

Legal protection of factual relationship: is marriage necessary to create a family?

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Abstract

In Kosovo, the number of people who choose out-of-marriage relationships as an alternative way of family-making is increasing. But, there are also many couples who have a traditional or religious ceremony without finalizing their relationship through formal civil marriage. Today, cohabitation has almost the same legal protection as marriage has, hence it is an option without many obligations and formalities, but it is adequately protected. Therefore, this research will explain the cases in which out-of-marriage relationship has legal effects. Which are the content and the main elements of factual relationship? Furthermore, special attention was given to the comparison of cohabitation and marriage, finding their similarities and differences. Finally, we have also presented the legal ways of ending the factual relationship.

Keywords: out-of-marriage relationship, marriage, institution, dissolution of the factual relationship.

Introduction

Social-economic changes, declining of religion impact, increasing levels of education, and economic independence of women are the main factors that influenced young couples to choose cohabitation instead of the traditional marriage. In Kosovo's society, because of the lack of law tradition, there are many cases where the couples had a traditional ceremony, but they did not register it officially as a civil marriage. Hence, the regulation and recognition of the factual relationship is a legal necessity. This institute has special attention not only in regulating the relationship of the partners but also in the necessary protection of children born in this union.

Family Law of Kosovo regulates the factual relationship stating that "A factual relationship (out-of-marriage relationship) is the factual relationship between the husband and the wife who live in as a couple, characterized by a joint life that represents a character of stability and continuation."¹ As we notice, in Kosovo we use the term factual relationship or out-of-marriage relationship. On the other side, in Albania, they use the term cohabitation with a similar definition "Cohabitation is the factual union between the husband and the wife who live in as a couple, characterized by a joint life that represents a character of stability and continuation".²

Even though the marriage union was the accepted form, the institute of out-of-

¹ Kosovo Family Law No. 2004/32, Article 39 paragraph 1.

² Family Code of the Republic of Albania, article 163.

marriage relationship has existed since the early times, although not with the same legal protection as today. In Roman law, cohabitation is defined with the term *concubinage*. *Concubinage* represented the permanent and stable relationship between a man and a woman without reciprocal marriage intentions. It was a characteristic of only the inferior social strata. However, today, cohabitation can be considered a reality of all social strata.

Elements of entering into a factual relationship

For the factual relationship to have legal protection, some requirements must be fulfilled. They are similar to marriage, but they also have other characteristics. Some of these requirements are:

1. The relation between different sexes

Based on the law definition of the factual relationship, this relationship is only accepted as a relation between a man and a woman, excluding the relation between same-sex people. This happens because our society is still not ready to accept same-sex marriage and is still against LGBT rights. Also, this reluctance is related to the stage of the development of society, the traditional moral values, and religious prohibitions and religious resistance. However, many countries around the world recognize not only same-sex marriage but also cohabitation between people of the same sex. By all means, no one can prevent two people of the same sex to live together and to regulate their relationship according to their wish, including personal and property relations (Dnes, 2007).

2. Cohabitation as a stable and solid relationship

Another element that is required by the law for the out-of-marriage relationship to have legal protection is the fact that this relationship between the husband and wife should be stable and solid. The main purpose of the family law is the protection of the family and protection of children, hence, from the articles which define the factual relationship, we notice that it is equal to marriage, because it is considered as an alternative of family creation and aims to protect the unity of a man and a woman who intend to create a family. Also, the factual relationship, in which partners aim to have a long term or permanent relationship similar to wedlock, will have legal protection. The characteristics of a stable and solid cohabitation are also related to other important aspects in a couple's life such as moral and intellectual support, material assistance, and raising and educating children. Hence, we can conclude that relationships that are not stable and solid will not have legal protection and therefore do not constitute an interest in the law. Such cohabitations can be short-term relationships that do not have the goal to create a family.

3. They live openly as a couple

This implies that the two cohabiting partners must manifest their relationship to the public in the same way as in the case of a registered marriage. An important condition for cohabitation is living together in an intimate and committed relationship because

cohabitation between friends or siblings would not be called factual relationship and would not have legal protection. Therefore, we can say that these adults can legally enter into wedlock, but for personal reasons choose not to formally obtain a legal marriage.³

4. Marriage prohibitions

Similar to wedlock, in order for the factual marriage to have legal protection, it is required that the couples who live together to not have marriage prohibitions. First, this means that none of the partners should be in a registered civil marriage with another person. But, what happens if both of the cohabiting partners or one of them is already married to someone else? Family Law of Kosovo says that existing marriage is a prohibition for entering into a factual relationship. In case when the partners are in wedlock but have already stopped every relationship between their former partners, again, the existing marriage will be considered an obstacle for cohabitation. Therefore, even though the factual relationship between two opposite-sex adults exists, it will not have legal protection (Gashi, Aliu, Vokshi, 2007). Although we say that existing marriage is a prohibition to a cohabitation which has legal consequences, by law, if a man and a woman create property through joint work from a partnership without cohabitation, the property acquired between them is considered their common property, i.e the same property provision shall apply as in the case of the property acquired in a legally registered marriage or in the factual relationship.⁴ The term "partnership without cohabitation" indicates the relationship between a man and a woman who don't live together because one of them or both of them are legally married to another person (Gashi, Aliu, Vokshi, 2007). Also, similar to civil marriage, straight-line blood relation without boundaries and collateral blood relation until the fourth-degree ban or prohibit cohabitation. Another obstacle is the adopting relation, applying the same rules as blood relations. People who suffer from mental illnesses or whom court removed their legal capacity to act, if they live in a factual relationship, this relationship does not have legal protection.⁵

Similarities between out-of-marriage relationship and marriage

All over the world, we see the increasing tendency of people who prefer to live in a factual relationship and, as a result, many countries in the world treat it with the same importance and legal protection as marriage (Willoughby, Busby, Dean, 2012). We can even say that the differences between these two institutions of the family law have to do more with the social aspects than the legal ones.

Regarding the similarities between marriage and cohabitation, first, we have to mention the fact that both institutions should meet the same requirements in order to have legal consequences. Both wedlock and cohabitation are entered by two adults who have capacity to act and are capable to understand their acts. Exceptionally, wedlock can also be entered under the age of eighteen through the emancipation

³ Kosovo Family Law, no. 2004/32, Article 40.

⁴ Kosovo Family Law, no. 2004/32, Article 58, paragraph 1

⁵ Kosovo Family Law, no. 2004/32, Article 39 paragraph 3.

institute. Through a court's decision, a person from the age of sixteen until eighteen may be allowed to enter into wedlock and to obtain the capacity to act. This rule does not apply for cohabitation because cohabitation has legal effects only when two adults are living together. If a factual relationship would have legal consequences in the case of the under-aged cohabitants, then both partners would have had the right to obtain the full capacity to act. However, if we use the analogy with marriage, when a man and woman create a family while living together (cohabiting), and especially when from this relationship there are children, the capacity to act is seen as a necessity. This capacity would allow the partners to regulate their relationship but also their rights and obligations towards their children. Considering the importance of obtaining the full capacity to act of the cohabiting partners who are under 18, we think that it is reasonable for them to have the legal opportunity to ask the court for obtaining the full capacity to act. This suggestion comes from the fact that both cohabitation and marriage have the same goal, therefore, the aim of the factual relationship is the same and is related to the protection of the family. Some legislation, such as that of Croatia, state that the capacity to act can also be acquired from people between the ages of 16 until 18 who are already in a factual relationship and have children (Gashi, Aliu, Vokshi, 2007).

As we mentioned above, marriage and cohabitation are allowed only between people of the opposite sex. The cohabitation of same-sex people is not legally prohibited but it does not have legal protection.

To have legal effects, both marriage and cohabitation should be entered by the free will of both partners, stating their autonomous consent free from coercion, threat or by mistake or any other lack of free will.⁶

For a cohabitation to have legal effects, it is required to not have any marriage bans or prohibitions. Hence, all the legal facts which should not exist in a marriage, such as an already existing wedlock, are prohibitions for both marriage and cohabitation. Other prohibitions such as straight-line blood relations without boundaries in its degree, and collateral blood relation until the fourth degree, adopting relation, mental illness or inability to judge are all applied to marriage and cohabitation. Even though affinity and custody are not textually mentioned in the articles regarding the cohabitation, we think that they should be applied similarly to entering into wedlock.

Another similarity between marriage and cohabitation are the rights and obligations between the partners. Article 39, paragraph 2, states clearly that factual relationship is equal with the marital status in terms of rights and obligations, financial and moral supporting, and property rights. As in wedlock, the property which is collected during the cohabitation shall be called the common property of the cohabiting partners. At the same time, the apportioning of the joint property shall be based on the provisions which regulate the acquisition and apportioning of the joint property of marital spouses.⁷ In both cases, partners are equal in all personal and property relations.

Also, when from this relationship there are children involved, both in marriage and in the factual relationship, parents are obliged to raise the children and have to fulfill all other obligations which come out from the parents' responsibility. In both

⁶ Kosovo Family Law, no. 2004/32, paragraph 18.

⁷ Kosovo Family Law, no. 2004/32, Article 58 paragraph 2.

unions, parents are obliged to take care of the children, putting their needs first, and providing them with emotional and material wellbeing, and safety. They should take care of the child's education and legal representation. These legal obligations will also be applied when the marriage or the factual relationship ceases to exist.

Differences between out-of-marriage relationship and marriage

Even though there are many similarities between cohabitation and marriage, there are also many differences. First of all, they differ in terms of how they are created. Partners enter into cohabitation by the expressed or tacit consent of both partners. Hence, legal provisions do not foresee any forms of entering into cohabitation, making it more difficult to prove when the partners entered into cohabitation (Podvorica, 2011). When the factual relationship ends in disagreement between the partners, each one of them will have conflicting claims regarding their rights, especially property rights. Therefore, to create legal stability and safety, we think that the law should provide a legal opportunity which would enable the verification of the time when the partners have entered into cohabitation. This act, according to our opinion, can be a written agreement between the cohabiting partners, similar to USA, where a cohabitation agreement is used to protect both partners and to avoid conflicts in the event of a breakup.⁸ This agreement can be used to detail and define the relationship in terms of rights and obligations, but also in the event of a breakup.

When entering into wedlock a procedure should be followed. The two adults should solemnly declare their will and full consent for marriage in front of the registrar, following other procedures as well, such as the declaration of marriage, presence of the two witnesses, and signing of the statement in front of the official registrar. Another difference between wedlock and cohabitation is the way of ending the relationship. Similarly as when entering into cohabitation, to bring the factual relationship to an end the expression of the will of one or both partners is enough. In this event, no official legal action is required. On the other hand, if a couple decides to divorce, several procedures must be followed: one spouse or both of them should file a claim for divorce within the competent court, lawful causes which led to divorce and filing of the lawsuit, reconciliation attempts by the court, etc. The long procedure to be followed for the ending of a marriage is one of the main reasons why couples choose cohabitation as a new way of family-making.

Another distinction between marriage and cohabitation is the right to providing financial maintenance and accommodation for the spouse who does not have sufficient means for living based on the fulfillment of the legal conditions.⁹ On the other hand, in the event of cohabitation, there is no obligation for the partners to provide financial maintenance and accommodation for the partner after the breakup (Omari, 2010). Even though there is no legal obligation, the court can require alimony from one of the former partners.

⁸ https://www.lawdepot.com/contracts/cohabitation-agreement/?loc=US&pid=googleppc-cohab_us-sitelink_a-ggkey_cohabitation%20agreement&pid=googleppc-cohab_us-CohabT1_h1-ggkey_cohabitation%20agreement&gclid=EAIaIQobChMI5pTF08aK4wIVx4jVCh3-Uw5NEAAYBSABEGlC7_D_BwE#.XRUt3uszbl

⁹ Kosovo Family Law, no. 2004/32, Article 298.

The right to inherit is another difference between cohabitation and marriage. In the event of the death of one of the spouses, the other spouse has the right to inherit in the first rank of inheritance and in equal shares with the children and successors. If the decedent has no children or successors, the surviving spouse inherits in the second rank of inheritance, together with the parents of *De cujus*, but this time the spouse inherits half of the property. If the parents of the decedent have died before him and have no successors, the surviving spouse with inherit all the property.¹⁰

Nevertheless, the provisions on inheritance which are applied in marriage are not applicable to cohabitation. In the event of the death of one of the non-marital spouse, the surviving partner has the right to inherit only if the cohabitation has lasted for at least five years from the moment of death of the testator, or if children were born from this relationship for at least three years.¹¹ Another difference in the right to inherit in marriage and cohabitation is the fact that the spouse in the factual relationship will not be considered a compulsory heir.¹²

Dissolution of cohabitation

Cohabitation can come to an end based on specific facts and circumstances. Hence, cohabitation can end, in these ways:

Agreed dissolution of cohabitation, as we mentioned above, cohabitation can be entered but also can be ended with the free will of the partners who were living together. The end of the cohabitation with an agreement is not an object to any legal form, but it can be achieved through the simple statement of the free will of both cohabiting partners.

Unilateral dissolution of cohabitation, when the cohabiting partners cannot come to an agreement, one of them can end the relationship unilaterally. This dissolution is manifested through quitting from living together with the cohabiting partner. Living together is a crucial element in the factual relationship, while in wedlock it is not an essential factor because marriage will be legally valid even if the spouses do not live together. Unilateral dissolution of cohabitation can be achieved when there are justified reasons for it (Gashi, Aliu, Vokshi, 2007).

Dissolution of cohabitation upon the death of the partner, death is considered a natural factor that results in the termination of cohabitation when one or both partners die. Likewise, cohabitation will come to an end with the announcement of the missing spouse dead.

Dissolution of cohabitation upon entering into wedlock, we can say that often cohabitation is the stage which precedes marriage so that the partners will know each other better to then finalize their relationship into marriage. Cohabitation will cease to exist if the out-of-marriage spouses will enter into wedlock with each other, or with other people.

¹⁰ Law on Inheritance in Kosovo, No. 2004 / 26 , article 12 dhe 14.

¹¹ Law no. 06/1-008, On amending and supplementing the law no. 2004/26, On Inheritance in Kosovo, article 4.

¹² Law on Inheritance in Kosovo, No. 2004 / 26, article 28 paragraph 2.

Conclusions

Marriage may not be the ideal solution to all since some couples want to avoid legal formalities or don't want to enter into wedlock at the time. Whatever the reason, today cohabiting partners or partners living together in a factual relationship are guaranteed with a higher level of protection. From this research, we can conclude that, legally, cohabitation is equal to marriage in many aspects. To enter into a cohabitation relationship that provides legal protection, all the requirements which are necessary for entering into wedlock must be met. The only exception is the form provided by law, which is the crucial difference between these two institutions. Also, for the cohabitation to have legal consequences, it is required to have none of the marriage prohibitions or bans, which are applied to wedlock.

Taking into account the rights and obligations of the cohabiting partners, the financial support, children obligations that come out from the relationship parent-child, and the inheritance rights during the cohabitation, we can say that there is no essential difference with the institute of marriage.

After analyzing the differences between marriage and cohabitation, we notice that there are no fundamental differences between them; there are no differences that would make marriage a safer and better way to create a family. On the contrary, we can conclude that the differences between these two institutions, which are mostly related to the many formalities of entering into or putting an end to it, make cohabitation more preferable.

Finally, given these conclusions, a question arises: Is marriage a necessity which offers a guarantee to the future spouses? This question until now remains unanswered and to be seen in practice. However, we come to the conclusion that the legal protection in wedlock and cohabitation is almost the same, with only some differences in the social aspect.

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