

Marriage as a Legal Act or as a Legal Contract According to the Legislation and Doctrine in Kosovo

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Abstract

Defined marriage as a constitutional category and legal which is created with the formulation of a legal act released from civil state institution, which act sides have expressed their will to create and legally living together among themselves, the thing which puts in dilemma the scientific opinions that marriage could be legal contract and not only a legal act. According to the numerous scientific opinions, it is a thought that marriage in terms of the constitution is freedom and civil-political right of each subject right specifically of each physical person which with his full will can accomplish only a marital bond in the same time and always keeping in mind marital barriers as blood type which let to imply that blood type as a marital barrier cannot be avoided in case it exist, unlike civil contract (defined contracts at the right of obligations) which can be created as law contracts outside the registry office, then can be created civil contracts and amongst physical persons with same blood type and in the same time can be created two or more civil contracts unlike marriage. Therefore, in the inclusive content of the work in words, will be treated legal marriage issues and marriage as contract, so two different scientific attitudes, and finally my scientific attitude on this issue!

Keywords: Marriage; Marriage as a legal act; Marriage as a civil contract; Marriage barriers.

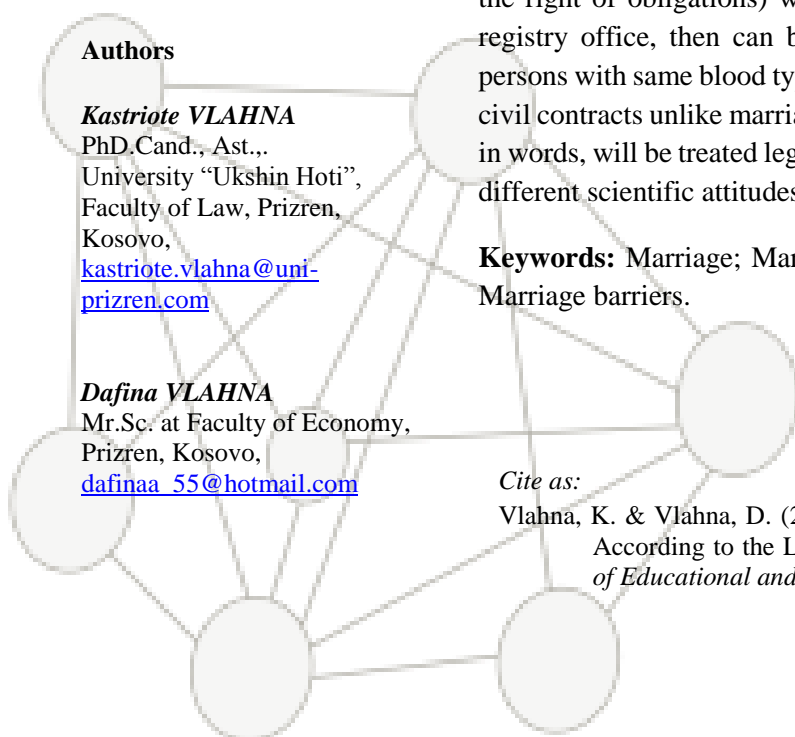
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1. INTRODUCTION

Marriage - Meaning

The right to marry and the right to establish a marriage is one of the fundamental civil and political freedoms and rights of any physical person.¹ Law for the Kosovo family defines family as a vital community of the parents and their children also the other persons in gender, which family can be created with marriage, with living together out of wedlock, and with the kid adoption.² Positive law in the republic of Kosovo of marriage bond and opposite sex is not limited to race, nationality or region³ except in case that exist barriers and marital prohibitions. Legally in power husband and wife should must submit a request before the registrar of the civil state for the marriage bond and that the basis for the starting process and procedure for marriage bond. In fact, this is considered a preliminary procedure that enables the declaration of the will of persons that want to get married. Problematic issue and with more dilemmas to civil science created exactly with the act formulation of marriage, which act there are opinions that the act of the registrar is contract not an administrative act, which it is done and is clearly noticed in case that we analyze such a thing. We notice the differences starting from the creation of the marriage act, which act we should consider as an individual act which derives from the general act⁴, i.e. from the Constitution of Kosovo⁵. Unlike contracts which have their source in the agreements of the sides and not in any general administrative act.

Additionally, before the marriage act is created, the Civil Registry Officer assesses whether the essential conditions have been met by both sides who want to create the marriage act. A condition which begins with the presence of both sides who want to create the marriage act, unlike contracts in which there are cases when the same can be created in the presence of one side, and which such a thing is a positive right. exclude when it comes to marriage. This exception was made by LFK, emphasizing that: Filing a request for marriage according to LFK cannot be done through representation from the point of view of representation in the performance of legal affairs, the submission of a request for marriage by LFK is excluded. A distinction must be made between the presence for the submission of a request and the presence for the marriage, because the LFK on the occasion of the marriage requires that persons wishing to enter into marriage must be second, so the marriage cannot be done through the institute of representation neither for one of the future spouses. Such a thing was allowed by UNMIK regulations, which allowed marriage to be entered into through representatives, and that in the law of obligations stipulates that for some legal work

¹ See: Constitution of the republic of Kosovo, Prishtina,2008, Article 37, section 1.

² See: law no.2004/32 for the family of republic of Kosovo, Prishtina,2004, article, sect.2.

³ See: General statement for human rights, article 16, point 1.2.3, on the basis of which they are approximated and legal provisions of Kosovo and defining that: Men and women in mature age have the right to marry and form families, without any restrictions and as far as race, citizenship or trust. They have equal rights as in the case of marriage, during marriage and in case of divorce. 2.Marriage should connect only with consent completely free of the persons that wants to marry. 3. Family is naturally core and basic society and have the right of protection from society and the country.

⁴ Clarification: Individual (concrete) acts consist of individual legal norms. They cannot be approved unless they are based on the general legal act previously adopted. Individual acts derive from general ones and should not be consistent with them. It follows that the individual legal act cannot be approved if any previous conduct had not been regulated by a general legal act or by a general legal norm. Individual legal acts resolve concrete life situations and each time are dedicated to specific persons or a specific group

⁵ See: Constitution of Kosovo. Pristina, 2008. Article 26.

special authorization must be obtained and in Among these special legal works is the connection of the crown through authorization⁶, which such a thing in the legal provisions in power is now not allowed⁷. Such a thing is allowed and possible in the conclusion of contracts.

After both parties have expressed their willingness to the registrar, we say that the legal-civil marriage has been established and that according to the Family Law marriage is a legally registered community, which means that only a marriage registered in the book of In our law, are considered a marriage⁸, and the existing marriage is legally defined as a marital impediment, otherwise the same person creates two marriages at the same time, then we can say that we have violated the criminal code by causing the offense bigamies⁹ criminal. Bigamies in our law in Kosovo is prohibited, but it is also punishable under the Criminal Code of Kosovo and is considered a penal act¹⁰. Existing marriage or as it is said by law the previous marriage prevents the marriage of the new marriage, and the second if it is considered absolutely invalid respectively null, because the second marriage can never become valid as long as the first marriage exists.

Marital goals

Persons who claim to create a common life among themselves, they and as a primary purpose have a common life among themselves, before they have the purpose of creating a family and children. Such a thing is determined by the Family Law of Kosovo, according to which it is stated that: Marriage is a legally registered community between two persons of different sexes, through which they freely decide to live together with purpose to create family¹¹, so two persons of the opposite sex a woman and a man create marriage at the moment of signing the legal act offered by the registrar of Civil Status¹², with which they intend to live together between them. So the main and only purpose of creating a marriage is the joint living between the spouses¹³ and not the creation of the family, as the family is automatically created by signing the legal act of marriage¹⁴. Such a thing was not defined in Roman law, since according to the first written laws, every person who created a marriage, the main and only purpose was to have the creation of children and not only to live together as a married couple but also to create children necessarily. In the event that the child was not created within a married couple within three years of the marriage, they were obliged to remarry the man, regardless of who was to blame for not being able to have the child¹⁵. According to the positive law of modern times, the main purpose of a legal marital relationship is the

⁶ See: Dauti. Nerxhivane. Contracts (special part of the law of obligations), Pristina, 2012. p. 243.

⁷ See: Law no. 2004/32 on Kosovo Families, Pristina, 2004. Article

⁸ See: Commentary on Family Law, Author. Aliu Abdulla & Gashi Haxhi. Pristina, 2012. p. 52.

⁹ See: Criminal Code In the Criminal Code of Kosovo of 2012, in Article 244, paragraph 1, which says: "Whoever enters into a new marriage while he is married shall be punished by imprisonment of up to one year." Paragraph 2: "Whoever marries a person whom he knows to be married, shall be punished by imprisonment of up to 1 year.

¹⁰ See: Law no. 2004/32 for the Family of Kosovo, Pristina, 2004. Article 19 of the LFK which affirms the mother for the future monogamous marriage, a man a woman.

¹¹ See: Law no. 2004/32 for Kosovo Families, Pristina, 2004. Article

¹² See: No. 04 / L-003. FOR Civil Status. Pristina, 2011. Article. 42.

¹³ See: Law no. 2004/32 on Kosovo Families, Pristina, 2004. Article. 14 par 1.

¹⁴ See: Gashi. Haxhi / Aliu. Abdulla / Vokshi. Adem. Commentary on the Law on Family of Kosovo. Pristina 2012. Pg. 51, 52.

¹⁵ Selmani. Union. Roman Law. Tetovo, 2013. p. 311.

cohabitation of a man and a woman who claim to create a marriage¹⁶. by law and which they cannot resolve on their own¹⁷.

When we talk about marital goals, then there are more pronounced elements of the contract. I say this because the purpose of marriage and the purposes of the contract are to achieve the legal effect of the legal work, created by the expressed will, freely reciprocal and binding. Precisely the mutual and binding promises for a common life, resemble in the solemn promise of the contracting parties that they will fully fulfill the rights and obligations set out in the contract as well as that, at the time of marriage, the spouses promise to fulfill all obligations specifically the obligations arising from the marriage bond¹⁸.

But we emphasize that the differences between marriage and contract are more pronounced so they prompt us to define that marriage is not a contract. As defined above, the differences are related to the fact that marriage is related to an administrative body¹⁹ in an administrative procedure from the competent person, in a procedure which from the form and content of the act to the marriage bond is not entirely administrative. However, again recently we conclude that marriage is not a contract like other contracts, because there are many elements that distinguish it from the contract.

Exclusion of the meaning of marriage as a civil contract

Unlike Civil Legal Contracts, which in case of their creation as an essential condition must have the purpose of concluding that contract, without which the contract will not be able to enter into, and even if that contract is entered into can be canceled with court decision²⁰, unlike the conclusion of a marriage in which the purpose does not appear even though the positive law states that the primary purpose for two persons to enter into marriage is cohabitation²¹.

It is no random that both parties who want to create a valid legal marriage must be of the opposite sex, ie a male and a female²², as in Kosovo, the right of the community of the same sex is not yet recognized. the same, which has been recognized by some positive rights in Europe; Croatia has enacted the Gender Equality Act, Narodne Novine, 2003/16, other countries are: Denmark, Norway, Sweden, Hungary, Belgium, France, Germany, etc. have laws allowing same-sex marriages based on the principle of sexual non-discrimination. From the juridical-civil point of view, in terms of contractual law, such a condition does not apply to the conclusion of a Private contract (civil or commercial), which implies that only two persons with opposite sexes can create a marriage. a male and a female, while civil contract can be created by persons of the same sex. It

¹⁶ See: Law no. 2004/32 on Kosovo Families, Pristina, 2004. Article

¹⁷ See: Gashi. Haxhi / Aliu. Abdulla / Vokshi. Adem. Commentary on the Law on Family of Kosovo. Pristina 2012. P, 51.

¹⁸ See: Law no. 2004/32 on Kosovo Families, Pristina, 2004. Article 42, par. 1, 3, 4;

¹⁹ The Administrative Body which has the competencies to create the marriage act, is the Civil Registry Officer, who exercises his authorizations under the guidance of the Administration, respectively the Municipality of the Local Level.

²⁰ The annulment of the fictitious contract can be done by the Court by taking a decision, specifically with the development of the Contested procedure, in which the procedure ends with the taking of a judgment by which the contract which has not fulfilled the essential condition therefore the purpose why it is concluded contract, then the Court annuls that contract, specifically declares it invalid and it is considered that it had never produced a legal effect.

²¹ See: Law no. 2004/32 on Kosovo Families, Pristina, 2004. Article 14. par. 1.

²² Aliu Abdulla & Gashi. Haxhi. Family Law. Pristina, 2008. p. 14.

is enough for the party to be able to act and to fulfill other conditions with law as defined by special laws, for example. the law of Property and other Property Rights²³.

The ability to bind marriage

Both sides claiming to be legally married, both male and female, must have the ability to act²⁴, but based on the general principle of "there are exceptions to this rule" (*dies certus an et cetus quando*) and in this case an exception has been made, according to which valid legal marriage can be created by (physical) persons who have not yet reached full capacity to act, i.e. persons who are under the age of 18 years. Specifically, marriage is allowed to be created by persons who are 16 years of age, but always keeping in mind that the decision must first be taken by the Basic Court in whose jurisdiction the sides have their residence or domicile. After receiving the decision from the Court, which considers that the sides and why they are 16 years old meet the conditions of ...provided by law²⁵ then the sides may avoid this marital prohibition. The issue of granting a marriage license takes place in a non-contentious Civil Procedure and based on the legal provisions of the Law on Non-Contested Procedure, the judge decides to give permission to the sides to be able to create a marriage before the registrar²⁶. In this case, it should be noted that marriage is not established when the court gives the decision which only allows the sides, even though they do not meet the essential condition to enter into marriage, to form a marriage before the Civil Registry Officer²⁷. And after the Registrar sees that the parties have a court decision with which their marital prohibition has been avoided, then the same acts with the formulation of the marriage act in which the parties declare their will to create that act²⁸.

Thus, the sides claiming to be married must always be fully capable of acting, including the person's age and mental and physical development, whether male or female, who wish to marry. Exceptionally, the case when the parties are 16 years old and they are allowed to get married only if they are given permission with a decision taken by the Basic Courts of Kosovo²⁹.

Unlike civil contracts, which are a general condition for concluding a contract, the ability of the contracting parties, but unlike the parties to enter into a marriage contract, since the parties who claim to create a civil contract, is allowed to enter into a contract at the age of 14, since from the age of 14 each subject of law acquires the tortious capacity, according to which the subject of the right must be responsible for the damage caused by someone else's property.

²³ According to the LPDTS of Kosovo, it is said that only the person who is the owner can alienate the item. And if the contract of sale of that item is concluded for that item, then the seller must always be the sole owner of the item. Thus, prose law defines only this type of condition for the subject of law who wants to enter into a civil contract, but not the condition to be of the same or opposite sexes. Mjaton to be subject to the law regardless of their gender, can be contracting parties, unlike marriage, which and according to the law marriage can only connect two natural persons of the opposite sex.

²⁴ See: Law no. 2004/32 For the Kosovo Family. Pristina, 2004, article 16, par. 1 and 2;

²⁵ See: Law no. 03 / L-007. Non-contentious Civil Procedure. Pristina, 2009. Article 114.

²⁶ See: there. Article 115, paragraph 1.

²⁷ See: Law no. 04 / L-003. Kosovo's Civil State. Pristina, 2011. Article 41, par. 1, 2.

²⁸ See: Law no. 2004/32 For the Kosovo Family. Pristina, 2004, article 29.

²⁹ See: Gashi. Haxhi / Aliu. Abdulla / Vokshi. Adem. Commentary on the Law on Family of Kosovo. Pristina 2012. Pg. 51, 52.

If we look at how a 14-year-old person can be held accountable for the harm he or she causes to another, then it is up to him or her to establish a work relationship³⁰. The Labor Law also clarifies the employment relationship of whether I can create a natural person with incomplete capacity to act, according to which it is stated that persons without full capacity to act can establish employment relations, but on time halved work. The halved working hours according to the Law is half of the regular schedule, i.e. from 8 to 4 hours. This also states the age of the person who can establish the employment relationship, who can be 15 years old³¹.

So, according to the above, contracts from civil law, specifically from private law in general, including contracts from commercial law, differ with the act of marriage and the condition of the ability to act, which made it known that a marriage can be called an act but not a contract. Blood type, defined as a condition and we can say it is the main condition, in the conclusion of a marriage, but not in the conclusion of a private contract³² (whether civil, commercial, or employment contract). Blood type marriage produces legal * criminal consequences³³ the reason for the responsibility are possible genetic deviations³⁴ violation of blood type as a marital prohibition extends to close and extended family.³⁵ The ban includes family members and stepfather or stepmother, grandfather or grandmother, uncle or aunt, etc.³⁶

In Private Contracts (Civil, Commercial) it is not an barrier, as civil contracts can be created and family members such as sister and brother can create a contract of sale of a thing³⁷, for which there is no obstacle even though they are in the bloodline in the straight line. So the difference is both in terms of form and also in terms of content. This applies to the blood connection in a straight line at the unlimited and in the indirect connection up to the fourth degree³⁸.

Conditions for connection a civil legal contract

Before mentioning the conditions for concluding a contract, clarify the term contract based on positive law³⁹. The term contract becomes very clear if we look at where contracts are widely studied, and with a look at civil science specifically the law of obligations we see that contracts are the material source of the law of obligations which are considered relevant legal facts based on to which a liability relationship may be established, altered or terminated. So only a relationship of obligations can be created, changed or even extinguished and not any relationship from the

³⁰ Aliu. Abdulla. Civil right (general part). Pristina, 2013. p. 240.

³¹ See: Law no. 03 / L-212 I Labor. Pristina, 2010. Article. 7, par 1 and 2.

³² Private Contract marked, based on the fact that private law contains in its branches such as: Civil Law, Commercial Law; Labor Law, Social Security Law. In case we say private contract then we completely include the branches of civil law as they are (general civil law, property law, law of obligations, family law, inheritance law). At the moment when we say commercial contracts, then contracts are included here from all types of companies, as well as labor law and social security.

³³ Common life we call: Cohabitation Although it involves living together, it has an even broader meaning, ie intimate relations between spouses, mutual assistance between them, it is not allowed to agree not to respect the purpose of marriage.

³⁴ See: Criminal Code of Kosovo. Pristina, 2012. Article 236 Sexual relations within the family, paragraph 1.

³⁵ Aliu. Abdulla & Gashi. Haxhi. Family right Pristina 2008. p. 38.

³⁶ See: Law no. 03 / L-007. Non-contentious Civil Procedure. Pristina, 2009.

³⁷ Dauti. Nerxhivane. Contracts (separate part of the law of obligations). Pristina 2012. Pg. 126.

³⁸ Podvorica. Hamdi. Family Law. Pristina 2013. Pg.

³⁹ See: Law no. 04 / L-077 I Obligations. Pristina 2012. Article. 15.

family law of family character and which have the purpose of living together such as marriage⁴⁰. So the main form in which work is done in economic circulation are contracts⁴¹, which is created with the agreement of two or more persons who intend to create, change or even extinguish a relationship of obligations⁴². From the above data we emphasize that the term contract is used only for the relationship of character from the right of obligations by which the legal relationship is claimed to perform work in economic circulation⁴³, and not to have the purpose of living together or starting a family. I also emphasize that in a contract of obligations as a contracting side there may be two or more subjects (natural or legal persons), and such a thing cannot happen in the conclusion of a legal marriage, as a marriage can create only one male with one female and without breaking that existing marriage no other marriage can be created⁴⁴. To be considered a legally valid contract, it must be created on the basis of general conditions such as: working capacity of the sides, consent of the will, the subject of the contract and the legal basis of the contract and as special conditions: form of contract, contract signing delivery of the item and consent to enter into the contract⁴⁵. In order to conclude a contract, we must meet the general conditions of exemption, the special conditions which depend on the agreement of the sides. Such conditions do not apply to create a valid legal marriage, but the conditions mentioned in the above chapters of this paper apply, which turns out that Marriage cannot be considered as a contract since in order to be considered a contract it must be fulfilled the same conditions as contracts.

Lack of will, ability to act for marriage and representation of the side in civil-legal contracts

Marital barriers generally accepted by family law are: Lack of willpower; - Existing marriage; - Mental illness; inability to act - Gender and - Minority. Marriage impediments are also obstacles to the conclusion of a private contract, specifically to the conclusion of a civil contract, for example: if we want to create a contract for the sale and purchase of an item, before we create all parties must express their full will⁴⁶ (without delusion, deception, violence, intimidation).

In addition to the will, the parties must have the ability to act, but even if they do not have the ability to act or have limited, those parties are allowed to create a legal contract but with the help of the power⁴⁷ of prosecutor or legal representative⁴⁸. Such a thing is not allowed in marriage, since marriage cannot be entered into on behalf of someone else⁴⁹. Thus, marriage with authorization is not allowed,⁵⁰ unlike contracts that can be created through authorized sides⁵¹. So, in the above case, it is clearly stated that marriage is not a contract, but only a legal act. In addition

⁴⁰ Gashi. Haxhi / Aliu. Abdulla / Vokshi. Hoti. Family Law Commentary. Pristina 2012. Pg 51.

⁴¹ Dauti Nerxhivane. Contracts. Pristina, 2012. p. 9.

⁴² Ibid, p, 10.

⁴³ See: Law no. 04 / L-077 I Obligations. Pristina 2012. Article. 15, 18.

⁴⁴ See: Law no. 2004/32 For the Kosovo Family. Pristina, 2004, article 29.

⁴⁵ Dauti Nerxhivane. Contracts. Pristina, 2012. p. 33

⁴⁶ See: Law no. 04 / L-077 I Obligations. Pristina 2012. Article. P. 15, 18.

⁴⁷ According to the Law on Obligations, it is allowed for a contract to be concluded with a party which has not fulfilled the capacity to act, but on the condition that the party without the capacity to act represents a person who has the capacity to act. And specifically the law defines it as follows: The conclusion of the contract and other legal affairs can also be performed with representatives.

⁴⁸ Aliu. Abdulla. Civil Law (general part). Pristina, 2013. p. 341.

⁴⁹ See: Law no. 2004/32 For the Kosovo Family. Pristina, 2004, Article 14, paragraph 1.

⁵⁰ Gashi. Haxhi / Aliu. Abdulla / Vokshi. Hoti. Family Law Commentary. Pristina 2012. P, 52.

⁵¹ See: Law no. 04 / L-077 I Obligations. Pristina 2012. Article. 72, par.1 and 2.

to the aforementioned barriers, the other barrier to marriage is the existing marriage. When a person is married, he cannot have a second marriage without extinguishing⁵² the existing marriage⁵³. In case we would consider marriage as a civil contract then and marriage should have been allowed to create two or more marriages at the same time, as it happens in the conclusion of civil contracts, since within a day we can enter into two or more civil contracts. And in this case it becomes clear that marriage should not be considered as a contract but as a legal act. Marital prohibitions can be avoided by the sides as well as in civil contracts. Any kind of prohibition can be avoided unless a contract is entered into by a person who does not have the capacity to act, this obstacle can be avoided over time, if the person he gains the ability to act and the condition for gaining the ability is the passage of time. And in case a civil contract is created with entities that have not yet reached the capacity to act at the moment they have created the contract, that contract, although not valid at the beginning of the creation, becomes valid over time, one thing such are allowed by convalidation⁵⁴ institutes, according to which invalid legal work over time becomes valid.

A legal work, specifically a contract, may remain in force even though at the time of the conclusion it was invalid, but such a thing cannot be allowed even in marriage. If the marriage is created by two minors, that marriage, whenever it is identified with you, can be declared absolutely invalid, except for this, and both the registrar and the parties that have entered into the marriage are punished by the criminal code! And in this case we notice that marriage is not a contract, but a legal act.

CONCLUSION

The subject of the right that by birth acquires guaranteed rights and obligations and with the highest legal act. Among the fundamental rights and freedoms of every physical subject is the right to marry, respectively the right to start a family. Such a positive right is allowed and considered legal only if that marriage is established before the competent body and before the registrar. The right which is applicable by the subjects, but also not understandable for the family and scholars of family law, specifically marital law. The dilemmas lie precisely in the relationship that the spouse creates at the time of the marriage, so that relationship, respectively the expression of the will, is put in a dilemma to be called a contract or an act of marriage created. Therefore, since the study of Private Law is mainly of the branch of private law in particular, we consider that Marriage created between two subjects of the opposite sex is an act (action) and not a legal contract. As to why it is not a legal contract, in the content of the topic I have presented the reasons and the legal basis, in which you will notice that we really cannot consider marriage as a contract as such a thing is opposed by the Laws in force of the Republic of Kosovo. But, in general, we emphasize that the

⁵² Termination of marriage is done by: actions of nature which is the natural death of the husband or wife, then by actions of the man which actions are: the declaration of the missing person to die, the annulment of the marriage as well as the divorce of the marriage.

⁵³ See: Law no. For the Kosovo Family. Pristina, 2004. Article 60. Par 1,2.

⁵⁴ Aliu. Abdulla. Civil Law (general part). Pristina, 2013. p. 413.

content of this paper is my opinion as a researcher of science but not definitive and mandatory for other researchers!

Recommendations

1. Completion of civil legislation. Specifically, in defining what we call legally related marriage and how it is performed, it is defined by the Law on Family of Kosovo, according to which it is stated that: Marriage is a legally registered community between two persons of different sexes, through which they freely decide to live together for the purpose of starting a family, and in which provision I think it would be fairer to determine and that marriage is a legal act so as not to create doubts that the marriage act is a contract.

2. Regarding the Conditions of Marriage, both in the doctrine and in the legislation, I think it would be fairer to specify precisely that these conditions are valid only to create a marriage, for example: in the case when It is mentioned that the will of the sides that create a legal contract then determine that the will is expressed only by men and women who want to create marriage, unlike the contracts in which the subjects express their will, whether natural or legal persons and without taking considering the gender of the parties !.

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Applicable laws and conventions:

- Constitution of the Republic of Kosovo, Pristina, 2008.
- Law no. 2004/32 for Families of the Republic of Kosovo, Pristina, 2004.
- Law no. 04 / L-077 on liability relations. Kosovo, Pristina 2012.
- Law no. 03 / L-154 on property and other property rights. Kosovo, Pristina, 2009.
- Law no. 04 / L-003. FOR Civil Status. Pristina, 2011.
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The Universal Declaration of Human Rights.