Family Law on Post-Soviet European Territory: A Comparative Overview of Some Recent Trends

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1. Introduction

As a result of the Soviet Union dissolution in 1991, 15 new independent states were formed on post-Soviet territory. Ten of them – Armenia, Azerbaijan, Belarus, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, and Ukraine – are usually regarded as belonging to Europe.¹ All these countries, except Belarus, are Member States of the Council of Europe. Estonia, Latvia, and Lithuania are Member States of the European Union.

The formation of the new states on post-Soviet territory was followed by radical reforms in political, economic and legal systems in these countries. Family law reform was a constituent part of this revision. Family law had to be adapted to the new social and economic realities, which came to these countries together with tremendous political change. All the countries under consideration adopted new family legislation, the very first being Latvia in 1992 and the last one Armenia in 2004. In chronological order, the following legislation was enacted:

- 1992 – the Civil Law of Latvia 1937 (restored) (Part One on Family Law);²
- 1994 – the Family Law Act of Estonia (included as a separate book in the Civil Code);³
- 1997 – the Civil Code of Georgia (Book Five on Family Law);⁴
- 1999 – the Code on Marriage and the Family of Belarus;
- 2000 – the Civil Code of Lithuania (Book Three on Family Law);⁵

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¹ The question of the boundary between Europe and Asia has not been finally settled. Geographically speaking, Armenia, Azerbaijan and Georgia are in the southern Caucasus, and, traditionally, the Caucasus Mountains are considered to divide the two continents. At the same time, Armenia, Azerbaijan and Georgia have always been at the crossroads of Europe and Asia; and due to their close political, economic and cultural links to Europe are often considered transcontinental states and included in the list of European states.

² The English version of the Latvian Law may be found at: <http://www.ttc.lv/?id=50>.

³ The English version of the Estonian Act may be found at: <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022>.

⁴ The English version of the Georgian Code may be found at: <http://www.g-p.ge/code_civil.pdf>.

⁵ The English version of the Lithuanian Code may be found at: <http://www.tm.lt/default.aspx?item=aktual&id=4536>.
2000 – the Family Code of Azerbaijan;
2001 – the Family Code of Moldova;
2002 – the Family Code of Ukraine; and

To understand the current state of family law in the European post-Soviet countries and the main trends in its development within the European context, we need to be aware of the origin of family law in these countries. We need to be aware that it came, to a lesser or greater extent, from the family law of the USSR; and the longer Soviet tenure, the more engrained Soviet family law principles. Putting aside an overall critique of the Soviet political regime, it would be mistaken not to acknowledge the liberal and progressive character of Soviet family law during much of the Soviet period. More than that, at a certain stage, during the first 15 years after the Bolshevik coup d’etat in October 1917, it significantly outstripped Western family law.

Before October 1917, family law in the Russian Empire did not differ considerably from Western law: spouses’ relationships were based on the subordinate position of a married woman; the husband was the head of the family; marriage, as well as divorce, fell within the jurisdiction of ecclesiastical courts; and dissolution of marriage was either forbidden or permitted only on a fault basis often regulated differently for men and women; children born out of lawful wedlock were discriminated in many respects because of their illegitimate status.

One of the main tasks of the new Soviet power with respect to marriage and family was to break down completely, as quickly as possible, the old family law rules. The Bolsheviks understood that to establish a new social order in the most effective way, it was necessary to break down the old stereotypes and, first of all, to break down the old stereotypes within the family. To do so, to reorganize the family completely, it was necessary to withdraw marriage from the jurisdiction of the ecclesiastical courts and introduce civil (secular) marriage, to make women equal to men and to release women from their husbands’ “tyranny”, to use Lenin’s expression, to abolish fault-based divorce, to make divorce by consent easily available, and to equalize the status of children born within and outside marriage, eliminating the very concept of illegitimacy from the law. All this was achieved in 1917-18 through the Bolshevik’s new legislation on marriage and the family. Later, in 1926, the validity of de facto marriage, or what we call now extramarital cohabitation, was recognized. Thus, during the first post-revolutionary years a new family law was created – a family law that was entirely different from Western family law of the same period. It could be seen, to quote M. Antokolskaia, “as an early herald of the pan-European ‘family law revolution’”. It would take the West 50 to 60 years to pass similar reforms.

Slightly digressing from the main theme of this paper, I need, nevertheless, state that during the subsequent Stalinist period most of the liberal provisions of the first post-revolutionary legislation were rescinded, especially when the infamous Act of 8 July 1944 abolished most liberal rules as defined in earlier, post-revolutionary family law. Particularly, it abolished de facto marriages, made divorce very difficult and put it under strict control of the courts. It also abolished the institution of establishing paternity outside legal marriage, and

6 The English version of the Ukrainian Code may be found at: <http://www.mfa.gov.ua/data/upload/publication/usa-en/7148/family_kideks_engl.pdf>.
went to the opposite extreme, since it became impossible for a man to legally recognize his child born out of wedlock and for an unmarried mother to institute paternity proceedings. The liberal provisions were restored only in late 1960s with the exception of *de facto* marriage which has not been recognized since being abolished in 1944.

Technically, according to the federal structure of the Soviet state, the Soviet Republics were granted, at least in theory, the right to have their own family law. However, in reality, the Republics did not have any freedom in designing these laws. Instead, they were obliged to follow the federal law – the Fundamentals of the Legislation of the USSR and Soviet Republics on Marriage and the Family of 1968 – which covered the main family law issues. Apart from that, the imperial nature of the Soviet state did not presuppose the independence of the republics; on the contrary, it was implied that republics would copy the legislation of the Russian Soviet Federative Socialist Republic (RSFSR)9 – the “main” Soviet republic which was considered to be the first among equals. The result was that differences between the republican Family Codes (the Codes on Marriage and the Family), if any, were slight; and they all had the RSFSR Code on Marriage and the Family of 1969 as a common compulsory model.10

Soviet family law was designed to meet the demands of Soviet society. This was a society without a market economy where the overwhelming majority of the population earned low salaries. The Soviet regime did not allow spouses to freely make their own property arrangements, and the legal rules on property and financial relations between spouses were imperative and very restrictive. The legislator considered the marriage contract a bourgeois relic and did not permit spouses to deviate from the statutory rules. Both spouses were supposed to work and providing alimony occurred only as an exception, in cases of a spouse’s serious disability.

It is not surprising, therefore, that after the former Soviet republics became independent and were released from the pressure of the Soviet state, a completely different picture of family law emerged. The countries had different choices and could go in different directions. The range of innovations clearly indicates that at least some of them departed from the Soviet model of family law significantly.

First of all, as to the form in which the recent post-Soviet family law reforms have been carried out, there were two different solutions. Six countries adopted new codes that dealt exclusively with matrimonial and family matters – as it was done in the Soviet Union. Most of them were titled “Family Code”, with only Belarus retaining the old Soviet name “The Code on Marriage and the Family”. At the same time, four other countries (Latvia, Lithuania, Estonia, and Georgia) included family law in their Civil Codes as a separate book or section, thereby making it an integral part of civil law in accordance with the continental law tradition since the Napoleonic Code of 1804. Former Chair of the Supreme Court of Georgia L. Chanturiya called family law “a natural part of civil law taken out from the Civil Code

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9 Which was renamed as the Russian Federation after the USSR breakdown.

10 Thus, in Ukraine the marriageable age for women was 17 years old, whereas in other Soviet republics it was 18 years for both sexes. Also, in some republics (for instance, in Ukraine) the law allowed the spouses to combine their surnames and to have a joint surname, while in other republics it did not. These were the main examples that could illustrate the differences between the Soviet republican Codes. See F.M. Beliakova, V.A. Riasentsev, V.F. Yakovlev, Soviet Family Law (in Russian: *Sovetskoe semeinoe pravo*), 1982, p. 35, 71.

during the Soviet time on ideological grounds”. Its return to the Civil Code was perceived as “an important peculiarity of Georgian civil codification”.

Indeed, this distinction is not just a matter of technicality or legal drafting methodology. It is directly linked to the Soviet ideology and the way separation of family law from civil law was interpreted and reasoned in the USSR. The point is that Soviet law did not recognize division of public and private law because of its “bourgeois” nature. Under the Soviet legal system socialist law was divided into numerous branches, with family law being interpreted as a separate branch, distinct from civil law. Marriage and family matters were therefore regulated by a separate legal act that dealt specifically with matrimonial and family issues and were not included in the Civil Code.

The separation of family law had a historical explanation and, initially, it occurred in the post-revolutionary legislation for reasons of legal technique only. At that time, while the country urgently needed a radical reform of family law, it did not need any civil law at all, as all private property, which exceeded the “bare need of consumption”, was abolished as an attribute of capitalism. During these first post-revolutionary years, “there was going on a process of destruction of the core of the prerevolutionary civil law – the law of private ownership”. When, later, in the course of the New Economic Policy (NEP) and in a revived economy, the need for a civil law arose, the first Civil Code was adopted (in 1922). However, by that time the first Family Code 1918 had already been functioning successfully for almost four years; everyone had become familiar with it and its revision had not become necessary yet. For that reason, it was decided not to include family law in the new Civil Code of 1922.

Later, however, by the end of the 1920s and in the early 1930s the “separate existence” of family law would step by step acquire a strong ideological basis. The need for this basis was rooted in the development of a totalitarian state. 1929, known as “the year of the Great Retreat”, marked a final point in the development towards a totalitarian regime and the beginning of Stalin’s reign of terror. To pursue Stalin’s policy, the government needed strict legal rules to control society. Consequently, it was necessary “to reconsider” the very idea of the “withering away” of the state and the law, the idea fashionable during the after-revolution years. Stalin’s policy was connected with tightening up, apart from other areas of social life, ideological and political disciplines. At the academic level it showed itself in the attacks on Soviet legal scholars who claimed that the law would crumble under socialism. They were accused of taking a nihilistic approach to Soviet law, and many were subject to repression for their “wrong” thoughts and opinions. Under the “new” understanding, it was said that Marx’ and Lenin’s attacks on law were in fact attacks only on “bourgeois” law and

14 Other main branches of Soviet law were state law, administrative law, labour law, land law, kolkhoz law, criminal law, procedural law, and international law. Later other branches were added, such as maritime law, environmental law, and cosmos law.
17 The full title of this Code was The RSFSR Code on Acts of Civil Status, Marriage, Family, and Guardianship.
19 For the details, see Gsovski V., op. cit., at 172 et seq.
not a denial of Socialist law. To the contrary, as it was stated at the time, law would play a very important role in Socialist society.

Exactly the same metamorphosis took place in the field of family law. According to the “new” doctrine, marriage was not supposed to wither away following the state and the law, but would instead be strengthened under socialism. It is interesting to see how official doctrine “played” with communist ideas and how it managed to use the same principles for pursuing a radically different policy; the diverging interpretations of the same concepts clearly depended on the demands of a given time. To be fair, it was done rather skillfully. It was said, for example, that “the founders” of Marxism-Leninism, when they attacked the family, had in mind, in fact, only the bourgeois family, and not the family under socialism.

It is therefore not surprising, that Soviet legal doctrine needed a family law that would be separate from civil law, as well as separate and distinct from Western family law. It would help to substantiate the differences between the Soviet and the bourgeois family where the former was declared to be free from mercantile considerations and based on love only and the latter had a pragmatic, mercenary basis, which was alien to the official Soviet vision of marriage and the family. The Soviet state had always defended vigorously the “separate existence” of family law; and this concept is still very strong, at least in Russian legal doctrine, although in the post-Soviet era it lost its spirit of confrontation with the West.

Thus, coming back to the post-Soviet family law reforms, the fact that four countries have chosen a Civil Code format is itself a remarkable feature of the development of post-Soviet family law. It meant that they rejected the Soviet interpretation of family law as conceptually different from civil law.

The Lithuanian drafters also conceptualized the transfer of family law provisions from the Code on Marriage and the Family to the Civil Code by emphasizing the contractual element of marriage. It influenced significantly and in some way even determined the way certain issues were solved in the Code (particularly, engagement, property relations, and divorce).

The content of the main innovations made in post-Soviet European family law can be summarized as follows. Three countries have restored a religious form of marriage. In two of them, the publication of marriage, a contemporary version of the ancient institution of the publication of banns, has been re-introduced. Four countries also restored betrothal or engagement. Some of the laws introduced (or, in fact, restored) the fault-based divorce, or at least some consequences of a fault-based approach. Two countries returned to legal separation – another old and well-known institution. All the new laws allowed spouses to deviate from the matrimonial property regime stipulated by law and to make marriage contracts. One of the countries introduced the concept of “family property” that aimed at providing more protection to an economically weaker spouse and the children, as well as to the family as a whole. Two countries extended the possibility of spousal maintenance after divorce. Two countries included provisions on extramarital cohabitation into their laws. Finally, to complete the picture I will just add that none of the countries allowed same-sex partnerships or unions.

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22 Ibid.
23 For a detailed discussion, see S. Keserauskas, ‘Moving in the Same Direction?’, op. cit., p. 315 et seq.
At the same time, many of the Soviet family law concepts did outlast their creator, the USSR, and have since been transferred to the post-Soviet family laws. K. Kullerkupp, for instance, admits that “regulation method and prevalent ideology” of the Estonian Family Law Act “largely rely” on the Code that was in force in Estonia during the Soviet period.\textsuperscript{24} Commentators on Russian family law in the post-Soviet period noted that it underwent “surprisingly few changes”\textsuperscript{25} and that the Family Code could not be called “a revolutionary document”.\textsuperscript{26} It is also evident that many of the post-Soviet family laws that were adopted after the enactment of the 1995 Russian Family Code were based on the Russian model, or at least the Russian Family Code was thoroughly reviewed. There are many provisions in post-Soviet family laws that repeat verbatim the wording of some of the articles of the Russian Family Code.\textsuperscript{27}

All in all, family law in post-Soviet European territories currently is a mixture of new and old laws and rules. Recent reforms introduced both liberal and what have been traditionally considered conservative provisions in post-Soviet family law. The Latvian and Lithuanian family law reforms show the most significant departure from the Soviet family law model. The most innovative law, in my opinion, is the Ukrainian Family Code.\textsuperscript{28}

This paper will focus on the most drastic changes that were made in three major family law institutions: marriage, extramarital cohabitation, and divorce.

2. Marriage: Secular and Religious

No doubt, one of the most significant changes with regard to marriage law on the post-Soviet territory is the restoration of the religious form of marriage in Latvia, Lithuania, and Estonia as an alternative to civil (secular) marriage.\textsuperscript{29} This could be interpreted as a conservative phenomenon. However, taking into account the realities of the Soviet regime, it rather seems a natural reaction to the suppression of the church in the Soviet Union and may be interpreted as “a partial compensation for the repression”\textsuperscript{30} that the church experienced during the communist rule. Thus, these three countries have joined Western jurisdictions, where with regard to marriage ceremony “different variants of what one might call pluralistic systems are in force”,\textsuperscript{31} and have allowed those who are planning to marry to choose the form of marriage ceremony that is the most appropriate to their tastes and beliefs.

\textsuperscript{24} K. Kullerkupp, Statutory Marital Property Law de lege lata and de lege ferenda in: Juridica International, 2001, VI, p. 78.


\textsuperscript{26} P.V. Krasheninnikov, Introduction to the Family Code of the Russian Federation with Clause-By-Clause Comments (in Russian), Moscow, Spark, 1996, p. 5.


\textsuperscript{29} A similar phenomenon can be observed in some of the post-socialist countries (notably in Croatia, the Czech Republic and Poland), where after the Soviet breakdown an alternative religious form of marriage was introduced.

\textsuperscript{30} S. Keserauskas, ‘Moving in the Same Direction?’, op. cit., p. 322.

Section 53 of the Latvian Civil Law states that “a marriage shall be solemnized by the registrar of a General Registry office or a minister of the denominations set out in Section 51 if the provisions regarding the entering into of marriage have been complied with”. The denominations specified in s. 51 are the following: Evangelical Lutheran, Roman Catholic, Orthodox, Old Believers, Methodist, Baptist, Seventh Day Adventist or believers in Moses (Judaism), provided the minister of the respective denomination has the relevant permission from the leaders of the denomination. The Civil Law requires that the ministers of denominations, for each solemnized marriage, within a period of forty days, send the necessary information required for the Marriage Register to the General Register Office in whose territory the marriage has taken place. If the minister fails to perform this duty, he or she may be held administratively liable (s. 58).

The Estonian Family Law Act of 1994 initially did not provide for a religious form of marriage. The amendments to the Act made in 2004 entitled the Minister of Internal Affairs to grant a minister of religion of a church, congregation or association of congregations who has received appropriate training the right to perform the functions of a vital statistics officer related to the conclusion of marriage. Provided the minister of religion has been properly authorized, he or she has the right to register marriages and issue marriage certificates (§ 1301 (1), (2)).

There is much more uncertainty with regard to the Lithuanian strain of religious marriage. The Lithuanian Civil Code (art. 3.24) permits formation of religious marriage in the procedure established by the church (confessions). In addition, in the same article the Civil Code laid down the conditions under which religious marriage would “entail the same legal consequences as those entailed by the formation of a marriage in the Register Office”. One of these conditions is that the formation of a marriage in the procedure established by the Church (confessions) be “recorded at the Register Office in the procedure provided for herein”. The person authorized by the respective religious organization is obliged to present to the local Register Office notification of the religious marriage solemnized in the procedure set by the church (confession) within ten days of the marriage ceremony (art. 3.304 (1)). If this requirement has been met, and the Register Office has received the notification on time, the marriage will be considered to have been concluded on the day of the religious ceremony. However, if the notification requirement has not been fulfilled on time, “the marriage shall be held to have been contracted on the day when it was registered in the Register Office”.

In such a case, the question reasonably arises whether the Lithuanian version of religious marriage is a “true” religious marriage or just a marriage ceremony that acquires all the requisites of lawful marriage and entails the legal consequences of a lawful marriage only after its registration in the state administrative bodies. If it is not a “true” religious marriage but a religious marriage that “transcends into a civil one” – and such a conclusion does rather suggest itself from the wording of the Civil Code – then the Civil Code in this part is not quite in line with the 1992 Lithuanian Constitution, which “provides for an unconditional recognition of religious marriage”.

A practical question that could be raised in this regard is whether a person who died within the ten-day period after a religious marriage ceremony without having his or her marriage registered in the Register Office, will be regarded as lawfully married or not (with all the legal consequences this entails). There is no answer to

32 For this purpose, the Code also requires that: 1) the conditions for concluding a marriage laid down in the Civil Code be satisfied; and 2) the marriage be formed according to the procedures established by the canons of a religious organization registered in and recognized by the Republic of Lithuania.
33 S. Keserauskas, op. cit., p. 323.
34 Ibid., p. 322-323.
this question in the Civil Code of Lithuania, though it could help to clarify the situation by defining whether a religious ceremony, under Lithuanian law, is itself an investitive fact.

Restoration of the religious form of marriage was accompanied in Latvia and Lithuania by the restoration of the “publication” of both civil and religious marriages. “Before a marriage is solemnized, it shall be published”, the Latvian Civil Law declares (s. 40). The Lithuanian Civil Code also provides for “public announcement of an application for the registration of marriage” (art. 3.302). It aims, as it did long ago, to announce a forthcoming marriage ceremony and to let those who have objections or knowledge of any legal impediment against the marriage raise them.

3. Engagement to Marry

Another institution that relates to the conclusion of marriage and that was abolished in the USSR and restored as a result of recent reforms in some of the countries (Georgia, Latvia, Lithuania, and Ukraine) is betrothal or engagement. A betrothal, as it is defined, for instance, in the Latvian Civil Law, is “a mutual promise to join together in marriage” (s. 26). Betrothal (engagement) provisions do not aim to force a person to marry somebody to whom he or she gave prior consent to marry. “The engagement does not create the obligation to marry”, article 31 (2) of the Ukrainian Family Code states. The Latvian Civil Law contains a similar provision (s. 26): “A betrothal does not give rise to a right to bring court action to enforce the entering into a marriage”. The main goal of these provisions, putting aside the peculiarities of the respective national laws, is twofold. First, they aim at protecting the property rights of the betrothed (engaged), especially when he or she is not responsible for cancelling the betrothal. Second, they aim at increasing the responsibility for promising to marry by imposing sanctions on the person who refused to conclude the marriage without a good cause.

Thus, under Latvian law, if the betrothal is cancelled or one of the betrothed withdraws from it, both parties shall return to each other all the property that he or she received as a gift from the other party, the party’s parents or another person in connection with the intended marriage. Gifts need not be returned, if (and only if) the marriage does not take place because: a) the betrothed donor died; b) the donor has refused to marry without a good cause; or c) the behavior of the donor has been good cause for the other betrothed to refuse to marry (s. 27). The Georgian Civil Code contains a general provision that all the gifts the parties received in connection with the engagement shall be returned, if the marriage does not take place (s. 1109 (3)).

The answer to a question who may be considered betrothed (engaged) is addressed only in the Ukrainian Code: “the persons that have filed an application for marriage registration” (art. 31 (1)). Lithuanian law differentiates between private and public agreements to marry (engagement) made, respectively, in private and in public (arts. 3.7-3.11). An application to register a marriage officially presented to the Register Office is considered a public agreement to marry. In the latter case it allows also for compensation claims for non-pecuniary damage (s. 3.11). Under the Lithuanian Code, an agreement to marry may be expressed “orally or in writing” (s. 3.8 (2)).

In accordance with the “civil law ideology” underlying some of the Lithuanian family law provisions, which, particularly, conceptualized marriage as “a voluntary agreement” (art. 3.7), family law scholars interpret engagement as a “preliminary agreement” – a kind of “agreement-marriage” and an act that gives rise to “pre-contractual obligations”.

4. Extramarital Cohabitation

As for one of today’s most topical family law issues, extramarital cohabitation, only two countries have included special provisions on legal consequences of cohabitation in their new family legislation: Lithuania and Ukraine.

The Ukrainian Family Code provisions may look misleading at first, as in the very beginning the Code states that “a woman and a man’s living as a family without being married does not constitute a ground for them to have the rights and responsibilities of a married couple” (s.21 (2)). However, the Code does in fact recognize that living together as a family may have legal consequences with regard to property rights and spousal support. For example, in accordance with s. 74, if a man and a woman live together as a family but without being legally married, the property they acquire during the period of cohabitation “belongs to them as common joint property”, unless a written contract made between them states otherwise.36 The cohabiters’ property rights with regard to common joint property are governed by the Code’s provisions that relate to property rights of spouses.

In the same way, the Ukrainian Code deals with spousal support between cohabitating couples. If a man and a woman who are not married to each other have been living together for a prolonged period of time (s. 91) the partner that became unable to work during the period of their living together has the right to maintenance on the same terms as a spouse in the case of divorce. The Code also extends the right to maintenance granted to a spouse with whom a child under 3 years of age or a disabled child resides to a cohabitee in the same situation.

The Civil Code of Lithuania dedicates a whole chapter to the property rights of cohabiting but not legally married couples (Chapter XV). However, it conditions recognition of the rights and duties of cohabitees with regard to their property on registration of their cohabitation. Chapter XV applies only to couples who “having been cohabiting at least for a year with the aim of creating family relations” registered their cohabitation “in a procedure laid down by the law” (art. 3.229). If the parties have registered their cohabitation, their property rights are similar to those that married couples enjoy. Special protection is given to the shared dwelling of the cohabitees. If the assets are to be divided, a dwelling space may be awarded to the cohabitee who is in greater need, all circumstances being taken into account (age, health, the interests of minor children, etc.).

As to the rest of the post-Soviet European territory, the applicable laws clearly provide that only lawful, i.e. officially registered, marriage shall give rise to marital rights and duties.37 Most post-Soviet countries therefore adhere to erstwhile Soviet law which did not recognize any legal effect of de facto marriage, except for the 18-years’ period from 1927 until 1944, when the validity of de facto marriage was recognized by law.

The question now arises whether the issue of legal recognition of extramarital cohabitation is topical for the post-Soviet European countries at all. Perhaps, no such problem presents itself here? It is difficult to give a precise answer to this question as no precise data are available. At the same time, even if we admit that extra-marital cohabitation is not as widespread in post-Soviet countries as it is in the West, the implication cannot be that the problem does not exist at all.

36 The matrimonial regime of common joint property is available only for married couples and it operates by law only after the conclusion of marriage.
37 See, e.g., the Russian Family Code, s.10 (2), the Family Code of Moldova, ss. 2 (2), 9 (2), the Code on Marriage and the Family of Belarus, s. 15, the Civil Code of Georgia, s. 1151, and the Family Code of Armenia, s. 9 (2).
For instance, Estonian family law scholars noted more than ten years ago that there was a wide range of cohabitational relationships in society.\(^\text{38}\) The number of these relationships can since only have increased; the courts, depending on the circumstances, have been recognizing the legal consequences of factual cohabitation for some time now in property disputes between cohabiting couples.\(^\text{39}\) Also, Estonia is currently awaiting another family law reform, and permission for cohabitating couples to register their cohabitation may become one of its principle provisions.

In Russia, the number of extramarital cohabitation is constantly increasing. The Russian population census of 2002 showed that about 10 percent of those interviewed said that they lived in *de facto* marriages.\(^\text{40}\) In comparison, in 1989 the number of extramarital cohabitations constituted approximately 5-6%.\(^\text{41}\) There are serious reasons to question whether the official statistics reflect the real situation, as other data and assessments of indirect factors demonstrate that unregistered cohabitational relations are more widespread in Russia.\(^\text{42}\) The data represented above may not be quite correct, in particular, because, as sociologists believe, men tend to present themselves as unmarried, women as married. According to the study performed in Moscow by the Institute of Family and Upbringing in 2006, the so-called “civil marriage” (unregistered marriage or cohabitation) was favoured by 12-14 percent.\(^\text{43}\) Interestingly, married men were the main proponents of unregistered relations (cohabitation): 14.6 percent of them said that they would “vote” for cohabitation.\(^\text{44}\) Extramarital cohabitation is most popular among those who are under 30 and usually consider it a “trial” marriage. Results of a poll titled “Generations and Gender Programme” conducted under UN coordination in 2004 speak for themselves: approximately 80 percent of those who were born before 1960 began their marital life with the registration of marriage; and almost half of those who were born in the 1970s and 1980s began their marital life with extramarital cohabitation.\(^\text{45}\) To this I would add that the number of children born out of wedlock in Russia has increased three times since 1980 and now constitutes 30 percent.\(^\text{46}\) Nearly 50 percent of those born outside marriage have been registered by joint application of both parents.\(^\text{47}\) This is usually considered a clear indicator of popularity of *de facto* marriages.\(^\text{48}\)

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43 <http://www.izvestia.ru/moscow/article3099409/index.html>
44 Ibid.
47 Ibid.
This “quiet revolution”\(^{49}\) in attitude towards marriage that occurred during the last two decades in Russia was reflected for the first time in judicial practice recently, though it was to a certain extent provoked by a decision of the European Court of Human Rights. In case *Gavrikova v. Russia (2007)*\(^{50}\) the applicant complained, in particular, about the domestic courts’ denial of compensation for non-pecuniary damage in connection with the death in a plane crash of her non-marital partner (to which she would undoubtedly be entitled if she had a status of the widow). In its decision of 14 June 2002, the Russian Regional Court (Sverdlovsk) stated, *inter alia*, that the applicant was not “a relative of Mr. Gavrikov who died in the crash” and “therefore, the provisions on compensation for non-pecuniary damage in connection with the loss of a relative may not be applied to [the applicant] and her mental trauma… is of no legal significance”.\(^{51}\) After the European Court declared the application in this part admissible by decision of 30 June 2005, the Russian Federation Supreme Court examined an application for supervisory review lodged by the applicant on 5 August 2005 and referred it for examination on the merits to the Presidium of a Regional Court.\(^{52}\) The Presidium of the Regional Court found the application meritorious. It pointed out that:

> the law does not make the right to receive compensation for non-pecuniary damage conditional on the existence of a marital relationship. Family ties may arise not only from marriage or cognation, and the death of a breadwinner may cause damage not only to the spouse or blood relatives, but also to other family members.

The Presidium of the Regional Court quashed the Regional Court’s initial judgment of 14 June 2002 in the part concerning non-pecuniary damage compensation and remitted this part of the claim for a new examination to the District Court.\(^{53}\) The District Court “found that the applicant had incurred non-pecuniary damage because of the death of her partner” and “stressed that the law does not confine the possibility of receiving compensation for non-pecuniary damage to the persons in a registered marriage.”\(^{54}\)

Thus, though there is still no wide recognition of cohabitation in the post-Soviet jurisdictions, in some of the countries the first steps in this direction have been taken either in legislation or in judicial practice when the courts had to react to the social reality.

5. Divorce by Consent and Fault-based Divorce

The abolition of a simplified administrative divorce procedure for cases where there is mutual consent between the spouses and where there are no common children, the introduction of fault-based divorce, and, in general, a more restrictive approach to divorce regulation in some of the post-Soviet European countries marked a complete departure from the relatively liberal Soviet model of divorce law. It took its most comprehensive form in Latvian and Lithuanian legislation.

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\(^{49}\) *S. Zakharov, The Most Recent Trends of Formation of the Family in Russia, op. cit.*

\(^{50}\) *Gavrikova v. Russia* (Application no. 42180/02). ECHR, Judgment of 15 March 2007 (Final 15/06/2007).


\(^{52}\) Sverdlovsk Regional Court.

\(^{53}\) Zarechnyi District Court.

\(^{54}\) *Gavrikova v. Russia, op. cit.*, paras. 14-15.
In accordance with the amendments to the Latvian Civil Law adopted in 2002, Latvian divorce law is based on the concept of the breakdown of marriage. These amendments made Latvian divorce law more consistent than it was under the 1992 version of the Civil Law.55 At present in Latvia, marriage is considered to have been broken down if the spouses no longer cohabit and if there is no prospect that they will renew cohabitation (s. 71). A marriage is presumed to have been broken down if the spouses have lived apart for at least three years (s. 72). In such a case it is possible to obtain a divorce order even if the other spouse does not consent to divorce.

If the spouses have been separated for less than three years, the marriage may be dissolved only in three cases (s. 74), namely when:

1) the continuation of the marriage for the spouse who has requested the dissolution of the marriage is not possible due to reasons that are dependent upon the other spouse and due to which cohabitation with him or her would be intolerable cruelty towards the spouse who has requested the dissolution of the marriage;

2) both spouses request the dissolution of the marriage or one spouse consents to the request of the other spouse for the dissolution of the marriage; or

3) one of the spouses has commenced cohabitation with another person, and in such cohabitation a child has been born or the birth of a child is expected.

The law expressly forbids dissolution of a marriage before the three-year separation period has expired if the other spouse does not consent to divorce and none of the reasons for divorce fits one of the three scenarios specified above (s. 75). More than that, the court shall not dissolve a marriage, even though it has broken down, if “the preservation of the marriage as an exception due to special reasons is necessary in the interests of the minor children born in the marriage” (s. 76). Similarly, the court shall not dissolve a marriage if all divorce-related issues (custody and maintenance of children born in the marriage, division of common property, etc.) have not been solved before the dissolution of the marriage and are not raised simultaneously with divorce application (s. 77).

The Latvian Civil Law does not use the term “fault” with regard to divorce or its consequences. However, in accordance with fault-based divorce logic, Latvian law says that upon application of one of the spouses, a court may prohibit the other spouse who has promoted the breakdown of the marriage to use the surname acquired in marriage after divorce, if it does not affect the interests of the child (s. 82). Another divorce-related consequence that may have fault-based implications is post-divorce spousal maintenance. Under the 2002 version of the Civil Law, the perception of the respective provision has been changed from a negative to a positive one. Thus, according to the initial text of s. 82, a former spouse who by his or her actions “promoted the disintegration of the marriage” would lose the right to be supported by the other spouse. Now the appropriate provision (s. 80) is expressed in a more gentle manner; and the right to claim maintenance is also conditioned on the financial status of each of the ex-spouses: “…a former spouse may claim means from the other former spouse commensurate with his or her financial state if the latter by his or her

actions has promoted the breakdown of the marriage and the means are necessary to ensure or maintain the previous level of welfare”.

Lithuanian divorce law represents a more sophisticated approach. It differentiates between divorce by mutual consent of the spouses, divorce on the application of one of the spouses, and divorce through the fault of one of the spouses. In this respect, it resembles the French divorce reform of 1975, which was described as establishing “divorce à la carte”.56

The Code permits divorce by mutual consent under a simplified procedure, provided one year has elapsed from the moment of the marriage, the spouses made a contract regarding all the consequences of the divorce (both property and child-related), and both of the spouses have full legal capacity (s. 3.51). However, there is still no “automatic” divorce even if there is mutual consent between the spouses regarding the divorce itself and all divorce-related issues. The spouses must indicate in their mutual application for divorce the reasons for the breakdown of their marriage. The court will issue a divorce order “if it is satisfied that the marriage has been broken down irretrievably” (s. 3.53). Separation “from board and bed”, to use the old expression, for over a year makes divorce much easier as it serves as a statutory presumption that a marriage has irretrievably broken down.

Divorce on the application of one of the spouses is designed for those cases when there are no fault-based grounds for divorce and the spouses do not apply for divorce by mutual consent. For this type of divorce the Code establishes a simplified procedure too. The cases that meet the requirements of this type of divorce are as follows (s. 3.55):

1) The spouses have been separated for over one year.
2) One of the spouses, after the conclusion of the marriage, has been declared legally incompetent by the court.
3) One of the spouses has been declared missing by the court.
4) One of the spouses has been imprisoned for over a year for a non-premeditated crime.

However, the Code also contains what may be called “a hardship clause” that may prevent the spouses from divorcing even after a one-year separation: the court, taking into consideration the age of one of the spouses, the duration of the marriage, and the interests of minor children may refuse to grant a divorce decree “if the divorce may cause significant harm to the property and non-property interests of one of the spouses or their children” (s. 3.57 (3)).

The fault-based grounds for divorce are traditional: a serious breach of family or matrimonial duties must occur, namely if a spouse committed adultery, or has been violent towards the other spouse or family members, or has deserted the family for over one year, or has been convicted of a premeditated crime (s. 3.60). The court may find that both spouses are at fault for the breakdown of their marriage. In such a case, the same consequences as in divorce by mutual consent will follow.

The “classical” fault-based approach to divorce assumes that a spouse who was at fault is not entitled to receive support from another spouse after divorce, or the amount of support may be significantly reduced. Thus, in Lithuania in accordance with this approach, in case of divorce granted on the basis of fault the spouse at fault looses the rights of a divorcee under the law or even under the marriage contract, including the right to maintenance (art. 3.70 (1)).

56 See M.A. Glendon, op. cit., p. 162.
The Family Code of Moldova, though not having any provisions on fault-based divorce, nevertheless did introduce the fault idea into the rules on divorce-related consequences. It says that if the court established that a marriage had broken down through fault of one of the spouses, the court may release the other spouse from paying maintenance to the spouse at fault or restrict this duty by a certain period of time (even if a spouse claiming maintenance is in need) (s. 85-d). In addition, a spouse “not guilty” in divorce may ask the court to declare the property acquired by him or her when they lived separately to be his or her personal property (s. 20 (5)). The rule itself is not harsh, but the very fact of using the term “fault” is noteworthy.

Finally, in Ukrainian law where there is no fault-based divorce concept either and where the term “fault” is not used, the idea of guiltiness, nonetheless, exists. The Family Code says that a spouse who behaved badly in the marriage does not have the right to maintenance (s. 75 (5)).

Thus, the concept of fault, in some form or other, has effectively returned to family law on the post-Soviet European territory.

Commentators on Lithuanian divorce law reform interpret the introduction of fault-based divorce and fault-based divorce-related consequences as the logical continuation of the marriage=agreement concept. If marriage is a contract, then, as the logic suggests, a contract termination analogy is applicable. In other words, marriage, like any contract, may be terminated either by the parties’ consent or because of a breach of the contract’s obligations by one of the parties. In such a case the party at fault should be held liable and bear the negative consequences of the breach; while the non-guilty party is entitled to some compensation. What we see here is the conceptual transformation of fault-based divorce from matrimonial offence into the breach-of-contract theory.

Among the drafters of the Russian Family Code, there were also those who considered the contractual nature of marriage one of the key points in reforming divorce law, for instance, trying to draw a parallel between dissolution of a marriage without mutual consent to divorce and the “unilateral repudiation of a contract”. However, I would not go so far as to equate marriage with a contract. It is true that these days, in contrast with the former fault-based divorce times, at least under the law women are no longer subordinate to men. At present, spouses consider themselves rather autonomous individuals with equal rights. Their relationships in a contemporary egalitarian family more closely resemble a partnership, not so much a marital unity as it was understood in the old times. Indeed, the emancipation of women brings more civil law components into family relations. Nevertheless, it does not, in my opinion, transform marriage into a contract. Leaving aside a detailed analysis, I would just state that marriage is still a sui generis institution in which the parties’ consent (undoubtedly, an important contractual element) is one of the key points, yet not the only one.

Apart from that, introduction of fault-based divorce as a concept that is understood within the marriage=agreement theory does not explain the clear trend to make divorce harder on principle.

57 See S. Keserauskas, op. cit., p. 331.
59 In Russian Law XVIII the concept of marital unity was embodied in a statement: “Husband and wife are one body. The husband is the head of the wife”. See, for instance, K.P. Pobedonostsev, The Course of Civil Law (Kurs grazhdanskogo prava), vol. 2, reprint of the 1896 edition, Moscow: Garant, 2003, p. 110. It is similar to W. Blackstone’s landmark definition of marital unity as the husband and wife being “one person in law”. See Blackstone’s Commentaries on the Law, from the abridged edition of Wm. Hardcastle Browne, Washington Law Book Co., Washington, D.C., 1941, p. 189.
In this regard, it is evident that the aim of divorce reform was not only to reintroduce the fault grounds, but also to make the divorce procedure itself more complicated. It aimed to have a “preventive and educative effect on society”. Particularly, it was one of the goals that the drafters of the Lithuanian Code set by making divorce more difficult to achieve and the consequences for the guilty party harsher. However, as to whether this may prevent people from divorcing and promote stability in the family, I share the skepticism expressed by Lithuanian scholars.60

In contrast with the Latvian and Lithuanian laws, the goal of the Russian family law reform of 1995 regarding divorce was to give more freedom to spouses involved in divorce proceedings and to simplify the divorce procedure, provided there was mutual consent between the spouses. At the same time, in order to give more securely protect the rights of the children involved in their parents’ divorce, it was necessary to put child-related matters in divorce proceedings under the strict control of the court. With this aim, the law stipulates that when there is no dispute between the spouses regarding the divorce itself, the court dissolves the marriage without ascertaining the reasons for divorce.61 If, however, the divorcing spouses did not come to an agreement on their child(ren)’s residence and maintenance62 or do not raise these issues during court proceedings, the Code obliges the court, when issuing a divorce decree, irrespective of the type of divorce procedure (i.e., whether there is mutual consent or not), to raise child-related questions of its own motion. Many other post-Soviet jurisdictions followed the divorce model suggested in the Russian Family Code with minor changes or no changes at all.63

6. Divorce and Separation

The introduction of legal separation in Lithuania and Ukraine confirm the Russian saying that roughly translates as “new things are old things long forgotten”. Fifteen years ago it would have been hard to imagine that the institution of separation as an alternative to divorce for couples who do not want to live together any longer would become topical again and would be included in active law on post-Soviet territory.

Most likely, if the divorce procedure had not become more difficult, for instance as is the case in Lithuania, there would have been no need for legal separation as an institution complementary to the dissolution of marriage by divorce.64 To a certain extent that is probably true for Lithuania. With regard to Ukrainian law, a feasible explanation must be sought elsewhere, as here, along with a relatively simple divorce procedure and no fault-based grounds, the Family Code stipulated the possibility for spouses to establish a regime of separation. If a legal separation is established by the court, under art. 120 of the Ukrainian law, property subsequently acquired by each of the spouses “is not deemed to be property acquired in the marriage”, “a child born by the wife after ten months is not deemed to be affiliated to her husband”, and “the wife and the husband may adopt a child without the consent of each other.” Thus, Ukrainian law attributes essentially the same legal

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60 See S. Keserauskas, op. cit., p. 331-332.
61 If the spouses have no common children they may dissolve their marriage in a simplified administrative procedure.
62 There is no concept of custody in the majority of post-Soviet European countries, Russia including. For more details, see O.A. Khazova, Allocation of Parental Rights and Responsibilities after Separation and Divorce under Russian Law, 39 Family Law Quarterly, no. 2, 2005, p. 373 et seq.
63 See, for instance, Chapter 7 of the Moldova Family Code, Chapter 2 of Book 5 of the Georgian Civil Code, and Chapter 6 of the Belarus Code on Marriage and the Family.
64 See S. Keserauskas, op. cit., p. 328.
consequences to separation as it does to divorce, with the exception that separation does not allow the separated spouses to enter another marriage.

Most probably, the revival of legal separation should be attributed to several interconnected considerations, with the increase of the role of the church in post-Soviet society being one of the decisive factors. In this respect, legal separation does offer a real option to those who for different reasons (but predominately of a religious nature) do not consider divorce acceptable.

7. Concluding Remarks

Given the great variety of reforms in post-Soviet family law, at first it seems impossible to systemize them at all. The drafters of new family laws were most probably driven by three underlying, and sometimes contradictory, motivations. These three motivations influenced the drafters to different degrees and, accordingly, revealed themselves differently in the post-Soviet family law reforms due to divergent political, historical and cultural circumstances. This fact to a significant extent explains the diversity of legal concepts and legal approaches incorporated into the new laws and the apparent impossibility of their systematization.

Firstly, for what were most likely purely political reasons, the drafters of the new family laws tended to reject the old Soviet legislation, regardless of its value, of its being good or bad. There were also objective reasons for the reconsideration of Soviet family law: as has been pointed out, many of the old rules were outdated and did not correspond to the new order that was established in the countries released from the restraints of the Soviet regime.

The second motivation that can be said to have guided legal drafters in the post-Soviet European countries was to consider restoring the law or some of the legal concepts that were in force before their annexation as far as such restoration made sense. It first and foremost concerned those countries that became part of the Soviet Union around 1940. A good example is Latvia, which re-enacted the Civil Law of 1937, the drafting of which, in the opinion of the Latvian Minister of Justice, “was guided by the latest trends in the civil law of the time in continental Europe”.65 In Estonia restoration of some of the concepts and ideas of the draft Civil Code of 1940 has been widely discussed in connection with the “next round” revision of the Family law.66

A third motivation can be traced to the need to follow recent European trends of family law. Globalization and the internationalization of family law required European drafters of national law to aim for consistency with international instruments and international practice, in particular, to be in line with the UN Convention on the Rights of the Child,67 and to meet the European standards established in the European Convention for the Protection of Human Rights and Fundamental Freedoms. I would be so bold as to assume that, if Russia had joined the Council of Europe by the time when the draft Family Code had been worked out, the influence of European law on Russian family law would have been more profound and many of the Code’s provisions would have been more in line with the European trends.68 For those countries that planned to join the European Union, conformity with EU law was of particular importance. Many of the French, Dutch, German, Italian, Swedish, and even English family law provisions served as examples for the new, post-Soviet family laws. Most of the new

66 See K. Kullerkupp, Statutory Marital Property Law de lege lata and de lege ferenda, op. cit., p. 82. See also supra, n. 40.
68 The Russian Federation joined the Council of Europe in 1996 and ratified the ECHR in 1998.
provisions seemed to fit in well with the national legislations, notwithstanding some practical “transplantation” difficulties.69

It may be wondered whether, despite the diversity in legal regulation, it is possible to identify the main trend in post-Soviet European family law. At first glance, it might seem that, bearing in mind the departure of some of the countries from what has been generally interpreted as liberal family law concepts, the development observed in the field of family law on the post-Soviet European territory challenges H. Willekens’s statement that “when change occurs the direction is always the same”.70 However, despite this variety and the distinctly conservative tone of some of the laws, movement towards Western models is evident, or at least its main direction is predictable. Perhaps, this movement is not as fast as might be expected, nor does it necessarily look like movement in all areas of family law. It is also not always straightforward – due to the peculiarities of mostly political, but also social and economic conditions, but the movement does indeed exist, and the direction is obvious. To move their family law forward, some of the post-Soviet jurisdictions had to start from the point where their development had been “interrupted”. This fact to a significant extent explains why some of the post-Soviet family laws have an openly conservative tone. Having thrown away the liberal Soviet family law as part of the Soviet heritage,71 these countries picked up where they left off, some 50 to 60 years ago, in pre-Soviet times. Now, they have a long march ahead of them to the advanced stage of development most of the European family laws are currently in. Yet, the path that post-Soviet European countries are travelling has been well-trodden by Western states, and it is therefore likely that the newcomers’ journey time will be much shorter.

69 The Russian courts particularly resisted applying a Family Code provision borrowed from English law that required the court to deal with child-related consequences before issuing a divorce order (provided the parents were silent on this matter), because it made them exceed the petitioner’s claim and that contradicted Russian rules on civil procedure.


71 M. Antokolskaia, Harmonisation of Family Law in Europe, op. cit., p. 271.