

## COMPARATIVE OVERVIEW OF CIVIL PARTNERSHIP

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**ABSTRACT:** *Italian legislation has been used many times as an example in drafting the legislation of the Republic of Albania. Since this country has recently adopted the law on regulating civil partnership we are referring to dealing with this institution. Two people with the same gender and seniority create civil partnerships through the declaration before the Civil Registrar Officer and in the presence of two witnesses. Civil Registrar Officer then registers the civil partnership act in the civil registry. Civil partnership can be opposed by the party whose consent is taken by violence or driven by a great external fear set by itself. Also another reason why it can be opposed is also the case in which the consent was given in terms of error on the identity of the person or error over certain qualities of the other party. All people, regardless of sex, sexual orientation or gender identity, have the right to enjoy the protection afforded by human rights legislation, including respect for the right to life, security of the person and his or her privacy, protection against torture, from arbitrary arrest and detention, from discrimination, as well as the right to freedom of expression, association and peaceful assembly. The common living of a gay couple, coupled with a stability in their relationships, is included in the concept of family life.*

**KEYWORDS:** Civil Partnership, Gender Identity, Sexual Orientation, Freedom

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## INTRODUCTION

### Regulation of civil partnership based on Italian legislation

Italian legislation has been used many times as an example in drafting the legislation of the Republic of Albania. Since this country has recently adopted the law on regulating civil partnership we are referring to dealing with this institution.

In Law No. 76 of 20 May 2016, the Italian legislator has made it possible to recognize the unification of two persons of the same sex under the term civil partnership. This law establishes a civil partnership between persons of the same sex as a special social formation in Articles<sup>2</sup> and <sup>3</sup> of the Constitution of the Republic of Italy.

Two people with the same gender and seniority create civil partnerships through the declaration in front of the Civil Servant and in the presence of two witnesses. The registrar then registers the civil partnership act in the civil registry.

They constitute an obstacle to the linkage of a civil partnership between persons of the same

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<sup>1</sup>Article 2 "The Republic recognizes and guarantees the intangible rights of man, both individual and social groups, where he expresses his personality, and seeks the fulfillment of the irrepressible obligations of political, economic and social solidarity.

<sup>2</sup>Article 3 "All citizens have the same social dignity and are equal in front of the law, regardless of sex, race, language, and political opinion, personal and social conditions. It is the duty of the republic to abolish any obstacle to the economic and social order, which in fact restricts freedom and equality of citizens, prevent the full development of the human personality and the effective participation of all workers in the country's economic and social political organization.

sex for these reasons:

- > Existence, for one of the parties, of a marriage or other civil partnership;
- > Mental illness of one of the parties;
- > Existence of the relations between the parties referred to in Article 87 (1) of the Italian Civil Code; also the civil partnership contract can not be signed between an uncle and his nephew or an aunt and her granddaughter;<sup>3</sup>
- > The sentence of one party for murder or attempted murder against a person who has previously been married or in a civil partnership, if we are before the delivery for trial, the first or second sentence or in front of a temporary measure, the link of the civil partnership contract is suspended until the moment of the declaration of innocence.

The existence of one of the causes mentioned above invokes the invalidity of civil partnership. Its connection to a breach of the above-mentioned causes or of the causes set forth in Article 68 of the Italian Civil Code can be ascertained by each of the parties, direct offenders, the public prosecutor and all those who have a legitimate and actual interest.

Civil partnership can be opposed by the party whose consent is taken by violence or driven by a great external fear set by itself. Also another reason why it can be opposed is also the case in which the consent was given in terms of error on the identity of the person or error over certain qualities of the other party. The action can not be opposed if they have lived together for more than a year after the end of the violence, extinguishing the obstacles that have led to the fear of the person giving consent or one year after the error was discovered. The mistake in the personal qualities of the person is essential whenever, given the conditions of the other party, clarifying that he would not have given his consent knowing in advance of these conditions and the fact that the error relates to:

- a) Existence of a physical or mental illness that hinders the development of a common living;
- b) Circumstances under article 122, paragraph 3, no 2), 3) and 4) of the Italian Civil Code <sup>4</sup>;

A partner at any time may object to the marriage or civil partnership of the other party. If the invalidity is opposed, this matter should be judged beforehand. Civil partnership between persons of the same sex is certified by a document certifying its creation, which must contain the personal data of the parties, indications of the property regime and their residence, as well as the personal data of the witnesses and their residence.

By making a statement to the Civil Registrar, the parties may decide, for the duration of the civil partnership, a common surname by choosing one of their surnames. Partners may decide to put on the common surname, before or after them, their surname if different, by means of a

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<sup>3</sup>Item 87 of Italian civil code.

<sup>4</sup>Article 122, third paragraph, item 2 "The existence of a sentence for a deliberate crime not less than five years, except for a case of repeated rehabilitation before marriage. The action for annulment can not be undertaken before the judgment has become final ", item 3 " declaration of ordinary or professional crime ", item 4 " the fact that the other spouse has been convicted of criminal offenses related to prostitution, more than two years. Cancellation action can not be taken before the decision becomes final".

statement to the Civil Registrar.

With the establishment of a civil partnership, the parties acquire the same rights and undertake the same obligations, from which follows the obligation of mutual moral and material assistance as well as the obligation to live together. Both sides are obliged in proportion to their incomes as well as their professional and household skills to contribute to livelihoods and common needs. The partners also agree to determine the common apartment and its address, each party has the right to use this address.

The property regime of goods, in the absence of any other agreement between the parties, will be that of the legal community. Regarding the form, modification or manner of signing the agreement by the parties, the provisions of Articles 162 to 166 of the Italian Civil Code apply. The parties can not derogate from the rights and obligations of the law regarding the effects of civil partnership. When the behaviour of one of the parties in the civil partnership is the cause of serious moral or physical damage to the other party, the competent judge may decide, at the request of the latter, to take the measures provided for in Article 342 of the Civil Code. Violence also constitutes a cause for annulment of a civil partnership contract when it threatens the person or property of the other party of the contract, bound by the contractor or his successor or the predecessor of the latter.

As in the case of coexistence even in the case of the civil partnership when the judge has to choose a guardian, the first that he prefers is partner of the person found in the conditions of physical or mental disability.<sup>5</sup>

With the sole purpose of ensuring respect for the rights and full fulfillment of obligations arising out of civil partnership between persons of the same sex, the provisions referring to marriage and those provisions which contain the words "spouse", "husband and wife" or Equivalent terms, wherever they are repeated in laws, in acts that have the power of law, regulations, administrative acts or collective contracts apply also to each of the parties of the civil partnership. With this determination, the legislator has decided that all rates applicable for spouses will apply equally to the same sex persons who have decided to share their life together, except for adoption cases that the court should assess on a case-by-case basis.

The death or announcement of death of one of the partners leads to the resolution of civil partnership. Another reason for resolving the civil partnership contract is also with the will of both partners, the request for resolution is made three months before the will of the parties to the civil service. When we are in the condition of registering a change of gender, and the partners do not want to solve the existing marriage or interrupt the civil effects of coexistence, then the civil partnership created by this change of affairs reflected in the civil registry records takes hold.<sup>6</sup>

Also in the law are defined rules of inheritance. In special way:

- For legal inheritance, regarding the competition between the heirs, it is determined that the partner of the de cujus takes half of the inheritance if in the inheritance competes with only one child of the decedent, and in other cases takes one third. If the descendants, brothers or sisters compete with a spouse or a civil partner, they are entitled to two-thirds of the inheritance, while

<sup>5</sup>Article 1, item 15, of the same law.

<sup>6</sup>Article 1, item 27 of law Nr 67 "Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze" dated 20 May 2016.

in the absence of children, other descendants, brothers or sisters, to the de cujus partner belongs the entire inheritance.<sup>7</sup>

- In the case of statutory legacy (that is, when the law itself provides reserves for special family figures, even though they are not mentioned in the will), the position of the civil partner equates to that of a spouse. Therefore, even when competing with the other inheritors for the civil partner is reserved the right to housing in the family house as well as the use of home furniture. In the case when de cujus leaves behind a civilian partner even a child, the latter is reserved one third of the inheritance, the same quota is reserved for the civil partner still alive. If the children are more than one, half of the inheritance is reserved to them, while one-fourth to the civil partner.

- In respect of unworthiness it is foreseen that he is excluded from inheritance as unworthy, a person who intentionally has killed or attempted to kill his intestate, his spouse or his civil partner, a successor or his predecessor; a person who has denounced a spouse, civil partner, his children or a predecessor for criminal offenses punishable by life imprisonment or an offense for which the law provides for imprisonment of not less than three years, the appeal has proved false in a criminal trial.

### **The right to private and family life of couples of the same gender within the European legislation**

Today the terminology used in drafting the legal status that is set by the initiatives to conduct legal registration of couple relationships is very rich. Common living Registered Partnership, Partnership of Life, Sustainable Relationships, Civil Unions, Legal Coexistence, Reciprocal Recipient and Registration of Unmarried Couples are all terms used in European Legislation and in the writings of academics, activists and media to determine the legal registration of the relationship of couples who, due to the lack of legal framework, can not legally marry, or choose not to exercise their right to do so<sup>8</sup>.

The term "Registered Partnership" is used to describe the various methods that enable unmarried individuals to record their relationships in order to gain formal, legal and social recognition.

The GJEDNJ for a long time has not recognized the steady relationship between same-sex partners as cases of family life, but has preferred to review these cases from the perspective of private life. However, they have admitted that there is an ever-growing international agreement that relations with same-sex couples should be treated the same way as heterosexual couples.

The national courts have refused to extend beyond the GJEDNJ's decisions regarding these matters and must accept that the relationship of couples with same-sex partners constitutes family life as defined in Article 8 of the KEDNJ<sup>9</sup>.

However, the National Courts, have consistently admitted that the relationship of same-sex partner couples, even if treated in the aspect of private life, necessarily require an analogous protection of heterosexual couples. In the context of housing and social welfare, has stated that a gay partner can be treated as a member of the original family and made it clear that gay

<sup>7</sup>[https://www.laleggepertutti.it/140658\\_cose-ununione-civile](https://www.laleggepertutti.it/140658_cose-ununione-civile).

<sup>8</sup>Haxhiraj. A, "The right to a family life within the framework of European law", Tirana 2016, pg. 132.

<sup>9</sup>European Court of Human Rights, M case against Secretary of State for Labor and Pensions, year 2006.

partners are no less close and deserve a similar protection to those of heterosexual partners. A gay couple, just as much as a heterosexual couple, share life with each other and live together in their home. These two different types of couples have equivalent relationships<sup>10</sup>.

Similarly, we can highlight the important acknowledgment of the GJEDNJ for the protection afforded by the Refugee Convention in the case of immigrants to maintain equal treatment in heterosexual relations. In the context of emigration, the GJEDNJ has maintained its position that the relationship with the same sex partner can be treated as a private life that is also intertwined with family life. Private life, as defined by Article 8 of the KEDNJ is a very broad concept, including within itself personal, social and economic relations; moral and physical integrity; personal identity, including sexuality; personal information; as well as personal or private space. From these aspects, the first three always face cases of deportation and emigration. In those cases where the relationship between two relatives is not recognized as a family life, it should nevertheless be defined as a protected private life that is of particular importance.

According to the Court, private life is a very broad concept that can not be summed up within a simple definition<sup>11</sup>. This concept is clearly wider than the right of privacy and relates to a sphere within which anyone can pursue the free development and fulfillment of their personality.

In 1992, the Court stated: "... it would be very restrictive if we narrowed down the notion of private life within an inner circle in which the individual can live his own life as he chooses, and we excluded from it all the outside world that is not part of this circle. Respect for private life should include, to a certain extent, the right to establish and develop relationships with other human beings"<sup>12</sup>.

For this reason, private life necessarily includes the right to establish relationships with other persons and the outside world. A person's sexual life is part of his private life, and constitutes an important part of it. So private life guarantees a sphere within which a person can create relationships of various kinds, including sexual ones, and consequently, the choice to affirm and accept a person's sexuality is done within the framework of Article 8 of the KEDNJ. In the *Dudgeon v. United Kingdom* case<sup>13</sup>, the Court decided that, based on the applicant's circumstances, the very existence of a legislation that considers homosexual behavior as unlawful has had a direct and continuous impact on his private life. However, not necessarily, any sexual activity conducted behind closed doors may be dealt with within the framework of Article 8.

In the *Laskey* case, *Jaggard & Broen v. The United Kingdom*, the applicants were involved in consensual Masonic activities for the purpose of sexual satisfaction. Although the Court did not have to formally determine whether the conduct of applicants could be included in the definition of private life, it provided some reservations to allow the protection provided by Article 8 to extend to activities involving: a considerable number of people; provision of rooms with special equipment; the recruitment of new members, as well as the recording of video tapes distributed among the members.

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<sup>10</sup>Haxhiraj. A, "The right to a family life within the framework of European law", Tirana 2016, pg. 133.

<sup>11</sup>European Court of Human Rights, case *Costello-Roberts v. The United Kingdom*, dated 25 March 1993.

<sup>12</sup>European Court of Human Rights, case *Niemietz v. Germany*, dated 16 December 1992.

<sup>13</sup>European Court of Human Rights, case, *Dudgeon v. The United Kingdom*, dated 22 October 1981.



**Prohibition of discrimination against homosexual couples.**

The GJEDNJ has stated that the relationship created between a person and his deceased partner did not enter into the area of non-discrimination on the basis of sexual orientation and was classified as the plaintiff's private life. This was justified by the justifiable effort to protect the traditional family.

The first change in the GJEDNJ's behavior was observed during the case *Karner v. Austria*. The applicant complained of a violation of his private life, family life, and home, according to Article 8. After the death of his partner, he could not exercise the lease rights, since he could not qualify as a "life partner" because of his sexual orientation. The Court did not consider it reasonable to examine the case in the private or family life view, because the complaint was clearly within the scope of the right to respect the habitation. Although the protection of the traditional family would again be a legitimate reason, the GJEDNJ found no reason to exclude same-sex couples from the term life partner<sup>14</sup>.

The GJEDNJ has tried to establish homosexual partners' relationships at the same level as married couple relationships, comparing it to the relationship of two twins sharing the room together. Later, in its jurisprudence, the GJEDNJ has suggested that same-sex couples may constitute family life, and respect for family life should also take into account developments and changes in the perception of society, including the rights of sexual minorities. The GJEDNJ decided that respect for family life should above all take into account the developments of society and change the social perception, the civil status and the problems of human relations, including the fact that there is no single way or a single choice for living family and private life.

Regarding the issue of what is considered as a family life, protected by Article 8, in child custody cases, a child born into a traditional family of two heterosexual married parents divides family life with both of his parents, and vice versa. Since *Schalk and Kopf against Austria* case, a relationship between homosexual partners, in itself constitutes family life of these partners.

For this reason, sexual orientation discrimination related to family life, and in particular cases of adoption and custody, may be included in the scope of protection of family life as defined in Article 8, and may also constitute a addition violation to Article 14.

All people, regardless of sex, sexual orientation or gender, have the right to enjoy the protection afforded by human rights legislation, including respect for the right to life, the security of person and his privacy, protection against torture, arbitrary arrest and detention, discrimination, as well as the right to freedom of expression, association and peaceful assembly.

The common lifestyle of a gay couple, coupled with a stability in their relationships, is included in the concept of family life. The GJEDNJ, referring to Article 8, interpreted in the light of Article 14, has reached this conclusion by referring to the recognition of the heterosexual couples' common lifestyle. GJEDNJ jurisprudence has come to the conclusion in some cases that the KEDNJ should be read in its entirety and in this context, having in mind the prohibition of discrimination, we have the conclusion that states should recognize that same-sex couples should have the right to marriage set out in Article 12 of the KEDNJ. This recognition should be made because the opposite means failure to comply with the obligations set out in the

<sup>14</sup>Haxhiraj. A, "The right to a family life within the framework of European law", Tirana 2016, pg. 138.

KEDNJin Articles 8 and 14, or, in other words, affects the right to family life and causes discrimination against these couples. From the jurisprudence of the GJEDNJthere is a persistence in the protection of private and family life versus the diversity of issues raised by gender. Fairly, family issues and their relationship with fundamental rights and freedoms set forth by the KEDNJhave often put the courts of Council of Europe member states into difficulties<sup>15</sup>.

The Albanian LGBT community is having a difficult time. The conservative Albanian society, indoctrinated with the classic concept of the family, is discriminating and denigrating with this community. Their rejection in Albanian society is the most common manifestation of social homophobia. Discrimination against homosexuals is open in public places, in institutions and elsewhere. The discussion on the situation of the LGBT community and their rights is conducted in closed rooms, small groups of supporters, international organizations and public information are rare. The issue of LGBT rights in Albania has been limited by the state, civil society and the media, because political and economic issues are perceived to have the highest priority. Inadequate knowledge of these issues causes the public to have a wrong reaction by creating ideas based on prejudices and wrong stereotyping of persons due to sexual orientation. Two have been identified as the main reasons for the invisibility of these issues. The first reason is of a legal nature. Thus, in Albania until 2001, homosexuality is considered a criminal offense provided by Article 116 of the Criminal Code. Homosexuality has been decriminalized in 2001, with changes to the Criminal Code, according to law no. 8733, dated 24.01.2001.

The second reason is of medical nature. Persons with different sexual orientation are considered and continue to be considered unjustly as sick persons or suffering from an illness. Thus, in a case filed to the Commissioner for Protection against Discrimination, has been requested removal from the teaching texts of homosexuality as a disease. The World Health Organization (WHO) since 1990 has removed homosexuality from the International Classification of Disease Statistics and Health Problems. Expressions that "homosexuality is a disease" are unfounded and misinform the opinion. Based on this fact and on the Law "On Protection from Discrimination", the Commissioner has stated that the definition of homosexuality as a disease constitutes a concern, creates a sense of insult and undermines the dignity of this community, making the perception of other persons for this category as well discriminatory.

## REFERENCES

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- [3] • Italian Civil Code
- [4] <sup>1</sup>Based on <http://www.parliament.uk/about/faqs/house-of-lords-faqs/role/> on 15<sup>th</sup> of May 2017.
- [5] <sup>1</sup>Haxhiraj. A, "The right to a family life within the framework of European law", Tirana 2016, pg. 133.
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<sup>15</sup>ArtaMandro-Balili, Gender Discrimination in Family and Marriage Matters, pg. 35.

- [7] <sup>1</sup>European Court of Human Rights, case Niemietzv.Germany, dated 16 December1992.
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- [9] Artamandro-Balili, Gender Discrimination in Family and Marriage Matters, pg. 35