

## DIFFERENT SCENARIOS OF IMPROPER DE FACTO UNION DUE TO IMPEDITION OF BOND: LEGAL ANALYSIS OF A COMPLEX SOCIAL REALITY

Luis Carlos Ávila Stagg<sup>1</sup>, Nohely Alejandra Zambrano Muñoz<sup>2</sup>

<sup>1</sup>Maestría en Derecho de Empresas. Universidad Católica de Santiago de Guayaquil, Guayaquil, Ecuador. Correo institucional, ORCID: 0009-0003-8064-0373

<sup>2</sup>Docente de la carrera de Derecho. Universidad Estatal de Milagro, Milagro, Ecuador. Correo institucional, ORCID: 0009-0007-1834-5196

luis.avila@cu.ucsg.edu.ec<sup>1</sup>  
nzambranom11@unemi.edu.ec<sup>2</sup>

### Abstract

Improper de facto unions represent a complex legal concept that arises when one or both members of a de facto couple maintain a previous, undissolved marital bond, preventing legal recognition of their current relationship. This article analyzes the various scenarios in which this institution manifests itself, from the perspective of impediment to a bond, examining the solutions adopted in different legal systems and the challenges posed by the protection of the rights of the individuals involved, especially those acting in good faith. This study adopts a qualitative approach to legal research, using the comparative method to analyze the different normative and jurisprudential approaches to the problem of improper de facto unions. Documentary analysis of primary sources (legislation, jurisprudence) and secondary sources (specialized doctrine) from several Latin American countries is employed. The research is structured around the analysis of paradigmatic cases identified in Mexican, Brazilian, and Peruvian jurisprudence, contrasting them with the Ecuadorian regime, where these unions lack legal protection. The hermeneutic method is used to interpret normative texts, and critical analysis is used to evaluate the solutions proposed in each legal system. Three main scenarios are identified: the persistence of marriages with community of life (parallel families), the persistence of marriages without community of life, and cases where a previously recognized de facto union exists. The study reveals the need to develop more flexible regulatory frameworks that recognize contemporary social reality and protect the fundamental rights of people in vulnerable situations, considering criteria of good faith and equity.

**Keywords:** improper common-law union, impediment to a marriage bond, parallel families, family law, legal protection

### 1. Introduction

The evolution of family structures in the twenty-first century has posed new challenges to traditional family law. Among these, the improper de facto union emerges as a social reality that requires specialized legal attention. This figure is configured when one or both people who are in a common-law relationship have a previous undissolved marital bond, which prevents the legal recognition of their current union (Oliva Gómez, 2022). The problem transcends the merely legal sphere to become a matter of fundamental rights, especially when considering the protection of the most vulnerable part of the relationship, generally the woman, who may be left unprotected due to the impossibility of accessing the legal benefits derived from the recognition of the de facto union (Rubio Rufino, 2022).

In Ecuador, as in other countries in the region, current legislation establishes as a fundamental requirement for the recognition of the de facto union that both people be "free of the marriage bond" (Constitution of the Republic of Ecuador, 2008, art. 68). This requirement, although understandable from the perspective of the protection of

marriage as an institution, generates situations of inequity and lack of protection that deserve an in-depth analysis.

The objective of this study is to examine the different scenarios in which the improper de facto union is manifested due to impediment of bond, analyzing the solutions adopted in comparative law and evaluating the legal protection alternatives available to people affected by this situation.

## **2. Theoretical and Conceptual Framework**

### **2.1 Concept of Improper De Facto Union**

An improper de facto union is defined as a cohabitation relationship that, meeting the material requirements of stability, singularity and permanence typical of a de facto union, cannot access legal recognition due to the existence of a dirimental impediment, specifically the subsistence of a previous marital bond of one or both cohabitants (Pérez Contreras, 2010).

This figure is distinguished from the de facto union itself precisely because of the absence of one of the fundamental legal requirements: to be free of a marriage bond. However, from the factual point of view, it can present all the characteristics of a true community of life, including permanent coexistence, mutual assistance, procreation and the shared life project (Varsi Rospigliosi, 2011).

### **2.2 Legal Grounds for Impediment of Bond**

The impediment of attachment is based on the principle of monogamy that governs Western legal systems. This principle, inherited from the Roman-canonical tradition, establishes that a person cannot simultaneously maintain two legal ties of a matrimonial nature (Cornejo Chávez, 1984).

The protection of marriage as a fundamental institution of society has led legislators to establish this requirement as a sine qua non condition for the recognition of de facto unions. However, this absolute protection can generate situations of injustice when it is applied rigidly without considering the particular circumstances of each case (Barrientos Grandón, 2008).

### **2.3 Typology of Scenarios**

Improper de facto union can manifest itself in various scenarios, each with specific characteristics and legal implications:

1. **Subsistence of the marriage with community of life:** When the cohabitant simultaneously maintains marital life with his spouse and with his common-law partner (parallel families).
2. **Subsistence of the marriage without community of life:** When there is de facto separation of the spouse, but the matrimonial legal bond subsists.
3. **Previous undissolved de facto union:** When one of the cohabitants has a previous de facto union recognized but not formally terminated.

## **3. Analysis of the Scenarios of the Improper De Facto Union**

### **3.1 Parallel Families: The Case of Matrimonial Subsistence with Community of Life**

Parallel families represent the most complex scenario of improper de facto union. They are configured when a person simultaneously maintains stable relationships with two or more partners, generally without them knowing the existence of the others (Chaves, 2008).

In Brazil, jurisprudence has developed different interpretative currents regarding this problem. The conservative current denies any recognition of parallel unions, arguing

that they violate the principles of fidelity and monogamy. The intermediate current admits only putative parallel unions, where one of the parties is unaware of the existence of the other relationship. Finally, the liberal current advocates the recognition of all parallel relationships, arguing that the lack of recognition only benefits those who act in bad faith (Rodrigues Rendwanski, 2012).

An emblematic case in Brazil involved a man who maintained three parallel stable unions, where apparently the women were unaware of the existence of the others, each one had procreated offspring and all the relationships had begun simultaneously. Brazilian jurisprudence began to apply the legal consequences derived from the state of companionship when the free partner was unaware of the marital impediment of the other, resorting by analogy to the putativity of marriage (Matte Russomanno, 2016).

### **3.2 De Facto Separation without Dissolution of the Marriage Bond**

This scenario, more frequent in practice, especially in countries with a high level of migration abroad, occurs when a person separated de facto from his or her spouse begins a new cohabitation relationship without having formally dissolved his or her previous marriage. The separation may have occurred for various reasons: abandonment of the marital home, migration, lack of interest in processing the divorce, or practical impossibility of accessing marriage dissolution procedures (Castro Avilés, 2014).

Ecuadorian jurisprudence has been consistent in strictly applying the impediment of bond. In the case resolved by the National Court of Justice (Judgment No. 157-2012), the situation of a couple who had been living together since 1984 was discussed, but the defendant had a marriage bond that was not dissolved until 1998. The court recognized the de facto union only after the dissolution of the previous marriage, ignoring the previous fourteen years of cohabitation (National Court of Justice, 2012).

This rigidity contrasts with the solutions adopted in other legal systems. For example, in Peru, the legislation protects the member of the couple who is not united in a previous marriage bond, provided that the community of property formed in the conjugal union has been broken (Zuta Vidal, 2018). This solution recognizes that the de facto dissolution of the marriage may justify the protection of the new cohabitation relationship.

### **3.3 The Mexican Paradigm: Protection of the Vulnerable**

Mexican jurisprudence has developed innovative criteria to address the problem of improper unions, privileging the protection of the vulnerable party over the rigid application of formal requirements.

In the Direct Amparo in Revision 230/2014, the Supreme Court of Justice of the Nation faced the case of a couple who lived together for 40 years and had five children, but the man was married to someone else. When the woman fell ill with cancer and was abandoned, she requested alimony from her ex-partner, who alleged the non-existence of concubinage due to the impediment of the bond (Supreme Court of Justice of the Nation, 2014).

The Court ruled that families made up of unmarried couples who live together in a constant and stable manner, based on bonds of solidarity, affection and mutual help, are also subject to the constitutional right to family protection. It established that people who are part of family unions with these characteristics have the right to benefit from the minimum protections provided for in family law, such as alimony obligations, regardless of compliance with formal requirements (Supreme Court of Justice of the Nation, 2014).

A subsequent case (Direct Amparo in Review 3727/2018) deepened this line of jurisprudence. The First Chamber determined that requiring a specific marital status to

recognize concubinage constitutes a distinction based on a suspicious category that hinders the exercise of rights, contrary to the principles of equality and non-discrimination. The Court stressed that, due to the structural inequality that exists for reasons of gender, women are often victims of this type of discrimination (Supreme Court of Justice of the Nation, 2018).

### **3.4 Legal Protection Alternatives**

Given the rigidity of the Ecuadorian system, various authors have proposed alternatives for the protection of persons in improper de facto unions:

#### **3.4.1 De Facto Partnership**

A first alternative consists of the recognition of a de facto partnership between the cohabitants, which allows the liquidation and equitable distribution of the assets accumulated during cohabitation. This figure, recognized in several legal systems, is based on the presumption that both parties have contributed to the formation of the common patrimony (Fernández Arce & Bustamante Oyague, 2000).

#### **3.4.2 Unjust enrichment**

Another alternative lies in the application of the doctrine of unjust enrichment, which would allow the injured party to claim compensation for their contribution to the couple's assets, preventing one of the parties from unfairly benefiting from the work or resources contributed by the other (Salinas Fuenzalida, 2015).

#### **3.4.3 Putative De Facto Union**

Following the model of some countries, the figure of the putative de facto union could be recognized, which would produce limited legal effects when one of the parties was unaware in good faith of the existence of the impediment of the bond. This solution would protect those who acted in good faith without completely eliminating the legal requirement (Pereira da Silva, 2018).

## **4. Comparative jurisprudential analysis**

### **4.1 The Ecuadorian Approach: Regulatory Rigidity**

Ecuadorian jurisprudence has been characterized by a strict application of the legal requirements for the recognition of de facto unions. The National Court of Justice has established that "for the de facto union to end, with the cause of the death of one of the cohabitants, it is necessary that this union has been declared as existing" (National Court of Justice, 2014).

This formalistic interpretation has led to situations where couples who have lived together for decades cannot access any type of legal protection if one of them maintains an undissolved marital bond, regardless of the particular circumstances of the case.

### **4.2 The Brazilian Evolution: Towards Gradual Recognition**

Brazil has undergone significant jurisprudential developments in the treatment of improper unions. Initially, the jurisprudence denied any recognition of these relationships. However, the doctrine of putative stable union has progressively developed, which allows certain legal effects when one of the parties acts in good faith (Chaves, 2008).

The Brazilian Supreme Court has recognized that "without recognizing the parallel relationship as a family entity, jurisprudence began to apply, in the specific case, the legal consequences derived from the state of companionship if the free partner is unaware of the marital impediment of the other" (Matte Russomanno, 2016).

### **4.3 Peruvian Innovation: Conditional Protection**

The Peruvian model presents an intermediate solution that deserves attention. Peruvian legislation protects the member of the couple who is not united in a previous marital

bond, provided that the community of property formed in the previous conjugal union has broken down (Rodas Quintana, 2018).

This approach recognizes that the de facto dissolution of the marriage, even if it has not been legally formalized, can justify the protection of the new cohabitation relationship, especially in its patrimonial aspects.

## **5. Gender Impact and Vulnerability**

### **5.1 The Gender Dimension in Improper Unions**

The problem of improper de facto unions has a marked differential impact by gender. Statistics and case studies reveal that women are, in most cases, the most affected by the lack of legal recognition of these unions (Deere et al., 2014).

This situation is aggravated by cultural patterns that normalize the existence of "two households" on the part of men, while women tend to dedicate themselves to the care of the home and children, leaving them in a situation of particular economic vulnerability when the relationship ends or when their partner dies (Supreme Court of Justice of the Nation, 2018).

### **5.2 Patrimonial Violence and Lack of Protection**

The impossibility of accessing the legal recognition of the de facto union can constitute a form of patrimonial violence, especially when one of the parties knowingly uses the impediment of the bond to avoid assuming economic responsibilities towards his partner (Deere et al., 2014).

This situation is particularly serious in contexts where access to justice is limited or where divorce proceedings are costly or complex, perpetuating situations of lack of protection that disproportionately affect women and the most vulnerable socioeconomic sectors.

## **6. Reform Proposals and Legal Alternatives**

### **6.1 Towards a Graduated Protection System**

Comparative experience suggests the need to develop a graduated protection system that recognizes different levels of rights according to the specific circumstances of each case. This system could include:

1. **Full recognition:** For unions where both parties are free of marital bond.
2. **Limited recognition:** For unions where a party acts in good faith and is unaware of the impediment.
3. **Basic patrimonial protection:** For all unions that meet the material requirements of cohabitation, regardless of the formal impediment.

### **6.2 Good Faith and Proportionality Criteria**

A fundamental element in any reform must be the incorporation of criteria of good faith and proportionality in the evaluation of each case. This would allow people who have acted in good faith to be protected, while maintaining incentives for the formalization of relationships (Plácido, 2001).

Good faith could be evaluated by considering factors such as knowledge or lack of knowledge of the impediment, the duration of cohabitation, the existence of common children, and the legitimate expectations generated in the relationship.

### **6.3 Strengthening Existing Legal Alternatives**

While comprehensive legislative reforms are being developed, it is possible to strengthen the application of existing legal concepts that can provide some protection to affected parties:

- **Unjust enrichment:** For cases where one party has contributed significantly to the other's estate.
- **Business Management:** For situations where one party has managed the other's assets or business.
- **Civil liability:** For cases where the concealment of the impediment constitutes compensable damage.

## 7. Challenges and Limitations

### 7.1 Tension between Legal Stability and Material Justice

The regulation of improper de facto unions poses a fundamental tension between the need to maintain the stability and predictability of the legal system and the imperative to achieve fair results in particular cases (Prieto Sanchís, 2016).

Excessive relaxation of requirements could erode the institution of marriage and generate legal uncertainty, while absolute rigidity can produce inequitable results that violate fundamental rights.

### 7.2 Evidentiary complexity

The recognition of legal effects to improper unions poses complex evidentiary challenges. Determining the good or bad faith of the parties, the effective duration of cohabitation, and the real contribution of each party to the common heritage requires clear evidentiary standards and efficient procedures (Castro Avilés, 2014).

### 7.3 Risk of Instrumentalization

There is a risk that too broad a recognition of improper unions could be exploited by people who seek to evade the responsibilities derived from marriage or benefit financially from occasional relationships (Cornejo Fava, 2000).

## 8. Future Prospects and Emerging Trends

### 8.1 Towards a More Inclusive Family Law

Contemporary trends in family law point towards a broader recognition of the diversity of family forms and greater protection of people's fundamental rights, regardless of the formalization of their relationships (Herrera & Pérez Gallardo, 2023).

These developments suggest that legal systems will need to develop more flexible and adaptive regulatory frameworks that can respond to the complexity of contemporary family relationships.

### 8.2 Impact of Human Rights

International human rights standards are exerting an increasing influence on the interpretation of national family law. The Inter-American Court of Human Rights has established that "the family can be constituted by legal or de facto ties" and that the State must protect the diversity of family configurations (Inter-American Court of Human Rights, 2017).

### 8.3 Technology and New Challenges

Technological development is creating new challenges for family law, including the need to regulate long-distance relationships, transnational families, and new forms of communication and cohabitation that can influence the configuration of de facto unions.

## 9. Conclusions

The analysis of the different scenarios of the improper de facto union due to impediment of bond reveals the complexity of this legal institution and the urgent need to develop more comprehensive and adaptive regulatory frameworks.

Comparative experience shows that it is possible to find balanced solutions that protect people's fundamental rights without completely eroding traditional legal institutions. The Mexican, Brazilian, and Peruvian models offer valuable alternatives that could be adapted to the Ecuadorian context.

The gender dimension of this issue requires particular attention, given that women are disproportionately affected by the rigidity of current regulatory systems. The incorporation of criteria of good faith, proportionality and protection of the vulnerable party must be central to any reform.

It is essential that family law evolves to recognize the contemporary social reality, characterized by a growing diversity of family and relational forms. This does not imply abandoning the fundamental principles of the legal system, but rather developing more sophisticated and context-sensitive instruments that allow fair results to be achieved in particular cases.

Improper de facto union should not be seen as a legal anomaly, but as a manifestation of the complexity of human relations that requires equally sophisticated legal responses. Only through a constructive dialogue between legal dogma, social reality and fundamental rights will it be possible to develop truly effective solutions to this problem.

The way forward requires not only legislative reforms, but also a paradigm shift in judicial interpretation that privileges substance over form and the protection of fundamental rights over the mechanical application of formal rules. In this process, academia, the judiciary and the legislature must work together to build a fairer, more inclusive family law that is adapted to the needs of contemporary society.

## References

- Barrientos Grandón, J. (2008). *De facto unions. Legislation, doctrine and jurisprudence*. Lexis-Nexis.
- Castro Avilés, E. F. (2014). *Legal and jurisprudential analysis of the de facto union*. Academy of the Magistracy.
- Chaves, M. (2008). Parallel families. En M. B. Dias & J. Duarte Pinheiro (Eds.), *Escritos de Direito das Famílias: uma perspectiva luso-brasileira* (pp. 45-68). Magister Editores.
- Constitution of the Republic of Ecuador. (2008). Official Gazette No. 449.
- Cornejo Chávez, H. (1984). Family and Law. *Revista de la Universidad Católica*, 15-16, 27-54.
- Cornejo Fava, M. T. (2000). The de facto union: a solution for undue enrichment. *Ius et Praxis*, 31, 133-141.
- Inter-American Court of Human Rights. (2017). *Advisory Opinion No. OC24/17*. [https://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_esp.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf)
- National Court of Justice. (2012). *Trial No. 157-2012*. Specialized Room for Family, Children and Adolescents.
- National Court of Justice. (2014). *Resolution No. 234-2014, Judgment No. 143-2014*. Room for the Family, Childhood, Adolescence and Adolescent Offenders.
- Deere, C. D., Contreras, J., & Twyman, J. (2014). Gender, marital status and the accumulation of assets in Ecuador: a look at patrimonial violence. *Eutopia: Journal of Territorial Economic Development*, 5, 93-119.
- Fernández Arce, C., & Bustamante Oyague, E. (2000). The De Facto Union in the Peruvian Civil Code of 1984: Analysis of its Legal Conceptualization from the Exegetical and Jurisprudential Perspective. *Law & Society*, 15, 221-239.

- Herrera, M., & Pérez Gallardo, L. B. (2023). *Contemporary Family Law. Advances and tensions in the Argentine Civil and Commercial Code and the Cuban Family Code* (Second part). Editores del Sur.
- Matte Russomanno, F. (2016). Parallel families and asset sorting. *RJLB*, 1, 55-92.
- Oliva Gómez, E. (2022). New family typologies: their urgent recognition in legal systems. *Actualidad Jurídica Iberoamericana*, 17, 2354-2377.
- Pereira da Silva, R. (2018). *Parallel families: recognition and patrimonial implications*. Faculty of Athens.
- Pérez Contreras, M. M. (2010). *Family and inheritance law*. Nostra Ediciones.
- Plácido, A. (2001). *Manual of Family Law* (1st ed.). Legal Gazette.
- Prieto Sanchís, L. (2016). *Notes on the Theory of Law*. Editorial Trotta.
- Rodas Quintana, C. A. (2018). The legal effects on parallel families. Legislative proposal in the family code of Peru. *Revista Científica Epistemia*, 1, 85-102.
- Rodrigues Rendwanski, M. (2012). *The legal concept of family from the plurality of figures existing in the current Brazilian system*. Federal University of Rio Grande do Sul.
- Rubio Rufino, I. L. (2022). Unions: marriage and concubinage. In S. C. Treviño Fernández & A. M. Ibarra Olguín (Eds.), *Curso de Derecho de Familia* (pp. 47-98). Supreme Court of Justice of the Nation.
- Salinas Fuenzalida, S. (2015). *Unjust enrichment in quasi-contracts. Concubinage: evolution and jurisprudential trends*. Gabriela Mistral University.
- Supreme Court of Justice of the Nation. (2014). *Direct Amparo in Revision 230/2014*. First Chamber.
- Supreme Court of Justice of the Nation. (2018). *Direct amparo in revision 3727/2018*. First Chamber.
- Varsi Rospigliosi, E. (2011). *Treatise on Family Law: Marriage and Stable Unions*. Legal Gazette.
- Zuta Vidal, E. I. (2018). The de facto union in Peru, the rights of its members and pending challenges. *IUS ET VERITAS Journal*, 56, 186-198.