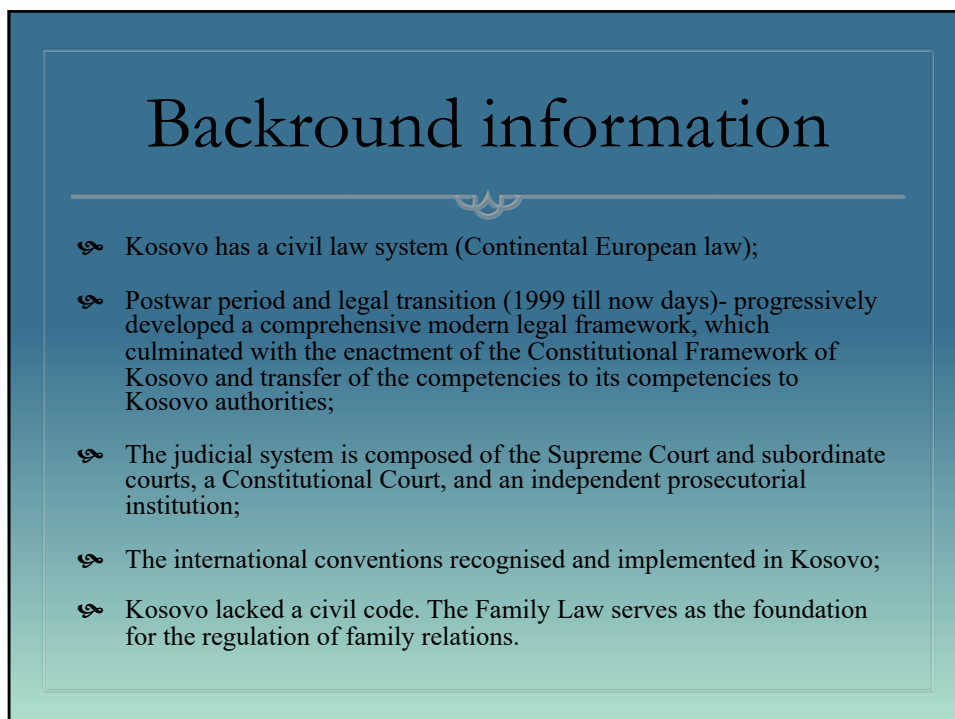
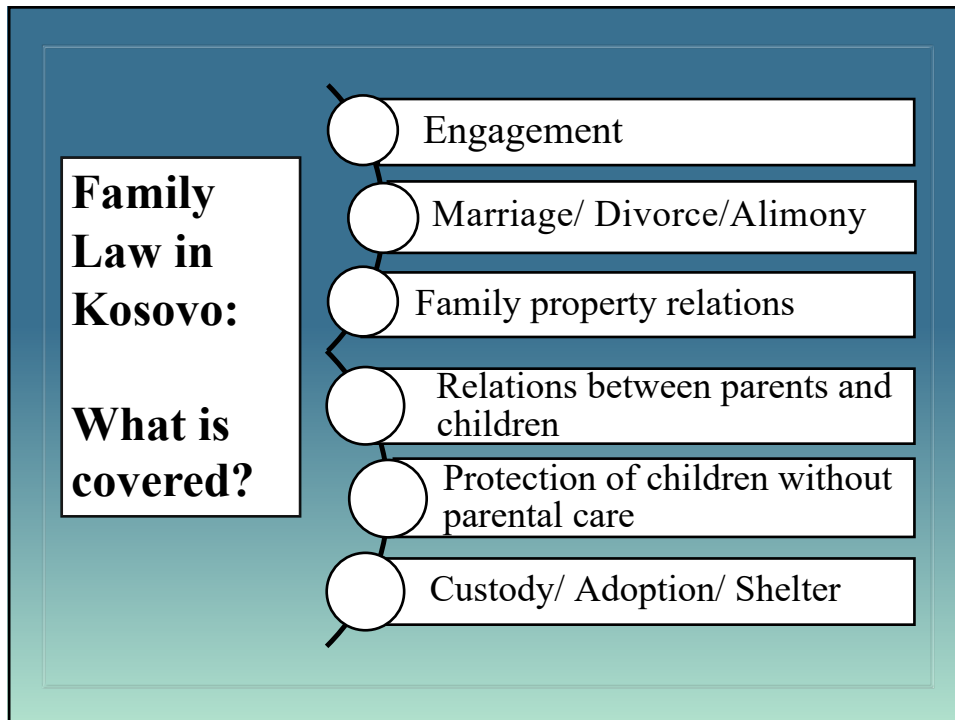


1



2



3

Specific to Kosovo

- **Marriage** is recognized only between persons of different sex; Civil partnership between same sex persons it is not recognized ;
- **Child marriage** for persons from 16 years old is recognized under the permission of the court;
- **Cohabitation** is known as a source of creating a "family relationship" under the same conditions as in marriage;
- **Preuptial and Postnuptial** agreements are not recognized yet;
- **Divorce procedures** do not require obligative **factual separation**;
- **Adoption**: proceedings to adopt only a child/minor;
- **Surrogacy** is regulated by law as process of giving birth by a surrogate mother;
- **Child protective proceedings**: administrative and court proceedings that may result from state intervention in (Custody organ and Center for social welfare).

4

Concerns in family law court proceedings

- lengthy delays in the resolution of cases;
- shortcomings with respect to the hearing of witnesses and the abduction of evidence;
- deficiencies in managing the mandated role of Centres for Social Work (CSWs) and Custody organ in these cases; and /or
- insufficiently reasoned judgements or lack of harmonization of court decision related to the same provisions.

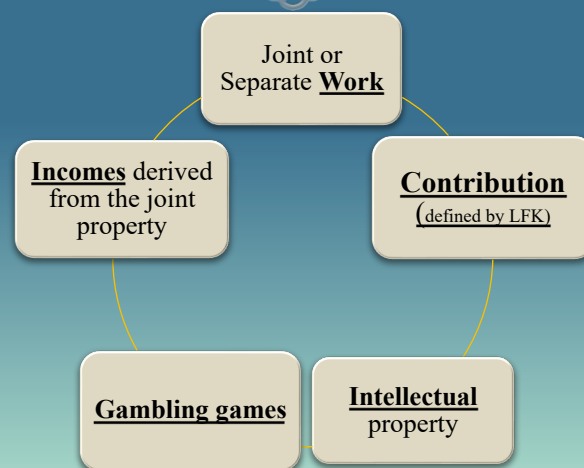
5

The impact of marriage on spouses' property rights

- Matrimonial property regime of community of acquisition;
- Two types of property
 - Joint property
 - Separate/individual property
- Administration and distribution of joint property

6

Joint property



7

Problematic provision

- ☞ Equal shares?
- ☞ Joint owners of shared property, unless they have agreed otherwise;
- ☞ Assets registered in the name of one of the spouses;
- ☞ Protection for harmonized court decisions for right and equal interpretation;

8

Special property

- ☞ The property belonging to the spouse at the time of entering into marriage.
- ☞ The ownership invested to increase the value of the joint property.

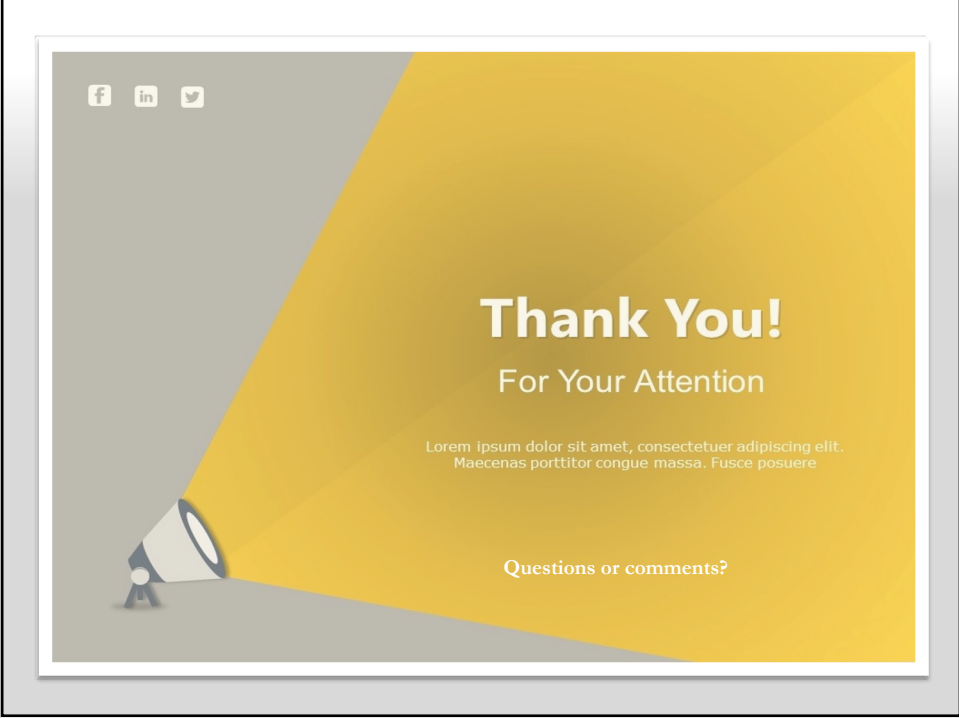
NB! Provisions relating to apportioning of joint property of spouses of a legally registered marriage apply analogically for property relations of persons in a factual relationship (non-marital cohabitation)

9

What's new

- ☞ Draft Civil Code approved by the Government in December 2021 after seven years of work and support from the European Commission;
- ☞ Blocked by Parliament in relation to the provision that foresees regulation of civil unions relations in a special law;
- ☞ Structured in five Books and regulate better:
 - Complete equality between spouses;
 - Children's rights without parental care;
 - Child marriage prohibition;
 - Adoption procedures with shorter deadlines and better privacy;
 - Even Kosovo citizens living abroad will be eligible for international adoption.

10



EDUCATION PROGRAMME PAPER

Topic:

KOSOVO FAMILY LAW AND DEVELOPMENTS

Prepared by

Prof. ass. Jorida Xhafaj

Pristina, 2022

I. FAMILY LAW IN KOSOVO

1. May be you know that Kosovo has the young population (half of that is under 25 years old) but the Kosovar discourse is heavily influenced with patriarchal concepts when it comes to impact of marriage on property rights and women rights. Women consider the share that they have as a share that they have to “get” from the male inheritors and this causes impossibilities for a normal functioning of laws, since they are instead replaced with traditions.
2. Kosovo has a civil law system, also known as Continental European law. Until now, Kosovo has not had a Civil Code, but rather special laws in the civil field such as the Law on Obligations, Law on Property and Other Real Rights, Law on Family and the Law on Inheritance.
3. Kosovo's legal system has evolved over time, and it now includes prominent bodies and branches that assist Kosovo in enacting adequate laws and carrying out proper legal procedures. As a result, has been introduced the idea of the codification of Kosovo civil law, whose overall effects were concentrated by the fact that the entire civil law legislation was fragmented by the significant number of laws in the field of civil law and by the discrepancy between these regulations.

As a result, Kosovo launched the civil law codification process in 2014, with assistance from the European Commission and the Kosovo Ministry of Justice. The second phase of CC began in 2017, with project support from the European Commission. It largely unifies civil law and contains innovations reflecting new modern institutions. After several years, the Government approves the consolidated draft of the KDCC, which was not approved by the Assembly in April 2022 due to heated debates in Kosovo about the permissibility of civil partnerships and the rejection of institutions as a bridge to same-sex marriage.

The draft Civil Code is the largest single legal act up to date in Kosovo both in terms of the volume as well as in the terms of the scope of its regulation. It is divided into 5 separate books, coherently and logically connected with each other. The order of the books is as following: Book 1 (General Part); Book 2 (Obligational Relations), Book 3 (Property Rights and other Real Rights), Book 4 (Family) and Book 5 (Inheritance);

The Kosovo Family Law “regulates engagement, marriage, relations between parents and children, adoption, custody, protection of children without parental care, family property relations and special court procedures for disputes of family relations.

The regulation of family relations is based on the principles of:

- monogamy and the secularity of marriage;
- equality between husband and wife and also, mutual assistance between them and family members;
- protection of children’s rights and the responsibility of both parents for the growth and education of their children;

- the obligation of parents and children to provide each other assistance and consideration for the entire span of their lives.
- children of unmarried parents enjoy the same rights and have the same obligations as children born from parents who were married at the time of their birth.

According to the report of monitoring non-governmental organizations and the Ombudsman, the most solid comprehension issues are as follows:

- lengthy delays in the resolution of cases;
- shortcomings with respect to the hearing of witnesses and the adduction of evidence,
- deficiencies in managing the mandated role of Centres for Social Work¹ (CSWs) and Custody organ² in these cases; and /or
- insufficiently reasoned judgements or lack of harmonization of court decision related to the same provisions.

A. Legal Framework

- The following **international human rights standards** have been recognized as mandatory in Kosovo:
 - European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);
 - Convention on the Rights of the Child;
 - Hague Convention on the Civil Aspects of International Child Abduction ratified by a special law;
 - Other norms taken into account in the analysis of the legislation of Kosovo include the two Protocols to the CRC, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, and 18 other UN instruments.
- **Domestic framework**

¹ The Centers for Social Work (CSWs) are government bodies operating in each municipality in Kosovo under the auspices of the Department of Labour and Social Welfare. Their role is set out at Article 7 of the Law on Social and Family Services.

² Law No. 2005/02-L17 on Social and Family Services, defines in article 1 the custodian body as “the function within the Centre for Social Work that is responsible for protection of children.” The Albanian language text refers to the custodian body is a phrase which is translated into “guardianship authority” and “custodian body” seemingly interchangeably in the Kosovo legal framework. Referring to article 6, of Family Law „*The Custodian Body is an administrative municipal body competent for social issues. It shall be comprised of a group of experts with professional work experience in the specific field of duty.....The Custodian Body, participating in the family relations procedures, is authorized to present motions for the protection of children’s rights and interests, to present facts that parties have left out, to suggest administration of necessary evidence, to exercise legal remedies, and undertake other contentious actions*

- Constitution of Kosovo No. K-09042008 published in Official Gazette No. 09. 04. 2008 and which is in force since 15 June 2008.
- Law No. 2004/32 on Family published in Official Gazette No. 4 of 1 September 2006 and Law No. 06/L-077 on Amending and Supplementing the Law on Family published in Official Gazette No. 3 of 17 January 2019.
- Law No. 2005/02-L17 on Social and Family Services, as promulgated by UNMIK Regulation 2005/46, 14 October 2005.
- Law No. 2004/26 on Inheritance published in Official Gazette No. 2005/7.
- Law No. 03/L-006 on Contested Procedure, 20 September 2008
- Law on Out Contentious Procedure, No. 03/L-007, 13 December 2008, which courts in Kosovo began applying on 28 January 2009
- Law No. 05/L-021 on the Protection From Discrimination

II. Marriage

Marriage is defined as “a legally registered community of persons of different sexes, through which they freely decide to live together with the goal of creating a family”. Spouses are equal “in all personal and property relations” that characterise the marriage. Marriage is regulated by special provisions in Articles 14 till 98 of the law, implying that it is a central institution in the Kosovo Family law. Several characteristics can be gleaned from this regulation, including the following:

- a. the existence of two persons of different sexes;
- b. their free will and desire to live tin a family;
- c. the absence of marriage prohibitions and bans.

The majority of marriages are obtained at the ages of 18 and 16 years, respectively, and with the court's permission to conclude the marriage.

Finally, it should be noted that the draft Civil Code of Kosovo has taken the initiative to prohibit child marriage, and this issue is associated with a lot of debates, related to traditional norms and the uncertainty of whether the best interests of the minor will be ensured.

Likewise, there are no corresponding provisions in any legal system known that enable the registering official to inform the fiancées that they should inform themselves about the state of health of the other spouse. Such a provision is already found in the existing family law.

The same applies to the duty of the registering official to inform the spouses about the legal matrimonial property regime and its effects. Even though marriage contracts (premarital, during the marriage, and during a divorce) are no longer provided for in the draft law before us, this provision makes sense in order to make both spouses aware of the very property law effects associated with divorce.

To summarize, the draft Civil Code (in accordance with the LOF) regulates only the classic or traditional form of marriage between a man and does not recognize marriage between persons of the same sex, but it has opened the door for a special law that would regulate cohabitation or civil union of persons of the same sex. This solution is consistent with the evolution of the most advanced European legal systems.

COHABITATION

Entering into a non-marital partnership is regulated under German, Austrian or Swiss law according to the principles of contract law, i.e. the non-marital partnership is a contract that can also be structured and dissolved like any other contract, whereby the provisions of the law of obligations must be observed. So far, the Hague Conference on Private International Law (HCCH) has been dealing with these international law issues relating to cohabitation outside marriage since the late 1990s (including registered partnerships)

The current family law and the draft CC provisions codify this institution as a source of family relations. Cohabitation is presupposed as a source of creating a "family relationship between an unmarried adult man and an adult woman who openly live as a couple, characterized by a joint life and work that represents a character of stability and continuation." This is because, according to current family law articles 39 and 40, as well as the draft Civil Code (article 1164), marital obstacles must not exist at the time the marriage is formed.

The need to protect the weaker partner (mostly women) and children strongly suggests that, as in Kosovo, family law regulation of non-marital, even non-formalized partnerships is a modern and forward-thinking approach.

The property rights of the property acquired during the factual relationship (out-of-marriage relationship) will be discussed in the following session, as will the distribution or division of joint property.

THE IMPACT OF MARRIAGE ON SPOUSES' PROPERTY RIGHTS

The property law of Kosovo is not a community of accrued gains and it is based on the preliminary work of the CEFL (Commission of European Family Law), taking into account the fact that the European countries, except Germany, have predominantly a matrimonial property regime of community of acquisitions, has provided preliminary work to combine the advantages of both matrimonial property regimes.

The starting point of the property law is - as in the case of community of acquisitions - two types of property: Separate and Joint Property.

According to the revised Kosovo Family Law, joint property of spouses includes property acquired through joint or separate work and contribution during the marriage, as well as income derived from the joint property in any other way. Work and contributions are regarded as equal.

The starting point of matrimonial property law is also that if the matrimonial community is dissolved, the joint property is divided by two, with each spouse receiving half. And this regardless of how he contributed to the Joint Property (through housework, family work, or paid employment; *E.g. the male spouse works in a supermarket and he saves in his bank account during the marriage from his incomes 10.000 EUR, whereas the female spouse does not earn any money but since she*

is at home caring for the common child, the 10.000 EUR savings in the bank account is a joint property of both spouses).

This principle applies irrespectively of any other provisions that refer to "contribution to the joint property" and, in the wrong judicial interpretation, could give the court more leeway.

It is the responsibility of judicial practice to follow the principle that, regardless of any possible leeway, this half-share principle of joint property is respected. And this regardless of how and under what circumstances the spouses' joint property acquired during the marriage. This is especially important in order to ensure that housework and paid work are equivalent.

Besides the special property or separate property that belongs only to one of the spouses that he/she may administer it independently from other spouses, under the Civil Code, it is provided the regulation for the joint property, too.

In addition, joint property may also include property rights and obligations rights (claims). (*e.g. the male married spouse buys a flat during marriage because he earns more incomes than his female spouse. He has a job, whereas the female spouse is at home with the kids. The flat becomes a joint property or if the male spouse provides a loan of 10.000 EUR. The loaner owes him 10.000 EUR. The claim against him is joint property, too*).

The property acquired through gambling games, from joint gifts, intellectual property and other similar forms, during the duration of marriage is considered as joint property, too.

Matrimonial and pre-matrimonial agreements (contracts) were introduced into the Civil Code before 2020, but were later rejected in its final version. Despite the fact that previous legislation did not discriminate on the basis of gender, women suffered as a result of traditional old customs in Kosovo society, such as being denied unjustly inheritance rights and during divorce proceedings. As a result, safeguards have been introduced as absolute protection in the context of the impact of traditions and social developments, with the expectation that property rights will be automatically split 50/50 between spouses, with the exception of special property (e.g. inheritance and gifts).

Provisions of this law relating to apportioning of joint property of spouses of a legally registered marriage apply analogically for property relations of persons in a factual relationship (non-marital cohabitation). So, according article 58 of Kosovo Family law property of a husband and wife gained through corporate work and during the existence of cohabitation is considered their joint property. From a wording interpretation of the provisin joint property may exist:

- from cohabitation
- from partnership without cohabitation

The registration is the criteria that can make the difference of these two relationships.

Apportioning of joint property of spouses and evaluation of shares

Joint property of spouses may be apportioned during marriage and upon its termination (KFL Article 56, par. 1 and Article 89). Persons eligible to demand apportioning are:

- Spouses
- Successors of a dead spouse or of a spouses announced to be dead

- Creditors, if the request of the creditor cannot be realized from the separate property

Joint property is apportioned after marriage ends in divorce (KFL Article 89), but also after analogous annulment of the marriage as in the case of divorce

- In principle, the joint property may be apportioned in the same decision that dissolves the marriage, if spouses agree and there are no contentious circumstances;
- In practice, joint property is apportioned with another contentious procedure after the dissolution of marriage;
- Apportioning of objects for exercising the craft, vocation and personal objects;
- Article 90 of KFL determines the rule that when dividing property, the debt are divided as well. Debts are divided by apportioning in proportion with the share of property divided to each spouse;

In case of apportioning, the objects belonging to one of the spouses as part of craft or vocation (working machines, medical clinics, etc.) should belong to the spouse, i.e. transferred to the spouse exercising the craft or vocation. If the value of these objects is proportionally higher than the value of joint property, the other spouse shall be entitled to the equal value.

- The spouse to whom the joint children have been entrusted to for protection and education, besides his/her share, is provided with objects serving the child or those for fulfilling the child needs (KFL Article 93);
- If the value of these objects is bigger compared to the joint property, the other spouse shall be entitled to equal value;
- When the spouse's property is apportioned, the other spouse has the right to pre-emption in that share (KFL Article 94);
- Shares of property jointly used at home and right to housing are evaluated separately (KFL, Article 95).

Remark:

All participants are welcome to ask questions about the regulation of family relations such as child custody or adoption, which are frequently encountered in our practice, particularly in cases with an international element.