

Property Regimes of European Spouses and Partners. Towards Their Unification or Just to a Certain Degree of Harmonization?

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Abstract: Over the centuries, in the European context, life-in-common has been organized in different ways although until very recently the undisputed predominance of marriage has stood out. In addition, the combination of today's means of communication with the implementation of one of the fundamental goals of the European Union (EU) – the free movement of goods, persons, services and capital – has led to an exponential increase in the number of couples of different nationalities, with obvious consequences for the laws governing their property relations. What are the rules governing the property of married and unmarried couples? Are there any similarities or connections between these systems? Is there a tendency towards unification or harmonization? These are the three main questions that this study seeks to answer. After examining the property regimes applicable to marriage, registered partnerships – if any – and cohabitation in the twenty-seven countries that currently make up the EU, in England and Wales, and in some others that have never been part of the Union (Norway, Switzerland and Iceland), an attempt will be made to shed some light on the question of the convergence or divergence of Family law in Europe. Finally, a brief reference will also be made to the two EU Council Regulations adopted on 24 June 2016 on enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of decisions in matrimonial property regimes and on the property consequences of registered partnerships.

Résumé: Au fil des siècles, dans le contexte européen, la vie en commun a été organisée de différentes manières, même si, jusqu'à très récemment, la prédominance incontestée du mariage s'est imposée. En outre, la combinaison des moyens de communication actuels avec la mise en œuvre de l'un des objectifs fondamentaux de l'Union européenne – la libre circulation des biens, des personnes, des services et des capitaux – a entraîné une augmentation exponentielle du nombre de couples de nationalités différentes, avec des conséquences évidentes sur les lois régissant leurs relations patrimoniales. Quelles sont les règles qui régissent le patrimoine des couples mariés et non mariés? Existe-t-il des similitudes ou des liens entre ces systèmes? Une tendance à l'unification ou à l'harmonisation est-elle observable? Telles sont les trois principales questions auxquelles cette étude tente de répondre. Après avoir examiné les régimes patrimoniaux applicables au mariage, aux partenariats enregistrés – le cas échéant – et à la cohabitation dans les vingt-sept pays qui composent actuellement l'Union européenne, en Angleterre et au Pays de Galles, ainsi que dans certains autres qui n'ont jamais fait partie de l'Union (Norvège, Suisse et Islande), nous tenterons d'apporter un éclairage sur la question de la convergence ou de la divergence du droit de la famille en Europe. Enfin, une brève référence sera faite aux deux règlements du Conseil de l'Union européenne (UE) adoptés le 24 juin 2016 sur la

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coopération renforcée dans le domaine de la compétence, de la loi applicable, de la reconnaissance et de l'exécution des décisions en matière matrimoniale.

Zusammenfassung: Im Laufe der Jahrhunderte wurde das Zusammenleben in Europa auf unterschiedliche Weise organisiert, wobei sich bis vor kurzem die unbestrittene Vorherrschaft der Ehe durchgesetzt hat. Darüber hinaus hat die Kombination der heutigen Kommunikationsmittel mit der Verwirklichung eines der grundlegenden Ziele der Europäischen Union – der freie Verkehr von Waren, Personen, Dienstleistungen und Kapital – zu einem exponentiellen Anstieg der Zahl von Paaren unterschiedlicher Nationalität geführt, mit offensichtlichen Folgen für das Recht, das ihre Vermögensverhältnisse regelt. Welche Vorschriften gelten für das Eigentum von verheirateten und unverheirateten Paaren? Gibt es Ähnlichkeiten oder Verbindungen zwischen diesen Systemen? Gibt es eine Tendenz zur Vereinheitlichung oder Harmonisierung? Dies sind die drei Hauptfragen, die diese Studie beantworten will. Nach einer Untersuchung der auf die Ehe, die eingetragene Partnerschaft – sofern vorhanden – und das Zusammenleben anwendbaren Eigentumsregelungen in den siebenundzwanzig Ländern, die derzeit die Europäische Union bilden, in England und Wales, sowie in einigen Ländern, die nie der Union angehörten (Norwegen, Schweiz und Island), wird versucht, die Frage nach der Konvergenz oder Divergenz des Familienrechts in Europa zu beleuchten. Schließlich wird auch kurz auf die beiden am 24. Juni 2016 angenommenen Verordnungen des Rates der Europäischen Union (EU) über die Verstärkte Zusammenarbeit im Bereich der Zuständigkeit, des anwendbaren Rechts, der Anerkennung und Vollstreckung von Entscheidungen in Güterrechtssachen und über die vermögensrechtlichen Wirkungen eingetragener Partnerschaften eingegangen.

Resumen: A lo largo de los siglos, en el contexto europeo, la vida en pareja se ha organizado de diferentes maneras, aunque hasta hace muy poco ha destacado el predominio indiscutible del matrimonio. La combinación de los actuales medios de comunicación con la puesta en práctica de uno de los objetivos fundamentales de la Unión Europea – la libre circulación de bienes, personas, servicios y capitales – ha provocado un aumento exponencial del número de parejas de distintas nacionalidades, con evidentes consecuencias para las leyes que regulan sus relaciones patrimoniales. ¿Cuáles son las normas que rigen los bienes de las parejas casadas y no casadas? ¿Existen similitudes o conexiones entre esos regímenes? ¿Existe una tendencia a la unificación o armonización? Estas son las tres preguntas principales a las que pretende responder este estudio. Tras examinar los regímenes patrimoniales aplicables al matrimonio, a las uniones registradas – en su caso – y a la cohabitación en los veintisiete países que componen actualmente la Unión Europea, en Inglaterra y Gales, y en algunos otros que nunca han formado parte de la Unión (Noruega, Suiza e Islandia), se intentará arrojar algo de luz sobre la cuestión de la convergencia o divergencia del Derecho de familia en Europa. Por último, también se hará una breve referencia a los dos Reglamentos del Consejo de la Unión Europea (UE) adoptados el 24 de junio de 2016 sobre cooperación reforzada en el ámbito de la competencia, la ley aplicable, el reconocimiento y la ejecución de resoluciones en materia de regímenes matrimoniales y sobre los efectos patrimoniales de las uniones registradas.

1. Introduction

1. Life as a couple has been a constant throughout history. Over the centuries, in the European context, life-in-common has been organized in different ways – e.g., informal marriage in Roman law, *concubinage* in the Middle Ages, etc. – although until very recently the undisputed predominance in number, time and extension of marriage has

stood out. In recent decades, however, de facto *unions* have experienced a significant growth in the various European countries, taking on different names – civil unions, civil partnership, *civil solidarity pact*, unmarried unions, de facto unions, non marital couples, cohabitation, informal relationships, de facto cohabitation, etc. – and different forms of organization both in their personal dimension and in their patrimonial aspect.

In addition, the combination of today's means of communication with the implementation of one of the fundamental goals of the European Union (EU) – the free movement of goods, persons, services and capital (cf. Arts 21, 28 to 37 and 45 to 66 of the Treaty on the Functioning of the EU, and Art. 3.2 of the Treaty on EU) – has led to an exponential increase in the number of couples – married or not – made up of persons with different nationalities, with obvious consequences for the laws applicable to them and, in particular, as far as we are concerned, to their property relations. Which are the regimes established by the legal systems of the different countries with regard to the property of married and unmarried couples? Are there any similarities or connections between these systems? Is there a tendency towards uniformity or harmonization? These are the three main questions that this study seeks to answer. This study focuses primarily on the twenty-seven countries that currently make up the EU. In addition to them, England and Wales, and others that have never been part of the Union – Norway, Switzerland and Iceland – are also included in this research.

2. Before turning to the analysis that follows, a few methodological issues need to be highlighted. Firstly, it is obviously not possible in a few pages to carry out an exhaustive study of all the property rules applicable to married and unmarried couples in each country. For this reason, only a panoramic view of the way in which their patrimonial dimension is regulated will be given, from the perspective mentioned above, without going into detail.¹ Secondly, while the legal systems of all the countries under review have specific legislation on the institution of marriage, this is not the case for unmarried couples. Faced with this reality, solutions vary from one legal system to another. For this reason, this last element – the legislative response to unmarried couples – will be used as a criterion for grouping the different legal systems (section 2). Thirdly, although reference will be made, where appropriate, to the origin of a specific rule or to other relevant doctrinal or jurisprudential aspects, this study will basically focus on the legal rules relating to the property of married and unmarried couples in all of the mentioned countries.² The analysis of these rules will follow a tripartite scheme: the

1 There are interesting studies on these issues which analyse in detail the legal regimes applicable to both marriage and registered or unregistered partnerships. Among these, and in addition to those referred to in this paper, I would like to highlight two: Various authors, *European Family Law*, vols. I-IV (Edward Elgar Publishing: United Kingdom 2016) and Various authors, *Couples in Europe, Matrimonial and Registered Partnership Regimes* (CAE – IRENE – CNUE: Greece 2019–2020).

2 It should also be noted that all the rules quoted have been translated into English for ease of reading. Only in a few cases have some terms or expressions been kept in the original language where relevant. The way in which the laws are cited has also been standardized to make them easier to understand and

property regime applicable to marriage, the regime applicable to registered partnerships – if any – and, even if there is one, the regime applicable to cohabitation. Finally, even though in some jurisdictions different and varied terms are used to refer to unmarried couples – the same does not happen in relation to marriage –, for ease of follow-up, ‘registered partnership’ will be used when there is a formal registration of such a couple – a formal act – and ‘cohabitation’ when such union is not registered and is based only on the factual reality of living together in a marital style.

3. After examining the content of the various rules (s. 2), an attempt to shed some light, if possible, on the question of the convergence or divergence of Family law in Europe will be made (s. 3). And, in particular, on the couples’ property dimension: are we moving towards unification or only towards a certain degree of harmonization? A brief reference will also be made to the most appropriate current ways of ensuring that the variety of regulations does not hinder or impede the free movement of couples and their property within the EU. In other words, a brief reference will be made to the two EUEU Council Regulations adopted on 24 June 2016 on enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of decisions in matrimonial property regimes (Council Regulation 2016/1103) and on the property consequences of registered partnerships (Council Regulation 2016/1104).

2. Property Regulations for Married and Unmarried Couples in European Countries

2.1 Introduction

4. As mentioned above, while all European countries have specific legislation on marriage and its economic regime, this is not the case for unmarried couples. As is well known, there are different positions with regard to them. Although some scholars have distinguished up to seven possible situations regarding their recognition, here they will be analysed divided into two different groups: legal recognition of registered partnerships through a specific Law or non-recognition at all.³ Along with the analysis

upper/lower case is used to distinguish the generic term ‘regulation’ – a synonym for rules, laws or legal norms – from ‘Regulations’ – a specific normative instrument of the European Union –. Finally, it has been decided to use some terms – e.g., ‘matrimonial property regime’ or ‘matrimonial contract’ – which have a long tradition in civil law systems but are less familiar in common law countries.

- 3 See e.g., the classification contained in Various Authors, *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), as well as that contained in M. ANTOKOLSKAIA, *Harmonization of Family law in Europe: A Historical Perspective. A Tale of two Millennia* (Intersentia: Antwerpen-Oxford 2006), p 373, which she then develops on pp 374–424. As can be seen, such classifications are the result of the time in which such studies are carried out, since legislative changes have occurred and continue to occur over time that may alter the classification of a particular country, as well as the category in which it was included at the time. This study covers legislative changes in all countries under review up to 30 Nov. 2024, the end date of the study.

of each of these categories a brief reference will also be made to cohabitation; in particular, to its patrimonial dimension.

The countries which have opted for a non-legal recognition of the registered partnership – or even unregistered ones – are Bulgaria, Lithuania, Poland, Portugal, Romania and Slovakia (s. 2.2). The rest of the countries under review have – or had – specific rules for registered partnerships. However, this last group can be further subdivided into three categories according to the reaction that same-sex marriage has provoked in these laws: countries that have repealed the rules for registered partnerships once they have introduced same-sex marriage – or, without abolishing them, have limited their application – (s. 2.3); the countries that have maintained the existing regime of registered partnerships despite the introduction of same-sex marriage into their legal systems (s. 2.4); and, finally, those that have maintained such a system without introducing the aforementioned possibility with regard to same-sex marriage (s. 2.5). The classification criteria used allow the countries to be grouped together for the purposes of a joint study, but they are also of considerable importance because, as it will be seen, they take into account the function and role of the registered partnership and, consequently, the property regime recognized to them by each legal system.

2.2 *Countries Where There Is no Regulation of Registered Partnerships*

5. The common feature of the group of countries now under discussion is that none of them has adopted legislation on registered partnerships, even though most of them may recognize the factual phenomenon of cohabitation.⁴ This group of countries consists of Bulgaria, Lithuania, Poland, Portugal, Romania and Slovakia.

6. As far as the economic regime applicable to the marriage is concerned, the above-mentioned countries provide for limited community property as the standard legal regime, albeit with different nuances in each country: Bulgaria establishes it in its

4 Five of the six countries in this group do not allow same-sex marriage, usually by including a definition of marriage in the constitutional text. This is the case in Bulgaria (Art. 46.1 of the Constitution of 13 Jul. 1991), Lithuania (Art. 38 of the Constitution of 25 Oct. 1992), Poland (Art. 18 of the Constitution of 2 Apr. 1997) or Slovakia (Art. 41.1 of the Constitution of 1 Oct. 1992). Usually in these countries a similar provision is also included in the civil law regulating marriage. In Romania, on the other hand, there is only a provision in the Civil Code, approved by Law 287/2009 of 17 Jul. 2009 and amended in 2011 (see Arts 258 and 259 and, particularly, Art. 277 of the Romanian Civil Code which prohibits marriage for same-sex couples), and not in the Constitution. In this context, the European Court of Justice (ECJ) Decision '*Relu Adrian Coman and others/Romania*' (Case C-673/16; ECLI:EU:C:2018:385) is noteworthy, as it ruled that EU Member States are obliged to recognize same-sex marriages performed in another EU Member State for the purpose of residence rights. For its part, in Nov. 2023 the Polish Supreme Administrative Court referred a question to the ECJ for a preliminary ruling on whether Member States must recognize a same-sex marriage legally contracted in another EU Member State, even if the law of the former does not permit such a union. Finally, and with a different policy on the matter, Portugal allows same-sex marriage since Law No 9/2010 of 31 May 2010.

Family Code (cf. Arts 21 et seq.),⁵ Lithuania in its Civil Code (Arts 3.87 to 3.100),⁶ Poland in its Family and Guardianship Code (Art. 31 ‘*KRiO*’),⁷ Portugal in the Civil Code (Arts 1717 and 1721 to 1731),⁸ Romania in the Civil Code (Arts 339 et seq. of Law 287/2009)⁹ and Slovakia in the Civil Code (cf. §§143 to 151).¹⁰ In any case, they expressly recognize the freedom of the spouses to agree on various elements relating of the marriage, such as the design, choice and configuration of the property regime, within the established limits. Thus, Bulgaria, Lithuania and Poland allow both agreements

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- 5 The Family Code of 12 Jun. 2009 sets out the rules applicable to marriage (cf. Arts 2 et seq.) and to property regimes (cf. Arts 18 et seq.). In the default regime the ordinary management of the joint property may be exercised by either spouse (cf. Art. 24.2), but the disposition requires the conjunction of both spouses (cf. Art. 24.3). With regard to debts, each spouse is liable for his/her own or personal debts and for his/her share of the joint property; both spouses are liable for debts incurred for the satisfaction of ‘family needs’, even if only one of them incurred them (cf. Art. 32). Finally, the Bulgarian Family Code also contains the rules governing the separation of property regime (Ch. III, Statutory Regime of Separation of Property, Arts 33 et seq.), which allow for a form of compensation for the dedication to the family or to the house that has made it possible to increase the former’s assets (cf. Art. 33.2).
 - 6 The provisions on marriage and matrimonial property regime are contained in Part II and III of Book III (Family Law) of the Lithuanian Civil Code of 18 Jun. 2000 (Arts 3.7 to 3.80 and 3.81 to 3.129). The default legal regime is joint community property (Art. 3.81).
 - 7 In Poland, the legal regime of marriage and its property dimension is regulated in Title I of the Family and Guardianship Code (‘*KRiO*’) of 25 Feb. 1964 (Arts 1–61; in particular, on the property regime, S. III, comprising Arts 31–54). In addition to community property, which is the default regime (Art. 31 *KRiO*), two other regimes are also provided for: separation of property (Art. 47 *KRiO*) and separation of property with equalization of gains (Arts 51 et seq. *KRiO*).
 - 8 In Portugal, the *Direito de Família* is governed by Book IV (Arts 1576 to 2023) of the Portuguese Civil Code of 25 Nov. 1966, as amended by Law No 329-A/95 of 12 Dec. 1995, Title II of which regulates ‘*casamento*’ (Arts 1587 to 1795). In particular, the matrimonial property regimes are set out in Ch. IX, s. IV (Arts 1717 to 1752) and three are recognized: ‘*comunhão de adquiridos*’ (community of acquired property) in Arts 1721 to 1731, ‘*comunhão geral*’ (universal community of property) in Arts 1732 to 1734 and ‘*separação*’ (separation of property) in Arts 1735 to 1737. The first is the default regime. In this case, the earnings or benefits received by both spouses are shared between them and are divided equally when the community is dissolved. In certain exceptional circumstances, the separation of property regime is compulsory (cf. Art. 1720); e.g., if the marriage was celebrated without a previous marriage ceremony or if the spouses are over 60 years of age.
 - 9 In Romania, Book II ‘On the Family’ (Arts 258–534) of the Romanian Civil Code, approved by Law 287/2009 of 17 Jul. 2009, contains the regulation of marriage and matrimonial property regimes; the latter in Ch. 6 of Title II (Arts 312 et seq.). In addition to the mandatory primary regime and the statutory default regime (Arts 339 et seq.), the regime of separation of property (Arts 360 et seq.), and the conventional community (Arts 366 et seq.) are also included.
 - 10 In Slovakia, the Family Act No 36/2005 of 19 Jan. 2005 is the law that, among other things, regulates marriage (Part I). The ‘community of property between spouses’ is contained in Title II of Part II (§§143 to 151) of the Slovak Civil Code, approved by Act No 40/1964 of 26 Feb. 1964 and amended several times; most recently in Jul. 2024. In the default legal regime – called ‘undivided co-ownership of spouses’ – a ‘community property’ is created with the assets acquired by both spouses during the marriage, with some exceptions: gifts received, those acquired by inheritance, etc. (see §143 of the Slovak Civil Code).

before marriage (prenuptial agreements) and matrimonial contracts during the marriage to modify the regime (Arts 18.1 and 37 to 43 of the Bulgarian Family Code; Arts 3.81 and 3.101 of the Lithuanian Civil Code and Art. 47 *KRiO*). Portugal and Romania recognize prenuptial agreements prior to the celebration of the marriage which, in principle, cannot be modified during the marriage (Art. 1714 of the Portuguese Civil Code and Arts 312, 329, 330 and 334 of the Romanian Civil Code). In Slovakia, on the other hand, the freedom to contract is more limited since the prenuptial agreements are not regulated, and as far as the matrimonial property regime is concerned, only certain matters defined by law can be agreed: e.g., the extent of community property or the conditions of its administration and management.¹¹ In practice, the use of such agreements varies.

In addition to these restrictions – and others that vary from one legal system to another – a typical element on which the freedom of agreement is limited, as they usually are mandatory rules, is the common dwelling and its furnishings: even if only one of the spouses is the owner, he/she cannot normally dispose of it without the consent of the other or, failing that, of the judge.¹²

7. Obviously, the lack of legislative recognition of the registered partnership prevents any analysis of the property regime that might be applicable to it. It is possible that this situation will change in the near future, as there are legislative initiatives in several countries promoting the adoption and approval of specific rules, as well as judicial decisions that may have an impact on this matter.¹³

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- 11 Nor can the future spouses exclude the established legal regime before marriage. However, the spouses may contractually agree to reserve the creation of joint property until the dissolution of the marriage (cf. §§143a and 147 of the Slovak Civil Code).
 - 12 See e.g., Art. 26 of the Bulgarian Family Code. In Portugal, Art. 1699 of the Portuguese Civil Code contains some restrictions to the above-mentioned principle of freedom, concerning, e.g., the change in the rules governing the administration of the couple's property. Similar provisions are contained in the Civil Codes of Lithuania (Art. 3.36 of the Civil Code) and Romania (Art. 322 of the Civil Code).
 - 13 In Lithuania, the situation is somewhat peculiar, as Ch. XV of the Third Book of the Lithuanian Civil Code contains provisions on cohabitation, but they will only enter into force after the adoption of a separate law on the procedure for registering partnerships, which has not yet been adopted after more than 20 years. In 2021 and 2022, several projects have been proposed to Parliament. In Slovakia, the Life Partnership Bill was submitted to the National Council in Apr. 2023, which aims to regulate registered partnerships through a civil union open to both opposite-sex and same-sex couples. Other previous legislative and unsuccessful attempts to adopt laws on registered partnerships are described in L. DUFALOVÁ, T. ČÍPKOVÁ & K. BURDOVÁ, 'Legal consequences of marriage and cohabitation under the Slovak Law', 11. *AJI (Actualidad Jurídica Iberoamericana)* Aug. 2019, p (148) at 155–156. And in relation to court rulings, Poland seems to have the intention to adopt a law, especially after the judgment of the European Court of Human Rights (ECtHR) condemning Poland in the case of 12 Dec. 2023, 11454/17 and others, *Przybylszewska and others/Poland* (ECLI:CE:ECHR:2023:1212JUD001145417). Finally, Romanian Government said that they were going to appeal the condemnation of the European Court of Human Rights in the case of 23 May 2023, 20081/19 and others, *Buhuceanu and others/Romania* (ECLI:CE:ECHR:2023:0523JUD002008119) for violating the right to private and family life of

8. On the other hand, it is worth mentioning, albeit briefly, the phenomenon of cohabitation. Only one of the six countries in this group has a specific law regulating cohabitation with a certain degree of systematization: even if it does not have the same effects as marriage in all its elements, it does have the same effects in some of them. I am referring to the Portuguese Law 7/2001, of 11 May 2001, on ‘Measures to protect de facto unions’ which contains wide effects for those relations.¹⁴ In Bulgaria and Slovakia, although there is no general or specific law, there are some particular provisions, mainly of a patrimonial nature, applicable to cohabitants either directly - as any other individual person - or through the interpretation of certain terms. Of the latter type are the provisions of the Slovak Civil Code referring to ‘*household*’, ‘*close person*’ or ‘*persons living together*’, which allow their application to cohabitants.¹⁵ Finally, in Lithuania, Poland and Romania there is no explicit mention.¹⁶

The fact that the legal provisions of a patrimonial nature which affect cohabitation only allude to specific aspects, or their very non-existence, implies that the patrimonial regime applicable to cohabitants will be that which derives from the general rule of the Law of obligations. In other words: the fact of cohabitation does not affect the ownership of property and debts or its distribution after a possible dissolution of the union. They are subject to the same rules as if they had not lived together: in principle, both assets and debts belong to each of them individually, unless, like any other independent citizens, they establish joint ownership of certain assets or debts. In short, in the legal systems of the above-mentioned countries, cohabitants are treated as independent subjects, so that the community of life which unites them does not, as such, affect their property regime, except for some special and specific provisions, and not in all the countries

several couples by failing to establish a legal system that adequately recognizes and protects same-sex relationships.

- 14 The aforementioned law defines ‘de facto unions’ (Art. 1), refers to obstacles for joining that union and the proof of such a union (Art. 2), to its effects (Art. 3), to the protection of the family home in the event of separation or death (Arts 4 and 5), contains the regime of access to death benefits (Art. 6), includes adoption (Art. 7) or the dissolution of such a union (Art. 8). Originally, Law 7/2001 was not so broad. The current version is the result of the amendments made in 2010, 2016 and 2018. On the other hand, after several reforms, the Portuguese Civil Code also contains some references to ‘de facto unions’. For example, in the area of ‘*accompaniment of adults*’ (Arts 138 et seq.), civil liability (Art. 496), parental responsibility (Art. 1903), adoption (Art. 1979) or relative incapacity in the area of inheritance (Art. 2192).
- 15 For example, the Slovak Civil Code refers to ‘*household*’ in §115, which contains its definition, in §474 (1) regarding the ability to become a legal heir under certain conditions, or in §706 in relation to a lessee. The term ‘*closed person*’ is defined in §116 and, e.g., §140 on exceptions to the right of pre-emption is applied to him/her.
- 16 In particular, the Romanian Civil Code (Art. 277) prohibits the equation of certain forms of cohabitation with marriage, including civil partnerships.

of this group.¹⁷ Consequently, in principle, there is no place for a claim for maintenance or compensation.¹⁸

In some of these countries there are also provisions that limit the freedom of choice of the cohabitants in order to protect the weaker party of the union. Thus, although there is no formal recognition of such a union, certain rules, which are considered to be the minimum necessary to fulfil such a protective role, are ‘imposed’: the legal system does not recognize cohabitation as a legal institution but understands that the fact of living together and/or some of its legal consequences must be protected, at least from a patrimonial point of view, in order to defend the weaker party in the relationship. In particular, in Portugal there are provisions on the right to the use of the ‘conjugal’ domicile in the event of death (cf. Arts 4 and 5 of the Portuguese Law 7/2001 of 15 May 2001 on ‘Measures to protect de facto unions’), and, contrary to the exclusive logic of the Law of obligations, a kind of right of maintenance for the surviving cohabitant is also recognized (cf. Arts 2016-A, 2019 and 2020 of the Portuguese Civil Code).¹⁹ In Slovakia, cohabitants may enter into a formal agreement on alimony for life or for an indefinite period (see §842 of the Civil Code), but always based on contractual agreements.

9. As it has been explained, in the group of countries now examined – Bulgaria, Lithuania, Poland, Portugal, Romania and Slovakia – only married couples have so far enjoyed full legal recognition and only they have a matrimonial property regime which, although generally dispositive, contains some mandatory provisions. The existence of cohabitation as a de facto reality has led to the introduction of some special and particular rules to correct the unfair situations that could arise if only the Law of obligations were applied, without taking into account in a general way, with the exception of Portugal, the community of life that such unions entail. Moreover, in the absence of laws on registered partnerships in these jurisdictions, the only possible ‘alternative’ to marriage would be the de facto situation of cohabitation, which, as we have seen, lacks the legal structure of marriage.²⁰ Cohabitation is therefore not the ‘functional equivalent’ of marriage: the normative provisions are usually particular and

17 In Portugal, in addition to what has already been mentioned, cohabitants are taken into account, e.g., in matters relating to tenancy (Arts 1072 or 1093 of the Portuguese Civil Code, among others).

18 In Bulgaria, Art. 140 of the Family Code does not include the partner among the persons ‘*entitled to maintenance*’, but it does in relation to the ‘*spouse*’ and even the ‘*former spouse*’. In Slovakia, there is no room for a claim based on unjust enrichment (§451 of the Civil Code) if the cohabitants voluntarily provide maintenance for each other or jointly cover their needs while living in a household. It is assumed that there is an implicit agreement between them (see DUFALOVÁ, ČÍPKOVÁ and BURDOVÁ, 11. *AJL*, Aug. 2019, p 158).

19 Be that as it may, there are critical voices in Portugal who point out that the aforementioned Law 7/2001, by not establishing an economic regime similar to the matrimonial one, is a complete denial of reality, basing such a regime on the ‘chimera of private autonomy’.

20 As a result, same-sex couples are not formally recognized in Bulgaria, Lithuania, Poland, Romania and Slovakia. Portugal is the only exception regarding this issue (see footnote No 4).

fundamentally affect the patrimonial sphere. Similarly, the absence of laws on registered partnerships prevents any comparative analysis between them and married couples.

2.3 Countries Whose Regulations on Registered Partnerships Have Been Limited or Repealed

10. The element that unites the countries in this second group is that they adopted more or less complete registered partnership laws in order to provide same-sex couples with a legal alternative to marriage, which they could not enter into at the time. Such laws configured registered partnerships as the ‘functional equivalent’ to marriage, both in the personal and, what matters now, in the patrimonial sphere.²¹

11. In line with this legislative approach, as soon as these countries adopted legislation giving same-sex couples access to marriage, the laws on registered partnerships became meaningless. As a result, several countries decided to repeal these provisions as unnecessary: Denmark,²² Iceland,²³ Norway,²⁴ Slovenia,²⁵ Sweden²⁶

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- 21 On the ‘equivalence’ or ‘alternative’ to marriage, cf. W. SCHRAMA, ‘Empowering private autonomy as a means to navigate the patchwork of EU Regulations on Family Law’, in J.M. Scherpe & E. Bargelli (eds), *The Interaction between Family Law, Succession Law and Private International Law* (Intersentia: Cambridge 2021), p 42.
 - 22 In Denmark, marriage and its property regime are mainly governed by the Marriage and Matrimonial Causes Act No 148/1991 of 8 Mar. 1991 (consolidated Act No 1080/2023), although other Acts also apply, e.g., the Act on Spouses’ Financial Matters No 548/2017 of 30 May 2017 (consolidated Act No 962/2020). For its part, Act No 372/1989 of 7 Jun. 1989 on Registered Partnerships (consolidated Act No 938/2005) was repealed by Act No 532/2012 of 12 Jun. 2012 due to the authorization of same-sex marriages.
 - 23 In Iceland, marriage and the matrimonial property regime are governed by the Marriage Act No 31/1993 of 14 Apr. 1993. The Registered Partnership Act No 87/1996 of 12 Jun. 1996 was repealed in 2010 when marriage was amended to be gender neutral.
 - 24 In Norway, the Marriage Act No 47/1991 of 4 Jul. 1991 (consolidated Act No 57/2024 of 25 Jun. 2024) contains the legislation on marriage (§§1-30) and its property regime (§§31-78). The regulation of registered partnerships was contained in the Registered Partnership Act No 40/1993 of 30 Apr. 1993, which was repealed by Act No 53/2008 of 27 Jun. 2008 amending the Marriage Act to allow same-sex marriage.
 - 25 In Slovenia, the rules on marriage and matrimonial property relations are contained in the Family Code No 15/2017 of 31 Mar. 2017, which entered into force on 15 Apr. 2019 (cf. Arts 20 et seq. and 63 to 94). As will be seen, the said Code also refers to cohabitants, whether of the same sex or not. The Civil Union Act No 33/2016 of 9 May 2016, applicable only to same-sex couples, was repealed on 30 Jul. 2023. On 31 Jan. 2023 the Act amending the Family Code to allow same-sex marriage entered into force in Slovenia.
 - 26 In Sweden, the Marriage Code (1987:230, of 14 May 1987) regulates marriage and matrimonial property. The Registered Partnership Act (1994:1117, of 23 Jun. 1994) was revoked by the Repealing of the Registered Partnership Act (2009:260, of 2 Apr. 2009) when the Marriage Code became gender-neutral.

and Switzerland.²⁷ Others, instead of opting for repeal, preferred to keep such laws in force, but with appropriate modifications to prevent the creation of new registered partnerships, since such an institution lost its meaning: the possibility of creating new couples was eliminated but the existing ones were not abolished. The countries that used this second option were Finland,²⁸ Germany²⁹ or Ireland.³⁰ In both situations – the complete abolition of the registered partnership laws or their amendment to prevent the creation of new ones – transitional legal provisions were established with regard to the existing partnerships at the time, which also allowed for their free conversion to marriage in all cases.³¹

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- 27 In Switzerland, the Swiss Civil Code of 10 Dec. 1907 regulates marriage (Title 3, Arts 90 et seq.) and matrimonial property regimes (Title 6, Arts 181 to 251) in S. 1 (Matrimonial Law) of Part 2 (Family Law). The Federal Act of 18 Jun. 2004 on Registered Partnerships for Same-sex Couples (LRegP RS 211.231; in force since 1 Jan. 2007) has been repealed by the Federal Act of 18 Dec. 2020 (Marriage for All), in force since 1 Jul. 2022 (AS 2021 747).
- 28 In Finland, marriage and its property effects are governed by the Marriage Act No 234/1929 of 13 Jun. 1929 (consolidated Act No 732/2023; cf. §§1–32 and §§33 et seq.) and the registered partnerships by the Registered Partnership Act No 950/2001 of 9 Nov. 2001. Both were amended to provide for same-sex marriage by the Act on Amendment to the Marriage Act No 249/2016 of 8 Apr. 2016 (see §1 Marriage Act). Subsequently, the registration of new partnerships in Finland was prevented by means of the Act on Amendment to Registered Partnership Act No 250/2016 of 8 Apr. 2016, which repealed §§1 to 6.
- 29 In Germany, marriage and its property consequences are governed by the provisions of the fourth Book of the German Civil Code (BGB), which is devoted to Family law; in particular, the sixth Title is devoted to the ‘matrimonial property regime’ (§§1363–1563). The Law on Registered Life Partnerships (LPartG) of 16 Feb. 2001 was amended by the Law of 20 Jul. 2017, which allowed same-sex marriage. Since then, it has not been possible to form new registered partnerships in Germany.
- 30 The opening of marriage to same sex people through the Marriage Act No 35/2015 of 29 Oct. 2015 entailed the amendment of Art. 41.4 of the Constitution, which now provides that ‘*marriage may be contracted in accordance with law by two persons without distinction as to their sex*’. Marriage and the ‘matrimonial property regime’ in Ireland are governed by a number of related Acts, but primarily, as far as is relevant here, the Marriage Act (Arts 4 et seq.) and the Married Women’s Status Act No 5/1957 of 30 Apr. 1957 (Arts 3 et seq.). Registered partnerships were regulated by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act No 24/2010 of 19 Jul. 2010. However, following the amendment made by the Marriage Act of 2015, which repealed §2(2e) of the Civil Registry Act No 3/2004 of 27 Feb. 2004, no new registered partnerships can be created, even though this repeal does not affect existing ones.
- 31 In Denmark see §5 of Act No 532/2012 of 12 Jun. 2012 on Amendments to the Marriage and Matrimonial Causes Act; in Finland §1a of the Marriage Act; in Germany, §20a(1) LPartG; in Iceland, Art. 5 of Act on Amendments to the Marriage Act and Other Laws and on the Repeal of the Registered Partnership Act No 65/2010 of 22 Jun. 2010; in Norway, §95(5) of the Marriage Act; in Slovenia Art. 3 of the Act amending the Family Code (2023), which allowed such conversion until 31 Jul. of that year; in Switzerland Arts 35 and 35bis of the LRegP as amended by the Federal Act of 18 Dec. 2020. In Sweden, such conversion must be carried out by a ceremony or by written request (§3 of the Repealing of the Registered Partnership Act), while in Ireland there is no automatic conversion: it is necessary to conclude the marriage by means of the appropriate ceremony (cf. Art. 11 of the Marriage Act). If conversion is not chosen, even if no new couples can be registered, the existing legislation continues to apply, e.g., §1 of the Swedish of the Repealing of the Registered Partnership Act.

12. It should be noted that the countries that make up the group under discussion are the ‘Nordic countries’, to which Germany, Ireland, Slovenia and Switzerland are added. The term ‘Nordic countries’ is used because, as is well known, there is a remarkable degree of cooperation or harmonization of legislative policies in this geographical area.³² In fact, the countries in this area – Denmark, Finland, Iceland, Norway and Sweden – tend to adopt a common approach to Family law, albeit with certain differences.

13. As far as the property regime of marriages is concerned, in the countries of this second group, the separation regime prevails, albeit with a deferred community or deferred right to the property of the other spouse. All the ‘Nordic countries’ have a system of deferred community property,³³ Germany has a community of accrued gains (§§1363–1390 of the BGB)³⁴ and Switzerland has a system of participation in acquisitions (cf. Art. 181 of the Swiss Civil Code).³⁵ In Ireland,

32 See I. LUND-ANDERSEN, ‘Foreword’, in R. Engelsted Jonassen (ed.), *The Division of Property between Unmarried Cohabitees. A Nordic Perspective on Living Together* (European law Students’ Association, wolfLegal Publishers: The Netherlands 2020), p. 11. While there has been a great deal of cooperation between Denmark, Norway and Sweden in developing rules for marriage, this has not been the case for cohabitation. As we shall see the legal solutions vary.

33 In Denmark see §§1–5 of the Act on Spouses’ Financial Matters; in Finland, §§34 and 35 of the Marriage Act; in Iceland, §§99 and 103 of the Marriage Act; in Norway, §31 of the Marriage Act; in Sweden, Ch. 1 §3 of the Marriage Code. The deferred community property regime is characterized, with some differences from one country to another, by the fact that during the marriage the spouses own their property separately and after the dissolution of the marriage, either by death or divorce, they have a right to half the net value of marital property – unless they make agreements to the contrary –. However, some legal systems allow certain assets to be set aside: those of a personal nature or use, those acquired by inheritance or gift, those that can be shown to have existed before the marriage, etc. (see e.g., Ch. 7 §2 of the Swedish Marriage Code). During the marriage, the principles of separate liability and separate ownership apply in relation to creditors. Similarly, each spouse may dispose of the property belonging to him/her. The fact that these are the legal rules does not mean that others cannot be agreed. This is the case, e.g., in Denmark (§§12 et seq.; in particular §§19–22 of the Act on Spouses’ Financial Matters), in Finland (§41 of the Marriage Act), in Iceland (§§71 and 80 et seq. of the Marriage Act) or in Norway (§42(1) and (2) of the Marriage Act). In Sweden, on the other hand, it is not possible to agree on a different regime, but it is possible to determine in the marriage contract which assets are private property and which are matrimonial property (Ch. 7 §3 of the Marriage Code).

34 During the marriage, it operates as a system of separation of property, but at the end of the marriage, the gains made by each are equalized. Each spouse is generally responsible only for his/her own debts and is liable with his/her own assets. Debts due to ‘family needs’ are excluded. Spouses may also opt for the regime of separation of property (§1414 BGB), community of property (§1415 BGB) or an optional community of accrued gains (§1519 BGB).

35 In Switzerland, the default legal regime is the participation in acquisitions, although there are other legal regimes: community of property (Arts 221 to 246 of the Swiss Civil Code) and separation of property (Arts 247 to 251 of the Swiss Civil Code). The two latter regimes may be agreed by the spouses before or after marriage by means of a marriage contract (cf. Arts 182 and 184 of the Swiss Civil Code). Under the regime of participation in acquisitions, the spouses’ estates remain separate – each spouse owns, manages and disposes of his/her own assets, and is liable for

on the other hand, the default legal regime is separation of property with judicial distribution (Art. 3 of the Married Women's Status Act and Art. 15 of the Judicial Separation and Family Law Reform Act).³⁶ Slovenia, which provides for a certain limited community of property (Arts 66 and 67 of the Family Code), is to some extent an exception.³⁷

As in the countries examined in the previous section, the legal systems analysed here also recognize the freedom of the spouses to agree – as far as the property dimension is concerned – but not to an unlimited extent. In fact, all of them impose restrictions, the most common being on the home.³⁸ The remaining restrictions vary from one country to another.³⁹

14. Given the purpose for which the laws on registered partnerships were adopted at the time – to provide an alternative to marriage for same-sex couples who had been denied access to such an institution – it is understandable that a regime similar to that of marriage was established for them: both in the 'general statute' and, as far as the property is concerned, in the property rules.⁴⁰ In fact,

his or her debts – but at the time of dissolution they acquire a right to participate in the acquisitions for valuable consideration of the spouses.

- 36 Article 3 of the Married Women's Status Act provides that all property belonging to a married woman '*immediately before*' or '*at the time of her marriage*' or '*after such commencement is acquired by*' her, '*shall belong to her as if she were unmarried and may be disposed of accordingly*'. Article 15 of the Judicial Separation and Family Law Reform Act No 6/1989, of 19 Apr. 1989, provides that '*(1) On granting a decree of judicial separation or at any time thereafter, the court may, on application to it by either spouse, make a property adjustment order, that is to say, any one or more of the following orders*'. In the light of the above, it could be said that there is no 'economic regime' in the strict sense of the word, and therefore no choice of matrimonial property regime.
- 37 In essence, this regime implies community for joint property of the spouses and separate property for what belong to each one of them. Both spouses may sign a marriage contract (Art. 89 of the Slovenian Family Code).
- 38 As indicated in the text, a typical example is that relating to the rules for the protection of the family home and its furnishings: regardless of the regime, one of the spouses may not carry out acts of disposition (sale, rent, mortgage, etc.) without the consent of the other spouse. Otherwise, the act will be null and void. This is the case, with variations, e.g., in Denmark (§§6 to 9 of the Act on Spouses' Financial Matters), Finland (§38 of the Marriage Act), Iceland (§§60 to 62 of the Marriage Act), Norway (§§32 and 33 of the Marriage Act), Slovenia (Art. 59(2) of the Family Code), Sweden (Ch. 7 §5 of the Marriage Code) or Switzerland (Art. 169 of the Civil Code). In Germany, §1365(1) BGB provides that one of the spouses may not dispose of all his/her property without the consent of the other spouse. Finally, in relation to Ireland, see Art. 3 of the Protection of the Family Home Act No 27/1976 of 12 Jul. 1976.
- 39 See e.g., Ch. 7 §5 of the Swedish Marriage Code or §39 of the Finnish Marriage Act, which sets out other restrictions on the disposition by one of the spouses (shares, movable property, tools, etc.).
- 40 This was the case, e.g., in Denmark, where the registration of a partnership has '*the same legal effects as the conclusion of a marriage*', with the exceptions provided for in §4 (§3 of the Registered Partnership Act). Or in Finland (§8 of the Registered Partnership Act), or in Iceland (§5 of the Registered Partnership Act, although initially there were some exceptions, some of which were later reduced or abolished) where it is referred to as having '*the same legal effects*' as marriage. Or in Norway, where the legal provisions on marriage are interpreted to include registered partnerships, even where this is not

it has been a common rule in the laws on registered partnerships of these countries to establish a property regime parallel to the matrimonial one, whether it be a deferred community, a community or participation in gains or acquisitions, a separation of property or a certain limited community. Likewise, and as in the case of spouses, registered partners were recognized as being free to agree on their arrangements.⁴¹ And as in the case of matrimonial property law, there were also some exceptions to the freedom of agreement for the registered partners.⁴²

15. Given the property regime of marriage and registered partnership, what about cohabitation? Again, none of the aforementioned countries has comprehensive and systematic substantive rules on cohabitation, partly because it was not intended by them to create a ‘second-class marriage’.⁴³ In addition to case law providing solutions to specific problems – especially in countries such as Switzerland where there are no particular legal provisions –, other countries also have legal provisions that generally bring cohabitants closer to spouses: either of a specific nature and contained in different laws as in

expressly provided for (§95(1) and (2) of the Marriage Act). Or, finally, in Sweden (Ch. 3 §1 of the Registered Partnership Act). In Ireland, as in marriage, each partner retains ownership of his/her property unless they agree to create joint ownership with some of it. However, a special feature of this system is that, on dissolution, the judge may award a specified share of the other’s property – as well as financial compensation – on the basis of a ‘fair division’ rather than an ‘equal division’, although there is no automatic right to this (Arts 118 and 120 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act). In Germany, the LPartG provides that the provisions of the matrimonial community property regime apply *mutatis mutandis* to registered partners (§§6 and 7 LPartG), unless they agree otherwise in a ‘*life partnership contract*’. In Slovenia, civil unions produce the same legal consequences as marriage in all legal areas (property regime, maintenance, property and housing, etc.), except for minor issues relating to time limits or the conditions for exercising rights. And finally, in Switzerland, the rules for registered partnerships were in many aspects very similar to those for marriage, although some differences could be observed in the course of the partnership and at its dissolution. In particular, the property regime is based on the perspective of two independent individuals, although Art. 18 LRegP does not explicitly refer to this regime. Joint ownership is presumed if there is no evidence of private ownership (Art. 19 LRegP).

- 41 See the legal references mentioned in the previous footnote which, as mentioned above, also apply to couples.
- 42 In Ireland, the ‘joint home’ enjoys a protection similar to that recognized for spouses in the Family Home Protection Act: one of the partners cannot sell, rent or mortgage it without the prior written consent of the other (cf. Arts 27–42 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act). The situation is similar in the other countries examined here, which grant registered partnerships a similar status to that of marriage in that particular element: see footnote No 40 for the Nordic countries, §8 LPartG in Germany or Art. 14 LRegP in Switzerland.
- 43 This was mentioned in Denmark in Report No 918/1980 (Cohabitation without marriage) submitted by the Danish Marriage Committee. Something similar was mentioned in Iceland, in the Report of the Minister of Justice submitted to Session 126 (2000–2001) Doc No 935; cf. D.T. BJÖRGVINSSON, ‘Registered partnerships in Iceland’, in J.M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 114.

Denmark⁴⁴ – and sometimes with different requirements as in Germany,⁴⁵ Iceland⁴⁶ or Norway⁴⁷ –, or by dedicating specific laws to cohabitation. In this respect, Sweden adopted the Cohabitation Act in 2003 (SFS 2003:376, of 12 June 2003) which entered into force on 1 July 2003 and is applied by default⁴⁸; in Ireland, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act No 24/2010 of 19 July 2010, provides some protection for cohabitants of the same or different sex⁴⁹; or in Finland, through Act No 26/2011, of 14 January 2011, ‘the Dissolution of Cohabitation of Unmarried Couples’ was approved.⁵⁰

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- 44 Over the years, provisions have been introduced in specific areas where it was understood that cohabitants needed special protection, but without putting them on the same footing as spouses. These include §§87 and 88 of the Danish Inheritance Act No 515/2007 of 6 Jun. 2007 (consolidated Act No 1347/2021), §1(2)(d) of the Danish Inheritance Tax Act No 287/1996 of 4 Jun. 1996 (consolidated Act No 11/2023) or §111a of the Danish Administration of Estates Act (consolidated Act No 1807/2021). In social security matters, §§12 and 13 of the Danish Liability and Compensation Act (consolidated Act No 1070/2018), provide for compensation to the surviving cohabitant in the event of the death of a person who is the breadwinner caused by the wrongful act/negligence of another. According to I. LUND-ANDERSEN (‘Registered partnerships in Denmark’, in J. M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 22) ‘one could therefore say that what was suggested was, in actual fact, the introduction of a third-class marriage’. On ‘cohabitation’ in Denmark see also A.C. KANSTRUP JACOBSEN et alii, ‘The Danish Report’, in R. Engelsted Jonassen (ed.), *The Division of Property between Unmarried Cohabitees. A Nordic Perspective on Living Together* (European law Students’ Association, wolfLegal Publishers: The Netherlands 2020), pp 23–54.
- 45 In Germany, see e.g. the right to succeed to a tenancy on the death of the tenant in §563.a BGB.
- 46 In fact, in Iceland, specific provisions on cohabitation can be found in different laws and with different conditions for their application: some require registration – a simple notification to the National Register –, others do not; some take into account the duration of cohabitation, others the existence of common children, etc. See e.g., §2 of the Law on Children No 76/2003 of 27 Mar. 2003.
- 47 In Norway, in the absence of a general definition of cohabitation, attention must be paid to those contained in the various provisions in which it appears. See e.g., §1 of the Household Community Act No 45/1991 of 4 Jul. 1991 (consolidated Act No 21/2019), or §§2(3), 4(2) and 32 et seq. of the Inheritance Act No 21/2019 of 14 Jun. 2019 (consolidated Act No 59/2023). If the latter seems to understand cohabitation as a ‘marriage-like relationship’ the former does not, thus allowing for other groups of persons to be included therein, e.g., family members or friends. On ‘cohabitation’ see C. GARNAAS BERGER et alii, ‘The Norwegian Report’, in R. Engelsted Jonassen (ed.), *The Division of Property between Unmarried Cohabitees. A Nordic Perspective on Living Together* (European law Students’ Association, wolfLegal Publishers: The Netherlands 2020), pp 89–118; in particular, the joint ownership of property and cohabitation agreements on pp 94–98 and 107–113.
- 48 In Sweden, the Cohabitation Act, which applies to unmarried couples living together, is a development of two different laws passed in 1987, which – with similar content – regulated cohabitants of the same and opposite sex.
- 49 It should be noted that the above law applies to both registered and cohabiting couples.
- 50 The above-mentioned Finnish law applies to couples who have lived together for more than 5 years or who have or had a child together (§3). According to that law, which, with some exceptions, is mainly

In no case do such rules regulate in a comprehensive and systematic way such a de facto phenomenon, whether it is a life choice of the couple or a trial before marriage. Although there is a certain tendency to attribute to them *some* effects similar to those of marriage, the general rule in the patrimonial field is that they are governed by the Law of obligations and by the general principle prohibiting unjust enrichment.⁵¹

Along with this, another more or less common way of proceeding is that both the general regulations and the particular norms that exist in each case are ‘imposed’ on the cohabitants.⁵² In other words, the legal system establishes minimum standards that it considers fair and applies them ‘retrospectively’ to the cohabitants. There are fewer countries in which it is possible to opt-out and paralyse the ‘forced’ application of such regulations: Ireland recognizes the cohabitants’ freedom of agreement and, in particular, the possibility of agreeing to an ‘opt-out’ to avoid the legal effects of cohabitation.⁵³ In Sweden it is also possible for cohabitants to agree on an ‘opt-out’ on the regulation applicable to the distribution of assets at the time of termination of cohabitation.⁵⁴

dispositive (§2), after the dissolution of the couple the property is distributed according to their ownership (§§4 and 5). If one of the partners has helped the other to acquire or retain property through his/her contribution to the common household, he/she is entitled to compensation if the benefit received by the other is large, but not if it is small (§8). If the above conditions for the application of the law are not met, all questions relating to property are to be settled in accordance with the general rules of law – e.g., unjust enrichment, restitution of property, etc. With regard to ‘cohabitation’ see C. CHILLEMI et alii, ‘The Finnish Report’, in R. Engelsted Jonassen (ed.), *The Division of Property between Unmarried Cohabitees. A Nordic Perspective on Living Together* (European law Students’ Association, wolfLegal Publishers: The Netherlands 2020), pp 55–88.

- 51 See e.g., §1 of the Icelandic Marriage Act or, for Finland, what is indicated in the previous footnote.
- 52 This is usually done through the very definition of cohabitation. See e.g., §88(2) of the Danish Inheritance Act, §3 of the Finnish Act on the Dissolution of the Joint Household of Cohabiting Partners No 26/2001, or §1 of the Swedish Cohabitation Act. In Ireland, for its part, cohabitation is recognized ‘retrospectively’ when certain criteria are met, without any formal or official manifestation of its commencement, in the manner of an opt-in regime. Specifically, after 5 years of cohabitation, or 2 years if there are children in common, the union will be considered ‘qualified cohabitation’, which makes it possible to apply to the court for certain compensation at the time of the dissolution of the couple (Art. 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act).
- 53 Cf. Art. 202 (3) of the Irish Civil Partnership and Certain Rights and Obligations of Cohabitants Act. Both must receive legal advice before signing the agreement.
- 54 In fact, in Sweden, cohabitants can agree that the dissolution and liquidation rules of the Cohabitation Act do not apply to them (§9). In addition to what is stated in the following footnote, the general rule for liquidation is that the net value of the cohabitants’ property is divided and the person who owns the largest share may choose whether the compensation is to be made by payment of a lump sum or by transfer of property of equivalent value (§17). The cohabitant who is most in need of the home may be granted the right to take over the home when the cohabitation ends, even if it is solely owned by the other cohabitant, subject to certain conditions (§§16 and 22).

16. The Slovenian regulation is somewhat surprising: after recognizing that ‘*an extramarital union is a long-term life union between two persons who have not entered into marriage and there are no grounds for nullity of marriage*’, it determines that ‘*the same legal consequences apply to them under this Act as if they had entered into marriage*’ (Art. 4 of the Family Code). Therefore, having eliminated the registered partnerships on 30 July 2023 – which were only same-sex partnerships and which, whether ‘concluded’ or ‘inconcluded’, were subject to the same effects as marriage, with very few exceptions – it is evident from the transcribed text that the same legal consequences contained in the Family Code apply to cohabitation as if they had entered into marriage, including those related to the economic regime: cohabitation is therefore functionally equivalent to marriage, despite the fact that there is no registration; an issue that raises quite a few problems, for example, with respect to the verification of the existence of such community of life. In other Slovenian laws, they have the same consequences only if the applicable laws so provide (cf. Art. 4 of the Family Code).

17. On the aforementioned legal and contractual basis, case law is usually a frequent way of ‘constructing’ solutions to the problems presented by cohabitation.⁵⁵ However, although this is the general regime, it should not be forgotten that, logically, there are variations from one country to another.⁵⁶ For example, in Iceland, the non-application of the matrimonial property regime to cohabitation does not prevent cohabitants from making appropriate agreements to avoid prejudice to the weaker party.⁵⁷ Rules on the possibility of obtaining

55 For example, the purpose of the Swedish Cohabitation Act is to give the financially weaker party in a relationship a minimum of legal protection when the relationship ends. If the cohabitants want more, they must achieve it through marriage or through the agreements possible under the Law of obligations. With regard to the net value of the joint home and the household goods acquired for joint use, according to §8 of the Swedish Cohabitation Act they are divided equally at the end of the cohabitation ‘*even if one cohabitant alone paid for the apartment or house and is the sole legal owner*’; cf. M. BRATTSTRÖM & C. SÖRGJERD, ‘Registered partnerships in Sweden’, in J. M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 85. As in the case of spouses, cohabitants are subject to the same restrictions on the disposal of the joint household (§§23-25).

56 See e.g., §§23-25 of the Swedish Cohabitation Act and D. MUHIEDDINE, ‘The Swedish Report’, in R. Engelsted Jonassen (ed.), *The Division of Property between Unmarried Cohabitees. A Nordic Perspective on Living Together* (European law Students’ Association, wolfLegal Publishers: The Netherlands 2020), pp 117-156. Similarly, Norway also has special provisions for unmarried adults belonging to the same household (*Husstandsfelleskap*), which is intended for but not limited to cohabitation (cf. Household Community Act No 45/1991 of 4 Jul. 1991, consolidated Act No 21/2019).

57 In Iceland, however, case law has recognized the right of the weaker party to a share in the accumulated assets if he/she has contributed to the common expenses or has otherwise contributed to the other party acquiring or retaining an asset of significant value (cf. BJÖRGVINSSON, in *The Future of Registered Partnerships. Family Recognition beyond Marriage?* p 116).

some compensation at the end of cohabitation are contained in other countries.⁵⁸

18. In the group of countries examined – Denmark, Finland, Germany, Iceland, Ireland, Norway, Slovenia, Sweden and Switzerland – there are basically two options for living together: marriage – open to opposite or same-sex – or cohabitation, since it is not possible to form new registered partnerships due to the repeal or limitation of existing regulations. It seems that all of them consider that the existence of gender-neutral marriage and cohabitation are sufficient ways to channel life as a couple. Therefore, the existence of a quasi-marriage or a registered partnership with a specific legal regime is not considered necessary, which does not prevent the maintenance of the existing ones.

This being so, and with the exception, to a certain extent, of Sweden and Ireland, the non-existence of a global regulation of cohabitation implies, among other things, that such a union cannot be recognized as a ‘functional alternative’ to marriage: it is a cohabitation that can produce some particular legal effects – mainly of a patrimonial nature and not in the personal dimension, which shows that it is not an ‘alternative’ to marriage – that can even be limited by means of the opting-out. Such a vision has its logical consequence in the property regime: there are economic regimes applicable only to marriage and, in the case of cohabitation – which is not a ‘reflection’ of marriage – the cohabitants will have to govern their property relations by means of agreements. No specific global regime is imposed on them, even if there are some specific provisions applicable for the defence of the weaker party.

2.4. Countries Which Maintain Registered Partnership Regulations Despite the Introduction of Same-Sex Marriage

19. As can be deduced from the title of this section, the unifying element of the countries now examined from a patrimonial perspective is that they have maintained their registered partnership regimes despite the fact that same-sex marriage has been allowed. This group of countries includes Austria, Belgium, England, Estonia, France, Greece, Luxembourg, Malta, the Netherlands, Spain and Wales.

Whereas in the countries analysed in the previous section (s. 2.3) registered partnership was only open to persons of the same sex – which is why the existence of such a figure made less sense once the possibility of such persons entering into marriage was allowed – in the countries analysed here the situation differs. In fact, in them there was initially a greater variety of possibilities as to who could enter into a registered partnership, although at present the legislative changes have brought them closer together, with such differences largely disappearing. Indeed,

58 In Germany, e.g., it is possible to claim compensation on the basis of the provisions of partnership law (§§705 et seq. BGB) as well as on the basis of the rules on unjust enrichment (§812, para. 1 sent 2 BGB).

only in Austria,⁵⁹ England and Wales⁶⁰ registered partnerships were initially restricted to people of the same sex. In Greece, only for opposite sex couples.⁶¹ In the other countries in this group – Belgium,⁶² Estonia,⁶³ France,⁶⁴

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- 59 In Austria, marriage and its economic regime are governed by the Civil Code (ABGB) of 1 Jun. 1811 (Arts 44 to 136), the Marriage Act No 870/1938 of 6 Jul. 1938 (EheG) and related legislation. Registered partnerships are governed by Law No 135/2009 of 30 Dec. 2009 on Registered Partnerships (EPG). Initially, it was only applicable to persons of the same sex, as they were barred from access to marriage, but following the ruling G 258-259/2017-9 of the Constitutional Court of 4 Dec. 2017 (https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_258-2017_ua_Ehe_gleichgeschlechtl_Paare.pdf) and the legislative amendments that resulted from it, since Jan. 2019 persons of the same sex can enter into marriage and the registered partnership legislation also applies to persons of the opposite sex.
- 60 In England and Wales, marriage is regulated by: the Marriage Act No 76/1949, of 24 Nov. 1949, amended several times; the Matrimonial Causes Act No 18/1973, of 23 May 1973, and the Marriage (Same Sex Couples) Act No 30/2013, of 17 Jul. 2013. For their part, couples are governed by the Civil Partnership Act No 33/2004, of 18 Nov. 2004, which initially allowed only same-sex couples to enter into a civil partnership, although it was amended in 2019 to allow opposite-sex couples (see s. 1(1)).
- 61 Matrimonial matters are regulated in Book IV of the Greek Civil Code of 23 Feb. 1946 (Arts 1346-1694): marriage is dealt with in Arts 1350-1385, and economic regimes in Ch. IV on the spousal relationship, personal and financial aspects (Arts 1396 et seq.). Art. 1350 of the Greek Civil Code was amended by Law No 5089/2024 of 15 Feb. 2024 on ‘Equality in civil marriage, reform of the Civil Code and other provisions’, which introduced same-sex marriage (Art. 3). For its part, Law No 3179/2008 of 26 Nov. 2008 approved registered partnership only for opposite-sex couples, but Law No 4356/2015 of 24 Dec. 2015 opened it to same-sex couples (cf. Art. 1), based on the Vallianatos Decision of Nov. 2013.
- 62 In Belgium, the rules on marriage and its economic regulation are contained in Arts 143 to 311 *quater* of the Old Civil Code of 21 Mar. 1804 (hereinafter the Old Belgian Civil Code or oBCC), which make up Title V and VI of Book I, and in Arts 2.3.1 to 2.3.882, which make up Title III of Book II of the new Belgian Civil Code adopted on 1 Jan. 2002 (hereinafter Belgian Civil Code). Since 2003, marriage has been opened up to same-sex marriages (see Art. 143 oBCC). Also in Title *Vbis* of Book III of the Old Belgian Civil Code (Arts 1475 to 1479 oBCC, introduced by Law No 35/1998 of 23 Nov. 1998), the so-called ‘*cohabitation légale*’ is open to both heterosexual and homosexual couples.
- 63 In Estonia, Part 1 of the Family Law Act of 18 Nov. 2009 (§§1 to 79) regulates both marriage and the property relations of spouses (§§24 to 62). The amendment of §1(1) in Jun. 2023 legalized equal marriage. The Registered Partnership Act of 9 Oct. 2014 applied from the outset to both heterosexual and same-sex couples (cf. §1).
- 64 In France, matrimonial law is governed by the Civil Code of 21 Mar. 1804 (Arts 143 to 309), which also contains a primary system of an imperative nature (Arts 212 to 226). The matrimonial property regime is governed by Title V of Book III (Arts 1387 to 1581). In 2013, marriage was opened up to same-sex couples by Law No 404/2013 of 17 May 2013. For its part, there is only one type of registered partnership – the ‘*pacte civil de solidarité*’ (*PACS*) – introduced by Law No 944/1999 of 15 Nov. 1999, which is open to both same-sex and opposite-sex couples. Its regulation is currently contained in Art. 515 et seq. of the French Civil Code.

Luxembourg,⁶⁵ Malta,⁶⁶ the Netherlands⁶⁷ and Spain⁶⁸ – registered partnerships could be formed by persons of the same or different sex from the outset.

This different configuration of couples means that the union has or can have a different function than in the countries examined in the previous section (s. 2.3); this should logically have consequences for the property regime, and that is what is of interest here. In fact, in the countries now analysed, registered partnerships constitute a ‘second type of marital union’, with characteristics that are in part different from those of marriage and that also vary from one country to another. They are not, therefore, in all cases a ‘functional equivalent’ of marriage. This explains, as we shall see why there is no total identity between the economic regimes the different legal systems attribute to marriage and those they recognize for registered partnerships, unlike what happened in the previous section. Let’s proceed step by step.

20. With regard to the property regime applicable to the marriage, the countries in this group can be subdivided into two sets. On the one hand, Austria (§1237 ABGB), England and Wales (s. 37 of the Law of Property Act No. 20/1925, of 9 April 1925) and

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- 65 In Luxembourg, marriage is regulated by Title V of Book I of the Civil Code of 15 Mar. 1803, which comprises Arts 143 to 228. Art. 143 of the Luxembourg Civil Code was amended in 2014 to allow two persons of the same sex to marry. The economic rules are set out in Title V of Book III of the same Code (Arts 1387 to 1581). The law of 9 Jul. 2004 regulates registered partnerships and their legal effects.
- 66 In Malta, all matters relating to marriage and its economic regime are governed by Arts 2 to 66 and 1236 to 1345 of the Civil Code of 11 Feb. 1870. The legislation governing registered partnerships – called ‘civil unions’ – is the Civil Unions Act No 9/2014 of 14 Apr. 2014 (Ch. 530 of the Laws of Malta). In 2017, the law was amended to allow same-sex marriage. Members of ‘civil unions’ entered into before that date were also allowed to convert their ‘civil union’ to marriage within a five-year period, which ended on 1 Sep. 2022 (cf. Art. 11 (1) of the Civil Unions Act).
- 67 In the Netherlands, the provisions on marriage and its economic regime are contained in Book 1 of the Dutch Civil Code of 1 Oct. 1838 (Arts 30 to 80 and 81 to 196), substantially amended on 1 Jan. 1992. Since 1 Apr. 2001, civil marriage has been opened to same-sex couples. The Netherlands was the first country in the world to make this possible, as it has long been ‘extremely pro-active in the fight for equal civil rights of many kinds of groups of citizens’; cf. I. SUMNER, ‘Registered Partnerships in The Netherlands’, in J.M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 122. For its part, the Act of 5 Jul. 1997 created the institution of a registered partnership open to any type of person and introduced it in Book 1 of the Dutch Civil Code under a new title: Title 1.5A, containing Arts 80A to 80G.
- 68 In Spain, according to Art. 149.1.8 of the Spanish Constitution of 26 Dec. 1978, the regulation of marriage is an exclusive competence of the central state (national law), with some exceptions in the regional sphere on some aspects of marriage, e.g., economic regimes. That regulation is contained in the Spanish Civil Code of 24 Jul. 1889 largely applicable throughout the country (Arts 42 to 107 and 1315 to 1444). In 2005, a law was passed modifying the Spanish Civil Code allowing same-sex couples access to marriage, which was challenged into the Constitutional Court and validated six years later. There is no national law regulating partnerships; however, there are several laws at the regional or autonomous level (regional law) that regulate them from a civil or purely administrative point of view, each with different requirements.

Greece (Arts 1397-1402 Civil Code) establish as the default legal regime the separation of property, with distribution – agreed or judicial – at the end of the marriage, or a right to participate in the profits.⁶⁹ On the other hand, the rest of the countries now analysed incorporate as default regime the limited community of property, which has different names and nuances depending on the country. In Estonia (§§25 et seq. of the Family Law Act) and Luxembourg (Arts 1393, 1400 of the Civil Code) it is a limited community of property.⁷⁰ In Belgium (Art. 2.3.16 of the Civil Code),⁷¹ France (Arts 1393 and 1400 of the Civil Code),⁷² Malta (Arts 1316 et seq. of the Civil Code),⁷³ the

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- 69 Under the Austrian separation regime, each spouse: retains the property brought into the marriage; is the owner of the property he/she subsequently acquires; manages and disposes of it; and is the sole debtor of his/her creditors (cf. §§1233 and 1237 ABGB). Marriage in itself does not create a community of property, unless the spouses so decide, which is often the case in practice. However, at the time of the dissolution, in the absence of an agreement between the parties, the judge will determine in an equitable manner which marital property, savings and the family home belong to each of them (cf. §81 EheG); it is therefore a regime of separation with division, agreed or judicial. The ABGB also contains other optional regimes: the community of property *inter vivos* – whether universal or limited – and the *mortis causa* community also called ‘inheritance contract’ (cf. §§1217, 1233 and 1249 et seq. ABGB). In England and Wales, on the other hand, it is assumed that marriage does not affect the ownership of property in any way, which is why it can be said that there is no regulation of the matrimonial property regime in the strict sense, although in practice is similar to the separation of property with a final judicial distribution. The Law on Property Act No 20/1925, of 9 Apr. 1925, s. 37, provides that ‘*husband and wife shall, for all purposes of acquisition of any interest in property (...) be treated as two persons*’. At the time of dissolution there is a final distribution by the competent authority (Matrimonial Causes Act Part 2, ss 21 et seq.). Finally, in Greece, Art. 1397 of the Civil Code provides that ‘*marriage does not alter the proprietary independence of the spouses*’ although there are some exceptions concerning movable property (Art. 1398 of the Civil Code). As already mentioned, there is a right to participate in the acquisition – accrued gains – (Arts 1400 to 1402 of the Civil Code).
- 70 Other regimes are also recognized in both countries: community of accrued gains (§40 et seq. Estonian Family Law Act) and separate property regime (§§57 and 58 Estonian Family Law Act) in Estonia. Separate property regime (Arts 1536 to 1541 of the Luxembourg Civil Code), participation in acquisitions regime (Arts 1569 et seq. of the Luxembourg Civil Code) and conventional community regime (Arts 1497 et seq. of the Luxembourg Civil Code), which can also be universal (Art. 1526 of the Luxembourg Civil Code), in Luxembourg.
- 71 In Belgium, the default legal regime is community of acquisitions (Arts 2.3.12 and 2.3.16 to 2.3.51 of the Belgian Civil Code), although other options are also recognized: separation of property (Arts 2.3.61 to 2.3.81 of the Belgian Civil Code) and universal community of property (Art. 2.3.54 of the Belgian Civil Code).
- 72 In France, the default legal regime is the community of acquisition or ‘*communauté légale*’ (Art. 1393 of the Civil Code). Other legal regimes are: community of property, which includes both conventional community (Arts 1497 to 1526 of the Civil Code) and universal community (Art. 1526 of the Civil Code), separation of property (Arts 1536 to 1543 of the Civil Code) and participation in acquisitions (Arts 1569 to 1581 of the Civil Code).
- 73 In addition to the matrimonial property regime of community of acquisitions (Arts 1316 et seq. Civil Code), other regimes provided for in Maltese law are that of separation of property (Arts 1237 (2) and 1334 (1) of the Civil Code) and that of community of residue with separate administration (cf. Arts 1338 et seq. Civil Code).

Netherlands (Art. 1:94 of the Civil Code)⁷⁴ and Spain (Arts 1344 et seq. of the Spanish Civil Code)⁷⁵ there is a regime of community of acquisitions or acquests.⁷⁶ Perhaps the fact that these latter countries belong to the same ‘cultural environment’, together with the influence of the Napoleonic Code in all of them – albeit with different intensity – may explain the coincidence in the economic regime for the marriage.

Moreover, in all the countries examined in this section, the freedom of the spouses to agree on the elements of their marriage is generally recognized, both in the personal and, this is the point, in the property sphere, particularly in the matrimonial property regime.⁷⁷ This takes place despite the fact that, as is often

74 In the Netherlands, the default legal regime is that of the community of property, which is laid down in Arts 1:94 et seq. Civil Code.

75 In Spain, in most of the Autonomous Communities (regions), in the absence of an agreement between the spouses, the community property regime applies (Arts 1344 et seq. of the Spanish Civil Code), with the exception of a few where the legal regime applicable by default is different: the ‘conjugal consortium’ in Aragon (Arts 193 and 210 et seq. of Legislative Decree No 1/2011, of 22 Mar. 2011, of the Code of Foral Law of Aragon), that of the ‘foral communication of property’ in some areas of the Basque Country (Arts 127 et seq. of Law No 5/2015, of 25 Jun. 2015, of Foral Civil Law of the Basque Country), that of ‘conquests’ in Navarre (Law 87 et seq. of Law No 1/1973, of 1 Mar. 1973, of the Fuero Nuevo de Navarra), that of separation of property in Catalonia and the Balearic Islands (Arts 231-10 and 232-1 of Law 25/2010 of 29 Jul. 2010 of the Civil Code of Catalonia and Art. 3 of the Law Decree 79/1990, of 6 Sep. 1990, of the Civil Code of the Balearic Islands) and the customary ‘universal community of property’ in some areas of Extremadura (Fuero de Baylío). In addition to the community property regime, the Spanish Civil Code regulates two other regimes: the separation of property (Arts 1435 et seq.) and the division of profits (Arts 1411 et seq.).

76 Under that property regime, all assets acquired by the spouses for valuable consideration during the marriage belong to the community property; assets acquired privately are excluded. In line with this, the administration and disposition of community property is joint. However, there are nuances in the various countries regarding ordinary and extraordinary management, the liability regime and also the assets that are included. In general, third parties may assert their rights against the spouses jointly or separately, depending on the person to whom they are bound by a contract or a claim.

77 Marriage contracts, which have a specific name in each country, are usually the instrument by which the spouses can modify the legal matrimonial property regime and choose other optional regimes. They usually have to be drawn up by a notary. In this respect, see e.g., in Austria, §1217 of the ABGB and §1 of the Law No 76/1871, of 25 Jul. 1871 on Notarial Deeds; in Belgium, Arts 2.3.1, 2.3.7 and 2.3.8 of the Belgian Civil Code; in Estonia, §§24 and 59 to 62 of the Family Law Act; in France, Art. 1387 of the Civil Code; in Luxembourg, Art. 1387 of the Civil Code; in Malta, Arts 1236 et seq. of the Civil Code (in particular Art. 1245); in the Netherlands, Arts 1:93 and 1:114 et seq. of the Civil Code; in Spain, Arts 1315, 1317 and 1325 of the Spanish Civil Code and the regulations of the Autonomous Communities with legislative powers in this field. Such contracts may be concluded before or after marriage; the fewest countries impose a restriction in this respect. In Greece, Arts 1403 et seq. of the Civil Code seem to limit the freedom of the spouses to opt for a regime of total or partial community of property: movable property, purchases or even immovable property. Finally, it should be noted that there is ‘no specific rule’ governing the matrimonial property regime in England and Wales. However, the judgment of Supreme Court of United Kingdom, in *Radmacher (formerly Granatino) v. Granatino*, 20 Oct. 2010, UKSC 42 (<https://www.supremecourt.uk/cases/uksc-2009-0031.html>) has recognized the validity of pre-nuptial agreements that modify some aspects of the matrimonial property dimension, e.g., the way in which liquidation

the case, that freedom is subject to certain limits, whether general – respect for equality, the law or good customs – or particular – usually the home.⁷⁸

Perhaps the most significant peculiarity of the matrimonial property regimes existing in the countries now mentioned is that in some of them a broad primary regime of a mandatory nature is positively regulated; or, in other words, the restrictions imposed by the law on the aforementioned freedom of contract are of greater intensity and apply independently of the matrimonial property regime in force. This is the case in Belgium, France, Greece, Luxembourg, the Netherlands and Spain, which, as is well known, are based, at least in part, on the same Civil Code model.⁷⁹ And this may be, at least partially, what explains the existence in some countries of a second type of conjugal-style union but subject to a different set of rules: the desire of a couple

is carried out, etc. More recently see *Versteegh v. Versteegh*, 10 May 2018, EWCA Civ 1050 (<https://www.judiciary.uk/wp-content/uploads/2018/05/versteegh-v-versteegh.pdf>).

78 The ‘general limits’ include, e.g., ‘a mandatory rule or rule of public order or the need for consistency in their matrimonial property regime’ (Art. 2.3.1 of the Belgian Civil Code); ‘good customs or the following provisions’ (Art. 1387 of the French Civil Code); ‘the principle of equality of rights and obligations between spouses’ (Art. 1404 of the Greek Civil Code); ‘the laws’, the ‘generally accepted principles of morality, or which limits the equal rights of each spouse’ in Spain (Art. 1328 of the Spanish Civil Code). A similar provision is contained in Arts 1237 et seq. of the Maltese Civil Code. With regard to specific matters, e.g., in Austria, the total waiver of maintenance between spouses is null and void (§94(3) ABGB). And in relation to the family home, there are protective provisions in Austria (§97 ABGB), Belgium (Art. 215 of the Old Belgian Civil Code), Estonia (§§27 and 41.2 of the Family Law Act), France (Art. 215.3 of the Civil Code), Luxembourg (Art. 215 of the Civil Code), Malta (Art. 3A of the Civil Code), the Netherlands (Art. 1:88.1.a of the Civil Code) or Spain (Art. 1320 of the Spanish Civil Code), where the consent of the other spouse is required to dispose of the common habitual residence – even if it is owned by only one of them –. As regards England and Wales, the distinction between legal ownership and equitable or beneficial ownership may be affected, e.g., by the acquisition of a beneficial interest by one spouse and its registration in the Land Registry. See also S. 82 of the Civil Partnership Act, which refers to Sch. 9 and Part 4 of the Family Law Act No 27/1996.

79 Indeed, the Belgian, Luxembourg and Spanish Civil Codes are strongly influenced by the Napoleonic Code of 1804. This influence is less direct in the case of the modern Dutch Civil Code (adopted in 1992), although its earlier version, adopted in 1838, also had some Napoleonic influence. Thus, although they all share common historical roots and some mutual influences, they do not respond to a single model. Each has developed its own set of rules and principles, adapted to its particular historical, social and legal context. However, this is also the case in Greece, where such an influence existed, but in a lesser order and together with others (cf. Arts 1387 et seq. of the Civil Code, which are similar to those mentioned below). The typical subjects of the primary mandatory rules in their patrimonial dimension, which are applicable irrespective of the economic regime, are: rules for the protection of the family home and its furnishings, rules relating to contributions to the household expenses of the marriage, joint and several liability for household debts, freedom to exercise a profession, the possibility of granting powers of attorney between spouses, etc. In Belgium, these rules are contained in Arts 212 to 224 of the Old Belgian Civil Code, in France in Arts 212 to 226 of the French Civil Code, in Greece in Arts 1387 et seq. of the Civil Code, in Luxembourg in Arts 212 to 226 of the Civil Code, in the Netherlands in Arts 1:81 et seq. of the Civil Code and in Spain in Arts 1315 et seq. of the Spanish Civil Code.

to enjoy greater autonomy in the configuration of their relationship may be at the basis of the regulation of a second type of marital-style union.⁸⁰

21. Having looked at the economic regime of the spouses, what about the property regime of registered couples? First of all, it should be noted that in the countries of this group, the status of registered partnership is similar to that of marriage, although not always identical. In fact, apart from the case of Estonia and Spain for various reasons, some of those legal systems provide for a regime for couples that is partially or slightly different from that established for marriage.⁸¹ In Greece,⁸² Malta,⁸³ the Netherlands⁸⁴ and England and Wales,⁸⁵ the differences between both are minimal or non-existent. In Austria⁸⁶ and Luxembourg the differences are ‘small’. In Belgium and France, the differences are more significant.

80 Similarly, N. PALAZZO, *Legal Recognition of Non-conjugal Families. New frontiers in Family Law in the US, Canada and Europe* (Hart: Oxford 2021), p 36.

81 Estonia is a special case, as although the Registered Partnership Act covers important issues in this area, its implementation has been hampered by the fact that the implementing legislation has not yet been adopted by Parliament. However, in 2023–2024 certain rights and responsibilities will be extended to registered partners, including property rights, adoption, legal residence and citizenship. Regarding Spain see [23] in the main text.

82 It seems that in Greece partnerships are considered equivalent to marriage. In this sense, Art. 5(2) of Law No 4356/2015 states that the provisions regulating the relations of spouses arising from marriage also apply by analogy to the non-personal relations of the partners, unless they regulate them otherwise. In Greece, the only difference is the way to dissolve those unions.

83 In Malta, Art. 4 of the Civil Unions Act provides that ‘*save as provided in this Act, a civil union, once registered, shall mutatis mutandis have the corresponding effects and consequences in law of civil marriage contracted under the Act*’; cf. similarly, Art. 9 of the same Act.

84 In the Netherlands, both the institution of marriage and the registered partnership require the same formalities and have the same legal status (cf. Art. 1:80A Civil Code). This is evidenced by the fact that the regulation of partnerships contains many ‘global references’ to marriage law. This reflects ‘Parliament’s intention to regard this as an institution akin to that of marriage, affecting family life and having consequences for one’s civil status’ (I. SUMNER, in *The Future of Registered Partnerships. Family Recognition beyond Marriage?*, p 123). The aforementioned recognition entailed the amendment of more than 100 rules, in order to achieve full equalization in the area of public and private law.

85 In view of the provision in the Civil Partnership Act in England and Wales which gives partners the same legal rights as marriage, it has been suggested that they are ‘marriage in all but name’ (High Court of Justice Family Division of United Kingdom, 31 Jul. 2006, *Wilkinson v. Kitzinger* (No 2) EWHC 2022 (Fam) at 88). However, there is a belief that ‘civil partnerships possess a special value for many couples’ and not as an alternative to marriage; cf. A. HAYWARD, ‘Registered Partnerships in England and Wales’, in J.M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 222. The fact that not many of them have been converted into marriage explains this. But this is meaningless given the legal configuration; social beliefs are another matter.

86 In Austria there are some differences between registered and married couples, e.g., regarding the minimum age for membership: 16, albeit exceptionally, and 18 respectively (cf. §1(2) EheG and §4 EPG).

In fact, the Belgian regime of ‘*cohabitation légale*’ is clearly different from both marriage and informal cohabitation, in such a way that it represents a different type or a different way of configuring the union: it has more legal consequences than cohabitation but fewer than marriage.⁸⁷ Something similar can be said of the French ‘*pacte civil de solidarité*’ (*PACS*): it produces fewer patrimonial effects than marriage and leaves the members of the couple more freedom and autonomy in its configuration.⁸⁸ As can be seen, both the Belgian and the French figures do not correspond to the usual status of the registered couples mentioned so far, where the equalization of legal effects with marriage is almost complete. For example, family members who do not intend to live together in marriage can benefit from the Belgian ‘*cohabitation légale*’.

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- 87 For example, it has been criticized that ‘the Belgian registered partnership was excessively broad but insufficiently deep’; cf. G. WILLEMS, ‘Registered Partnerships in Belgium’, in J.M. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 385. Given that in some cases the different treatment has been considered as discrimination by the Belgian Constitutional Court, it is not easy to determine to what extent the marriage regime and the ‘*cohabitation légale*’ regime must be equated or not. As a consequence, the decisions of the courts are often unpredictable; cf. A-C VAN GYSEL, ‘Conjugalités belges entre incohérences et discriminations’ in A-C. Van Gysel (ed.), *Conjugalités et Discriminations* (Anthemis/LGDJ: Limal-Paris 2012), pp 130-132. From a legal perspective, Art. 1475 of the Old Belgian Civil Code defines ‘*cohabitation légale*’ as the ‘*situation of living together of two persons who have made a declaration within the meaning of article 1476*’.
- 88 In particular, Art. 515bis of the French Civil Code defines *PACS* as ‘*a contract concluded by two natural persons of legal age, of different or the same sex, for the purpose of organizing their life together*’. Although the status of registered partnership has been redefined to strengthen its similarity to marriage – what has been called as ‘matrimonialization’ of *PACS* (i.e., Art. 343 of the French Civil Code or Law No 728/2006 of 23 Jun. 2006, ‘*portant réforme des successions et des libéralités*’ and L. FRANCOZ TERMINAL, ‘Registered Partnerships in France’, in J. M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), p 159) – there are still differences in status. For example, the ways of creating and dissolving *PACS* are still partly different from those of marriage; *PACS* does not create kinship as marriage does; there is no compensation scheme in case of dissolution unless expressly agreed in the contract; it does not create legal succession rights, etc. Be that as it may, those who want *PACS* may do so because they do not want ‘any legal interference in their matrimonial life’ and for them ‘*PACS* is considered safer than nothing if something bad happens’ (W. RAULT, ‘Entre droit et symbole. Les usages sociaux du pacte civil de solidarité’, 48. *RFS (Revue Française de Sociologie)* 2007/3, p (555) at 559, doi: 10.3917/rfs.483.0555). Statistics show that the vast majority of *PACS* partners are heterosexual couples. This means that ‘from the beginning the *PACS* was considered as a real alternative to marriage, mostly chosen by people who could have got married whenever they wanted to’. Therefore, it can be said that ‘the *PACS* has introduced an additional shade in the matrimonial law sphere that seems to be consistent with couples’ expectation of a third path. The *PACS* is not marriage and is not meant to become the sub-marriage it has often been described to be’ (FRANCOZ TERMINAL, in *The Future of Registered Partnerships. Family Recognition beyond Marriage?*, pp 181-182).

22. The diversity of registered partnership configurations – and hence their greater or lesser ‘functional equivalence’ to marriage – means, as mentioned above, that there is no single criterion for the property regime. In Malta, the Netherlands, Greece, England and Wales, the registered partnership is subject to the same regime as the spouses: community in the first two cases and separation with distribution in the following ones.⁸⁹ For their part, Estonia and Luxembourg allow the freedom to choose between the legal regimes or to freely regulate their property relations.⁹⁰ In Austria, the ‘slight’ differences noted between the two regimes do not prevent registered partners from applying a property regime similar to that of marriage: separation of property with division – which is logical since ‘marriage does not affect property relations’.⁹¹ On the other hand, in Belgium and France – countries where it is clearer that registered partnership is an ‘alternative to marriage’ and not a substitute with functional equivalence – it is not attributed the same economic regime as marriage. While marriage in Belgium and France is subject to a regime of community of acquisitions or *acquêts*, registered partnerships – ‘*cohabitation légale*’ and *PACS* – are subject to a regime of separation of property.⁹² This is partly explained by the wider range of people who can be involved.

89 Compare Art. 4 of the Maltese Civil Union Act; in the Netherlands, see Art. 1:80B of the Civil Code; in Greece, see Art. 5.2 of Law No 4356/2015. And as far as England and Wales are concerned, if marriage does not affect the ownership of property, the same applies with respect to registered partnerships. A similar reasoning is applied to the dissolution of the partnership – which is not a divorce –. As with married couples (Matrimonial Causes Act Part 2 and House of Lords, 26 Oct. 2000, *White v. White* [2001] 1 AC 596 (HL), <https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd001026/white-1.htm>, and House of Lords, 24 May 2006, *Miller v. Miller and McFarlane v. McFarlane* [2006] UKHL 24, <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060524/mill-1.htm>), the court has discretion to: redistribute property and/or award maintenance; make property adjustment orders; divide assets listed in Sch. 5 of the Civil Partnership Act (cf. S. 72 of the Civil Partnership Act), etc.

90 In Estonia, see §16 of the Registered Partnership Act, which contains the possibility to choose the property relations of the registered partners. In Luxembourg, Art. 6 of the Law of 9 Jul. 2004 states that the partners are free to determine the conditions of property relations within their partnership as they wish, provided that they do not contravene the mandatory rules applicable to all civil partnerships.

91 Cf. §11 EPG. For example, the provisions on the prohibition of alienation or on condominium ownership that apply to marriage (§14(3) Condominium Act or §364c ABGB) apply to registered partners.

92 In fact, in Belgium it is presumed that the regime applicable to partners is that of separation of property with a presumption of community with regard to those assets that cannot be proved to be the individual property of each of them, as well as the income they produce (Art. 1478.1 and 2 of the Old Belgian Civil Code). The registered partners are free to make the contractual arrangements they wish in order to personalize the legal effects in the material sphere – not in the personal sphere – (cf. Art. 1478. 4 of the Old Belgian Civil Code). In France, for its part, in the absence of an express agreement, the regime of separation of property applies to couples in the *PACS*, each of whom owns, manages and disposes of the property and is responsible for his/her personal debts

23. Spain is a special case. There is no law common to the whole country, but there are numerous and diverse laws at the regional level (the level of the so-called ‘Autonomous Communities’) regulating non-marital living-together with different requirements. Thus the content of the 14 Autonomous Community laws enacted so far must be taken into account, and no general criterion or tendency applicable to all of them can be extracted; neither with regard to the way in which the couple is created, nor with regard to the existence of an explicit reference to the analogous or non-analogous nature of marriage.⁹³ Moreover, if some of these laws have exceeded their powers and have been declared unconstitutional, others, which are essentially unconstitutional because they raise same problems, have not yet been so declared because they have not been called into question.⁹⁴ However, in what is at stake here, there are fewer Autonomous Communities that establish an economic regime for couples.⁹⁵ The majority of them, after recognizing the freedom to agree – in both personal and property matters –, lay down, in the absence of the exercise of such freedom, minimum rules for property matters, such as the proportional contribution to support family burdens, the responsibility for debts resulting from the raising of family needs, etc.⁹⁶ An economic regime similar to that of marriage

(Art. 515-4, para. 1 of the French Civil Code). There is also a presumption of indivisibility similar to that in Belgium (Art. 515-4, para. 2 of the French Civil Code) and another regarding everyday goods (Art. 2276 of the French Civil Code). Finally, the partners may, if they so wish, opt for the regime of joint division of the assets acquired by them, jointly or separately (Art. 515-5-1 of the French Civil Code), with the exceptions provided for in Art. 515-5-2 of the French Civil Code.

93 Among the different Autonomous Communities, the Balearic Islands, the Basque Country, Cantabria, Extremadura, Galicia, Madrid and Valencia have opted for a system of voluntary registration to ‘create’ the partnership and their laws apply only to registered partnerships. The rest of the regions follow a de facto model, either by declarative registration or by respecting a de facto situation. For a detailed analysis of patrimonial issues in Autonomous Communities civil laws, see Various Authors, *Las relaciones patrimoniales entre cónyuges y parejas convivientes en los Derechos civiles autonómicos* (Dykinson: Madrid 2021).

94 In this context, it is worth mentioning the rulings of the Spanish Constitutional Court No 81/2013 of 11 Apr. 2013 on the Madrid law (ECLI:ES:TC:2013:81), No 93/2013 of 23 Apr. 2013 on the Navarre law (ECLI:ES:TC:2013:93) and No 110/2016 of 9 Jun. 2016 on the Valencia law (ECLI:ES:TC:2016:110).

95 In Spain, there are various solutions: (1) Autonomous Communities laws which expressly establish an economic regime for couples in the absence of an agreement (cf. Art. 5.1 of Law 2/2003, of 7 May 2003, on the regulation of unmarried couples in the Basque Country); (2) Autonomous Communities laws in which the applicable regime is inferred without being explicitly stated (e.g., in Aragon, the Balearic Islands or Catalonia); and (3) legislation which, by treating a partnership as equivalent to marriage for the purposes of the application of a particular law, makes it possible to defend the application of a specific economic regime (cf. Art. 171 and Additional Provision No 3 of Galician Law 2/2006, of 14 Jun. 2006).

96 See e.g., Art. 4 of Law 18/2001 of 19 Dec. 2001 of the Balearic Islands. On this subject see J. FERRER-RIBA, ‘Registered Partnerships in Spain’, in J. M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), pp 367 et seq.

does not generally apply to them, not even by analogy⁹⁷: it is up to the couples themselves to define the specific economic and patrimonial rules they wish to apply to their relationship, either explicitly or implicitly. In other words, they must choose the rules that will govern the acquisition, management and distribution of property during their living together and after their possible dissolution. Otherwise, the general rules of the Law of obligations will be applied: the members of the couple will then be considered as two autonomous individuals in property matters – in short, as in the case of separate property – and will be subject to the general rules on joint property, whether in the Civil Code or in the regional regulations.

24. Apart from the exceptions described above, it is a general criterion in all the countries examined in this section – Austria, Belgium, England, Estonia, France, Greece, Luxembourg, Malta, the Netherlands, Spain and Wales – to recognize the freedom of choice to the registered partners.⁹⁸ And, like spouses, some countries recognize certain restrictions on that freedom, usually relating to housing.⁹⁹ In France, in particular, there is also a compulsory primary regime for registered partners (*PACS*), which is less extensive than that for spouses and which applies whatever the economic regime has been chosen. It concerns the material support and assistance that they must give each other, the commitment to live together and the joint liability for debts contracted by one of them with third parties for ‘daily needs’ (see Art. 515-4, paras 1 and 2 of the French Civil Code). The situation is similar in

97 The Spanish Supreme Court has been particularly clear in this regard. In its Judgment of 12 Sep. 2005 (ECLI:ES:TS:2005:5270), it was stated that ‘today, with the legal existence of same-sex marriage and unilateral divorce it can be proclaimed that a *de facto* partnership is formed by people who absolutely do not want to marry assuming all the consequences. Therefore, the application by *analogia legis* of marriage rules has to be rejected, such as Arts 96, 97 and 98 of the Civil Code, because such application inevitably penalizes free exit from the relationship, and particularly the party who does not desire its continuity’, allowing recourse to *analogia iuris*, from which a general principle of law and the notion of unjust enrichment can be derived, which will always serve as a ‘closing clause’ to resolve the issue.

98 The freedom of the partners to regulate their property regime (usually under the same conditions as the spouses) by means of a partnership agreement is provided for in Austria in §1217(2) ABGB; in Belgium in Art. 1478 of the Old Belgian Civil Code; in Estonia in §9(5) of the Registered Partnership Act; in France in Arts 515-3 para. 1 and para. 5 of the French Civil Code; in Greece in Art. 5.2 of Law No 4356/2015; in Luxembourg in Art. 6 of the Law of 9 Jul. 2004; in Malta, in Art. 4 of the Civil Unions Act; in the Netherlands in Art. 1:80B of the Civil Code; and in England and Wales, the provisions on pre-nuptial agreements apply to pre-civil partnership agreements (see footnote No 77); see also ss 73 and 74 of the Civil Partnership Act. Finally, in Spain, although the formulas vary according to the different rules applicable, there are some restrictions on the freedom of agreement: those which contravene mandatory rules, the equality of the cohabitants or are seriously detrimental to one of them are null and void.

99 See e.g., in Luxembourg Art. 9 of the Law of 9 Jul. 2004 or, in Belgium, Arts 1477 and 1478 of the Old Belgian Civil Code.

Belgium: the freedom of the partners to agree is limited by a kind of primary rule applicable to all which includes the obligation to contribute to the common expenses and the system of passive solidarity of the spouses applicable to them (cf. Art. 1477 §3 and §4 of the Old Belgian Civil Code).¹⁰⁰ It can be concluded from this that in these two countries – and in particular in contrast to what happened with the initial regulation of the *PACS* – despite the fact that such a figure has a clear contractual nature, it is not currently configured as a totally private contract, since there are mandatory rules that the registered partners must respect.¹⁰¹

25. Finally, with regard to cohabitation, the group of countries examined – Austria, Belgium, England, Estonia, France, Greece, Luxembourg, Malta, the Netherlands, Spain and Wales – does not have a comprehensive and systematic regime for this phenomenon either: there is no general recognition of cohabitation.¹⁰² On the other hand, in some countries the existence of cohabitation is recognized by means of particular legal provisions, as well as by the assumption of the general principle that cohabitants' property relations are governed by the Law of obligations and that they may therefore conclude the agreements they deem appropriate.¹⁰³ In this sense, the agreements usually cover the issues where greater

100 Arts 215 and 224§1, 1 of the Belgian Civil Code are also applied by analogy (cf. Arts 1477 §2 of the Old Belgian Civil Code).

101 This was emphasized by the Constitutional Council (Decision No 99-419 DC 9 Nov. 1999, <https://www.conseil-constitutionnel.fr/decision/1999/99419DC.htm>). This situation has led to the observation that 'the parallel with the legal framework of marriage is obvious'; cf. H. BOSSE-PLATIERE, 'Contenu du *PACS*' in P. Murat (ed.), *Dalloz Action Droit de la famille* (Paris 2009), No 152 et seq. In any case, the compulsory structure of the *PACS* is not comparable to that of marriage.

102 Malta is a special case: the Cohabitation Act (Ch. 571 of the Laws of Malta) was passed on 21 Apr. 2017, regulating various issues (registration, maintenance, ability to amend cohabitation agreements, and restrictions on the disposal of ordinary, principal and common homes, etc.), but was repealed on 5 Jun. 2020.

103 A common feature of the countries in this group is that, in general, cohabitants are not heirs to each other nor there are maintenance obligations, etc.; this is the case, e.g., of the Netherlands, Estonia, etc. However, as it is mentioned, in some countries there are special and particular legal provisions. In Austria, e.g., §14(3) of the Tenancy Act puts cohabitation on a par, to a certain extent, with marriage and registered partnership or §748 ABGB contains an extraordinary inheritance right for the unmarried partner. In Belgium, *de facto* cohabitation is taken into account in tax and social security legislation. In Greece, cohabitation – called 'free union' – is mentioned negatively in the Civil Code (Art. 1444, para. 2): maintenance ceases in the event of remarriage or cohabitation. In France, the fact of cohabitation is recognized in Art. 515-8 of the French Civil Code and there are specific provisions on social and welfare rights, adoption (Art. 343 of the French Civil Code) or measures to fight against domestic violence (Arts 515-9 et seq. of the French Civil Code). Apart from these specific rules laid down in the different countries, particularly in the patrimonial sphere, cohabitants may regulate their relations by means of an agreement, usually notarized, provided that it does not conflict with mandatory law and does not violate the institution of marriage (see e.g., Greece, Estonia, the Netherlands, etc.). In the absence of such an agreement, the courts apply patrimonial law and case law, which is used to 'regulate' the legal relations of cohabitants, particularly in the event of a break-up. Frequently, recourse is made to 'tacit agreement',

autonomy is allowed – property matters – and are the least where issues of a more imperative nature are regulated, such as parental responsibility, maintenance of children, etc.¹⁰⁴ However, it should also be borne in mind that, within the same country, the diversity of the elements defining and structuring cohabitation in the laws that establish the applicable rules is a source of confusion as to the rights and obligations that such persons must fulfil.

26. In the light of the above, it can be seen that in this third group of countries, registered partnerships play different roles depending on the country: they can be an ‘alternative to marriage’ with a high degree of ‘functional equivalence’, or a type of union that is more distinct from marriage. These possibilities have an impact both on the status of the registered partnership and on the economic regime applicable to it, with different solutions being found. If cohabitation – with limited legal recognition – is added to the two forms of living together, the question that arises in those countries is around the need to maintain three different regimes, with the property problems they raise – which are more or less regulated – and the possible feeling that the registered partnership is a ‘shadow institution’ or a ‘second class of marriage’, especially where the ‘functional equivalence’ is greater, since where it is less, there seems to be a clear difference in purpose.

the concept of ‘unjust enrichment’ or the principle of ‘reasonable fairness’ (e.g., in the case of the Netherlands, France or in Austria where the analogous application of the marriage criteria in the event of dissolution is rejected: cf. §81 et seq. EheG; see also in Greece, Art. 6 of Law No 4356/2015 which states that joint property is divided ‘*according to general provisions on unjust enrichment*’). Finally, the situation in Spain is peculiar because there is no general criterion. At national level, some laws have recognized cohabitation by granting certain rights (tenancy, social security, health care), but without elaborating a comprehensive regulation. At the regional level, the rules vary: while some Autonomous Communities have a fairly broad regime (Catalonia or Aragon, e.g.) and cohabitation produces the same effects as registered and formalized partnerships if the legal requirements outlined above are met without any chance for opting out, in others it is less extensive (Galicia) and in others the regime covers basically public law issues (Madrid, Asturias, Andalusia, Canary Islands, among others). There is a wide range of jurisprudence offering solutions to the legal problems posed by cohabitation based on ‘unjust enrichment’, contractual agreements – tacit or express – or general principles of law. Thus, according to FERRER-RIBA (in *The Future of Registered Partnerships. Family Recognition beyond Marriage?*, pp 377, 378 and 380), following the legislative changes of 2005 and due to the two-levels of the legal structure of the Spanish legal system, ‘both the nature of marriage and the legal relevance accorded to cohabitation have deprived formalized partnerships of their rationale to a great extent’. In Spain, registered partnerships, originally ‘conceived as an alternative to marriage (...) have not fared any better’ and nowadays ‘mainly are entered into for accessing public benefits and for probative reason. They very rarely fulfill family law functions’. Finally, in England and Wales, the rights of the parties are derived and conferred on an ad hoc basis from a variety of statutory provisions (e.g., Family Law Act, Part 4, S. 36). Irrespective of such statutory provisions, the England and Wales High Court in *Dobson v. Griffey*, 10 May 2018, EWHC 1117 Ch clarified the absence of entitlements in the absence of a formal cohabitation agreement.

- 104 The fact that the agreements are governed by the Law of obligations and not by Family law means that there are areas of the rules that are not available to the cohabitants, i.e., maintenance, parentage or parental responsibility, etc.

2.5. Countries Which Maintain Registered Partnership Regulations Despite the Inability of Same-Sex Couples to Marry

27. The countries in this last group are Croatia, Cyprus, the Czech Republic, Hungary, Italy and Latvia. As far as what is important now is concerned, the unifying element of this group of nations is that they maintain the regulation of couples essentially as it was approved at the time; that is, in most cases composed only of persons of the same sex. This is partly explained by the fact that none of them has allowed same-sex marriages, as there are constitutional or legal provisions that prevent it.¹⁰⁵

28. In addition to this common element, there are several things to note. First, most of these countries are geographically located in Eastern Europe. Second, some of them have similar matrimonial property regimes, perhaps because they share a common geographical location or tradition. Thus, although to a different extent, there is a partial community property regime in Croatia (Art. 34 of the Family Act),¹⁰⁶ and a limited community property regime in the Czech Republic (§§708 and 709 et seq. of the Civil Code),¹⁰⁷ in Latvia (Arts 89–113 of the Civil Law),¹⁰⁸ in Hungary (§4:34 (2) of the Civil Code)¹⁰⁹ and in Italy (Art. 159 of the

105 For example, Art. L of the Hungarian Constitution (25 Apr. 2011) or Art. 110 of the Latvian Constitution of 15 Feb. 1922 (reinstated in 1997 and revised and amended in Dec. 2005 and 2007) state that marriage is ‘*the union of one man and one woman*’. A similar provision is contained in Art. 12 of the Croatian Family Act No 103/2015 of 22 Sep. 2015, in Art. 3(1) of the Cypriot Marriage Act No 104(I)/2003 of 21 Jul. 2003 and, in the Czech Republic, in §655 of the Civil Code No 89/2012 of 3 Feb. 2012. Finally, in Italy, in spite of the numerous bills that have recently been presented in favour of equal marriage (inter alia, in 2022, i *Disegni di Legge* (House Bill) No 2602, No 130 and No 215, or in 2023 the *Disegno di Legge* No 958), same-sex marriage is not recognized.

106 In Croatia, the regime of matrimonial property is governed by the principle of freedom of agreement, failing which the regime of partial community property applies (Art. 34 of the Family Act); they may also choose, if they so wish, the regime of separation (Art. 35 of the Family Act). The ordinary administration of the matrimonial property may be exercised by either spouse, since mutual consent is deemed to have been given in such matters. On the other hand, there is a provision requiring joint action of both spouses or the written consent certified by a Notary for certain acts, such as disposal of immovables and some others (Art. 37 of the Family Act). With regard to debts, there is a solidarity regime for those resulting from the satisfaction of the family’s needs, either by one spouse alone or jointly: they are to be paid from the matrimonial and personal property of each spouse (Art. 44 of the Family Act).

107 Title I of Book 2 (Family Law) of the Czech Civil Code contains the law relating to marriage (§§655 to 770) and matrimonial property (Division 2; §§708 to 753). Apart from the limited community of property (§§708 and 709 et seq.), which is the default legal regime, it also contains others: separation of property (§§729 and 730), deferred community of property (§717) and the conventional community regime (§§708.2 and 717).

108 In Latvia, Part One (Family Law) of the Civil Law of 1 Sep. 1937, which has been amended several times, regulates marriage (Arts 26–145) and matrimonial property regimes (Arts 89–145). If the default matrimonial regime is the limited community of property (Arts 89–113), others are also provided for: the separation of property (Art. 117) and the universal community of property (Arts 124 et seq.).

109 In Hungary, Act V of 2013 on the Civil Code devotes the fourth book to Family law. Title VI of Part II of this book is dedicated to ‘Matrimonial Property Law’ (§§4:34 to 4:85). The default statutory

Civil Code).¹¹⁰ On the contrary, Cyprus (Art. 13 of the Property Relations of the Spouses Act No 232/1991) has a default statutory regime of separation of property.¹¹¹ Moreover, in comparison with the countries of the previous sections, some of those now examined, by way of exception, recognize less freedom for the spouses to draw up agreements or in their legal systems additional duties for their execution by the spouses are laid down.¹¹² The legislation of Cyprus, for example, shows that it does not recognize such freedom for spouses.¹¹³

regime is community property (§4:34(2)), although there are two other alternative regimes: the community of accrued gains (§4:69) and the separation of property (§4:72). In the default regime, there are three types of property: the spouses' own property (property acquired before and during the marriage by inheritance or gift) and the matrimonial common property, which consists of property acquired individually or jointly by both spouses during the community (§§4:37 and 4:38). The administration of the latter property is joint; its disposition can be joint or individual: in the latter case it needs the other's prior consent (§4:45).

110 In Italy, matters relating to marriage are governed by Title VI (Arts 79 to 230*ter*) of Book I of the Civil Code of 16 Mar. 1942. Within this Title, Ch. VI (Arts 159 to 230*ter*) regulates matrimonial property regimes. In addition to the community property regime (Art. 159), which is the default regime, there are two other optional regimes: the 'contractual community property regime' (Arts 210 to 214) and the separation of property (Arts 215 to 230).

111 In Cyprus, the matrimonial property regime is governed by the Property Relations of the Spouses Act No 232/1991 of 30 Dec. 1991. Its Art. 13 states that '*without prejudice to the provisions of this Part, marriage does not modify the property independence of the spouses*' so that each spouse exercises the administration and free disposal of his/her property; consequently, each spouse pays his/her debts with his/her own property. Logically, the aforementioned separation is not an obstacle to the existence of ordinary community property. In any case, at the end of the marriage, there is a right to compensation for the increase in the other spouse's assets (cf. Art. 14).

112 In Croatia, it is surprising that, in addition to and despite the aforementioned principle of freedom of agreement, there is no particular provision protecting the changeability of the regime during marriage. However, the doctrine tends to allow it on the basis of Art. 35 of the Family Act and the autonomy of the spouses' will, provided that it does not violate mandatory rules or public order. In Italy, marriage contracts must be concluded whenever the spouses wish, but in a public document. In any case, '*the choice of the separation regime may also be declared in the marriage celebration act*' (Art. 162 of the Italian Civil Code). In Latvia, the marriage contract may be concluded before or after the marriage and must be registered in the public register (Art. 114 of the Civil Law); the same applies in the Czech Republic (§§716 et seq. of the Civil Code). With regard to special restrictions, in Croatia there is a special regime for the home, even if it is privately owned: the written consent of the non-owning spouse is required to dispose of it (Art. 32 of the Family Act). In the Czech Republic, cf. §§698 and 699 of the Civil Code on household equipment and §§743 et seq. on real estate. In Hungary, it is possible to conclude such agreements, the restrictions being the typical ones relating to the dwelling (cf. §§4:76 et seq. of the Civil Code). A particular limitation in Italy is that it is not possible to agree on a dowry (Art. 166*bis* of the Italian Civil Code) and that some rules on the management of joint property or on the equality of participation shares are not available (Art. 210 of the Italian Civil Code).

113 For example, in Cyprus, due to the mandatory nature of the Property Relations of the Spouses Act, prenuptial agreements are not recognized and are therefore null and void, as they are considered contrary to public policy and morality.

29. Regarding registered partnerships, the legislation in this fourth group of countries, like that in the countries examined in section 2.3, was mostly geared only to persons of the same sex.¹¹⁴ As marriage between such persons was – and is – not allowed, registered partnerships were conceived as a substitute for marriage, with ‘functional equivalence’.¹¹⁵ The consequence of such a conception and function is that, in what is at stake here, couples are generally recognized as having an economic regime similar to that of spouses. This is the case in Croatia (cf. Arts 50 et seq. of the Same-Sex Life Partnership Act, and Arts 32 et seq. of the Family Act), in Cyprus (cf. Art. 33 of the Civil Unions Act) and in Italy (cf. Art. 13 of the Same-sex Civil Unions Act). In particular, Hungary explicitly states that the matrimonial rules are applied by analogy (cf. §3§(1) of the Registered Partnership Act). In Latvia, on the other hand, nothing is stated. And, as an exception, in the Czech Republic, it is pointed out that there are no specific legal rules, which must be freely agreed by the partners, but with one restriction: the limited community property regime does not exist and cannot be created. Legal

114 Cyprus is an exception, as the Civil Unions Act No 184(I)/2015, of 9 Dec. 2015, also allowed them from the outset for the opposite sex, equating them to marriage. In Croatia, the Same-Sex Life Partnerships Act No 92/2014, of 18 Jul. 2014, requires a declaration before a competent authority for the official recognition of the same-sex union (Arts 1 and 2). It is also possible for them to be of an informal nature – i.e., without registration or recognition before the competent authority – if they have lived together for at least three years and fulfil the conditions necessary for the validity of the union from the outset (Art. 3). In Hungary, following a 2009 Constitutional Court ruling which stated that same-sex and opposite-sex registered partnerships could not be treated equally, Act XXIX/2009 on Registered Partnerships, which entered into force on 1 Jul. 2014, was adopted, covering only same-sex partnerships (see §1§(1)). In Italy, see Art. 2 of the Law No 76/2016 of 20 May 2016 on Same-sex Civil Unions, known as the CIRINNÀ Law. In the Czech Republic see §1 of the Partnership Registration Act (*Registrované partnerství*) No 115/2006, of 1 Jul. 2006. Finally, in Latvia, the Law on the Reform of the Law on Notaries, which entered into force on 1 Jul. 2024 (cf. Transitional Provision 8), allows same-sex couples who have ‘*a close personal relationship, a common dwelling and the intention to care for and support each other*’ to formalize their relationship in a public document signed before a Notary.

115 In Hungary, this follows from §3(1) of the Registered Partnership Act. In addition, the Constitutional Court, in its well-known Decision No 154/2008 (XII, 17), stated that a registered partnership is a ‘quasi-marriage’. A similar situation exists in Cyprus, where even the structure and the terms used in the Civil Unions Act equate partnership with marriage; on this issue, see D. LIMA, ‘Registered partnerships in Greece and Cyprus’, in J. M. Scherpe & A. Hayward (eds), *The Future of Registered Partnerships. Family Recognition beyond Marriage?* (Intersentia: Cambridge 2017), pp 340 and 344. In Italy, the Same-sex Civil Unions Act extends almost all the rights and obligations of marriage to those unions, with some exceptions: fidelity and adoption. In the Czech Republic, too, the similarity is not total: there is identity in inheritance, medical information and maintenance (§§8–12 of the Partnership Registration Act); there are differences in adoption, pensions and joint property regime. On the other hand, Latvia insists that partnerships, which can be registered from Jul. 2024, are different from marriage.

relations are governed by the general rules on property, co-ownership and obligations, irrespective of the existence of a registered partnership.¹¹⁶ In any case, couples are of course recognized as being able to enter into agreements to regulate their property relations (see for example, Art. 53(1) of the Croatian Same-Sex Life Partnership Act, Arts 33 and 42 of the Cypriot Civil Unions Act or Art. 13 of the Italian Same-sex Civil Unions Act No. 76/2016 of 20 May 2016).

30. Finally, with regard to cohabitation, as in the other countries analysed so far, there is no comprehensive and systematic legal recognition in the countries under study; indeed, in some of them there is no legal recognition at all (e.g., Latvia). In the countries where there is some recognition, only certain specific legal provisions usually refer to cohabitants.¹¹⁷

Among the existing regulations, those of Croatia stand out, where the Same-Sex Life Partnership Act No. 92/2014 of 8 July 2014 for same-sex couples also recognizes the ‘unregistered life partnership’ and applies the same regulation to it. Along with that, the Family Act of this country also recognizes cohabitation in the case of opposite-sex couples.¹¹⁸ Therefore, the same substantive regulation

116 There is no community of property, nor joint tenancy by operation of law, nor protection of the family home, nor protection by the rules governing the usual fixtures and fittings constituting the common household. But, §3020 of the Czech Civil Code states that ‘*the provisions of Book One, Book Three and Book Four on marriage and on the rights and duties of spouses apply by analogy to registered partnership and the rights and duties of partners*’; that is, everything but the Book Two (Family Law).

117 As far as de facto unions are concerned, Cypriot law does not contain any provisions regulating them and Family law is limited to that based on marriage. This does not prevent, on the one hand, the application of the law on trusts to unmarried couples – obviously if it is possible to prove the existence of such cohabitation and a common intention with regard to the assets involved – and, on the other hand, the fact that the Property Relations of the Spouses Act of Cyprus, which ‘regulates spouses’, refers to cohabitation from a negative perspective (Art. 11): maintenance ceases if the party remarries or cohabits with another person in a free union. The Hungarian Civil Code, in Book Six on Obligations, contains a Title on cohabitation open to both same-sex and opposite-sex couples (Title XXV; §§6:514 to 6:517): ‘*The cohabitants may settle their property relations between each other for the duration of the cohabitation by contract*’ and ‘*may determine any property-law provisions in that contract that can be validly determined between spouses under a contract or this Act*’ (§6:515.1 and 2). In any case, ‘*unless otherwise provided in the cohabitation property contracts, they shall be independent acquirers while living together*’ but they are ‘*entitled to a share in the increase in property in proportion to his contribution to its acquisition, primarily in kind*’ – any work done in the household is considered as a contribution to the acquisition of the property (§6:516) –. In addition, cohabitants are mentioned elsewhere in the Civil Code (e.g., in relation to maintenance, §§4:86 et seq., or in relation to the regulation of the use of residential premises, §§4:92 et seq.). Finally, in the Czech Republic, cohabitants are covered by the second class of heirs (§§1636 and 1637 of the Civil Code) or by §§2270 and 2279 concerning tenancy.

118 For the recognition of unregistered same-sex partnerships in Croatia, see Art. 3 of the Same-Sex Life Partnership Act. With regard to the cohabitation of opposite-sex couples, Art. 11 of the Croatian Family Act states that such a union exists if the couple has had a child together or if

applies to opposite-sex marriages, same-sex registered partnerships and cohabitation, whether same-sex or opposite-sex, although they are contained in different laws.

For its part, the Italian law on Same-sex Civil Unions, in addition to regulating the civil unions of same-sex couples, also introduces provisions on cohabitation – known as ‘*convivenza*’ or ‘*unione di fatto*’ – whether homosexual or heterosexual.¹¹⁹ They are granted with certain rights, but without being equated to married couples or civil unions in all of them; e.g., same rights as spouses in penitentiary system (Art. 38 Same-sex Civil Unions Act),¹²⁰ but not subject to any economic regime as cohabitants may regulate their property relations. If they want any kind of joint property regime they must sign a cohabitation contract, which can be modified at any time (cf. Arts 50–64 Same-sex Civil Unions Act).¹²¹

31. As noted above, in this latter group of countries, and similarly to the countries examined in section 2.3, if registered partnerships are open only to persons of the same sex, they are a ‘functional equivalent’ of marriage. Since ‘equal’ marriage is not allowed, the registered partnership fulfils that function without it being ‘necessary’ to amend or repeal the law on registered partnerships in order to ‘adapt’ it to this situation, as was the case in the countries mentioned in section 2.3. A coherent legislative policy: the law on registered partnerships provides for a situation not covered by the law on marriage, without creating a second type of marriage-like union. Therefore, generally, the same matrimonial property regime is applied to them and the freedom of contract is recognized to a greater or lesser extent. However, two facts ‘tarnish’ this coherence. Firstly, the opening up of registered Cyprus partnership to heterosexual couples removes the

they have lived together for three years without the need for registration – if the members of the couple wish to obtain such recognition, they must prove to the court that they meet the specified conditions –. The same rules on property apply to such unions as apply to spouses if the conditions of Art. 3 of the Family Act are fulfilled (cf. Art. 11 of the Family Act).

119 Article 230*ter* has also been introduced into the Italian Civil Code, according to which cohabitants are entitled to participate in the profits of the family business and in the assets acquired with them, as well as in the expansion of the business, in proportion to the work done. The definition of those who are ‘*conviventi di fatto*’ is contained in Art. 36 of the Same-sex Civil Unions Act.

120 Rights are also recognized in the case of hospitalization (visitation and information), in matters of inheritance, a right to live in the same house for two years or for a period equivalent to cohabitation if it has lasted more than two years, etc. Total equalization does not seem possible, since Art. 29 of the Italian Constitution of 22 Dec. 1947 limits the application of matrimonial law by analogy to cohabitation, stating that ‘*the Republic recognizes the rights of the family as a natural society based on marriage*’.

121 Cohabitation agreements may include provisions about each party’s financial contribution to shared needs, use of the family home and other financial aspects of living together.

‘functional equivalence’. On the other hand, the inclusion of a similar regime or status for cohabitation – as is the case in Croatia – creates, in my opinion, a great deal of legal uncertainty and distortion of the existing regime, which is aggravated by the fact that the definitions of cohabitation are not always entirely consistent.¹²²

3. Is There Convergence or Just Harmonization of Couple’s Property Regimes in Europe? Its Impact on Cross-Border Couples

32. Having examined the property regimes established by European countries for married couples and, where such regimes exist, for registered partnerships, it is worth asking whether there is a degree of convergence – or, failing that, harmonization – and to what extent this reality may affect to property regimes of cross-border families within European territory. In my opinion, the answer to this question can be approached from two perspectives: a conceptual one and a practical one. Let us start with the first.

33. The question of the convergence or divergence of European Family law is neither simple nor new. On the one hand, because the choice of the period to be studied and the particular aspect to be considered have a decisive importance for the result.¹²³ Choosing a period of two thousand years rather than focusing on the last twenty years is obviously not indifferent. Similarly, it is quite different to analyse the whole range of Family law provisions than to examine only one particular element: e.g., registered partnerships; or even more, restrictions on the disposal of housing for registered partners.

On the other hand, I understand that the concepts of ‘convergence’ and ‘unification’ must also be distinguished from those of ‘modernization’ or ‘adaptation’. The essential need to adapt to society or to regulate what exists in it explains why the legal systems of all European countries have been ‘modernized’ and

122 Cf., in this respect Art. 11 of the Family Act and Art. 8(2) of Act No 48/2003 of 18 Mar. 2003 on succession.

123 On the decisive influence that the mere choice of the research period can have on the outcome of the study, see M. ANTOKOLSKAIA, ‘Harmonization of Family Law in Europe: a Historical Perspective’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe* (Intersentia: Antwerpen-Oxford 2007), p 12. As the author points out, in the debate on whether there is convergence or divergence ‘both sides are able to invoke empirical evidence since the history of Family law in Europe includes periods showing divergence as well as periods of convergence’ (*ibid.*, p 12). Similarly, the proponents of convergence ‘lay the emphasis on the overall similarity of these developments, while its opponents stress the difference in profundity and pace’ (*ibid.*, p 14). Thus, the author believes that since the Protestant Reformation, divergence has increased rather than convergence, contrary to what had happened before (*ibid.*, pp 13 and 21).

‘updated’ in recent decades.¹²⁴ Whether these changes have taken a unifying direction is another matter.

A third relevant element in order to give a complete answer to the question raised is the role played in Family law by the interpreting bodies; I am basically referring to the courts.¹²⁵ In this sense, both the European Court of Human Rights and the Court of Justice of the EU have, perhaps unintentionally, played an important ‘unifying’ role with their decisions, as has been seen in recent years, for example, in relation to same-sex couples or gender recognition.¹²⁶ Indeed, the fact that European countries are signatories to the European Convention on Human Rights of 4 November 1950 and/or are members of the EU means that the decisions of the highest judicial bodies of both orders have a positive influence on the legislation and interpretations of the various countries, even if these decisions do not always have the same binding force as national case law.¹²⁷ This may be a ‘catalyst for a natural tendency’ towards harmonization – perhaps due to globalization – or, on the other hand, it may ‘artificially’ favour it. Moreover, the extent to which this ‘influence’ can be used for ‘political’ purposes or to impose a certain ‘family policy’, whatever it may be, and, as far as the EU is concerned, the extent to which Family law seeks to ‘link up’ with the Union’s own dimension of competence, are two relevant questions in the abovementioned ‘harmonization’. The answer of both depends

124 On the difference between ‘modernization’ and ‘convergence’, cf. M. ANTOKOLSKAIA, in *Convergence and Divergence of Family Law in Europe*, p 14. The aforementioned author considers that there is a general ‘modernization’ trend, even if it varies in speed and depth (*ibid.*, p 15). And that it has accelerated ‘especially from the 1960s onwards’ and it ‘has in turn led to a reduction in this diversity and created a perception that convergence, rather than divergence, is the main effect of modernization’ (*ibid.*, p 21).

125 Although in a different order, the role of the Commission on European Family Law (CEFL, <https://ceflonline.net>) is also worth mentioning, which, although not binding, has or can have an influence in the European context. On this subject, see CEFL, *Principles of European Family Law regarding Property Relations between Spouses* (Intersentia: Cambridge, 2013).

126 For example, ECJ ‘*Relu Adrian Coman and others/Romania*’ (Case C-673/16; ECLI:EU:C:2018:385).

127 For example, and within the scope of the European Court of Human Rights (ECtHR): 13 Jun. 1979, 6833/74, *Marckx/Belgium* (ECLI:CE:ECHR:1979:0613JUD000683374); 21 Jul. 2015, 18766/11 and 36030/11, *Oliari and others/Italy* (ECLI:CE:ECHR:2015:0721JUD001876611), which led to the approval of the Italian CIRINNÀ Law; 11 Jul. 2002, 28957/95, *Goodwin/UK* (ECLI:CE:ECHR:2002:0711JUD002895795) which led to the adoption of the Gender Recognition Act 2004 in the UK; or 5 Sep. 2023, 40209/20, *Koilova and Balbukova/Bulgaria* (ECLI:CE:ECHR:2023:0905JUD004020920), which condemned Bulgaria for failing to satisfy its ‘positive obligation to ensure that the applicants had available to them a specific legal framework providing for the recognition and protection of their union as a same-sex couple’. It has also recognized that informal cohabitants enjoy the figure of ‘family life’ under Art. 8 ECHR and same-sex couples deserve a specific legal framework; see 18 Dec. 1986, 9697/82, *Johnston/Ireland* (ECLI:CE:ECHR:1986:1218JUD000969782) and J. MILES, ‘Unmarried cohabitation in a European perspective’ in J. M. Scherpe (ed.), *European Family Law. Volume III, Family Law in a European Perspective* (Edward Elgar publishing: Cheltenham, United Kingdom 2016), pp 82 et seq.

on the prudence and neutrality of the persons who belong to these decision-making bodies.¹²⁸ Indeed, the awareness of the transcendental nature of the decisions adopted by these courts invites to be very cautious and precise in their drafting. An ill-considered extension or widening of competences could be a way of eliminating the legitimate legislative differences between countries.¹²⁹ On the contrary, the ‘fine-tuning’ of such

128 As is well known, the substantive rules of Family law belong to the competence of the Member States and not to the European Union. This is evidenced by the fact that 2/3 of EU Member States grant the family a special standard of protection at constitutional level (see constitutional references in N. PALAZZO in *Legal Recognition of Non-Conjugal Families*, pp 134 et seq.). The European Union has only ‘delegated competences’ – explicit or implicit (e.g., Art. 308 Treaty of Lisbon) – and not ‘original’ or ‘general’. It has only regulatory power to harmonize the rules of private international law relating to cross-border families (Art. 81(3) TFEU), although it influences or shapes Family law concepts through Directives, non-binding Recommendations, ECJ Decisions or interpretation of the European Charter of Fundamental Rights (see N. PALAZZO in *Legal Recognition of Non-conjugal Families*, p 174). Moreover, the aforementioned Art. 81(3) TFEU is, e.g., the basis of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (data.europa.eu/eli/reg/2012/1215/oj) and the Council Regulation (EU) 2019/1111 of 25 Jun. 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (data.europa.eu/eli/reg/2019/1111/oj). Thus, if on the one hand, ‘Family Law becomes a powerful tool to change society’, it should not be forgotten that, as MEULDERS-KLEIN argues, ‘political considerations and politicians influence voluntarily the evolution of Family laws’. That way, this author concludes saying ‘that divergences or convergences reflect not only culture or heritage’; they also respond to ‘political and economic goals’; cf. M.-T. MEULDERS-KLEIN, ‘Towards a uniform European Family Law? A Political Approach’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe* (Intersentia: Antwerpen-Oxford 2007), p 277.

129 See M.-T. MEULDERS-KLEIN, in *Convergence and Divergence of Family Law in Europe*, pp 271–281, for a very critical view of the role of both institutions based on, among others, several facts. First: the ECtHR, by judicial interpretation of vague terms such as ‘private life’ or ‘family life’ (Art. 8), has condemned not only acts of Governments but also of Parliaments. Combined with the immediate and self-executing effect of the Court’s interpretative judgments in all Member States, this is sufficient ‘to undermine a whole code of family law’ (p 275 and dissenting opinion of Sir Gerald Fitzmaurice in ECtHR 13 Jun. 1979, 6833/74, *Marckx/Belgium*; ECLI:CE:ECHR:1979:0613JUD000683374). Thus, the ECtHR makes an important contribution ‘to an «approximation» of European family laws by «deconstructing» national family rules piece by piece on an unforeseeable basis’ (p 276). Second: although Family law is a national competence, under the banner of the ‘«free movement of persons, goods and services in the European Space» supported by means of judiciary Regulations which are theoretically in accordance with the economic logics of the free market and globalization’ Family law is being affected (p 278). Against this background, she states, on the one hand, that the ‘question of a voluntary *harmonization* even more of a directly or indirectly forced *unification* of European substantive Family laws thus has nothing to do with a spontaneous return to the medieval *Ius commune*’ (p 273) and, on the other hand, that the much-vaunted argument of cultural constraints ‘becomes outdated and irrelevant’ since the Member States do not seem to be entirely free to decide on substantive Family law issues by themselves (*ibid.*, p 278). Finally, she raises the question of whether European Family law is based on European courts that ‘they follow the evolution of peoples’

matters allows each country to maintain its freedom to determine the family rules it deems most appropriate within the framework of its jurisdiction.

34. Having said this, and looking at the period from the French Revolution to the present day, some clear and, to a certain extent, ‘unifying’ or ‘converging’ trends can be observed in Family law in Europe. First of all, the equality of the members of the couple, married or unmarried, and of the children, whether or not they are the fruit of a marriage, seems to be consolidated in all countries.¹³⁰

35. Secondly, although Family law is still marriage-centred in relation to adult relationships, there is also a certain parallel – and not unanimous – development in the various European countries with regard to the recognition and/or regulation of de facto unions.¹³¹ Fifty years ago, Europe was unanimous in denying legal recognition to non-marital unions. Today, there is a hesitant consensus that the rights of cohabitants should be protected in some way.¹³² However, there is a wide range of legal constructions used to provide such protection. While some recognize registered partnerships as the ‘functional equivalent’ of marriage, others do not, or recognize them as an ‘alternative institution’ that is slightly or significantly different in its regulation – not so much or not always as a reality of life – to marriage. In any case, it seems clear that in all countries the existence of the phenomenon of extra-marital cohabitation is accepted, since legal provisions are more or less in place to recognize and protect it. However, the rapid spread of the recognition of cohabitation is not in itself a decisive element in determining whether or not we are moving towards spontaneous harmonization, since, on the one hand, there is

ideas, mores and morals’ or ‘the latter follow the increasingly exponential and irreversible extrapolations of the supranational courts’, which can become ‘in a perfect vicious circle’ (*ibid.*, p 277).

130 Cf. M. ANTOKOLSKAIA, in *Convergence and Divergence of Family Law in Europe*, pp 12 and 19.

131 Indeed, as we have seen in this paper, of the 31 countries analysed, 6 have never regulated registered partnerships, 9 have regulated them and abolished – or modified them –, and 16 maintain a regulation for such partnerships. Furthermore, as ANTOKOLSKAIA (in *Convergence and Divergence of Family Law in Europe*, p 19) points out, ‘there is also a persistent diversity in Europe regarding how far the State should go in imposing regulation on opposite-sex couples who have chosen not to institutionalize their relationship’. On the centrality of marriage, cf. J. MILES, in *European Family Law. Volume III*, p 113.

132 Cf. M. ANTOKOLSKAIA, in *Convergence and Divergence of Family Law in Europe*, p 18. At EU level, this protection is narrow and only applies to the free movement of workers and their family members, asylum, immigration and benefits for partners in the context of labour law (see J. MILES, in *European Family Law. Volume III*, p 90). The same author goes on to describe the different systems for regulating cohabitation: opt-in assimilation, opt-in different, default/opt-out assimilation, default/opt-out different and no specific legal recognition (*ibid.*, pp 102–113).

recognition and, on the other, the variety and diversity of the rules in force show that it is a heterogeneous reality in terms of its content and function.¹³³

36. A third element on which a certain convergence can be observed is that of matrimonial property regimes.¹³⁴ As we have been able to examine in these pages, there are several main regimes applied in different countries. Most of them have community of property, either limited or deferred: limited in those based on Roman systems and in Eastern Europe, and deferred in Germanic and Nordic legal systems. And the separation of property regime is more common in Common law systems.¹³⁵ Despite this diversity, some things are worthy to be mentioned. First, there are certain bridges of approximation between these regimes. Thus, in separate property regimes, there is in practice some community of property and the need to maintain the common household affects the debt regime. Community property regimes also recognize a certain autonomy of the spouses in the ordinary management. Therefore, separation of property with certain criteria of community of property and community of property with certain independence.¹³⁶ Moreover, in all or almost all of them, the availability of certain assets is restricted by the purpose of the marital union: usually the common home and the care of the family.

With regard to matrimonial property regimes a second element to be mentioned is that they share some common objectives, expressed in different ways:

133 On this subject see M. ANTOKOLSKAIA, in *Convergence and Divergence of Family Law in Europe*, p 16, although referring to Family law in general and not specifically to cohabitation.

134 On the difficulties of defining what is meant by 'matrimonial property law', see B. BRAAT, 'Matrimonial property law: diversity of forms, equivalence in substance?', in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe* (Intersentia: Antwerpen-Oxford 2007), p 237, who points out, inter alia, that the term is not traditionally used in all European countries – in fact, Brussels II and IIbis do not use it – and that it is an issue at the crossroads of Family law and Property law.

135 In the same sense, see B. BRAAT, in *Convergence and Divergence of Family Law in Europe*, p 240.

136 Thus, in separate property regimes, each spouse manages his/her own property, although the absence of community during the marriage does not mean that the idea of participation does not exist, or that the solidarity inherent in marriage does not influence the status of the property. Similarly, in community property, the management of individual or personal property is the sole and exclusive responsibility of the spouse who owns it; that is, the rules governing the management of common property are usually based on the idea of the independence of both spouses. Moreover, in both cases, the autonomy of management is tempered by a number of mandatory rules which require the consent of the other spouse for certain acts, particularly those relating to housing and property solidarity between spouses (cf. B. BRAAT, in *Convergence and Divergence of Family Law in Europe*, p 241). In summary, the aforementioned author points out that there is 'independence for daily matters, usual acts and acts related to the profession of a spouse but solidarity and thus existence of an obligation to obtain the consent of both spouse for important/dangerous acts' (*ibid.*, p 244). Previously, M. A. GLENDON, *The Transformation of Family Law* (University of Chicago: Chicago 1989), p 117 had pointed out that 'separate property systems had adopted devices to increase sharing of property between the spouses, and community property systems had adopted devices to provide for more independence in management'.

equality of property between spouses, solidarity between them in some matters and autonomy in others.¹³⁷ Thus, there is a certain convergence of objectives and a greater divergence of concepts, rules and techniques for their implementation and enforcement.¹³⁸ And a third element regarding property regimes from a more general perspective is the majority tendency to recognize a certain autonomy in their configuration, whether in the case of married couples, registered partnerships or, *mutatis mutandis*, cohabitants. In fact, couples are generally free, within certain limits, to conclude agreements that regulate their property relations.

37. The foregoing leads to the conclusion that it is conceptually difficult to make a definitive judgment as to whether Family law in Europe – and in particular as far as couples are concerned – is moving towards unification or not. Rather, it seems to me that we are faced with certain common basic trends – the recognition of the existence of non-marital unions, common patrimonial goals in married couples, etc. – which are articulated in different ways in different countries, taking into account, to a certain extent, the ‘cultural constraint argument’.¹³⁹

38. The second perspective from which to analyse the question under consideration was the practical one. In this situation, given the increase in the number of couples – married and unmarried – made up by people with different nationalities, and given the diversity of regimes, how can we act? how can we harmonize the property situation? Harmonization and the search for effective solutions involve recourse to Council Regulations (EU) 2016/1103 and 2016/1104 of 24 June 2016 on enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to matrimonial property regimes

137 As B. BRAAT (in *Convergence and Divergence of Family Law in Europe*, p 245) notes ‘matrimonial property law in Europe isn’t perhaps that colourful. A lot of differences remain but the main principles behind the practical differences often show a lot of similarities’. A similar opinion is expressed by M. ANTOKOLSKAIA in *Convergence and Divergence of Family Law in Europe*, p 20.

138 As pointed out by B. BRAAT (in *Convergence and Divergence of Family Law in Europe*, p 241), it is in the area of creditors’ rights where there is the greatest diversity.

139 According to the ‘cultural constraints argument’ it would not be possible to harmonize Family law because the Family laws of the different European countries are very much embedded in their unique national culture and history (see ANTOKOLSKAIA, in *Convergence and Divergence of Family Law in Europe*, p 11 and in *Harmonization of Family law in Europe: A Historical Perspective. A Tale of two Millennia*, p 512 where she minimizes its impact, to the point of almost completely negating it). Thus, according to ANTOKOLSKAIA (in *Harmonization of Family law in Europe: A Historical Perspective. A Tale of two Millennia*, pp 488–490) ‘history of Family Law in Europe more closely resembles a spiral rather than a linear process’. She also outlines the characteristics and the driving forces from Roman times to the Protestant Reformation and from then to the present day. In the first period there is a movement from diversity to uniformity, and in the second from uniformity to the present diversity.

and the property consequences of registered partnerships, respectively.¹⁴⁰ Both Regulations, while respecting the legislative autonomy of each Member State, are, as is well known, effective instruments to bring some order to the diverse legal landscape that exists in the different countries. In particular, Regulation 2016/1104 clarifies the concept of ‘registered partnership’ by distinguishing it from cohabitation or purely de facto unions. Such rules are applicable when the condition of an element of foreignness is met, so that there is a significant link with two or more legal systems and there is doubt as to which one should apply, e.g., because there are different nationalities, residences or assets abroad.¹⁴¹

140 The territorial scope of these Regulations is limited to the 18 countries that have opted for enhanced cooperation: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden. For their part, Denmark and Ireland, members of the EU, have a special status: the former is excluded from the measures adopted by the EU in relation to the area of freedom, security and justice; and the latter, like the United Kingdom when it was a member of the EU, may or may not exercise its right to opt in to the application of both Regulations, which it has not done in this particular case. Finally, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia have decided not to join the enhanced cooperation and are therefore not to be bound by the Regulation, ‘presumably out of fear’ that their adoption would be a way of introducing registered partnerships and/or same-sex marriages; cf. P. QUINZÁ REDONDO, *Uniones registradas en la Unión Europea. El Reglamento (UE) n° 2016/1104 en perspectiva Española* (Tirant lo Blanch: Valencia 2022), pp 42–43. That seems logical, at least in view of the definition of the gender-neutral registered partnership contained in Art. 3.1.a of Regulation 2016/1104, without defining the degree of personal commitment required of its members – is it or is it not analogous to marriage –. It is an autonomous concept, different from the domestic one (see Recital 17 of the Regulation), which, despite its shortcomings – married couples fit into it to a certain extent – has legal effects. It is noteworthy that Regulation 2016/1103 does not define marriage, leaving it to the national law of each Member State, nor does it define the matrimonial property regime, whereas Regulation 2016/1104 defines both the ‘registered partnership’ and their ‘property consequences’. In view of this, it is obvious that problems can easily arise in determining the personal and objective scope of both instruments: would Regulation 2016/1103 apply to the registered partnership, which has the same effects as marriage?

141 With regard to the registered partnership, an element of particular importance in relation to Spain is the nature of the register in which the registration must be made, an aspect on which the ECJ is still silent. If the former is of a constitutive nature, most of the couples of the Autonomous Communities laws would not fall within the personal scope of the Regulation, since, as J. P. MURGA FERNÁNDEZ (‘Parejas de hecho, registros autonómicos y el limitado alcance en España del Reglamento europeo sobre efectos patrimoniales de las uniones registradas’, 2. RDC (*Revista de Derecho Privado*), 2021, p (31) at 61–62) pointed out, such is the nature envisaged by the legislator of the European Union (cf. Arts 3.1.a and 3.1.b of Regulation 2016/1104). And if it also alludes to registers of a civil nature, such couples would have no place in the Regulation. A contrary and perhaps more pragmatic opinion is defended by P. QUINZÁ REDONDO, in *Uniones registradas en la Unión Europea*, p 49; A. RODRÍGUEZ BENOT, ‘Ámbito de aplicación y definiciones del Reglamento (UE) 2016/1104 sobre efectos patrimoniales de las uniones registradas’, in C. Hornero y A. Rodríguez Benot (eds), *Régimen patrimonial de las uniones registradas: aspectos estatales y supraestatales (a propósito del Reglamento UE 2016/1104)* (Thomson Reuters

39. As is well known, the two Regulations are parallel as far as the applicable law is concerned. On the one hand, they contain a clause on the universal scope of the applicable law: *‘the law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State’* of the enhanced cooperation established by such instruments (Art. 20 and Recital 43–44 of both Regulations). And, on the other hand, they also both refer to the ‘unity’ of such rules and to the exclusion of renvoi (cf. Art. 32 of both Regulations).¹⁴² If Article 21 of EU Regulation 2016/1103 applies it to matrimonial property regimes – *‘the law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located’* –, Article 21 of EU Regulation 2016/1104 does the same, in similar terms, for registered partnerships: *‘the law applicable to the property consequences of a registered partnership shall apply to all assets that are subject to those consequences, regardless of where the assets are located’*. However, and despite the detailed content of the scope of application of the governing law contained in Article 27 of both Regulations, the broad definition of the ‘matrimonial property regime’ contained in Regulation 2016/1103 and the parallel definition of the ‘property consequences of a registered partnerships’, whose different scope and content in the various European countries has already been mentioned, raise a number of doubts – e.g., do they include the primary regime when it exists?, does the Regulation apply to the division of a joint asset? – the examination of which is beyond the scope of this paper. Similarly, the differences in the wording of Recital 18 of the two Regulations cast a shadow on the most appropriate interpretation.

40. In addition, and this is the most interesting point, the principle of ‘choice of law’ is established as the primary criterion for determining the applicable law, albeit in a limited way because the number of possible options is limited (cf. Art. 22 of both Regulations). In practice, the couple will first look at the objective connection – which is applied in a subsidiary manner – and if, having subjectively decided that it is appropriate, no further choice is made; that will be the case if, for whatever reason, the objective connection is not satisfactory. However, the lack of in-depth knowledge on the part of the couples or their advisor regarding the content of the various laws and their practical legal effects can lead to undesirable consequences. In any event, both the *‘spouses or future spouses’* and the *‘partners or future partners’* (of a registered partnership) can *‘designate or change’* by

Aranzadi: Cizur Menor 2022), p 215 or A. BOSCH CARRERA, ‘Definición y tipología de las uniones registradas: una perspectiva comparada’, in C. Hornero y A. Rodríguez Benot (eds), *Régimen patrimonial de las uniones registradas: aspectos estatales y supraestatales (a propósito del Reglamento UE 2016/1104)* (Thomson Reuters Aranzadi: Cizur Menor 2022), p 49.

¹⁴² It should be borne in mind that recourse to the mechanism of enhanced cooperation limits the advantage of the universal nature of the Regulation, which in turn is intended to discourage ‘forum shopping’.

common agreement the law applicable to their property relations – either to their ‘*matrimonial property regime*’ or to ‘*the property consequences to the institution of the registered partnership*’ –¹⁴³ by choosing the law of the state in which one or both of them have their habitual residence ‘*at the time the agreement is concluded*’, or the law corresponding to the nationality of either of them ‘*at the time the agreement is concluded*’.¹⁴⁴ Only in the case of registered partnerships is there a third criterion, namely ‘*the law of the State under whose law the registered partnership was created*’ – as has already been explained, unlike in the case of marriage, not all these states have a particular nor a similar system –.¹⁴⁵ Similarly, Article 27 of both Regulations defines the scope of the applicable law. According to these rules, it will govern: the classification of the property and its transfer from one category to another; the liability of one for the obligations and debts of the other; the powers, rights and obligations of one or both in relation to the property; the dissolution of

143 With regard to registered partnerships, Art. 22 of Regulation 2016/1104 introduces the expression ‘*provided that that law attaches property consequences to the institution of the registered partnership*’, which is a logical consequence of the diversity of existing legal options. However, it is worth recalling the differences in ‘intensity’ and ‘content’ of the different regimes, e.g., the French *PACS* is not the same as the Belgian ‘*cohabitation légale*’ or the Spanish partnership laws.

144 Obviously, habitual residence – which is not defined in both Regulations – and the criteria on which it is based – which are not described in those instruments – may be a major source of conflict in the event of a discrepancy, which recommends their agreement *ex ante* in order to minimize litigation. To this end, Recital 23 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 Jul. 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession can serve as an interpretative guideline. Finally, on the possibility of subjecting the determination of the applicable law to the suspensive condition of the acquisition of a certain nationality or residence, see C. GONZÁLEZ-BEILFUSS, ‘La autonomía de la voluntad en los Reglamentos europeos sobre régimen económico matrimonial y efectos patrimoniales de las parejas registradas’, in A. Serrano de Nicolás (ed.), *Los Reglamentos UE 2016/1103 y 2016/1104 de regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas* (Marcial Pons: Madrid 2020), p. 105.

145 Article 22(2) and (3) of both Regulations provide that ‘*unless the spouses [partners] agree otherwise, a change of the law applicable to the matrimonial property regime [to the property consequences of their registered partnership] made during the marriage [the partnership] shall have prospective effect only*’. ‘*Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law*’. However, the change of the applicable law during the validity of the marriage or registered partnership, in addition to fulfilling the same conditions as the first choice, necessarily requires certain substantive adaptations. Finally, the two Regulations contain similar provisions on the formal validity of the agreement for the choice of applicable law (Art. 23), on consent and material validity (Art. 24) and on the formal validity of property agreements (Art. 25). The law applicable in the absence of a choice by the parties is set out in Art. 26 of both Regulations and is determined according to different criteria, although in each case it is an objective connection. And, although it is not possible to analyse it now, it is very interesting to determine the possibilities of tacit choice of such a law and its consequences.

the economic regime, where applicable, and the partition, distribution or liquidation of the property; the patrimonial effects of the regime on the legal relationship between one of the spouses and a third party; and the material validity of the property agreements.

41. In view of the foregoing, and given the great importance of the autonomy of the will, which makes it possible to regulate the personal and, in particular, the patrimonial regime of the couple – in practice this is still not a very widely used resource – it is highly advisable to consult a Notary in order to draw up the appropriate agreements, whether specific or general. In this way, it will be possible to reduce the legal uncertainty caused by certain laws – or even by the diversity and multiplicity of rules – and to determine the applicable law when the members of the couple do not have the same nationality – or, in their case, the same civil residence – and to establish the couple’s regime where it could be automatic.¹⁴⁶

4. Final Remarks

42. Following this necessarily brief examination of the patrimonial situation of married and unmarried couples in the countries of the EU and other European nations, a number of conclusions can be drawn.

43. Firstly, it should be noted that the issue of same-sex marriage has had – and continues to have – an enormous impact on the existence, regulation, concept and functioning of registered partnerships. This obviously has an impact on their patrimonial dimension. However, this is not the only relevant element, since, as we have seen, the political decision on the possibility, creation, continuation and dissolution of registered partnerships also has an impact, and consequently allows only one or more ways of articulating shared life. For example, there are countries that consider the regulation of marriage – same-sex or not – and, where appropriate, cohabitation, to be sufficient, and therefore do not regulate – or have abolished or limited – registered partnerships. All of these options, as we have seen, have an impact on the property regime.

44. In addition to that, it should also be noted that, with some exceptions, there is a general tendency to assimilate marriage – whether between persons of the same or different sex – and registered partnership – where it exists –.¹⁴⁷ Therefore, if the registered partnership is legally configured as the ‘functional equivalent’ of marriage, it makes sense that an identical or at least similar economic regime should be

¹⁴⁶ In my opinion, the application of the matrimonial property regime to cohabitants in Croatia and Slovenia, or the diversity of criteria and effects of the various Spanish Autonomous Communities regulations, are, among other things, two sources of uncertainty that confirm the convenience of going to a Notary to draw up property agreements between the couple.

¹⁴⁷ France and Belgium are notable exceptions. See S. 2.4.

applied to it. This is not the case if it is only an 'alternative' without a 'functional equivalence' to marriage, as is the case in Belgium, France and Spain. As far as matrimonial property regimes are concerned, there is also a certain degree of convergence between those of certain countries, which can be explained either by the fact that they belong to the same geographical and cultural area or by particular circumstances that have favoured such harmonization. For example, the similarities between the 'Nordic countries' or the influence of the Napoleonic Code in the countries of southern Europe.¹⁴⁸

45. Two observations are common to all the countries studied. On the one hand, there is a general recognition of the wide freedom of the spouses and, in particular, of the partners to organize their property relations and, in some cases also their personal relations. The countries that do not move in this direction are an exception. On the other hand, in all these countries, there are greater or lesser restrictions on property rights, essentially due to the repercussions that the community of life produces; for example, in the matter of housing.

46. In the light of the above, it can be deduced that the 'registered partnership' has more or less functioned as a 'shadow institution': it follows marriage and, as far as it is relevant now, also in terms of property.¹⁴⁹ Does it therefore make sense to maintain it?

Starting from the premise that such a decision corresponds to the legislative bodies of each country, and disregarding assessments or considerations of a different nature, analysing the issue solely from the point of view of legal technique, in those countries where 'registered partnerships' are open only to persons of the same sex, their existence is meaningless if marriage between such persons is permitted. This is especially the case if the institution is regulated by giving the spouses a great deal of freedom, as it happens in many countries, in line with what has been called the 'privatization' of marriage. Since it is not necessary to maintain a second, and a similar figure, not a few countries have abolished registered partnership laws or limited their effectiveness. On the other hand, if same-sex marriage is not allowed, its existence makes more sense if it is intended to provide an 'alternative to marriage' for such couples.

In countries where 'registered partnerships' are open to persons of the same and different sex, it seems to me that it would only make sense to maintain their existence if the restrictions on the freedom of the spouses to enter into a marriage are particularly strong; in other words if there are a more intense and extensive

148 Referring to some of these phenomena, see M. ANTOKOLSKAIA, in *Convergence and Divergence of Family Law in Europe*, p 15 who recognizes them as examples of a deliberate harmonization that exists in some parts.

149 On the 'shadow institution' see A. WÓJCIK, *Pareja de hecho y matrimonio. Un estudio de las diferencias* (Instituto de Ciencias para la Familia: Pamplona 2002), pp 9-10.

primary marital regime. If this is the case, and always only from the point of view of legal technique, it may be appropriate for there to be a second institution with a marital style, which recognizes greater freedom for its members. Otherwise, its justification loses its force because it would create a duality of legal ‘conjugal’ realities. In my opinion, and in the light of the legislative evolution of recent decades, it seems more coherent to recognize greater freedom for spouses than to institutionalize a second form of living together.

47. Another question concerns cohabitation. For all those couples who live together but do not wish to formalize their relationship – either as a marriage or as a registered partnership, where the existence of this second category makes more sense – the question arises as to whether or not it is necessary to establish a special regime to regulate them. On the one hand, it could be argued that since their intention is to live ‘outside the law’, the law should not regulate their relationships in order not to ‘violate’ their freedom and autonomy. However, if people who live together do so out of ignorance rather than a positive intention to live outside the law, this argument loses its force. In fact, it is not uncommon for cohabitants to seek the protection of the legal system when conflicts arise, especially when it comes to the dissolution of the couple and the consequent distribution of assets. On the other hand, it should also be borne in mind that the law cannot ignore the factual reality of such cohabitation and must therefore lay down minimum rules to ensure fairness and justice in such situations. Depending on whether the legislative policy is more in favour of the first or the second argument, particular regimes will be established where the weaker party in the relationship is protected or where an opt-in or opt-out regime is established.

48. In any case, it follows from all of the above that it is highly advisable to have recourse to the Notary to regulate, as far as possible, the personal and property relations of couples; either to establish differences with respect to the regime attributed to them by default, or to introduce new elements not regulated by the law. The diversity and disparity of the rules in the various European countries are proof of the above-mentioned convenience, especially when, as is increasingly the case, the couples in question are mixed couples with an international element.

