COHABITATION AS AN ALTERNATIVE TO MARRIAGE?

(Maciej Mikołajczyk, M. A., Faculty of Law and Administration)
University of Warmia and Mazury in Olsztyn

According to the legal system in force in Poland, the basis of the family is marriage. On the other hand, actual marriages (cohabitation) do not have any legal protection. Our political principles treat cohabitation as a socially undesirable phenomenon and contrary to the model of relations shaped on the basis of marriage institutions. It may be the source of a family based on the motherhood of the woman (concubine) who gave birth to the child, and on the determined by the voluntary or judicial paternity of a given man (living with a concubine, i.e. a cohabitant) towards that child. The Supreme Court in Poland in one of its rulings took the position that the existence of actual marital co-existence can be said when the situation actually created between a man and a woman is completely analogous to that resulting from a legally concluded marriage. Cohabitation is treated differently in different legal systems.

In the Republic of Poland, especially in the western part of our country, the phenomenon of cohabitation has taken on a large scale and is a significant social and legal problem, which, however, is not regulated by applicable law. The position of the Polish legislator in relation to cohabitation is explained by the need to maintain the rank and social significance of marriage. In my opinion, it should be considered whether granting a concubine, even to a limited extent, the rights that a married woman would have, would undermine the legally contracted marriage, making a cohabiting institution competing with her. On the other hand, however, the legal situation of persons living in actual marital life demands a legal definition of cohabitation, but only covering heterosexual couples. In fact, therefore, cohabitation is outside the law. Therefore, the provisions on the rights and obligations of spouses and family members do not apply to them and they cannot be applied by analogy. As a result, it must be stated that the Polish law in force treats cohabitation as a personal matter of two people, legally indifferent. However, the liquidation of factual relations between parties living in a cohabitation (cohabitants) after its termination takes place under the provisions of the Civil Code and is often much more rigorous than consideration of cases between former spouses. The gender difference is an obvious premise for the establishment of cohabitation as a de facto marriage. It is in the concept and results from the goals of cohabitation. Lack of this difference will also occur if, from the medical point of view, it is not possible to determine the sex at all, then - in the case of duality (bisexuality) or when the characteristics of a specific sex similar to the sex of the partner predominate. Homosexual relationships, due to the continuity of views established in this case, the development of culture and applicable ethical norms cannot be treated as cohabitation. In EU countries that recognize cohabitation, the person will also have rights and obligations regarding ownership, inheritance and maintenance following separation. However, several EU countries do not recognize registered partnerships: Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia. The difference between a marriage and a cohabitation basically boils down to the lack of a legal act consisting in entering into a relationship in a manner specified in the provisions of the Family and Guardianship Code. However, this is a very fundamental difference, because it removes cohabitation

outside the scope of applicable law. On the other hand, the other characteristics of cohabitation are the same, if not identical, as in marriage. As in marriage, cohabitation should be considered a monogamous institution, and therefore a relationship between a man and one woman, and vice versa. It can no longer be hidden that the phenomenon of cohabitation is becoming a more and more common fact. Due to the fact that cohabitation can be the source of a family, this fact - whether we want it or not - is of great social importance. It should be noted that some areas of law, e.g. cooperative law, housing law, have acknowledged this fact and regulated the rights of the parties to this actual marriage in important areas of life. However, the family and guardianship code seems to be an impenetrable bastion in this area. However, humanitarian, moral and social considerations, as well as the principles of social coexistence, require legislative protection of the cohabitation parties and their children. It could be provided, e.g. by adding art. 196 of the Civil Code of the third paragraph, which reads as follows: "The provisions of this chapter shall also apply to the joint property of persons who are actually in a marriage."

However, for such an action to enjoy the favor of the law, one should take into account the attempt to define a cohabitation and to include those features that will refer directly to the cohabitants. It should not be an institution competing with the marriage, nor be it an attempt to replace it, but in the event of an emergency it should be recalled. Such a provision, not legally sanctioning cohabitation, would at the same time guarantee a uniform settlement of material human matters based on the provisions of the Act. On the other hand, there is no indication that the phenomenon of cohabitation will disappear or decrease in the future, so this fact must change the previously neutral position of civil law towards the socially important phenomenon, which is cohabitation.