

The interplay between matrimonial property regimes and commercial law in Albanian legislation: Influences from the Italian Civil Code

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Abstract. The study explored legal inconsistencies in Albania's matrimonial property and commercial law, where differing traditions create uncertainty in classifying business assets acquired during marriage, impacting spouses' rights and creditor claims. The purpose of research was to identify the applicable law on the commercial activities started and/or managed by each spouse during marriage, as well as to investigate the inconsistencies between family and commercial legislation. The study employed a comprehensive legal research methodology, integrated desk legal analysis, case law examination, comparative study, and doctrinal legal research, with a particular focus on analysing national and foreign legislation, judicial decisions from the Albanian and Italian High Courts, and academic legal doctrine to assess the intersection of matrimonial property and commercial law. The study analysed the Family Code of Albania and the Law on Entrepreneurs and Commercial Companies. These two sets of legislation were enacted at different times and are based on distinct legal models. The study demonstrated that, they lack coordination, making their practical application challenging for Albanian courts. Additionally, it examined the influence of the Civil Code of Italy on the Albanian legislation regarding the regulation of the matrimonial property regimes. Although the community property regime is modelled after Italian law, there are some differences between the two legal systems when it comes to commercial activities established during marriage. The study lays the groundwork for legal reforms to harmonize matrimonial property and commercial law in Albania, ensuring clarity in business asset distribution

Keywords: marriage; community of acquisitions; spouses' party autonomy; entrepreneur; commercial company

Introduction

The core issue in this research lies in the insufficient examination of the intersection between matrimonial property regimes and commercial law in Albania. This gap is particularly significant because the two legal domains family law and commercial law have been shaped by different legal traditions, leading to potential inconsistencies in their application. While Albania's Family Code, enacted in 2003, is rooted in the Italian and French civil legislation, the country's commercial law, introduced in 2008, follows principles derived from English law. These divergent legal foundations create challenges in reconciling the rights and obligations of spouses within both the domestic and business spheres. A key issue arises when married individuals engage in commercial activities, particularly in cases where one or both

spouses own or manage businesses. The uncertainty regarding whether business assets acquired during marriage fall under the community of acquisitions regime or remain the separate property of the operating spouse can lead to legal disputes. For instance, in the absence of a clear legal framework, creditors seeking to recover debts from a business owned by one spouse may face difficulties in determining whether the other spouse's assets can be used to satisfy financial obligations (Scherpe, 2023). In the event of divorce, the classification of business assets whether they should be equitably divided or remain under individual ownership becomes a contentious issue.

Another problematic scenario involves the participation of both spouses in business activities. If a couple operates a

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jointly owned enterprise, the lack of harmonisation between commercial and family law can create legal uncertainty regarding decision-making powers, financial liabilities, and profit distribution. For example, if one spouse claims ownership over company shares due to the principles of the matrimonial property regime, but commercial law prioritises formal registration and contractual agreements, conflicts may arise regarding rightful ownership and control (Niculescu, 2019; Alqsass *et al.*, 2023). The need for resolving these inconsistencies is pressing because unresolved legal ambiguities can lead to prolonged litigation, financial insecurity, and difficulties in business transactions. Given that commercial activity is a key driver of economic growth, ensuring legal clarity in matters of business ownership and liability within marriage is crucial for fostering both economic stability and family law coherence. Addressing this issue requires a comprehensive legal review to align matrimonial property regulations with commercial law provisions, ensuring that both individual and shared financial interests are adequately protected within Albania's legal system.

W. Pintens (2021) explores the fundamental principles of matrimonial property regimes in civil law jurisdictions, emphasising the existence of mandatory rules that ensure the participation of both spouses in household expenses and debts, known as *régime primaire*. This study provides a comparative analysis of matrimonial property systems across different legal traditions, identifying the default regimes in various countries. The research highlights that while most Romanic law jurisdictions, such as France, Italy, Belgium, Spain, and Portugal, have adopted the community of acquisitions as the default property regime, Germanic legal systems, including Germany, Austria, and Nordic countries, follow a participation in acquisitions model. Author concludes that these regimes, despite their variations, share the common objective of ensuring fairness in property distribution between spouses, particularly in cases of marital dissolution.

D. Eskinazi and I. Amar (2020) examine the absence of matrimonial property regimes in common law jurisdictions and how the financial consequences of divorce are instead determined by judicial discretion. Their research contrasts the predictability of property distribution in civil law systems with the flexibility of common law courts, which take into account various factors such as the financial needs of each spouse and the overall fairness of the settlement. The authors argue that while common law systems do not impose predefined property-sharing mechanisms, judicial intervention serves as an alternative means of achieving equitable outcomes in marital property disputes.

T. Nuts *et al.* (2022) focus on the role of matrimonial property regimes in protecting economically weaker spouses. Their studies analyse the function of the community of acquisitions and participation in acquisitions regimes, demonstrating how these frameworks are designed to ensure an equitable distribution of wealth accumulated during marriage. They argue that by balancing principles of individual ownership with mechanisms for wealth-sharing, these regimes provide a safeguard against economic disparity upon divorce. Their findings underscore the importance of matrimonial property laws in addressing financial vulnerabilities and reinforcing economic stability within families.

E. Qarri and Xh. Kadi (2024) specifically investigate Albania's matrimonial property laws, situating them within the broader civil law tradition. Their research contextualises the

adoption of the community of acquisitions regime in Albania, explaining that this choice reflects the country's socio-economic conditions and legal heritage. They analyse how the default legal framework regulates financial relationships between spouses, ensuring shared ownership of assets acquired during marriage unless a marriage contract specifies otherwise. Their findings highlight the alignment of Albania's legal approach with broader European civil law trends while also acknowledging the country's specific economic and social context as a determinant of its regulatory choices.

From a structural point of view, the legal community is a partial community (Tsvigun, 2024). As analysed by S. Omari (2015), based on the moment that the property acquired by spouses during marriage falls into the community, the community property is divided in two groups: current or immediate community and eventual or deferred community. In Albanian legal doctrine there are very few contributions regarding the legal regime of commercial activities under the community of property regime. A. Malltezi (2018) has conducted an in-depth exploration of the intersection between matrimonial property regimes and commercial law in Albania, focusing specifically on the interpretation and scope of Article 74(ç) of the Family Code (2003). This provision concerns the classification of business assets within the matrimonial property framework, raising the question of whether it applies universally to all forms of enterprises or is intended solely for sole proprietorships. This analysis critically examines the legislative intent behind this article, highlighting ambiguities in its wording and the potential consequences of different interpretations for spouses involved in business activities.

The purpose of the study was to analyse the current legislation governing entrepreneurial activities started by spouses during marriage and to identify the problems arising from the interaction of family and commercial law in Albania. The objectives of the study were as follows:

- 1) to evaluate the challenges faced by Albanian judges in interpreting and applying legislation on property relations of spouses in the field of entrepreneurship;
- 2) to investigate the relationship between family and commercial law in the context of regulating spouses' entrepreneurial activities;
- 3) to determine the degree of influence of the Civil Code of Italy (1942) on the provisions of the Albanian Family Code regulating property relations of spouses.

Materials and methods

This paper employed a comprehensive research methodology that integrates multiple dimensions, including desk research, legal analysis, case law examination, and comparative study. The approach involved analysing relevant national laws alongside foreign legislation from traditional civil law jurisdictions. The Albanian legal framework referenced in this study includes the Constitution of the Republic of Albania (1998), the Civil Code of the Republic of Albania (1994), the Family Code of Albania (2003), and the Law of Albania No. 9901 "On Entrepreneurs and Commercial Companies" (2008). The analysis examined Decision of the Civil College of the High Court of Albania No. 340 (2012), that highlighted the divergence in judicial interpretation. The minority opinion in this case argued for a narrow interpretation of commercial activity, limiting it to sole proprietorships, whereas the majority view included shares in

commercial companies as part of the legal community. This decision set a precedent for subsequent cases, shaping the way Albanian courts approach the classification of business assets in divorce proceedings.

Another landmark case analysed in this research concerns the ownership of shares in Top Channel JSC (2017), a company founded during marriage by one spouse. The High Court ruled that, despite the formal registration of the company under one spouse's name, the shares acquired during marriage fell within the scope of the legal community, as per Articles 66, 73, 74, and 75 of the Family Code of Albania (2003). This ruling reinforced the principle that profits and business assets obtained during marriage are subject to division unless explicitly excluded by a prenuptial or marital contract. The research further examines the practical challenges that judges face in interpreting these provisions, particularly when the commercial activities in question involve complex business structures such as joint-stock companies or partnerships. Given the inconsistencies in prior rulings, this study underscores the need for clearer legislative guidelines to harmonize the application of family and commercial law.

Firstly, the study analysed the principle of freedom of economic activity foreseen by the Constitution of the Republic of Albania (1998), which was the main legal document that governed fundamental rights and freedoms of citizens. The aim of this analysis was to determine whether the Family Code of Albania (2003) provisions, which included in the community property all commercial activities started by spouses during marriage, violated the freedom of economic activity. Then, the Family Code of Albania (2003), which governed the matrimonial property regimes and the financial consequences of the dissolution of marriage, was analysed. Special attention was given to the default regime, the community of property regime. This regime governed the commercial activities that were started by each spouse during marriage. The next legal act that was analysed in the research was the Law of Albania No. 9901 "On Entrepreneurs and Commercial Companies" (2008). This act governed the establishment, operation, management, and reorganization of entrepreneurs and commercial companies in Albania. The analysis of these acts showed that there was a lack of coordination between them regarding the commercial companies started by spouses during marriage. To gain a deeper understanding of the Family Code of Albania (2003) norms regarding matrimonial property regimes, the Civil Code of Italy (1942), on which the Family Code of Albania (2003) was modeled, was analysed. It was important to note that the comparative analysis served to enhance comprehension and implementation of the legal community regime, which was the most commonly used regime by spouses in practice. An additional methodology used in this research was doctrinal legal research, which involved examining the primary legal sources mentioned above to identify legal principles, legal ambiguities, and inconsistencies, and to clarify the application of the law in practice. In this paper, the legal doctrine settled in academic works, legal commentaries, and judicial opinions was used. The academic works of Italian and Albanian legal scholars were mostly used, without disregarding the academic works of other European countries' scholars, whose default regime was the community property. Moreover, the paper used the case law method. The research extensively analysed the jurisprudence of Albanian and Italian Courts to enrich the analysis and provide practical insights

into the application of legal principles. In particular, the research took into consideration the case law of the High Courts of both countries.

Results

The term matrimonial property regime refers to the totality of legal norms that govern the property relations between spouses and their property relations with third parties during marriage. There are different types of matrimonial property regimes, such as separation of property regime, community of acquisitions regime, participation in acquisitions regime and universal community regime. The legal position of these regimes differs from one European country to another. The Family Code of Albania (2003), within the framework of the legal community property regime, establishes specific rules governing the commercial activities of spouses. These rules govern the commercial activities started by spouses during marriage (Article 74 para. 1 (ç)), the commercial activities which, although started before marriage, are managed by both spouses during marriage (Article 74 para. 2), the commercial activities started before marriage when community assets are used for their management (Article 75), and the legal regime of work instruments exclusively required for the needs of each spouse's profession (Article 77 (ç)).

The term commercial activity used by Family Code of Albania (2003) is very broad, therefore there is a need to clarify its meaning. While the Law of Albania No. 9901 "On Entrepreneurs and Commercial Companies" (2008) does not explicitly define the concept of commercial activity, it provides a non-exhaustive list of activities deemed commercial. These activities fall into two categories: entrepreneurial activities and commercial activities organised as commercial companies, such as limited partnerships, general partnerships, limited liability companies, and joint stock companies. An entrepreneur is defined as a natural person engaged in independent economic activities requiring standard commercial organisation. Furthermore, Article 2, paragraph 2, of the Law of Albania No. 9901 "On Entrepreneurs and Commercial Companies" (2008) specifies that individuals pursuing independent activities (e.g., lawyers, notaries, brokers, accountants, doctors, engineers, architects, or artists) are considered entrepreneurs if the specific law governing their profession grants them this status (Dine & Blecher, 2008). A natural person who carries out agricultural or forestry activities will also be considered an entrepreneur if his activity is mainly focused on the processing and sale of agricultural or forestry products. Also, the term commercial activity includes simple companies started according to the provisions of the Civil Code of the Republic of Albania (1994). According to Albanian jurisprudence, the concept of commercial activity essentially includes any type of profitable activity that requires a certain form of organisation of a natural or of a legal person.

The Family Code of Albania (2003) just like the commercial legislation, does not define commercial activities. Therefore, it is necessary to analyse what the legislator means by using this concept. The concept of commercial activity foreseen by the Family Code of Albania (2003) should be interpreted in line with the commercial legislation, which is the specific law governing this issue. However, there are different opinions in Albanian jurisprudence. In the minority opinion of Decision of the Civil College of the High Court of Albania No. 340 (2012), the concept of commercial activity

provided by Article 74 para. 1 (ç) of the Family Code of Albania (2003) is defined narrowly than the Law of Albania No. 9901 “On Entrepreneurs and Commercial Companies” (2008), including only “entrepreneurs”, and not commercial companies.

The contention focused on whether shares obtained by one spouse during the marriage could be classified as separate property. The claimant contended that the shares, formally registered in their name and independently managed, should be excluded from the marital estate; nonetheless, the majority determined that commercial assets acquired during marriage – unless expressly excluded by contract – are deemed community property. The case determined that stakes in commercial enterprises can be included in the community property system if obtained during the marriage. The minority view contended that commercial entities ought to be distinguished from personal property. Nonetheless, the majority elucidated that business assets are liable to division unless expressly stipulated otherwise. The court underscored that both active and passive interests in commercial entities, including shareholdings, are jointly owned under matrimonial property law, unless clearly delineated by written agreement. This verdict has subsequently functioned as a standard in adjudicating commercial ownership disputes in divorce proceedings.

Even if it is accepted that only the entrepreneur is the material object of the application of Article 74 para. 1 (ç) of the Family Code of Albania (2003) nothing prevents the inclusion of the shares of commercial companies started during marriage by one or both spouses, or shares acquired by the spouses through legal transactions, within the scope of Article 74 para. 1 (a) – a property acquired by one or both spouses, jointly or separately, during marriage. Albanian jurisprudence has also embraced this position. In the aforementioned decision, the Civil College of the High Court held the position that the shares of limited liability company and joint stock company started during marriage by both spouses (Wisdom Ltd. and Wisdom 1 Ltd.) are part of the legal community.

In a later decision, the Civil College of the High Court assessed that, in accordance with articles 66, 73, 74, 75, and 76 of the Family Code of Albania (2003) the shares of the commercial company “Top Channel JSC” (2017) are included in the legal community regime. The company was started during marriage in the form of a limited liability company by the husband, who owned 100% of the shares. The company was then transformed into a joint-stock company during the marriage. The case underscored that share in a joint-stock company founded during marriage are part of the legal community, regardless of whose name is on the registration. The ruling reinforced the idea that business profits obtained during marriage belong to both spouses, advocating for economic fairness in divorce settlements.

The dispute arose when one spouse, founder of Top Channel JSC during the marriage, claimed exclusive ownership of the company's shares based solely on formal registration. The other spouse argued that, since the company was established and operated during the marriage, its shares and related income should be deemed marital property. The court ruled in favour of the latter, holding that business assets acquired during marriage belong to the marital estate unless explicitly excluded by a formal agreement. This decision, which extends to dividends and profits, established

that both direct and indirect contributions to a business must be equitably distributed in divorce proceedings, setting a precedent to prevent asset concealment through corporate arrangements.

From the analysis of the provisions governing the legal community, it results that articles 74 para. 1(ç), 74 para. 2, 75, and 77 (ç) are more suited to commercial activities organised in the form of “entrepreneur”, as defined in Article 2 of the Law of Albania No. 9901 “On Entrepreneurs and Commercial Companies” (2008). The study draws this conclusion from the terminology used by the legislator, namely management by both spouses, community property assigned to the management of a commercial activity, means of practicing the profession other than those designated for the management of a commercial activity. This is due to the adaptation of articles 74, 75, and 77 of the Family Code of Albania (2003) with articles 177, 178, and 179 of the Civil Code of Italy (1942), whose provisions are translated literally. The terms “azienda coniugale and azienda gestita da entrambi i coniugi” have been translated and adapted in the Family Code of Albania (2003) as “commercial activity”. According to Italian doctrine, these terms refer only to the commercial activity developed in the form of an entrepreneur and are not applicable to commercial companies.

The first factor to determine if a commercial activity is considered personal or community property is whether the activity started before or during marriage. Based on a combined interpretation of articles 74 para. 2 and 77 (a) of the Family Code of Albania (2003) results that the commercial activities established before marriage by each spouse or the participation rights of each spouse in these activities are personal property. According to Article 74 para. 1 (b) of the Family Code of Albania (2003), the profits acquired during marriage from the commercial activity of one spouse are part of the community only if unconsumed at its end.

There can be commercial activities that are started by one spouse before marriage and jointly managed by both of them during marriage. In this case, while the commercial activity remains separate, the community includes the profits and the additional output (Article 74 para. 2 of the Family Code of Albania (2003)). The profits and the increase in the production of the commercial activity realised during the time of the jointly management of the activity, are part of the current community, which means that they are joint property from the moment of their acquisition. The legislator uses the term commercial activity that is managed by both spouses during marriage (Scherpe, 2022). It is not clear what does the legislator mean by the term management, which is a term that does not appear in the provisions of the Law of Albania No. 9901 “On Entrepreneurs and Commercial Companies” (2008) or in the provisions of the Civil Code of the Republic of Albania (1994).

Since Article 74 of the Family Code of Albania (2003) is modelled after Article 177 of the Civil Code of Italy (1942), it is essential to consult Italian legal doctrine for its proper interpretation. Article 177 (d) of the Civil Code of Italy (1942) uses the term company managed by both spouses – joint management (*azienda gestita da entrambi i coniugi – gestione congiunta*). According to Italian doctrine, the term joint management is a matter of fact, and it is not formally related to the spouse in whose name the commercial activity is registered. Joint management refers to the factual situation, in which both spouses perform managerial functions

in the commercial activity, make decisions on investments, on the division of profits, and in general perform any material or legal action, both within the activity and in relation to third parties (Cosenza, 2020). The term management of the commercial activity refers to the participation of the non-owner spouse in decision-making activities in the company that also brings responsibility such as, i.e., the function of the administrator of the commercial company (Santosuosso, 1984). Joint management must be distinguished from the case where one spouse is employed in the commercial activity of the other spouse. If the non-owner spouse during marriage was employed, based on an employment contract in the commercial activity of the other spouse, e.g., as a secretary, financier, lawyer, etc., this employment activity will not be considered as “management” (Santosuosso, 1984).

Based on Article 74 para. 1 (ç) of the Family Code of Albania (2003), any commercial activity started during marriage by one of the spouses immediately becomes part of the legal community, making the other spouse a co-owner in equal shares with the founding spouse. Naturally, the question arises whether this legal arrangement contradicts Article 11 of the Constitution of the Republic of Albania (1998), which regulates free economic initiative. According to Article 11 para. 1 of the Constitution of the Republic of Albania (1998) “The economic system of the Republic of Albania is based on private and public property, as well as on the market economy and on the freedom of economic activity”. Also, according to the third paragraph of Article 11 of the Constitution of the Republic of Albania (1998) “Restrictions on the freedom of economic activity can only be imposed by law and only for important public reasons”.

Analysing this provision on a comparative basis with Article 177 of the Civil Code of Italy (1942), it is noted that, in contrast to the Family Code of Albania (2003), according to which any commercial activity started during marriage by one spouse is included *ipso jure* in the legal community; the Civil Code of Italy (1942) provides that only those commercial activities started by one spouse constant matrimonii, which are jointly managed by both spouses, are included in the legal community. Thus, its law provides joint management as an essential condition for the inclusion of the commercial activity started during marriage by one spouse in the legal community.

From the first reading of Article 74 para. 1 (ç) of the Family Code of Albania (2003), it is evident that the legislator has explicitly regulated the commercial activity started during marriage. The first element worth discussing is what the legislator means by the term started during marriage. A dilemma arises whether this provision refers only to commercial activities established by one or both spouses during marriage or includes the case of commercial activities started by other persons but acquired by one spouse during marriage (Dine & Blecher, 2008). The same dilemma is raised by the Italian legal doctrine referring to Article 177 (d) of the Civil Code of Italy (1942).

Due to the intertwining of the spouses' financial interests, it is common for community property to be used in the management of one spouse's commercial activities. According to Article 75 of the Family Code of Albania (2003), if during marriage the property of the legal community is used for the management of the commercial activity of one spouse, then this property as well as the additional output of the commercial activity (extras) are included in the

community, if they are unconsumed at its end (co-ownership between spouses). In this context, the commercial activity belongs to one spouse, while at the end of the community the other spouse is entitled to only ½ part of the community property used for the management of the commercial activity and to the ½ part of the additional output and has no right to participate in the commercial activity (Niculescu, 2019).

From the point of view of legislative technique, Article 75 is positioned in Chapter II of Title III of the Family Code of Albania (2003) between Article 74 (composition of the legal community) and Article 77 (category of personal property). This provision includes that category of assets that, although acquired during marriage, are not immediately included in the community. They are included in the community only if they are unconsumed at its end. This Article must be interpreted in close connection with articles 74 para. 1 (ç), 74 para. 2, and 77 (ç) of the Family Code of Albania (2003). The purpose of the provision is to protect the free economic initiative of the entrepreneurial spouse, to guarantee the organisation and decision-making in the commercial activity of the entrepreneurial spouse, independently of the will of the other spouse, even though community property is used for the management of this activity.

While reading Article 75 of the Family Code of Albania (2003), it becomes clear that the term “property designated for the management of the commercial activity of one spouse” requires further clarification. Since Article 75 is based on Article 178 of the Civil Code of Italy (1942), the Italian doctrine provides valuable insights into this concept. According to the Italian legal doctrine, for an asset to be considered assigned to the management of a commercial activity, two conditions must be met. First, the property must have been acquired with the intention of using it for the management of the commercial activity. The manner in which the spouse manifests this intention is not important; what matters is proving that the property was acquired with this purpose in mind, such as if the property is used immediately after its acquisition for managing the commercial activity. Including this asset in the category of eventual community constitutes a derogation from the general rule established by Article 74 para. 1 (a) of the Family Code of Albania (2003). The burden of proof that the asset has been used for the management of the commercial activity belongs to the person with an interest in the case, namely the entrepreneurial spouse or creditors. Second, the asset must be suitable for use in the commercial activity for which it was acquired, although it is not necessary for the property to be indispensable for the activity. Assets designated for the management of a commercial activity can include both corporeal and non-corporeal items.

The property acquired during marriage with the intention of using it for the management of the activity of one of the spouses falls into the category of eventual community (Article 75 of the Family Code of Albania (2003)). This qualification is important in terms of the legal regime to which this property will be subject during marriage. As part of the eventual community the entrepreneurial spouse retains all rights of management and free disposal of this property, without the need to obtain the consent of the other spouse.

Another aspect of Article 75 of the Family Code of Albania (2003) that needs to clarify is the term additional output of the commercial activity. According to the Italian doctrine, the additional output of the commercial activity is the net

added value of all the assets of the commercial activity, at the time of the end of the community, in relation to the value that these assets had at the time that the community's property was used for the management of this activity. From the community will be excluded the added value of the assets of the commercial activity, which is not related to the use of the property of the community, but it is related to other reasons, such as: other investments made with capital borrowed from the bank, the geographical position of the exercise of the commercial activity, the change in the value of the currency, etc. (Tega, 2024). Since in many cases it is difficult to prove the cause of the additional output, the doctrine is of the opinion that the burden of proof falls on the entrepreneurial spouse. If the cause of the additional output cannot be proven, it is presumed that the increase is attributed to the utilisation of the community property.

Another aspect of Article 75 to discuss, is the legal nature and content of the rights that the community has at the time of its dissolution over the property of the community used for the management of the commercial activity and its additional output. There are debates in the legal doctrine whether the property used for the management of the commercial activity falls into the community, or the community has only a right of credit over the entrepreneurial spouse, i.e., the right to be compensated with the value of this property updated with the market price, while the asset itself remains the property of the commercial activity (Dydach *et al.*, 2024). The authors who support the thesis that the community has only a credit right, base their thesis on three arguments: a) the need to guarantee the entrepreneurial spouse the freedom of economic activity even after the end of the legal community; b) the need to protect the non-entrepreneurial spouse from the creditors of the commercial activity; c) the need to recognize to the community a right of the same nature both on the wealth of the commercial activity and on its additional output.

On the other hand, starting from the literal interpretation of Article 75 of the Family Code of Albania (2003), most of the authors think that the community will include the property of the community that was designated for the management of commercial activity and not a credit right on its value. According to the same authors, at the end of the community, on the condition that are unconsumed, the following properties shall be subject to the spouse's joint ownership: the property of the community assigned to the management of the commercial activity of one spouse and the additional output of the commercial activity. The inclusion in the legal community of the property of the community assigned to the management of the commercial activity of one spouse and the additional output of the activity can potentially damage the creditors' interests. On the one hand, it can damage the creditors' interests or put into question their confidence in the managerial abilities of the entrepreneurial spouse, and on the other hand, it can put at risk the very continuity of the commercial activity, if, at the time of the division of the community, there is not enough liquidity to compensate the non-entrepreneurial spouse.

Article 77 (ç) of the Family Code of Albania (2003) governs the necessary work instruments for exercising the profession of one of the spouses, besides those designated for the management of a commercial activity. According to this article, these work instruments are personal property, except those assigned to the management of a commercial activity.

From the contrary interpretation of this provision, it results that the work instruments that serve for the exercise of the profession of one spouse but are assigned for the management of a commercial activity, are not personal property. They are included in the legal community (Semprini, 2024). According to legal doctrine, the term profession encompasses not only the liberal professions, provided that the practice of the profession is not classified as a commercial activity, but also a profession that is exercised repeatedly, both independently and in the form of a dependent work relationship, i.e.: a lawyer or an architect, who is employed with a monthly salary in a law firm or an architectural firm (Radice, 1997). The concept of profession should be distinguished from the concept of commercial activity, especially when the latter is realised in the form of an entrepreneur and includes the exercise of the professional skills of one spouse.

The concept of profession is believed to include any professional activity of each spouse, provided that the activity is not considered a commercial activity by the special law regulating the exercise of the profession. Consequently, it will not include liberal professions, such as that of a lawyer, notary, accountant, broker, real estate broker, accounting expert, architect, etc. According to Albanian legislation these professional activities are considered commercial activities, because the laws that regulate the exercise of these professions require their registration at the National Business Centre, in order to equip them with the identification number of the commercial person.

Another aspect of Article 77(ç) to discuss is whether the concept commercial activity refers only to a commercial activity started during marriage (which is part of the community) or it includes also an individual activity of one spouse. For better understanding of this disposition, reference must be made to the corresponding provision in the Civil Code of Italy (1942), specifically Article 179 (d). According to this article, it is not considered personal property "the property destined for the management of a commercial activity which is part of the legal community" (The following do not constitute the object of the community and are personal property of the spouse: d) property used for the exercise of the spouse's profession, except for property used for the operation of a business forming part of the community). This is the only logical interpretation of the Article 77 (ç) of the Family Code of Albania (2003). If Article 77 (ç) were to refer to the individual commercial activity of one spouse, then the work instruments used for managing the commercial activity of the entrepreneurial spouse would also be considered personal.

Discussion

After the fall of the communist state in 1991, Albanian legislation underwent a total reformation, due to the change of the socioeconomic background of the country. These changes aimed to align Albanian legislation with the principles of the free market economy, rule of law, democratic state, and protection of fundamental human rights and freedoms. The family legislation has also had a significant transformation, with the introduction of the new Family Code of Albania (2003). The explicit regulation of spouses' commercial activities within the framework of the legal community property regime represents an innovation in the Family Code of Albania (2003), aimed at protecting the economically weaker spouse. Despite this positive intention, the legislator has disregarded the impact that the inclusion of

commercial activities in the community of property would have on their functioning, and in general the freedom of economic activity of the entrepreneur spouse. Without undermining the principle of marital solidarity, the research highlights the importance of coordinating the commercial interests of the business with the property interests of the family and each spouse. The study proposes viable solutions for addressing issues related to the dissolution of marriage and the division of property that includes commercial activities. The proposed solutions focus on legal mechanisms to harmonize these interests.

The study finds that the concept of commercial activity used by the Family Code of Albania (2003) is broad, which can lead to inconsistent interpretation and application of community property rules by legal scholars and practitioners. In contrast to this finding, the dissenting judges of the Decision of the Civil College of the High Court of Albania No. 340 (2012) argue that Article 74 (ç) of the Family Code of Albania (2003) is limited only to entrepreneurs, excluding commercial companies. This study disagrees, arguing that as long as the legislator has not made such restrictions, neither can the interpreter of the law. This position is also supported by A. Malltezi (2018). In conclusion, the study argues that, according to articles 74 para. 1 (ç), 74 para. 2, 75, and 77 (ç) of the Family Code of Albania (2003), the notion of commercial activity includes any commercial activity, regardless of its legal structure: entrepreneur, commercial companies, and simple partnerships. Therefore, the concept of commercial activity used by the Family Code of Albania (2003) should be interpreted in line with commercial legislation.

E. Qarri and Xh. Kadi (2024) address the complex issue of aligning matrimonial property regimes with commercial law, highlighting the challenges posed by the fact that these two areas of law are built on different legal models and were developed in separate timeframes. They argue that the interpretation of these laws must strike a delicate balance between several competing interests: protecting the property rights of the family, upholding the entrepreneurial spouse's constitutional right to economic freedom, and ensuring the protection of creditors' rights. They emphasize the importance of considering the broader economic stability of the country when interpreting these laws.

The study agrees with T. Duell-Cases (2024), who states that one of the factors to classify the commercial activity of one spouse as separate or community property is whether the activity started before or during marriage. If the commercial activity started before marriage, it is personal property of the entrepreneur spouse (Yakymenko, 2023). However, if the activity is jointly managed by both spouses the profits and the additional output fall in the community. The study agrees with the view of Italian legal scholars, such as F. Santosuosso (1984) and F. Cosenza (2020) and who argue that joint management refers to the active participation of both spouses in the business activities, irrespective of ownership. According to them, the simple employment of the non-entrepreneur spouse in the commercial activity does not consist in management activity.

If the commercial activity starts during marriage, it is community property (Hubeladze, 2024). In line with P. Di Martino (1997) opinion, the study suggests that in interpreting Article 74 para. 1 (ç) of the Family Code of Albania (2003) the term creation should include both the commercial activities started during marriage and the quotas/

shares/participation rights acquired by one spouse during marriage, on exception of those acquired through donation or inheritance. The study also offers a critical perspective on the immediate inclusion in the community of any form of commercial activity started by one spouse during marriage. As also stated by A. Semprini (2024) authors argue that this constitutes an excessive solidarity of the property interests of the spouses and infringes the freedom of economic initiative of the entrepreneur spouse. Furthermore, this is a constitutional principle provided by Article 11 para. 1 of the Constitution of the Republic of Albania (1998). Therefore, the study proposes that the Family Code of Albania (2003) provisions should be interpreted in light of this constitutional principle.

De lege ferenda, the study suggests that the commercial activities started during marriage by one spouse, but not jointly managed, should not fall automatically in the community. As A. Semprini (2024) argues, alternative solutions should be considered instead: either they could be included in the eventual community or the community could have a credit right of $\frac{1}{2}$ of the value of the founding capital signed by the entrepreneur spouse or the right of $\frac{1}{2}$ of the profits realised from the activity, without including the commercial activity itself in the community (Benanti, 2023). To protect the economic freedom of the entrepreneurial spouse, if community property is used for managing one spouse's commercial activity, the activity remains personal, with the community including only the additional output and property used for management if they remain unconsumed at dissolution (Xhafka *et al.*, 2024).

Agreeing with Italian jurisprudence (Case No. 25415 of the Italian Court of Cassation) as analysed by S. Cannizzaro (2022), if the entrepreneur spouse disposes the community property that was used for the administration of his/her commercial activity, and the act of disposal is realised within the business context, the added value gained from the alienation is attributable solely to the entrepreneur spouse. Overall, the study states that future legislative amendments should consider alternative solutions in governing commercial activities within marriage, ensuring a fair balance between economic freedom and spouses property rights.

Conclusions

The current Family Code of Albania has for the first time expressly regulated the commercial activities started by spouses during marriage, this within the framework of the new economic-political system established in Albania after the 1990s. This study demonstrates that, given that in the Albanian legislation, specifically in the commercial one, there is no definition of the term commercial activity, a coordinated interpretation and implementation of the provisions of the Family Code of Albania that regulate the matrimonial property regime and of the provisions of the Law on Entrepreneurs and Commercial Companies should be made. The interpretation process must aim to balance several competing interests: the family's property rights, representing the interests of the legal community; the necessity of sustaining commercial activity; each spouse's constitutional right to economic freedom; the rights of creditors of the entrepreneurial spouse; and, more broadly, the country's economic growth and stability. Achieving harmony between these two legal areas presents significant challenges, as family and commercial laws were developed at different times and influenced by diverse legal models from various jurisdictions.

The results of the study show that including ipso jure all the commercial activities started by one spouse during marriage in the legal community limits the economic freedom of the entrepreneurial spouse and can have a negative impact on the business affairs. These rules were introduced to protect the weaker spouse (mostly the women), thus ensuring marital solidarity. However, over the past twenty years, the socio-economic landscape of the country has undergone significant changes and women now have much greater access to education, to the labour market, and to business opportunities.

The analysis of judicial practice reveals significant inconsistencies in the interpretation and application of matrimonial property rules concerning commercial activities in Albania. While the High Court has increasingly recognised that business assets acquired during marriage whether through direct ownership or participation in commercial companies fall under the legal community regime, divergent judicial opinions persist. Some rulings have narrowly interpreted Article 74(ç) of the Family Code, limiting its scope to

sole proprietorships, whereas others have adopted a broader approach, including company shares and business profits accumulated during marriage. The findings indicate that judicial decisions are moving toward a more inclusive interpretation of business-related assets in matrimonial property disputes, yet unresolved ambiguities continue to create unpredictability in legal outcomes, underscoring the need for legislative reform to ensure consistency and clarity in applying the law.

Future research could focus on refining the definitions of “commercial activity” and “joint management” in Albanian family law, addressing the current ambiguities in the Family Code of Albania.

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Conflict of interest

None.

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Взаємодія між режимами спільної власності подружжя та комерційним правом в албанському законодавстві: вплив Цивільного кодексу Італії

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Анотація. У дослідженні було розглянуто правові неузгодженості в албанському законодавстві про майно подружжя та комерційне право, де різні традиції створюють невизначеність у класифікації бізнес-активів, набутих під час шлюбу, що впливає на права подружжя та вимоги кредиторів. Метою дослідження було визначити чинне законодавство щодо комерційної діяльності, започаткованої та/або керованої кожним із подружжя під час шлюбу, а також дослідити невідповідності між сімейним та комерційним законодавством. У дослідженні використано комплексну методологію правових досліджень, що поєднувала правовий аналіз, вивчення судової практики, порівняльні дослідження та доктринальні правові дослідження, з особливим акцентом на аналізі національного та іноземного законодавства, судових рішень Верховних судів Албанії та Італії, а також академічної правової доктрини для оцінки перетину подружнього майна та комерційного права. У дослідженні проаналізовано Сімейний кодекс Албанії та Закон про підприємців і комерційні компанії. Ці два законодавчі акти були прийняті в різний час і базуються на різних правових моделях. У дослідженні продемонстровано, що їм бракує координації, що робить їх практичне застосування складним для албанських судів. Крім того, у дослідженні проаналізовано вплив Цивільного кодексу Італії на албанське законодавство в частині регулювання режимів спільної власності подружжя. Хоча режим спільної власності моделюється за прикладом італійського законодавства, між двома правовими системами існують певні відмінності, коли йдеться про комерційну діяльність, засновану під час шлюбу. Дослідження закладає основу для правових реформ, спрямованих на гармонізацію подружньої власності та комерційного права в Албанії, що забезпечить чіткість у розподілі бізнес-активів

Ключові слова: шлюб; спільність набуття; автономія сторін подружжя; підприємець; комерційна компанія