

# ENSURING EFFECTIVE PROTECTION OF FAMILY RELATIONS IN ALBANIA: COHABITATION REGULATION AND ITS IMPLICATIONS

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*This scientific paper aims to analyze the effective protection of family relations in Albania, specifically the regulation of cohabitation and its implications. The authors' interest in this topic stems from three main circumstances: a) the constantly increasing trend of couples choosing cohabitation instead of marriage; b) the inadequacy of the existing Albanian legal framework to regulate such family relations (the contract regulating the cohabitation in Albania seems to have limited practical use); c) Albania's aspiration for the accession to the EU requires a more specific regulation in this regard, in compliance with the EU legal framework. For these reasons, it is recommended that Albania should regulate cohabitation for registered partnerships through specific and detailed legislation, just like some EU countries have already done.*

*Key words: family relations; cohabitation; registered partnerships; ECtHR's jurisprudence*

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## 1. INTRODUCTION

In recent years, Albania, like other countries in the world, has experienced an increase in cohabitation. In modern times, couples worldwide seem to choose cohabitation over marriage for different reasons.

Since the 1960s, marriage rates in nearly all European countries have experienced a continuous decline.<sup>1</sup> That is also confirmed by recent studies which concluded that participants rejected marriage and wedding practices as old-fashioned and unequal, embracing civil partnership as representative of egalitarianism.<sup>2</sup> Other studies argue that the introduction of civil partnerships promotes the advancement of equality between same- and different-sex couples.<sup>3</sup> Unlike marriage, cohabitation relationships lack clearly defined norms concerning their personal and property rights. As a result, the rise in cohabiting couples<sup>4</sup> has prompted some legal systems, as will be discussed below, to develop new legal frameworks for cohabitation.

First, for the purposes of our paper, it is necessary to give the definition of cohabitation. Various countries treat cohabitation differently.<sup>5</sup> Intuitively, cohabitation refers to two adults living together in an intimate relationship

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<sup>1</sup> Klärner, A., *The low importance of marriage in eastern Germany – social norms and the role of peoples' perceptions of the past*, Demographic Research, vol. 33, art. 9, 2015, p. 240. DOI: 10.4054/DemRes.2015.33.9 (20 September 2024).

<sup>2</sup> Hayfield, N. et al., *Exploring Civil Partnership from the Perspective of Those in Mixed-Sex Relationships: Embracing a Clean Slate of Equality*, Journal of Family Issues, vol. 0 (0), 2023, p. 19. DOI: 10.1177/0192513X2311942 (20 September 2024). See also Jowett, A.; Peel, E., *A question of equality and choice: same-sex couples' attitudes towards civil partnership after the introduction of same-sex marriage*, Psychology & Sexuality, vol. 8, no. 1-2, 2017, p. 69. DOI: 10.1080/19419899.2017.1319408 (20 September 2024).

<sup>3</sup> Fenwick, H.; Hayward, A., *From same-sex marriage to equal civil partnerships: On a path towards 'perfecting' equality?* Child and Family Law Quarterly, vol. 30 no. 2, 2018, p. 97-120. Available at: <https://durham-repository.worktribe.com/output/1335996> (20 September 2024).

<sup>4</sup> Sánchez Gassen, N.; Perelli-Harris, B., *The increase in cohabitation and the role of union status in family policies: A comparison of 12 European countries*, Journal of European Social Policy, vol. 25 no. 4, 2015, pp. 431-449. DOI: 10.1177/0958928715594561 (24 September 2024).

<sup>5</sup> Hiekel, N.; Liefbroer, A.C.; Poortman, A.R., *Understanding Diversity in the Meaning of Cohabitation Across Europe*, European Journal of Population, vol. 30, 2014, p. 391. DOI:10.1007/s10680-014-9321-1 (24 September 2024).

that is not considered marital. However, in some legal systems, more precise definitions see cohabitation as an alternative form of marriage.<sup>6</sup>

Usually, *de facto* relationships differ from marriages and civil unions because they do not require any formal legal steps to start or end. On the other hand, a civil partnership is a legal relationship that can be registered by two people to grant their relationship legal recognition. In some countries, civil partnerships are available to both same-sex couples and opposite-sex couples.

Cohabitation may refer to heterosexual or homosexual couples. Legal recognition of same-sex relationships in Europe first started in the Nordic countries, with Sweden leading the way in 1987.<sup>7</sup> Numerous studies explore the discourses surrounding same-sex relationships, addressing a broad spectrum of discourse types and cultural contexts.<sup>8</sup>

In certain nations, cohabitation closely resembles marriage, whereas in others, it serves as more of a precursor to formalizing a marital union.<sup>9</sup> The negative impacts of insufficient institutionalization of unmarried cohabitations affect more the weaker partner, who is often a woman.<sup>10</sup> The safeguarding of the family, recognized as fundamental to society, is affirmed in international

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<sup>6</sup> Ryznar, M.; Stępień, A., *The Legal Framework of Cohabitation: Toward Greater Recognition*, in Mary Daly, and others (eds), *The Oxford Handbook of Family Policy Over The Life Course* (2023; online edn, Oxford Academic, 23 Feb. 2023), DOI: 10.1093/oxfordhb/9780197518151.013.22 (20 September 2024).

<sup>7</sup> Scherpe, J. M., *The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights*, *The Equal Rights Review*, vol. 10, 2013, p. 83. Available at: [https://www.equalrightstrust.org/ertdocumentbank/ERR10\\_spl.pdf](https://www.equalrightstrust.org/ertdocumentbank/ERR10_spl.pdf) (20 September 2024).

<sup>8</sup> Kania, U., *Marriage for all ('Ehe fuer alle')?! A corpus-assisted discourse analysis of the marriage equality debate in Germany*, *Critical Discourse Studies*, vol. 17, no. 2, 2020, p. 139. DOI: 10.1080/17405904.2019.1656656 (20 September 2024).

<sup>9</sup> Blom, N.; Perelli-Harris, B.; Wiik, K. A., *Relationship quality and family formation in Europe*, *Advances in Life Course Research*, vol. 55, 2023, 100527, p. 3. DOI: 10.1016/j.alcr.2023.100527 (20 September 2024).

<sup>10</sup> Perdoch Sladká, D., *Marital plans and partnership transitions among German opposite-sex couples: Couple agreement and gender differences*, *Demographic Research*, vol. 49, Article 39, 2023, pp. 1087-1116. DOI: 10.4054/DemRes.2023.49.39 (20 September 2024).

instruments such as Articles 8<sup>11</sup>, 12<sup>12</sup>, and 14<sup>13</sup> of the European Convention on Human Rights (ECHR). In Albania, this protection is further guaranteed by Article 53<sup>14</sup> of the Albanian Constitution (AC) and the general principles of the Albanian Family Code (AFC).<sup>15</sup>

The fact that heterosexual couples still cannot form civil partnerships, even after the introduction of gender-neutral marriage, violates Articles 8 and 14 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>16</sup>

Article 53 of the AC guarantees the right to have a family as an independent and distinct right from the right to marry. Nonetheless, the question is whether this right is effectively guaranteed in practice.

Given these premises, this paper addresses the following questions: a) when guaranteeing the right to family life, are married couples and registered partners treated equally?; b) does the current Albanian legal framework fully guarantee the rights and obligations of cohabiting partners, including homosexual partners?; c) is contractual autonomy sufficient to effectively guarantee the right to have a family, as guaranteed by marriage regulations, in compliance with Article 8 of the ECHR? The European Court of Human Rights' jurisprudence (ECHR)

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<sup>11</sup> Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>12</sup> Right to marry. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

<sup>13</sup> Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

<sup>14</sup> 1. Everyone has the right to marry and form a family. 2. Marriage and family enjoy special protection by the state. 3. The formation and dissolution of marriage are regulated by law.

<sup>15</sup> Kodi i Familjes, Ligj nr. 9062/2003 i ndryshuar [Albanian Family Code, Law no. 9062/2003], Fletorja Zyrtare e Republikës së Shqipërisë nr. 49, 20.06.2003, e ndryshuar [Official Gazette of the Republic of Albania no. 49, 20.6.2003, as amended].

<sup>16</sup> Draghici, C., *Equal Marriage, Unequal Civil Partnership: A Bizarre Case of Discrimination in Europe*, Child and Family Law Quarterly, vol. 29 no. 4, 2017, pp. 313-334. Available at: <https://openaccess.city.ac.uk/id/eprint/18517/> (20 September 2024).

and the issues that arise in practice in the Albanian context have confirmed the need for a more specific regulation of the relationships of cohabitants in personal and property spheres. In addition, the analysis of some EU countries' legislation shows that most of them have taken the necessary measures to ensure the required protection for cohabitants, including homosexual couples. In fact, specific laws provide for the registration of partnerships and other aspects of their personal and property relationship.<sup>17</sup>

Considering the above-mentioned arguments, a detailed legal framework for those who want to register their partnership would properly guarantee cohabitation for both different-sex and same-sex couples. This specific legislative regulation is not only necessary *per se* but is also an obligation regarding Albania's accession to the EU.

In this context, some aspects of relations between partners are regulated uniformly in EU legislation, while others are left to the member states to regulate in their national laws. As per the uniform normative, the Council Regulation (EU) 2016/1104 – which entered into force on 29th January 2019 – provides common rules on jurisdiction, applicable law, and the recognition and enforcement of decisions in the field of property regimes of international couples, including registered marriages and partnership.<sup>18</sup>

In terms of methodology, primary and secondary sources were examined using qualitative and analytical methods. Specifically, this study focuses on a critical review of the doctrinal debate and the Albanian legal framework, in accordance with international obligations. In addition, the analysis includes an overview of some Western Balkan and EU countries' legal frameworks regarding cohabitation. Particular attention is dedicated to the relevant ECtHR's jurisprudence.

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<sup>17</sup> Palazzo, N., *Legal Recognition of Non-Conjugal Families. New Frontiers in Family Law in the US, Canada and Europe*, First Edition, Hart Publishing, Oxford, 2020.

<sup>18</sup> Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. Available at: <https://eur-lex.europa.eu/legal-content/EN/TX/T/?uri=CELEX%3A32016R1104> (20 September 2024). This Regulation was adopted by the Council of the EU with the aim of extending enhanced cooperation among member states in implementing provisions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This Regulation is mandatory only for those states that have participated in this enhanced cooperation, while other states continue to apply their national law. However, it allows member states to join at any time.

It is recognized that the Court of Justice of the EU has so far addressed the protection of same-sex couples from an anti-discriminatory perspective.<sup>19</sup> The ECtHR, as well, has been consistently stressing out the need for the member states to draft a comprehensive legal framework on partnerships of both different-sex and same-sex couples.<sup>20</sup>

In line with the above-mentioned considerations, it is recommended to draft a specific and detailed legislation in Albania regarding registered partnerships.

## 2. DOCTRINAL DEBATE ON A SPECIFIC AND DETAILED LEGISLATIVE REGULATION OF COHABITATION

The doctrine on the best ways to regulate cohabitation has generally been divided between different orientations. Some authors question if cohabitation is a functional equivalent to marriage and if marriage and cohabitation are similar enough to have similar legal treatment.<sup>21</sup> Others recommend its regulation through contract, as part of private autonomy.<sup>22</sup> They argue that, as per their choice, partners willingly avoid marriage. Others argue that a similar option would offer them the same position provided for married couples, potentially leading to the creation of category “B” marriages.<sup>23</sup> Yet others, which we agree with, argue that a specific and detailed regulation is necessary for registered

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<sup>19</sup> De Mozzi, B., *Powers Conferred Upon the EU and the Powers of the Court of Justice: The Protection Afforded to Same-Sex Couples in a Stable Relationship*, In: Pinto de Albuquerque, P.; Wojtyczek, K., (eds) *Judicial Power in a Globalized World*, Springer, 2019, p. 301. DOI: 10.1007/978-3-030-20744-1-20 (20 September 2024).

<sup>20</sup> Draghici, C., *op. cit.* (fn. 16); (20 September 2024); Kříčková, L., *Same-sex families' rights and the European Union: incompatible or promising relationship?* *International Journal of Law, Policy and the Family*, vol. 37, no. 1, 2023, p. 6. DOI: 10.1093/lawfam/ebad001 (20 September 2024).

<sup>21</sup> Brining, M. F.; Nock, S. L., *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option*, *Louisiana Law Review*, vol. 64, no. 3, Spring 2004, p. 403. Available at: [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1648&context=law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1648&context=law_faculty_scholarship) (20 September 2024).

<sup>22</sup> Kabza, E., *Three different legal attitudes towards non-marital partnership in Europe*, *Comparative Law Review*, vol. 27, 2021, p. 271. DOI: 10.12775/CLR.2021.010 (20 September 2024); Craig, J., *Cohabitation: A call to action*, (April 5, 2023), Pennington Manches Cooper, 2023. Available at <https://www.penningtonslaw.com/news-publications/latest-news/2023/partnership-a-call-to-action> (20 September 2024).

<sup>23</sup> Cian, G.; Oppo, G.; Trabucchi, A., *Commentario al diritto italiano della famiglia*, Cedam, Torino, 1993, p. 795.

partnerships to better guarantee their rights.<sup>24</sup> Others argue that in terms of legal protection, mixed-sex civil partnerships hold the same standing as marriage, providing couples with significantly stronger legal protections for themselves and their children compared to remaining in a cohabiting arrangement.<sup>25</sup> This debate is also reflected in the “opt-in” scheme – which would support the stronger party – and the “opt-out” scheme – which would support the weaker parties in relationships, particularly women.<sup>26</sup>

The EU legislation concerning *applicable law*<sup>27</sup>, *jurisdiction*<sup>28</sup>, and *recognition or enforcement in family and inheritance law*<sup>29</sup> defines rules on property regimes for married couples and registered partnerships. This regulation aims to avoid parallel or conflicting proceedings in EU member states concerning property relations.

In this regard, other issues may arise for same-sex couples, registered partnerships, and *de facto* cohabiting couples, where the weaker party may face difficulties that can only be resolved through a previous choice of jurisdiction

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<sup>24</sup> Lamçe, J.; Lamçe, Y., *Kuptimi i institutit të bashkëjetesës në legjislacionin shqiptar. Parimi i heteroseksualitetit si kufizim që bie ndesh me legjislacionin dhe jurisprudencën europiane*, [The meaning of the institution of cohabitation in Albanian legislation. The principle of heterosexuality as a limitation that conflicts with European legislation and jurisprudence], Jus & Justicia no. 10, UET Press, Tirana, 2014, pp. 13-25. Available at <https://uet.edu.al/jus-justicia/wp-content/uploads/2022/03/jus-justicia-10.pdf> (20 September 2024); Culhane, J. G., *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples' Real Relationships*, Family Court Review, vol. 58 no.1, 2020, pp. 145-156. DOI: 10.1111/fcre.12460 (20 September 2024); Craig, J., *op. cit.* (fn. 22); See House of Commons Women and Equalities Committee, *Rights of Cohabiting Partners*, Second Report of Session 2022-2023, p. 23. Available at: <https://committees.parliament.uk/publications/23321/documents/170094/default/> (20 September 2024). The Committee's recommendation to the government was to implement the proposed partnership law scheme from 2007 by the Law Commission.

<sup>25</sup> Hayward, A., *Mixed-sex civil partnerships and relationality: a perspective from law*, Policy Press, vol. 10, no. 1, 2020, p. 208. DOI: 10.1332/204674320X16062294691475 (20 September 2024).

<sup>26</sup> *Ibid*

<sup>27</sup> Chapter III-Applicable Law (Article 20-Article 35) of Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1104> (20 September 2024).

<sup>28</sup> Chapter II-Jurisdiction (Article 4-Article 19).

<sup>29</sup> Chapter IV-Recognition, Enforceability and Enforcement of Decisions (Article 36-Article 57).



and applicable law for dispute resolution.<sup>30</sup> There is a lack of homogeneity in EU member states regarding family law regulation and legal treatment of cohabitation (*more uxorio*) including same-sex unions.<sup>31</sup> In order to promote equality between different-sex couples and same sex-couples, the EU introduced the EU Free Movement Directive 2004/34/EC which granted EU citizens the freedom of movement rights for both them and their family members, regardless of their sexual orientation.

The Directive outlines distinct frameworks for married, registered, and unregistered partners. If a same-sex couple is married in their home state, EU law explicitly requires the host state to recognize the marriage. Nevertheless, in practice, host states that do not recognize same-sex marriages frequently impede the effective exercise of the right of a spouse to join their partner. This issue has been subject of legal proceedings in the Luxembourg Court.<sup>32</sup>

In 2009, following the entry into force of the Treaty of Lisbon, the EU Charter gained binding status for both the EU and its member states when they implement EU law.<sup>33</sup> Furthermore, Article 10 of the Treaty on the Functioning of the European Union (TFEU) expresses the EU's commitment to "combat discrimination based on (...) sexual orientation" while carrying out its policies and activities. In addition, Article 19 of the TFEU grants the EU institutions expanded authority to pass legislation for addressing discrimination, a power that has been exercised by the EU.<sup>34</sup> Consequently, it is impossible to identify a common European legal solution in this context.<sup>35</sup>

<sup>30</sup> ELI, *Report of the European Law Institute, Empowering European Families: Towards More Party Autonomy in European Family and Succession Law*, 2019, pp. 1-21. Available at: [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/EEF/ELI\\_EEF\\_Instrument.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/EEF/ELI_EEF_Instrument.pdf) (20 September 2024).

<sup>31</sup> Romito, A.M., *The rights of same sex couples under European and Italian Law (II)*, Bulletin of the Transilvania University of Brasov, Series VII, Social Sciences, Law, vol. 12 (61) no. 2, 2019, p. 419. DOI: 10.31926/but.scl.2019.61.12.2.25 (20 September 2024).

<sup>32</sup> Uladzislau, B., *The Federal Rainbow Dream: On Free Movement of Gay Spouses under EU Law*, VerfBlog, 2018. Available at: <https://verfassungsblog.de/the-federal-rainbow-dream-on-free-movement-of-gay-spouses-under-eu-law/> (20 September 2024).

<sup>33</sup> Shahid, M., *Equal marriage rights and the European Courts*, vol. 23, 2023, p. 408. DOI: 10.1007/s12027-023-00729-w (20 September 2024).

<sup>34</sup> Guth, J., *When is a Partner not a Partner? Conceptualisations of 'Family' in EU Free Movement, Law*, Journal of Social Welfare and Family Law, vol. 33, no. 2, 2011, pp. 193-204. DOI: 10.1080/09649069.2011.617078 (20 September 2024).

<sup>35</sup> Zatti, P., *Familia, familiae – Declinazioni di un'idea I. La privatizzazione del diritto di famiglia*, Familia, 2002. pp. 9-42; Lamçe, J., *Njohja Ligjore e Vlefshmërisë së Martesës*



### 3. IMPLEMENTATION OF LEGISLATION ON COHABITATION IN SOME EUROPEAN AND WESTERN BALKAN COUNTRIES

Since the early 1990s, Europe has increasingly moved towards implementing regulations aimed at addressing the rights and obligations of unmarried cohabiting couples, whether they are same-sex or different-sex, through legal frameworks designed to address their rights and obligations. Nevertheless, in some countries, cohabitation was recognized even before the 90s. In 1973 Sweden was among the first countries to legally recognize cohabitation through the Sambo Act (Sambolagen), which provided legal rights and obligations for cohabiting different-sex couples. Later, similar protections were extended to same-sex couples in 1987.<sup>36</sup> In 1989 Denmark became a pioneer in recognizing same-sex partnerships with its Registered Partnership Act, but cohabitation between different-sex couples had informal legal recognition earlier, including rights related to inheritance and housing.<sup>37</sup> Norway has provided a definition for cohabiting couples since 1972<sup>38</sup>, only to introduce formal legal recognition for same-sex couples through its Registered Partnership Act<sup>39</sup> in 1993. In 1971, in the Netherlands, a new provision (Article 1:160 of the Dutch Civil Code) was introduced, marking the first legal recognition of non-marital cohabitation, which was then referred to as concubinage.<sup>40</sup> Croatia legally recognized informal

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*dhe e Modeleve të Tjera të Lidhjeve në çift në Europë, [Legal Recognition of the Validity of Marriage and Other Patterns of Couple Relationships in Europe]*, Jus & Justicia no. 7, UET Press, Tirana, 2011, pp. 95-107.

<sup>36</sup> Jänträ-Jareborg, M.; Brattström, M.; Eriksson, L.M., *National Report: Sweden, Informal Relationships – Sweden*, Commission on European Family Law, (March 2015), p. 1. Available at: <https://ceflonline.net/wp-content/uploads/Sweden-IR.pdf> (20 September 2024).

<sup>37</sup> Lund-Andersen, I., *National Report: Denmark, Informal Relationships-Denmark*, Commission on European Family Law, (January 2015), p.1. Available at: <https://ceflonline.net/wp-content/uploads/Denmark-IR.pdf> (23 September 2024).

<sup>38</sup> Sverdrup, T., *National Report: Norway, Informal Relationships-Norway*, Commission on European Family Law, (April 2015), p. 3. Available at: <https://ceflonline.net/wp-content/uploads/Norway-IR.pdf> (23 September 2024).

<sup>39</sup> Lov om registrert partnerskap [Registered Partnership Act]. Available at: <https://lovdata.no/dokument/NLO/lov/1993-04-30-40>. This act was in place until 2009, when it was replaced by the new gender-neutral Marriage Act, which allowed same-sex couples to marry in the same manner as opposite-sex couples (23 September 2024).

<sup>40</sup> Schrama, W., *National Report: The Netherlands, Informal Relationships-The Netherlands*, Commission on European Family Law, (March 2015), p. 2. Available at:

relationships among heterosexual couples known as cohabitation-during the late 1970s with the adoption of the Marriage and Family Relations Act in 1978.<sup>41</sup>

In 16 EU countries, marriage is available to both opposite-sex and same-sex couples.<sup>42</sup> While the situation of registered partnership varies significantly among different countries, twenty EU countries allow registered partnerships, including same-sex couples.<sup>43</sup>

Specific modern regulations in this regard were introduced across various European countries.

In France there have been several reforms regarding cohabitation. The most significant reform has been the introduction of the Pacte Civil de Solidarité (PACS) in 1999 by Law no. 99-944 relating to civil partnership. This agreement is available to both heterosexual and same-sex couples and serves as the foundation of legal policy on cohabitation.<sup>44</sup> However, the current form and structure of PACS differs from the original 1999 law, as it underwent significant reform

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<https://ceflonline.net/wp-content/uploads/The-Netherlands-IR.pdf> (23 September 2024).

<sup>41</sup> Rešetar, B.; Lucić, N., *National Report-Croatia*, Informal Relationships-Croatia, Commission on European Family Law, (January 2015), p. 5. Available at: <https://ceflonline.net/wp-content/uploads/Croatia-IR-Legislation1.pdf> (23 September 2024).

<sup>42</sup> Netherlands (2001), Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013), Luxembourg (2015), Ireland (2015), Finland (2017), Germany (2017), Malta (2017), Austria (2019), Slovenia (2022), Estonia (2023), Greece (2024). Available at: [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law/property-international-couples-marriages-and-registered-partnerships_en); Cortina, C.; Festy, P., *Same – sex Couples and Their Legalization in Europe: Laws and Numbers*, In: Digoix, M. (eds) *Same-Sex Families and Legal Recognition in Europe*. European Studies of Population, vol. 24, Springer, Cham, 2020, pp. 45-71. DOI: 10.1007/978-3-030-37054-1\_3

<sup>43</sup> Austria, Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Slovenia, Spain, and Sweden: *Ibid*

<sup>44</sup> Köppen, K., *Marriage and Cohabitation in western Germany and France*, Dissertation zur Erlangung des akademischen Grades doctor rerum politicarum (Dr. rer. pol.) der Wirtschafts-und Sozialwissenschaftlichen Fakultät der Universität Rostock [Dissertation for the attainment of the academic degree Doctor of Political Sciences (Dr. rer. pol.) at the Faculty of Economic and Social Sciences of the University of Rostock], 2010, p. 74. Available at [https://www.demogr.mpg.de/publications/files/4277\\_1318519041\\_1\\_Full%20Text.pdf](https://www.demogr.mpg.de/publications/files/4277_1318519041_1_Full%20Text.pdf) (23 September 2024).

in 2006.<sup>45</sup> It regulates both opposite-sex and same-sex marriages, as well as opposite-sex and same-sex registered partnerships.<sup>46</sup> Unlike the Pacte Civil de Solidarité (PACS), cohabitation in the French Civil Code is addressed in just one article (Article 515-8). According to this article, cohabitation is defined as the act of living together between two people, whether of different or same sex, characterized by stability and continuity.<sup>47</sup>

While in Italy, Legge n. 76/2016 “Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze”<sup>48</sup>, establishes civil unions between same-sex individuals as a specific social formation in accordance with Articles 2 and 3 of the Italian Constitution and regulates *de facto* cohabitations. Previously, cohabitation lacked legal regulation. Cohabitation, according to paragraph 36 of the sole article of Law 76/2016, is defined as the situation in which “two adults live together in a stable relationship of emotional partnership and mutual moral and material support, not bound by relationships of kinship, affinity, or adoption, marriage, or a civil union”. Law 76/2016 has granted cohabiting couples many of the protections and rights that are available to spouses.

In Germany, cohabitation is primarily regulated through the Registered Partnership Act (Gesetz über die Eingetragene Lebenspartnerschaft)<sup>49</sup>, enacted in 2001, which initially provided legal recognition for same-sex couples. Unlike the French Civil Code, the German Civil Code grants cohabiting partners more rights and obligations, nearly equivalent to those of a married couple. German

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<sup>45</sup> Metaj-Stojanova, A., *French Civil Partnership Contract (PACS)*, SEEU Review, vol. 14, no. 1, Sciendo, 2019, pp. 134-159. DOI: <https://doi.org/10.2478/seeur-2019-0008> (23 September 2024).

<sup>46</sup> Ferrand, F; Francoz-Terminal, L., *National Report: France, Informal Relationships-France*, Commission on European Family Law, (January 2015), p.1, Available at: <https://ceflonline.net/wp-content/uploads/France-IR.pdf>. (23 September 2024). Same-sex marriage in France was legalized in 2013.

<sup>47</sup> Article 515-8 of the French Civil Code, [Code Civil] Available at: [https://www.legifrance.gouv.fr/codes/texte\\_lc/LEGITEXT000006070721/](https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/)

<sup>48</sup> Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Legge 20 maggio 2016. n.76, [Regulation of civil unions between people of the same sex and discipline of partnerships, Law 20 May 2016.n.76], Gazzetta Ufficiale della Repubblica Italiana, Anno 157, Nr. 118, 21.05.2016, [Official Journal of the Italian Republic, Year 157, Nr. 118, 21.05.2016]

<sup>49</sup> Gesetz über die Eingetragene Lebenspartnerschaft [Law on Registered Life Partnerships]. Available at: <https://www.gesetze-im-internet.de/lpartg/BJNR026610001.html>. (23 September 2024). In 2017, Germany legalized same-sex marriage, allowing same-sex couples the same legal status as opposite-sex couples.

law allows a cohabiting partner to adopt the biological child of their partner, a provision unavailable under the French Civil Code.<sup>50</sup>

In Croatia, the formal recognition of cohabitation began with its inclusion in the Marriage and Family Relationships Act of 1978. This Act granted couples in long-term cohabitation the same property and maintenance rights as married spouses.<sup>51</sup> In 2003, the Republic of Croatia introduced the Same-Sex Union Act<sup>52</sup>, regulating for the first time the *de facto* same-sex union. With this Act, homosexual partners have been recognized to have mutual maintenance and property rights within their union. However, the legal framework concerning same-sex unions is separated from the Family Act. This Act was later superseded by the Life Partnership Act<sup>53</sup> in 2014, which expanded the rights of same-sex couples, granting them many of the same rights as heterosexual couples, though marriage itself remains unavailable to them. The 2014 Croatian Same-Sex Partnership Act designated the same-sex partnership as “life partnership” and defined it as the union of family life.<sup>54</sup> In Croatian law, as per the Family Act of 2015, a non-marital union is described as a life partnership between an unmarried woman and an unmarried man, lasting for a minimum of three years. Alternatively, it can be for a shorter duration if they have a child together or if this union leads to a marriage.<sup>55</sup>

In Greece, cohabitation is legally recognized through Cohabitation Agreements which were introduced by Law 3719/2008.<sup>56</sup> This law applied only to

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<sup>50</sup> Gventsadze, A., *Cohabitation and Civil Union According to the French Civil Code as of November 14, 2022*, Law and World, vol. 9, no. 25, 2023, pp. 110-115. DOI: 10.36475/9.1.10 (23 September 2024).

<sup>51</sup> Rešetar, B.; Lucić, N., *op. cit.* (fn. 41)

<sup>52</sup> Zakon o istospolnim zajednicama [The Same-Sex Union Act]. Available at [https://narodne.novine.nn.hr/clanci/sluzbeni/2003\\_07\\_116\\_1584.html](https://narodne.novine.nn.hr/clanci/sluzbeni/2003_07_116_1584.html) (23 September 2024).

<sup>53</sup> Zakon o životnom partnerstvu osoba istog spola [Law on Life Partnership of Persons of the Same Sex]. Available at <https://www.zakon.hr/z/732/Zakon-o-%C5%BEivotnom-partnerstvu-osoba-istog-spola> (23 September 2024).

<sup>54</sup> Korać Graovac, A., *Family Protection in Croatia*. In: Family Protection from a Legal Perspective. Ferenc Mádl Institute of Comparative Law; Central European Academic Publishing, Budapest, Miskolc, p. 61, 2021, DOI: 10.54237/profnct.2021.tbblfl\_2 (23 September 2024).

<sup>55</sup> Korać Graovac, A., *Legal Development of Non-Marital Union in Croatia*. Law, Identity and Values, vol. 1, no. 1, 2021, p. 55. DOI: 10.55073/2021.1.55-70 (23 September 2024).

<sup>56</sup> Law 3719/2008, Reforms regarding the family, the child, the society and other provisions. Available at: [https://eclass.uoa.gr/modules/document/file.php/LAW110/L3719\\_2008%20cohabitation%20pact.doc](https://eclass.uoa.gr/modules/document/file.php/LAW110/L3719_2008%20cohabitation%20pact.doc) (23 September 2024).

opposite-sex couples, providing an alternative to marriage with a legal framework for property, inheritance, and tax matters. In 2015, Law 4356/2015<sup>57</sup> was enacted, extending the right to enter into a cohabitation agreement to same-sex couples as well. This marked a significant step in recognizing same-sex partnerships and granting them rights similar to those of married couples.

Provisions concerning matrimonial regulations regarding maintenance and property acquired during cohabitation can be found in the family laws of Macedonia, the Federation of Bosnia and Herzegovina, and Serbia.<sup>58</sup> In these legal systems, for example, property acquired by at least one cohabitant during the relationship is considered joint ownership. Cohabitants are jointly and severally liable for any liabilities incurred by either of them in matters related to meeting the needs of the family. In addition, within a year from the termination of the relationship, one cohabitant may request the other to provide maintenance for a period typically lasting up to five years. In Serbia, although cohabitation has similar property consequences and alimony implications as marriage, cohabitants do not have inheritance rights.<sup>59</sup>

Non-marital cohabitation was regulated in Macedonian family law with the adoption of the Family Law Act of 1992. Article 13 of the FLA defines non-marital cohabitation as a living arrangement of a man and woman, not established according to the provisions of this law (non-marital cohabitation), lasting at least one year. It is considered equivalent to marriage concerning mutual maintenance rights and property rights acquired during cohabitation. Thus, Macedonian family legislation provides only for heterosexual non-marital cohabitation.<sup>60</sup>

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<sup>57</sup> Konsta, A.-M.; Koutsourdis, A.G., *Greece, Update-Greece*, Commission on European Family Law, (February 2021), p.10. Available at: <http://ceflonline.net/wp-content/uploads/Greece-Konsta.pdf> (23 September 2024). In February 2024, Greece opened marriage to same-sex couples.

<sup>58</sup> Kabza, E., *op. cit.* (fn. 22)

<sup>59</sup> Stępień-Sporek, A.; Ryznar, M, *The Consequences of Cohabitation*, University of San Francisco Law Review, vol. 50, no. 1, pp. 75-101 Available at SSRN: <https://ssrn.com/abstract=2603990>

<sup>60</sup> Mickovik D.; Ristov A., *Family Law in the Civil Code of the Republic of Macedonia*. Journal of Civil & Legal Sciences, vol. 5, no.1, 2016. DOI:10.4172/2169- 0170.1000166 (24 September 2024); Ignovska, E., *The family law of the Republic of North Macedonia through the prism of the European Convention on Human Rights*, Iustinianus Primus Law Review, vol. 11, Special issue, 2020, Available at: <https://www.researchgate.net/publication/367361658> (22 September 2024).

In Serbia, family law recognizes two types of unions: marriage and heterosexual non-marital cohabitation. Same-sex unions remain unregulated.<sup>61</sup>

Same-sex partnerships encounter numerous challenges and obstacles in Bosnia and Herzegovina. Long-term relationships between same-sex couples lack recognition and legal protection, significantly restricting their ability to exercise various rights that are available to heterosexual couples.<sup>62</sup>

In 2020 Montenegro became the first Balkan country to legalize same-sex civil partnerships. According to Article 1 of the Law on the Same-Sex Life Partnership<sup>63</sup> (Law No.868 of July 2020) this law recognizes same-sex partnerships as legal unions, regulates the establishment and termination of same-sex life partnerships and provides for the maintenance of a national register. A same-sex partnership is to be based on the principles of equality, mutual respect, mutual assistance and respect for partners.

According to Article 1138 of the Draft Civil Code of the Republic of Kosovo “1. Marriage is a legally registered union of two spouses of different sexes, through which they freely decide to live together as husband and wife (...) 2. Registered civil unions between persons of the same sex are allowed. Conditions and procedures are regulated by a special law (...) 4. Married couples and partners in civil unions enjoy mutual rights and duties under this Code”.<sup>64</sup>

Most Western Balkan countries do not legally recognize same-sex partnerships in any form. As a result, same-sex couples in these countries do not have the rights enjoyed by heterosexual couples, including inheritance rights, hospital visitation rights, and access to health insurance benefits from their partner.<sup>65</sup>

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<sup>61</sup> Kovaček Stanić, G., *Marriage and Partnership in Serbian Family Law: Legal Consequences*. Law, Identity and Values, vol. 1, no.1, 2021, pp.71–84. DOI: 10.55073/2021.1.71-84 (22 September 2024).

<sup>62</sup> Isović, M., The fight for (full) marriage recognition in Bosnia and Montenegro's Queer Communities, (15 March 2024), Available at: <https://balkandiskurs.com/en/2024/03/15/the-fight-for-full-marriage-recognition-in-bosnia-and-montenegros-queer-communities/> <https://www.researchgate.net/publication/367361658> (22 September 2024).

<sup>63</sup> Zakon o životnom partnerstvu lica istog pola [Law on Life Partnership of Persons of the Same Sex], Available at: <https://me.propisi.net/zakon-o-zivotnom-partnerstvu-lica-istog-pola/> (19 September 2024).

<sup>64</sup> Projektkodi Civil i Republikës së Kosovës [Draft Civil Code of the Republic of Kosovo], Available at: <https://md.rks-gov.net/desk/inc/media/5582524D-4557-43D6-A814-D541D7E8E037.pdf> (20 September 2024).

<sup>65</sup> Study for the FEMM committee, European Parliament, Women's Rights in Western Balkans, 2019 p. 95. Available at: <http://www.europarl.europa.eu/supporting-analyses> (19 September 2024).



#### 4. THE INSTITUTE OF COHABITATION IN THE ALBANIAN LEGAL FRAMEWORK

Albanian doctrine argues that cohabitation is still marginal compared to the marriage rate.<sup>66</sup> Nonetheless, the number of cohabitations has progressively increased in Albania<sup>67</sup> while the regulation of cohabitation in the Albanian Family Code (AFC) has not changed since 2004. According to Article 163 of the AFC, “cohabitation is a factual union between a man and a woman living as a couple, characterized by a common life characterized by stability and continuity”. Meanwhile, Article 164 specifies that “cohabiting persons may enter into agreements attested by a notary public, specifying the consequences arising from their cohabitation with regards to children and their property”. In Albania, these agreements are not mandatory and depend on the partners’ free will. Nonetheless, they are rarely used in practice.

If family and marriage should enjoy special protection as per AFC provisions (Article 53), cohabitation needs to be protected in the same way. While married couples are privileged, having a detailed legal framework within the family law, cohabitation is subject to the partners’ private autonomy. The latter is regulated by the AFC in only two provisions (Articles 163 and 164). That may potentially lead to unequal treatment, because of the weaker position of one of the partners. The purpose of a regulation in general is to protect the citizens who cannot protect their own rights and interests (for example, same-sex couples cohabitants, or female cohabitants). So far, there have been no legislative proposals for a comprehensive normative regulation of the cohabitation institute.

Albania is a country whose legislation does not include any specific regulation on same sex couples’ cohabitation or on the registration of cohabitants in the Civil Status Office.<sup>68</sup> The lack of this provision in Albanian law has created various obstacles for cohabiting couples.

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<sup>66</sup> Danaj, E., *Marriage institution, civil unions, and gender issues in sociological and legal perspective*, EU Health Issues Project, University of New York, Tirana, 2021, p. 4. Available at <https://unyt.edu.al/wp-content/uploads/2023/03/E.Danaj-Marriage-Institution-Civil-Unions-and-Gender-Issues-in-Sociological-and-Legal-Perspective.pdf> (20 September 2024)

<sup>67</sup> Qendra për Nisma Ligjore Qytetare, United Nations Fore Gender Equality and the Empowerment of Women, *Mbështetje për aksesin e grave në të drejtat e pronësisë. Udhëzues praktik për profesionistët e drejtësisë*, [Support for women’s access to property rights. Practical guide for legal professionals], 2015, p. 36. Available at: [https://www.qag-al.org/publikime/guide\\_praktike.pdf](https://www.qag-al.org/publikime/guide_praktike.pdf) (24 September 2024).

<sup>68</sup> Bulgaria, Latvia, Lithuania, Romania, Slovakia, Ukraine, Slovakia, Romania, Poland: *Your Europe, Civil unions and registered partnerships*. Available at <https://europa>.



In a recent case, two Albanian homosexual cohabitants, during their factual cohabitation, had expanded their family with the birth of twin children through artificial insemination undergone by one of the cohabitants. They expressed their intention to register the children born through artificial insemination, also requesting to be recognized and registered as “mothers” in the civil registry. The Civil Registry Office denied their request, arguing on the absence of explicit legal recognition for registering children born to parents of the same gender.<sup>69</sup>

In addition, as argued below in this paper, many EU countries have provided a comprehensive legal framework for civil partnerships, and their legislators have not limited partnerships only to heterosexual couples.<sup>70</sup> Thus, a detailed legislative regulation of registered partnership in Albania is fundamental to guarantee personal and property rights of heterosexual and homosexual partners, as has already been done by most European countries.

#### 4.1. Regulation of cohabitation in Albania: personal aspects

Regarding personal aspects of married couples, Article 50 of the AFC provides that: “Through marriage, husband and wife acquire the same rights and assume the same obligations. Marriage gives rise to the mutual obligation of fidelity, moral and material support, cooperation in the interest of family and cohabitation”. These obligations – except for the property obligations, which will be analyzed in the following paragraph – constitute personal obligations, which are not provided for cohabiting couples. Seeing as cohabitation is a personal choice, characterized by contractual autonomy, its aspects belong to the sphere of individual freedoms guaranteed by the Constitution.

Nevertheless, in our opinion, referring to ECtHR’s latest jurisprudence<sup>71</sup> there is a need for the regulation of personal and property aspects of registered cohabitants in terms of moral support between cohabiting partners, whether heterosexual or homosexual. These couples, although not married, may constitute

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eu/youreurope/citizens/family/couple/registered-partners/index\_en.htm (23 September 2024).

<sup>69</sup> The Ombudsman’s Amicus Curiae Opinion on the request brought by the First Instance Administrative Court of Tirana, concerning the lawsuit filed by the plaintiffs, A. A., E. M., H. M., and A. M.

<sup>70</sup> Digoix, M., *Same-sex Families and Legal Recognition in Europe*, European Studies of Population, vol. 24, 2020, p. 11. Available at <https://link.springer.com/book/10.1007/978-3-030-37054-1> (23 September 2024).

<sup>71</sup> Judgement of the ECtHR of 1 June 2023, *Maymulakhin & Markiv v Ukraine*, application no. 75135/14.

a family. They can offer mutual assistance in case of illness or need, or even representation. Therefore, it is necessary to include clauses regarding the possibility of a) designating the cohabitant as a representative in case of the other's illness, in cases of incapacity to act, in making decisions on legal matters, or in case of death with decisions related to, for example, funeral arrangements; b) designating the cohabitant as a guardian, curator, administrator, etc.<sup>72</sup>

#### 4.2. Regulation of cohabitation in Albania: property aspects

Property issues arising from cohabitation constitute another element to be taken into consideration when evaluating the private autonomy of the parties. As mentioned earlier, there are only two provisions in the AFC referring to the institution of cohabitation. Article 164 of the AFC refers to property regulation providing that: "Cohabitants may enter into agreements before a notary, specifying the consequences of cohabitation in relation to children and property". However, detailed regulation of cohabitation is not provided by law. In addition, according to Albanian doctrine, these contracts are rarely used in practice. In fact, seeing as cohabiting relationships tend to demonstrate stability and continuity, the division of property accumulated during the years of cohabitation has been problematic in some cases. In these cases, the economic power of the male partner and the tendency in society for all assets to be registered in his name, have led to a weaker economic position for the female partner.<sup>73</sup>

Even though, family law or even civil law protection of individuals is not rooted in a paternalistic dimension, in the Albanian society the economic power of men is predominant, and women are considered a vulnerable part. If we refer to Albanian legislation, the AFC provides for reciprocal rights and obligations of spouses in relation to property relationships during marriage and after its termination, specifying various marital property regimes. However, there is no such regulation in this code regarding the property of cohabitants. In this context, where there is a lack of regulation, the property consequences of cohabitation are subject to the partners' contractual autonomy or even to the national and international doctrine and jurisprudence. In Albania, the law does not provide for any specific property regime for cohabitants, leaving it to their contractual agreements. There are numerous legal cases in Albania that deal with issues related to the division of property between cohabitants. In a

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<sup>72</sup> Legge 20 maggio 2016. n. 76, *op. cit.* (fn. 48)

<sup>73</sup> Anastasi, A., *Barazia dhe drejtësia gjinore [Equality and gender justice]*, Academy of Sciences, Tiranë, 2021, p. 228.

recent decision, the Albanian Supreme Court<sup>74</sup> regarding the recognition and distribution of jointly acquired property during a partnership concluded that:

“However, despite the fact that, even though the provisions regulating the property regime of a legal marriage do not apply to cohabitation, the lack of a notarial agreement for the regulation of the property regime between cohabitants, in a contrary interpretation of Article 164 of the Family Code, cannot serve as an exclusionary criterion of the property rights of cohabitants who prove their contribution to the creation of assets during cohabitation. Such an interpretation is in line with the constitutional and Convention guarantees for the protection of the right to property under Article 41 of the Albanian Constitution and Article 1 of Protocol 1 to the European Convention of Human Rights and respects the principle of equality before the law as provided in Article 18 of the Albanian Constitution”.

This decision sets an important precedent for lower courts regarding the distribution of property between cohabitants. While the Supreme Court does not exclude the possibility of property division among cohabitants, it highlights the complexity of proving each party’s contribution to property acquired during partnership. It underscores the importance of establishing a partnership contract to protect individual property rights, in accordance with constitutional guarantees and international human rights standards.

#### **4.3. Regulation of cohabitation in Albania: inheritance aspects**

Inheritance relationship between married couples is regulated by Articles 360<sup>75</sup> and 361<sup>76</sup> of the Albanian Civil Code (ACC).<sup>77</sup> According to these

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<sup>74</sup> Decision no. 153 of the Albanian High Court of 23 March 2023.

<sup>75</sup> According to Article 360 of the ACC: “Legal heirs are the children, grandchildren, spouse, parents, siblings, and the children of predeceased siblings, grandparents, and other ancestors, persons dependent on the testator who are unable to work, other relatives up to the sixth degree, as well as the state. These heirs are called to inherit according to the order established in this Code”.

<sup>76</sup> According to Article 361 of the ACC: “In the first instance, the heirs called to inherit are the children and the spouse, whether able or unable to work, with each inheriting an equal share.

If one of the children has died before the testator, has been deemed unworthy to inherit, has renounced the inheritance, or has been excluded from the inheritance, their children replace them in the inheritance. If these children cannot inherit for the above reasons, their descendants inherit without limitation. In such cases, the parent’s share is divided equally among the descendants.

provisions, a spouse is considered a legal heir and is called to inherit in an equal position to the children of the deceased person, as the first category of beneficiaries.

In the meantime, the ACC does not provide specific regulations regarding inheritance for cohabitants. However, the repeal of Article 377<sup>78</sup> of the Albanian Civil Code (ACC) by the Decision of the Albanian Constitutional Court<sup>79</sup> is viewed positively regarding the status of the cohabiting partner. In this decision, the Constitutional Court was activated by the Court of Appeal regarding the issue that infringed upon the position of the cohabiting partner concerning inheritance relations between cohabiting partners. Referring to this decision, the Court of Appeal of General Jurisdiction stated, among other things, that Article 377 of the Albanian Civil Code (ACC) fundamentally violates the principle of equality before the law by creating unequal treatment in property rights between spouses, who are recognized as first-order heirs, and cohabiting partners, who do not have such status. This disparity is both disproportionate and unjustified, as

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When, apart from the spouse, there are no other first-order heirs, the next successors, as provided in Article 363 of this Code, are called to inherit. If none exist, the next heirs, as provided in Article 364 of this Code, are called.

In all cases, the spouse receives half (1/2) of the inheritance.

If there are no heirs from the above-mentioned orders, the inheritance is given to the surviving spouse”.

<sup>77</sup> Kodi Civil Shqiptar, Ligj Nr. 7850/1994 i ndryshuar [Albanian Civil Code, Law no. 7850/1994 as amended].

<sup>78</sup> According to Article 360 of the ACC: “The testator who does not leave descendants or siblings has the right to dispose of their property by testament in favor of any natural or legal person”.

<sup>79</sup> Decision no. 69 of the Constitutional Court of the Republic of Albania of 27 December 2023. According to this Decision, on June 1, 2023, and July 26, 2023, the referring courts—the High Court and the Court of Appeal of General Jurisdiction—requested the Constitutional Court to assess the constitutionality of Article 377 of the Civil Code (CC). Regarding the case presented by the Court of Appeal of General Jurisdiction (which is related to our topic), in the will dated December 2, 2017, the testator bequeathed his property, designating his cohabiting partner and his minor son as testamentary heirs. The testator’s ex-wife, representing their minor son, filed a lawsuit seeking the absolute nullity of the will concerning the portion allocated to the cohabiting partner and recognition of her son as the sole heir. The Court of First Instance in Vlorë, in Decision no. 2085, dated December 17, 2018, dismissed the lawsuit as unfounded in law and evidence. The testator’s ex-wife appealed this decision. The Court of Appeal in Vlorë, after reviewing the case during the court session on June 28, 2022, and hearing the parties involved, issued an interim decision to suspend the proceedings and refer the matter to the Constitutional Court to assess the constitutionality of Article 377 of the Civil Code.

families are formed not only through marriage but also through cohabitation. This inequality arises from legislative shortcomings, particularly the absence of positive intervention in the ACC provisions that regulate the circle and the order of legal heirs.

After a comprehensive analysis, the Albanian Constitutional Court notes, among others:

“Since inheritance implies *de jure* the legal transfer of ownership of an asset, and although the legislator may reasonably limit its disposition to those heirs who have a blood relationship, a fair regulation in line with today’s conditions cannot exclude individuals who are *de facto* members of the family. Hence, the legislator has the duty to protect the traditional essence of the institution of inheritance, without overlooking the fact that the law must adapt to social conditions as a fundamental principle of the rule of law, while also maintaining a reasonable balance between categories of legal and testamentary heirs. In this view, the Court emphasizes that, in principle, the obsolescence of a norm does not in itself constitute grounds for its unconstitutionality, except for in cases where it fails to respond to the social, cultural, economic, and moral development of society to the extent that it disrespects the essence of human rights and freedoms.”

## 5. ECtHR CASE LAW ON THE RIGHTS OF DIFFERENT-SEX AND SAME-SEX COUPLES

In this regard, it is important to note that the European Convention on Human Rights does not include a specific article that protects unmarried cohabiting couples as such. On the contrary, the European Convention on Human Rights includes several articles that protect private and family life (Article 8) and the right to marry and found a family (Article 12). Additionally, it prohibits discrimination (Article 14). The Court’s judgments on cohabitation are based on these provisions.<sup>80</sup>

There is vast case law concerning the protection of unmarried cohabiting heterosexual and homosexual partners. Initially, this protection was primarily reserved for unmarried cohabiting couples, especially in cases involving children.

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<sup>80</sup> Sanz Caballero, S., *Unmarried cohabiting couples before the European Court of Human Rights: Parity with marriage?* The Columbia Journal of European Law, vol 11, no.1, 2005, pp. 151. Available at: [https://repositorioinstitucional.ceu.es/bitstream/10637/6507/4/Unmarried\\_Sanz\\_TCJOEL\\_2004.pdf](https://repositorioinstitucional.ceu.es/bitstream/10637/6507/4/Unmarried_Sanz_TCJOEL_2004.pdf) (24 September 2024).

Later, this protection was expanded to include same-sex couples in order to safeguard family life.

Regarding parent-child relationships, the jurisprudence of ECtHR has often stated that the protection of children born out of wedlock will be similar to that of children born within wedlock. However, apparently, differences between married and unmarried heterosexual couples regarding property issues, pensions, inheritance etc., seem impossible to eliminate when there is no specific regulation for cohabiting couples at the national level. In the case *Makarčeva v. Lithuania*<sup>81</sup> the applicant complained under Article 8 of the Convention that she couldn't inherit her cohabitants' property because they were not married, and that in Lithuania it was not possible to register a civil partnership. Since her partner did not have any heirs, his property was inherited by the state. Consequently, the applicant was ordered to vacate the apartment in which she had lived with him.

Albania is one of those countries that still lack any legal mechanisms for recognizing same-sex relationships.<sup>82</sup> Article 163 of the AFC provides for the cohabitation between heterosexual couples only, leaving same-sex couples unprotected. Consequently, same-sex couples may enjoy protection only under ACC, but not under AFC.

In many areas of law, various jurisdictions differentiate between same-sex and different-sex cohabitants. This distinction is particularly notable in matters such as parenting, care leave, domestic violence, testifying in criminal procedures,

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<sup>81</sup> Judgment of the ECtHR of 28 October 2021, *Makarčeva v. Lithuania*, application no.31838/19. The applicant and J.B. were in a relationship from 1993 to 2013. Although they never married, they lived together in an apartment owned by J.B. He also owned another apartment and some shares. In May 2013, J.B. passed away without having made a will. Under domestic law, unmarried partners had no right to inherit their partner's property in such circumstances. The applicant filed a lawsuit seeking recognition that the apartments and shares were jointly owned by her and J.B. The courts acknowledged that the applicant and J.B. had lived together as a de facto family and shared a household. However, they ruled that, based on domestic case law, property belonging personally to one unmarried partner could only be recognized as joint property if the other partner had made significant improvements to it. The courts determined that the applicant had not provided sufficient evidence to meet this threshold.

<sup>82</sup> Azerbaijan, Bosnia-Herzegovina, Bulgaria, North Macedonia, Turkey, Georgia, Lithuania, Montenegro, Moldova, Serbia, and Ukraine also lack any mechanism for recognition; Palazzo, N., *Landmark European ruling on LGBT+ rights* (May 25, 2023), Social Europe, 2023. Available at: <https://www.socialeurope.eu/landmark-european-ruling-on-lgbt-rights> (22 September 2024).

immigration, inheritance tax, and property rights after death. Almost all exclusions of same-sex cohabitants from rights enjoyed by different-sex cohabitants will likely constitute violations of the well-established *Karner v. Austria*<sup>83</sup> case law of the European Court of Human Rights.<sup>84</sup>

In one of its recent decisions on the legal recognition of same-sex couples (*Buhuceanu & Others v România*)<sup>85</sup>, the ECtHR reaffirmed what it had previously stated in the case of *Fedotova v Russia*<sup>86</sup> and earlier decisions: the state party of the Convention must, in accordance with Article 8 of the ECtHR, establish a legal framework to ensure the recognition and protection of same-sex couples. The ECtHR jurisprudence has consistently held that the legal recognition of different-sex civil partnerships, excluding same-sex civil partnerships, is incompatible with the ECtHR (*Vallianatos & Others v. Greece*<sup>87</sup>, *Oliari and Others*

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<sup>83</sup> Judgement of the ECtHR of 24 July 2003, *Karner v. Austria*, application no. 40016/98. The applicant claimed that he had been discriminated against based on his sexual orientation, as he was denied the status of “life companion” to the late Mr. W., which prevented him from inheriting Mr. W.’s tenancy. The Court acknowledged that the application raised a significant issue of general interest, not only for Austria but also for other States Parties to the Convention. The Court reiterated that differences based on sexual orientation require particularly serious justification. It found that the Government had not provided convincing and substantial reasons to justify the discriminatory treatment of the same-sex partner, thus constituting a violation of Article 14 of the Convention in conjunction with Article 8.

<sup>84</sup> Waaldijk, K., *Extending rights, responsibilities and status to same-sex families: trends across Europe*, Council of Europe, 2018, p. 10. (24 September 2024)

<sup>85</sup> Judgement of the ECtHR of 23 May 2023, *Buhuceanu & Others v Romania*, applications nos. 20081/19 and 20 others.

<sup>86</sup> Judgment of the ECtHR of 17 January 2023, *Fedotova & Others v Russia*, applications nos. 40792/10, 30538/14 and 43439/14. In the case at hand, according to the European Court of Human Rights (ECtHR), Russia violated their right to a private and family life under Article 8 of the Convention by refusing to allow the formal registration of the relationships of three same-sex couples.

<sup>87</sup> Judgment of the ECtHR of 7 November 2013, *Vallianatos & Others v Greece*, applications nos. 29381/09 and 32684/09. The applicants, four couples residing in Greece, argued that according to the Law on Partnership No. 3719/2008, civil partnerships were only allowed between individuals of different genders. This provision was incompatible with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights and Article 14 (Prohibition of discrimination) in conjunction with Article 8. They claimed that by excluding same-sex couples from civil unions, the Greek government was discriminating against them based on sexual orientation. The ECHR ruled in favor of the applicants. The Court



v. Italy<sup>88</sup>, Schalk and Kopf v. Austria<sup>89</sup>). In the case of Oliari and Others v. Italy, the European Court of Human Rights (ECHR) extensively leaned on the European consensus doctrine, ultimately reinforcing the formalization of two distinct institutions: marriage and civil unions.<sup>90</sup>

In Schalk and Kopf v. Austria the ECtHR decided that although according to the ECHR, same-sex couples did not have the right to marry, they constituted a family, and their family life had to be respected (Article 8 of the ECHR). In Salgueiro da Silva Mouta v. Portugal<sup>91</sup> case, where a father was denied the cus-

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found that Greece had violated Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life).

<sup>88</sup> Judgment of the ECtHR of 21 October 2015, Oliari & Others v Italy, applications nos. 18766/11 and 36030/11. The applicants, same-sex couples residing in Italy who wanted to marry but were forbidden by the country's laws, argued that they lacked legal means to protect their relationship and were unable to formalize their relationship legally. They claimed a violation of their right to a private and family life protected by Article 8 of the Convention. The Court concluded that considering that many same-sex couples were freely living their relationships in Italy, the Italian state had failed in its obligation to provide them with protection through specific legislation, thereby violating Article 8 of the Convention. This decision served as the basis for the enactment of Italian Law 76/2016.

<sup>89</sup> Judgment of the ECtHR of 24 June 2010, Schalk & Kopf v Austria, application no 30141/04. The applicants, a same-sex couple, wished to get married. However, as Austrian law did not allow for marriage between same-sex partners, their request was denied. The applicants complained that the refusal by Austrian authorities to solemnize their marriage violated their right to marry, protected under Article 12 of the Convention. They also complained of discrimination based on their sexual orientation, alleging violations of Article 14 and Article 8 of the Convention. According to the Court, Article 12 of the Convention does not obligate states to recognize marriage between same-sex couples, so there was no violation of the applicants' right to marry. Additionally, the Court found that there was no violation of Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life) of the Convention in this case.

<sup>90</sup> Ziyadov, N., *From Justice to Injustice: Lowering the Threshold of European Consensus in Oliari and Others versus Italy*, Indiana Journal of Global Legal Studies, JSTOR, vol. 26, no. 2, 2019, p. 631. DOI: 10.2979/indjglolegstu.26.2.0631 (22 September 2024).

<sup>91</sup> Judgment of the ECtHR of 21 December 1999, Salgueiro da Silva Mouta v Portugal, application no. 33290/96. After the Portuguese Court of First Instance awarded custody of Salgueiro da Silva Mouta's daughter following his divorce, his ex-wife appealed the decision, claiming that the father was gay, which she considered an abnormality to which children should not be exposed. Following this appeal, the Court of Appeal granted custody to the mother. Ultimately, the European Court of Human Rights (ECHR) unanimously determined that Portugal violated Article 8 in conjunction with Article 14 of the Convention, as it infringed upon the right

tody of his child because he was homosexual and lived with a male partner, the ECtHR ruled that this decision violated the father's right not to be discriminated against based on his sexual orientation in relation to his family and private life. Many countries, even the more conservative ones, have recognized the right to register partnership for same-sex couples as well.<sup>92</sup>

Thus, considering the obligations that derive from the ECHR and the related ECtHR jurisprudence, it is recommended to amend Article 163 of the AFC in order to extend its application to same-sex couples, as well, as the only way to have their right to family life guaranteed.

## 6. CONCLUSIONS

From the above analyses we may conclude that there is an increasing trend in the European Union member states to regulate through specific legislation the cohabitation of both different- and same-sex couples. This trend has been driven not only by the increased number of cohabiting couples worldwide but also by ECtHR jurisprudence, which, in many of its decisions, has condemned states for failing to take measures to protect different- and same-sex couples.

The Albanian legal framework on cohabitation of couples, does not fully guarantee their rights and obligations as provided by Article 8 of the ECHR (right to a family life), leaving only to the private autonomy the regulation of their personal and property aspects. Moreover, there are no provisions in Albanian legislation concerning cohabitation for same-sex couples.

For these reasons, it is recommended that – for those couples that want to enter into a registered partnership – the Albanian regulation of cohabitation is provided through a specific and detailed legislation, as established in several EU countries. This specific legislation should be aligned with the jurisprudence of the ECtHR.

Specifically, Albania would have to consider drafting a specific legal framework for regulating cohabitation, addressing both different-sex and same-sex couples. In this context, it is recommended that Article 163 of the AFC is amended in order to extend its provisions to same-sex couples.

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to private and family life and constituted discrimination between different-sex and same-sex couples. Also, the Court expressed that there was a general trend in the recognition of legal relationships for same-sex couples in European countries, where legislation provided for a form of non-marital union.

<sup>92</sup> Austria, Belgium, Cyprus, Estonia, France, Greece, Luxembourg, Malta, Netherlands: *Civil unions, and registered partnerships, op. cit.* (fn. 68).

The enactment of a specific and detailed law on cohabitation is recommended to include, among others, specific personal rights such as: the right to visit, access to personal information in cases of illness, appointment of a partner as a representative, and the right to continue living in the shared residence after the death of one of the cohabitants. In addition to personal relationships, it is crucial to address property and inheritance rights within the civil partnership framework.

When drafting the Albanian legal framework on cohabitation, best practices of European countries, such as Italy, could be considered, since according to scholars, the regulation of this institution in Italian Law 76/2016 differs from the institution of marriage.<sup>93</sup>

In addition, it is recommended that this regulation includes the establishment of an official civil partnership registration system in Albania for both different-sex and same-sex couples. This registration would serve as formal recognition of the partnership, providing legal security for the partners.

Lastly, with regards to the *de facto* cohabitations, their contractual autonomy should be respected as a choice not to enter into a registered partnership. It's up to them whether to ask for legal protection or not. Thus, the specific legislation (*de lege ferenda*), as recommended in this paper, should be applied only to those couples who want to enter into a registered civil partnership.

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<sup>93</sup> Cipriani, N., *Unioni Civili: Same-Sex Partnerships Law in Italy*, *The Italian Law Journal*, vol. 3, no. 2, 2016, p. 347. DOI: 10.23815/2421-2156.ITALJ (24 September 2024)

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Sažetak

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## OSIGURAVAJUĆI UČINKOVITU ZAŠTITU U OBITELJSKIM ODNOSIMA U ALBANIJI: UREĐENJE IZVANBRAČNE ZAJEDNICE I IMPLIKACIJE

*U radu se analizira učinkovita zaštita u obiteljskim odnosima u Albaniji, posebno uređenje izvanbračne zajednice implikacije istoga. Tema je u prvom redu predmet obrade zbog tri razloga: a) stalno rastući trend broja parova koji žive u izvanbračnoj zajednici a ne u braku; b) nedostaci u postojećem albanskom pravnom sustavu glede uređenja takvih zajednica (ugovor o izvanbračnoj zajednici se čini ograničenog djelovanja); c) nastojanja Albanije glede pristupanja Europskoj uniji koje zahtijeva konkretnije uređenje ovoga pitanja u skladu s pravnom stečevinom. Zbog toga se predlaže uređenje izvanbračne zajednice kao registriranog partnerstva putem posebnog zakona, kao što je već ono uređeno u nekim zemljama Europske unije.*

*Ključne riječi: obiteljski odnosi, izvanbračna zajednica, registrirano partnerstvo, praksa Europskog suda za ljudska prava*

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