

Family law matters in a European dimension

A comparative perspective between Brussels II bis Regulation and the new Albanian Act on private international law.

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Abstract

This paper aims to analyze to the regulation of the family matters in the EU “*acquis communautaire*” regarding marriage, dissolution of marriage, marital property regimes and parental responsibility. The European Union law of these recent years has shown some increasing trend of intervening in the regulation of family relationships.

Community acts in the area of family law are the acts for the recognition of the foreign judicial decisions and for the jurisdiction criteria as well as finally the uniform conflict rules, but no material acts. Thus, this is about rules which exclusively regulate only the international cross-border family matters, leaving unregulated the core of the family matters.

The regulation of these cases aims to create, maintain and develop a common area of freedom, security and justice, with a view to the well functioning of the common European market.

In accordance with the power provided by the EU Treaty, the European Commission has adopted the Regulations Brussels II bis and Rome III.

Also the paper will focus in the study of the institute of marriage and parental responsibilities in the cases of marriages with foreign elements, seen in the framework of the new Albanian Act “On private international law” compared to the previous law and compared with the EU regulations Brussels II bis and Roma III.

Keywords: marriage; parental responsibility; property regime; foreign elements; conflict rules.

Introduction

On the basis of articles 53 and 16 of the Constitution, every person in the territory of the Republic of Albania, Albanian citizen, foreign citizen or persons without nationality has the right to get married and create a family.

In the eventuality of a marriage with cross-border implications, naturally, the following problems arise:

- Which is the applicable law for the regulation of the matrimonial matters, such as the essential conditions for marriage, the legal procedure, the patrimonial and personal relationships among spouses, divorce and its consequences, marriage annulment and parental responsibility;
- Which is the court that has jurisdiction for the resolution of disputes in the family area;
- Based on which criteria will judicial decisions on family disputes issued by foreign courts be recognized and enforced in the Albanian state.

Before we jump to the elaboration of these problems, it is important to clarify the meaning of the “foreign element” and the civil matters with foreign elements. The new Act on PIL defines the foreign element as “any legal circumstance related to the subject, content or object of a legal civil relationship and that becomes cause for the connection of this relationship to a certain legal system¹.”

We are before a marriage with foreign element in the cases a) when two foreign citizens or persons without nationality get married in the territory of the Republic of Albania; or b) two Albanian citizens get married outside the territory of the Republic of Albania or c) when one Albanian citizen gets married to a foreign citizen or person without nationality despite the territory where the marriage is done².

Up to now, the civil matters with foreign elements, including matrimonial matters, have been regulated by the Act No. 3920, dated 21.11.1964 “On the enjoyment of civil rights by foreigners and the enforcement of the foreign law”. This law, taking into consideration the time of its adoption, does not reflect the current social, economic and legal situation of the country.

The social and economic changes in our country, membership in international organizations, adhering to different international conventions as well as the obligation of approximating the domestic legislation to that of the EU have influenced the need for setting a new legal framework which reflects the most contemporary developments of the legal institutes of private international law.

Therefore, as a consequence the international private legislation underwent reformation by the adoption of the Act no.10428, dated 02.06.2011 “On private international law”, an act that takes into consideration the new legal changes, as well as the conceptual and doctrinal developments of the private law institutes.

¹ Article 1/2 of the Act no. 10428, date 02.06.2011 “On international private law”.

² Omari, Sonila, “*E drejta familjare*”, Tiranë 2008, p. 46.

This Act has as a scope the regulation of the civil matters with foreign elements as well as the determination of the Albanian courts' jurisdiction and procedural rules on the civil matters with foreign elements³.

In the regulation of the matrimonial matters, the new Act on PIL, has brought an evident novelty be it from the quantitative aspect⁴ (the number of legal provisions) as well as from the qualitative point of view. The novelties of the new Act compared the old one consist in providing for two new connection factors: the habitual residence (different from the dwelling place provided by the previous law) and its close connection to a certain place. In the law of 1964 the main connection criteria for determining the applicable law to marriage with cross-border implications was the criteria "lex patriae", thus the law of the nationality of the spouses. It is to be appreciated that the Albanian legislation in this aspect has been harmonized with the EU legislation and with the ratified international conventions⁵.

Another novelty clearly identified in the new PIL Act is the provision of the principle of the autonomous will. In many institutes of the law, a great importance is given to the autonomy of the parties by giving them a limited possibility to choose the law applicable to their relationships.

European Union family law.

The fast increase of the migratory movements and the free circulation of citizens within the European Union space have brought a considerable increase in the number of legal family relationships among citizens from different EU states. The regulation of these relations, may not be left anymore only to the domestic legal regulation of the member states but, it is a duty of the EU which is creating a unique legal system of private international law in the family matters. The family matters have not found a legal regulation under the community law at least in the last decade. Some notions on the family law were found in community acts which regulated the free movement and the social security of workers in the EU area.

The institutions of the European Union, on the basis of the founding treaties, have not been entitled with powers for the regulation of the family matters. Currently, the only legal bases according to which the community institutions may issue community legal rules for the regulation of family relationships, are articles 61 and 65 of the EC Treaty, which provide powers for the community institutions to regulate the family matters only in the area of the procedural and international law. Community acts in the area of family law are the acts for the recognition of the foreign judicial decisions and for the

³ Article 1/1 of the Act no. 10428, date 02.06.2011 "On international private law".

⁴ The new Act has brought the improvement of the existed legal institutes, and has expanded their contents in line with the most modern developments of the international private law.

⁵ For further information see the EU Regulation Bruxelles II bis.

jurisdiction criteria as well as finally the uniform conflict rules, but no material acts. Thus, this is about rules which exclusively regulate only the international cross-border family matters, leaving unregulated the core of the family matters.

The regulation of these cases aims to create, maintain and develop a common area of freedom, security and justice, with a view to the well functioning of the common European market.

In accordance with the power provided by the EU Treaty, the European Commission has adopted the Regulations Brussels II bis and Rome III. The Regulation Rome III was adopted by the Commission in full compliance with the right provided by article 81 of the founding Treaty to include measures aimed at ensuring the compatibility of the rules applicable in the member states concerning conflicts of law.

The marriage with cross-border implications.

The essential conditions for marriage have been classified by the doctrine in formal and material conditions⁶. Although, both the material and formal conditions are essential conditions as they are provided as *ad validitatem*, meaning for the validity of marriage, this classification represents a special practical importance in the case of marriage with foreign element⁷.

On the basis of article 21/1 of the PIL Act, the material conditions for marriage are regulated by the law of the state of the nationality of each of the future spouses *in the time of marriage*⁸. This fact reveals that our legislator has given priority to a personal criterion for the determination of the material conditions for marriage, such as the nationality criteria - "*lex patriae*"⁹. If the persons that will be joined in marriage have different nationalities, then the capacity and the material conditions for marriage will be evaluated separately based on the law of the nationality of each of the parties that will be joined in marriage.

Also, on the basis of article 21/2 of the PIL Act, the foreign citizens or persons without nationality that get married in the territory of the Republic of Albania, besides the material conditions provided by their national legislation, they must fulfill also the essential obligations for marriage provided by the Albanian Family Code.

Based on the article 21 of the Act on PIL, the connection criteria provided by the Albanian legislation for the determination of the applicable law to the essential conditions of the marriage are:

⁶ Omari, Sonila, p. 45.

⁷ Omari, Sonila, p. 46.

⁸ In relation to the Act of 1964, the new PIL Act has made a more correct and complete regulation regarding the citizenship criteria, specially refereeing to the citizenship of the spouses at the time of the marriage.

⁹ Kalia, Ardian, "*E drejta ndërkombëtare private*", p. 211.

- The nationality criteria - "*lex patriae*", as a general rule (the law of the state of the nationality of each spouses at the time of marriage);
- The criteria of "*habitual residence*" and that of "*close connections*", as an exception from the general rule for persons without nationality or with various nationalities.

While for determining the essential conditions of marriage, the connection criteria is "*lex patriae*", for the regulation of the formal conditions (marriage procedure) the PIL Act determines another connection criteria - "*lex loci celebrationis*" that is the law of the state where the marriage is done¹⁰. If two foreign citizens or persons without nationality decide to marry in the Republic of Albania, then the marriage must necessarily be done before the civil state office employee, according to all legal regulations provided by the Family Code, otherwise the marriage will be invalid.

According to the article 22/3 of the PIL Act, marriages concluded outside the Albanian state, despite the nationality of the parties, will be considered valid in Albania if the form of marriage is considered valid based on the law of the state used for this connection. I am of the opinion that the wording of this provision is not completely accurate. The question that arises in this case is: Will it be valid in our domestic legal order, the marriage done in a foreign state among two Albanian citizens that live in Albania, if the form followed for the marriage is not the civil form but another e.g. religious? Will the religious marriage concluded in Italy by two Albanian citizens, inhabitants in Albania, marriage which is completely valid under Italian legislation, be recognized in Albania? If we are to make a literal interpretation of article 22/3 of the PIL Act, the answer to the questions posed above will be "yes", the marriage is valid. But, this is not true, the problem in appearance finds its solution in the public order clause, based on which if the foreign law conflicts the Albanian public order then it is not enforced¹¹.

A better phrasing of the provision of article 22/3 of the PIL Act, would be the supplementation of the provision with the phrase "if, in the case of marriage concluded among Albanian citizens living in Albania, it is in compliance with the Albanian legislation¹²" or by following the same legal logic as the law of 1964¹³ "if, in the case of marriage concluded among Albanian citizens living in Albania, it has been concluded in the form of the civil marriage".

¹⁰ Article 22/1 of the Act no. 10428, date 02.06.2011 "On international private law".

¹¹ According to the article 7 of the PIL Act "The foreign law does not apply when the effects of its implementation are clearly contrary with the public order or may have consequences which are apparently not compatible with the fundamental principles set in the Albanian Constitution and legal system. In case of not compatibility is applied one other provision of the foreign law and when this is absent the Albanian law is applied."

¹² The formulation of the article 22/3 should be: "The form of the marriage, which is valid according the law of the state in which is concluded, could be recognizable in the Republic of Albania, if it is compatible with the Albanian legislation that regulates the form of the marriage, in the case of the marriage concluded between two Albanian citizens who live in Albania."

¹³ Article 6 of the Act no. 3920, date 21.11.1964 "On the enjoyment of the civil rights by the foreigners and on the enforcement of the foreign law".

The conclusion of marriage brings for the spouses a series of rights and obligations, of the personal and patrimonial character, which represent the content of the marriage relationship¹⁴.

On the basis of articles 23 and 24 of the PIL Act the applicable law to the personal relationships among spouse is the law of the state of:

- The common nationality of the spouses. This criterion is implemented in case of spouses having the same nationality.
- Where the spouses have their common habitual residence, in the case when spouses have different nationalities;
- The law of the state in which the mate relationship has the *closest connection*, in cases when it is impossible to determine the applicable law based on the above two criterions.

The new PIL Act has brought a series of novelties regarding the connection criterions for determining the applicable law for the regulation of the patrimonial matters among spouses¹⁵.

The patrimonial relationships among spouses are regulated by the so called matrimonial property regime. Different from the previous legislation, the PIL Act, for the first time, on the basis of the autonomous will principle, provides the right of the spouses to choose through an agreement, the applicable law to the matrimonial property regime. On the basis of article 24/2 of the PIL law, the spouses have a limited autonomy to choose the applicable law to matrimonial property regime the law of the state ("*lex voluntatis*", the law chosen upon agreement of the spouses, as a general rule):

- Of the nationality of one of the spouses in the case when spouses have different nationalities;
- Where one of the spouses has their *habitual residence*;
- Where the immovable property is located - "*lex rei sitae*".

In the absence of an agreement among the spouses the applicable law is the law of the state that regulates the personal relationships among spouses (the law of nationality, the law of habitual residence or the law of the state where the spouses have the closest connections).

¹⁴ Omari, Sonila, op. cit, p. 86.

¹⁵ In accordance with the article 8 of the Act no. 3920, date 21.11.1964 "On the enjoyment of the civil rights by the foreigners and on the enforcement of the foreign law", the connection criteria for determining the material law, that regulates the personal relations between the spouses, is *lex patriae* of both the spouses and if the spouses have different nationalities than the Albanian law is applicable. See, Kalia, Ardian, op. cit, p. 225.

The spouses' agreement on the determination of the applicable law to the matrimonial property regime must be in a form of an act issued by the notary public or equivalent issued by a public authority, as a condition for validity¹⁶.

In this direction the PIL Act is completely compliant with the Green paper for a proposal regulation of the European Commission "On jurisdiction, applicable law and recognition and enforcement of judicial decisions in matters of matrimonial property regimes", published on March 16, 2011. On the basis of articles 16, 17 and 18 of this proposal the spouses have the right to freely choose the applicable law to the matrimonial property regime between the law of the common habitual residence, the law of habitual residence of one of the spouses at the time the agreement is concluded and the law of the nationality of one of them at the time the agreement is concluded. In the absence of an agreement among the spouses their property relationships will be regulated by the law of the first habitual residence after the marriage, the law of the common nationality at the time of the marriage or the law of the state the spouses have closer relations with. Also, the proposal provides the principle of the unity of the applicable law for all the patrimony of the spouses, despite its character¹⁷.

The question that arises in this case is whether these connection criterions will be applied to all the property of the spouses, both to the moveable and immoveable assets. Through a careful reading of article 24 of the PIL Act we may conclude that the law has adopted the principle of the unity of the applicable law to all the property of the spouses. But on the other hand in article 36/1 it is provided that the ownership, possession and other property rights on moveable and immoveable assets are regulated by the law of the country in which the asset is located - "lex rei sitae". Then, naturally the following problem arises – if in order to regulate the relationships among spouses on the immoveable properties gained in the course of the marriage will the connection criterions provided by article 24 be implemented or those provided by article 36 of the PIL Act.

Another novelty highlighted in the new PIL Act is the determination of the applicable law to the parental responsibility based on the best interest of the child. On the basis of article 29 of the law, the applicable law to parental responsibility will be regulated by two alternative connection criterions: a) habitual residence of the child or b) child's nationality. The applicable legislation among the law of the habitual residence and that of the nationality of the child will be determined in compliance with the child's best interest.

¹⁶ Article 24/2 of the Act no. 10428, date 02.06.2011 "On international private law".

¹⁷ The article 15 of the Draft-Regulation.

Divorce and the annulment of the marriage.

On the basis of article 25 of the PIL Act the divorce is regulated by the law of the nationality of the spouses at the time the court is seized, in the case the spouses have a common nationality at this time.

If the spouses, at the time the court is seized, have different nationalities, then the law provides two other connection criteria for the determination of the applicable law to divorce:

- Their common habitual residence or,
- The last common habitual residence at the time the court is seized

In any event, if the applicable law, referred by the connection criteria does not allow the divorce then the Albanian law will be applied, if the applicant at the time the court is seized is an Albanian citizen or was an Albanian citizen at the time of marriage.

The problem identified in the PIL Act is the lack of regulation of the annulment of marriage. For an overall regulation of the marriage institute, the law must have provided the connection factors for the determination of the applicable law to annulment of the marriage.

In order to maintain and develop an area of freedom security and justice in which the free movement of persons is assured, the Council of the European Union has adopted a regulation for the determination of the applicable law to divorces and legal separation in the member states, Council Regulation (EU) no 1259/2010 of 20 December 2010, "Implementing enhanced cooperation in the area of the law applicable to divorce and legal separation", known as Regulation Rome III.

The scope of the regulation Rome III is the determination of the law applicable to divorce and legal separation having cross-border implications. The Regulation Rome III shall not apply to the annulment of the marriage and to personal and property consequences of divorce for the spouses. The determination of the applicable law in these cases will be left to the domestic legislation of member states. The Regulation Rome III is based on the principle of the spouses' autonomy in choosing the applicable law to divorce and legal separation. On the basis of article 5 of the regulation, the spouses have a limited possibility to choose through mutual agreement the law applicable to divorce and legal separation one of the following laws:

- The law of the state where the spouses are habitually resident at the time the agreement is concluded;
- The law of the state where the spouses were last habitually resident, in so far as one of them still resides here at the time the agreement is concluded;

- The law of the state of nationality of either spouses at the time the agreement is concluded; or
- The law of the forum.

The agreement designating the applicable law shall be expressed in writing, dated and signed by both spouses. The agreement may be concluded or modified at any time until the time the court is seized.

In the absence of an agreement between the parties, the applicable law to divorce and legal separation shall be:

- The law of the habitual residence of the spouses at the time the court is seized;
- The law of the last habitual residence of the spouses at the time the court is seized;
- Both spouses' nationality law at the time the court is seized; or
- The law of the state where the court is seized.

From a combined reading of the provisions of the Rome III Regulation and those of our PIL Act, it is observed that our law follows the same principles as provided by the regulation regarding the law applicable to divorce but without providing the opportunity of an agreement among the spouses.

The jurisdiction of Albanian courts on family and marriage disputes.

According to the article 75 of the PIL Act, the Albanian courts have jurisdiction in marriage disputes, consequences of divorce, annulment and the matrimonial property regimes disputes, when:

- One of the spouses was or is an Albanian citizen at the time of their marriage;
- The spouse against whom the lawsuit has been filed or the plaintiff, in the case of the divorce, has this habitual residence in the Republic of Albania;
- One of the spouses is a person without nationality and has his habitual residence in Albania.

Also, the law regulates the jurisdiction of the Albanian courts on lawsuits related to the rights and obligations among parents and children arising from marriage. For the parental responsibilities the Albanian courts have jurisdiction in cases when one of the parties (the parents or the child) has Albanian nationality or residence in the Republic of Albania.

Through a careful reading of this provision of the PIL Act, some important problems arise:

The first problem is the limited sphere of application. The law regulates the jurisdiction of the Albanian courts only for the parental responsibilities matters for children of both spouses leaving outside the scope of regulation the parental responsibilities matters to all children despite a divorce dispute.

Second, it is given priority to the residence of one of the parties in determining the jurisdiction of the Albanian courts and not to the habitual residence. In this case, I am of the opinion that based on the general spirit of the law and international acts and the EU ones, the right criteria should have been the habitual residence instead of the residence.

Under the example of the European legislation, the Council Regulation Brussels II bis, I am of the opinion that the law should have provided as a criterion for the determination of the jurisdiction of Albanian courts the nationality or the habitual residence of the child and not of one of the parties.

The EU Council has adopted the Regulation (EC) No 1347/2003 of 29 May 2000 "On jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses," known as Brussels II Regulation. This was a significant evolution the European family law. This regulation covers matters of parental responsibility in the limited sphere of matrimonial proceedings between spouses.

For this reason the Brussels II Regulation was replaced by the new Council Regulation "On jurisdiction and the recognition and enforcement of Judgments in matrimonial matters and in matters of parental responsibility", known as Brussels II bis, no 2201/2003 of 27 November 2003.

The new Regulation has brought several positive provisions such as:

- Brussels II bis extends the sphere of application to all children involving in the parental responsibility matters;
- Makes changes to the process of recognizing and enforcing access orders in other countries, changes the jurisdiction rules on children cases and the strength the return provisions in children abduction cases.
- Provide the autonomy of the parties to choose the court's jurisdiction to matrimonial matters between 7 jurisdictions that are alternative between them. This 7 jurisdictions are regulated in the bases of two connection factors, the "habitual residence" and the "nationality".
- Brussels II bis applies the principle of "lis pendense" or "firts come, first serves" when one action is raised in two different member states at the same time. The competent court is the court that is seized first.

The habitual residence

The key concept used in the law on PIL Act and EU Regulations, Brussels II bis and Rome II to determine the applicable law and jurisdiction in matrimonial and parental responsibilities matters is the “habitual residence”. This is a new concept in our legislation.

But, what does habitual residence mean? It is clear that this is not a synonym to the concept of residence as provided by the Civil Code.

On the other hand, if we refer to the European and international instruments, it is observed that none of them gives a definition of the “habitual residence”.

The PIL Act, in *article 12* defines the habitual residence of person as:

“....the country where he has decided to stay for most of the time, even without a registration and despite the permit or authorization stay. In the determination of this notion the court takes into consideration personal and professional circumstances which show steady relationships with this country or the person’s intent to establish such relationships”

From the definition given above we may reach to some conclusions regarding the meaning of “habitual residence”:

- It is a factual criteria and not a legal one. It reflects the factual connection between a person and a specific country, not relationship in the legal sense;
- Although the law gives some definition, the habitual residence will be determined on a case by case basis by the courts, based on the specific circumstances;
- It is the country where the person has the steadiest personal and professional relationships. The European Court of Justice has defined it as the place of the center of a persons’ interests;
- Registration in public records of the state is not conditional;
- The habitual residence may be also illegal as a consequence of the residence in a country without permission or authorization by the responsible state bodies.

Also, a difference should be made between the “habitual residence” and the “mere presence” in a specific state. The difference lies in two important elements which make “habitual residence” easily distinguishable from the mere presence:

- Duration; and
- Regularity.

The determination of the “habitual residence” of the child is of special importance because this implies a complex operation. The European Court of justice has given the

definition of the habitual residence in the case C-523/07. In this judgment it is said that:

“...the concept of the habitual residence under Article 8/1 of the regulation No. 2201/2003 must be interpreted as meaning it corresponds to the place which reflects some degree of integration in a social and family environment. A child is habitually resident under Article 8/1 of the Regulation Brussels II bis, in the place in which the child- making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her center of interests.

Conclusions

The new law “On private international law” sets new and contemporary rules in the regulation of applicable law and jurisdiction in civil matters having cross-border implications, taking into consideration the latest developments in the area of private international law and in response to new social and economic relationships in Albania.

This law has been drafted in full compliance with Albania’s obligations arising from the membership in the Hague Conference¹⁸, as well as the obligations arising from the ratification of the Stabilization Agreement and the approximation of the Albanian legislation to that of the EU Regulations also in the field of private international law¹⁹.

As regards the regulation of family matters, the new law has brought considerable novelties both from the qualitative aspect regarding a more detailed regulation of the matrimonial matters and from the quantitative aspect regarding the regulation of new matters which were not covered by the previous law such as the matrimonial patrimony regime.

The new law “On private international law”, reflecting the contemporary developments in the field of private international law, in compliance with the Hague Conventions and with “*acquis communautaire*” brings a new connection criteria in the determination of the law applicable to matrimonial matters “the habitual residence”.

¹⁸ The Albanian Republic has been a member of the Hague Convention since 2002, by the Act no. 8867, date 14.03.2002.

¹⁹ Furthermore see the Minutes of the Committee on Legal Affairs, Public Administration and Human Rights, held on 04.04.2011, for the approval of the Draft-Law “On private international law”, p.3.

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