

DIVISION OF MARITAL PROPERTY: FORMS, PROCEDURES, AND LEGAL EFFECTS

Landonita ILJAZI, Leandrit MUSTAFI, Nazmije SHAQIRI

^{1*}Faculty of Law

^{*}landonita@gmail.com, nazmije.shaqiri@unite.edu.mk

Abstract

This paper, prepared for the publication at the International Journal of Legal studies, focuses on procedures applied in practice, the legal effect on couples and the outcome of consensual and judicial separation.

By analyzing the legal frameworks of the three states of Balkan peninsula the study adopts a comparative approach on how laws governing property division are applied. These legal systems have established a consistent approach that strikes a balance between individual rights and social equality.

The harmonization of family and property law, not only strengthens the protection of individual rights but also enhances trust in the legal system, forming the basis for achieving a stable and equitable society, where principles of fairness and clarity apply.

The paper contributes to legal literature by identifying similarities and differences among the legal systems and by improving the understanding of how marital property is defined, managed and divided within contemporary civil law jurisdictions. It also highlights the need of further development of legal mechanisms that reflect modern socio-economic realities.

The findings show that while all three systems are based on the principle of equality, significant differences exist in the level of contractual freedom and justice discretion.

Keywords: marital property, property division, spouses, judicial separation, legal framework, comparative law.

1. Introduction

The marital property of spouses comprises the assets that they acquire or create during the course of their marriage and which belong to both spouses simultaneously. As long as the marital community exists, this property is indivisible, the spouses do not know their ideal shares, and such shares cannot be encumbered with separate burdens. The spouses enjoy equal rights in relation to the use, management, and administration of the marital property, which they exercise together, with or without a specific agreement. Claims and obligations arising within the framework of marital property also belong jointly to the spouses, who are jointly and severally liable for the related debts. To a large extent, the marital property of spouses is created through their work during the marital community, regardless of whether they engage in the same profession or in different professions.

Property represents the main civil legal institution of any legal system or order. As full power over the thing, it authorizes the owner with three types of authorizations, namely *ius utendi*, *ius fruendi* and *ius abutendi*, or the right to possess, enjoy and dispose of the thing, always in accordance with the law.

Property rights are regulated primarily at the national level through constitutional and legal provisions, but they are also protected internationally as a fundamental human right. This protection is reflected in several key international instruments, including the Universal Declaration of Human Rights, the European Convention on Human Rights (ECHR) and its

additional protocols, as well as the Cairo Declaration on Human Rights in Islam and other international acts.

Within the framework of European and national law, the protection of property rights is firmly established. In Kosovo, Article 46 of the Constitution affirms the right to property and expressly prohibits arbitrary deprivation of property (Kosovo, 2008). Similarly, Article 41 of the Constitution of Albania provides constitutional protection for private property (Albania, 1998). In Republic of North Macedonia, Article 8 of the Constitution specifies the fundamental values of the constitutional order, including respect for fundamental freedoms and individual rights and respect for the rule of law, in accordance with international standards. Taken together, these constitutional provisions demonstrate a shared commitment among these states to protect property rights as a fundamental element of democratic governance. It sets out the separation of powers into legislative, executive, and judicial branches, political pluralism, and the conduct of free, direct, and democratic elections. The article also guarantees the legal protection of property, supports market freedom and entrepreneurship, and promotes humanism, social justice, and solidarity. Additionally, it emphasizes local self-government, responsible urban and rural planning for a sustainable human environment, ecological protection and development, and respect for generally accepted norms of international law (Constitution of the Republic of North Macedonia, 1991, art. 8).

Throughout history, marriage has evolved from being an element of custom and tradition into a socially regulated institution, through which the relations between spouses are governed. Today, by entering into marriage, certain property rights and obligations are created, which form the legal basis for regulating the economic relations between spouses and for protecting their property interests. (Čović, 2020)

The joint property of spouses is also an institution of family law, since its basis is marriage. It represents the property that spouses acquire during the marriage, over which the spouses do not know their shares, such property is indivisible.

This principle states that both individuals and legal entities have the right to enjoy their possessions peacefully without unlawful interference. Any limitation of this right must be justified by considerations of public interest and based on clear legal grounds in accordance with the principles of justice and fairness.

The division of marital property is considered one of the most complex and sensitive issues within family law (Mustafi, 2014). In practice, it requires not only the identification of assets and rights acquired during marriage but also the careful interpretation of legal rules governing their management and distribution after the dissolution of the marital relationship. In civil law systems, property is treated as a fundamental right deeply rooted in national and international legal frameworks. Marital property, as a special category of property, has significant social and legal consequences, as it involves balancing the interests of the spouses, their families, and the wider society.

This study applies a qualitative legal research methodology based on doctrinal analysis and comparative legal methods. It examines primarily legal sources including constitutions and relevant legislation of North Macedonia, Albania, and Kosovo, as well as academic literature. The comparative approach is used to identify similarities, differences, and practical implications in the regulation of marital property.

2. Concept and Legal Nature of Marital Property

In civil law, property is considered one of the oldest and most important legal institutions, as it defines a person's right to control, use, and dispose of property within the limits set by law. These rights can be freely exercised as long as they do not interfere with the legitimate rights and interests of others. According to established principles of civil law, assets acquired during

marriage through the joint or individual efforts of spouses are generally presumed to belong equally to both parties, regardless of the formal name under which they are registered. This presumption reflects the idea that marriage is a shared economic partnership, in which both spouses contribute in different ways to the creation of joint property.

By *property (assets)* we mean the totality of subjective civil rights of a proprietary nature—rights whose ultimate object is money as a specific asset—which belong to an individual subject or to a specific group of legal subjects (Aliu, 2007).

According to Article 5 of the *Law on Property and Other Property Rights* (North Macedonia, 2001), the law regulates the property of both marital and extramarital spouses, equating the extramarital community with the marital one. The notion of property refers to all proprietary rights belonging to a legal entity, including the right of ownership and other real rights, rights arising from obligations or claims against third parties, as well as rights related to intangible assets such as intellectual property (Law on Property and Other Property Rights, 2001, art. 5). Similarly, Article 5 of the *Family Law of the Republic of Kosovo* (2004) equates the property rights of married and extramarital spouses, in line with Macedonian legislation, and this is further detailed in Article 58 (Family Law of the Republic of Kosovo, 2004, arts. 5, 58).

Besides the existence of marriage as a condition for acquiring marital property, work is also a requirement. Marital property can only be accumulated through work, which may be individual or joint. When spouses independently generate income that increases the value of marital property, this is considered individual work of the spouses. Joint work, on the other hand, refers to the work that spouses carry out together to generate income, thereby increasing their marital property (Mustafi, 2014).

In countries that follow a statutory marital property system, spouses have no alternative but to adhere to the legal rules, which govern their property relations without the possibility of choosing a different arrangement.

However, in jurisdictions that recognize both statutory and contractual regimes, spouses have the flexibility to opt for a contractual arrangement instead of the default legal regime. Countries that allow such contracts include Austria, the Netherlands, Denmark, Albania, Switzerland, and France, among others. In these cases, spouses can decide in advance how property acquired during the marriage will be treated. If no agreement is made, the property is generally treated as joint or co-owned, with equal shares for both spouses.

The current legal system of the Republic of North Macedonia does not recognize the contractual property regime, but only the legal property regime. Spouses are therefore obliged to implement the legal property regime provided in Articles 66–80. They do not have the right to change these relations at their own will or regulate them differently, but are bound to respect the legal regime. What they can agree on by contract is limited to the method of administration and disposal of joint ownership and separate property determined by law (Law on Property and Other Property Rights, 2001a, 2001b).

The marital property regime thus reflects both the legal and moral expectations of marital partnership. It is founded on the presumption of equal contribution and solidarity between spouses. This form of ownership implies that each spouse has an undivided interest in the property as a whole and cannot dispose of specific parts without the consent of the other.

Although the presumption of equal contribution aims to ensure fairness, in practice it may overlook non-financial inequalities between spouses, particularly in cases where one spouse has significantly less economic power. That raises questions about whether formal equality always leads to substantive justice.

3. Forms and Procedures of Property Division

The division of marital property can be accomplished either through agreement between the spouses or through judicial proceedings, depending on the circumstances of each case. In practice, a consensual division based on mutual understanding is generally considered the most efficient and least conflictual solution. This allows the couple to negotiate the division of assets in light of their personal circumstances and contributions; however, such agreements must comply with mandatory legal provisions and not violate public order. After notarization, these agreements acquire binding legal effect and are considered enforceable civil contracts. While consensual division is generally more efficient it may not always reflect a fair balance between spouses, especially in cases involving unequal bargaining power or lack of legal awareness. This may result in agreements that are formally valid but substantively unjust.

Judicial division becomes necessary when the spouses cannot reach a voluntary solution. In such cases, the court must identify the assets that make up the joint property, evaluate their value, and distribute them according to the principle of equality. The law, however allows the courts to adjust the ratio of the division, if there was an unequal contribution to the property. The litigation process often involves documentations proving the ownership, source of income and the time property was acquired, making court proceedings time-consuming and procedurally burdensome. Judicial proceedings, although are designed to ensure fairness often face practical challenges such as lengthy procedures that prolong disputes between spouses.

3.1 Types of Marital Property: In legal doctrine, marital property is generally divided into two main categories: common/joint property and personal/separate property. This classification plays a crucial role in both determining property rights and establishing the rules to be applied in the division of marital property after the divorce. By distinguishing between these two forms of ownership, the legal system aims to provide greater clarity and fairness in resolving property disputes between spouses.

- Common/joint property generally includes assets acquired by the spouses during the marriage through their joint or individual work, income, or other forms of contribution. In principle, such property is considered to belong equally to both spouses, regardless of whose name appears on the property deed or registration documents. This approach reflects the idea that both spouses contribute to the creation of the family's economic resources in different ways.
- Separate property includes assets acquired prior to marriage or obtained individually through inheritance, donation, or personal compensation, which remain outside the marital estate.

This classification plays a central role in the division of marital property because it provides a clear basis for evaluating property claims and contributes to more consistent and predictable legal outcomes. The table below provides an overview of the two main forms of property ownership recognized in North Macedonia, Albania, and Kosovo.

Type of Property	Legal Basis	Ownership Nature	Disposition Rights	Examples
Joint (Common) Property	Acquired during marriage by joint or separate work	Undivided, presumed equal	Managed jointly; requires mutual consent for disposition	Family home, joint savings, vehicles purchased during marriage
Separate Property	Acquired before marriage, by inheritance, gift, or personal compensation	Individual ownership	Managed independently by each spouse	Property owned before marriage,

Type of Property	Legal Basis	Ownership Nature	Disposition Rights	Examples
				inherited assets, personal gifts

This differentiation allows courts and spouses alike to distinguish between communal and private assets, providing a fair and balanced framework for property allocation.

3.2 Forms of Property Division: The division of marital property generally takes two main forms: **consensual division** and **judicial division**.

- The first one occurs when spouses can agree on the distribution of their assets without the need for court intervention. Based on their personal circumstances and mutual understanding, and once these agreements are formalized through notarization, they gain binding legal effect and are considered equivalent to court judgments. In many cases, the consensual division helps maintain respectful relations between former spouses.
- Judicial division becomes necessary when disagreements prevent the parties from reaching a voluntary settlement. In these cases, the court must examine the marital property, determine its value, and divide it according to the principles of equality and proportional contribution. Consequently, judicial division generally involves more complex and time-consuming procedures.

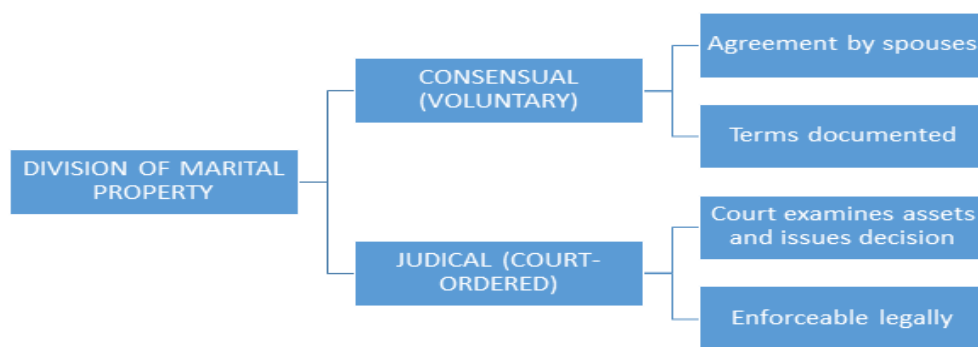


Figure 1 Property Division Flowchart

4. Legal Effects and Comparative Overview

The legal consequences of the division of marital property go beyond a simple division of assets between former spouses. They affect issues as financial responsibility, inheritance rights and future legal obligations. Once the separation is complete, joint ownership ends and is replaced by individual ownership. In practice, this legal division of property establishes clear boundaries that allow both parties to independently organize their economic and personal lives.

In North Macedonia, the regulation of marital property is primarily regulated by the Law on Property and Other Real Rights, which replaces previous provisions in family law.

In Albania, this area is regulated by the Family Code, which provides for regulatory and contractual property regimes. Prenuptial agreements are explicitly recognized by the Family Code (2003) and once notarized, they allow spouses to contractually regulate their assets, maintain separate property, unequal shares, where each spouse retains individual ownership on assets acquired during their marriage.

Meanwhile, Kosovo continues to rely primarily on the Family Law as the central legal framework governing marital property relations, emphasizing equality and cooperation between

spouses. Despite these differences in regulatory approaches, all three legal systems recognize the protection of property as a constitutional guarantee and a fundamental human right, in line with the principles of the European Convention on Human Rights.

Despite the apparent similarities, the legal systems differ significantly in terms of flexibility. Albania provides greater autonomy through contractual regimes, while North Macedonia maintains a more rigid system. This difference reflects varying approaches to balancing legal certainty and individual freedom of spouses.

Comparative analysis shows that while procedural rules and institutional arrangements vary, the underlying principles remain largely similar in all these jurisdictions. Property acquired during marriage is generally presumed to be the joint property of both spouses, division can be achieved by agreement or judicial intervention, and equality serves as the guiding standard unless strong evidence justifies a different outcome. This level of convergence reflects a broader trend towards harmonization in modern European family law systems. Albanian prenups agreements offer the most post marital flexibility allowing spouses to choose regimes via notarial contracts before or after marriage, while Republic of Kosovo and North Macedonia legislation emphasize premarital ownership with limited adaptation post marriage and qualify the assets acquired before marriage through inheritance or gifts as separate property.

The lack of contractual flexibility in certain jurisdictions may limit the ability of spouses to adapt their property relations to modern economic realities, where dual income households and individual financial independence are increasingly common. In this context, reliance on the principle of equality as a default rule, although essential, may not always lead to equitable outcomes in practice. The absence of clear criteria for assessing spousal contributions can result in inconsistent judicial decisions, thereby affecting legal predictability and overall fairness.

5. Conclusion

Property represents the main civil legal institution of any legal order. The joint property of spouses as an institution of family law represents the property that spouses acquire during marriage, unknowing their shares. The main principle when it comes to the joint property of spouses and its division is the principle of equality and fairness representing a vital component of the legal framework that safeguards economic justice and stability in marital relationships, it is also presented as a necessary information in everyday life. when it comes to spousal contributions, judicial practice also considers the assistance provided by one spouse to the other, be it childcare, running the household, caring for and maintaining property, as well as any work and cooperation related to the administration and protection of joint property.

Regardless of comparative analysis, North Macedonia, Albania, and Kosovo have developed consistent systems that balance individual rights with social equality. While procedural differences exist among them, the philosophy of equality and mutual responsibility is universal. The division process, whether consensual or judicial, ensures the distribution of assets acquired through joint efforts in a manner that reflects justice, transparency, and the rule of law.

Therefore, the ongoing evolution of marital property law in these jurisdictions underlines the importance of adapting legal norms to contemporary social realities. Harmonizing family and property law not only strengthens the protection of individual rights but also increases trust in the legal system and contributes in pursuit of social stability and equality.

Despite the shared legal principles, practical challenges remain in ensuring fair property division. Differences in legal frameworks, particularly regarding contractual freedom, highlight the need for further harmonization. Future reforms should focus on increasing flexibility, improving judicial guidelines and adapting legal rules to contemporary socio-economic conditions.

References

- [1] Aliu, A. (2007). *E drejta civile*.
- [2] Aliu, A. (n.d.). *E drejta civile – Pjesa e përgjithshme*. Universiteti i Prishtinës, Prishtinë.
- [3] Albania. (1998). *Constitution of the Republic of Albania* (21 October 1998).
- [4] Council of Europe. (1952). *Protocol No. 1 to the European Convention on Human Rights*. Paris.
- [5] Constitution of the Republic of Albania. (1998). *Article 41: The right to private property*.
- [6] Constitution of the Republic of Kosovo. (2008). *Article 46: Protection of Property*.
- [7] Constitution of the Republic of North Macedonia. (1991). *Article 8: Fundamental values of the constitutional order*.
- [8] Constitution of the Republic of North Macedonia. (1991). *Article 30: Right to property and inheritance*.
- [9] Family Law of the Republic of Kosovo. (2004). *Official Gazette of the Republic of Kosovo*, No. 2004/24/1.
- [10] Gelevski, S. (2002). *Law on property and other real rights: With commentary and case law* (p. 141). Skopje.
- [11] Law on Property and Other Property Rights. (2001a). *Official Gazette of the Republic of North Macedonia*, No. 18/2001.
- [12] Law on Property and Other Property Rights (amended). (2001b). *Official Gazette of the Republic of North Macedonia*, No. 46/2006, 103/2008.
- [13] Mustafi, L. (2014). *Pronësia e përbashkët e bashkëshortëve dhe ndarja e saj* (Master's thesis). Faculty of Law, State University of Tetova.
- [14] North Macedonia. (2001). *Law on Ownership and Other Real Rights*. *Official Gazette of the Republic of North Macedonia*.
- [15] North Macedonia. (2001). *Law on Property and Other Property Rights*. *Official Gazette of the Republic of North Macedonia*.
- [16] Kosovo. (2004). *Family Law of the Republic of Kosovo* (Law No. 2004/32).
- [17] Čović, A. (2020). *Porodičnopravni aspekti verskih brakova*. Institut za uporedno pravo.
- [18] Civil Code of The Republic of Albania 1994