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Aspects of Marriage Contract under Albanian Legislation. Private International Law on International Marriages

M.Sc. XHULIO DOKU[1]
Faculty of Law
Tirana University, Tirana, Albania

Abstract

Under the influence of important political changes that occurred in Albania after 1990, the number of "international marriages" in our country increased rapidly. Globalization and movement of individuals and families across national borders have leaded into conflict of laws with respect to marriage in different jurisdictions. This social reality brings a series of problems related to the definition of substantive legislation applicable to spouses' personal and property relations.

In this regard, there is a crucial need to study and take in analysis the legal framework which defines the forum[2] that governs marriage contract and matrimonial regimes in general, in case of marriages with foreign elements.

The latest legal amendments on private international law of Albania, specifically, law no. 10428/02.06.2011 "On Private International Law", brought important novelties with regard to rules for defining the applicable law on matrimonial property regimes, as well as regards to party autonomy on the choice of applicable law that governs marriage contract. The aim of this paper is to provide a brief

[1] Mr. **Xhulio Doku** is a law professional and a qualified attorney in Republic of Albania. He has obtained a Master of Science degree in Private Law from Faculty of Law, University of Tirana, with a gold medal. He has successfully represented University of Tirana in the international arbitration competition "24th *Willem C. Vis International Commercial Arbitration* in Vienna, Austria." His research interests focuses on private law, labour law, contract law, family law and international commercial arbitration. **Email address: xhuliodoku@gmail.com**

[2] Forum is a synonym of legal system, jurisdiction and legislation.

overview of the regulation that Albanian Family Code provides on matrimonial property regimes, marriage contract, together with an analysis of provisions that Albania Private International Law makes on marriage contracts in the case of international marriages.

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Keywords: marriage, contract, choice, law, international, regime, property.

1. Matrimonial property regimes under Albanian Family Code.

Marriage is a legal action which does not only change the personal status of the individuals involved in it, but also affects the property rights on the assets and wealth that spouses create during marriage. In addition to the various obligations arising from marriage, spouses have the obligation to co-contribute for the welfare of the family. Albanian Family Code recognizes two types of contribution that each of the spouses may bring to the unity: Financial contribution which consist on the incomes that each of the spouses generates for the mutual benefit of the family and contribution in kind which covers a wide range of actions, such as childcare, home chores, home care etc. which are considered as a legal contribution in the family. For this reason, it is of great importance to analyse the way legislator has governed property relations between two legally married persons in Republic of Albania, which is a complex and at the same time an interesting legal institute.

Albanian Family Code defines two categories of matrimonial property regimes:

1. Regime of joint ownership.
2. Regime of marriage contract.

Let's briefly provide an overview of each of the abovementioned regimes.

1. Regime of Joint Ownership.

This type of matrimonial property regime is the most common one that governs matrimonial property relations in Albanian married couples. However it is important to note that such regime is only applicable when the spouses do not opt for a marriage contract, which is the first legal action that governs marital relations with regard to properties. Following the new Family Code which was adopted in Albania in 2003, the marriage contract represents the general rule for regulating the matrimonial property regime among spouses.[3] Yet, only a minority of couples go for a marriage contract, consequently letting the regime of joint ownership govern their matrimonial property relationships.

Under regime of joint ownership, almost every property and asset perceived by each of the spouses during marriage, together or separately, is considered to be in the ownership of both spouses at the ratio 50:50, despite the nature of the contribution that each of the spouses has given to the family in the financial aspect.

Having a wide range of application, it is with great interest to scrutinize the legal regulation under the regime of joint ownership. In this regard, Article 74 of Albanian Family Code defines the properties/assets that are included in the marital joint ownership. Under this ruling, it is defined that marital property (estate) are considered:

a) the wealth obtained by the spouses, together or separately, during the marriage;
b) income from specific activities of each spouse during the marriage, which were not consumed, before the termination of joint ownership;
c) profits from the properties of each spouse, which have been acquired and not consumed before the termination of joint ownership;
d) commercial activities created during marriage.

[3] Sonila Omari, 2010, Family Law, Morava Publications, Tirana Albania.

The abovementioned estate is considered to be in the joint ownership of spouses, because under this regime, there is a legal presumption that the contribution of each spouse in financial aspect in marriage is equal, despite the nature of contribution. However, the legislator has provided for some specific estate to remain in the sole ownership of the one spouse, as a result of the narrowly personal nature of the ownership. Such estates/assets include the following:[4]

a) assets, which prior to the marriage were jointly owned by one spouse and another person(s) or over which s/he was entitled to a real usage right;
b) assets acquired during marriage through gift, inheritance or legacy, unless in the instrument evidencing the gift or in the testament it is stated that the assets were given to both spouses;
c) assets strictly for the personal use of each spouse and assets gained as accessories from personal wealth;
d) work equipment necessary for the performance of the profession of one of the spouses, except for those that have been specified for the administration of a trade activity;
e) assets gained from an award of personal damages, except for pension funds obtained as the result of a partial or full loss of work capacity;
f) assets gained from the disposal of the above-mentioned personal wealth.

In conclusion, it is important to note that under the regime of joint ownership, almost every asset that each of the spouses obtain separately or together is considered to be mutual property of the spouses, excluding the wealth which is narrowly related to one spouse.

[4] See Article 77 of Albanian Family Code.

2. Regime of Marriage Contact.

In basis of regime of marriage contract, spouses have only the obligation to give the required financial contribution for a normal family life, however most of the assets earned by the spouses during marriage, remain in the respective ownership of each spouse, or otherwise as agreed by the spouses under the marriage contract.

Under the regime of marriage contract, the property relationships between the parties are governed by the provision imposed by the spouses themselves, under the contract at hand. Due to its particular nature, marriage contract is governed by both Civil Code and Family Code. Provisions of Civil Code apply for essential conditions that a marriage contract must meet in general, in order to produce legal consequences and Family Code stands as a *lex specialis* for specific aspects of such contracts.

Albanian Civil Code imposes 4 criteria that a contract shall meet in order to be legally binding. Such criteria include:

- Will of the parties
- Legal consideration of the contract
- Subject of the contract
- Legal form

As the topic of this paper is the marriage contract, we will elaborate these four conditions with regard to this type of contract.

Marriage contract falls within the range of the bilateral legal actions, meaning that in order to come in force, *the mutual consent* ***(will)*** *of the parties must meet at the same time.* Albanian Family Code does not define marriage contract as a narrowly personal legal action because under Article 69 of Family Code, such contract can be signed even by a legal representative of the spouse, which is authorized by the latter for undertaking such action through a power of attorney.

In order for an individual to sign a marriage contract, he/she must have complied 18 years old which is the age that

the individual enjoys full legal capacity to enter into contractual relationships. It is interesting to note here that a couple, in which one of the spouses is under 18 years old,[5] cannot opt for a contractual matrimonial regime, because one of the spouses lacks the legal capacity to be part of a contract. However, by complying 18 years old, this couple has the option to bind a marriage contract, which, of course will govern only the property relationships between the married couple that will result after the conclusion of the contract.

Now, focusing on **consideration,** marriage contract must be signed in basis of a legal consideration. Consideration is the social and economic function of the contract.[6]

The consideration for a marriage contract is the defining the rulings for matrimonial property relationships between the married individuals. The aim of such contract is setting a matrimonial regime which is different by the one imposed obligatory by the law (regime of joint ownership). By explaining the consideration of the contract, even the **subject** of such contract is clear: regulation of matrimonial property relations between the spouses.

As per the **legal form of the contract**, Article 69 of Family Code imposes the obligation that marriage contract shall be made in the form of a notary act. Such ruling shows that Albanian legislator has assessed that the marriage contract due to its particular importance shall vest a specific legal form to be binding for the parties and to produce legal consequences. It should be said that the legal form that the legislator has provided for marriage contract, affects the validity of the contract if it is not respected by the parties. Hence, a written or verbal marriage contract, without the stamp and signature of a Notary Public is null and void.

[5] Albanian family law provides that the minimum age an individual can marry is 18 years old, however, the court in the location where the marriage is to be concluded may, for sufficient reasons, allow marriage prior to this age.
[6] For more, see Francesco Galgano, 2017, *Diritto Privato,* CEDAM editors, Wolters Kluwers.

2.1. General considerations on Marriage Contract.

In this section, we are providing a list of considerations that must be taken in account with regard to marriage contract.

- A marriage contract can be signed before or during the marriage.
- A marriage contract can be amended only after two years it has come in force.
- Spouses cannot sign a marriage contract for at least two years after they marry, if they have not signed a pre-marriage contract.
- A marriage contract must be registered in the marriage act, which is stored at the local offices of Civil Status. The registration of the contract is made by the Notary Public which has attested the contract. If the contract covers the property relations with regard to a company's share, such contract shall be registered also in National Business Centre.
- A marriage contract is binding to third parties only after 3 month from the moment it is registered in local offices of Civil Status, or in National Business Centre, if it is the case.

3. Marriage Contract under Private International Law

As stated in the abstract of this paper, the number of marriages with foreign elements has rapidly increased during recent years, as a result of globalization and free movement of individuals, especially in the territory of European Union. Doctrine explains that marriages with foreign elements are considered the ones that contain elements related to different jurisdictions. Such elements can be the legal relationship of the spouses, the spouses themselves, or the place where the marriage is settled. Even Article 1/2 of Law no. 10428/02.06.2011 "On Private International Law" has provided a definition for "the foreign element", which is as follows: The foreign element implies any legal circumstance that is related

to the subject, the content or the object of a juridical-civil relationship (concretely marital relationship) and which is the cause for linking this relationship to a certain legal system.[7]
For this reason, it is of crucial importance to elaborate the rulings that Private International Law provides on applicable law for various aspects that are related to marriage, in general, and marriage contract, in particular.

Until 2011, in Albania was in force Law no. 3920/1964 "On the enjoyment of civil rights by foreigners and the implementation of foreign law", which was the legal basis that imposed private international rules, with regard to marriage. Following, in 2011 Albania adopted Law no. 10428/02.06.2011 "On Private International Law", which will be the object of study in this paper, for the provision related to marriage and marriage contract.

The most important novelty that the new law brought, was the autonomy of the parties to choose the applicable law that shall govern matrimonial property relations between a married legal couple. It is understandable that the choice of law shall be made by expressly providing so in a marriage contract. Hence *lex voluntatis*[8], is the law that prevails with regard to regulation of legal relationship between the parties and in its absence, the other rules of Private International Law (later PI law) apply for determination of the applicable law. Let's analyse them below.

The applicable provision to the regulation of personal relationships and matrimonial property relations between spouses is found in articles 23 and 24 of the PI law. While article 23 of PI law defines the applicable to all consequences of marriage, article sets the applicable law on the material consequences of marriage.

[7] See Article 1/2 of Law no. 10428/02.06.2011 "On Private International Law".
[8] Lex volunatis is a latin term which means, the law chosen voluntarily by the parties.

Firstly, let's analyse the applicable law to personal relations between the spouses. Article 23 of PI Law defines *lex nacionalis* [9] as the general rule for defining the applicable law for this case. Paragraph 1 of this article, rules that the personal relations of the spouses are governed by the law of common citizenship. In case the spouses are citizens of different states, the law of mutual residence state is applicable.

As we can see, the legislator has not provided party autonomy in defining the applicable law for personal relations between the parties, as such ruling are considered to be part of public order of Albanian legal system.

However, the legal situation is completely different with regard to applicable law to matrimonial property relations, between the parties. It is important to note that applicable law to matrimonial property regimes also governs the validity and other aspects of marriage contract. As per matrimonial property regimes, PI law has provided for the party autonomy to choose the applicable law[10] to ownership issues related with marital estate. Anyway, party autonomy in choosing the applicable law in this case is not unlimited. Let's have a look at what Article 24 of PI law imposes on the choice of law in a marriage contract.

The 1st paragraph of article 24 imposes the general rule, which defines that in absence of a marriage contract, the matrimonial property regime is governed by the law of the state, which regulates the personal relations of spouses. Later on, the 2nd paragraph of the same article provides the party autonomy to set the applicable law through a marriage contract. This article rules that spouses, in agreement between them, made by a notary act or by another act of equivalent and issued by a public body, may decide the applicable law on the

[9] Lex naciolis means the law applicable in the state where the individual is a citizen.
[10] Applicable law for the marital regimes is also known as *lex causae.*

property regime. However, the spouses can only alternatively choose the law of the state:

a) whose nationality has one of the spouses;
b) where one of his spouses has his habitual residence;
c) in which is located the immovable property of the spouses.

In conclusion, we can say that Law no. 10428/02.06.2011 "On Private International Law" recognizes the party autonomy of will as the main ruling for defining the applicable law with regard to matrimonial property regimes, with certain restrictions. As per applicable law to personal relations between the spouses, PI law provisions are obligatory and the parties cannot address the choice of law through a marriage contract.
Having explained that, we are assessing the applicable law for certain elements which are crucial for the validity of marriage contract.

PI law provides that *the ability (legal capacity to act) of spouses to enter into a marriage contract* shall be governed by the law of the state of citizenship of the spouses.[11] In this case, for each of the spouses the legal criteria for having full legal capacity to act shall be assessed separately, in basis respective law of the states where each spouse is a citizen.

As per the *consent (will) of the parties to enter into a marriage contract*, PI law does not provide us with linking criteria that define the applicable law. However, doctrine has stand that parties' consent to sign a marriage contract shall be governed by *lex causae,*[12] thus the law applicable for the validity of marriage contract. Doctrine is also unilateral in the conclusion that *lex causae* (law applicable to matrimonial

[11] See Article 11/1 of Law no. 10428/02.06.2011 "On Private International Law".
[12] See endnote ix.

property regime), also regulates *the subject* and *the legal consideration* of marriage contract.[13]

Last but not least, PI Law has not defined the applicable law for legal form of marriage contract. As we mentioned above, Art. 24 of PI Law only defines that the contract that defines applicable law to matrimonial regimes shall be in the form of a notarial act, however it does not make a generalisation for the marriage contract as a whole. We believe that under art. 24/2 of PI law, the applicable law for the validity of contract *(lex causae)* is also applicable to the legal form of contract. However, in order for a marriage contract to be recognised in a state that has adopted Hague Convention of 1978[14], it shall at least be in a written form and signed by both of spouses, despite the rules imposed by *lex causae* on the form of the contract.

CONCLUSION

As stipulated above in this paper, the contractual matrimonial regime is present in Republic of Albania since 2003, when the actual Family Code was adopted by Albanian legislation, however only a minority of couples have opted for a marriage contract to regulate their matrimonial regime.

It holds true that matrimonial regime of joint ownership is the one that governs the majority of matrimonial regimes in Albania, and in our opinion, this type of matrimonial regime fits best with economic and social reality in Albania.

The institute of marriage contract under Albanian Private International Law has for the first time recognised the party autonomy on choosing the applicable law to validity of marriage contract and matrimonial property regimes. Despite the regulations that PI law has already imposed, we believe

[13] Eniana Qarri, 2014, Marriage Contract, PhD Dissertation, University of Tirana.

[14] Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes.

that in order to avoid any uncertainties that may arise in implementation of the PI law in the future, an amendment of this law by providing a more detailed criteria with regard to applicable law for other aspects of matrimonial regimes, is necessary, as the actual law provides only two articles for this case.

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