsuperscript{106} Civil Code (France), Article 515-7
document. The PACS is then deemed to have come to an immediate end by operation of law on the date on which the marriage was celebrated. Nevertheless, failure to satisfy the legal procedure prior to celebrating the marriage does not affect the termination of the PACS.

Thus, France has attempted to draw a clear line between age old institution of marriage on the one hand and the less traditional form of registered cohabitation on the other by providing different dissolution procedures to institution of marriage and registered unions of PACS. While registered non-marital unions can be terminated through administrative method the marriages can be terminated on the basis of judicial procedure only. In France the dissolution procedures available to couples involved in a non-marital registered relationship is purely non-judicial and totally administrative. The dissolution of a relationship takes place by means of a joint or unilateral declaration. Where the parties disagree as to terminate their relationship mutually either party may unilaterally terminate their relationship. However this observance of the principle of party autonomy has been secured at the cost of the protection offered to the weaker party. The method of unilateral termination of the registered union has been heavily criticized since it affords the weaker party absolutely no protection and supports the formerly traditional argument of the State’s involvement in the union dissolution procedure.

5.2.2.2 Unregistered Cohabitation/ Common Law Partnership (Concubinage)

Cohabitation concubinage has been defined under French Civil Code as “a de facto union, characterized by a life together offering a character of stability and continuity, between two persons of different sexes or of the same sex, who live as a couple”. ‘Provisional cohabitation’ (cohabitation au présent) is a new style of living life combined with tolerance for sexual and intimate relationship but without a long-term project of common life and family; this kind of cohabitation is common

107 Civil Code (France), Article 515-7
108 Civil Code (France), Article 515-7
109 Supra note 85 at 23
110 Id. at 23-24
111 Civil Code (France), Article 515-8[Concubinage is an union in fact, characterized by a life in common offering a character of stability and continuity, between two persons, of different sexes or of the same sex, who live in couple.]
among young adults, but also among adults after a divorce or separation, or even after widowhood. Socially, this kind of cohabitation is not correlated with a long term project, separation is not a very dramatic issue, and property is not considered common. ‘Long-term cohabitation’ is a way of living together identified with a long-term project, with or without children. In this type of cohabitation, the behaviour and values are no different from those in marriage i.e. the cohabiting partner is considered as an informal spouse, and cohabitation as a sort of ‘marriage without papers’ (mariage sans papiers). The similarity between cohabitation and marriage is particularly evident as far as parenting is concerned: the rights and duties of parents and children are considered to be exactly the same. The modern distinction is no longer between ‘legitimate’ and ‘illegitimate’ children, but between children with two parents and the 6 per cent of children born to a real ‘lone mother’. Of course, in spite of the fact that these different social significations are important, it is extremely difficult to distinguish between ‘provisional cohabitation’ and ‘long-term cohabitation’ in quantitative data except the presence of children. And, in fact, many of the long-term unions (married or not) begin as ‘provisional cohabitation’. Sociologists underline that the new phenomenon is the tendency towards very ‘soft’ and informal transitions in the life cycle. Another problem is that it is difficult to know whether people in long-term cohabitation consider that marriage is definitely excluded for the future or not.\textsuperscript{112}

Long ignored by law, live-in partnership is legally defined since 1999 as a union characterized by a common-life with a character of stability and continuity, between two persons of opposite sex or the same sex, are living in couples. The certificate of live-in partnership (certificat de concubinage notoire) has very little legal value and is not a contract but if necessary may certify to the situation of the live-in partners. It is issued by the town hall of the place of residence, free of charge, on the production of receipts or invoices in both names, documents of ownership and sworn statements.\textsuperscript{113} Where the municipality refuses to establish live-in partnership, live-in partners may submit a sworn statement to justify their

\textsuperscript{112} Supra note 1 at 5

concubinage. The contents of live-in partnership agreement may be chosen at will, the main end-purpose of this agreement is to provide for the conditions under which the partners live together, however there are far fewer advantages in this agreement than a marriage contract or a civil solidarity pact (PACS). In specific terms, it is used to draw up an inventory of the property, particularly movables, each partner owns and to specify how the couple operates on a day-to-day basis and the conditions for dividing up the property if they separate. But it does not govern the general ownership of property acquired during the partnership i.e. whether the property will either belong solely to the person who purchased it or be jointly owned by both partners. Neither does it enable partners to enforce personal obligations on one another.\textsuperscript{114}

To conclude, it is agreed that a hierarchy of relationships offered not only preserves the sanctity of marriage but offers a real choice to couples. Distinctive types of relationship stand for different level of commitment and values and the law only plays a sophisticated role in regulating how people organize their relationship.\textsuperscript{115} State’s intervention to be the ‘last-guard’ to ensure fairness and welfare of the spouses and children in institution of marriage is justified because of the high level of commitment of couples that decide to marry and/or presence of children. If partners decide to actively register their relationship, they are free to agree among themselves the terms of their relationship and the state should only act to enforce this mutually agreed contract as in France, as long as the parties are well-advised, with minimal amount of rights and duties specified by the state. Those uninformed but sharing a sufficiently serious relationship shall also be granted a degree of rights and duties, but may be through the more general property law, to ensure that a safety net of justice and fairness is prepared to hold them should they fall. In any case, regardless of married or unmarried, registered or unregistered, a balance between autonomy and protection can hopefully be better struck.\textsuperscript{116}

Marriage, naturally, is the highest layer in the hierarchy. In abstract terms, this is commitment in its highest form. The fullest set of rights and duties should be attached and thus the strictest rules on separation should ensue. Practically and

\textsuperscript{114} Ibid.
\textsuperscript{115} Supra note 8 at 20
\textsuperscript{116} Ibid.
ideally, a relationship based on such level of commitment between the couples would create the best environment to raise children. To foster this ideal, married couples should be treated more and sufficiently favorably through policies that are linked to children, such as children tax concession, ‘discounted’ inheritance tax, priority public housing for families with children etc.\textsuperscript{117}

Thus it is important to make a general understanding that how the development of law should progress with the more and more acceptance of the unmarried relationships in the society. Plainly, registration envelopes freedom of choice but automatic ‘catch-all’ or ‘opt-out regimes through qualification of threshold requirements maximizes protection, especially to those less-informed and thus most vulnerable. The approach of self-governed agreement for relationship like PACS could be encouraged for those who choose to actively register their relationship and further fairness can also be ensured by the involvement of neutral lawyers and the non-interfere by the courts usually with agreements so concluded.\textsuperscript{118}

However, for those who do not draw up a contract among themselves and the category of relationships that may have passive recognition of law, it is highlighted that primary essentials such as duration of the relationship and presence of children must be retained to justify the state’s intervention in the protection of parties on the basis of their relationship.\textsuperscript{119} Further it is submitted that the difference in terms of ramifications must be retained or even extended to make the existence of each category meaningful and to make different categories of union formation complementary, rather than discriminatory and competing to each other and also to evolve the effect of interaction between them. This extension does not have to take the form of curtailing certain rights and duties but can through introducing additional ones like tax concessions, more stringent divorce procedure and better compensation upon separation for married couples. In this concern, the French approach should be complimented as it combines ‘private ordering and institutionalization’. Thus it is evident that those who do not explore registration or are not qualified to be recognized by law may be quite vulnerable. Thus those who choose registered cohabitation do

\textsuperscript{117} Id. at 19
\textsuperscript{118} Ibid.
\textsuperscript{119} Id. at 19-20
have a right just that they do not exercise it and the law respects their liberty. Regarding the latter, those who cohabit without registration and comparatively short period of cohabitation either that the ramifications would not be too serious or their relationship may not be compelling enough to trigger state’s intervention.\textsuperscript{120}

\subsection*{5.2.3 Rights and Liabilities of Unmarried Couples}

While the shift from a strict matrimonial conception of the family is generally accepted in France, attitudes are much more conflicting with respect to legal rights of unmarried couples.\textsuperscript{121} Though, the legal status of cohabitants varies across countries but extensive cohabitation policies exist within the France itself. In France cohabitants are allowed by French law to register their cohabitation. These registered cohabitants in some policy areas have similar rights as married spouses; however, differences remain in others. Other cohabitants who refrain from registering their cohabitation have comparatively fewer rights.\textsuperscript{122} Both, an increase in cohabitation and an increase in childrearing within cohabiting couples have created a challenge to welfare schemes of the states because these schemes have traditionally placed marriage at the centre of family policies and ignored cohabitation. A lack of legal regulation also constitutes a challenge for unregistered cohabitants who are financially dependent on their partner, e.g. because they maintain the household rather than being in paid employment. In such relationships these cohabitants may be in a vulnerable situation if the relationship ends by their partner’s death or separation, and when legal rules or state benefits would be needed to solve property disputes and avoid drops in income.\textsuperscript{123} However it is not likely to be case in every such circumstance and some cohabitants may be financially independent and able to keep their living standard if the union dissolves or the other partner dies. Though in countries with higher rate of cohabitation and increased number of children are raised by cohabitants, more

\begin{flushright}
\textsuperscript{120} Ibid.
\textsuperscript{121} Supra note 1 at 2
\textsuperscript{123} Ibid.
\end{flushright}
policies are framed keeping in view these cohabitants and their children; however, the lesser legal regulation of cohabitation in comparison to marriage is not necessarily to cohabitants’ disadvantage. Oftenly, in long term cohabitation many couples eventually marry and fall under the legal framework for married spouses and the others confine them to cohabiting relationship only, precisely to avoid legal regulation, because they reject the institution of marriage. Thus, as already made clear that lack of legal regulation makes cohabitants vulnerable especially when their property becomes intertwined and one partner is financially dependent on the other, for instance while raising children. Further, on the dissolution of such cohabitation the economically weaker cohabitant may have no right towards the partner’s property or may not be eligible for welfare benefits that are available for widowed persons. Where cohabitants live with children, these will be affected as well.124

French law is very diverse with regard to status of cohabitants. Generally under civil law non-married cohabitants are considered as single in status and not as a couple. In a way, the old Napoleonic attitude of 1804 is maintained i.e. they don’t want law, law pays no regard to them.125 The French civil law made no provision in case of separation or death of cohabitants and further, these non-married cohabitants were treated as if they were strangers to each other. This attitude towards cohabitation was also followed in the French Civil Code and in fiscal policies and consequently cohabitants were not considered as a couple for the calculation of the annual income tax like married couples. Married couples were allowed to declare their income jointly. On the other hand, social law is based on concrete situations, and tends to recognize ‘concubinage’, but mostly in a negative way.126 Holding ‘de facto solidarity’ between the partners to be an advantage compared to living alone, social law increasingly refuses to treat all ‘non-married’ persons equally. So, entering cohabitation will lead to the loss of some allowances which are targeted at single persons, especially single parent; the allowance for lone parents (API), the allowance for family support (ASF), and the allowance for widowhood (pension de reversion). It will reduce other benefits like minimum income benefit (RMI) or housing allowances.

124 Ibid.
125 Supra note 1 at 10
126 Id. at 11-12
In contrast to benefits provided to cohabitants by many insurance companies and by public and private transportation companies; French social law is very biased. Cohabitants derived few social rights from cohabitation i.e. to remain in the common rented home after a separation or death, and to be considered as a social security beneficiary of the partner where there is no income: however, in the year 1998 with the introduction of *Couverture Maladie Universelle* (Universal Health Coverage) which provides to everybody a right to social security, this last benefit also disappeared.\(^\text{127}\)

The French legal situation arises from almost incompatible factors. On the one hand, there is a vigorous traditional marital preference in French culture holding that people who are not legally linked together should not be treated alike people who have proved their mutual commitment and further no benefits from the State should be provided in the same way as provided to couples who have proved their mutual commitment. Further under civil and fiscal law, only married couples are treated to be a real couple. Though under social law cohabitation is identified but only in order to decline or curtail allowances for single people. Such attitudes are common among the traditionalist part of the population who see growth of individualism and the change in the family as a threat to society. On the other hand, the new lifestyles have a strong influence on the society. It has to be noticed that most of long-term cohabitants seemed to accept the lack of legal intervention as a aftereffect of the individual freedom of their relationships. And further it has to be accepted that if cohabitants wants to make provision for the survivor after death of one, there are new private solutions available in the form of contracts, life insurance and so on.\(^\text{128}\)

Though France has introduced equal treatment of married and unmarried couples in its legislations, but a historical overview about the evolution and progression of legislations and laws on cohabiting unions and children born to cohabiting couples provides quite ambiguous picture. After the Second World War, French family policies were based on the norm of the conjugal family. The increase in cohabiting couples during the last few decades of the 20\(^{th}\) century did not prompt

\(^{127}\) *Ibid.*

authorities until year 1998 to extend social legislation from married to unmarried couples.129

Earlier the Rules of taxation did not allow unmarried couples to jointly declare their income, however, on January 01, 2005 the income tax regime for married couples was also extended to PACS unions. Under this new application of the progressive tax regime to PACS couples similar to married couples in France, now couple filing joint income taxes, in almost all cases, pays less tax than they would filing separately if one of the partners earns substantially more than the other. The Finance Act, 2011 modified income tax regulations for both married couples and PACS unions.130

Before the PACS though there were no rights of mutual inheritance in case of the death of unmarried partner but the non-married cohabiting persons were still treated differently than singles, e.g. they were not entitled to claim special allowances, like allowance for family support to single mothers or allowance for widowhood.131

The creation of the Pacte Civil de Solidarité (PACS) partly changed this situation, but did not give the same advantages to cohabiting and married couples. Despite the increase in cohabiting unions, the French legislations gave its preference to marriage.132 ‘Les concubins ignorent la loi, la loi ignore donc les concubins’ (The concubines are ignorant of the law, the law therefore ignores cohabitants), indeed, have retained much of its truth. Today's cohabitants still live together without bothering with their legal relations and the law still does not provide adequate rules for cohabitation. Nobody can blame cohabitants for being unaware of their legal status, but in times when the social importance of marriage significantly declines the law should not ignore cohabitation, at least, as far as children and the protection of the weaker cohabitant is concerned. Therefore, an assessment of different legal landscapes appears to be necessary in order to identify issues which should be addressed by future juridical and legislative activities.133 However, on the basis of

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129 Supra note 27 at 601
130 Supra note 56 at 2
131 Supra note 27 at 601
132 Ibid.
present legal provisions of France, researcher have explained the rights and responsibilities of non-married partners as following:

**5.2.3.1 Right to Maintenance in France**

Partners bound by a civil solidarity pact provide mutual and material help. The modalities of this assistance are fixed by the pact. In France liability to ‘maintenance’ is only available where disparity in standard of living of spouses is resulted because of divorce. ‘Maintenance’ in France is in the nature of a lump sum and takes the form of a capital amount fixed by the court, thus it is called *des prestations compensatoires* (compensatory benefit) rather than maintenance in the general sense.\(^{134}\) It is important to note that the impact and sacrifice one spouse has made towards the upbringing and education of children is enunciated explicitly as a principle that French judges have to take in notice when granting *prestations compensatoires*, together with other factors like the means and needs of the respective spouses, duration of the marriage, professional status of the parties, their pension rights etc.\(^{135}\)

In France, maintenance is not guaranteed but can be granted based on needs and means of each party under the principle of fairness aforementioned and can be in

\(^{134}\) Civil Code (France), Article 270 [Divorce puts an end to the duty of support between spouses. One of the spouses may be compelled to pay the other a benefit intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living. This benefit shall be in the nature of a lump sum. It shall take the form of a capital the amount of which must be fixed by the judge. However, the judge may refuse to grant such a benefit where equity so demands, either taking into account the criteria set out in Article 271, or where the blame lies wholly upon the spouse who requests the advantage of this benefit, considering the particular circumstances of the breakdown.]

\(^{135}\) Civil Code (France), Article 271[A compensatory benefit must be fixed according to the needs of the spouse to whom it is paid and to the means of the other, account being taken of the situation at the time of divorce and of its evolution in a foreseeable future. For this purpose, the judge shall have regard in particular to:
- the duration of the marriage;
- the ages and states of health of the spouses;
- their professional qualifications and occupations;
- the consequences of the professional choices made by one spouse during the community life for educating the children and the time which must still be devoted to this education, or for favouring his or her spouse's career to the detriment of his or her own;
- the estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime;
- their existing and foreseeable rights;
- their respective situations as to retirement pensions.]
the form of periodic or lump sum payments. Lifetime maintenance is very seldom awarded after divorce, due to the extreme criteria required by the leading cases. In the latest orders, this principally happens for elderly wives, who have not been able to work due to their spouse's situation and who may be unable to obtain a qualification. This lifetime maintenance may be substituted by a capital payment if it is justified by a change in circumstances. It cannot be raised if circumstances change.

Thus the concept of maintenance in France is restricted to married couples only and even that is available in very few cases in the form of compensation because there are so many support systems in France that even after divorce they have financial security from state. Further in comparison to India the concept of maintenance has not been extended to non-married partners as Indian judiciary has extended the benefits of maintenance to long term live-in partners.

5.2.3.2 Right of Unmarried Couples against Domestic Violence

Policy against domestic violence in France and more specifically violence against women is quite recent. Long seen as a private matter domestic violence has been a taboo issue until recently. It was only in 1994, when the new Criminal Code came into force, that the seriousness of domestic violence was acknowledged through the introduction of an aggravating circumstance that applies in the event that the spouse or partner of the victim uses criminal violence at the time of an incident. Rape within marriage has been recognized in case law since 1990.

The French law on domestic violence is similar to married spouses and unmarried cohabiting couples. The similarity of civil provisions also has been

136 Supra note 8 at 17
137 Civil Code (France), Article 276-4[The debtor of a compensatory benefit in the form of a life annuity may at any time refer the matter to the judge for the purpose of ruling on the replacement of the annuity by a capital determined under the terms of Articles 275 and 275-1. That application may be made by the debtor's heirs. The creditor of a compensatory benefit may make the same application where he or she establishes that a modification in the situation of the debtor allows that replacement, in particular at the time of liquidation of the matrimonial regime.]
maintained in Penal Code of France as well. It includes the term cohabite along with words spouse in provision of punishment for domestic violence.\textsuperscript{140} The French Penal Code\textsuperscript{141} provides that for some violent offenses the perpetrator may face an increased penalty when an aggravated circumstance exists, such as the offense being committed against a natural or legitimate ascendant or the adoptive father or mother or by the spouse or cohabite of the victim, and the act of violence causes an unintended death, mutilation or permanent disability, total incapacity to work for more than eight days, incapacity to work of eight days or less or causing no incapacity, or the act subjects the victim to torture or to acts of barbarity.\textsuperscript{142}

In 2010 the French Parliament has adopted Law on Violence Against Women, Violence Between Spouses, and the Effects of These Types of Violence on Children, which introduces new means of protection against violence available to persons in any of the various familial structures; marriages, civil partnerships, and co-habitation.\textsuperscript{143} Although it protects both sexes, the law is primarily designed to help women and children who are victims of domestic violence. It contains civil and criminal provisions. French Parliament make it a crime to inflict psychological violence in the domestic sphere. The law prohibits harassing one’s spouse, partner, or co-habitant by repeated act that degrade one’s quality of life and cause a change in one’s physical or mental state of health. It is punishable by a maximum penalty of three years in prison and a fine. Here it is also important to note that offence of domestic violence in France is gender neutral.\textsuperscript{144} Thus it is clear from the above provision of the French law that law treats spouses and unmarried cohabiting couples equally in cases of domestic violence and harassment and further same amount of fine and imprisonment has been provided. The Law introduces a new tool, the protective order (ordonnance

\textsuperscript{140} Penal Code of France, 1971, Article 222-3-6, 222-8-6, 222-10-6, 222-12-6
\textsuperscript{141} Penal Code of France, 1971, Article 222-11, 222-12
\textsuperscript{144} Ibid.
de protection) rendered by a family judge, which permits the protection of the victim through various measures, including the following:

- evicting the violent spouse, partner, or co-habitant and rendering a decision on which party will be financially responsible for the family housing;
- prohibiting the violent spouse from seeing certain individuals and from owning a firearm or any other type of weapon;
- allowing the victim to hide where she/he is domiciled;
- ruling on the custody of the children;
- prohibiting a child to leave French territory without the authorization of both parents; and
- awarding legal aid to the victim.¹⁴⁵

Thus it clear that in France the law relating to domestic violence is similar to married spouses and unmarried couples, and further this similarity has been maintained in the statutory provision of France. Here I would also like to emphasize that since marital rape in France is an offence the cohabiting partner could also be prosecuted for the offence of rape.

5.2.3.3 Unmarried Couples’ Rights on Properties and Liabilities Thereon

In French civil partnership, partner can either decide govern by the basis of a strict separation of ownership of property, or that property is owned and shared jointly between partners, whomever actually financed the purchase. The first type of ownership structure is called *regime de separation de biens* (Separation of Property) in which each partner remains the exclusive owner of all property purchased in their sole name. As property is not jointly held it remains owned separately by each partner. And the other basis of ownership of the property is *en indivision* (in Joint Ownership) in which all property is said to be jointly owned.¹⁴⁶

¹⁴⁵ Ibid.
With respect to conjugal association of property legislation regulates only in absence of special agreements, which the spouses may enter into as they deem proper, however such agreement should not be contrary to public morals and legal provisions of ante-nuptial agreements and of matrimonial regimes provided in French Civil Code. Thus couples are free to draw up their own agreement but must not be immoral.\textsuperscript{147} If the registered partners have made agreement regarding property in the Pact itself, property will be divided accordingly. Similar is the case with unregistered partners. When non-married cohabiting couples wish to separate by mutual agreement, a court does not need to intervene. However, if one is in dispute with other partner, \textit{the juge aux affaires familicates} (family court judge) will be able to settle the differences.\textsuperscript{148}

With regard to assets, if family home was bought solely by one partner, the non-buying partner has no legal right to it and will be unable to oppose the sale or the letting of the property by its owner. If property is bought by both of partners, the consent of both partners is required in order to be able to sell or let the property. In France, the cohabiting home cannot be disposed of without the other partner’s consent.\textsuperscript{149} The sum invested by each partner and given in the notarized instrument (\textit{acte notarie}) of the property sale will serve as the starting point in the event of a cohabitation breakdown. When cohabiting partners does not enter into pact the agreement regarding properties, on dissolution of such partnership the French law of co-ownership applies. Community property/common property in France includes only goods acquired during partnership, however, inheritances and gifts are normally excluded. Income derived from dividends from shares, rents from a house or other personal assets is included in the community of asset. Though pension rights are treated as personal asset, however, the impact on financial relief upon separation is only indirect.\textsuperscript{150}

\textsuperscript{147} Civil Code (France), Article 1387 [Legislation regulates conjugal association, with respect to property, only in default of special agreements, which the spouses may enter into as they deem proper, provided they are not contrary to public morals and to the following provisions.]

\textsuperscript{148} Supra note 8 at 15

\textsuperscript{149} Ibid.

\textsuperscript{150} Civil Code (France), Article 1400, 1404, 1405[Art. 1400: Community of property which is established failing an agreement or by a simple declaration of being married under the community of property regime, is subject to the rules explained in the following three Sections. Art. 1404: Constitute separate property by their nature, even where they have been acquired during the marriage, clothes and belongings for the personal use of one of the spouses, actions for
The co-ownership rules in France provide that creditors may recover debts that a spouse has incurred for whatever reasons, personal use or for the benefit of the relationship, during the relationship from community of property. Likewise, if a community property is used to set off a personal debt, reimbursement from that spouse is to be expected.\textsuperscript{151} However, property from community cannot be used to set off personal debts incurred before marriage. Each spouse is entitled to administer alone or even dispose of any common property but would be accountable for faults so committed. One spouse, however, may not without the other’s consent dispose of \textit{inter vivos} gratuitously a common property or make it a surety for a third person’s debt.\textsuperscript{152} Although in principle common property is to be divided equally, one party will have to compensate the other for the other’s sole contribution towards the communal property before equal division takes place. For instance, money transferred from one spouse’s parents to settle a joint debt accrued to a third party.\textsuperscript{153} Also, a compensation for bodily or moral harm, inalienable claims and pensions, and, more generally, all property which has a personal character and all rights exclusively attached to the person. Constitute also separate property by their nature, but subject to a reimbursement if there is occasion, implements necessary to the occupation of one of the spouses, unless they are accessory to business assets or to an enterprise forming part of the community.

\textbf{Art. 1405:} Remain separate property the items of property of which the spouses had ownership or possession on the day of the celebration of the marriage, or which they acquire, during the marriage, through succession, gift or legacy. A gratuitous transfer may stipulate that the property which is its subject-matter will belong to the community. Property falls into community, unless otherwise stipulated, where a gratuitous transfer is made jointly to both spouses. Property surrendered or transferred by the father, mother or other ascendant to one of the spouses, either in order to discharge what he owes to him or her, or under the obligation of paying debts of the donor to outsiders, remain separate property, subject to reimbursement.\textsuperscript{154}

\textbf{Civil Code (France), Article 1413, 1416} [\textbf{Art. 1413:} Payment of debts which either spouse owes, for whatever reason, during the community, may always be enforced on community property, unless there was fraud of the debtor spouse and bad faith of the creditor, and subject to reimbursement due to the community, if there is occasion.

\textbf{Art. 1416:} A community which has discharged a debt for which it may have been sued under the preceding Articles, is nevertheless entitled to reimbursement, whenever that undertaking had been contracted in the personal interest of one of the spouses, for example for the acquisition, preservation or improvement of a separate property.\textsuperscript{155}]

\textbf{Civil Code (France), Article 1421, 1422} [\textbf{Art. 1421:} Each spouse has the power to administer alone the common property and to dispose of it, subject to being accountable for faults committed in his or her management. Transactions entered into without fraud by a spouse are enforceable against the other. A spouse who follows a separate profession, has alone the power to perform acts of administration and disposition necessary for it.

\textbf{Art. 1422:} One spouse may not, without the other, dispose \textit{inter vivos}, gratuitously, of the common property.\textsuperscript{156]}

\textbf{Civil Code (France), Article 1405} [\textbf{Remain separate property the items of property of which the spouses had ownership or possession on the day of the celebration of the marriage, or which they}
spouse may request preferential allotment or occupation of the matrimonial home but the final decision lies on the court.\textsuperscript{154}

Thus the same rules of co-ownership that are applied to married spouses are similarly applied to unmarried partners.

For PACS registrants, the latest law amended in 2009, replaced the former default regime of undivided co-ownership and provided equal division upon dissolution (\textit{l’indivision}) by a separation of property regime. Thus, unless otherwise stated in their pact, each partner can administer and dispose of their personal assets on their own and each is responsible for their own personal debts arising before or during the \textit{pacte} except those incurred personally but intended for the partners’ joint daily life.\textsuperscript{155} Each partner can prove exclusive ownership of a property and only those that exclusivity cannot be established will be subject to equal division. \textit{Les pacés} can still opt for the \textit{régime de l’indivision} (division on dissolution) if they wish but this has to be stated clearly in the pact. \textsuperscript{156}

\section*{5.2.3.4 Cohabitants’ Right to Succession and Exemption from Taxation}

As far as succession rights are concerned, in absence of any agreement regarding property, the free voluntary legacy which might be made to the cohabiting partner is severely limited by the reserve for children and ascendants. Apart from certain rights and responsibilities that are attached with PACS the couples forming a PACS undertake to take care of each other. Though couples under PACS are not fully equal to married couples, many French councils treat PACS couples equal to married couples while assigning benefits or accommodation. Further, there are certain rights available to married spouses that are not necessarily available to PACS couples, for example pension and inheritance rights.\textsuperscript{157} Unless an agreement (\textit{régime de

\begin{itemize}
\item acquire, during the marriage, through succession, gift or legacy. A gratuitous transfer may stipulate that the property which is its subject-matter will belong to the community. Property falls into community, unless otherwise stipulated, where a gratuitous transfer is made jointly to both spouses. Property surrendered or transferred by the father, mother or other ascendant to one of the spouses, either in order to discharge what he owes to him or her, or under the obligation of paying debts of the donor to outsiders, remain separate property, subject to reimbursement.]

\begin{footnotes}
\item Supra note 8 at 15-16
\item Civil Code (France), Article 515-5
\item Supra note 8 at 17
\end{footnotes}
l'indivision) has been specifically drawn up and one of the partners dies, the remaining partner has no right to succession. The deceased partner can leave all of their estate to the surviving partner if there are no descendants or ascendants.\textsuperscript{158} The remaining partner can also benefit from tax exemptions and allowances.

Perhaps the biggest tax advantage for unmarried couples of entering into a PACS is where succession tax is concerned. Assets passing between PACS partners on death are tax free, as they are between married couples. Without a PACS agreement, those assets are taxed. For lifetime gifts passing between PACS or married couples, there is a tax-free exemption.\textsuperscript{159} By entering into a PACS the surviving partner benefits from an exemption from liability to inheritance tax on any property left to them by their deceased partner. Otherwise they are liable for inheritance tax at the rate of sixty percent, with only a miniscule allowance available to them.\textsuperscript{160} Such a benefit is also available to anyone who is already in a civil partnership from other country, and then he will also normally be exempt from French inheritance tax. There is no exemption for other beneficiaries of the inheritance, who will be taxed on the basis of their relationship to the deceased.\textsuperscript{161}

After the death of a partner the surviving partner is automatically awarded the lease allowing them to continue living in the rented accommodation, however if the property had been owned by the deceased partner, the surviving partner may continue to live there for one year, regardless of the succession rules.\textsuperscript{162}

5.2.3.5 Other Tax Benefits Available to Cohabitants

PACS couples can benefit from a joint tax declaration on their annual disposable income and have similar obligations like married couples. Though initially the registered couples were offered the right to file joint income taxes only after three years but from the year 2005 all PACS couples are allowed to file joint taxes, in the

\textsuperscript{158} “Information on the benefits and obligations of a PACS, including information on how to change or end a PACS contract”, available at: https://www.angloinfo.com/france/how-to/page/france-family-marriage-partnerships-effects-of-pacs (Last visited on May 22, 2017)

\textsuperscript{159} Supra note 157


\textsuperscript{161} Ibid.

\textsuperscript{162} Supra note 158
same manner as married couples. On January 01, 2005, the income tax regime for PACS unions was aligned with that of married couples.\textsuperscript{163} After this progressive way to file income tax jointly by registered couples is applied in France, a couple filing joint income taxes, in almost all cases, pays less tax than they would filing separately if one of the partners earns substantially more than the other. The Finance Act (France), 2011, modified income tax regulations for both married couples and PACS unions. Previously, PACS partners could file a total of three returns (two separate ones for the period preceding the partnership, a single joint one for the period following it) for the first year of their union, and as each was considered for the entire twelve months, lower tax rates generally applied. Henceforth, they must select a single regime for the whole of the first year, filing either two separate returns or a single joint one.\textsuperscript{164} The couple may also be liable to pay Wealth Tax (\textit{Impôt sur la Fortune}), which is calculated by reference to the couple's joint worldwide assets. Wealth tax was consistently applied to the combined assets of both partners, since the introduction of the PACS in 1999.\textsuperscript{165} Tax benefits have also been granted for succession by surviving partner, which have already been discussed in detail.

\subsection*{5.2.3.6 Parental Rights and Liabilities}

The French system of parental authority unequivocally applies to married parents, divorced parents and to parents of illegitimate children i.e. non-married parents. It transformed the concept of parental matrimony.\textsuperscript{166} There is almost exhaustive similarity of rights and duties for children, independently of the legal status of relationship of parents.\textsuperscript{167} The legal provisions concerning parental responsibilities are contained in Articles 371 to 387 of the Civil Code of France. The French concept of parental authority (\textit{autorité parentale}) encircles several different parental rights and duties. The child, irrespective of his age, owes honour and respect

\begin{flushleft}
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\textsuperscript{163} Supra note 56 at 2
\textsuperscript{164} Ibid.
\textsuperscript{165} Ibid.
\textsuperscript{167} Supra note 1 at 12
\end{flushleft}
French Civil Code gives a broad definition of parental authority. It provides, “parental authority is a collection of rights and duties aimed at the interests of the child. The parental authority belongs to the father and mother until the child reaches the age of majority or is emancipated (émancipé). This authority is used for the protection of the child’s safety, health and morality. The rights and duties also ensure the child’s education and allow for its personal development. The parents should make the child a party to the decisions relating to him, allowing for the child’s age and degree of maturity.”

Parental rights include a wide variety such as the right to raise and to educate the child, the right to usage of surname to the child, the right to represent the child and to administer the child’s property and also an obligation to maintain the child. This obligation does not automatically cease when the child reaches majority. It is in the child’s interest to study and have professional education even if the child has reached majority. The concept of parental authority in France is almost identical irrespective of form of their relationship. In France, a duty and right to maintain personal contact with the child is generally conferred to the parent without parental authority which shall remain unaffected even if the relationship between the parents breaks down.

168 Civil Code (France), Article 371[A child, at any age, owes honour and respect to his father and mother.]

169 Civil Code (France), Article 371-1[Parental authority is a set of rights and duties whose finality is the welfare of the child. It is vested in the father and mother until the majority or emancipation of the child in order to protect him in his security, health and morality, to ensure his education and allow his development, showing regard to his person. Parents shall make a child a party to judgments relating to him, according to his age and degree of maturity.]

170 NOTE: [The term "education," as used in the Civil Code, has two connotations. The first relates to the formal education of the child. In addition, the term refers to the moral and social upbringing. The term includes all that comprises the authority of a parent to educate and raise one's child to become a mature, responsible adult. Even if the court awards custody to a third party, both parents continue to oversee the child's education, unless the court rules otherwise.]

171 Civil Code (France), Article 371-1

172 Civil Code (France), Article 373-2 [Separation of the parents has no influence on the rules of devolution of the exercise of parental authority. Each of the father and mother shall maintain personal relations with the child and respect the bonds of the latter with the other parent. Any change of residence of one of the parents, where it modifies the terms of exercise of parental authority, shall be the subject of a notice to the other parent, previously and in due time. In case of disagreement between them, the most diligent parent shall refer the matter to the family causes judge who shall rule according to what the welfare of the child requires. The judge shall apportion
In the case of separation of unmarried parents ‘natural’ families were marked by the principle of unilateral parental authority even more than legitimate families. Indeed, the parents were presumed to be more or less separated or on the brink of separation. Only one of the parents exercised authority in this situation. Before 1970 it was the father, after that date it was the mother. With the rise of genuine families formed out of wedlock, lawmakers had to change the law. Thus, the Law of July 27, 1987, established the possibility of shifting from unilateral exercise of parental authority, which remained the rule, to joint exercise.\textsuperscript{173} The Law of January 8, 1993, made joint exercise the rule, provided two conditions were met: both parents had to recognise the child during the first year after birth and they had to be living together at the time of the second recognition. If they did not meet these conditions, joint exercise could be introduced by decision of the family law judge or by a joint declaration before the head registrar of the Regional Court. In any event, separation had no automatic effect on the joint exercise of parental authority since the judge did not have to intervene a priori. The rule would hold unless one of the parents called into question the terms governing the exercise of parental authority or its organisation. With the Law of March 4, 2002, a single rule was applied to all children, whether legitimate or natural.\textsuperscript{174} However at present the French Civil Code states that fathers and mothers shall exercise joint parental authority.\textsuperscript{175} Once their paternity and maternity are established, the parents therefore exercise their parental function jointly and equally. To take into account particular features of out-of-wedlock filiation, however, the law specifies that if the filiation with respect to the second parent

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\textsuperscript{174} Ibid.

\textsuperscript{175} Civil Code (France), Article 372 [The father and mother shall exercise in common parental authority. Where, however, parentage is established with regard to one of them more than one year after the birth of a child whose parentage is already established with regard to the other, the latter alone remains vested with the exercise of parental authority. It shall be likewise where parentage is judicially declared with regard to the second parent of the child. Parental authority may however be exercised in common in case of joint declaration of the father and mother before the chief clerk of the tribunal de grande instance or upon judgment of the family causes judge.]
(usually the father) is established more than one year after the birth of the child, parental authority would continue to be exercised by the parent that recognised the child first (usually the mother). But even in this case, joint exercise can be introduced by means of a joint declaration by the father and mother (before the head registrar of the Regional Court) or by decision of the family law judge. In accordance with the general principle set forth in Article 373-2-1 the separation of the parents has no effect on the rules of devolution of the exercise of parental authority. Thus the rule of joint exercise of parental authority in families formed out of wedlock continues even after separation, except when contrary is agreed in agreement or upon a court decision. Further the parents need only decide and agree upon the terms governing their joint exercise, including the child's living arrangements. From this point of view, the Law of March 4, 2002, introduced a profound innovation by proposing alternating residence as a model.

- **Primary Residence of the Child with the Father or Mother**

The system of providing child primary residence with either father or mother is the most frequently adopted solution, which corresponds, mutatis mutandis, to the old approach of having one of the child's parents take charge on a day-to-day basis. Though the parent with whom the child primarily provided residence enjoys a de facto privileged situation and a correspondingly greater responsibility but still the rules for joint exercise of parental authority apply i.e. the parents must make all the decisions jointly relating to education and protection of the child. Thus the exercise of

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176 Civil Code (France), Article 372-2 [ Where one of the "parents" performs alone an usual act of parental authority concerning the person of the child, he or she shall be considered to be acting with the consent of the other with regard to third parties in good faith.]

177 Civil Code (France) Article 372

178 Civil Code (France), Article 373-2-1[Where the welfare of the child so requires, the judge may commit exercise of parental authority to one of the parents. The exercise of the right of access and lodging may be refused to the other parent only for serious reasons. That parent shall keep the right and duty to supervise the support and education of the child. He or she must have notice of the important choices relating to the life of the child. He or she shall comply with the obligation that devolves upon him or her under Article 371-2.]

179 Civil Code (France), Article 373-2-7 [Parents may seize the family causes judge to have approved the agreement through which they organize the terms of exercise of parental authority and establish their contributions to the support and education of the child. The judge shall approve the agreement unless he observes that it does not sufficiently protect the welfare of the child or that the consent of the parents was not freely given.]

180 Supra note 173
joint parental authority has been simplified for the parents by the presumed agreement stated in Article 372-3 by which parents can agree upon the terms of exercise of parental authority in case of separation. For ordinary acts, each of the parents is considered to act with the consent of the other and further the parent, particularly the parent with whom the child primarily resides, may act alone. However in case of disagreement, the parents may call upon the arbitration of the judge, who will rule in the best interests of the child. The parent with whom the child does not primarily reside has an irreducible right, except for a serious reason, to maintain a personal relationship with the child and the other parent is expected and required to respect these ties.  

- Alternating Residence of the Child with the Father and Mother

The question of shared or alternating residence had been a subject of lively controversy in France for the last two decades of the 20th century. The ‘alternating custody’ came into being with ‘joint custody’ in the early 1980s. Those who cherished the system of alternative residence find this the only system that ensures equality between the parents by allowing the father who was rarely granted the child's primary residence. This system further enables both parents to maintain well balanced ties with their child or disunited family. Those who opposed this arrangement, find the alternating residence system to destabilize the child, who is shunted from one parent to the other depending on the day or the week. While the alternating residence system satisfies the apparent rights of the father and mother, it is said to turn the child into a thing to be shared, without concern for his or her best interests. The Amendment of July 22, 1987 in Civil Code, then the Amendment of January 8, 1993, confirmed this position by including in the Code the requirement of a ‘primary

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181 Civil Code (France) Article 373-2[Separation of the parents has no influence on the rules of devolution of the exercise of parental authority. Each of the father and mother shall maintain personal relations with the child and respect the bonds of the latter with the other parent. Any change of residence of one of the parents, where it modifies the terms of exercise of parental authority, shall be the subject of a notice to the other parent, previously and in due time. In case of disagreement between them, the most diligent parent shall refer the matter to the family causes judge who shall rule according to what the welfare of the child requires. The judge shall apportion removal expenses and adapt accordingly the amount of the contribution to the support and education of the child.]

182 Supra note 173 at 307-308
The supporters of alternating residence arrangements did not surrender, however. The ambiguity of the wording, the demands of parents, and the activism of fathers' associations led some judges to accept a variety of shared residence arrangements. The Law of March 4, 2002 finally accepted the legality of alternating residence in the name of the principle of co-parenthood. Sharing the child's residence in this way was expected to ensure greater equality between the separated father and mother in terms of time and parental roles. Legislators even showed a preference for alternating residence by mentioning it first. The law went even further by giving the judge the power to impose alternating residence as an experiment, in the event of disagreement between the parents. According to Article 373-2-9 of the French Civil Code, "at the request of one of the parents or in the case of disagreement between them regarding the child's living arrangements, the judge can, on a temporary basis, order a period of alternating residence and determine its length. At the end of the period, the judge shall make a final decision on the child's living arrangements, either in favor of alternating residence at the homes of both parents or primary residence with one of them."

Thus it is up to the parents to set forth in their agreement, or leave it to be decided by the judge in case of separation, on the periods of alternating residence e.g. as part of each week, alternating weeks, or alternating months. Alternating residence is decided within the scope of joint exercise of parental authority. Therefore, decisions must be made jointly except where something else has been agreed under the agreement by the parents. Under the principle of co-parenting the infatuation with alternating residence is quite understandable when. However, contemporary French lawmakers intended to assert the continuing need for ties between the child and both of his or her parents through the principle of co-parenting. Further, great caution is required in the system of alternative residence as there is a

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183 Ibid.
184 Ibid.
185 Civil Code (France), Article 373-2-9[In compliance with the two preceding Articles, the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. On request of one of the parents or in case of disagreement between them about the mode of residence of the child, the judge may order provisionally an alternate residence of which he shall determine the duration. On the expiry of it, the judge shall rule finally on the residence of the child alternately at the domicile of each of the parents or at the domicile of one of them.]
extensive danger of destabilizing the child and encouraging parental selfishness on the pretext of the presumed best interests of the child.\textsuperscript{186}

For children born outside wedlock, paternity may also be judicially declared but such a right is reserved to the child only.\textsuperscript{187} The conclusion is that a father always has the chance of acquiring paternity even if he has missed the step of registering himself as the father upon the child’s birth; however, an unmarried father must take additional steps to establish the paternity. French law does not absolutely elevate male PACS partners to enjoy such parental authority as they are simply grouped under the category of unmarried fathers.\textsuperscript{188} Earlier, under \textit{accouchement sous X}\textsuperscript{189}, a child could had no parent, one parent or two parents. There was only one gender-neutral rule stating that if one parent seeks to recognize his or her child after more than a year after the child’s birth and that the other parent has already acknowledged the child, the first parent was granted parental authority i.e. the parental authority was vested solely on the parent that acknowledged child first.\textsuperscript{190} There was however a proviso that parental authority may be exercised in common when the mother and father together make a joint declaration before the chief clerk of the \textit{tribunal de grande instance} or upon a court’s decision.\textsuperscript{191} In France a father may be the sole parent if only he recognizes his child. Moreover, recognition means attachment of parental authority. Thus, an unmarried father in France needs not to do anything further to establish parental authority after recognizing his child.\textsuperscript{192} It makes clear that in France.

\begin{itemize}
\item \textsuperscript{186} \textit{Supra} note 173 at 307-308
\item \textsuperscript{187} Civil Code (France), Article 327[ After the death of the husband, his heirs are likewise entitled to contest his paternity, either as a precautionary step where the husband was still in the prescribed period for doing so, or in defence to a claim of status.]
\item \textsuperscript{188} \textit{Supra} note 8 at 11
\item \textsuperscript{189} NOTE: [Choice of a woman to give birth to a child while keeping her anonymity and the secret of her admission to a health care facility. This choice is usually accompanied by abandonment of the child. The mother and the father then have a period of 2 months to recognize the child.]
\item \textsuperscript{190} Civil Code (France), Article 372 [The father and mother shall exercise in common parental authority. Where, however, parentage is established with regard to one of them more than one year after the birth of a child whose parentage is already established with regard to the other, the latter alone remains vested with the exercise of parental authority. It shall be likewise where parentage is judicially declared with regard to the second parent of the child. Parental authority may however be exercised in common in case of joint declaration of the father and mother before the chief clerk of the tribunal de grande instance or upon judgment of the family causes judge.]
\item \textsuperscript{191} \textit{Supra} note 8 at 11
\item \textsuperscript{192} \textit{Id.} at 12
\end{itemize}
no one is directly presumed to be a legal parent and vested with parental responsibility upon the birth of a child and this is true for married couples, couples under PACS and unregistered unmarried couples.\textsuperscript{193}

A simple reading of the French Civil Code shows no direct provision of whether and how a new partner of a legal parent of child can attain parental rights. The adjacent provision is that a family court judge may regulate in detail the relationship between a child and a third party person (relative or not) if it is in the best interest of the child\textsuperscript{194}, which is nearly of granting a full parental authority. The court may also assign a child to a third person but the responsibility of this third person extends only to supervision and education while parental authority still remains with the legal parents.\textsuperscript{195} Thus, a non-genetic parent possibly only stands a chance to establish parental authority through delegation with court’s approval or adoption.\textsuperscript{196} In case of death of both parents of whom at least one was exercising parental responsibilities at the time of the death, the judge of the guardianship court shall order a guardianship.\textsuperscript{197} The guardian will exercise parental responsibilities under the direction and the supervision of the board of guardians.\textsuperscript{198}

\textsuperscript{193} Ibid.
\textsuperscript{194} Civil Code (France), Article 371-4 [Where the child was entrusted to a third party, parental authority shall continue to be exercised by the father and mother; however, the person to whom the child was entrusted shall perform all the usual acts regarding his supervision and education. The "family causes judge", where he temporarily entrusts the child to a third person, may decide that the latter shall require the establishment of a guardianship.]
\textsuperscript{195} Civil Code (France), Article 373-3 and 373-4 [Art. 373-3: "Separation of the parents" is not a bar to the devolution provided for by Article 373-1, even where the parent who remains able to exercise parental authority was deprived of the exercise of some attributes of that authority by the effects of a judgment delivered against him or her. The judge may, by way of exception and where the welfare of the child so requires, in particular when one of the parents is deprived of the exercise or parental authority, decide to entrust the child to a third person, chosen preferably within his relatives. He shall be seized and shall rule under Articles 373-2-8 and 373-2-11. In exceptional circumstances, the "family causes judge" who decides on the terms of exercise of parental authority after "a separation of the parents" may decide, even in the lifetime of the parents, that in case of death of the parent who exercises parental authority, the child may not be placed in the custody of the survivor. He may, in that event, designate the person to whom the child shall temporarily be entrusted.]
\textsuperscript{196} Supra note 8
\textsuperscript{197} Civil Code (France), Article 390 [A guardianship must be opened where the father and mother are both dead or are "deprived of the exercise of parental authority". It must also be opened with respect to a child who has neither a father nor a mother. There is no derogation to specific statutes governing the Children's aid service.]
\textsuperscript{198} Supra note 8
Since France supports joint parental authority even after divorce and separation a parent with parental authority cannot relinquish from joint parental responsibilities by agreement between them without the court’s approval unless the court decides otherwise in the child’s interest. However the parents can submit to the court jointly as to how they have agreed to the terms of exercising their respective parental authority and the court would usually approve such agreement unless the child’s interest is not protected adequately. The same applies to les pacsés and other unmarried couples; on separation the parent with parental authority cannot relinquish his or her responsibility except through a decision of court for the same in the interest of child.\textsuperscript{199}

The parents whether they are married, a registered PACS or living together without registered union can decide which name the child will bear. The selection of the family name has to be decided by a joint declaration when registering the birth. When registering the birth, parents can choose if the child will have the name of the father or mother or of both. The name will be the same for any children that the couple may have afterwards, generally, in the absence of a joint declaration, the child will bear the father's name if child is recognized by father.\textsuperscript{200}

In following three circumstances parental responsibilities automatically come to an end\textsuperscript{201}:

- when the child reaches majority\textsuperscript{202}, or
- when the child is emancipated. This takes place when the child, who must be at least 16, obtains the capacity to enter in legal transactions\textsuperscript{203}. The parents can petition jointly or one parent can act alone and if the guardianship court (juge des tutelles) believes after the child is heard that there are justes motifs

\textsuperscript{199} Civil Code (France), Article 373-2 and 376 [Art.376: No relinquishment or transfer relating to parental authority may be effective, unless under a judgment in the cases specified below.]

\textsuperscript{200} Supra note 158


\textsuperscript{202} Civil Code (France), Article 371-1

\textsuperscript{203} Civil Code (France), Article 481[An emancipated minor is capable, like an adult, of all transactions of civil life. He must however, in order to marry or give himself in adoption, comply with the same rules as if he was not emancipated.]
(serious reasons) for the emancipation, an emancipation order will be issued\textsuperscript{204}, or

- when the minor child gets married\textsuperscript{205}.

However, it is possible for the court to discharge parents of their parental responsibilities (retrait de l’autorité parentale) by express provision of a criminal judgment, parental authority may be totally withdrawn from the father and mother who are sentenced either as perpetrators, co-perpetrators or accomplices of a serious or ordinary offence committed on the person of their child, or as co-perpetrators or accomplices of a serious or ordinary offence committed by their child.\textsuperscript{206}

Thus the rights and liabilities of parents are similar whether they are in PACS or marriage or unregistered cohabitation. In France the rule of equality of parenthood has been applied.

5.2.3.7 Rights of Child of Unmarried Parents

The parental responsibilities and rights to child are attached to each other. Some of rights of child born to unmarried parents are discussed as under:

a) Liability to Support/Maintain Child

In proportion to each parent’s means and to the child’s needs it is the duty of parents to support and maintain their child. In France the maintenance and support obligation of the parents towards the child goes further than the simple vital needs. It includes, among others, the affiliation to social security and the duty to get insured for

\textsuperscript{204} Civil Code (France), Article 477 [A minor, even unmarried, may be emancipated when he has reached the full age of sixteen years. "After the minor has been heard" that emancipation shall be pronounced, if there are proper reasons, by the judge of guardianships, on request of the father and mother or of one of them. Where the request is filed by only one parent, the judge shall decide after hearing the other, unless the latter is unable to express his or her intention.]

\textsuperscript{205} Civil Code (France), Article 476 [A minor is emancipated as a matter of right by marriage.]

\textsuperscript{206} Civil Code (France), Article 378 [By express provision of a criminal judgment, parental authority may be "totally withdrawn" from the father and mother who are sentenced either as perpetrators, co-perpetrators or accomplices of a serious or ordinary offence committed on the person of their child, or as co-perpetrators or accomplices of a serious or ordinary offence committed by their child. That "withdrawal" may be applied to ascendants other than the father and mother as regards that part of parental authority which they may have over their descendants.]
civil liability (assurance responsabilité civile).\textsuperscript{207} And further, such obligation to support and maintenance does not cease automatically on the majority or emancipation of child; it remains same when, for example, the child is studying at university and is not yet able to support himself.\textsuperscript{208} In France, the courts set child support liabilities. For separating parents the judge will decide the amount of child support and also the contact arrangements. The judge allows child support agreements to be made by separating parents themselves when the separation is by mutual consent and joint petition, however, the separating couples may leave it to the courts where they cannot come to an agreement on child support and contact arrangements. Though there are no precise guidelines for calculation of child support in France but the court generally takes into account the requirements, needs of the children and the income of the non-resident parent. Child support levels are generally low in France.\textsuperscript{209}

Proportionately to their resources each parent, whether married or unmarried, has a duty to participate in the needs of common children. France has a family benefit system based on the number of children from the age of two upwards, and not related to the income of the parents. Therefore, the court will take into account this amount, as well as other criteria such as home, state allowances and any income of the parents.\textsuperscript{210} This child support does not include any right for the mother, for example, to have a roof over her head. In broad terms, the judge determines the available income of each parent after deducting compulsory expenses. This support is based on living costs. This support may vary if the resident parent relocates far away from the other parent. The judge has the power to decide which parent will have to pay travel costs. Child support is taxable by the Internal Revenue Service for the creditor and deductible for the debtor.\textsuperscript{211} In France child support is not paid in about ten per cent of cases and irregularly paid in another forty per cent. The resident parent can ask the family benefits office to recover child support on their behalf after two months of non-payment. Payments can be deducted from the salary or bank account of the non-

\begin{thebibliography}{99}

\bibitem{207} Supra note 201 at 6
\bibitem{208} Ibid.
\bibitem{210} Supra note 138
\bibitem{211} Ibid.
\end{thebibliography}
resident parent, or collected by a tax collector or bailiff. Thus there is provision to recover a minimum maintenance amount but these measures are rarely used.212

Thus in France the responsibility of parents to maintain child is similar to that of married parents and parents are legally responsible for the needs of their child. However the French system has provided two main benefits for single parents; first, there is the Family Support Allocation (Allocation Soutien Familial, ASF)213, which is a non-contributory benefit for families where there is no second parent, and secondly, there is the Isolated Parent Allocation (Allocation de Parent Isole, API)214 which is payable for twelve months, or until the youngest child turns three years old. API is more generous that the Minimum Income Support Benefit, (Revenue Minimum D'Insertion, RMI)215, but when the entitlement to API expires, a single parent may claim RMI.216

b) Child’s Right to Inheritance

In France the right to inheritance of child from unmarried relationships has been assimilated to that of child of marriages. Nowadays, a natural child born in concubinage can inherit from his parents just as a legitimate child does.217 Concubinage has now been known as free union (union libre) in the sense of open-ended union, and marital life is generally used in connection with it. If father and mother subsequently enter into a certified marriage and have legitimate children, those younger children do not have more rights than their natural born siblings whose birth date back to when their parents were still living in a free union.218 The same

211 Supra note 209
212 NOTE: [Allocation Soutien Familial (ASF) i.e. the family support allowance is paid by the Family Allowance Fund (CAF) or the Social Mutualité Agricole (MSA) to the person who raises his or her child alone with the help of one of his parents, under conditions.]
213 NOTE: [The Parent Isole (API) is designed to help financially single parents who have dependent children.]
214 NOTE: [Revenue Minimum D’Insertion (RMI) i.e. Minimum Income for Retirement is a cash benefit for persons aged 25 or over who are in charge of one or more children and whose income is less than a certain amount determined by regulation.]
215 Supra note 209
217 Ibid.
218
applies to a natural child born from a free union after a divorce from a certified spouse. Natural born children can now inherit the entire estate of their parents not only three quarters as in earlier times, of course, the estate is divided into equal shares among them and their legitimate siblings, if they exists. More importantly, natural children are now integral parts of their parents’ respective families and lineages. Better yet, reciprocal inheritance is now permitted between natural born children and their parents’ respective relatives up to six degrees of ascent and descent. What makes inheritance reciprocal is that for a natural born child, now having the same rights as a legitimate child, the law grants members of his mother’s and father’s lineages right to inherit from him just as from any legitimate child.\(^{219}\)

The central point to grasp with French inheritance laws is that children are specifically protected from being disenfranchised from parent’s estate. Parent cannot freely dispose of any part of reserve (la reserve), which must be held for children. One is only free to dispose as he/she wish of the portion disposable (quotité disponible). The amount of la réserve and the amount freely disposable will depend on the number of children a parent have. The following table illustrates the entitlement children of the deceased receive under la réserve and the portion freely disposable.

**Table:** Share in Property Reserved and Open for Disposal

<table>
<thead>
<tr>
<th>Inheritors</th>
<th>Réserve</th>
<th>Freely Disposable</th>
</tr>
</thead>
<tbody>
<tr>
<td>One Child</td>
<td>1/2 of estate</td>
<td>1/2 of estate</td>
</tr>
<tr>
<td>Two Children</td>
<td>2/3 of estate</td>
<td>1/3 of estate</td>
</tr>
<tr>
<td>Three Children</td>
<td>3/4 of estate</td>
<td>1/4 of estate</td>
</tr>
</tbody>
</table>

If a parent die leaving no surviving spouse and two children, the children will automatically be entitled to 2/3 of parent’s estate, and you are free to dispose as you wish of 1/3 of your estate.\(^{220}\) These rules apply in the absence of any inheritance planning steps having been taken, such as a French marriage contract, purchase _en

\(^{219}\) *Ibid.*

tontine, a will or gifts etc. Accordingly, it is possible to increase the rights of the surviving spouse, but this requires that some prior inheritance planning steps are taken to bring it about.

Thus the right of inheritance of children of unmarried couples has been legally protected in France and parents have been restricted from completely disposing of their properties in such a way that it could affect the rights of the child.

c) Right to Custody of Child

This right has deep historical roots. Both French tradition and the French law consider the biological parents as the persons most naturally inclined to serve the interests of their children. The right to custody of one's children is included within the scope of parental authority. The French law also recognizes that it is in the interests of the children to be in the custody of those persons who naturally have the closest and most loving relationship with them. In principle, the courts in France consider the moral protection of the child as more important than the material protection of the child, as long as there is a modicum of material well-being afforded by the parent who will provide the greater moral protection. Thus, in practice, the biological parents are typically accorded custody. Parents are seen to have the right to custody of their children and the right to hold parental authority until their children reach majority.

The French Civil Code states that the breakdown of a marriage or a relationship does not affect the rules governing the exercise of parental responsibility. Therefore, separated parents continue to exercise joint parental responsibility over their children, which is the general principle provided for by Civil Code. However,

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221 NOTE: [It refers to investment plans for raising capital, devised in the 17th century and relatively widespread in the 18th and 19th centuries. It combines features of a group annuity and a lottery. Each subscriber pays an agreed sum into the fund, and thereafter receives an annuity.]

222 Supra note 220

223 Supra note 166 at 299 and 317

224 Civil Code (France), Article 372, 372-2[Art. 372: The father and mother shall exercise in common parental authority. Where, however, parentage is established with regard to one of them more than one year after the birth of a child whose parentage is already established with regard to the other, the latter alone remains vested with the exercise of parental authority. It shall be likewise where parentage is judicially declared with regard to the second parent of the child. Parental authority may however be exercised in common in case of joint declaration of the father and mother before the chief clerk of the tribunal de grande instance or upon judgment of the family causes judge.]

- 236 -
the judge may entrust only one parent with parental responsibility when the best interests of the child require this. Serious reasons must be evidenced in order for the judge to grant unilateral parental responsibility. In determining the practicalities concerning parental responsibility, the judge will take several elements into consideration, such as:

- The agreements previously entered into by the parents.
- The feelings expressed by the child.
- The ability of each parent to assume their duties and to respect the rights of the other.
- The results of social and psychological investigations.\(^{225}\)

Following the breakdown of a relationship or marriage, the court determines custody of the child on the basis of two available options. The court may decide either:

- To award custody to one of the parents, or
- To allow alternate residence (one week at the mother's place, one week at the father's place for example).\(^{226}\)

However, this last option will only be considered if conditions relating to age of the child, availability of the parents, material conditions of accommodation, proximity of the parents' places and so on satisfy the court.\(^{227}\)

When child custody is awarded to one of the parents, the non-custodial parent will benefit from a visitation right e.g. the first, third and fifth weekend of each month.

\(^{225}\) Civil Code (France), Article 373-2 and 373-2-11: Where he rules on the terms of exercise of parental authority, the judge shall take into consideration in particular:
1. The practice previously followed by the parents or the agreements they entered into earlier;
2. Feelings expressed by a minor child in the way provided for in Article 388-1;
3. The capacity of each parent to assume his or her duties and to respect the rights of the other;
4. The result of court-ordered appraisals possibly carried out, taking into account in particular the age of the child;
5. Information collected in possible social enquiries and counter-enquiries provided for in Article 373-2-12.

\(^{226}\) Supra note 138

\(^{227}\) Ibid.
and half of the school vacation. The right of visitation is not defined in the French Civil Code. Essentially, the jurisprudence considers visitation as a right to maintain direct and personal relations with one's child. It is the right to meet, visit with, see or receive one's child. Visitation does not include the right to lodge one's child, as such right is embraced within the right of hibernement\textsuperscript{228}. Just as the ‘right of supervision’\textsuperscript{229} applies as a matter of law to both parents, including the parent who has not been awarded custody of the child, the right of visitation is established in the Civil Code as a reciprocal right and obligation.\textsuperscript{230} There is little substantive difference between the right of hibernement and that of visitation. The essence of the two rights is that both parents, whether or not they have custody, may nourish and care for their children, at least during certain portions of each year. The Code recognizes that the child requires a relationship with both parents. The parent who has not been awarded custody also has the right to correspond with his or her children without any interference from the other parent. The rights of hibernement and visitation are seen by French jurisprudence to include such rights as (1) the right of correspondence, (2) the right of both parents to enjoy the presence and the love of their children, even though both may not have the right to continuing custody, and (3) the right to enjoy the presence of one's children during special occasions such as holidays or during the annual vacation.\textsuperscript{231} Thus, the non-custodial parent may have a significant impact on the conduct, health and education of his children.

Visitation rights can be denied to the non-custodial parent but only if it is justified by serious reasons. The judge can also decide that the non-custodial parent's visitation right will be exercised in a special meeting space, when the best interests of the child require this. Under the Civil Code similar arrangements can be made concerning the presentation of the child. These may take place in a special meeting space or with the assistance of a trusted third party, when the best interests of the

\textsuperscript{228} NOTE:[Droit d'hébergement i.e. right to accommodate. France gives the parent other than the one with whom they mainly reside the right to have them stay overnight (weekends, holidays etc)]

\textsuperscript{229} NOTE: [Article 288(Repealed) of the French Civil Code had provided that the spouse to whom physical custody has not been confided retains the right of supervision over the child's maintenance and education. Thus, the non-custodial parent may have a significant impact on the conduct, health and education of his children.]

\textsuperscript{230} Supra note 166 at 313

\textsuperscript{231} Id. at 312
child require this or when direct presentation of the child to the other parent presents a risk for one of them. Additionally, the parents can agree on parental responsibility, child custody and visitation rights, and submit to the judge their plans for the same. The judge will ratify the agreement, unless it does not sufficiently protect the best interests of the child or the parents' consent has not been given freely.

5.2.3.8 Adoption Rights of Unmarried Cohabitants

Adoption is, first and foremost, a gesture of love by which a child can be given to a family and a family to a child. It creates a genuine parent-child relationship between the adopter and the adoptee. However, this relationship will only exist if the adopter expressly asks for it and if it is made official by an order from the regional court, *tribunal de grande instance*. Couples who have been married for more than two years, or who are both aged at least 28 may adopt jointly (whether they are of different sexes or the same sex). However, partners in a civil partnership and unmarried couples may not adopt jointly, only one of the partners or one of the members of the couple can be an adoptive parent. In principle, the adopter or adopters must be at least 15 years older than the child they wish to adopt, however, the court may allow exceptions if the age gap is smaller. It should be noted that in the special case of the adoption of a spouse's child, the adopter does not have to meet the age condition. In addition, the minimum age gap between the adopter and the adoptee may also be reduced to 10 years.

The law’s prohibition of *PACS* couples from adopting children is an example of the law’s cautiously homophobic nature. This clause makes homophobic implications because homosexuality is a morally corrupt way of life; gays are more

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232 Penal Code (France). Articles 373-2 and 373-9 [Art. 373-2-9: In compliance with the two preceding Articles, the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. On request of one of the parents or in case of disagreement between them about the mode of residence of the child, the judge may order provisionally an alternate residence of which he shall determine the duration. On the expiry of it, the judge shall rule finally on the residence of the child alternately at the domicile of each of the parents or at the domicile of one of them.]

233 Supra note 138

prone than heterosexuals to committing child-related sex crimes, such as those involving molestation or pornography.235

It is evident from the French view on adoption of children that unmarried couples are not allowed to adopt child in order to protect child from household devoid of responsibilities. However if an individual wants to adopt it is allowed as full responsibilities can be entrusted on that single adopting parent.

The discussion of rights of unmarried couples and the children born to unmarried parents makes it clear that the rights of unmarried couples i.e. registered cohabitants and married couples are akin with regard to child rights and duties, though there were some differences in the starting years of PACS, however, gradually similar benefits and rights were extended to such children and parents. Further the rights to couples in registered unions enjoy more rights than unregistered cohabitants as evident from the above study, however, the property rights of registered couples are not akin to that of married spouses.

5.2.4 Analysis of PACS

In France the legal difference between marriage and non-marital registered relationship has been well established by ensuring that the package of legal effects attributed to the domestic form of non-marital registered relationship are not similar to those provided to married spouses. In France one begins with the assumption that the registration of a non-marital relationship should have no effects unless expressly agreed upon by the parties. The Government was thus not circumscribed by the predisposition that the rights and duties attached to marriage must also be conferred on non-marital registered relationships. Instead, these Governments departed from the premise that the registration should be contractual in nature, with the principle of party autonomy playing a central role.236

With these principles underpinning the entire legislative framework for non-marital registered relationships, the French legislature have not seen the need to

236 NOTE: [This view is clear from the autonomy given to parties in registration and dissolution procedure provided under Civil Code (France).]
amend the law in the fields of civil status, nationality law, name law, child law, or inheritance law, due to the passage of the PACS or statutory cohabitation legislation. Although registered partners and spouses are treated identically with respect to tax law, however earlier under French law this equal treatment was available only once the parties have been registered for three years. This equality is, however, currently restricted to the field of tax law, with the registration of a non-marital relationship having no effect on the parties’ social security benefits or pensions and moreover, not subject to a duty of fidelity or support and assistance.

It would also appear that the registered partners are treated alike married spouses with respect to the duty to contribute to the repayment of debts, the duty to contribute to household expenses and afforded similar protection with respect to the common home.

In France, along lines similar to the matrimonial community of property, parties to a PACS are subject to régime de l’indivision (division on dissolution). Although a difference is drawn between meubles meublants (furniture) and other goods, this difference is in practice relatively irrelevant. This difference would, however, be removed if the proposals made by the French Ministry of justice be accepted. The group advising the French Ministry of Justice believed that the current application of Art. 515-5, French Civil Code is extremely rigid and complex, noting

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238 Supra note 85 at 32
239 Civil Code (France), Article 212 and Article 226 [Art. 212 -Spouses mutually owe each other fidelity, support and assistance. Art. 226- The provisions of this Chapter, on all questions where they do not save the application of ante-nuptial agreements, apply by the sole effect of marriage, whatever the matrimonial regime of the spouses may be.]
240 Civil Code (France), Article 515-4 [Partners bound by a civil covenant of solidarity shall provide mutual material and moral aid to each other. The terms of that aid shall be fixed by the covenant. Partners shall be jointly and severally liable with regard to third parties for debts incurred by one of them for the needs of everyday life and for expenses relating to the common lodging.]
241 Civil Code (France), Article 515-4
242 Civil Code (France), Art. 515-5 [Partners to a civil covenant of solidarity shall lay down, in the agreement, whether they wish to submit to the system of undivided ownership the furniture they would acquire for value after the conclusion of the covenant. Failing which, that furniture shall be deemed undivided in halves. It shall be likewise where the date of acquisition of that property may not be established. The other property of which partners become owners for value after the
that this complexity has been virtually unanimously denounced. It is not, however, entirely clear why the group did not examine the possibility of extending the matrimonial community of property regime to those involved in a PACS.\textsuperscript{243} 

It appears that though France adopted a system of weak registration but it confined the effects of such a registration to fiscal and property law only. It also makes evident that it will not be right to say that France is deliberately progressing towards providing the full package of marital rights to registered partners. Although it is true to say that the legislature in France have already or is in the process of granting more rights to registered partners, it is not true to talk of a steady progression towards total equality in the legal effects of marriage and non-marital registered relationships.\textsuperscript{244} The rights and duties associated with the first category are generally of a low politically sensitive nature. It is assumed that parties involved in an intimate relationship wish to commit to each other, and by imposing duties such as a duty to cohabit or contribute to the costs of the household, the State is merely indicating its moral stance at little financial burden to the State. Moreover, in the majority of legal systems, parties are in any case able to draw up a contract regulating such issues themselves. The State simply provides for a default system to operate in the absence of such an expression of the parties’ will.\textsuperscript{245} 

Thus the non-marital relations in France and India are way apart. Unlike India, where non-marital relations and unmarried mothers faces strong stigma in society including non-availability of legal status of such relations, France has adopted the regularized forms of different union formations which now have acceptability of French society as well as legal recognition of such relationship status. India has still not regularized even the relationships in the nature of marriage neither have conferred rights based on that status whereas France have regularized non-marital cohabitation through PACS. The other important feature of French code is that it has also provided for non-regularised cohabitation in the form of concubinage. It is evident from the conclusion of the covenant shall be deemed undivided in halves where the instrument of acquisition or of subscription does not otherwise provide.] 

\textsuperscript{243} Supra note 85 at 33 
\textsuperscript{244} Id. at 35 
\textsuperscript{245} Id. at 35
above study of the French protection to its non-married living together couples is one of the most regularized system of the world and has provided for the protection of regularized unions and also for the essential rights of the couples in non-regularized relationships.

One of the most important difference between Indian and French legal system lies with regard to position of homosexuals. In India homosexuality is still an offence under Indian Penal Code whereas in France homosexuals are allowed to marry and are also allowed to form civil solidarity pacts (PACS) as already discussed that PACS can be concluded between two persons of same or opposite sex. Many other basic differences lies between the French and Indian legal system, some of them are pertaining to custody of child, where parental rights are allowed even to a non-married father, further, long-term non-married relationships does not result in a liability to provide support to live-in partner after separation (as we have discussed that in France there is right of lump-sum general compensation only to spouses on divorce) except where it is in relation to well-being of child.

Simply, the rules and regulations that each country adopts may be more affected by culture, tradition and politics than some grand underlying principles of jurisprudence; France has a tradition of allowing mothers to give birth secretly which has huge impact on regulations relating to parentage in France. French family policies could be characterized by normative neutrality and flexible representations about family lives. For example, France is characterized by a great availability of childcare, which allows women to combine a professional career with family life. Another example is taxation and the rule of family splitting which offer advantages to couples with children, whether they are married or not.

Thus it is clear from the French approach that individual freedom has been maintained with availability of alternative relationship formation and at the same time duties of parents towards child has remained near about equal for parents in all forms of unions as evident from above study.

5.3 NON-MARITAL RELATIONSHIPS IN PHILIPPINES

The Philippines is a collection of three main island regions where several different languages are spoken by several different ethnic groups. Prior to Spanish colonization in Philippines there was no concept of a unified country and following
the arrival of the Spanish the main governing bodies tying the country together were village level Catholic bishops. To this day, the Philippines is characterized by a weak central state and strong family ties. Furthermore, families were structured by bilateral kinship systems, reinforcing the importance of both maternal and paternal relatives.\textsuperscript{246} Due to a strong colonial legacy, the Philippines stand apart for being the only predominantly Catholic or Christian country in the Southeast Asian region. Today, the vast majority of Filipinos report being Catholic and the Catholic Church continues to shape governance and policy. Today, despite a lack of official religion, government documents make religious references and use religious dogma to justify policy positions. Government agencies cite religious values in their mission statements and church leaders actively influence policy, either directly through vocal statements of support or censure or indirectly through national and local level politicians. With both the wide practice of Catholicism and the prominence of the Catholic Church in policy discourse, it is not surprising that people in the Philippines espouse conservative views. However, in practice, there is a marked gap between ideals and reality. For example, an estimated 600,000 abortions occur each year, despite its illegality and the nearly universal popular and political opposition to abortion.\textsuperscript{247} And while divorce is illegal and considered morally unacceptable and never justifiable by a majority of the population, over ten thousand annulment petitions to end marriages were filed in 2013.\textsuperscript{248} It follows that the growth in unmarried cohabitation may be another social and family issue that exemplifies a gap between ideal and reality.

5.3.1 Family Code and Union Formations in Philippines

Philippines has its own well regularized union formation system based on its culture and traditions which has been transformed at different times. Like any other country Philippines also provides the union formations and regularization statutorily. The provisions on family law, prior to the enactment of the present Family Code, were contained in the Civil Code of the Philippines.\textsuperscript{249} The Civil Code of the


\textsuperscript{247} Ibid.

\textsuperscript{248} Ibid.

Philippines was prepared by a Code Commission created by Executive Order No. 48 on March 20, 1947. The Code was approved as Republic Act. No. 386 on June 18, 1949, and took effect one year after publication in the Official Gazette or more precisely on August 30, 1950. The Civil Code contained new provisions chosen with care from the codes, laws and judicial decisions of other countries as well as from the works of jurists of various nations. However, at present union formations are regularized under Family Code of the Philippines that was signed into law by former President Corazon C. Aquino on July 6, 1987 under Executive Order No. 209. It took effect on August 3, 1988, one year after its publication in a newspaper of general circulation. The Family Code repealed several Articles in the Civil Code of 1950.

Before exploring the concept of non-marital cohabitation in Philippines society it is imperative to discuss its traditional forms of union formation i.e. marriage.

5.3.1.1 Marriage in the Philippines

The Family Code was promulgated out of the need to implement policies to strengthen marriage and the family as basic social institutions and ensure equality between men and women. The Family Code of Philippines defines marriage as “a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code.”

a) Requisites of Marriage

The essential requisites of marriage in the Philippines are provided under Article 2 of the Family Code of Philippines as following:

(1) Legal capacity of the contracting parties, who must be male and female;

(2) Consent freely given.

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250 Ibid.
251 Id. at 2
252 Family Code of Philippines, 1987, Article 1 [Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code.]
Any male or female, 18 years of age or over, not under any impediment mentioned in Articles 37 and 38 of the Family Code of Philippines, may contract marriage. It should be noted that the contracting parties are required to obtain the consent of their parents or guardian to the marriage if the parties to marriage are between the ages of eighteen and twenty-one; however, if the age of parties is between twenty-one and twenty-five, then they are obliged to seek the advice of their parents or guardian upon the intended marriage. This provision embodies the Filipino custom and tradition of ‘pamanhikan’ (which literally means going to the house of the bride to ask for her hand in marriage) where couples honor their elders by seeking their permission or advice prior to marriage. In addition to this, the parties are required to undergo marriage counseling and be certified by a priest or by a marriage counselor, duly accredited by a proper government agency, as having undergone such counseling.

The formal requisites of marriage provided in Article 3 of the Family Code of Philippines are as following:

“(1) Authority of the solemnizing officer;
(2) A valid marriage license except in cases provided under Family Code.
(3) A marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife in the presence of not less than two witnesses of legal age.”

Family Code of Philippines, 1987, Article 37 [Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate:(1) Between ascendants and descendants of any degree; and (2) Between brothers and sisters, whether of the full or half-blood.]

Family Code of Philippines, 1987, Article 38 [The following marriages shall be void from the beginning for reasons of public policy:(1) Between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree;(2) Between step-parents and step-children;(3) Between parents-in-law and children-in-law;(4) Between the adopting parent and the adopted child;(5) Between the surviving spouse of the adopting parent and the adopted child;(6) Between the surviving spouse of the adopted child and the adopter;(7) Between an adopted child and a legitimate child of the adopter;(8) Between adopted children of the same adopter; and (9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.]

The Filipino Tradition of Pamanhikan: During a Pamanhikan, the family of the groom-to-be accompanies him to meet with the bride's family, usually in the bride's own home. The aspiring groom and his parents bring food to share with the bride's family.

Supra note 249 at 6

Family Code of Philippines, Article 3 [The formal requisites of marriage are:
The absence of any of the essential or formal requisites of marriage shall render the marriage *void ab initio*.

b) **Property Relations between the Husband and Wife**

Ever since the Family Code was promulgated in Philippines, Filipino couples have become more aware of the benefits of entering into a ‘pre-nuptial agreement’\(^\text{258}\). This agreement governs the property relations between the future spouses. Before the enactment of the Family Code in Philippines if no pre-nuptial agreement on complete separation of property has been entered into then the property relations of spouses were governed by the system of ‘conjugal partnership of gains’\(^\text{259}\). However, at present, future spouses who fail to enter into a pre-nuptial agreement are governed by the regime of absolute ‘community’\(^\text{260}\) automatically. There is cause for alarm particularly for the richer spouse whose marriage may not succeed. At the end of a failed marriage that spouse may be forced to part with half of his/her properties, including those which were inherited prior to the marriage, in favor of an unworthy spouse. The Philippine Family Code states that unless otherwise provided under Chapter of ‘System of Absolute Community’ or in the marriage settlements, the community property shall consist of all the property owned by the spouses at the time

\(\text{(1) Authority of the solemnizing officer;}
\)
\(\text{(2) A valid marriage license except in cases provided for in Chapter 2 of this Title; and}
\)
\(\text{(3) A marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife in the presence of not less than two witnesses of legal age.}
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\(^{258}\) NOTE: [Pre-nuptial Agreement: A prenuptial agreement, antenuptial agreement, or premarital agreement, commonly abbreviated to prenup or prenupt, is a contract entered into prior to marriage, civil union or any other agreement prior to the main agreement by the people intending to marry or contract with each other. The content of a prenuptial agreement can vary widely, but commonly includes provisions for division of property and spousal support in the event of divorce or breakup of marriage. They may also include terms for the forfeiture of assets as a result of divorce on the grounds of adultery; further conditions of guardianship may be included as well.]

\(^{259}\) NOTE: [Conjugal Partnership of Gains: Oftentimes referred to as the CPG, it is one of the property relations between the spouses, under which the husband and wife place in a common fund the proceeds, products, fruits and income from their separate properties and those acquired by either or both spouses through their efforts or by chance, and, upon dissolution of the marriage or of the partnership, the net gains or benefits obtained by either or both spouses shall be divided equally between them, unless otherwise agreed in the marriage settlements.]

\(^{260}\) NOTE: [Community Property: Unless otherwise provided by law or in the marriage settlements, the community property shall consist of all the property owned by the spouses at the time of the celebration of the marriage or acquired thereafter. Property acquired during the marriage is presumed to belong to the community, unless it is proved that it is one of those excluded therefrom.]
of the celebration of the marriage or acquired thereafter. The future spouses can however, avoid this automatic coverage by choosing the system of their property relations in a pre-nuptial agreement indicating a system of conjugal partnership of gains or a complete separation of property or any other regime.

5.3.1.2 Cohabitation and Philippine Society

Transitions in fertility, union formation, and family structure have been emerging worldwide. Among these transitions are postponement of marriage and childbearing, increased divorce, and a growing pattern of cohabitation, non-marital births, and voluntary childlessness, leading to a multitude of family forms. Many scholars frame these demographic changes as indicators of ideational change, concomitant with modernization and industrialization, a systematic shift referred to as a ‘Second Demographic Transition’. From this perspective, idea change is diffused through higher or prolonged education and more educated individuals are considered the forerunners of value change and liberalized attitudes toward new family behaviors, such as non-marital cohabitation. However, at the same time, it is also important to emphasize that understanding the growth of cohabitation depends on the local context. As cohabitation emerges as accepted family form, its continued uptake over time may reflect different context dependent social, economic or cultural forces.

Here we examine to what extent the Philippines is experiencing the Second Demographic Transition, focusing specifically on cohabitation. As a densely populated nation of approximately over 100 million, the family demography of the Philippines deserves particular attention as it may have substantial impact on the future global landscape. Furthermore, the Philippines has a unique cultural, historical, political, and economic context and is undergoing rapid changes in union formation, specifically marked increases in the prevalence of cohabitation. However, unlike its neighboring countries, the Philippines has not experienced either a precipitous drop in fertility or large scale postponement of marriage and childbearing.

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261 Family Code of Philippines, Article 91 [Unless otherwise provided in this Chapter or in the marriage settlements, the community property shall consist of all the property owned by the spouses at the time of the celebration of the marriage or acquired thereafter.]

262 Supra note 249 at 7

263 Supra note 246

264 Ibid.
The policy environment is a distinct factor; while divorce is on the rise in some neighboring Asian countries, the Philippines is the only country in the world where divorce is illegal. Abortion is also illegal and family planning is not readily available throughout the country, especially for young unmarried women, which undoubtedly influences fertility and partnership.  

To our knowledge, there are no existing cross-national studies of cohabitation that include the Philippines. Few recent studies of the Philippines examine union formation at a national level, and even fewer within the larger context of the Second Demographic Transition theory. Existing studies often fail to distinguish cohabiters from married people or cohabiters from single people, or else focus solely on youth. Because cohabitation has grown markedly in recent years, emerging as a prevalent family form, systematic social and economic differences between those who marry and those who cohabit without marrying need to be explored at all age groups. In particular, investigating how different educational subgroups, and thus subgroups with different resources, opportunities and priorities differ in union formation is key to understand among whom, how, and why cohabitation has increased over time.

Early marriage and childbearing are now less regular phenomena in Asia than they once were. Within the region, age at first marriage has increased over the years in Catholic countries such as Thailand and the Philippines. However what this states for relationships before marriage in the period of time is not yet certain. For example, cohabitation has taken the place of marriage for some couples in Europe and the United States, as marriage and cohabitation exhibit many of the same characteristics: shared home, economic support, sexual intimacy, and not infrequently, children. The extent to which such opposite sex co-residence is considered acceptable when the couple does not marry shows marked variation globally though; it is not clear whether it will gain widespread acceptance in Southeast Asian contexts in the near term. Though increases in non-marital cohabitation are offsetting decreases in marital

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265 Ibid.
266 Ibid.
unions in many Western contexts, and non-married but sexually intimate relationships are to some extent filling the gap in Southern Europe and Japan, yet, elsewhere in Southeast and East Asia neither of these trends appears to be very strong at present. At the same time, recently a slight increase in cohabiting unions has been documented among young Filipinos between 1994 and 2002, and indicated that media description of cohabiting couples may now be challenging more conservative positions against the practice.268

“According to Seltzer attitudes toward less conventional behaviors such as non-marital cohabitation and divorce may shift from those behaviors once one has experienced the behavior. In addition, as younger people develop a tolerance for certain behaviors, the door becomes open to future widespread adoption of those behaviors.”269 The literature suggests that marriage is in retreat throughout much of the world. Some shifts toward non-marriage have been identified in Southeast Asia, and these have been particularly striking in the large cities of the region. Census data actually shows a slight decline after 1980 in the percentages unmarried among 45-49 year old women in the Philippines.270

In the Philippines, non-marital cohabitation is not really a novel phenomenon. Its existence has been documented in textbooks for decades, although it remains a small section in the discussion on marriage and family. Estimating the proportion of the population in unmarried cohabitating unions however is quite difficult given limited data sources.271 As mentioned earlier, unmarried cohabitation has been existing in the Philippines for a long time but no statistical data are available to provide information about its level of prevalence. The only estimate available is from the study of Joseph A. Vancio, *The Realities of Marriage of Urban Pilipino Women*

268 Id. at 2-3
269 Quoted in Lindy Williams, Midea Kabamalan *et al.*, “Attitudes toward Marriage in the Philippines” available at: https://aboutphilippines.ph/documents-etc/Attitudes-toward-Marriage.pdf at 3 (Last visited on August 12, 2017)
270 Supra note 267 at 14-15
(1977)\textsuperscript{272} who found two percent of his sample in common-law marriages.\textsuperscript{273} This suggests very strong norms against non-marital cohabitation in the Philippines, although media articles in most recent times tend to show otherwise. By focusing on the personal lives of popular personalities particularly those in the entertainment industry and politics, the media have unwittingly challenged the conservative view towards living-in. But while personal views may have changed, the perception of the opinion of others may have remained the same. In addition, there is a feeling of ambivalence when it comes to cohabitation. For example, some Filipino men admit that it is all right for them to cohabit but they would prefer that their children and grandchildren would marry. To a certain extent, this also implies a weakening of the norm against unmarried cohabitation. Moreover, the stigma people are afraid of, in reality have a temporal quality, and may not be present anymore.\textsuperscript{274}

In the Philippines, nowadays, it is common to have news about entertainment personalities who live-in with someone then break up and later live-in with another. Many women are also vocal about their desire to have children outside of marriage while others admit they have had a baby with a partner not married to them. Cohabitation among entertainers and politicians has started to spread among common people. Such observations are supported by quantitative data documenting the increase of Filipinos who are cohabiting and the decrease of those formally marrying. Based on the National Demographic and Health Survey, 53 percent of women between ages 15 to 49 were formally married and six percent were cohabiting without marriage in 1998.\textsuperscript{275} However, it is now possible to estimate their numbers on a national scale. The Philippines have much evidence to guide us with regard to non-marital cohabitation. Now in the Philippines, non-marital cohabiting relationships are known to be quite common. This is why the category ‘live-in’ was included in the


\textsuperscript{273} Supra note 271 at 114

\textsuperscript{274} Id. at 113

\textsuperscript{275} Maria Midea M. Kabamalan and Nimfa B. Ogena, “Marriage as Ideal, Cohabitation as Practical: Revisiting Meanings of Marriage in the Philippines” available at: https://iussp.org/sites/default/files/event_call_for_papers/IUSSP%202013%20Marriage%20as%20Ideal%20Cohabitation%20as%20Practical%20Extended%20Abstract_0.pdf (Last visited on July 24, 2017)
Philippines census in 2000. No other country in the region includes such a question, a situation that reflects the fact that cohabitation is not considered socially acceptable or prevalent.\textsuperscript{276} According to the Philippine Census, in the year 2000, there were more than 2.4 million Filipinos who were living-in without marriage and eighteen percent of them were between ages 20 to 24.\textsuperscript{277} However, the character of union is changing. Filipinos continue to form unions but they do not necessarily marry. Census Data shows that there are increasing numbers who are in unmarried cohabiting unions. Almost all of those who were in union in 1990 (35\%) were legally married while those who cohabit without marriage were very few. Ten years later, the proportion legally married dropped to 27 percent, and the decline was obviously absorbed by cohabitation.\textsuperscript{278}

Unfortunately, studies in the Philippines examining norms, values and attitudes regarding marriage and cohabitation are still lacking. The limited literature on the issue still points to very strong norms against it. These studies also suffer from lack of adequate empirical data. One-third of the youth aged 20 to 24 have already formed a union and seventy percent of them begun their first union with unmarried cohabitation. Some are still cohabiting without marriage while others have formally married already. Those who have never been in a union are more likely to be males, have higher educational attainment, most likely to be doing something productive like being in school or working, attend religious services more than once a week, and were raised by both parents at least until they reached age 15.\textsuperscript{279}

The Philippines is one such country that has witnessed rapid demographic and social changes. The realities of today’s Filipino youth are substantially different from those of their parents, just a generation ago. The social context has changed in many ways; rapid urbanization, globalization, and the proliferation of mobile and internet technology. Perhaps the most profound changes among Filipino youth, however, have been those associated with dating, sex, and marriage. Similar to other global settings,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{277} \textit{Supra} note 271 at 114
\item \textsuperscript{278} \textit{Ibid.}
\item \textsuperscript{279} \textit{Id.} at 123-126
\end{itemize}
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Filipino adolescents are more likely to delay marriage, to choose cohabitation over formal marriage, and to engage in premarital sex as compared to their parent’s generation. These shifts in age at marriage have been accompanied by an increase in premarital cohabitation or cohabitation without marriage. Premarital sex is also more common. According to one survey in the Philippines, more than 22 percent of married respondents had ever lived-in with their spouse/partner before getting married and about 10 percent with a partner whom they did not marry or had not yet married. Exclusion of respondents reporting their marital status as ‘live-in’ from the ‘single’ category could have further reduced the proportion. And further, if the Philippines had measured those ever cohabiting the figure would have been higher than the figure for currently cohabiting. How much higher it would have been is hard to know, although both, evidence of practice and attitudinal data, suggest that while premarital cohabitation with the person one intends to marry or to live with for life is a common occurrence in the Philippines whereas cohabitation not leading to marriage or lifelong partnering is much less common.

A more recent analysis from Metro Cebu found that 67 percent of males and 47 percent of females had sex before age 21, of whom 98 percent of males and 91 percent of females had sex before marriage. Despite the rise in non-marital cohabitation and premarital sex, most Filipino youth are not in favor of these practices for men or for women. Stark differences in the occurrence and acceptance of these behaviors for young men versus young women attest to the persistence of traditional gender norms in the areas of sexual behaviors and partnership patterns in the Philippines. Social norms for young women are more conservative and dictate that women are expected to be modest and chaste, and should refrain from expressing.

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281 Supra note 276 at 459
283 Supra note 280 at 3
interest in or knowledge about sex or contraception, especially before marriage. But there is a large proportion of the youth who approve of unmarried cohabitation, but the level is far from universal. This might suggest a waning of the importance of a formal marriage but at the same time, this might also suggest some sort of rationalization on the part of those who do go through a cohabitation episode before a formal marriage. Nonetheless, marriage remains ideal.

While the absolute number of registered marriages in the Philippines has declined considerably by nearly twenty-five percent between years 2004 to 2013 (CITE Philippines Statistics Authority), it is possible that this decline has been the impact of increase in cohabitating unions. Cohabitation in the Philippines is not an entirely new phenomenon and both its measurement and comparison with marriage patterns are possible. Historically non-marital cohabitation was practiced in the Philippines before Spanish colonization and often among lower income people to avoid legal fees and ceremony or celebration costs. As Western influences and religion took hold, traditional cohabitation persisted in geographic areas far removed from urban centers and capital cities. Today, cohabitation as an indigenous practice coexists alongside more contemporary forms of cohabitation, representing both longer term commitment and trial marriage. Cohabiting women may even opt to self-report as being married or practicing kasalukuyang may kinakasama over identifying as a cohabiter. For others, cohabitation serves as a prelude to marriage, shown by the substantial proportion of married people reporting pre-marital cohabitation with their spouse.

The Philippines is the only country in the world where divorce is illegal and the only recourse to marital dissolution is either legal separation (without the possibility of re-marriage in the future) or a costly and complicated annulment procedure inaccessible to most. Divorce has not always been illegal. Since

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284 Ibid.
285 Supra note 271 at 127
286 Supra note 246
287 Ibid.
288 NOTE: [kasalukuyang may kinakasama (Currently with Partner) is a traditional form of lifelong commitment.]
289 Supra note 246
colonization by the Spanish centuries ago, the prevailing national divorce policy varied depending on the occupying force; Spanish, Japanese, and American. After Philippine independence, divorce became illegal in 1950\textsuperscript{290} for all non-Muslims; and thus it is possible that the rise in unmarried cohabitation in recent decades and decline in registered marriages are related to this policy change. Because marital dissolution is prohibitively expensive and difficult, couples with fewer resources eschew marriage and prefer to cohabit, since dissolving a cohabiting union poses fewer economic and logistic hurdles. Older people currently cohabiting may have been married to a different partner in the past and unable to remarry their current partners; additionally, older cohabiters may have partners who were previously married. In both situations, both duration and prevalence of unmarried cohabitation would be extended since it would not be possible to transition to marriage.\textsuperscript{291}

The in-country arguments against divorce mainly focus on religious reasons but also, interestingly, on the preservation of Philippine culture and nationalistic distinction. Even supporters of legalizing divorce frame their support for divorce in a very moralistic manner, emphasizing how divorce policy in the Philippines should distinctly reflect Filipino culture and preserve the importance and dignity of marriage. Scholars in the Philippines have commented on the construction of the nuclear Filipino family as a symbol of tradition and national identity in the face of both colonial legacy and globalization. “The moral values of the ‘Filipino family’ have come to represent the cultural distinction of the nation and its people in globalization… Hence, this [Family] Code embodies the nation’s struggles between tradition and modernity in globalization, with the ‘Filipino family’ and its moral values representing tradition and therefore the failure of modernity (as well as colonialism) to tarnish national identity”\textsuperscript{292}. Additionally, while several attempts to

\textsuperscript{290} NOTE: [It was only on August 30, 1950, when the New Civil Code took effect, that divorce was disallowed under Philippine law. Only legal separation was available. The same rule was adopted by the Family Code of 1988, which replaced the provisions of the New Civil Code on marriage and the family, although the Family Code introduced the concept of “psychological incapacity” as a basis for declaring the marriage void.]

\textsuperscript{291} Supra note 246

\textsuperscript{292} Quoted in B. Kuang, S. Padmadas \textit{et al.}, “The Unexpected Rise of Cohabitation in the Philippines: Evidence for a Negative Educational Gradient”, \texttt{available at: https://paa.confex.com/paa/2016/mediafile/ExtendedAbstract/Paper3783/B%20Kuang%20PAA%2}
pass a divorce law and increasing public support for legalizing divorce suggest that attitudes are becoming more liberal, support for legalizing divorce is still nowhere near universal. Thus, while divorce is associated with the Second Demographic Transition as an indication of heightened individual autonomy over prescribed religious and moral codes, the Philippines again remains purposefully distinct.293

While the emphasis on nuclear families and conservative values remain persistent, the order in which transitional events among youth such as parental home leaving, sexual initiation, partnership formation, marriage, and childbearing has changed for many, further suggesting a gap between espoused ideals and reality. For example, although many Filipino youth report strong disapproval of premarital sex and non-marital fertility, the prevalence of premarital sex has increased substantially over time for both young men and women. Unsurprisingly, both teenage pregnancy and non-marital fertility are also growing in the Philippines.294

Thus, in a climate where single parenthood is likely unacceptable, marriage does not include the possibility of dissolution, and family planning options are limited for both the general population and especially for unmarried youth, unintended pregnancies are another key contributing factor to highlight the growth of cohabiting relationships. In addition to policies and social norms directly related to family formation, labor migration may also be associated with cohabitation. The Philippines has been deeply affected by international labor migration, much of which impacts young female labour migrants. Due to the mobile nature of the working population and the element of economic and residential instability inherent in contract based work, young adults hesitate to commit to more permanent partnerships if they anticipate that they or their partners have to work abroad in the future. Furthermore, internal rural to urban migration among young people is also common and also has an effect on union formation and living arrangements, especially since many migrant youths in urban areas are women. As youth move away from home and centers of social control, some opt to form non-marital cohabiting relationships while free from

293 Supra note 246
294 Ibid.
parental control. Conversely, others seek a live-in partner specifically as a substitute for family.\textsuperscript{295}

In urban settings, migrant youth are more likely to be cohabiters than local youth. Cohabitation in the Philippines has often been linked to traits associated with disadvantage or instability, absent parents, lack of engagement in work or education, migration, urban residence; and while marriage is widely viewed as ideal, especially for women, financial reasons such as the economic burden of hosting a wedding reception and the costs of filing the necessary paperwork and pregnancy are often cited as motivations behind cohabiting. Witnessing parents’ marital difficulties is another reason for wariness toward marriage and preference for cohabitation, especially because divorce is illegal in the Philippines. Thus, individualism and secularism among the educated elite do not appear to be behind the growth of cohabitation among youth, as the Second Demographic Transition would suggest.\textsuperscript{296}

There are also inconsistencies in sexual mores between classes, giving further credence to the idea that cohabitation may be the recourse of lower income classes under financial duress and not the practice of wealthy, educated, elite forerunners of idea change. In the past two decades, cohabitation has been increasingly practiced among all age groups. The trends in the 2013 National Demographic and Health Surveys (NDHS) data shows that changes are especially stark among the younger population; approximately one quarter of all 20-29 year old women report currently cohabiting.\textsuperscript{297} At the same time that cohabitation has increased in all age groups, the percentage of women currently married has decreased consistently across all age groups, suggesting the possibility that decreases in marriage may be offset by increases in cohabitation. The Philippines is in a fascinating and unique demographic transition where cohabitation is increasingly practiced and growing in both incidence and prevalence while other family behaviors remain relatively conservative.\textsuperscript{298}

\textsuperscript{296} Ibid.
\textsuperscript{297} Ibid.
\textsuperscript{298} Supra note 246
In Philippines, with an increasing number of couples starting families out of wedlock, marriage has started losing its charm for many. More than 37 percent of the 1.78 million babies born in Asia’s Roman Catholic outpost in 2008 had unmarried mothers, it is cited in results of the latest population census. This was 12.5 percent higher than the previous year, and compared with a 2.0 percent increase for all births.\(^{299}\)

In Philippines marriage is no more a need for starting families. A growing number of Filipinos now treat marriage as an option, rather than a requirement. A member of a unit of the National Statistics Office, Nene Baligad said that “nowadays, some couples just live in and only get married after having four or five children. You can’t really say it’s for practical reasons, since you can be married on the cheap. It’s more like, we Filipinos tend to follow what is in fashion.”\(^{300}\) Eight out of ten Filipinos are Catholic, and the Philippines is one of only three territories in the world along with Malta and the Vatican, where divorce remains illegal. However the census showed that many couples were defying the nation’s powerful Catholic bishops by not only on having babies out of wedlock, but also by shunning church weddings. Marriages either solemnized by the church or by government officials decreased by 0.7 percent in 2008. Just over a third of couples were married in Catholic ceremonies.\(^{301}\)

Thus these trends show that non-marital cohabitation has been increasingly practiced in the Philippines. Although earlier trends suggest that marriage is considered ideal and cohabitation before marriage should be a prelude to marriage. The span of most the unmarried cohabiting unions also leave the impression that many couples practice cohabitation as a longer term arrangement. The above discussion and elaboration also conclude that the non-marital cohabitation has increased in recent times, which further leads to impression of higher acceptance of non-marital unions. Furthermore, it has also been noticed that the cohabitation is

\(^{301}\) Supra note 299
associated with lower levels of education and also generally with lower levels of wealth, both of which are not consistent with characteristics of a second demographic transition or evidence of value change.  

These findings provide crucial preliminary insights into the nature of union formation change in the Philippines, placing this demographic transition within the larger context of family formation patterns worldwide. In fact, the current patterns of union formation in the Philippines proves to be truly unique in a number of ways, distinct from existing patterns in Western, Asian, and Latin American regions. First, cohabitation has gained prevalence despite the fact that postponement of nuptiality and fertility has been weak at best. Typically, cohabitation is a lagging feature of demographic transition and gains popularity only after delayed union formation and childbearing occur, as in Southern Europe and East Asia. Second, the policy climate in the Philippines, particularly the illegality of divorce and abortion, the limited availability of family planning, and the emphasis on co-residential nuclear families may act simultaneously as both an impetus for cohabitation and also an obstacle to widespread ideational change, preventing full convergence to demographic transitions. Finally, the large scale international migration of working age men and women of all ages also undoubtedly has an impact on familial cohesiveness and perhaps also on attitudes toward partnership.

Whatever may have been the reasons of increase in non-marital union formations in Philippine society, the present day situation is that this union formation is largely practiced in Philippines. Further, under Article 34 of the Family Code of Philippines unique provision to legally ratify the cohabitation has been provided to non-marital cohabiting couples. The provision has been discussed in detail following:

5.3.1.3 Rule of Legal Ratification of Marital Cohabitation

One of the formal requisites of a valid marriage, in consonance with Article 3 of the Family Code of the Philippines, is a ‘valid marriage license’, the absence of which will, as a rule, render the marriage void ab initio. While it is beyond dispute that the absence of a valid marriage license will render the marriage void, there are, however, marriages that are exempted by law from this formal requirement, one of

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302  Supra note 246
303  Ibid.
304  Family Code of Philippines, Article 3
which is found in Article 34\textsuperscript{305} of the Family Code of Philippines. Known as the ‘provision on legal ratification of marital cohabitation’ provides that no marriage license shall required for the marriage of a man and a woman if without any legal impediment to marry each other they have lived together as husband and wife for at least five years. All that concerned parties have to do that to state the facts in an affidavit before any person authorized by law to administer oaths that they are living together as husband and wife from immediate preceding five years. However, the solemnizing officer shall ascertain the qualifications of the contracting parties and legal absence of any impediment to the marriage under oath and he shall make a statement to that effect also.\textsuperscript{306}

\textbf{a) Marriage License}

A marriage license is issued by the local civil registrar of the city or municipality where either of the contracting parties to the marriage habitually resides after completion of the ten day period of publication of the notice of the impending marriage. A marriage license is different from a marriage certificate/marriage contract. The latter is issued by the solemnizing officer after the marriage, in which the contracting parties to the marriage declare, among others, that they take each other as husband and wife. It is the primary or best evidence to prove the existence of the marriage when the question as to whether or not a marriage has been contracted arises in litigation.\textsuperscript{307} The former, a marriage license, is the written permission issued by the civil registrar to the contracting parties authorizing their marriage before any authorized solemnizing officer. In brief, it is the authority to marry.\textsuperscript{308} On the other hand, it is a formal requisite of marriage issued before the

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\textsuperscript{305} Family Code of Philippines, Article 34 [No license shall be necessary for the marriage of a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other. The contracting parties shall state the foregoing facts in an affidavit before any person authorized by law to administer oaths. The solemnizing officer shall also state under oath that he ascertained the qualifications of the contracting parties and found no legal impediment to the marriage.]

\textsuperscript{306} Family Code of Philippines, Article 34


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marriage, the total absence of which at the time of the celebration of the marriage renders the marriage *void ab initio* except in the case of marriages exempt from the license requirement as provided under Articles 27 to 34 of the family code of the Philippines. One of these exemption provided under Article 34 is “marriages between a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other at the time of the celebration of the marriage.”^309

A *marriage license* is valid in any part of the Philippines, not abroad, for a period of 120 days from the date of issue. The date of issue refers to the date of signing of the local civil registrar of the *marriage license*. The contracting parties to the marriage must make use of the same within the 120 days period; otherwise, it shall be deemed automatically cancelled. A marriage contracted with an expired *marriage license* is equivalent to a marriage solemnized without a *marriage license*; hence, such marriage is *void ab initio*.^310

Thus in the case of the exemption under Article 34, the contracting parties to the marriage shall execute an *affidavit of cohabitation*, stating therein the facts that (a) they have lived together as husband and wife for at least five years, and (b) no legal impediment to marry each other exists at the time of the celebration of the marriage. Also, the solemnizing officer shall execute a *sworn statement* stating under oath that he ascertained the qualifications of the contracting parties to the marriage and found no legal impediment to the marriage. In the computation of the five year period of cohabitation, the five year period should be computed on the basis of cohabitation as husband and wife where the only missing factor is the *marriage contract* to validate the union. This five year period should be the years immediately before the day of the marriage and it should be a period of cohabitation characterized by exclusivity; meaning no legal impediment was present at any time within these five years, and continuity that is unbroken.^311

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^309 Family Code of Philippines, Article 34
^310 Supra note 307
b) **Requisites for Legal Ratification of Cohabitation**

To apply this provision on legal ratification of marital cohabitation, the following requisites must concur:

- The man and woman must have been living together as husband and wife for at least five years before the marriage;
- The parties must have no legal impediment to marry each other;
- The fact of absence of legal impediment between the parties must be present at the time of marriage;
- The parties must execute an affidavit stating that they have lived together for at least five years [and are without legal impediment to marry each other]; and
- The solemnizing officer must execute a sworn statement that he had ascertained the qualifications of the parties and that he had found no legal impediment to their marriage.\(^{312}\)

Thus all these requisites shall be fulfilled to avail exemption from marriage license under Article 34. There is no exemption from securing a marriage license unless the circumstances clearly fall within the ambit of the exception.

c) **Rationale**

The principle why no license is required in such case is to evade exposing the parties to disgrace, stigma and embarrassment concomitant with the scandalous cohabitation of persons outside a valid marriage due to the publication of every applicant’s name for a marriage license. It is apprehended that the requirement of marriage license may demoralize such couples from legitimizing their status. To protect peace in the family, avert the peeping and suspicious eye of public exposure and contain the source of gossip arising from the publication of their names, the law deemed it wise to preserve their privacy and exempt them from that requirement.\(^{313}\)

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\(^{312}\) Family Code of Philippines, Article 34

\(^{313}\) Supra note 311
d) Five-Year Common-Law Cohabitation Period

The five-year common-law cohabitation period, which is counted back from the date of celebration of marriage, should be a period of legal union without marriage; however the parties should be capacitated to marry each other. Otherwise, if that continuous five year cohabitation is computed without any distinction as to capacity of the parties to marry each other during the that five years, then the law would be sanctioning immorality and promoting people to have common law relationships and placing them equally with those who lived legally with their spouse. This five year period should be the years immediately before the day of the marriage and it should be a period of cohabitation characterized by exclusivity; no third party should be involved at any time within the five years and continuity; that is unbroken.314

e) Affidavit of Marital Cohabitation

The contracting parties, whose marriage falls within the scope of the provision on legal ratification of marital cohabitation under Article 34 of the Family Code, must, in lieu of a valid marriage license, execute an affidavit of marital cohabitation, stating that they have lived together as husband and wife for at least five years and are without any legal impediment to marry each other.

f) Effect of a Falsified Affidavit of Marital Cohabitation

If the parties falsify their affidavit in order to have a quick marriage, despite knowing the fact that they have not been cohabiting for five years, their marriage will be void for lack of a marriage license, and they will also be criminally liable. In other words, if the parties falsified the affidavit to facilitate their marriage as it takes time to secure a license and fully knowing the falsity, the marriage is not exceptional but an ordinary marriage.315 As such, there being no license obtained, the marriage is void for lack of valid marriage license. Moreover, the parties are liable for perjury under

314 Ibid.
Article 183\textsuperscript{316} of the Revised Penal Code of Philippines. The falsity of an affidavit of marital cohabitation, where the parties have in truth fallen short of the minimum five-year requirement, effectively renders the marriage \textit{void ab initio} for lack of a marriage license.\textsuperscript{317}

Nevertheless, what is certain is that if all the requisites for the application of the provision on legal ratification of marital cohabitation under Article 34 of the Family Code are present, the marriage may then be solemnized even in the absence of a valid marriage license, it being one of the marriages exempted by law from such formal requirement.\textsuperscript{318}

\subsection*{5.3.2 Non-Marital Live-in Relationships and Legal Status thereof in Philippines: Rights of Non-Married Couples}

The Family Code of Philippines makes it clear that in Philippines the family being the bedrock of the society is a fundamental social institution which public policy cherishes and protects; family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect.\textsuperscript{319} In Philippines marriage is a special contract of permanent union between a man and a woman for the formation of conjugal and family life. Marriage is an inviolable social institution and the base of the family whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage.\textsuperscript{320} A marriage to be legally valid the parties to marriage should be a male and a female of legal capacity, free consent in the

\begin{footnotesize}
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\item \textsuperscript{316} The Revised Penal Code of Philippines, 1930, Article 183 [False testimony in other cases and perjury in solemn affirmation-The penalty of arresto mayor in its maximum period to prision correccional in its minimum period shall be imposed upon any person, who knowingly makes untruthful statements and not being included in the provisions of the next preceding articles, shall testify under oath, or make an affidavit, upon any material matter before a competent person authorized to administer an oath in cases in which the law so requires. Any person who, in case of a solemn affirmation made in lieu of an oath, shall commit any of the falsehoods mentioned in this and the three preceding articles of this section, shall suffer the respective penalties provided therein.]
\item \textsuperscript{317} Supra note 315
\item \textsuperscript{318} Supra note 308
\item \textsuperscript{319} Family Code of Philippines, Article 149 [ The family being the foundation of the nation is a basic social institution which public policy cherishes and protects; family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect.]
\item \textsuperscript{320} Family Code of Philippines, Article 1
\end{itemize}
\end{footnotesize}
presence of solemnizing officer and marriage ceremony performed in presence of two witnesses of legal age.\textsuperscript{321} Absence of any of the essentials or formal requisites shall render the marriage void an initio.\textsuperscript{322} Like India, Philippines also have normative values of family and marriage institution, however, the increasing instances of non-marital cohabitation makes it clear that Philippine people are also affected by this changing pattern of union formation. Though, as we have already discussed that the reasons for this alternative union formation in Philippines are slightly different from the rest of the world.

The two forms of cohabitation; consensual marriage and the \textit{querida} system, have been practiced in the country for a long time. Consensual marriage is one where the relationship is seen as permanent but one that is not sanctioned by a formal marriage ceremony. Some relationships are long-lasting that these were treated as substitute to marriage to avoid any expense associated with having a wedding ceremony. The other form of cohabitation, the \textit{querida} system, is the keeping of a second wife or family. While both are publicly known, the latter is considered more problematic especially when seen from the point of view of the people whose norms were predominantly influenced by Catholic teachings. For Catholics, monogamy is the rule and marriage is a sacrament. The wedding is a religious event as much as it is a public affair. Even civil marriages are frowned upon such that some couples married by public officials eventually go through a church wedding later. This was the case for some married people in Metro Manila in the mid 1970s. Twenty percent of them had a civil wedding preceding their church wedding.\textsuperscript{323}

In Family Code of Philippines the term ‘unions without marriage’ has been used under chapter dealing with property matters of persons living in non-marital cohabitation or unions which are not considered marriage under Philippine Law. Philippine Family Code makes it clear that an union is ‘union without marriage’ when

\textsuperscript{321} Family Code of Philippines, Article 2 and 3
\textsuperscript{322} Family Code of Philippines, Article 4
\textsuperscript{323} Supra note 271 at 112-113
a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefits of marriage.\textsuperscript{324} Philippine Family Code also made property provisions for persons living in cohabitation other than defined under Article 147 of the Code of Philippines.\textsuperscript{325} This seems to researcher that the cohabitation about which Philippine Code has provided in Article 148 refers to cohabitation of persons who are not capacitated to marry each other and living exclusively with each other as husband and wife.

Philippine concept of non-marital unions seems to researcher like Indian concept where non-marital unions have been differentiated as live-in relationship in nature of marriage and live-in relation not in nature of marriage, however, a major difference lies in both jurisdictions is that in Philippines in spite of not recognizing non-marital union legislatively like India, but unlike India Philippines under its Civil Code has made provisions for the property rights of the non-marital unions.

- Rights of Non-Married Partners:

5.3.2.1 Maintenance Rights to Living-in Couple

In Philippines husband and wife both are obliged to support/maintain each other.\textsuperscript{326} However duty to support ceases after separation, annulment of marriage or declaration of nullity of marriage except in cases of one party being guilty.\textsuperscript{327} Philippine Family Code provides for support during the pendency of the action of separation, annulment or nullity. Such support shall be according to the written agreement between the spouses and in case of absence of such an agreement court shall decide the amount of support.\textsuperscript{328}

\textsuperscript{324} Family Code of Philippines, Article 147
\textsuperscript{325} Family Code of Philippines, Article 148
\textsuperscript{326} Family Code of Philippines, Article 68 [The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support.]
\textsuperscript{327} Family Code of Philippines, Article 98 [Neither spouse may donate any community property without the consent of the other. However, either spouse may, without the consent of the other, make moderate donations from the community property for charity or on occasion of family rejoicing or family distress.]
\textsuperscript{328} Family Code of Philippines, Article 49 [During the pendency of the action and in absence of adequate provisions in the written agreement between the spouses, the court shall provide for the support of the spouses and the custody and support of their common children. The court shall give paramount consideration to the moral and material welfare of said children and their choice of the
In addition to obligation of husband and wife to support each other Philippine Civil Code contains provision for obligation of spouses to support each other.\textsuperscript{329} Though not expressly stated in Philippine law however it seems that such a repetition is because of presence of non-married couples and thus non-married live-in partners are under obligation to support each other during subsistence of their relationship. The concept of maintenance in Philippines is limited to the duration of relationship and the responsibility to maintain lies with both spouses to maintain each other. This responsibility ends with the end of relationship. Similar to India, responsibility to maintain non-married partner is not clear in Philippines as well.

\textbf{5.3.2.2 Protection of Unmarried Woman from Domestic Violence}

The Philippines has enacted ‘Anti-Violence Against Women and Their Children Act, 2004’ to protect the family and its members particularly women and children, from violence and threats to their personal safety and security. The Anti-Violence Against Women and Their Children Act, 2004, defines violence against women and their children as “any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship\textsuperscript{330}, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty.”\textsuperscript{331} It includes, but is not

\textsuperscript{329} Family Code of Philippines, Article 195 [ Subject to the provisions of the succeeding articles, the following are obliged to support each other to the whole extent set forth in the preceding Articles: (1) The spouses; (2) Legitimate ascendants and descendants; (3) Parents and their legitimate children and the legitimate and illegitimate children of the latter; (4) Parents and their illegitimate children and the legitimate and illegitimate children of the latter; and (5) Legitimate brothers and sisters, whether of full-or half blood.]

\textsuperscript{330} Anti-Violence Against Women and Their Children Act, 2004, Section 3(b) ["Dating relationship" refers to a situation wherein the parties live as husband and wife without the benefit of marriage or are romantically involved over time and on a continuing basis during the course of the relationship. A casual acquaintance or ordinary socialization between two individuals in a business or social context is not a dating relationship.]

\textsuperscript{331} Anti-Violence Against Women and Their Children Act, 2004, Section 3(a)
limited to physical violence\textsuperscript{332}, sexual violence\textsuperscript{333}, psychological violence\textsuperscript{334} and economic abuse\textsuperscript{335}. Section 5\textsuperscript{336} of the Anti-Violence Against Women and Their

\textsuperscript{332} “Physical Violence” refers to acts that include bodily or physical harm;
\textsuperscript{333} “Sexual violence” refers to an act which is sexual in nature, committed against a woman or her child. It includes, but is not limited to:
  a) Rape, sexual harassment, acts of lasciviousness, treating a woman or her child as a sex object, making demeaning and sexually suggestive remarks, physically attacking the sexual parts of the victim's body, forcing her/him to watch obscene publications and indecent shows or forcing the woman or her child to do indecent acts and/or make films thereof, forcing the wife and mistress/lover to live in the conjugal home or sleep together in the same room with the abuser;
  b) Acts causing or attempting to cause the victim to engage in any sexual activity by force, threat of force, physical or other harm or threat of physical or other harm or coercion;
  c) Prostituting the woman or child.
\textsuperscript{334} “Psychological violence” refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and marital infidelity. It includes causing or allowing the victim to witness the physical, sexual or psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.
\textsuperscript{335} “Economic abuse” refers to acts that make or attempt to make a woman financially dependent which includes, but is not limited to the following:
  1. Withdrawal of financial support or preventing the victim from engaging in any legitimate profession, occupation, business or activity, except in cases wherein the other spouse/partner objects on valid, serious and moral grounds as defined in Article 73 of the Family Code;
  2. Deprivation or threat of deprivation of financial resources and the right to the use and enjoyment of the conjugal, community or property owned in common;
  3. Destroying household property;
  4. Controlling the victims’ own money or properties or solely controlling the conjugal money or properties.
\textsuperscript{336} Anti-Violence Against Women and Their Children Act, 2004, Section 5 [Acts of Violence Against Women and Their Children.- The crime of violence against women and their children is committed through any of the following acts:
  (a) Causing physical harm to the woman or her child;
  (b) Threatening to cause the woman or her child physical harm;
  (c) Attempting to cause the woman or her child physical harm;
  (d) Placing the woman or her child in fear of imminent physical harm;
  (e) Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct:
  (1) Threatening to deprive or actually depriving the woman or her child of custody to her/his family;
  (2) Depriving or threatening to deprive the woman or her children of financial support legally due her or her family, or deliberately providing the woman's children insufficient financial support;
  (3) Depriving or threatening to deprive the woman or her child of a legal right; and
Children Act, 2004, enlists what acts will be construed as acts of domestic violence against women and their children. And further in Section 6\textsuperscript{337} penalties for the offence under Section 5 have been provided. The special feature of this Act to be noted is

(4) Preventing the woman in engaging in any legitimate profession, occupation, business or activity or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties.

(f) Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions;

(g) Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family;

(h) Engaging in purposeful, knowing, or reckless conduct, personally or through another, that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts:

(1) Stalking or following the woman or her child in public or private places;

(2) Peering in the window or lingering outside the residence of the woman or her child;

(3) Entering or remaining in the dwelling or on the property of the woman or her child against her/his will;

(4) Destroying the property and personal belongings or inflicting harm to animals or pets of the woman or her child; and

(5) Engaging in any form of harassment or violence.

(i) Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children of access to the woman's child/children.

\textsuperscript{337} Anti-Violence Against Women and Their Children Act, 2004, Section 6 | Penalties.- The crime of violence against women and their children, under Sec. 5 hereof shall be punished according to the following rules:

(a) Acts falling under Sec. 5(a) constituting attempted, frustrated or consummated parricide or murder or homicide shall be punished in accordance with the provisions of the Revised Penal Code; if these acts resulted in mutilation, it shall be punishable in accordance with the Revised Penal Code; those constituting serious physical injuries shall have the penalty of prison mayor (major arrest); those constituting less serious physical injuries shall be punished by prison correccional (correctional prison); and those constituting slight physical injuries shall be punished by arresto mayor.

Acts falling under Sec. 5(b) shall be punished by imprisonment of two degrees lower than the prescribed penalty for the consummated crime as specified in the preceding paragraph but shall in no case be lower than arresto mayor;

(b) Acts falling under Sec. 5(c) and 5(d) shall be punished by arresto mayor;

(c) Acts falling under Sec. 5(e) shall be punished by prision correccional;

(d) Acts falling under Sec. 5(f) shall be punished by arresto mayor;

(e) Acts falling under Sec. 5(g) shall be punished by prision mayor;

(f) Acts falling under Sec. 5(h) and Sec. 5(i) shall be punished by prision mayor.

If the acts are committed while the woman or child is pregnant or committed in the presence of her child, the penalty to be applied shall be the maximum period of penalty prescribed in the Section. In addition to imprisonment, the perpetrator shall (a) pay a fine in the amount of not less than One hundred thousand pesos (P100,000.00) but not more than three hundred thousand pesos (300,000.00); (b) undergo mandatory psychological counseling or psychiatric treatment and shall report compliance to the court.
Section 9\(^{338}\) that provides for a long list of persons that can apply for protection orders for the offended women and child.

Thus this overview of the Anti-Violence Against Women and Their Children Act, 2004, makes it clear that Philippine law against domestic violence is equally available to married and living together couples and it has been provided through statute itself.

5.3.2.3 Property Rights of Unmarried Couples

As we have already discussed that in Philippines there are two types of unmarried cohabitation i.e. one is Cohabitation of Persons Capacitated to Marry Each Other and the other is Cohabitation of Persons Not-Capacitated to Marry Each Other. The right of property under Philippines Family Code has been provided as under:

5.3.2.3.1 Property Rights under Cohabitation of Persons Capacitated to Marry Each Other

The Philippine Family Code provides that property acquired by both cohabitators capacitated to marry each other, through their work or industry shall be governed by the rules of co-ownership and their wages and salaries shall be owned by them in equal shares. All properties acquired during cohabitation shall be assumed to have been secured by their joint efforts, work or industry, unless proved otherwise, and shall be governed as their co-ownership. A cohabitant who had not participated in the acquisition of any property by the other cohabitant shall be deemed to have contributed jointly if the cohabitant who had not participated in acquisition has made efforts in the care and maintenance of the family and of the household. And neither

\(^{338}\) Anti-Violence Against Women and Their Children Act, 2004, Section 9 [Who may file Petition for Protection Orders. – A petition for protection order may be filed by any of the following:
(a) The offended party;
(b) Parents or guardians of the offended party;
(c) Ascendants, descendants or collateral relatives within the fourth civil degree of consanguinity or affinity;
(d) Officers or social workers of the DSWD or social workers of local government units (LGUs);
(e) Police officers, preferably those in charge of women and children's desks;
(f) Punong Barangay or Barangay Kagawad;
(g) Lawyer, counselor, therapist or healthcare provider of the petitioner;
(h) At least two (2) concerned responsible citizens of the city or municipality where the violence against women and their children occurred and who has personal knowledge of the offense committed.]
party can during the subsistence of cohabitation dispose of or encumber any share in
the property by acts *inter vivos* without the consent of the other cohabitant.\(^{339}\) Till the
cohabitation subsists the sale and disposition of the share in such properties cannot be
effected without the consent of the other party.

Article 147 of the Family Code provides for the property relations of couples,
who are living together under a void marriage or who are living together without the
benefit of marriage but are capacitated to marry i.e. cohabitation under a void
marriage or without legal impediment to marry. The rules of co-ownership govern the
property relationship of these couples. The share of the party in bad faith in a void
marriage shall be forfeited in favor of their common children. In case of waiver or
default by any or all of the common children, the share of the party in bad faith shall
go to the respective surviving descendants. In case there are no descendants, the share
shall accrue to the innocent party.\(^{340}\)

Thus, for Article 147 to operate, the man and the woman: (1) must be
capacitated to marry each other; (2) live exclusively with each other as husband and
wife; and (3) their union is without the benefit of marriage or their marriage is void.\(^{341}\)

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\(^{339}\) *Family Code of Philippines, Article 147*[When a man and a woman who are capacitated to marry
each other, live exclusively with each other as husband and wife without the benefit of marriage or
under a void marriage, their wages and salaries shall be owned by them in equal shares and the
property acquired by both of them through their work or industry shall be governed by the rules on
c-ownership.

In the absence of proof to the contrary, properties acquired while they lived together shall be
presumed to have been obtained by their joint efforts, work or industry, and shall be owned by
them in equal shares. For purposes of this article, a party who did not participate in the acquisition
by the other party of any property shall be deemed to have contributed jointly in the acquisition
thereof if the former’s efforts consisted in the care and maintenance of the family and of the
household.

Neither party can encumber or dispose by acts *inter vivos* of his or her share in the property
acquired during cohabitation and owned in common, without the consent of the other, until after
the termination of their cohabitation.

When only one of the parties to a void marriage is in good faith, the share of the party in bad faith
in the co-ownership shall be forfeited in favor of their common children. In case of default of or
waiver by any or all of the common children or their descendants, each vacant share belong to the
respective surviving descendants. In the absence of descendants, such share shall belong to the
innocent party. In all cases the forfeiture shall take place upon termination of the cohabitation.]

\(^{340}\) *Supra* note 249 at 10

\(^{341}\) The Lawyer’s Post, Article 147 of the Family Code Applies to Unions of Parties Who are Legally
Capacitated and Not Barred by any Impediment to Contract Marriage, but Whose Marriage is
Nonetheless Void, Oct. 19, 2015, *available at:* http://thelawyerspost.net/void-
marrage/#.WKwCQX_TBmg (Last visited on August 06, 2017)
Article 147 of the Philippine Family Code applies to such unions the parties to that are not barred by any impediment to contract marriage and are legally capacitated to marry each other, but whose marriage is nonetheless void. This provision creates a co-ownership with respect to the properties they obtain during their cohabitation. This special type of co-ownership applies when a man and a woman, having no legal impediment to marry each other, so exclusively live together as husband and wife under a void marriage or without the benefit of marriage. The term ‘capacitated’ in the provision refers to the legal capacity of a party to contract marriage as provided under Articles 2 and 3 of the Family Code of Philippines, not under any of the impediments mentioned in Article 37 and Article 38 of the Code.\textsuperscript{342} Article 2 of the Family Code provides that no marriage shall be valid, unless these essential requisites are present:

- Legal capacity of the contracting parties who must be a male and a female; and
- Consent freely given in the presence of the solemnizing officer.

Thus a marriage will be void if the parties to marriage had no legal capacity i.e. any male or female or are both not of the age of eighteen years or upwards.\textsuperscript{343}

5.3.2.3.2 Property Rights under Cohabitation of Persons Not Capacitated to Marry Each Other

When a man and a woman who are not capacitated to marry each other under law lives together as husband and wife the Philippines Family Code provides that the rule of co-ownership will not apply to properties acquired by them. The properties acquired by both cohabitants through their joint contribution of money, property or industry shall only be owned by them in common in proportion to their respective contribution, however, in the absence of proof to proportion of contribution, their contribution and corresponding shares will be presumed to be equal.\textsuperscript{344}

\begin{flushleft}
\textsuperscript{342} Ibid.
\textsuperscript{343} Family Code of Philippines, 1987, Article 2
\textsuperscript{344} Family Code of Philippines, Article 148[In case of cohabitation not falling under the preceding Article, only the properties acquired by both of the parties through their actual joint contribution of money, property, or industry shall be owned by them in common in proportion to their respective contributions. In the absence of proof to the contrary, their contributions and corresponding shares
\end{flushleft}
The property relations of couples living together but with impediments to marry are governed by Article 148 of the Family Code. In this case ownership of parties is limited in proportion to their respective contribution. Each party owns only those properties that are acquired through ‘actual joint contribution on money, property or industry’ by that party. The contribution of the parties shall be presumed to be equal unless proved otherwise. This presumption applies to joint deposits of money and evidences of credit. If one party is legally married to a third person (other than the live-in partner), his/ her share in the co-ownership shall belong to the absolute community or conjugal partnership of the valid marriage. If a party acted in bad faith and is not validly married to a third party, his/her share in the co-ownership shall be forfeited in accordance with the preceding Article 147.345

Thus it is evident that the differentiation in these two forms of cohabitations has been basically based on the existence and non-existence of impediments to marry. These impediments are mentioned in Article 37 and Article 38 of the Family Code of Philippines. These Articles provides about following types of impediments for legitimate relationships:

1. Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate:
   (a) Between ascendants and descendants of any degree; and
   (b) Between brothers and sisters, whether of the full or half blood.346

2. The following marriages shall be void from the beginning for reasons of public policy:

   are presumed to be equal. The same rule and presumption shall apply to joint deposits of money and evidences of credit.
   If one of the parties is validly married to another, his or her share in the co-ownership shall accrue to the absolute community or conjugal partnership existing in such valid marriage. If the party who acted in bad faith is not validly married to another, his or her share shall be forfeited in the manner provided in the last paragraph of the preceding Article.
   The forgoing rules on forfeiture shall likewise apply even if both parties are in bad faith.[345

   Supra note 249 at 10

   Family Code of Philippines, Article 37 [Marriages between the following are incestuous and void from the beginning, whether relationship between the parties be legitimate or illegitimate:
   (1) Between ascendants and descendants of any degree; and
   (2) Between brothers and sisters, whether of the full or half blood. ]
(a) Between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree;

(b) Between step-parents and step-children;

(c) Between parents-in-law and children-in-law;

(d) Between the adopting parent and the adopted child;

(e) Between the surviving spouse of the adopting parent and the adopted child;

(f) Between the surviving spouse of the adopted child and the adopter;

(g) Between an adopted child and a legitimate child of the adopter;

(h) Between adopted children of the same adopter; and

(i) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.\(^{347}\)

Thus it is clear that cohabitation of persons who are prohibited under above discussed categories will be considered as union of persons not capacitated to marry and any properties relating to their union will be governed as provided under Article 148 of the Family Code of the Philippines.

5.3.2.3.3 Co-ownership

There is co-ownership whenever the ownership of an undivided thing or right belongs to different persons.\(^{348}\) Thus co-ownership is a state where an undivided thing

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\(^{347}\) Family Code of Philippines, Article 38 [The following marriages shall be void from the beginning for reasons of public policy:
(1) Between collateral blood relatives whether legitimate or illegitimate, up to the fourth civil degree;
(2) Between step-parents and step-children;
(3) Between parents-in-law and children-in-law;
(4) Between the adopting parent and the adopted child;
(5) Between the surviving spouse of the adopting parent and the adopted child;
(6) Between the surviving spouse of the adopted child and the adopter;
(7) Between an adopted child and a legitimate child of the adopter;
(8) Between adopted children of the same adopter; and
(9) Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse.]

\(^{348}\) Civil Code of Philippines, 1949, Article 484 [There is co-ownership whenever the ownership of an undivided thing or right belongs to different persons. In default of contracts, or of special provisions, co-ownership shall be governed by the provisions of this Title.]
or right belongs to two or more persons, the Right of common dominion which two or more persons have over a thing, or part of a thing which is not physically divided. Each co-owner may avail the thing owned in common, provided he does so in accordance with the purpose for which it is promised and in such a way as not to abuse the interest of the co-ownership or prevent the other co-owner from using it according to their rights. The purpose of the co-ownership may be changed by agreement, express or implied.349

i) Characteristics of Co-ownership

- There must be more than one subject or owner.
- There is one physical whole divided into ideal shares.
- Each ideal share is definite in amount but is not physically segregated from the rest.
- Regarding the physical whole, each co-owner must respect each other in the common use, enjoyment, or preservation of the physical whole.
- Regarding the ideal share, each co-owner holds almost absolute control over the same.350

ii) Rules Regarding the Co-ownership

The share of the co-owners, in the benefits as well as in the charges, shall be proportional to their respective interests. Any stipulation in a contract to the contrary shall be void.351 The portions belonging to the co-owners in the co-ownership shall be presumed equal, unless the contrary is proved.352 Whenever a part of the thing belongs exclusively to one of the co-owners, and the remainder is owned in

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349 Civil Code of Philippines, 1949, Article 486 [Each co-owner may use the thing owned in common, provided he does so in accordance with the purpose for which it is intended and in such a way as not to injure the interest of the co-ownership or prevent the other co-owners from using it according to their rights. The purpose of the co-ownership may be changed by agreement, express or implied.]


351 Ibid.

352 Civil Code of Philippines, 1949, Article 485 [The share of the co-owners, in the benefits as well as in the charges, shall be proportional to their respective interests. Any stipulation in a contract to the contrary shall be void. The portions belonging to the co-owners in the co-ownership shall be presumed equal, unless the contrary is proved.]
Each co-owner shall have the full ownership of his part and of the gains and profits connected thereto and he/she may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved; however, the effect of the alienation or the mortgage, with respect to the co-owners, shall be limited to the share which may be allotted to that partner in the division upon the termination of the co-ownership.\(^{354}\)

Each co-owner may demand the partition of his/her concerned share at any time in a property owned in common. Though no co-owner shall be obliged to remain in the co-ownership but an agreement to keep the thing undivided for a certain period of time, not exceeding ten years, shall be valid and further this term may be extended by a new agreement. A donor or testator may prohibit partition for a period which shall not exceed twenty years. There shall not be any partition when it is prohibited by law. No prescription shall run in favor of a co-owner or co-heir against his co-owners or co-heirs so long as he expressly or impliedly recognizes the co-ownership.\(^{355}\)

However, the co-owners cannot ask for physical partition of the thing owned in common, if such partition would likely to render it inefficacious for the use for

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\(^{353}\) Civil Code of Philippines, 1949, Article 492 [For the administration and better enjoyment of the thing owned in common, the resolutions of the majority of the co-owners shall be binding. There shall be no majority unless the resolution is approved by the co-owners who represent the controlling interest in the object of the co-ownership. Should there be no majority, or should the resolution of the majority be seriously prejudicial to those interested in the property owned in common, the court, at the instance of an interested party, shall order such measures as it may deem proper, including the appointment of an administrator. Whenever a part of the thing belongs exclusively to one of the co-owners, and the remainder is owned in common, the preceding provision shall apply only to the part owned in common.]

\(^{354}\) Civil Code of Philippines, 1949, Article 493 [Each co-owner shall have the full ownership of his part and of the fruits and benefits pertaining thereto, and he may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved. But the effect of the alienation or the mortgage, with respect to the co-owners, shall be limited to the portion which may be allotted to him in the division upon the termination of the co-ownership.]

\(^{355}\) Civil Code of Philippines, 1949, Article 494 [No co-owner shall be obliged to remain in the co-ownership. Each co-owner may demand at any time the partition of the thing owned in common, insofar as his share is concerned. Nevertheless, an agreement to keep the thing undivided for a certain period of time, not exceeding ten years, shall be valid. This term may be extended by a new agreement. A donor or testator may prohibit partition for a period which shall not exceed twenty years. Neither shall there be any partition when it is prohibited by law. No prescription shall run in favor of a co-owner or co-heir against his co-owners or co-heirs so long as he expressly or impliedly recognizes the co-ownership.]
which it is designed. \(^{356}\) But whenever the thing is actually indivisible and the co-
owners cannot agree that it be allotted to one of them who shall indemnify the others, it shall be sold and its proceeds be distributed equally. \(^{357}\) The partition of a thing owned in common shall not prejudice third persons, who shall retain the rights of mortgage, servitude or any other real rights belonging to them before the division was made. Personal rights pertaining to third persons against the co-ownership shall also remain in force, notwithstanding the partition. \(^{358}\)

Partition may be made by agreement between the parties or by judicial proceedings. Partition shall be governed by the Rules of Court insofar as they are consistent with Civil Code. \(^{359}\) The creditors or assignees of the co-owners may take part in the division of the thing owned in common and object to its being effected without their concurrence. But they cannot impugn any partition already executed, unless there has been fraud, or in case it was made notwithstanding a formal opposition presented to prevent it, without prejudice to the right of the debtor or assignor to maintain its validity. \(^{360}\) Upon partition, there shall be a collective accounting for benefits received and reimbursement of expenses made and accordingly each co-owner shall pay for damages caused by reason of his/her

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\(^{356}\) Civil Code of Philippines, 1949, Article 495 [Notwithstanding the provisions of the preceding article, the co-owners cannot demand a physical division of the thing owned in common, when to do so would render it unserviceable for the use for which it is intended. But the co-ownership may be terminated in accordance with Article 498.]

\(^{357}\) Civil Code of Philippines, 1949, Article 498 [Whenever the thing is essentially indivisible and the co-owners cannot agree that it be allotted to one of them who shall indemnify the others, it shall be sold and its proceeds distributed.]

\(^{358}\) Civil Code of Philippines 1949, Article 499 [The partition of a thing owned in common shall not prejudice third persons, who shall retain the rights of mortgage, servitude or any other real rights belonging to them before the division was made. Personal rights pertaining to third persons against the co-ownership shall also remain in force, notwithstanding the partition.]

\(^{359}\) Civil Code of Philippines 1949, Article 496 [Partition may be made by agreement between the parties or by judicial proceedings. Partition shall be governed by the Rules of Court insofar as they are consistent with this Code]

\(^{360}\) Civil Code of Philippines 1949, Article 497 [The creditors or assignees of the co-owners may take part in the division of the thing owned in common and object to its being effected without their concurrence. But they cannot impugn any partition already executed, unless there has been fraud, or in case it was made notwithstanding a formal opposition presented to prevent it, without prejudice to the right of the debtor or assignor to maintain its validity.]
negligence or fraud. Every co-owner shall, after partition, be liable for defects of title and quality of the portion assigned to each of the other co-owners.

**iii) Effects of Partition**

- Mutual accounting for benefits.
- Mutual reimbursement for expenses.
- Indemnity for damages in case of negligence or fraud.
- Reciprocal warranty for defects of title or quality.
- Each former co-owner is deemed to have had exclusive possession of his part allotted to him for the entire period during which the co-possession lasted.

Every co-owner shall, after partition, be liable for defects of title and quality of the portion assigned to each of the other co-owners. A co-owner of a thing may exercise the right of redemption in case the shares of all the other co-owners or of any of them are sold to a third person. If the price of the alienation is grossly excessive, the redemptioner shall pay only a reasonable one. The right of legal pre-emption or redemption shall not be exercised except within thirty days from the notice in writing by the prospective vendor, or by the vendor, as the case may be. The deed of sale shall not be recorded in the Registry of Property, unless accompanied by an affidavit of the vendor that he has given written notice thereof to all possible redemptioners. The right of redemption of co-owners excludes that of adjoining owners.

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361 Civil Code of Philippines 1949, Article 500 [Upon partition, there shall be a mutual accounting for benefits received and reimbursements for expenses made. Likewise, each co-owner shall pay for damages caused by reason of his negligence or fraud.]

362 Civil Code of Philippines 1949, Article 501 [Every co-owner shall, after partition, be liable for defects of title and quality of the portion assigned to each of the other co-owners.]

363 Supra note 350

364 Civil Code of Philippines 1949, Article 501

365 Civil Code of Philippines 1949, Article 1620 [A co-owner of a thing may exercise the right of redemption in case the shares of all the other co-owners or of any of them, are sold to a third person. If the price of the alienation is grossly excessive, the redemptioner shall pay only a reasonable one. Should two or more co-owners desire to exercise the right of redemption, they may only do so in proportion to the share they may respectively have in the thing owned in common.]

366 Civil Code of Philippines 1949, Article 1623 [The right of legal pre-emption or redemption shall not be exercised except within thirty days from the notice in writing by the prospective vendor, or by the vendor, as the case may be. The deed of sale shall not be recorded in the Registry of Property, unless accompanied by an affidavit of the vendor that he has given written notice thereof.
5.3.2.4 Unmarried Couples’ Right to Parental Authority and Custody of Child

Parental Authority under Philippine law is considered a natural right as well as duty of parents and this duty includes the responsibility of caring and rearing children for civic consciousness and efficiency and the advancement of their moral, mental and physical character and well being. Parental authority cannot be renounced or transferred. Father and mother shall jointly exercise parental authority over child. No child under seven years of age shall be separated from mother except compelling reasons. As we have already stated that child born outside wedlock is considered illegitimate, so parental authority over such child can solely be exercised by mother. Parental authority over the person and property of child terminates on the attainment of emancipation i.e. age of majority. The right to physical custody of child has not been separately discussed in Philippine Family Code. It provides that the

to all possible redemptioners. The right of redemption of co-owners excludes that of adjoining owners.] 367 Family Code of Philippines, 1987, Article 209 [Pursuant to the natural right and duty of parents over the person and property of their unemancipated children, parental authority and responsibility shall include the caring for and rearing them for civic consciousness and efficiency and the development of their moral, mental and physical character and well being.] 368 Family Code of Philippines, 1987, Article 210 [Parental authority and responsibility may not be renounced or transferred except in the cases authorized by law.] 369 Family Code of Philippines, 1987, Article 211 [The father and mother shall jointly exercise parental authority over the persons of their common children. The case of disagreement, the father’s decision shall prevail, unless there is a judicial order to the contrary. Children shall always observe respect and reverence towards their parents and obliged to obey them as long as the children are under parental authority.] 370 Family Code of Philippines, 1987, Article 213 [In case of separation of parents, parental authority shall be exercised by the parent designated by the court. The court shall take into account all relevant considerations, especially the choice of the child over seven years of age, unless the court finds compelling reasons to order otherwise.] 371 Family Code of Philippines, 1987, Article 176 [Illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child.] 372 Family Code of Philippines, 1987, Article 234 [Emancipation takes place by the attainment of majority. Unless otherwise provided, majority commences at the age of twenty-one years. Emancipation also takes place: (1) By the marriage of the minor; or (2) By the recording in the Civil Register of an agreement in a public instrument executed by the parent exercising parental authority and the minor at least eighteen years of age. Such emancipation shall be irrevocable.] 373 Family Code of Philippines, 1987, Article 236 [Emancipation for any cause shall terminate parental authority over the person and property of the child who shall then be qualified and responsible for all acts of civil life.]
parents and those exercising parental authority over unemancipated children shall have to keep them in their company, to support, educate and instruct them by right precept and good example, and to provide for their upbringing in keeping with their means.  

5.3.2.5 Rights of Children Born Out of Cohabitation

In Philippines children born outside a marriage are illegitimate. The Family Code of Philippines provides for the legitimization of illegitimate children, however, children of cohabitants having no impediments to marry each other can only be legitimated. Legitimating takes place by a subsequent valid marriage between parents. The effect of legitimating a child retroacts to the time of the child’s birth and a legitimated child enjoys the same rights as a legitimate child.

The Philippine Family Code provides that illegitimate child shall use the surname of his/her mother. Such children shall be under the parental authority of their mother and shall be entitled to support in conformity with provisions provided in

374 Family Code of Philippines, 1987, Article 220[The parents and those exercising parental authority shall have with respect to their unemancipated children or wards the following rights and duties:

(1) To keep them in their company, to support, educate and instruct them by right precept and good example, and to provide for their upbringing in keeping with their means;
(2) To give them love and affection, advice and counsel, companionship and understanding;
(3) To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship;
(4) To enhance, protect, preserve and maintain their physical and mental health at all times;
(5) To furnish them with good and wholesome educational, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals;
(6) To represent them in all matters affecting their interest;
(7) To demand from them respect and obedience
(8) To impose discipline on them as may be required under the circumstances; and
(9) To perform such other duties as are imposed by law upon parents and guardians.

375 Family Code of Philippines, 1987, Article 165[Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this Code.]

376 Family Code of Philippines, 1987, Article 177[Only children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other may be legitimated.]

377 Family Code of Philippines, 1987, Article 178[Legitimation shall take place by a subsequent valid marriage between parents. The annulment of a voidable marriage shall not affect the legitimation.]

378 Family Code of Philippines, 1987, Article 180[The effects of legitimation shall retroact to the time of the child’s birth.]

379 Family Code of Philippines, 1987, Article 179[Legitimated children shall enjoy the same rights as legitimate children.]
Family Code of Philippines. \(^{380}\) Support includes everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation in accordance with financial capacity of the family. \(^{381}\) The education includes schooling or training for some profession, trade or vocation even beyond the age of majority and transportation include expenses in going to and from school, or to and from place of work. \(^{382}\) Philippines Family Code enlists under Article 195 \(^{383}\) persons who are obliged to support each other and it makes provision for the support of illegitimate child also and these are as follows:

1. The spouses
2. Parents
3. Grand-Parents \(^{384}\)
4. Legitimate Brother/ Sister (Full/Half-Blood) \(^{385}\)
5. Illegitimate Brother/ Sister (Full/Half-Blood) \(^{386}\)

It has also been made clear that only the separate property of the person obliged to support shall be answerable, however, if the oblider has no separate

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\(^{380}\) Family Code of Philippines, 1987, Article 176
\(^{381}\) Family Code of Philippines, 1987, Article 194 [Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family. The education of the person entitled to be supported referred to in the preceding paragraph shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority. Transportation shall include expenses in going to and from school, or to and from the place of work.]
\(^{382}\) Family Code of Philippines, 1987, Article 194
\(^{383}\) Family Code of Philippines, 1987, Article 195 [Subject to the provisions of the succeeding Articles, the following are obliged to support each other to the whole extent set forth in the preceding Article:
1. The spouses;
2. Legitimate ascendants and descendants;
3. Parents and their legitimate children and the legitimate and illegitimate children of the latter;
4. Parents and their illegitimate children and the legitimate and illegitimate children of the latter; and
5. Legitimate brothers and sisters, whether of full or half-blood.]
\(^{384}\) Family Code of Philippines, 1987, Article 195(4)
\(^{385}\) Family Code of Philippines, 1987, Article 195(5)
\(^{386}\) Family Code of Philippines, 1987, Article 196 [Brothers and sisters not legitimately related, whether of the full or half-blood, are likewise bound to support each other to the full extent set forth in Article 194, except only when the need for support of the brother or sister, being of age, is due to a cause imputable to the claimant’s fault or negligence.]
property the support shall be deducted from the conjugal or absolute community property.  

The Civil Code of Philippines provides for the right of illegitimate child’s right to inheritance. It provides for the following compulsory heirs under Article 887:

“(1) Legitimate children and descendants, with respect to their legitimate parents and ascendants;

(2) In default of the foregoing, legitimate parents and ascendants, with respect to their legitimate children and descendants;

(3) The widow or widower;

(4) Acknowledged natural children, and natural children by legal fiction;

(5) Other illegitimate children referred to in Article 287."

Here it is important to note that compulsory heirs mentioned in any clause are not excluded by another. In all cases of illegitimate children, their filiation must be duly proved. Legitime is that part of the testator's property which he cannot dispose of because the law has reserved it for certain heirs who are, therefore, called compulsory heirs. The legitime of legitimate children and descendants consists of one-half of the hereditary estate of the father and of the mother. The latter may freely dispose of the remaining half, subject to the rights of illegitimate children and of the surviving spouse as provided under Philippine law i.e. the law states that an illegitimate child

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387 Family Code of Philippines, 1987, Article 197 [In case of legitimate ascendants; descendants, whether legitimate or illegitimate, and brothers and sisters, whether legitimately or illegitimately related, only the separate property of the person obliged to give support shall be answerable provided that in case the obligor has no separate property, the absolute community or the conjugal partnership, if financially capable, shall advance the support, which shall be deducted from the share of the spouse obliged upon the liquidation of the absolute community or of the conjugal partnership.]

388 Family Code of Philippines, 1987, Article 287 [ Illegitimate children other than natural in accordance with Article 269 (see footnote 341) and other than natural children by legal fiction are entitled to support and such successional rights as are granted in this Code.]

389 Civil Code of Philippines, 1949, Article 886 [Legitime is that part of the testator's property which he cannot dispose of because the law has reserved it for certain heirs who are, therefore, called compulsory heirs.]

390 Civil Code of Philippines, 1949, Article 888 [The legitime of legitimate children and descendants consists of one-half of the hereditary estate of the father and of the mother. The latter may freely dispose of the remaining half, subject to the rights of illegitimate children and of the surviving spouse as hereinafter provided.]
shall receive a share equivalent to half of the share that will be received by a legitimate child who in turn shall receive a share of half of the value of the whole legitime.\footnote{Civil Code of Philippines, 1949, Article 895[The legitime of each of the acknowledged natural children and each of the natural children by legal fiction shall consist of one-half of the legitime of each of the legitimate children or descendants. The legitime of an illegitimate child who is neither an acknowledged natural, nor a natural child by legal fiction, shall be equal in every case to four-fifths of the legitime of an acknowledged natural child. The legitime of the illegitimate children shall be taken from the portion of the estate at the free disposal of the testator, provided that in no case shall the total legitime of such illegitimate children exceed that free portion, and that the legitime of the surviving spouse must first be fully satisfied.]}

Thus it is evident from these provisions of the Philippine Civil Code that the rights of illegitimate children are not akin to those of legitimate children unless and until they are legitimated. The illegitimate children that are not natural under Article \footnote{Family Code of Philippines, 1987, Article 269[Only natural children can be legitimated. Children born outside wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other, are natural.]} can have only half of the share that of legitimate child or legitimated natural child.

### 5.3.2.6 Unmarried Couple’s Right of Adoption

The Philippine law provides that a child must be adopted by husband and wife jointly however one spouse can adopt his/her own illegitimate child or illegitimate child of other spouse.\footnote{Family Code of Philippines, 1987, Article 185[Husband and wife must jointly adopt, except in the following cases:
(1) When one spouse seeks to adopt his own illegitimate child; or
(2) When one spouse seeks to adopt the legitimate child of the other.]
} A child can be given in adoption by the parents by nature or the legal guardian.\footnote{Family Code of Philippines, 1987, Article 188(2)[Article 188 The written consent of the following to the adoption shall be necessary:
(1) The person to be adopted, if ten years of age or over;
(2) The parents by nature of the child, the legal guardian, or the proper government instrumentality;
(3) The legitimate and adopted children, ten years of age or over, of the adopting parent or parents;
(4) The illegitimate children, ten years of age or over, of the adopting parent, if living with said parent and the latter’s spouse, if any; and
(5) The spouse, if any, of the person adopting or to be adopted.]} It makes clear that an illegitimate child under the parental authority of mother shall be given in adoption by mother of such child only. In Philippines neither any restriction has been placed on the adoption by cohabiting
couple nor there is any such provision specifically related to cohabiting persons. Though it has been provided that any person of legal age and in possession of full civil capacity and legal rights and in a position to support and care his/her children legitimate or illegitimate may adopt a child. It has also been provided that adopter must be atleast sixteen years older than the person to be adopted, unless the adopter is the parent by nature of the adopted or is the spouse of the parent of person to be adopted. Thus it is clear that persons living in non-marital cohabitation can adopt a child as there is no restriction regarding that and Civil Code provides for adoption by any person of legal age.

5.3.3 Analysis of Live-in Relationships in Philippines

Philippines and India are nearly similar in its social fabric. Monogamous marriage except Muslims, marriage as sacrament, family as primary institution, marriage as norm are some of the basics of both Indian and Philippine society. In Philippine society like Indian society non-marital relationships are censured however in both jurisdictions people from entertainment industry are living in non-marital relationships publicly. Elite class and very poor sections in both countries are living-in such relationships whereas middle class censuring such relationships being stigma. Despite stigma related to non-marital relationships and lack of legislative recognition of live-in relationships, numbers of couples living under such relationships are increasing. Though reasons for such increase are different in these two countries, after long practiced forms of living-in modernization and individualism is the major reason for increase in non-marital unions in India whereas in Philippines indissoluble form of marriage, illegality of divorce are the major reasons behind the increase of non-marital unions among common people.

As we have already highlighted the transitions in fertility, union formation, and family structure have been emerging worldwide. Among these transitions: postponement of marriage and childbearing, increased divorce rate, and a growing pattern of non-marital cohabitation, non-marital births, and voluntary childlessness, leading to a multitude of family issues. Many scholars frame these demographic

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395 Family Code of Philippines, 1987, Article 185
changes as indicators of ideational change, concomitant with modernization and these demographic changes has been termed as Second Demographic Transition and this ideational change is true to Indian society. However as we have discussed above in this Chapter many Filipino youth report strong disapproval of premarital sex and non-marital fertility, the prevalence of premarital sex has increased substantially over time for both young men and women. The Philippines is in a unique demographic transition where cohabitation is increasingly practiced - growing in both incidence and prevalence - while other family behaviors remain relatively conservative. Our analysis of available past researches also shows that the incidence of cohabitation has increased over time as well. Furthermore, these studies show that the cohabitation is associated with lower levels of education and also generally with lower levels of wealth, both of which are not consistent with characteristics of a Second Demographic Transition or evidence of value change.

Similarities and differences also lie in the comparison of legal status of non-married live-in partners in India and in Philippines. Much debate is done in India on the responsibility of non-married partner to maintain his living-in female partner and courts have in case of ‘live-in relationship in nature of marriage’ made male partner liable to maintain female live-in partner even after termination of relationship. A basic difference lies here between Philippine law and Indian law of maintenance that in Philippines both spouses are required to maintain each other during the relationship and such obligation to maintain one’s spouse ceases on the termination of relationship. In relation to property rights of non-married live-in partners also there exists a huge difference between Indian and Philippine law. In India legislature has not provided any property rights or succession rights to live-in partners. Succession by surviving live-in partner only possible either through will of the deceased or through judiciary. Indian courts have not granted right to succession by live-in partners as norm. However as we discussed in this Chapter, in Philippines, Civil Code specifically contains provision regarding property rights to non-marital unions.

Another difference lies between Indian and Philippine law is that under Indian law no child is considered illegitimate and an attempt has been made to abolish illegitimacy under law whereas in Philippines all children born outside legal wedlock
are made legally illegitimate with an option to legitimatize child through subsequent marriage of parents after birth of child.

For the maintenance or support to child, both parents are legally bound whether child is legitimate or illegitimate, in Philippines and hence it is clear that a child born out of non-marital live-in relationship is entitles to maintenance from both parents. However in India statute does not specifically deal with question of maintaining illegitimate child, though illegitimate children are dependants to the property of deceased. On the question of child born out of live-in relationship court have ruled that both parents are equally liable to maintain child. On the point of parental authority over child born out of wedlock both jurisdictions make it clear that child shall be under the parental authority of mother.

Law relating to adoption of child by live-in partners differs in Philippines and India. In India it has been made clear through guidelines that live-in couples cannot adopt a child. Philippine law specifically does not restrict joint adoption by non-marital live-in partners but also like India allows adoption by single person.

Thus it is evident from the above analysis that despite similar social fabric of India and Philippines there are many differences on the legal comparison. This position remains on the point of social-legal status of non-marital live-in relationships. Such non-marital live-in relationship is an increasing phenomena irrespective of social stigma attached to such relationships and majority of people being adherent to the norm of marriage in both countries, India and Philippines. However, legal status of live-in relationships in both countries differs. Whereas India has neither recognized such relationships legislatively nor granted any rights to them, Philippines though legislatively has not recognized such relationships but in its Civil Code has enacted separate provisions regarding the properties of non-marital unions. Thus though socially both countries are similar on their attitude towards non-marital relations, legally there lies a basic difference that unlikely India Philippines have recognized the property rights of non-marital live-in relationships in its Civil Code.

5.4 NON-MARITAL RELATIONSHIPS IN SCOTLAND

5.4.1 Introduction to Union Formation and its Progress in Scotland

Traditional understanding of a family composed of a husband, a wife and children is still considered to be common in Europe. At the same time, other concepts
of a family are commonly recognized. One of the so called new forms of family life is non-marital cohabitation.\textsuperscript{396} The number of cohabitating couples, as well as the number of children born in such unions, has been steadily increasing. The increase in non-marital cohabitation in Scotland like other western post-industrial societies was one of the major reasons of law reform culminating in Sections 25 to 29 of the Family Law (Scotland) Act, 2006. Family structures in Scotland changed and developed regularly and are still doing so. The Family Law Act, 2006, more nearly reflects the diversity in the make-up of families.

The development of legislation must be able to respond to the challenges of social reality and requirements of modern life and society. Family law is one of such areas because it directly affects mutual relations of persons and provides a certain balance in society. Apart from personal opinions of single individuals about marriage and cohabitation, a fact of wide spread of the latter is obvious, and it is undoubted that many other forms, such as life-long unions, exist.\textsuperscript{397}

The Law Commission of Scotland in 1992, under its Report on Family Law, recommended that by providing the legal right to make claims to each other’s property better legal recognition should be given to cohabiting couples. The recommendation of the Scottish Law Commission was influenced by the increasing incidents of non-marital cohabitation throughout the United Kingdom and on the responses received from Scottish people during its consultation process.\textsuperscript{398}

‘Cohabitation’ was defined as the relationship of a man and a woman who are not legally married to each other but are living together as husband and wife, whether or not they pretend to others that they are married to each other, and in order to maintain the distinction between marriage-like relationships and marriage itself the Commission confined the scope of its recommendations. Taking in view neither to undermine marriage nor to limit the freedom of those who were living without

\textsuperscript{396} Olga Beinarovica, “The Historical Development of Regulation of Non-Marital Cohabitation of Heterosexual Couples and its Effect on the Creation of Modern Family Law in Europe”, \textit{available at:} http://www12007.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Beinarovica.pdf at 28 (Last visited on August 05, 2017)

\textsuperscript{397} \textit{Id.} at 29-30

marriage the Commission recommended for doing away legal harshness and the commonly recognized unfair situations. The method in which these two, probably contrary intentions were to be fulfilled i.e. continuing to privilege both marriage and individual choice at the same time while giving legal recognition to cohabiting relationships; however, was not clear.399

The recommendations of the Commission were considered not more than an intuition and no legislation followed the recommendations of the Law Commission’s Report until 2004 when the Scottish Executive refreshed the issue of cohabitant rights after thirteen years of initial publication.400 The question of what sorts of rights or claims cohabitants should have to each other’s property was finally addressed under Sections 25-30 of the Family Law (Scotland) Act, 2006. The Family Law (Scotland) Act, 2006, makes various changes to family law in Scotland but our primary concern here is with those provisions which have an impact on the cohabitants. The recommendations made by the Scottish Law Commission have, largely, been implemented: the right of a cohabitant to make claims from his or her partner in certain circumstances has been introduced and marriage by habit and repute has been abolished. Taken together, these reforms represent an attempt to draw a clear line between marriage and marriage-like relationships.401

The Policy Memorandum402 that accompanied the Family Law (Scotland) Bill, reveals the philosophy for reform in the following terms: “The policy objective is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends. A second theme emphasized in the Policy Memorandum is protection of the vulnerable, whether adults or their children. A final justification, albeit of a different order, is that the reforms are a response to demographic changes and to a corresponding change in public opinion. All of these rationales were subject to the more general constraint of keeping marriage distinct from cohabitation.”403

399 Id. at 209
400 Ibid.
401 Ibid.
403 Id. at 13 para 64
In Scotland the number of cohabiting couples has been growing significantly. There is also evidence of common misunderstanding on the part of the general public as to the legal position of cohabiting couples. A persistent divergence exists between commonly-held beliefs about the law and the law itself.404 The reasons given by cohabitants for not marrying fall into four broad categories: First, there are those who believe that cohabitation carries the same legal consequences as marriage (the so-called ‘myth’ of common-law marriage). Secondly, there are those who wish to distinguish emotional from financial commitment and believe that the avoidance of legal consequences renders their relationship more pure. Thirdly, there are those who see themselves as being as good as married and do not see any need for a formal ceremony unless accompanied by lavish and expensive celebration at some later date. Lastly, there are those who actively wish to avoid marriage either as a manifestation of patriarchy or as a result of personal disillusionment. Given these differences, the question of why and in what form legal intervention may be justified becomes particularly important. How relevant are individual motives, and how (if at all) can they be taken into account in legislation. The issue of personal autonomy also raises the question of whether and to what extent it should be possible to contract out of legislation. The position appears to be that parties are free to enter into their own agreements about the financial consequences of cohabitation, including an agreement to opt out of the statutory provisions.405

When taking on the formulation of conflict rules especially choice of law rules to govern domestic relationships, it is first necessary to make distinction in various forms of relationship which are to be found with regard to unmarried couples. “The following legal categories can be identified in Scotland:

(a) regulated (de iure) partnerships, i.e. civil partnership (or similar), registered or formalised according to the internal law of a given state, and imposing upon registered partners all the consequences prescribed by the statutory regime of that state. Civil partnerships registered under the Civil Partnership Act 2004 fall into this category.

404 Supra note 398 at 221-222
405 Id. at 227-228
(b) regulated (de iure) partnerships, as above, but in respect of which some or all of the statutory consequences (e.g. matters of property and succession) may be excluded by agreement of the parties, i.e. where parties are able to opt out of certain consequences which otherwise would flow automatically from the act of registration or formalisation of the relationship.

c) de facto unions, i.e. cohabiting relationships established otherwise than by formal registration and/or legal ceremony, and imposing upon cohabitants all the consequences prescribed by the applicable legislative regime – including, in situations where legal consequences do not flow automatically from the fact of cohabitation, the opportunity to apply for legal rights. This category includes cohabitation as defined in section 25 of the Family Law (Scotland) Act 2006.

d) de facto cohabitation where some or all of the statutory consequences (including the right to apply for such) may be excluded by agreement of the parties. This category does not exist in Scotland, where it does not seem possible for cohabitants to agree, prior to or during the period of cohabitation, to contract out of the statutory entitlements laid down in the 2006 Act, albeit that the benefits to be conferred must be applied for by one or both parties. Some legal systems, however, may permit parties to opt out of the default regime and, if desired, to substitute their own arrangements.

e) de facto cohabitation unregulated by law, i.e. personal domestic relationships which incur no special legal consequences as such. This category includes not only individuals living under a legal system which (as in Scots law prior to the coming into force of the 2006 Act) makes no provision for de facto cohabitants, but also persons who do not satisfy the eligibility criteria imposed by the regulatory scheme in question (for example, under the 2006 Act, adult siblings having a shared living arrangement).”

However, the classification of the legal nature of a relationship (qua marriage, civil/registered partnership, de facto cohabitation etc) is a task for the forum.

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5.4.1.1 Increasing Trends of Cohabitation

The structure of the nuclear family of two parents of opposite sex married to each other is steadily changing across the Great Britain, though, quite recently it was considered to be the norm. There have been several long term trends that have affected United Kingdom families, the most significant being:

- rises in the numbers of people cohabiting
- rises in the number of children being born to unmarried parents
- rises in the number of people living alone and
- a fall in marriage rates.\(^\text{407}\)

There is limited data available to accurately trace trends of cohabitation over time. In fact, prior to the 1990s, cohabitants were largely statistically invisible. Until 1991, responses to the national census that indicated cohabitation, such as ‘common-law spouse’ or ‘de facto spouse’, were not recognised as an independent category. Such households appeared on the national census results as ‘households with no family’, ‘lone parent families with others’ or as ‘two-family households’ depending on the existence of children.\(^\text{408}\)

The standard classification of family composition in the national census first included the category of ‘living together as a couple’ in 1991. This option was incorporated into Scotland’s census shortly thereafter. Despite the limited duration of data gathering, a clear increase in cohabitation can be identified in the last three decades. There is evidence to suggest that in 1996, there were approximately 1.5 million heterosexual unmarried cohabiting couples in the United Kingdom. At that time, heterosexual unmarried cohabiting couples accounted four percent of all recorded families in Scotland. By 2001, the number of opposite sex cohabiting couples in the UK had increased significantly, to 2.1 million. At that time,


heterosexual unmarried cohabitants accounted five percent of all recorded families in Scotland.\textsuperscript{409}

In Scotland, more people now live together without being married. Also, many more children are born to parents who are not married (about half in 2008) than in the past. In 2006, about one quarter of unmarried adults aged 16 to 59 were cohabiting and, in 2008, there were about 370,000 cohabiting adults in Scotland. Cohabitation is more prevalent amongst younger age groups, with 57 percent of all cohabitants aged 34 or less and 81 percent aged 44 or less.\textsuperscript{410}

\textbf{5.4.1.2 Declining Trends of Marriage and Divorce}

Despite the significant increase in cohabitation, marriage remains the principal family form in Scotland. However, the available data indicates that the popularity of marriage is declining, with many couples choosing to delay marriage until later in life, or reject it altogether. However, while the number of married individuals living in Scotland remains statistically high, the dwindling number of new marriages recorded each year indicates a general decline in popularity. The number of registered marriages each year has decreased steadily.\textsuperscript{411} Along with a general decline in the popularity of marriage, there is evidence to suggest that the average age at the date of marriage is increasing. The increase in age at marriage has been attributed to couples cohabiting, as an alternative to, or in preparation for marriage.\textsuperscript{412}

In recent years there has been a significant increase in cohabitation in Scotland, and a decline in the popularity of marriage. Prior to 2006, some cohabitants were able to claim spousal succession rights by establishing that they had formed a marriage by cohabitation with habit and repute with their deceased partner. However, a surviving cohabitant had no statutory right to financial provision or redistribution of property on the death of their partner.\textsuperscript{413} With increasing trends of cohabitation, it

\textsuperscript{409} Id. at 9-10
\textsuperscript{411} Supra note 408 at 11
\textsuperscript{412} Id. at 12
\textsuperscript{413} Id. at 6
became apparent that there was a significant disparity between the social status of cohabitants and their legal status in succession law. In the early 2000s, the Scottish Executive recognised that the legal vulnerability of cohabitants sat ‘uncomfortably’ alongside the rising number of cohabiting couples living in Scotland, and undertook to legislate a set of principles and basic rights for cohabitants in succession. \textsuperscript{414} This response is now enshrined in Sections 25 and 29 of the Family Law (Scotland) Act, 2006. The Family Law (Scotland) Act, 2006 confers upon cohabitants the right to apply to the court for provision from their deceased partner’s intestate estate.

5.4.1.3 Social Attitudes towards Cohabitation and Marriage

The recent demographic changes have been accompanied by changing social attitudes towards cohabitation and marriage. Social acceptance of cohabitation, as a legitimate partnering and parenting structure, has now been achieved almost universally across the United Kingdom. “The Scottish Social Attitudes (SSA) Survey 2000 asked 1500 respondents if it was ‘alright’ for a couple to live together, without intending to get married. About 65 percent of respondents agreed, and a further 18 percent gave a neutral response. The same survey also asked whether it was a ‘good idea’ for a couple to cohabit before they get married. Nearly 55 percent of respondents confirmed that they agreed with this proposition, while a further 25 percent neither agreed nor disagreed. At this time, marriage was still a highly valued institution in Scotland, with 61 percent of respondents agreeing that marriage is ‘the best kind of relationship’. The results from the Scottish Social Attitudes survey four years later, confirm that support for this proposition had lowered slightly with only 58 percent of respondents agreeing. There was also a notable decline in this belief among respondents aged 18-34. The majority of respondents believed that couples ought to get married if they want to have children. However, there was a decline in the belief that unmarried couples made for inferior parents. The data suggests a broad acceptance of the new social trends in Scotland, and a decline in the \textit{a priori} belief that cohabitation is inferior to marriage. This general social acceptance has been met with the expectation that cohabitation ought to attract some legal protection similar to marriage.”\textsuperscript{415}

\textsuperscript{414} \textit{Ibid.}
\textsuperscript{415} \textit{Id.} at 14-15
Pre-marital relationships has now been recognized and accepted, while non-marital cohabitation is the most common form of first co-resident partnership. The context of parenthood has also changed in addition to the changes in partnership formation patterns. Other social surveys have shown a similar shift in attitudes (often generational) towards marriage, cohabitation and family life. In 2006, for example, 66 percent of those surveyed in Great Britain thought there was little social difference between being married and living together and only 29 percent felt married couples made better parents than unmarried ones. Nonetheless, 56 percent of adults surveyed agreed marriage was the best kind of relationship and 64 percent of respondents agreed that marriage was financially more secure than cohabitation. Similar attitudes prevail in Scotland. In the most recent Registrar General’s Annual Review of Demographic Trends for Scotland (General Register Office of Scotland 2015), reporting 2015 data, 28,210 of births out of total 55,098 births in Scotland were to unmarried parents.

5.4.2 The Legal Status of Cohabitants in Scotland

5.4.2.1 Cohabitation in Scotland Before Family Law (Scotland) Act, 2006: Marriage by Cohabitation and Repute

The law of Scotland made some provision for unmarried cohabiting couples prior to 2006, but this legal protection was limited. Most of the law on the constitution of marriage was statutory, in terms of the Marriage (Scotland) Act, 1977. However, a form of irregular marriage, known as marriage by cohabitation with habit and repute was recognized in the common law. In essence, if a man and woman, who were free to marry each other, cohabited as husband and wife for a considerable period of time and were generally regarded as being husband and wife, they were presumed to have consented to be married. If the presumption was not rebutted, the couple was held to be married by cohabitation by habit and repute. By virtue of a marriage by cohabitation by habit and repute, a cohabitant was able to claim spousal succession rights against their deceased partner’s intestate estate. However, this protective

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416 Supra note 407 at 7
417 Ibid.
418 Supra note 410
419 Supra note 408 at 16
mechanism was only available to a limited amount of couples. The doctrine was only applicable to couples that had the capacity to marry.\textsuperscript{420}

Following the separation or the death of the cohabitant the financial remedies probably available to surviving cohabitant were very limited prior to the Family Law (Scotland) Act, 2006. The surviving cohabitant then would simply be left to their rights under the general law of property.\textsuperscript{421} The cohabitant’s rights would thus depend, for example, on whether they had taken the title to the home in which they lived together in joint names, and on whether they had included a survivorship destination in that title or written wills providing for the survivor in the eventuality of the other’s death. If they had not done so, as would often be the case in relation to title to a house, the party who was not on the title and/or not provided for in any will, would be left in a potentially vulnerable position on the termination of relationship.\textsuperscript{422}

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\textit{Marriage by ‘Cohabitation with Habit and Repute’}

Marriage by cohabitation with habit and repute was the last form of irregular marriage allowed by Scottish law, and so not strictly speaking a law connected to cohabitation as such. A couple who had not gone through a valid ceremony of marriage was assumed to have silently agreed to be married, and so was treated in law as spouses. Living together as husband and wife in Scotland for a long period of time is enough to sustain an inference that the couple had silently agreed to marry. They must, crucially, have been free to marry and had the capacity to marry. Further the doctrine requires that couple pretend to be married among friends and they generally believe the couple to be married. It was one of the few situations where Scots law recognized rights arising from bad faith. However, where the doctrine applied, a declaration of marriage could be obtained and the marriage registered as such.\textsuperscript{423} Cohabitants who take the benefit of this doctrine would thus be removed from the category of cohabitant entirely and acquire the rights and obligations of married spouses. However it is of greater concern that in practice this doctrine does not apply to thousands of couples who wrongly believe in the ‘common law marriage myth’. It

\textsuperscript{420} Ibid.
\textsuperscript{421} Supra note 407 at 16
\textsuperscript{422} Ibid.
\textsuperscript{423} Ibid.
could not rescue those many cohabitants. There is no need to pretend to be married because they nevertheless enjoy the same legal status as spouses purely by virtue of living together.\footnote{Id. at 17} We therefore turn to consider the remedies available to couples in that position pre-2006.

5.4.2.1.1 Remedy of Unjustified Enrichment

A general remedy of unjustified enrichment is available in Scots law. An action for return of an unjustified enrichment can be raised against an individual or their estate. A cohabitant may be able to pursue some reparation, following the death of their partner, by way of a claim under this doctrine. An action of unjustified enrichment allows an individual to recover contributions they have made to another person, on the basis that the recipient has no legal basis on which to retain that enrichment. The focus in Scottish law has been on the remedies offered by the law of unjustified enrichment unlike England and Wales, where considerable use has been made of the law of constructive trusts in relation to the shared home on cohabitants’ separation. The law of unjustified enrichment potentially enables a party in relation to improvements made to such property or services provided for the other party’s benefit and money spent on property owned by the other party. Under this rule of remedy one would not compensate the pursuer for the losses or disadvantages suffered, but would instead reverse the consequent enrichment of the defender, even if the loss were greater. However to get remedied under this rule it would be necessary to prove that the enrichment was unjustified and it would be mandatory to bring the case within the scope of grounds prescribed by law for relief.\footnote{Ibid.}

An action must fall within one of three recognized categories, distinguished by the way in which the recipient acquired the enrichment. First, when the enrichment was the result of an intentional conferral of wealth, but there was some element to the transfer that rendered it invalid, for example mistaken payment to the wrong recipient. Second, when the enrichment was imposed upon the recipient; for example, an individual carries out unauthorized improvements to the recipient’s heritable property. Third, when the recipient had took the enrichment without authorization. Cohabitants’
claims have fallen mainly within the first two categories. An individual’s prospects of successfully recovering enrichment depend on their ability to establish that the enrichment was unjustified.\textsuperscript{426}

Unjustified enrichment is a remedy of last resort. The rule of subsidiarity prevents an individual making a claim of unjustified enrichment where another unexhausted legal remedy is available, whether by common law or under statute. Unjustified enrichment is therefore discordant with the doctrine of marriage by cohabitation by habit and repute, as any cohabitant that could pursue a claim in succession on the basis of a marriage by cohabitation by habit and repute, could not use the remedy of unjustified enrichment unless they established that their contributions to the relationship had a legal basis, for example a contractual loan. Moreover, the remedy of unjustified enrichment is not a substitute for succession rights because succession rights are not based on what has been ‘earned’. Unjustified enrichment provides a cohabitant with a remedy to recover only contributions that they made to their deceased partner’s wealth.\textsuperscript{427}

\textbf{5.4.2.1.2 Miscellaneous Provisions for Cohabitants before 2006}

There were some other provisions for cohabitants before 2006. An individual was able to claim damages for the wrongful death of their cohabitant under the Damages (Scotland) Act, 1976. A cohabitant was also able to apply to a court for occupancy rights to the family home, in terms of the Matrimonial Homes (Family Protection) (Scotland) Act, 1981. The law also recognized cohabitation for income-related benefits, succession to statutory tenancies, and various mental health purposes. In light of these provisions, and the potential for marriage by cohabitation by habit and repute or unjustified enrichment claims, in the early 2000s, the question was not whether the law should recognize cohabitants.\textsuperscript{428}

\textbf{a) Occupancy Rights}

A cohabitant can apply to court under the Matrimonial Homes(Family Protection) (Scotland) Act, 1981, Section 18 for the grant of occupancy rights for up to six months (renewable) in relation to that shared home of which the other party is

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{426}]
\item \textit{Supra} note 408 at 18
\item \textit{Id.} at 19
\item \textit{Id.} at 19-20
\end{enumerate}
\end{footnotesize}
owner or tenant if that cohabitant has no right under the general law of property.\textsuperscript{429} In the case of certain types of rented property a transfer of the tenancy may be ordered.

\textsuperscript{429}Matrimonial Homes (Family Protection) (Scotland) Act 1981, Section 18 [Occupancy rights of cohabiting couples-

(1)If a man and a woman are living with each other as if they were man and wife[ or two persons of the same sex are living together as if they were civil partners, in either case, a cohabiting couple in a house which, apart from the provisions of this section—

(a)one of them (an “entitled partner”) is entitled, or permitted by a third party, to occupy; and

(b)the other (a “non-entitled partner”) is not so entitled or permitted to occupy,

the court may, on the application of the non-entitled partner, if it appears that the entitled partner and the non-entitled partner are a cohabiting couple in that house, grant occupancy rights therein to the applicant for such period, not exceeding 6 months, as the court may specify:

Provided that the court may extend the said period for a further period or periods, no such period exceeding 6 months.

(2)In determining whether for the purpose of subsection (1) above two persons are a cohabiting couple the court shall have regard to all the circumstances of the case including—

(a)the time for which it appears they have been living together; and

(b)whether there is any child—

(i)of whom they are the parents; or

(ii)who they have treated as a child of theirs.]

(3)While an order granting an application under subsection (1) above or an extension of such an order is in force, or where both partners of a cohabiting couple are entitled, or permitted by a third party, to occupy the house where they are cohabiting, the following provisions of this Act shall subject to any necessary modifications—

(a)apply to the cohabiting couple as they apply to parties to a marriage; and

(b)have effect in relation to any child residing with the cohabiting couple as they have effect in relation to a child of the family, section 2; section 3, except subsection (1)(a); section 4; in section 5(1), the words from the beginning to “Act” where it first occurs; section 13 and section 22, and any reference in these provisions to a matrimonial home shall be construed as a reference to a house.

(4)Any order under section 3 or 4 of this Act as applied to a cohabiting couple by subsection (3) above shall have effect—

(a)if one of them is a non-entitled partner, for such a period, not exceeding the period or periods which from time to time may be specified in any order under subsection (1) above for which occupancy rights have been granted under that subsection, as may be specified in the order;

(b)if they are both entitled, or permitted by a third party, to occupy the house, until a further order of the court.

(5)Nothing in this section shall prejudice the rights of any third party having an interest in the house referred to in subsection (1) above.

(6)In this section—

“house” includes a caravan, houseboat or other structure in which the couple are cohabiting and any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure;

“occupancy rights” means the following rights of a non-entitled partner—

(a) if in occupation, a right to continue to occupy the house;

(b) if not in occupation, a right to enter into and occupy the house and, without prejudice to the generality of these rights, includes the right to continue to occupy or, as the case may be, to enter and occupy the house together with any child residing with the cohabiting couple;
Where the owner has occupied the property the other cohabitant could still be provide short-term occupation protection, however, there is no power to cohabitant to delay or refuse a decree of division and sale, or to restrain sale property solely owned by other cohabitant.430

b) Remedies for the benefit of children of the parties

Children were entitled to receive child support from their parents under the Child Support Act, 1991, which now has been amended by the Child Maintenance and Other Payments Act, 2008. In addition to the extent that the Child Maintenance and Enforcement Commission (the successor to the Child Support Agency) had jurisdiction to grant child support, a child was also entitled to aliment, not only from his or her parents, but also from anyone who had accepted the child as a child of his or her family. Like child support, aliment could be awarded in the form of periodical payments of an occasional or special nature (such as school fees); lump sums and other capital awards.431

c) The position on death

Cohabitants had no place in Scottish succession law prior to year 2006. In the case of death of one cohabitant the surviving cohabitant generally had to depend upon his or her partner’s will as cohabitant were neither included amongst those with prior or legal rights which cannot be defeated by a will, nor amongst the list of statutory heirs who stand to inherit in the event of intestacy. However, the only exceptions were related to rented house, to which a cohabitant could in certain cases had a statutory right of succession; and the deceased’s pension, if by nomination or by the exercise of the pension trustees’ discretion, make some provision for the survivor. In divergence to the position of cohabitant, the children of the deceased cohabitant enjoyed the legal right of ‘legitim’ i.e. one-third of the value of the moveable estate where there is a surviving spouse; one-half if there is no spouse, further they had the first priority to inherit from the free estate on intestacy.432

“entitled partner” includes a partner who is entitled, or permitted by a third party, to occupy the house along with an individual who is not the other partner only if that individual has waived his or her right of occupation in favour of the partner so entitled or permitted.]  

430 Supra note 407 at 18-19  
431 Id. at 19  
432 Ibid.
5.4.2.2 Family Law (Scotland) Act, 2006

In response to change in the union formation patterns, the Family Law (Scotland) Act, 2006, was passed which introduced new remedies for cohabitants whose relationships end either by separation or by death. Before the Family Law Act, 2006, the financial remedies possibly available to a cohabitant after separation or on death were very limited and often difficult to secure. Many people believed, wrongly, in the ‘common law marriage’ myth; that after a period of living together, cohabitants had marriage-type rights to financial provision on separation or death.433

The Family Law (Scotland) Act, 2006, was the product of fourteen years of consultation and development. The Family Law (Scotland) Act, 2006, came in to force as part of Scots law on 4th May 2006. It created a statutory framework to regulate cohabitants when the relationship is terminated by death or otherwise. Under Sections 25 and 29 of the Family Law (Scotland) Act, 2006, a cohabitant may apply to the court for discretionary provision from their late partner’s intestate estate. In theory, it equips the court to decide cohabitants’ succession claims, without the reputational requirements of marriage by habitation with habit and repute, and without the requirement for retrievable contribution of unjustified enrichment.434

Acknowledging the greater diversity of family life and multiplicity of relationship formations in Scotland, the Family Law (Scotland) Act, 2006, gave some acceptance to couples who live together without marriage or non-marital partnerships and provided limited financial remedies towards the cohabiting relationships. Though these provisions did not give people who live together the same rights as spouses or civil partners, but they create a middle way between that protection and no recognition. It recognizes unmarried cohabitants and provides some protection when the relationship ends to those who are economically vulnerable. The Act has recognized the value of financial contributions and the economic sacrifices that often arise from cohabitants’ homemaking and childcare activities and provided to cohabitants the financial remedies that were not available earlier.435 The Act has

433 Supra note 410
434 Supra note 408 at 21-22
435 Supra note 410
remarkably achieved a lot for Scottish cohabitants and their children by providing financial remedies and recognizing the value of financial contributions and the economic sacrifices. The Act reflects opinion in Scotland that cohabitation should not be treated in the same way as marriage, but can help to prevent injustices or hardships that may arise, especially if children are involved.\footnote{\textit{Ibid.}}

The Family Law Act, 2006, made a number of wide-ranging amendments to family law in Scotland; however our primary concern here is with those provisions which have an impact on the rights of cohabitants. The Act largely implemented the recommendations made by the Scottish Law Commission e.g. marriage by habit and repute has been abolished and the cohabitant’s right to make claims from his or her partner in certain circumstances has been introduced. These reforms represent an attempt that leads one to draw a clear line between marriage and marriage-like relationships.\footnote{Supra note 398 at 209} As a result of social change and recognition in public policies cohabitants no longer feel the need to hold themselves out as a married couple.\footnote{Id. at 214} If we say that in present context of the circumstances providing a definition of cohabitation is not easy matter, it would be hardly surprising.

### 5.4.2.2.1 Common law marriage/ Irregular marriages

The term ‘common-law’ husband or wife is often used but has no legal standing. It is a common misunderstanding that living together for a period of time as a couple established a ‘common law marriage’. This rule is not applicable in Scotland. In Scotland the concept of common-law-marriage does not exist. Even if couple has lived together for many years, they do not have the similar rights in law as a married couple does. There existed a form of irregular marriage called ‘marriage by cohabitation with habit and repute’ which could apply to couples who had lived together and were thought to have established a common-law-marriage. Though the marriage by cohabitation and repute was rarely used in practice and, except for very particular circumstances, however, it was abolished by Family Law (Scotland) Act,
2006. It is important here to mention that irregular marriages established before May 04, 2006, are still recognized in Scotland.439

5.4.2.2.2 Living Together/ Cohabitation in Scotland

Although there is no specific legal definition of living together, it generally means to live together as a couple without being married or without being in a civil partnership. Living together with someone is sometimes called cohabitation. In different areas of law it means different things and gives different rights. Cohabitants are a couple who live together or lived together as if they were husband and wife or civil partners.440

“Cohabitant means either member of a couple consisting of—(a) a man and a woman who are (or were) living together as if they were husband and wife; or (b) two persons of the same sex who are (or were) living together as if they were civil partners.”441

“In determining for the purposes of whether a person is a cohabitant of another person, the court shall have regard to—(a) the length of the period during which two partners are living together or lived together (period of two years was set out in an early draft of the Bill, the Act as passed does not prescribe any minimum period and it is presumably possible that a very short relationship could qualify as a statutory cohabitation depending on the court’s assessment of the other factors; (b) the nature of their relationship during that period; and (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.”442

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440 Ibid.
441 Family Law (Scotland) Act, 2006, Section 25(1) –[In sections 26 to 29, “cohabitant” means either member of a couple consisting of—
   (a) a man and a woman who are (or were) living together as if they were husband and wife; or
   (b) two persons of the same sex who are (or were) living together as if they were civil partners.]
442 Family Law (Scotland) Act, 2006, Section 25(2) –[ In determining for the purposes of any of sections 26 to 29 whether a person (“A”) is a cohabitant of another person (“B”), the court shall have regard to—
   (a) the length of the period during which A and B have been living together (or lived together);
   (b) the nature of their relationship during that period; and
   (c) the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.]
Even with this added gloss on the definition provided in Section 25 of the Family Law (Scotland) Act, 2006, the legislation still leaves considerable ambiguity as to the full range of factors which may be relevant as well as to the precise scope and meaning of terms specifically used within the Act.\textsuperscript{443} Thus the Act defines a cohabitant as a couple who live or lived together as if they were husband and wife if heterosexuals or as if they were civil partners if homosexuals. To entitle a couple the benefits of the Act of 2006, a couple must be a cohabiting couple. In determining whether two people are cohabitants, the court considers the nature and duration of their relationship and any financial arrangements between them during that period. No minimum period of cohabitation is stipulated in order to applicability of the Act.\textsuperscript{444} Hence this Act does not provide for any restrictions on persons to cohabit within prohibited degree relationship it would just be a presumption that as it has been provided that couple must live as husband and wife or as civil partners it is a supposition that such restrictions naturally applies to cohabitants also.

There is no guidance as to how the assessment should be conducted to determine whether a person is cohabitant of another. The list is neither exhaustive nor determinative, such that an applicant can satisfy the definition of ‘cohabitant’ without exhibiting all or any of the listed factors. The intention was that the facts and circumstances will, over time, build up an understanding of the situations in which recourse to the courts is likely to succeed. However, in the ten years since the Family Law (Scotland) Act, 2006, came into force, the fact of cohabitation has been disputed very rarely within reported case law. It therefore remains somewhat unclear how an assessment of cohabitation should proceed. There is no guidance to indicate the relevant weight to be given to each feature of the relationship, nor which of those features, if any, are essential to establishing cohabitation.\textsuperscript{445} The basic features to determine such relationships are discussed as under:

a) \textbf{The Duration of the Relationship}

The court will consider the duration of the relationship when determining whether the applicant was a cohabitant. The Family Law (Scotland) Act, 2006, was intended to protect cohabitants in ‘lengthy, enduring relationships’. A minimum

\begin{itemize}
  \item \textsuperscript{443} \textit{Supra} note 398 at 213-214
  \item \textsuperscript{444} \textit{Supra} note 410
  \item \textsuperscript{445} \textit{Supra} note 408 at 27-28
\end{itemize}
eligibility period of two years cohabitation was considered in the early stages of the Family Law (Scotland) Bill, such that no one could be a cohabitant for the purposes of the Act until the relevant relationship had subsisted for two years. However, a strict eligibility period, was said to be too ‘rigid and unresponsive’ to particular cases. As such, the court has discretion to take account of the duration of the relevant cohabitation, and to judge what is fair and reasonable, given all the circumstances of that relationship. While longevity may indicate eligibility for a claim in succession, the Act does not explicitly exclude shorter relationships.  

Practical difficulties may arise in determining the start of the relevant relationship. While in theory, cohabitation occurs overnight, commencing on the date a couple move in together, this rule may not be applicable in every case. For example, two people may live together as housemates or as landlord and tenant, and begin a romantic relationship some time after they begin sharing a home. There is no guidance on determining the point at which such a relationship would transform into eligible cohabitation. Similarly, it is unclear whether a temporary disruption to cohabitation will ‘reset the clock’. Should a cohabiting couple break up temporarily, it is unclear whether reunion would continue the original relationship or commence a new legal relationship for the purposes of the Act of 2006.

b) The Nature of the Relationship

The nature of the relationship will also be relevant to determining whether the applicant and the deceased were cohabiting. However it is even more important to decide that what factors will be taken in notice to finally decide the nature of a relationship. It include the amount and nature of time spent together, living under the same roof, sleeping together, having sexual intercourse together, eating together, having a social life and other leisure activities together, supporting each other, talking to each other, being affectionate to each other, sharing resources and sharing household and child-rearing tasks.

c) Financial Arrangements

The court will consider the nature and extent of any financial arrangements subsisting, or which subsisted, during the relationship, to determine whether it falls

446 *Id.* at 28-29
447 *Id.* at 29
448 *Id.* at 30
within the scope of Section 25. Section 25 instructs the court to consider the ‘financial arrangements’ of the couple. As such, there is no strict correlation between financial interdependence and eligibility. A cohabitant may conduct their own financial affairs, independently of their partner, without diminishing the value of the cohabiting relationship. Thus a legal cohabitation will be well established despite the fact that the pursuer did not contribute to mortgage payments for the shared home, the couple did not share a bank account, and the respondent kept elements of his financial wealth private.\textsuperscript{449}

d) Starting and Terminating a Cohabitation

As already stated any two persons whether of opposite sex or of same sex can enter into the union of cohabitation. No formal ceremony is required to be performed to enter into cohabitation. However if a couple wish to formalize aspects of their status they can conclude a cohabitation contract or living together agreement which enlists the rights and obligations they will have towards each other. Though a cohabitation contract may be difficult to enforce legally, particularly while cohabitants are still together, however, this contract may be useful to remind of original intentions, or when they split up.\textsuperscript{450} If any such agreement has been made by the parties court will apply that in the matters of property and other provisions also. Through such an agreement parties can also opt out of the provisions of the Family Law (Scotland) Act, 2006.\textsuperscript{451}

Sometimes couples may be unable to resolve their differences and may decide to end their relationship. A couple that live together may separate informally without any need for intervention of the court. When a cohabiting couple decide to end their relationship they can do so simply by separating, they need not to do any legal formality. Thus no formalities are required to be performed by cohabitants to terminate cohabiting relationship. Generally, parents and their children would come to an agreement together about the future arrangements for their children by which they need to decide things like residence of children and custody, what contact the children

\textsuperscript{449} Id. at 31
\textsuperscript{451} Supra note 398 at 228
will have with both parents and how their relationships with both parents will be maintained, however, the court may also exercise the powers to make orders relating to the care of the children.\footnote{452}{Supra note 439 at 11}

5.4.3 Cohabitants’ Rights under provisions of the Family Law (Scotland) Act, 2006

The Family Law (Scotland) Act, 2006, has introduced a set of basic rights to protect cohabitants, either when their relationship breaks down, or when a partner dies. But the law is very clear; couples living together do not have the same rights as married couples and civil partners.\footnote{453}{Id. at 2} It is very important that one understand this when deciding whether to move in with partner or to make a formal commitment. It is evident that by the Family Law Act of 2006, the Scottish Parliament decided that the law should be amended in accordance with the way families live today and that any rights that already existed for cohabiting couples but were limited to opposite-sex couples only should now be available to same-sex couples also.

5.4.3.1 Right to Maintenance

Unless expressly agreed by the cohabitants in an agreement, on the termination of a relationship the cohabiting partners don’t have a duty to maintain each other financially. However, within one year of the dissolution of relationship, one can apply to court, for a limited financial settlement from their former cohabitant, and the court may order that one party should pay the other a capital sum or make a payment in recognition of the costs of caring for any child of the relationship under the age of 16.\footnote{454}{Supra note 450} The court will also take into notice the financial disadvantages suffered by one partner as a result of decisions the couple made during their relationship e.g. when a couple had decided that one partner would give up a career to look after their children, the court will take into consideration the effects that decision had on the partner’s ability to earn money after the relationship ended.\footnote{455}{Ibid.}
5.4.3.2 Right Against Domestic Abuse / Domestic Violence

Abusive Behaviour and Sexual Harm (Scotland) Act, 2016, provides that where it is libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and proved that the offence is so aggravated, if in committing the offence the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm, however it is immaterial that the offence does not in fact cause the partner or ex-partner physical or psychological harm. The court must record the conviction in and take the aggravation into account in determining the appropriate sentence. 

456 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Section 1 (Aggravation of offence where abuse of partner or ex-partner)

(1) This subsection applies where it is—
(a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and
(b) proved that the offence is so aggravated.

(2) An offence is aggravated as described in subsection (1)(a) if in committing the offence—
(a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or
(b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.

(3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated as described in subsection (1)(a).

(5) Where subsection (1) applies, the court must—
(a) state on conviction that the offence is aggravated as described in subsection (1)(a),
(b) record the conviction in a way that shows that the offence is so aggravated,
(c) take the aggravation into account in determining the appropriate sentence, and
(d) state—
(i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
(ii) otherwise, the reasons for there being no such difference.

(6) For the purposes of this section, a person is a partner of another person if they are—
(a) spouses or civil partners of each other,
(b) living together as if spouses or civil partners of each other, or
(c) in an intimate personal relationship with each other,
and the references to a person’s ex-partner are to be construed accordingly.

(7) In this section—
“cause” includes contribute to causing (and “causing” is to be construed accordingly),
Further the Abusive Behaviour and Sexual Harm (Scotland) Act, 2016, provides that under this Act the term partner will include spouses or civil partners of each other, living together as if spouses or civil partners of each other’ or in an intimate personal relationship with each other; and the references person’s ex-partner are to be construed accordingly.\(^{457}\)

Thus from the scope of term partner under the Abusive Behaviour and Sexual Harm (Scotland) Act, 2016, it is clear that it includes live-in partners as well and thus all the protection provided to a married spouse is also equally available to live-in partners. ‘If a partner or an ex-partner is being abusive to another, then he/she has the right to go to court to get protective orders for him/her and children’s safety. There are a number of things that are covered by rules made for the whole of the United Kingdom. These cover things like national insurance, taxation, social security and other benefits like child tax credit and child support.’\(^{458}\)

One cohabitant can apply to the court for an order excluding its abusive partner from home but the applying cohabitant and partner must have the right to occupy the home by being the tenant, the owner, or permitted by a third party to occupy the home.\(^{459}\) A cohabitant can apply to the court for an interdict (also known as protective orders) where a partner or ex-partner is violent; the interdict can protect the other by restricting that person’s behaviour and prohibiting them from coming to one’s house, place of work or children’s school. Domestic abuse is a very serious issue and a cohabitant may decide that he or she wish to contact someone to give support, information or safe temporary accommodation.\(^{460}\)

5.4.3.3 **Rights in Housing, Housing Goods and, Money and Property**

Where during or after the cohabitation a question appears as to the cohabitants respective rights of ownership in any household goods it shall be presumed that each cohabitant has a right to an equal share in household goods acquired, except the goods received in gifts or acquired through succession from a third party, during the period

\[^{457}\text{Abusive Behaviour and Sexual Harm (Scotland) Act 2016 Section 1(6)}\]
\[^{458}\text{Supra note 439 at 6}\]
\[^{459}\text{Ibid.}\]
\[^{460}\text{Id. at 7}\]
of cohabitation. The presumption is though rebuttable. "Household goods means any goods, including decorative or ornamental goods, kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include—

(a) money;
(b) securities;
(c) any motor car, caravan or other road vehicle; or
(d) any domestic animal."

Thus Section 26 of the Family Law (Scotland) Act, 2006, designs a presumption of common ownership of household goods. Though this presumption is rebuttable, however, the points for rebuttal and any restrictions to which they may be subject have not been specified. It is evident that a contrary agreement could be used to rebut the presumption, further it might be implied from the general law that if an item acquired by a cohabitant on his or her own is owned by that cohabitant alone. There is also a presumption of common ownership in money and property deriving from housekeeping allowances.

Section 26 also provides for the division of household goods acquired during cohabitation (but not before it), except for money, securities, cars and pets. Except for goods received as gifts or by inheritance, it presumes joint ownership unless there is proof that the parties contributed to their acquisition in unequal shares. When a cohabiting couple puts to end their relationship and fails to mutually agree about who

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461 Family Law (Scotland) Act, 2006, Section 26(2) -[It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.]
462 Family Law (Scotland) Act, 2006, Section 26(3) -[The presumption in subsection (2) shall be rebuttable.]
463 Family Law (Scotland) Act, 2006, Section 26(4) -[In this section, “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes; but does not include—

(a) money;
(b) securities;
(c) any motor car, caravan or other road vehicle; or
(d) any domestic animal.]
464 Supra note 398 at 210-211
465 Supra note 410

- 309 -
owns possessions, any household goods (except money, securities, vehicles or pets) which were bought or acquired during the subsistence of their relationship are presumed to be owned equally. Goods acquired before this starting of cohabitation belong to the person who acquired them; similarly the gifts or inherited goods belong to the person who receives them.466

a) Rights in Money and Property

Where, a question appears in relation to cohabitants, whether during or after the termination of cohabitation, as to the right of a cohabitant to money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or any property acquired out of such money, the money or property shall generally be treated as belonging to each cohabitant in equal shares, however cohabitants may decide otherwise through an agreement between them. ‘Property’ in this provision does not include a residence used by the cohabitants as the sole or main residence in which they live or lived together.467 Section 27 of the Family Law Act provides that except family home all other assets acquired from savings made from a housekeeping allowance paid by one cohabitant to the other will be owned in equal shares, however the parties may agree otherwise through an agreement to that effect.468

b) Housing

Where one cohabitant lives in a tenancy and the other partner is not a tenant then the non-tenant cohabitant will have no rights to remain in the home if the cohabitant that is tenant, withdraws permission to stay.469 Though, where both partners moved in together it may be possible to prove that there is a joint tenancy and non-tenant can apply to the court for the right to remain in the home, however, where

466 Supra note 450
467 Family Law (Scotland) Act, 2006, Section 27[ Rights in certain money and property-
(1) Subsection (2) applies where, in relation to cohabitants, any question arises (whether during or after the cohabitation) as to the right of a cohabitant to—(a) money derived from any allowance made by either cohabitant for their joint household expenses or for similar purposes; or (b) any property acquired out of such money.
(2) Subject to any agreement between the cohabitants to the contrary, the money or property shall be treated as belonging to each cohabitant in equal shares.
(3) In this section “property” does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.]
468 Supra note 410
469 Supra note 450
the sole tenant leaves the property the other partner has no rights to stay unless have been granted occupancy rights by the court prior to the tenant leaving. A cohabitant who is not the owner cannot stop the sale of the house but may apply for limited right to remain in the home. Cohabitant is not entitled to a share of the proceeds unless either there is a joint ownership or it can be shown that both made financial contributions.\textsuperscript{470}

5.4.3.4 **Financial Claim on Termination of Cohabitation other than by Death**

Either cohabitant may claim financial provision from the other cohabitant where cohabitation ends other than by death. This can be a capital payment, calculated by reference to any economic advantage gained at the claimant’s expense by the defender or by a child of the parties. It can also include a contribution to the economic burden of caring for such a child.\textsuperscript{471}

Where cohabitation terminates otherwise than by the reason of death of cohabitant, on the application of a cohabitant (the applicant), the appropriate court may make an order requiring the other cohabitant (the defender) to pay a capital sum of a specified amount;\textsuperscript{472} or, make an order requiring the defender to pay such amount

\textsuperscript{470} Ibid.  
\textsuperscript{471} Supra note 398 at 211  
\textsuperscript{472} Family Law (Scotland) Act, 2006, Section 28(2)(a) [Section.28: Financial provision where cohabitation ends otherwise than by death-  
(1) Subsection (2) applies where cohabitants cease to cohabit otherwise than by reason of the death of one (or both) of them.  
(2) On the application of a cohabitant (the “applicant”), the appropriate court may, after having regard to the matters mentioned in subsection (3)—(a) make an order requiring the other cohabitant (the “defender”) to pay a capital sum of an amount specified in the order to the applicant; (b) make an order requiring the defender to pay such amount as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents; (c) make such interim order as it thinks fit.  
(3) Those matters are—  
(a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and  
(b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—(i) the defender; or (ii) any relevant child.  
(4) In considering whether to make an order under subsection (2)(a), the appropriate court shall have regard to the matters mentioned in subsections (5) and (6).  
(5) The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of—(a) the applicant; or (b) any relevant child.  
(6) The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of—
as may be specified in the order in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents;\textsuperscript{473} or, make such interim order as court thinks fit.\textsuperscript{474}

The Court shall make such order only after having regard to the following matters:

(a) Whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and

(b) Whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—

(i) the defender; or

(ii) any relevant child.\textsuperscript{475}

In considering whether to make an order requiring the other cohabitant to pay a capital sum of a specified amount under Section 28(2)(a) of Act of 2006, the

\begin{enumerate}
\item[(a)] the defender; or
\item[(b)] any relevant child,
\end{enumerate}
is offset by any economic advantage the applicant has derived from contributions made by the defender.

(7) In making an order under paragraph (a) or (b) of subsection (2), the appropriate court may specify that the amount shall be payable—

(a) on such date as may be specified;

(b) in instalments.

(8) Any application under this section shall be made not later than one year after the day on which the cohabitants cease to cohabit.

(9) In this section—“appropriate court” means—

(a) where the cohabitants are a man and a woman, the court which would have jurisdiction to hear an action of divorce in relation to them if they were married to each other;

(b) where the cohabitants are of the same sex, the court which would have jurisdiction to hear an action for the dissolution of the civil partnership if they were civil partners of each other;

“child” means a person under 16 years of age;

“contributions” includes indirect and non-financial contributions (and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited); and

“economic advantage” includes gains in—

(a) capital;

(b) income; and

(c) earning capacity; and “economic disadvantage” shall be construed accordingly.

(10) For the purposes of this section, a child is “relevant” if the child is—

(a) a child of whom the cohabitants are the parents;

(b) a child who is or was accepted by the cohabitants as a child of the family.]
appropriate court shall have regard to the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interests of the applicant; or any relevant child.  

The court shall also have regard to the extent to which any economic disadvantage suffered by the applicant in the interests of the defender; or any relevant child, is offset by any economic advantage the applicant has derived from contributions made by the defender.

Any application under Section 28 shall be made not later than one year after the day on which the cohabitants cease to cohabit. ‘Contributions’ includes indirect and non-financial contributions and, in particular, any such contribution made by looking after any relevant child or any house in which they cohabited. ‘Economic advantage’ includes gains in capital, income and earning capacity; and “economic disadvantage” shall be construed accordingly.

Section 28 empowers the court to order a capital sum following the separation of the cohabitants, either to assist with the ongoing economic burden of caring for the cohabitants’ children or to correct any imbalance in economic advantage and disadvantage between the parties, however, any such claim must be brought within one year of the separation.

5.4.3.5 Financial Claim on Death of Cohabitant

Where the cohabitation of a couple terminates with the death of one of the cohabitants the deceased cohabitants has not met a Will then their estate will be distributed according to the rules of intestacy. Where the couple had not owned the property jointly the surviving partner could not automatically inherit. Surviving partner may apply in court for a share in deceased cohabitant’s estate within six months of the death. This right arises only when the cohabitant dies intestate i.e. without leaving a Will. Although the cohabitant’s claim takes preference over any legal rights of children and could, in fact, leave them with nothing, however, it is

476 Family Law (Scotland) Act, 2006, Section 28(5)
477 Family Law (Scotland) Act, 2006, Section 28(6)
478 Family Law (Scotland) Act, 2006, Section 28(8)
479 Family Law (Scotland) Act, 2006, Section 28(9)
480 Supra note 410
481 Supra note 398 at 211
postponed by the prior and legal rights of a surviving spouse. Before deciding whether to make an award the court has to take into consideration the size of the estate, any benefit received by the survivor triggered by the death of the cohabitant from a source outwith his or her estate, the nature and extent of other claims on the deceased’s estate and any other matter court considers relevant.\footnote{Ibid.}

If the cohabitants immediately before the death of one cohabitant were domiciled in Scotland and the deceased has died intestate, then on the application of the survivor, the court may make an order-

(i) for payment to the survivor out of the deceased’s net intestate estate of a capital sum of such amount as may be specified in the order; or

(ii) for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified; or make such interim order as it thinks fit.\footnote{Family Law (Scotland) Act, 2006, Section 29(2)}

The Court shall make such an order only after having regard to the-

(a) the size and nature of the deceased’s net intestate estate;

(b) any benefit received, or to be received, by the survivor on, or in consequence of, the deceased’s death; and, from somewhere other than the deceased’s net intestate estate;

(c) the nature and extent of any other rights against, or claims on, the deceased’s net intestate estate; and

(d) any other matter the court considers appropriate.\footnote{Family Law (Scotland) Act, 2006, Section 29(3)}

The amount of award to survivor through an order or interim order under Section 29(2) of Family Law Scotland Act shall in no case be an amount which would exceed the amount that would have been entitled to the surviving cohabitant if he/she had been the spouse or civil partner of the deceased.\footnote{Family Law (Scotland) Act, 2006, Section 29(4)} Any application for financial claims under Family Law Act can be made within the period of six months after the
death of the deceased cohabitant. Section 29 applies only where a cohabitant has died intestate i.e. without leaving a Will. Thus the surviving cohabitant may bring a claim within six months of the death for a share of the estate and the court has a wide discretion to order a capital sum or the transfer of property from that estate. However, it is possible under the general law for cohabitants to opt out of these provisions by making agreements at any time that waive their rights to bring claims under the Act.

a) Preliminary Requirements under Section 29

Section 29 of the Family Law (Scotland) Act, 2006, provides a discretionary provision under which cohabitant has the right to apply for his/her

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486 Family Law (Scotland) Act, 2006, Section 29(6)
487 Supra note 398
488 Family Law (Scotland) Act, 2006, Section 29 [ Application to court by survivor for provision on intestacy-

(1) This section applies where—
(a) a cohabitant (the “deceased”) dies intestate; and
(b) immediately before the death the deceased was—
(i) domiciled in Scotland; and
(ii) cohabiting with another cohabitant (the “survivor”).
(2) Subject to subsection (4), on the application of the survivor, the court may—
(a) after having regard to the matters mentioned in subsection (3), make an order—
(i) for payment to the survivor out of the deceased’s net intestate estate of a capital sum of such amount as may be specified in the order;
(ii) for transfer to the survivor of such property (whether heritable or moveable) from that estate as may be so specified;
(b) make such interim order as it thinks fit.
(3) Those matters are—
(a) the size and nature of the deceased’s net intestate estate;
(b) any benefit received, or to be received, by the survivor—
(i) on, or in consequence of, the deceased’s death; and
(ii) from somewhere other than the deceased’s net intestate estate;
(c) the nature and extent of any other rights against, or claims on, the deceased’s net intestate estate; and
(d) any other matter the court considers appropriate.
(4) An order or interim order under subsection (2) 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.
(5) An application under this section may be made to—
(a) the Court of Session;
(b) a sheriff in the sheriffdom in which the deceased was habitually resident at the date of death;
(c) if at the date of death it is uncertain in which sheriffdom the deceased was habitually resident, the sheriff at Edinburgh.
(6) Any application under this section shall be made before the expiry of the period of 6 months beginning with the day on which the deceased died.
deceased’ partner’s intestate estate. For a legally relevant claim under Section 29, three preliminary requirements must be satisfied:

(i) the deceased must have been domiciled in Scotland;
(ii) the deceased must have died intestate, or partially intestate; and
(iii) the applicant must have cohabited with the deceased ‘immediately before the death’.

The latter requirement has caused concern that certain couples will fall outwith the scope of Section 29; for example, a couple that shared a home, but who were separated for a period prior to the death, by reason of hospitalisation. It has been suggested that in such cases, the courts would adopt a ‘common sense approach’, such that if the survivor could establish that the relationship had continued to be one of care and support, albeit without a shared home, an application under Section 29 would be competent. It may also be relevant to establish whether either party formed other relationships during the period of separation.489

An action under Section 29 must be raised within six months of the relevant death. The court has no discretion to extend this period, other than in cross border mediations. This appears to reflect the so called ‘six month rule of executry’, whereby an executor cannot be compelled to pay any debts of the estate, other than privileged

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(7) In making an order under paragraph (a)(i) of subsection (2), the court may specify that the capital sum shall be payable—
(a) on such date as may be specified;
(b) in instalments.
(8) In making an order under paragraph (a)(ii) of subsection (2), the court may specify that the transfer shall be effective on such date as may be specified.
(9) If the court makes an order in accordance with subsection (7), it may, on an application by any party having an interest, vary the date or method of payment of the capital sum.
(10) In this section—
  “intestate” shall be construed in accordance with section 36(1) of the Succession(Scotland) Act 1964 (c.41);  
  “legal rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964 (c.41);  
  “net intestate estate” means so much of the intestate estate as remains after provision for the satisfaction of—
  (a) inheritance tax;
  (b) other liabilities of the estate having priority over legal rights and the prior rights of a surviving spouse or surviving civil partner; and
  (c) the legal rights, and the prior rights, of any surviving spouse or surviving civil partner; and
  “prior rights” has the meaning given by section 36(1) of the Succession (Scotland) Act 1964.

489 Supra note 408 at 23
debts, until a period of six months has lapsed since the death.\textsuperscript{490} This rule exists in order to allow persons with a claim on the estate to make their claim known. A cohabitant’s claim under Section 29 is therefore treated as if it were a debt against the estate. The ‘debt’ is constituted by calling the deceased’s executor as a defender in the action. A potential difficulty arises if no executor is appointed within the six-month period. However, in such cases, an alternative procedure is available. The applicant may raise an action against the estate, seeking decree \textit{cognitionis causa tantum}\textsuperscript{491}, and naming all known heirs on the estate as defenders. By obtaining decree in this form, the surviving cohabitant’s claim can be constituted as a liquid debt against the estate, in respect of which diligence can then be done.\textsuperscript{492}

Having established title, a cohabitant’s claim will proceed in terms of Section 29 of the Family Law (Scotland) Act, 2006. However, in terms of the Family Law Act, 2006, a cohabitant’s rights are vastly inferior. A spouse enjoys absolute entitlement to a fixed proportion of their deceased spouse’s estate, whether the deceased died testate or intestate. In contrast, an eligible cohabitant has the right to apply to a court for provision from their deceased partner’s net intestate estate, and it is entirely within the discretion of the court whether or not the claim should be met. A cohabitant has no corresponding protection from disinhering.

The definition specifically excludes any such items that were acquired by way of gift or inheritance from a third party; and the provision does not cover money, securities, vehicles or domestic animals. In practical terms, the effect of Section 26 is that the contents of the cohabitants’ home may be subject to equal sharing upon termination of the cohabitation. Thus on the death of one cohabitant, it is presumed that the survivor is the owner of one half of those contents, whilst the other half will form part of the deceased’s estate. This provision mirrors Section 25 of the Family Law Act, 1985, which created a similar presumption for spouses.\textsuperscript{494} Some guidance is available to the court as to the relevant factors to consider when determining the appropriate value and nature of any award under Section 29(3):

\textsuperscript{490} \textit{Id.} at 24
\textsuperscript{491} NOTE: [\textit{Cognitionis causa tantum} - An action raised by creditor of a deceased debtor for purpose of constituting his or her debt against the estate.]
\textsuperscript{492} \textit{Supra} note 408 at 24
\textsuperscript{493} Family Law (Scotland) Act, 2006, Section 29(2)
\textsuperscript{494} \textit{Supra} note 408 at 33
b) The Size and Nature of the Estate

The first factor that the court will consider is the size and nature of the deceased net intestate estate. An intestate estate comprises the deceased’s entire moveable estate and his heritable estate in Scotland insofar as it is not disposed of by a valid testamentary disposition. However, in terms of Section 29 of the Family Law (Scotland) Act, 2006, a surviving cohabitant only has a claim against the intestate estate after the deduction of inheritance tax, other debts and liabilities of the estate, and the prior rights and legal rights of any surviving spouse. The court must consider the size and nature of that remaining portion of the estate in order to value a cohabitant’s award. In order to determine the debts and liabilities of the estate, the court will require to calculate the expenses of administration of the estate. A potential issue arises in that the administration expenses may include the cost of litigation arising from the Section 29 claim itself, as the cost of defending the action may be borne by the estate, if so ordered by the court.

The nature of the net intestate estate will have a bearing on the type of order that the court will make for a cohabitant. Section 29 empowers the court to make an order for payment of a capital sum or a transfer of property to the survivor from the deceased’s net intestate estate. If the estate comprises mainly heritable property, the court may make an order for transfer to the surviving cohabitant of some of that heritable property. Alternatively, the court might consider the possibility of selling the heritable property, and any associated difficulties with doing so, in order to determine if it is appropriate to make an award for payment of a capital sum to the surviving cohabitant.

c) Non-Estate Benefits Received by the Applicant

The court is required to take into account any benefit received, or to be received, by the surviving cohabitant as a result of their partner’s death, where that benefit comes from somewhere other than the deceased’s net intestate estate. This will generally cover benefits such as life insurance payments, pension benefits and similar.

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495 Id. at 34-35
496 Ibid.
497 Ibid.
The value of those benefits received by the survivor may militate against any further payment or transfer of property under Section 29.498

d) Other Rights Against, or Claims on the Estate

The court is required to consider the nature and extent of any other rights against, or claims on, the deceased’s net intestate estate. These will generally consist of surviving family members’ claims for prior rights or legal rights, and claims against the free estate. Any award to a cohabitant will reduce the inheritance of those other heirs. The court must therefore strike a balance between competing inheritance rights.499

e) Any Other Matter

Section 29(3)(d) provides that the court may take into account ‘any other matter’ it considers appropriate to the application. In *Fulwood v. O’Halloran*500 it was said that ‘Sub-section (3) is extremely wide in its scope. Its precise and unequivocal terminology brings within its ambit the opportunity to present an exceedingly broad range of facts and circumstances that might be deemed appropriate in the particular circumstances of any given case.’

f) Factors Outwith the Scope of Section 29

There are undoubtedly a wide range of factors that may be considered by the court when valuing a cohabitant’s claim. However, there is one particular matter that is outwith the scope of the court’s discretion. The succession rights of a surviving spouse can never be considered in competition with those of a cohabitant. The Scottish Executive indicated that a major policy objective behind the Family Law (Scotland) Act, 2006 was to preserve the ‘special place’ of marriage in society. Section 29 specifically preserves the payments due to a surviving spouse by way of prior rights and legal rights, such that the rights of any surviving spouse will be satisfied before the cohabitant’s claim is considered.501

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498 Family Law (Scotland) Act, 2006, Section 29(3)(b)
499 Family Law (Scotland) Act, 2006, Section 29(3)(c)
500 2014 G.W.D 11-196 para 38
501 *Supra* note 408 at 39
g) The Order of Entitlement

The Scottish legislature did not intend to create marriage-equivalent rights for cohabiting couples. Therefore they did not create a fixed system of succession rights for cohabitants. However, the right afforded to cohabitants under Section 29 is simply procedural. It can most accurately be described as the right to make a claim to the court to confer benefit on the cohabitant where no such right would otherwise arise. Thus, it is not in itself a right in succession.⁵⁰²

5.4.3.6 Parental Responsibilities and Rights

Laws regulating family and relations affect everybody. Each and every family is unique in itself and the problems every family faces will also be different. Family laws and rules help in sorting out these problems. However, the family laws are not just about solving problems, these laws and rules also regulates how the family members should treat each other. These laws and regulations require and expect parents to do certain things in the form of parental responsibilities for their children while they are growing up. To enable and help parents to meet the expected responsibilities certain rights have also been provided. These are known as parental rights. Rather than being two separate things, these two sets of rules work together.⁵⁰³ Parents are expected to use these rights to do things which are in their children’s best interests.

Following the amendments made in the Family Law (Scotland) Act, 2006 (from 4 May 2006), irrespective of the fact that whether the parents of child are married to one another or not, a child’s both parents can exercise parental rights and responsibilities if they register the child’s birth together, i.e. both of their names appear on the birth certificate. However, both parents are not required to be at the registration office at the time of the registration of the birth where the parent registering the birth has written authorization from the other parent to do so and the registration forms are completed properly. If the unmarried parents do not agree to jointly register the child’s birth, then the father could obtain parental rights by one of the following methods:

⁵⁰² Id. at 44
⁵⁰³ Supra note 439 at 7
by marrying the child’s mother;
by signing and registering a Parental Responsibilities and Parental Rights Agreement (PRPRA) with the mother (The mother needs to agree and the form needs to be registered in the Books of Council and Session, a public register kept in Edinburgh); or
by grant of parental rights through court on application by unmarried father.\textsuperscript{504}

Other people such as step-parents, grandparents, aunts or uncles with an interest in the child can also apply to the court for parental authority. When making a decision about a child, the court shall have to be concerned about the best interest of the child and not for the adults in the child’s life. The court shall before making its decision on child, has to ask the child what he would like to happen and will take the child’s views into account. Where more than one person has parental rights and responsibilities, they don’t have to ask each other about everything they want to do for the child except about major decisions, however, they must agree if one of them wants to take the child away from Scotland, even on holiday. It is expected that people with parental rights will always do what’s best for the child.\textsuperscript{505}

An unmarried mother has full parental responsibilities and rights over her child, unless these have been restricted by a court. Such rights also extend to custody of minor child. An unmarried father does not have automatic parental responsibilities and rights towards child unless he has jointly registered the birth of child with the child’s mother. Father will share these rights equally with the child’s mother. Alternatively, father acquires parental responsibilities and rights by concluding a formal agreement, known as parental responsibilities agreement. If child’s mother does not agree father can apply to court for grant of parental authority.\textsuperscript{506}

Children (Scotland) Act, 1995, provides about parental responsibility in the interest of child to:

a) safeguard and promote the child’s health, development and welfare
b) provide the child with appropriate direction and guidance

\textsuperscript{504} Id. at 8
\textsuperscript{505} Id. at 9
\textsuperscript{506} Supra note 450
Parents are under duty to look after their children, to encourage their growth, development and welfare, and to help them to be healthy. In order to do this, parents have the right to have their children live with them, or to decide where their children will live. Both parents are under the responsibility and duty to decide how their children should be brought up. This includes being in charge of, and directing, their behaviour until they are aged 16 and advising and guiding them until they have completed 18 years of age, however, the parental responsibility regarding education and training of child extends until child completes the age of 25 years. Where the children are not staying with parents, parents are under the responsibility and the right to stay in touch with and be involved with the lives of their children. Finally, they have the responsibility and the right to act for their child in legal proceedings.

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507 Children (Scotland) Act, 1995, Section 1[Parental Responsibilities-(1) Subject to section 3(1)(b) and (3) of this Act, a parent has in relation to his child the responsibility—
(a) to safeguard and promote the child's health, development and welfare;
(b) to provide, in a manner appropriate to the stage of development of the child—
(i) direction;
(ii) guidance, to the child;
(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
(d) to act as the child's legal representative, but only in so far as compliance with this section is practicable and in the interests of the child.

(2) "Child" means for the purposes of—
(a) paragraphs (a), (b)(i), (c) and (d) of subsection (1) above, a person under the age of sixteen years;
(b) paragraph (b)(ii) of that subsection, a person under the age of eighteen years.

(3) The responsibilities mentioned in paragraphs (a) to (d) of subsection (1) above are in this Act referred to as "parental responsibilities" ; and the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities.

(4) The parental responsibilities supersede any analogous duties imposed on a parent at common law; but this section is without prejudice to any other duty so imposed on him or to any duty imposed on him by, under or by virtue of any other provision of this Act or of any other enactment.]

508 Children (Scotland) Act 1995, Section 2 [Parental Rights-(1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—
(a) to have the child living with him or otherwise to regulate the child's residence;
(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
5.4.3.7 Benefits and Tax Credits

The unmarried couples who live together are treated in the same way as a married couple and civil partners when assessing entitlement to means-tested benefits and tax credits. The resources and requirements of unmarried couple are jointly assessed. Entitlement to various benefits depends on whether or not a couple has paid enough national insurance contributions. Further, a cohabitant cannot get an increase for a partner who lives with unless other partner is caring for children. These benefits include:

- incapacity benefit,
- contributory employment and support allowance,
- maternity allowance,
- contribution-based jobseeker's allowance.

Some other benefits, such as, disability living allowance and attendance allowance are available to all parents whether or not one live with partner. A couple who live together can claim benefit for any children who live with them.\(^{509}\)

When a couple live together, partners are taxed separately and not jointly. Each person is entitled to a personal allowance when calculating how much income

\(^{509}\) Supra note 450
tax such person must pay. If one partner gives away assets to the other partner, the capital gains tax is required to be paid. Neither partner is under liability for the other’s debts unless one had acted as a guarantor for the other or agreed for a joint liability. However, one partner can be liable for debts relating to council tax or a social fund loan.\textsuperscript{510}

\textbf{5.4.3.8 Sexual Relationship}

There is no legal presumption that two people who live together necessarily have a sexual relationship. In Scotland, a boy aged 8 or over can be charged with rape and sexual assault. A man can be charged with the offence of raping wife whether or not they are living together. Thus it seems clear that since there is no legal assumption of sexual relationship between the cohabitants, a cohabitant can be charged with rape and sexual assault on living-in partner. Here an important point to be clarified is that since both male and female can be victim of sexual offences under the Sexual Offences (Scotland) Act, 2009, law of sexual offences also applies to same-sex cohabitation as well. However a woman can only be charged with aiding and abetting someone else to commit rape.\textsuperscript{511}

\textbf{5.4.3.9 Status and Rights of Child Born from Living-in Relationships}

The Family Law (Scotland) Act of 2006 has abolished the discrimination between legitimate and illegitimate child. It provides that no person shall be illegitimate whose status is governed by Scots law; and accordingly, in determining the person’s legal status the fact that a person’s parents are not or have not been married to each other shall not be taken into consideration; and further, such fact shall be left out of account in establishing the legal relationship between the person and any other relations.\textsuperscript{512} Thus it has been made statutorily clear in Scotland that the child born out of wedlock will be legitimate and no person’s status shall be illegitimate.

\textsuperscript{510} Ibid.

\textsuperscript{511} “Rape and Sexual Offences” available at: https://www.citizensadvice.org.uk/scotland/relationships/gender-violence/rape-and-sexual-offences-s/ (Last visited on August 19, 2017)

\textsuperscript{512} Family Law (Scotland ) Act 2006, Section 21 and The Law Reform (Parent and Child) (Scotland) Act 1986, Section 1 [The Law Reform (Parent and Child) (Scotland) Act 1986, Section 1 - Abolition of status of illegitimacy- ( 1 ) No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person's parents are not or have not been married to each other shall be left out of account in—

- 324 -
a) Name of Child

A child’s name has to be decided by parents mutually. However if parents of child are not living together and more than one person has parental responsibilities and rights towards a child they must all agree on the choice or change of the child’s name. An unmarried mother can choose and change her child’s first name or surname. She may choose to give child her partner’s surname. An unmarried father only has a right to choose or change child’s name if he has acquired parental responsibilities and rights towards child by:

- jointly registering the birth of child with child's mother on or after 4 May 2006; or
- entering into a parental agreement with child's mother; or
- obtaining a court order giving parental responsibilities and rights.\(^{513}\)

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\(^{513}\) Registration of Births, Deaths and Marriages (Scotland) Act 1965, Section 18(1)
b) **Maintenance**

Both natural parents are required to provide financial support to child. The father is equally responsible even if he is not named on the birth certificate and when he is not living with the mother of child.\(^{514}\) Couples have the option to agreeing privately between them the level of child ailment and can incorporate this into a formal Separation Agreement. It benefits of allowing the actual financial circumstances of both households to be taken into account. However it is not possible to exclude the jurisdiction of the Child Maintenance Service (CMS) on a permanent basis. In Scotland the question of child support can be dealt with by agreement by the Child Maintenance Service (CMS) which assumed responsibility for all new cases from the Child Support Agency (CSA) on 25\(^{th}\) November 2013 and, in some limited circumstances, by the Court. This may happen if one of the parents lives abroad.\(^{515}\)

Where any separation agreement has been entered after March 2003, either party can apply to the Child Maintenance Service for a maintenance calculation and any such calculation will supersede the child support set out in the Separation Agreement. In situations where Child Maintenance Service is not able to deal with matters the parent may make an application to the court for an order for support. The amount payable may be increased or decreased to take account of matters such as residential element of boarding school fees, unusually high travel costs to see a child or the extra costs of caring for a disabled child.\(^{516}\)

c) **Inheritance**

Even if there is no Will, a child of unmarried parents has a legal right to inherit from both parents and the families of both parents like a child born within marriage can inherit automatically from both parents and the extended family of both

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\(^{514}\) Supra note 450

\(^{515}\) “Financial Support for Children” available at: www.familylawmattersscotland.co.uk/financial-support-for-children.html (Last visited on August 24, 2016)

\(^{516}\) Ibid.
parents. The position of adopted children is the same as that of natural child for the purposes of succession. Each child has an equal claim. The children are collectively entitled to one-third of the deceased parent’s moveable estate if the deceased left a spouse or partner, or to one-half of it if the deceased left no partner or spouse.

**d) Status of the Unmarried Father**

The mother’s consent or a court order declaring a person to be the father of child is required to put his name on the birth certificate of child. If his name is on the birth certificate of a child the man is presumed to be the father of that child.

**5.4.3.10 Right of Unmarried Couple to Custody and Contact with Child**

In Scots Law, issues relative to parental responsibilities are dealt with under the Children (Scotland) Act, 1995, which provides for the making of ‘residence’ (custody), ‘contact’ (access), and specific issue orders. Children (Scotland) Act 1995 provides that parent with parental responsibilities has right to regulate the child’s residence when child is living with him or her. If unmarried parents of child decide to separate, and the father has not acquired parental responsibilities and rights towards his children he would need to go to court to get a contact order giving him the right to contact with the children. If both parents have parental responsibilities and rights, both parents have a right to maintain contact with the children. If they cannot agree they can ask the court to make a decision.

**5.4.3.11 Unmarried Couple’s Right to Adoption**

An unmarried couple that is living together as husband and wife in an enduring family relationship, or who are living together as if civil partners in an enduring family relationship where each member of the couple is aged 21 or over and

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517 Supra note 450
519 Registration of Births, Deaths and Marriages (Scotland) Act 1965, Section 18(1)
520 Adoption and Children (Scotland) Act, 2007, Section 2(1)(a) [Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right to have the child living with him or otherwise to regulate the child’s residence.]
521 Supra note 450
neither member is a parent of the child to be adopted can make application for adoption if anyone of the following conditions is satisfied, these conditions are:

a) One member of the unmarried couple is domiciled in a part of the British Islands, or
b) Each member of the unmarried couple has been habitually resident in a part of the British Islands for a period of at least one year prior to the date of the application.\textsuperscript{522}

Thus in Scotland couples who live together in an enduring family relationship can adopt a child.\textsuperscript{523}

5.4.3.12 Opting Out of The Family Law (Scotland) Act, 2006

Under general principles of Scottish law, it is presumed as a matter of statutory interpretation that parties are free to renounce the right to bring any pecuniary claim. There is a strong tradition in Scottish family law in favour of party autonomy in this respect, compromised only to a relatively limited extent.\textsuperscript{524}

5.4.4 Critical Evaluation of Scottish Law on Cohabitation

\textbf{a) Legal Uncertainty and Lack of Clarity}

The uncertainty that lies with the legislation, when an unmarried couple living together is to be regarded as cohabiting couple, is the primary difficulty in

\textsuperscript{522} Adoption and Children (Scotland) Act, 2007, Section 29[Adoption by certain couples—
(1)Where—
 (a)each member of a relevant couple is aged 21 or over,
 (b)either member of the couple is a parent of the child to be adopted, and
 (c)one of the conditions in subsection (2) is met, an adoption order may be made on the application of the couple.
 (2)Those conditions are—
 (a)that a member of the couple is domiciled in a part of the British Islands,
 (b)that each member of the couple has been habitually resident in a part of the British Islands for a period of at least one year ending with the date of the application.
 (3)A couple is “relevant” for the purposes of this section if its members are—
 (a)persons who are married to each other,
 (b)persons who are civil partners of each other,
 (c)persons who are living together as if husband and wife in an enduring family relationship, or
 (d)persons who are living together as if civil partners in an enduring family relationship.
 (4)In this section “parent”, in relation to the child to be adopted, means a parent who has any parental responsibilities or parental rights in relation to the child.]

\textsuperscript{523} Supra note 450

\textsuperscript{524} Supra note 407 at 32
recognizing the entitlement to make claims on termination of the relationship. To the requirement in Section 25(1) of the Act of 2006 that unmarried partners are living together as husband and wife or civil partner, are added other factors set out in Section 25(2) Family Law Act, 2006, which the court must consider in determining whether the parties are, or have been, cohabitants. First is the duration of the relationship. Though the minimum requirement of two years duration was proposed in original draft of the Bill, however, the Act as passed does not prescribe any minimum requirement of any period and hence this may possibly be assumed that a very short duration of relationship could also qualify as a statutory cohabitation depending on the court’s assessment of the other factors.\textsuperscript{525} The second factor is the nature of the relationship. The ‘nature’ of relationship points toward those many factors which reflect a common life. These factors might consist of arrangements regarding the use of a joint home and its maintenance, the caring for any children of the relationship, financial arrangements, any other signs of commitment and the manner in which the couple present themselves as a couple to friends and family, and also comprise of evidences of decisions or actions imitating expectations by the parties that they would remain a couple. The final consideration is the nature and extent of any financial arrangements, especially the evidences of financial interdependence. Even with this additional gloss on the definition provided in Section 25 of the Act of 2006, the legislation still leaves considerable doubt as to the full range of factors which may be relevant as well as to the precise scope and meaning of terms specifically used within the Act.\textsuperscript{526}

It is barely surprising that framing a legal definition of cohabitation is difficult matter. As a change of social acceptance of non-marital cohabitation, cohabitants no longer feel the need to hold themselves out as a married couple. Since the existence of legally-recognized cohabitation is the foundation of the other rights conferred in the Family Law Act of 2006, it is unfortunate that the definition remains doubtful; it is this indecisiveness that will make it difficult to assume the clear legal position in many instances. An additional difficulty is the lack of clarity over the start of

\textsuperscript{525} Supra note 398 at 213
\textsuperscript{526} Ibid.
cohabitation, if a relationship is deemed to be cohabitation.\textsuperscript{527} ‘One assumes that if A moves in with B on 14 February, cohabitation will not exist as at 15 February or even, possibly, 15 August. Let us suppose that legal cohabitation did not begin until 14 July of the following year. What is the start date of cohabitation from which legal consequences follow? Is it 14 July (the date of legally-recognized cohabitation), or is 14 February in the previous year (when the parties actually began to live together)? Establishing this date has consequences for the sorts of claims that may be made under the Act on termination of the relationship’.

It is provided in the Family Law (Scotland) Act, 2006 that application may be made for the rights which it provides whenever Scots law is the \textit{lex causae}; however, except in relation to the rights discussed under Section 29, the Act does not clarify that under what circumstances such rights will be available.\textsuperscript{528} Further, the Act of 2006 does not provide for jurisdiction rules with regard to \textit{de facto} cohabitation. The territorial extent of the new regime is not clear. Effectively, therefore, the Act introduces significant new rules without enacting when those rules are to apply. It is easy to visualize the kind of unpredictability which might arise as regards the cohabitation in Scotland of one or more foreign domiciliaries, or concerning Scots-domiciled parties all or part of whose period of cohabitation was spent outside Scotland, or again concerning the cohabitation in Scotland of Scottish-domiciled parties who own property abroad.\textsuperscript{529}

b) \textbf{Financial Provision on Termination otherwise than by Death}

Section 28 of the Family Law Act provides a possibility of claim for financial provision if cohabitation terminates. In the first place the source of difficulty is the need to establish cohabitation. Another is that it is not entirely clear how courts will interpret the criteria they are given. To discuss in the context of the aim of protecting the vulnerable, there seems to be a tension between the largely backward-looking intentions of the Executive and the requirement to take into account possible disadvantage in terms of earning capacity. In addition, it is not clear what factors will

\textsuperscript{527} \textit{Id.} at 214
\textsuperscript{528} \textit{Supra} note 406 at 56-57
\textsuperscript{529} \textit{Ibid.}
have to be taken into account in determining the economic burden of childcare. It is unsettled that this financial provision is to be restricted to actual costs or it take would include the broader economic disadvantages of childcare such as present and future impact on earning capacity.  


c) Financial Provision on Death

Financial provision on death is regulated by Section 29 of the Family Law Act, 2006. Again, the difficulty here is in establishing the existence of cohabitation, especially when the process by which this is to be done is not specified. A practical issue is the administration of the estate. Apparently the executor will have to await the conclusion of any proceedings under Section 29; but will the executor also have to wait six months from the date of death to see if such a claim is forthcoming in the first place. The factor to be considered relevant by the court in determining applications under Section 29 give some practical assistance on how the amount of award is to be assessed, especially when the court can take into consideration any other matter it deems appropriate. However the suggestion in Section 29(4) that any award made can be no greater than that to which a spouse or civil partner would be entitled provides little further assistance.

Section 29 of the Act of 2006 permits a cohabitant to bring a claim against the estate of his or her deceased partner, where the deceased was domiciled in Scotland at death. The Scottish Law Commission had made recommendations for both testate and intestate cases i.e. whether or not the deceased had left a valid will disposing of the estate, but, the 2006 Act created a remedy only for cases where the deceased had left no valid will. Cohabitants have not, however, been added to the list of persons entitled to be appointed executor to administer the estate. The remedy created by Section 29 provide entirely new stance in Scots succession law, departing from the orthodox model of fixed legal entitlements in favour of discretionary provision.

d) Protection of Children

The protection of children is one of the reforms targeted to be achieved through the Act of 2006. Financial protection is ensured under Section 28 of the Act

\[530 Supra note 398 at 216\]
\[531 Id. at 217\]
\[532 Supra note 407 at 30-31\]
in the form of the option of making an application for an award to cover the economic burden of childcare after the termination of the cohabitation. However, this application is subject to two limitations. First, before any claim to the payment it will be required to establish the existence of cohabitation, and it will not be all instances of living together and producing or accepting a child that will be classified as cohabitation for the purposes of the Act. The second limitation is that the claim will be dependent on the availability of resources on the part of the person from whom the payment is sought.\textsuperscript{533}

Where, the case is of a married spouse, definitely there would be a choice of fixed rights due to its advantages over discretionary system. However, where the relationship is of a less certain character the choice may have to be between a system of discretionary provision and no provision at all, we think that the disadvantages of a discretionary system are tolerable.

5.5 \textbf{COMPARATIVE ANALYSIS OF NON-MARRIED COUPLES AND THEIR CHILDREN IN FRANCE, PHILIPPINES, SCOTLAND AND INDIA}

To compare the legal status of non-marital relationships it is necessary to assimilate together the rights and duties of such couples in jurisdictions of France, Philippines, Scotland and India. As we have discussed these rights and duties in detail earlier, here, the researcher have only tried to compare the availability i.e. judicial or statutory, non-availability of the rights in brief.

5.5.1 \textbf{Recognition of Non-Marital Relationships}

\textbf{France:} In France non-marital relationships have been recognized through the \textit{PACS} which allow heterosexual as well as homosexual couples to register their non-marital relationship. Further the French law allows the non-marital relationships in the nature of concubinage also. The Civil Code (France) provides for a detailed procedure and requirements for the registration of \textit{PACS}.

\textbf{Philippines:} In Family Code of Philippines the term Unions without Marriage has been used in Article 147 Family Code of Philippines under chapter dealing with

\textsuperscript{533} \textit{Supra} note 398 at 221
property matters of persons living in non-marital cohabitation or unions. Philippine Family Code makes it clear that a union is Union Without Marriage when a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage. Further the Code under Article 148 also governs the property of cohabitants who are not capacitated to marry. Thus it is clear that though Philippines law does not provide a provision for registration of the non-marital relationships but indirectly have provided for regulation of their property matters. However the term cohabitation has not been defined.

**Scotland:** Family Law (Scotland) Act, 2006 under Sections 25 to 30 deal with the property matters of cohabitants, however, same as the position of Philippines the law in Scotland also do not provide for the registration of the non-marital relationships. The Scottish Act however defines the term cohabitation under Section 25 of the Family Law (Scotland) Act, 2006.

**India:** In India, non-marital relationships has neither been recognized nor defined by any statute directly or indirectly, nor any statute provide for any kind of rights to non-marital couples. However, Indian judiciary has tried to recognize the long-term non-marital relationships under the term, relationship in nature of marriage under Protection of Women from Domestic Violence Act, a term which has its own limitations as discussed in previous chapters.

### 5.5.2 Right to Maintenance of Non-Married Partner

**France:** In France the concept of maintenance is restricted to married couples only and even that is available in very few cases in the form of compensation because there are so many support systems in France that even after divorce they have financial security from state.

**Philippines:** Though not expressly stated in Philippine law however it seems that repetition liability to support is because of presence of non-married couples and thus non-married live-in partners are under obligation to support each other during subsistence of their relationship. The concept of maintenance in Philippines is limited to the duration of relationship and the responsibility to maintain lies with both spouses to maintain each other.
Scotland: Unless an express agreement to do so, upon the termination of relationship cohabiting partner don’t automatically have a duty to maintain each other financially. However, one partner can apply within one year of the termination of relationship to court for a limited financial settlement from their former partner and a capital sum or a payment in recognition of the costs of caring for their child under the age of 16 years.  

India: In India the concept of maintenance has not been extended to non-married partners but Indian judiciary has extended the benefits of maintenance to long-term relationships in nature of marriage.

5.5.3 Right against Domestic Violence

France: The French law on domestic violence is similar to married spouses and unmarried cohabiting couples. The similarity of civil provisions also has been maintained in Penal Code of France as well. It includes the term cohabite along with words spouse in provision of punishment for domestic violence.  

Philippines: The Philippines has enacted ‘Anti-Violence Against Women and Their Children Act, 2004’ to protect the family and its members particularly women and children, from violence and threats to their personal safety and security. This Act includes the term dating relationship along with term wife and former wife. It equally protects married and unmarried and separated couples.

Scotland: Abusive Behaviour and Sexual Harm (Scotland) Act, 2016 provides against the domestic violence. It includes under protected relationships term partner and ex-partner. Further the Abusive Behaviour and Sexual Harm (Scotland) Act, 2016, provides that under this Act the term partner will include spouses or civil partners of each other, living together as if spouses or civil partners of each other’ or in an intimate personal relationship with each other; and the references person’s ex-partner are to be construed accordingly.

India: In India Protection of Women from Domestic Violence Act, 2005, protects women against domestic violence. However, this Act is not applicable to all

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534 Supra note 450  
535 Penal Code of France, 1971, Article 222-3-6, 222-8-6, 222-10-6, 222-12-6  
536 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Section 1(6)
types of non-married couples. Those couples who come under the relationships in nature of marriage can only be sure of their protection under this Act.

5.5.4 Rights in Property

France: In France les pacsés can either decide govern by the basis of a strict separation of ownership of property, or that property is owned and shared jointly between partners, whomever actually financed the purchase. The first type of ownership structure is called régime de separation de biens in which each partner remains the exclusive owner of all property purchased in their sole name. As property is not jointly held it remains owned separately by each partner. And the other basis of ownership of the property is en indivision in which all property is said to be jointly owned. Legislation regulates conjugal association with respect to property only in default of special agreements that may be entered into by couples as they may deem proper, however, such agreement shall not be contrary to public morals and legal provisions of ante-nuptial agreements and of matrimonial regimes provided in French Civil Code. Thus spouses are free to draw up their own agreement but must not be immoral. If the registered partners have made agreement regarding property in the Pact itself, property will be divided accordingly. Similar is the case with unregistered partners. When cohabiting partners does not enter into Pact the agreement regarding properties, on dissolution of such partnership the French law of co-ownership applies.

Philippines: The Philippine Civil Code provides that property acquired by both cohabitants capacitated to marry each other, through their work or industry shall be governed by the rules of co-ownership and their wages and salaries shall be owned by them in equal shares. All properties acquired during cohabitation shall be presumed to have been obtained by their joint efforts, work or industry, unless proved otherwise, and shall be governed as their co-ownership. When a man and a woman who are not capacitated to marry each other under law lives together as husband and wife the Philippines Civil Code provides that the rule of co-ownership will not apply to properties acquired by them. The properties acquired by both cohabitants through

537 Supra note 146
538 Civil Code of France, Art. 1387 [Legislation regulates conjugal association, with respect to property, only in default of special agreements, which the spouses may enter into as they deem proper, provided they are not contrary to public morals and to the following provisions.]
their joint contribution of money, property or industry shall only be owned by them in common in proportion to their respective contribution, however, in the absence of proof to proportion of contribution, their contribution and corresponding shares will be presumed to be equal.539

Scotland: The law relating to property of non-married couple has been elaborately provided under Family Law Scotland Act, 2006. Sections 26 to 30 deal with the different properties of non-married couples. Where any question arises, whether during or after the cohabitation, as to the respective rights of ownership of cohabitants in any household goods it shall be presumed that each cohabitant has a right to an equal share in household goods acquired, other than by gift or succession from a third party, during the period of cohabitation.540 The presumption is though rebuttable.

India: In India no specific law relating to property of non-marital relationships exists.

5.5.5 Cohabitant’s Rights Relating to Succession

France: As far as succession rights are concerned, in absence of any agreement regarding property, the free voluntary legacy which might be made to the cohabiting partner is severely limited by the reserve for children and ascendants.

Philippines: The reference to Unions Without Marriage in the Civil Code of Philippines came under the chapter of property rights but unfortunately it does not provide any provision for inheritance by unmarried couples.

539 Family Code of Philippines, 1987, Article 148[ in cases of cohabitation not falling under the preceding Article, only the properties acquired by both of the parties through their actual joint contribution of money, property, or industry shall be owned by them in common in proportion to their respective contributions. In the absence of proof to the contrary, their contributions and corresponding shares are presumed to be equal. The same rule and presumption shall apply to joint deposits of money and evidences of credit.

If one of the party is validly married to another, his or her share in the co-ownership shall accrue to the absolute community or conjugal partnership existing in such valid marriage. If the party who acted in bad faith is not validly married to another, his or her share shall be forfeited in the manner provided in the last paragraph of the preceding Article.]

540 Family Law (Scotland) Act, 2006, Sec 26(2) [It shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation.]
Scotland: If a cohabitant dies intestate without leaving a Will, their estate will be distributed according to the rules of intestacy. Surviving partner will not automatically inherit unless, as a couple, they owned property jointly. Surviving partner can apply to court within six months of death of partner for a share in deceased partner’s estate.\textsuperscript{541}

India: In India there is no specific provision will enables non-married partner to inherit the property of other partner except through a valid Will.

5.5.6 Child’s Right to Inheritance

France: Although in earlier times natural born children inherit only three quarters of the entire estate of their parents, however, now in France a natural child inherits from his parents similarly as a legitimate child does, of course, the estate is divided into equal shares among them and their legitimate siblings, if they exists. More importantly, natural children are now integral parts of their parents’ respective families and lineages. Better yet, reciprocal inheritance is now permitted between natural born children and their parents’.\textsuperscript{542} The central point to grasp with French inheritance laws is that children are specifically protected from being disenfranchised from parent’s estate. Parent cannot freely dispose of any part of la réserve, which must be held for children.

Philippines: In Philippines children born outside a marriage are illegitimate.\textsuperscript{543} The Civil Code of Philippines provides for the legitimization of illegitimate children. The effect of legitimating a child retroacts to the time of the child’s birth\textsuperscript{544} and a legitimated child enjoys the same rights as a legitimate child.\textsuperscript{545} Philippine Civil Code provides that an illegitimate child shall receive a share

\textsuperscript{541} Supra note 450
\textsuperscript{542} Supra note 217 at 50
\textsuperscript{543} Family Code of Philippines, 1987, Article 165[ Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this Code.]
\textsuperscript{544} Family Code of Philippines, 1987, Article 180 [The effects of legitimation shall retroact to the time of the child’s birth.
\textsuperscript{545} Family Code of Philippines, 1987, Article 179 [Legitimated children shall retroact to the time of the child’s birth.]
equivalent to half of the share that will be received by a legitimate child who in turn shall receive a share of half of the value of the whole legitime.  

**Scotland:** Even if there is no Will, a child of unmarried parents has a legal right to inherit from both parents and the families of both parents like a child born within marriage can inherit automatically from both parents and the extended family of both parents.

**India:** In India though there is no specific law with gives the rights to inheritance by child born out of non-marital relationships, however in *Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi & Others*\(^\text{548}\) observed that in view of the legal fiction contained in Section 16 of Hindu Marriage Act, the illegitimate Children for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. Section makes it very clear that a child can only claim rights to the property of his parents, and no one else.

**5.5.7 Unmarried Couple’s Right to Adoption**

**France:** Couples who have been married for more than two years, or who are both aged at least 28 may adopt jointly. However, partners in a civil partnership and unmarried couples may not adopt jointly, only one of the partners or one of the members of the couple can be an adoptive parent.

**Philippines:** In Philippines neither any restriction has been placed on the adoption by cohabiting couple nor there is any such provision specifically related to cohabiting persons, though, it has been provided that any person of legal age and in possession of full civil capacity and legal rights and in a position to support and care his/her children legitimate or illegitimate may adopt a child. However the adopter must be atleast sixteen years older than the person to be adopted.

**Scotland:** In Scotland couples who live together in an enduring family relationship can adopt a child\(^\text{549}\) if a member of the couple is domiciled in a part of the British Islands, or each member of the couple has been habitually resident in a part of

\(^{546}\) Civil Code of Philippines, 1949, Article 895  
\(^{547}\) Supra note 450  
\(^{548}\) 1996(4) SCC 76  
\(^{549}\) Supra note 450
the British Islands for a period of at least one year ending with the date of the application.\textsuperscript{550}

\textbf{India:} According to Adoption Regulations, 2017\textsuperscript{551} released by Central Adoption Resource Authority a couple having two years of stable relationship can adopt. An unmarried person can also adopt. But it does not provide for adoption by unmarried couple. Further a child born to unmarried mother can be given in adoption by her only.

\textbf{5.5.8 Parental Responsibility and Right to Custody of Child}

\textbf{France:} The Civil Code states that the breakdown of a marriage or a relationship does not affect the rules governing the exercise of parental responsibility. Therefore, separated parents continue to exercise joint parental responsibility over their children, which is the general principle provided for by Civil Code.\textsuperscript{552} However, the judge may trust only one of the parents with parental responsibility when the best interests of the child require this. French law gives equal rights and responsibilities to married and non-married parents.

\textbf{Philippines:} Parental authority cannot be renounced or transferred. Father and mother shall jointly exercise parental authority over child. No child under seven years of age shall be separated from mother except compelling reasons.

\textbf{Scotland:} Following the changes made in the Family Law (Scotland) Act, 2006 (from 4 May 2006), regardless of whether the parents are married to one another or not, a child’s both parents are given parental rights and responsibilities if they

\textsuperscript{550} Adoption and Children (Scotland) Act, 2007, Section 29
\textsuperscript{551} NOTE: [Regulations framed by the Central Adoption Resource Authority in exercise of the powers conferred by clause(c) of section 68 read with clause (3) of section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2015]
\textsuperscript{552} Civil Code of France, Art. 372[The father and mother shall exercise in common parental authority. Where, however, parentage is established with regard to one of them more than one year after the birth of a child whose parentage is already established with regard to the other, the latter alone remains vested with the exercise of parental authority. It shall be likewise where parentage is judicially declared with regard to the second parent of the child. Parental authority may however be exercised in common in case of joint declaration of the father and mother before the chief clerk of the \textit{tribunal de grande instance} or upon judgment of the family causes judge.] Civil Code of France, Art. 372-2 [Where one of the "parents" performs alone an usual act of parental authority concerning the person of the child, he or she shall be considered to be acting with the consent of the other with regard to third parties in good faith.]
register the child’s birth together. Where they have not jointly registered the birth, unmarried father can get parental rights and responsibilities by marrying child’s mother or through the intervention of the court. 553

**India:** Hindu Minority and Guardianship Act, 1956, clearly states under Section 6 that the father is the natural guardian of his minor legitimate children; the mother becomes the natural guardian in the absence of the father which means when the father is not capable of acting as the child’s guardian. However, Sub-Section (b) of Section 6 of the same Act seems to deal with live-in relationships in an indirect manner as it grants the custodial rights to the mother in case of children born out of illegitimate relations. 554 Protection of Women from Domestic Violence Act, 2005, applies to couples living in a long term live-in relationship. The Act of 2005 gives the aggrieved woman right of custody orders under Section 21 555. It provides that the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under Protection of Women from Domestic Violence Act grant temporary custody of any child or children to the aggrieved person.

5.5.9 **Liability to Support/Maintain Child**

**France:** In France, the courts set child support liabilities. For separating parents the judge will set the amount of child support along with contact arrangements. The law requires child support agreements to be made when the separation is by mutual consent and joint petition. Cohabiting couples may also use the courts where they cannot come to an agreement on separation. Each parent (whether married or not) has a duty to participate in the needs of common children proportionately to their resources.

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553 **Supra** note 439 at 8
554 Hindu Minority and Guardianship Act, 1956, Section 6(b)
555 Protection of Women from Domestic Violence Act, 2005, Section 21 [Custody orders-
Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:
Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.]
**Philippines:** Philippines Civil Code enlists persons who are obliged to support each other and it makes provision for the support of illegitimate child also. It has also been made clear that only the separate property of the person obliged to support shall be answerable, however, if the obliger has no separate property the support shall be deducted from the conjugal or absolute community property.\textsuperscript{556}

**Scotland:** Both natural parents are responsible for supporting a child financially. The father is equally responsible even if he is not named on the birth certificate and if he is not living with the mother.\textsuperscript{557} Couples have the option to agreeing privately between them the level of child ailment and can incorporate this into a formal Separation Agreement.

**India:** Section 20 of Hindu Adoptions and Maintenance Act makes it clear that both parents are liable to maintain children. Under this Act only father is not responsible to maintain children. Hence both live-in partners are equally liable to maintain child and child have right to claim maintenance from both of its parents. The Hindu Adoptions and Maintenance Act provide a clear provision of maintenance to child irrespective of legitimacy. Further, Section 125 Criminal Procedure Code (India) provides a legal right to children to claim maintenance. It provides that if any person having sufficient means neglects or refuses to maintain his legitimate or illegitimate minor child, whether married or not, unable to maintain itself\textsuperscript{558}, or his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself\textsuperscript{559}, may apply for maintenance before magistrate.

### 5.6 SUM UP

Thus from the comparative analysis of the legal status of non-marital live-in partners and their children in France, Philippines, Scotland and India it is evident that

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\textsuperscript{556} Family Code of Philippines, 1987, Article 197 [In case of legitimate ascendants; descendants, whether legitimate or illegitimate, and brothers and sisters, whether legitimately or illegitimately related, only the separate property of the person obliged to give support shall be answerable provided that in case the obligor has no separate property, the absolute community or the conjugal partnership, if financially capable, shall advance the support, which shall be deducted from the share of the spouse obliged upon the liquidation of the absolute community or of the conjugal partnership.]

\textsuperscript{557} Supra note 450

\textsuperscript{558} Code of Criminal Procedure, 1973, Section 125(b)

\textsuperscript{559} Code of Criminal Procedure, 1973, Section 125(c)
regulation of non-marital relationships and matters incidental thereto are not adequately dealt under Indian laws. As studied, in Philippines and Scotland though law didn’t provide for registration of non-marital unions like France but it have provided for the regulation of property matters of non-marital cohabitants. Indian legislations are much devoid of recognizing the presence of unmarried couples and their relationships, further, Indian judiciary is trying to streamline these relationships in accordance with existing laws. The detailed discussion of rights available to unmarried couples in France, Philippines and Scotland in comparison to rights available to unmarried couples in India leads researcher to sum up this chapter of comparative study by accepting that the unavailability of rights to unmarried couples and their children rests on the shifting sands of interpretation of statutes by Indian courts.