FUNDACJA
INSTYTUT PRAWA
USTROJOWEGO

A study prepared as part of the project:

The Concept of Marriage Through the Prism of Imperative Requirements Theory

Title of the study:

Legal Institution of Marriage and Parenthood in the Legal System of Malta (expert opinion)

Author of the study:

Prof. Ewa Tuora-Schwierskott[1]

[1] Associate professor at the Witelon Collegium State University, president of the Deutsch-Polnische Juristen Vereinigung (German-Polish Lawyers Association) based in Berlin, ORCiD: 0000-0003-0926-2173.

Ministerstwo Edukacji i Nauki

NAUKA DLA SPOŁECZEŃSTWA

POJĘCIE MAŁŻEŃSTWA

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

Table of contents

Three types of marriage relationship models 3

Marriage in the Maltese legal system 4

Getting married....4

Getting married in a religious form....4

Property relations of spouses....5

Inheritance between spouses....5

The institution of civil partnerships in the Maltese legal system 6

The institution of cohabitation in the Maltese legal system 6

General principles of cohabitation....6

De facto concubinage....7

Concubinage by contract....8

Concubinage by unilateral declaration....9

Summary 9

Summary 10

Bibliography 12

Ministerstwo Edukacji i Nauki

NAUKA DLA SPOŁECZEŃSTWA

POJĘCIE MAŁŻEŃSTWA

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

Three types of marriage relationship models

Same-sex marriage was introduced into the Maltese legal system on April 14, 2014. On that date, the Civil Unions Act entered into force[2]. On the other hand, on April 3, 2017, the Maltese Parliament passed a law called the Cohabitation Act 2016[3]. According to the latter, cohabitation can be both same-sex and opposite-sex unions.

Thus, the institution of marriage is regulated by the Civil Code of Malta and the 1975 Marriage Act[4] , while registered union is regulated by the Civil Union Act[5] (Chapter 530), and cohabitation is regulated by the Cohabitation Act[6] (Chapter 571).

A new law on cohabitation was introduced in 2020, replacing the 2017 law and providing more rights and protections for couples seeking legal recognition of their relationship without first entering into a marriage or partnership. The improved cohabitation provisions are intended to address a number of difficulties that couples faced under the previous law, including determining who is a cohabitant, how to establish a legally valid cohabitation agreement between cohabitants, and how community property rules should be regulated.

Thus, at present, Maltese family law and at the same time inheritance law recognizes three models of marital relationships:

1) Marriage between same-sex or opposite sex persons.
2) A registered union between persons of the same or opposite sex.
3) Community or cohabitation between persons of the opposite or same sex.

Those registered under the previous Cohabitation Act will continue to be recognized as such. According to a statistical survey, there are currently about 4,000 cohabiting couples in Malta. Considering Malta's population of 518,000, this is a significant number. Despite being one of the most Catholic countries in Europe, support for same-sex unions is over 60%[7].

Before 2017, only heterosexual couples could marry. As the law stands now, marriage, civil union and cohabitation are allowed for both opposite-sex and same-sex couples. There are different legal

[2] Att Dwar L-Unjonijiet Ċivili, Biex jirregola l-unjonijiet ċivili u biex jipprovdi dwar ħwejjeġ ligħandhom x'jaqsmu magħhom jew huma anċillari għalihom,14 ta' April 2014, (Maltese: *unjoni ċivili*), https://legislation.mt/eli/cap/530 [accessed 13.04.2023].
[3] Cohabitation Act, An Act to regulate cohabitations and to provide for other matters dealing with them or ancillary to them.21st April 2017 (Maltese: *Att tal-2016 dwar il-Koabitazzjoni*), https://legislation.mt/eli/cap/571/eng/pdf [accessed 13.04.2023].
[4] Marriage Act (Cap 255 of the Laws of Malta).
[5] **Civil Union Act (Chapter 530).**
[6] Cohabitation Act **(Chapter 571).**
[7] *Równość małżeńska na* Malcie, https://mnw.org.pl/rownosc-malzenska-na-malcie/ [accessed: 13.04.2023].

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

consequences depending on the form of the relationship.

Marriage in the legal system of Malta

Conclusion of marriage

The overarching legal framework for marriage is codified in the Civil Code[8] and the 1975 Marriage Act[9].

Marriage may be contracted only between two persons who are both at least 16 years of age[10]. It can be contracted through a civil or religious ceremony according to the traditions of the chosen religion[11]. To enter into marriage, the consent of both future spouses is required. A marriage in which the consent of the future spouse is forced or a person is deprived of the opportunity to freely choose is considered null and without effect at law. Any person responsible for forcing a person to marry will be held criminally liable – facing a prison sentence of 3 to 5 years[12] . Article 15(1) of the Marriage Law states that: "15.(1) A civil marriage shall be contracted in the presence of the Registrar, or of an officer of the Marriage Registry authorized by the Registrar to officiate at marriages, and of the witnesses required by this Act"[13].

Most marriages are subject to registration in the Marriage Registry, however, this is not essential to the validity of marriage[14]. The spouses form a community of property, which means that they have certain obligations, such as: working together to support each other with their resources and maintaining fidelity. If the marriage was concluded in Malta, it produces ipso jure between the spouses the community of acquests[15], unless they agree otherwise.

Celebrating married in a religious form

Marriage can be concluded in a religious form[16]. The registrar must be notified of this form. The marriage registrar should be notified of the church where the marriage will be held, the date; the name and surname of the priest performing it; the surname or surnames of the spouses after the wedding and the family name being adopted. The celebration of such a marriage is subject to the obligations imposed by the religious community, such as obtaining a copy of the marriage certificate and a certificate of announcement to be

[8] R. Farrugia, *International Marriage and Divorce Regulation and Recognition in Malta* "Family Law Quarterly" Vol. 29, No. 3, 1995, pp. 627 ff.
[9] Civil Union Act, https://legislation.mt/eli/cap/530/eng/pdf [accessed: 13.04.2023].
[10] Article 3(1) Marriage Act.
[11] Article 11 Marriage Act.
[12] Article 251G of the Maltese Penal Code.
[13] Capitel 230.
[14] Article 12 Marriage Act.
[15] Article 1316 of the Civil Code of Malta.
[16] *Marriage Registration*, https://www.identitymalta.com/services_3/marriage-registration/ [accessed: 13.04.2023].

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

presented to the pastor of the parish where the ceremony will take place, in addition to the need to present the appropriate documents, as in the case of a civil marriage. After the wedding mass, the bride and groom, along with their witnesses and the officer, must sign the marriage certificate. The certificate must be sent to the Registry Office by the parish priest or the priest authorized to register marriages.

The property relations of the spouses

The partition of the community of acquests shall be made by assigning one-half of the assets and liabilities comprised in the community to each of the spouses

If the marriage was concluded in such a way that the spouses live in a community of acquests, the property contributed by them during the marriage is considered as a joint property. The spouses administrate it on their own. Under ordinary circumstances, everything acquired by the spouses during the marriage is considered to belong equally to both spouses under the community property system.

Maltese law provides that spouses may choose various forms of their property relationships. This can be a marriage contract (Kitba taż-Żwieġ), various arrangements (set of rules) or a community of residue under separate administration (CORSA) or separation of estates (SoE). By community of residue under separate administration, everything acquired by the spouses is subject to separate administration[17]. When the community terminates (either because one spouse becomes redundant or because the marriage is dissolved), everything acquired by the spouses is combined into a community property and divided equally between them.

Another option is to enter into a prenuptial agreement and divide the property. Then each spouse retains full control of his or her property. By choosing this arrangement, spouses remain the sole owners of everything they owned before and after the marriage.

In case of divorce or separation and in case of partition of community property, each spouse is entitled to half of the liabilities[18]. When the community of acquests terminates, there is an equalization of the remaining after deducting the debts of the property mutually to the spouses[19].

Succession between spouses

After the death of a spouse, the situation is different for testamentary and statutory succession. Spouses can

[17] Articles 1338 et seq. of the Civil Code. Malta, https://legislation.mt/eli/cap/16/eng/pdf [accessed: March 13, 2023].
[18] Ibidem, Article 1333.
[19] Ibidem, Article 1341.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

appoint heirs to the entire estate in a will, without prejudice to the rights of descendants to a reserved share. If such a will is left, the surviving spouse receives half of the succession[20]. The surviving spouse also has the right to continue to live in the principal residence[21]. On the other hand, if the deceased has left no children or other descendants, the surviving spouse is the sole heir[22].

The institution of civil unions in the Maltese legal system

As mentioned above, same-sex marriage was introduced into the Maltese legal system in April 2014. The legal effects of a civil union are identical to those of marriage. The Civil Unions Act was enacted in 2014 to meet public expectations and the needs of same-sex couples who wished to formalize their relationship, but were unable to marry at that time[23]. The law was amended in 2017 to allow same-sex couples to marry, making the Civil Unions Act redundant. A registered partnership has *mutatis mutandis* the same legal effects, including property, as a civil marriage contracted under the law[24]. In the event of death, the partner has the same rights as a surviving spouse.

The institution of cohabitation in the Maltese legal system

General principles of cohabitation

As mentioned above, the Maltese Parliament has enacted legislation to recognize and regulate cohabitation – The Cohabitation Act of 2016[25]. The purpose of this Act is to protect cohabiting couples by providing a legal framework for their rights and obligations. Prior to this Act, Maltese law did not recognize this type of relationship and therefore did not provide legal protection. The Cohabitation Act applies to couples who do not wish to be bound to each other by marriage or civil partnership, but who nevertheless wish to have their relationship recognized by law. In this regard, the Act contains some innovative legal solutions that recognize that each couple has unique preferences for cohabitation[26]. Thus, the law offers a wide range of options for cohabiting couples, while providing legal protection for those who have entered into such

[20] Ibidem, Article 808 § 1.
[21] Ibidem, Article 633.
[22] Ibidem, Article 810.
[23] Civil Unions Act, *To regulate civil unions and to provide for matters connected therewith orancillary thereto*, April 14, 2014, https://legislation.mt/eli/cap/530/eng/pdf [accessed: 13.04.2023].
[24] Article 4 of the Civil Unions Act, CIVIL UNIONS ACT.
[25] Cohabitation Act, *An Act to regulate cohabitation and to provide for other matters dealing with them or ancillary to them*, April 21, 2017 (Maltese: *Att tal-2016 dwar il-Koabitazzjoni*), https://legislation.mt/eli/cap/571/eng/pdf [accessed: 13.04.2023].
[26] Article 8 of the Civil Unions Act, Civil Unions Act.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

relationships.

The Cohabitation Act allows any couple who consider themselves in an intimate relationship and wish to live together to enter into a legal union as defined by the law. Persons who are legally separated may also be considered *de facto concubines.* Under this law, any cohabitation is subject to the same restrictions as under the Marriage Law, i.e., cohabitation cannot be established in the following cases:

1) With a minor;
2) Between ascendants and descendants in the direct line;
3) Between siblings;
4) Between persons related by affinity in the direct line;
5) Between the person adopting and the adoptee;
6) Between persons, one of whom is unable to give consent[27].

In addition, the Cohabitation Act imposes other conditions that affect its validity. Cohabitation relationship cannot be entered into with a person who is married or in a civil union partnership. It is also not possible to enter into such a relationship if one of the parties is already bound by a cohabitation agreement with another person or is already in a marriage, civil union partnership or cohabitation relationship which is governed by a foreign law and creates rights and obligations and which produces legal effects in Malta. Therefore, entering into such a union should be considered to meet the same legal requirements as entering into a marriage. This is very important because this type of union between two people does not allow the law to be circumvented. Its sole purpose is to allow both same-sex and opposite-sex couples to consider whether it is desirable for them to enter into such a union.

The Cohabitation Act provides for three different forms of cohabitation:

1) *De facto* cohabitation;
2) Cohabitation by means of the contract;
3) Cohabitation by means of a unilateral declaration[28].

De facto cohabitation

Couples who are already living together or have been living together for at least two years are automatically

[27] Part. 3 Article 5 a-f Cohabitation Act.
[28] Cohabitation Act – An act to regulate cohabitations and to provide for other matters dealing with them or ancillary to them April 14th, 2014ACT IX of 2014 as amended by Act XXIII of 2017, XIII of 2018 and LXV 2020.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

considered to be *de facto* cohabitations. No legal document is required for this type of cohabitation[29] . *De facto* cohabitation does not create mutual rights and obligations between the cohabitants, but after two years of cohabitation, the couple obtains a limited set of rights. Cohabitants:

- are considered as tenants for all purposes of the law, which is relevant to the rental of their shared home;
- are considered their closest persons;
- have the right to take decisions relating to the medical care of the other cohabitant;
- cannot be compelled to testify against each other in legal proceedings[30].

Such a set of rights is certainly desirable from the point of view of living together and the need to deal with life issues, especially medical issues. At the same time, it is the bare minimum necessary for resolving life issues.

Cohabitation by means of the contract

People who intend to live together or are already living together and want to formally regulate their relationship can do so by signing a contract of cohabitation. The contract is drawn up and signed before a notary, it is registered as a public deed[31]. It is flexible and can be drawn up according to the wishes and needs of the couple. However, there are certain minimum requirements that the contract must contain[32], e.g.:

1) The agreement must specify the common premises (house or apartment), that will be considered the common house of the cohabitants;
2) The agreement must specify the title of each cohabitant on the house and the transfer of rights to it in the event of separation;
3) The agreement should include provisions for the division of assets and liabilities of the spouses in the event of separation;
4) Determine the maintenance, if one of the cohabitants is or becomes dependent on the other, and the annual percentage markup on the maintenance, if the couple wishes to establish such alimony;

[29] Cohabitation Act – "de facto cohabitation" means a cohabitation between two persons which cohabitation is not registered nor is it unilaterally declared under this Act and also includes persons who, although being in a marriage or civil union, are separated de jure.
[30] Part. 2 Article 3 a-c Cohabitation Act.
[31] Part. 3 Article 9 et seq. Cohabitation Act.
[32] Part. 3 Article 11 et seq. Cohabitation Act.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

5) It is necessary to regulate the children of cohabitants, regardless of whether they come from their relationship or a previous one, including the rules of custody and care in the event of separation;
6) The agreement should also include the terms of entitlement to live in a shared house and the payment of child support to dependents.

These rights and obligations are similar to those of married or civil union couples, including, among other things, alimony, access to shared housing or inheritance rights. These rights and obligations are similar to those of married or civil union couples, including, among other things, inheritance rights and social security rights[33].

Cohabitation by means of a unilateral declaration

The law gives one of the parties the possibility of declaring an existing cohabitation through a court procedure. This form of cohabitation applies to couples who disagree on how and whether to regulate their relationship, which may lead to situations in which one of the parties is in a difficult situation. In this case, the law provides for the possibility of regulating cohabitation through a formal procedure in the form of a declaration before a court. A judge and the complaining cohabitant are present. The presence of the other cohabitant is not required, but he or she will be notified of such proceedings[34]. It should be noted here that unilaterally declared cohabitation is subject to legal recognition by the state for five years from the entry into force of The Cohabitation Act, i.e. from June 5, 2020. It was considered that this period would give vulnerable parties enough time to regulate their legal situation with the help of the provisions of the same law. After five years, unilateral declarations will no longer be allowed.

Once the outcome of the court proceedings is registered and it is determined that there are no obstacles or objections from the other cohabitant, both parties are entitled to the basic rights and obligations listed in the Act. The couple is always free to choose to enter into a cohabitation agreement as described above, after which the outcome of the court proceedings would no longer be valid. In the case of a registered concubine, in the event of the death of one of the concubines, the survivor shall have the right to reside in the common house of the concubines for a period equal to the number of years of cohabitation, but not exceeding 15 years. The survivor is entitled to the aforementioned right of *vita durante* or until the conclusion of another contract of cohabitation, marriage or partnership.

[33] Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, *The Cohabition Law*, Malta 2020, p. 3–5.
[34] Cohabitation Act – an Act to regulate cohabitations and to provide for other matters dealing with them or ancillary to them April 14th, 2014, ACT IX of 2014 as amended by Act XXIII of 2017, XIII of 2018 and LXV 2020.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

Summary

In conclusion, Maltese law offers a wide range of possibilities for two people of the same or different sex to enter into a marriage. Those interested can enter into a civil marriage as well as a religious marriage. Same-sex partnerships are also possible. In addition, the Maltese legal system provides for both same-sex and opposite-sex cohabitation. This is a very interesting legal solution. Cohabitation can take three different forms: *de facto* cohabitation, cohabitation by contract and cohabitation by unilateral declaration before a court. The purpose of legally sanctioning cohabitation is to allow both parties to such a relationship to legally regulate the life interests of both cohabitants in the form of regulating legal access to shared housing, issues of custody and care of children, and alimony arrangements. Since there are several different forms of formalizing the union between two people, it should be noted that these forms meet the needs of both religious and liberal people. From the point of view of the state and the interests of the persons concerned, it is essential that these persons be able to obtain a certain legal certainty regarding their situation, shared housing, maintenance, and child custody rules.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

Abstract: The article discusses the institutions of marriage, civil unions and cohabitation in the Maltese legal system. Civil unions were already legally sanctioned already in 2014, and later the possibility of legalizing a cohabitation relationship was introduced.

Keywords: marriage, civil union, cohabitation, Malta.

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

Bibliography

Literature:

Farrugia R., *International Marriage and Divorce Regulation and Recognition in Malta* "Family Law Quarterly", Vol. 29, No. 3, 1995.

Documents and analysis:

Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, *The Cohabition Law*, Malta 2020.

Legal acts:

Att Dwar L-Unjonijiet Ċivili, Biex jirregola l-unjonijiet ċivili u biex jipprovdi dwar ħwejjeġ ligħandhom x'jaqsmu magħhom jew huma anċillari għalihom, 14 ta' April, 2014.

Cohabitation Act – an Act to regulate cohabitations and to provide for other matters dealing with them or ancillary to them April 14th, 2014ACT IX of 2014 as amended by Act XXIII of 2017, XIII of 2018 and LXV 2020.

Civil Unions Act – to regulate civil unions and to provide for matters connected therewith or ancillary thereto. April 14th, 2014, ACT IX of 2014 as amended by Act XXIII of 2017 and XIII of 2018.

Marriage Act (Cap 255 of the Laws of Malta).

Online sources:

Articles 1338 et seq. Civil Code of Malta [online] https://legislation.mt/eli/cap/16/eng/pdf [accessed: 13.03.2023].

Civil Union Act, https://legislation.mt/eli/cap/530/eng/pdf [accessed: 13.04.2023].

Cohabitation Act, An Act to regulate cohabitations and to provide for other matters dealing with them or ancillary to them.21st April 2017 (Maltese: Att tal-2016 dwar il-Koabitazzjoni), https://legislation.mt/eli/cap/571/eng/pdf [accessed: 13.04.2023].

International Marriage and Divorce Regulation and Recognition in Malta, https://www.jstor.org/stable/25740052 [accessed: 13.04.2023].

Malta, https://www.euro-family.eu/atlas_scheda-mt [accessed: 13.04.2023].

Marriage Registration, https://www.identitymalta.com/services_3/marriage-registration/ [accessed: 13.04.2023].

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.

Requisites for Marriage and Civil Unions – Marriage Procedure, https://family-law.com.mt/marriage-procedure [accessed: 13.04.2023].

Równość małżeńska na Malcie, https://mnw.org.pl/rownosc-malzenska-na-malcie/ [accessed: 13.04.2023].

The Cohabitation Law, https://meae.gov.mt/en/documents/press%20release%20documents/2017/cohabitation%20law.pdf [accessed: 13.04.2023].

Publikacja dofinansowana ze środków budżetu państwa w ramach programu Ministra Edukacji i Nauki pod nazwą „Nauka dla Społeczeństwa" nr projektu NdS/537637/2021/2021, kwota dofinansowania 1 400 000,00 zł, całkowita wartość projektu 1 400 000,00 zł.