

THE LEGAL NATURE OF THE MARRIAGE CONTRACT

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ABSTRACT: *This paper provides an analysis of the concept of a marriage contract, its characteristics, the difference between the civil code contracts and the terms of validity. Albanian civil code provides the marriage contract, which is a very important step in family relations, especially in the relationship between spouses, given the social position of women, but these changes did not find a suitable ground due to the patriarchal mentality of albanian society, which brought its implementation in rare cases in the field of family relations. Nowadays, spouses have the opportunity not only to contract on the property regime to which they will be subjected, but also beyond. The marriage contract is not limited to the determination of rights and obligations. It has the main purpose of fixing the wealth status of the family to be established, in terms of wealth rather than administration, determining the fate of most of the legal acts that spouses will do with third parties during their common life. Therefore, it can be considered as the "statute" of the family. The marriage contract represents the general rule in terms of regulating the property regime between the spouses. In the case when the latter have not signed a marriage contract, or it is invalid or related only to a part of the property, they will be subject to the property regime of the legal community.*

KEYWORDS: Marriage Contract, Characteristics, Regime, Elements.

INTRODUCTION

The definition of the marriage contract

The marriage contract is a legal act by which future spouses determine their marital regimes, in principle for the entire duration of marriage¹ through which spouses organize the economic means of society of their own, determine among the assets those that will be the exclusive property of one of them and those that will be in common.

Based on Article 66 of the Family Code, private autonomy manifests itself in the possibility of future spouses to regulate the property regime with a contract, which may be concluded before or during the marriage, within the limitations prescribed in the provisions of the Family Code. Marriage contract represents the general rule in the regulation of spouses property relations and the legal community regime will be applied, as an exception to the general rule, only in the absence of a marriage contract. From a close reading of this provision we can make two important conclusions. Firstly, the legal regime is subsidiary in relation to the contractual regime, in the sense that the latter applies only in the absence of contractual regime. Secondly, the legislator has given priority to the regulation of contractual spouses property relations, as the most appropriate way to regulate the economic aspect of family relationships².

¹ Zaka, T. "Jeta Juridike" Nr.2, February, Tirana, 2004.

² Ragazzini, L., "La revocatoria delle convenzioni matrimoniali", Maggioli Editore, Rimini, 1987, pg. 7.

Marital contract subjects are only natural persons who have special status³, spouses. Contrary to this contract, the contracts provided for in the Civil Code have as subjects not only natural persons, but also legal persons. According to the relevant provisions of the Family Code and Civil Code, marriage contract represents the legal action by which the two persons who are to marry create marital property regime or, as the case may be, alter or extinguish the property regime that has existed since the marriage was concluded⁴.

On the one hand, this contract is subject to the general regime for the conclusion of the contract and its validity provided for by the Civil Code and, on the other hand, the provisions of the Family Code, for example the rules of the will of a spouse will be subject provisions of the Civil Code. This contract is *sui generis*, based on some of its features which will be analyzed below.

Characteristics and Conditions of The Marriage Contract

The marriage contract must meet the basic conditions for its existence and validity. The consent of the spouses, who represents the will to conclude the contract, is one of the conditions necessary for its validity. The marriage contract is made in the presence and with the simultaneous consent of both parties or their representatives, based on Article 69 of the Family Code. The contract, in the absence of such consent expressed under the provisions of the Code, would be invalid and the spouses will be subject to the regime of the legal community. Unlike the marriage contract, which should have simultaneous consent of the spouses, the Civil Code provides that in concluding a contract the will goes through several stages from the proposal to the admission.

In accordance with the provisions of the Civil Code for the conclusion of a contract, as any legal action, the will of the spouses must be declared by a person who is fully competent to act, so the juvenile who links the marriage automatically is subject to the property regime of the legal community until the age of majority. Whereas, when the spouse is abolished or restricted the ability to act, although the code does not provide for a specific provision for this, we can say that the latter will be represented on the contract of marriage by his guardian.

The agreement expressed on the conclusion of the contract must be free, in order to bring about legal consequences and a free assessment of these consequences, as well as the unfairness, that is, not in terms of misinterpretation and intimidation. Also, the consent to sign a marriage contract must be expressed and cannot be inferred from concluding actions, which is one of its differences with the Civil Code contracts, which may also relate to silence.

The object of the marriage contract, set forth in the provisions of the Family Code, is another important condition of its attachment and validity. It has to do with the creation of a property regime and should not be treated the same as the material object of this contract, that means what are acquired by the spouses. The subject of the marriage contract may be:

- Creation of a property regime between spouses through a contract, which is related before the marriage is concluded, to its consequences will begin from this date.

³ Droit Civil “ les regimes matrimoniaux” Philippe Malaurie et Laurent Aynes, edition 1999, pg.99

⁴ In accordance with Article 66 of the Family Code and Article 659 of the Civil Code.

- Change of the existing property regime or modification of some aspects of it, but not two years⁵ from the implementation of this (previous) regime. The property regime cannot change even when the spouse is a minor, as mentioned above.
- Extinction of the regime provided for by a previous marriage contract, following the rule of the legal community regime.

The socio-economic contractual relationship is the cause of the marriage contract, which is another essential condition of the contract's validity and validity. Its cause is defined in the provisions of the Family Code, being a typical contract and it is precisely the definition of a property regime other than that provided by law.

The form of a marriage contract

The form of a marriage contract is a very important condition. The Family Code in its Article 69 provides: *"The marriage contract is done by a notary act, in the presence and simultaneous consent of the two future spouses or their representatives. At the time of signing the contract, the notary issues to the parties a notarial act, which contains the full identity, the address of the future spouses and the date of the marriage bond. The Notary has the obligation to file a copy of the contract at the Civil Registry before the marriage is concluded. If the marriage act shows that the spouses have not entered into a contract, they will be considered to be married to third parties under the marital law of the legal community."*

From this article it turns out that the marriage contract is a formal contract, which should be affixed in writing to validity because any other form of declaration of will would be null and void. Amendments that may be made to a marriage contract after marriage celebration should be made in the same form as the initial contract of marriage. No change is available without the simultaneous presence and consent of all persons who have been in the marriage contract or their representatives.

The marriage contract is a solemn contract, where the terms of its validity are related not only to the form but also to the content. Like any other contract, marital agreements are generally obeyed in the general contract law. However, the marriage contract has its specifics and therefore special rules apply regarding some important moments pertaining to the date of the contract and the qualities that the future spouses should enjoy.

The ability of spouses

The ability of spouses to enter into a contract means the ability to act in order to enjoy the possibility of entering into this contract as in the case of general rules on contracts and mutual consent of spouses for determining the marital property regime in the marriage contract. In case the above conditions for concluding a marriage contract are violated, as in the case of violation of the provisions of general law in relation to the consent in contracts and legal acts in general, in the case of a marriage contract it is affected by the nullity, however according to occasionally, we may be before the cancellation of the marriage contract or before the partial cancellation thereof. Eg: we are faced with the complete cancellation of the contract when it has not been properly signed and when one of the spouses has been the victim of a bug or is not represented properly. Hence, it should be seen case by case.

⁵ Article 72, first paragraph of the Family Code.

In the case of a partial cancellation of a marriage contract, only one contract clause may be invalid, which does not necessarily imply the invalidity of the entire contract. But it also depends on the nature of the clause. Eg: if a contract clause conditions the choice of the marital regime and this clause is invalid, it may affect the complete cancellation of the marriage contract.

Registration of the marriage contract

The marriage contract must be registered in the marriage register, where the marriage act is drawn up and administered by the civil service. Upon the signing of the marriage contract, the notary shall issue to the parties a notarial act containing the full identity of the parties, the address and the date of the conclusion of the contract. This formality is important to make the conception of marriage objectionable by third parties and in the non-fulfillment of this formality the spouses will be considered to be third parties married to the legal community regime, unless the spouses have stated that they have a marriage contract, in the legal transaction conducted with third parties.

In cases when spouses or one of them are traders, or engaged in commercial activity, they must also register the marriage contract in the commercial register. Also, in cases where the contract of marriage includes the change of legal status of an immovable item existing at the time of drafting the contract, it must also be registered in the IPRO. This is in accordance with the provisions of the Civil Code. The registration of this contract is not done for validity but it serves to inform the parties that have not participated in the contract, to protect their rights and interests and thus it has a declaratory effect. In a parallelism above can be mentioned the unification of judicial practice by the United Colleges of the Supreme Court, which conclude that *"The registration or transcription of a legal transaction is not an element of the contract's validity. Failure to sign a contract on immovable property registers does not render the immovable property contract invalid, but does not give the buyer the opportunity to alienate it to third parties. The contract that is not registered is perfect and valid and has the essential effects. By signing a contract for the alienation of immovable property, the beneficiary of the rights becomes the owner of the immovable property and is legitimated to exercise his rights vis-à-vis third parties, other than the alienation of immovable property in favor of third parties"*.⁶

Thus, the registration of the marriage contract is not included in the form that the law requires for entering into a contract and consequently the marriage contract is fully valid even if it is not registered in the relevant register. In contrast to this contract, which must be registered in the register of marriages and, as the case may be, in the immovable property register or in the commercial registers, the Civil Code sanctions only the registration of contracts that are object of immovable property.

The deposit of the marriage contract with the civil status office and the respective registration will be addressed to third parties from different moments, which will continue from the moment of the conclusion of the marriage contract. In case the marriage contract is concluded before the marriage, the registration is done simultaneously with the drafting of the act of the marriage act, whereas in the case when the marriage contract is concluded after the marriage is concluded

⁶ Decision No.1, dated 06.01.2009, United Colleges of the Supreme Court, Albania.

the registration will have consequences 3 months after the change has been deposited in registry of civil status⁷.

CONCLUSIONS

The marriage contract is a solemn act, a complex act and a statute for the upcoming family with some special features. Entrants in the marital contract are only two natural persons who have reached the age of 18 years, of different sexes, who have no blood relation or other obstacles to marry foreseen to the terms of marriage in the Family Code.

This contract has a complex nature, first of all by its contents. It aims to determine the status of the future family economy, the spouses' freedom to refer to one of the patterns of property regimes that the Family Code puts at their disposal. But, in the marriage contract, other conditions that are not provided in the law and do not contradict it may be foreseen.

There may also be found provisions that are not related to the status of spousal property.

The marriage contract must be registered, not for validity but for declarative effect, thus serving to inform the parties that have not participated in the signing of the contract in order to protect their rights and interests.

In order to be valid, it must meet certain conditions by analyzing in our work the consent of the spouses, which must be expressed, simultaneously, by both spouses, and when the spouse is abolished or limited the ability to act, although the code does not provide for a specific provision for this, we can say that the latter will be represented on the marriage contract by his guardian.

The form of entering into a contract is another condition stipulating in the provisions of the Family Code its written form of validity, as well as a notary act.

The object of the marriage contract is another important condition of its attachment and validity. It has to do with the establishment of the property regime and should not be considered the same as the material object of this contract, ie the things that are acquired by the spouses, by treating the work that may be included in the building. The lack of these conditions leads to the invalidity of the contract.

In the contractual community, as a form of property regime determined by contract, it can be said that contractual freedom of spouses is limited. They may change the rule of law community in accordance with their interests, but they cannot completely change the rules of the property regime.

This restriction of contractual freedom, according to which the parties must adhere to certain provisions of the legal community, is one of the differences in this contract with the Civil Code contracts where the contracting parties have the freedom to determine the content.

⁷ Art. 72/3 of the Albanian Family Code.

REFERENCES

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