



Research Article

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A Comparative Analysis of Donation Contract in Albanian and Italian Contract Law

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DOI: <https://doi.org/10.2478/ejels-2024-0008>

Abstract

The donation contract, as delineated in the Albanian Civil Code, symbolizes the altruistic and compassionate ethos upon which is founded. Its primary aim is to embody acts of generosity and selflessness, reflecting the donor's relinquishment of ownership for the benefit of the recipient. The motivation behind entering this legal relationship is rooted in the donor's desire to enhance the recipient's assets, a sentiment essential for the contract's efficacy.

The transition in Albania's political landscape has brought forth a new legislative ethos, prompting adaptations to legal provisions in alignment with contemporary requirements. As property relations evolve, influenced by political and historical shifts, so too does the donation contract. Addressing the challenges encountered in donation contracts, Albanian legal scholars have sought solutions that align with evolving social dynamics. While current legislation offers broader provisions for donation contracts compared to previous iterations, ambiguities persist. Thus, there's a recognized need for enhancements and clarifications, achieved through comparative analysis of Albanian and Italian legislation on donations. This comparison aims to elucidate critical yet ambiguous aspects of donation contracts for readers and scholars.

One such issue pertains to categorizing donations accurately, determining whether they stem from unilateral acts or real contracts. The Civil Code unequivocally designates donation as a contractual arrangement. Regarding the grounds for revoking donation contracts, Albanian law delineates only two cases wherein donors can revoke donations, in contrast to Italian law, which affords donors this right in numerous circumstances. Italian jurisprudence and the previous Albanian Civil Code, unlike the current one, recognize another ground for revocation: the birth of the donor's children. This provision aims to safeguard donors who, had they known about impending births at the time of donation, might have reconsidered their decision.

Keywords: donation; revocation; contract; donor, beneficiary.

1. Introduction

The Albanian legislation explicitly outlines the donation contract in Article 761, defining it as a contractual arrangement wherein one party transfers a specified object or real right to another party without any consideration, which the latter accepts (Sallabanda, 1962). At the core of this contract lies the spirit of generosity and kindness, known as “*animus donandi*” (Tutulani-Semini, 2016), demonstrated by the donor towards the beneficiary.

Inspired by this altruistic spirit, the donor voluntarily reduces their wealth, thereby enriching the beneficiary. This benevolent intent must be present and articulated in the contract, as it cannot be assumed. Like any contract, the consent of the beneficiary is essential in the donation contract, signifying the manifestation of their will. The expression of the beneficiary’s will in the donation contract aligns with the consent required in general contracts within civil circulation.

In contrast, Italian legislation views donation as a contract through which one party voluntarily enriches the other by transferring a right or assuming an obligation. Through the donation contract, the object or right donated permanently transitions from the donor’s wealth to that of the beneficiary. The donor’s obligation to transfer ownership of the object corresponds to the beneficiary’s right to acquire ownership (Stasa and Dedej, 2023).

An initial issue concerning donation, particularly in Italian law, pertains to its classification as either a contract or a unilateral legal act. The Civil Code resolves this matter by categorizing it as a contract, albeit treated separately from other contracts in Article 769, within the fifth part, immediately following the provisions regarding the will.

While donation is classified as a contract, it is also acknowledged as a *sui generis* contract, meaning it possesses unique characteristics deviating from general contractual norms. Various rules governing the donation contract, such as those concerning ownership rights, nullity due to unlawful cause or mistake, differentiate it from other contracts and draw parallels with testamentary inheritance provisions (Palazzo, 2009).

It’s noteworthy that donation is considered a bilateral legal act, specifically a contract, rather than a unilateral legal act (Cataudella, 2005). The contractual nature of donation hinges on the necessity of obtaining consent from the beneficiary, a feature absent in unilateral acts.

Unlike Albanian legislation, Italian law addresses cases of donations made jointly to multiple beneficiaries. In such instances, the donation is presumed to be divided equally among the recipients unless specified otherwise in the deed. A clause may be included allowing redistribution of a beneficiary’s share to others if they cannot or refuse to accept it, provided that all beneficiaries consent to it and it is expressly stipulated in the donation deed.

An important question arises regarding whether the right to designate the beneficiary or the object of the donation contract can be delegated to third parties. In terms of the

donation contract's characteristics, a donation with a specified object determined by a third party among items identified by the donor or within preset value limits is valid. However, delegating the selection of the beneficiary or the object itself is generally impermissible due to the personal nature of the contract.

Italian doctrine, referring to the character of the donation as a closely personal act, considers *animus donandi* as non-transmittable, and for this reason categorically excludes the possibility of entrusting the duty of donating items to another person. Furthermore, the need to avoid the risk that the donor may suddenly find himself deprived of his property explains the invalidity of entrusting someone with the duty to donate.

The only exceptions consist of the case of donation in favor of a person whom the third party will choose among several persons specified by the donor, as well as the case when the object of the donation contract can be determined by a third party but among several items specified by the donor and within the limits of the value set by the donor. In these cases, more than a delegation of powers or the ability to act on behalf of the donor, we are dealing only with a choice entrusted to the third party, which he will make considering the specific criteria already defined by the donor. Thus, the third party is not the arbitrator of the motives of love or gratitude that constitute the motive of the donation; the donor has already assessed those reasons himself and trusts only the choice by the instructed person to determine the one who possesses the desired qualities or is the most deserving among all others.

2. The donation made in favor of a legal entity

In examining the legal framework surrounding donations made in favor of legal entity, a comparative analysis of the Albanian and Italian Civil Codes offers valuable insights. While the Albanian Civil Code does not explicitly address donations to legal entities, drawing upon analogous provisions in Italian legislation provides a basis for understanding the implications and requirements governing such transactions.

The absence of explicit provisions within the Albanian Civil Code regarding donations to legal entity necessitates a nuanced interpretation. In the absence of explicit prohibition, it can be inferred that such donations are permissible, subject to certain conditions. Certainly, the legality and validity of donations to legal entities in Albania may hinge upon prior authorization from governmental authorities. This prerequisite underscores the regulatory oversight inherent in transactions involving legal persons, ensuring compliance with statutory requirements and safeguarding against potential abuses (Hasneziri, 2024).

In contrast, the Italian Civil Code provides explicit provisions governing donations to legal entities, offering a comparative framework for analysis. Notably, Italian law stipulates that donations in favor of legal entities are contingent upon obtaining prior authorization from governmental authorities. This requirement aligns with principles of regulatory oversight and legal formalism, ensuring transparency and legality in transactions involving legal entities.

Furthermore, the Italian Civil Code delineates specific procedures for donations made in favor of legal guardian a provision notably absent in the Albanian legal framework. In such instances, the validity of the donation is contingent upon obtaining final approval from the incompetent party, thereby conclusively severing the relationship between the latter and the guardian. This procedural safeguard serves to protect the interests of all parties involved and underscores the importance of due diligence in transactions involving guardianship.

3. Revocation of the donation contract

In cases where the donor donates in favor of the beneficiary, disposing in their favor without expecting anything in return, the beneficiary bears a moral obligation to express gratitude towards the donor for their generosity. However, if the beneficiary displays ingratitude towards the donor or their close relatives, the donor reserves the right to seek the revocation of the donation due to this ingratitude.¹ It's important to note that the donor's right to seek revocation applies only to donations that are unconventional and not made in exchange for compensation.²

Unlike Albanian legislation, Italian law categorizes certain donations as irrevocable due to ingratitude, including atypical donations; donations made in exchange for compensation; and donations made in anticipation of marriage (Cataudella, 2005). Additionally, Italian doctrine introduces another case for revocation not found in Albanian legislation, which pertains to the survival or birth of children.³ The Civil Code of 1929, unlike its current counterpart, lists the birth of a child as one of the grounds for revocation of the donation contract.⁴

Hence, donations made by individuals without children or living descendants at the time of donation may be revoked if the donor later has a legitimate child, even posthumously, or if a natural child born after the donation is legitimized through subsequent marriage. The donor's lack of knowledge regarding the existence of children at the time of donation is a crucial factor. Revocation may also occur if the child is conceived at the time of donation, provided the donor was unaware of the conception. However, in the case of non-birth of the children, the action for revocation is barred after a five-year period from the birth of the child (Cataudella, 2005)

The absence of this provision in the current Albanian Civil Code prejudices the rights of children born to the donor, who at the time of making the donation were not aware

¹ For more info see: Judgment No. 2293 of November 4, 2011, Civil Cassation. The Italian Court of Cassation, has aligned with the opinion of the Court of Appeal of Rome, which recognized the ingratitude of the wife - as the reason for the revocation of the donation contract - precisely due to the fact that she had formed an extramarital relationship for years and during the marriage had received many gifts from her husband until the moment she abandoned her spouse for her lover at a time when he needed her help and care more than ever.

² Article 771 of the Albanian Civil Code.

³ Article 803 of the Italian Civil Code.

⁴ Article 1510 of the Albanian Civil Code of 1929.

that they had children or would have them in the future. Therefore, the provision of this specific case of revocation would best protect the interests of the donor's children. The revocation of a donation due to the subsequent birth of children or descendants, responding to the need to allow the donor to reconsider the opportunity of the liberal attribution in the face of the birth of a child, or the subsequent knowledge of their existence, in function of the obligations of maintenance, instruction, and education that derive from such an event, is precluded if the donor was aware, at the date of the act of liberality, of the existence of a child or legitimate descendant. Nor does this provision conflict with the Constitution, not determining any unjustified disparity of treatment or violation of the rights of subsequent children, who are protected only indirectly and indirectly, as the interest protected by the norm is to allow the parent to meet the fundamental needs of the children, so it is precisely the absolute absence of descendants at the time of the donation that legitimizes the revocation, in order to ensure legal relevance to an intimate and profound feeling of the human being, which may not have been adequately evaluated by the donor who has not yet had children, differently from the one who, having already experienced the feeling of filial affection, has nevertheless determined to benefit the beneficiary, although aware of the obligations arising from parental status.⁵

This ground for revocation also does not operate "*ipso iure*", but only because of an action in which the donor is entitled to exercise, unless the child or descendant has died, as the revocation is sanctioned in their interest. The action for revocation due to the subsequent birth of children must be filed within five years from the day of the birth of the last child born in the marriage or descendant, or from the notification of the existence of the child or descendant, or from the acknowledgment of the child born out of marriage. The donor cannot initiate or continue the action after the death of the child or descendant.⁶

The donor has the right to request the revocation of the donation not for every type of action that the beneficiary may have taken against them, but only when: they intentionally killed or attempted to kill the donor, spouse, children, or parents, or when, without right, they fail to provide the donor with food when required by law (Nuni, Mustafaj, Vokshi, 2008).

In accordance with the provision of the Albanian Civil Code, the concept of "serious injury" required for the revocation of a donation due to ingratitude is delineated by an externally observable manifestation. This involves the clear demonstration to third parties of a sustained sense of disdain for the moral character and disregard for the dignity of the donor by the recipient. This sentiment stands in direct contrast to the expected expression of gratitude, which, according to societal norms, should be inherent in the recipient's demeanor. It is important to note that the legitimacy of the recipient's conduct does not alleviate the severity of the injury inflicted upon the donor.

In addition to the cases outlined by the Albanian legislator, Italian legislation

⁵ For more info see: Judgment No. 5345 of March 2, 2017, Civil Cassation, Section II.

⁶ Article 804 of the Italian Civil Code.

encompasses further scenarios that grant the donor the right to request the revocation of a donation. The Italian Civil Code delineates instances such as: falsely accusing the donor, spouse, children, or parents of committing a criminal offense punishable by at least a 3-year sentence, with such accusation being subsequently proven false by a final court judgment (a provision similar to our legislation is provided for in matters of inheritance); the recipient being convicted of severe insults against the donor; intentionally causing significant damage to the donor's property; the discovery of a child of the donor of which they were unaware at the time of the donation, among others.

Legal precedent establishes the behavior of the recipient after taking possession of the donated item or contractual right as one of the conditions for seeking the revocation of the donation contract. This behavior, if deemed detrimental to the honor and reputation of the donor and resulting in substantial moral harm, is considered significant. The Italian Court of Cassation has endorsed this perspective in one of its rulings, wherein it deemed the wife's deceitful conduct towards her husband, involving clandestine encounters with a lover in the marital home without his knowledge, as constituting serious injury.

Italian legislation also provides for other different cases from those foreseen by the Albanian legislator, which give the donor the possibility to request the revocation of the made donation.⁷ The Italian Civil Code mentions cases such as: making a false accusation against the donor, spouse, children, or parents that these persons have committed a criminal offense for which they would be sentenced to at least 3 years, and this accusation is declared false by a court decision of final judgment (a provision analogous to our legislation is provided for inheritance); the beneficiary is found guilty of serious insults against the donor; they seriously and intentionally damage the donor's property (Maroi, 1941); the existence of a child of the donor about whom they had no knowledge at the time of donation, etc.

In case of damage to the donor's property, a crucial consideration pertains to the requisite intent underlying the causation of property damage by the beneficiary. Specifically, the determination of liability hinges upon whether the damage resulted from the beneficiary's intentional actions or mere negligence. This distinction delineates the threshold for establishing culpability and potential legal ramifications in addressing the resultant harm.

Jurisprudence sees as one of the conditions for seeking the revocation of the donation contract the behavior of the beneficiary after taking possession of the donated item or contractual right, behavior that may affect the honor and reputation of the donor by causing them significant moral damage. This line of thought has also been upheld by the Italian Court of Cassation in one of its decisions⁸, which stated: "The disrespectful and deceptive behavior of the wife towards her husband, who without his knowledge met her lover in the joint matrimonial home, is considered a serious injury."

⁷ Article 801 of the Italian Civil Code.

⁸ For more info see: Judgment No. 14093, of May 28, 2008, Civil Cassation.

4. Conclusions

In conclusion, we appreciate that many of the issues discussed in this analysis indicate several shortcomings and discrepancies in the provisions and application of the law regarding the contract of donation in Albanian legislation compared to Italian law. The provisions in Albanian legislation seem not to provide it with the necessary approach and support to successfully and effectively address the issues related to the ownership, form, and effects of the donation contract.

We recommend a comprehensive review of the current provisions and practices of Albanian legislation regarding the donation contract to address these discrepancies and improve legislation in this area. This would ensure a more sustainable and clear approach in addressing issues related to donations, including the protection of the rights of all parties involved in this type of contractual relationship.

Another aspect that distinguishes Albanian legislation from Italian law is the lack of provisions for cases where the donation contract is made in favor of a guardian. The Italian Civil Code provides that in this case, the donation will be valid only after obtaining the final approval of the person who was incompetent. This provision in Italian legislation ultimately ensures the relationship between the person making the donation and the guardian.

If we look at the context of revoking donations, Italian legislation provides for an additional case for the revocation of the donation contract, which is not provided for in the Albanian Civil Code. This case is the birth of a child after the donation. The donations, made by those who did not have or were not aware of having children or descendants at the time of donation, may be revoked due to the appearance or existence of a child or descendant of the donor. They may also be revoked due to the acknowledgment of a child. Revocation may also be sought even if the donor's child had already been conceived at the time of the donation.

This means that donations made by individuals who did not have children at the time of the donation can be revoked if the donors later have a child, even after their death, or in the case where a subsequent marriage legitimizes a child born after the donation. The preconceived notion of this specific case of revocation will best protect the interests of the donor's children if they are affected by the donation.

The absence of provisions for the donation contract due to marriage, a well-known and widespread form of donation in our society, represents another deficiency in the Albanian Civil Code. This is an aspect that is particularly important for family law and the nature of the institution of marriage in our society. It is difficult to explain why the legislator has not addressed this particular type of donation, which is common and often used in legal practice and in people's daily lives.

In conclusion of this analysis, it is evident that the donation contract, as provided for in Albanian legislation, presents a contract that requires a thorough review of the legal framework. Despite the existing provisions and predictions in the Civil Code, many aspects of this contract remain unclear or outside the treatment, thus creating the need for improvement in this legal segment in the future.

References

- Albanian Civil Code.
Albanian Civil Code of 1929.
Italian Civil Code.
Judgment No. 14093, of May 28, 2008, Civil Cassation.
Judgment No. 5345 of March 2, 2017, Civil Cassation, Section II.
Judgment No. 2293 of November 4, 2011, Civil Cassation.
Cataudella, A., (2005). Successioni e donazioni. La donazione, vol. V, Giapichelli Editore, Torino.
Hasneziri, L. (2024). Terms of exclusion or limitation of contractual liability under English civil law *Academic Journal of Business, Administration, Law and Social Sciences, Vol. 10. No. 1.*
DOI: <https://doi.org/10.2478/ajbals-2024-0003>
Maroi, F., (1941). Delle donazioni, Codice Civile, Commentario, Firenze.
Nuni, A. Mustafaj, I. Vokshi, A. (2008). E drejta e detyrimeve Pjesa I. Tirana.
Palazzo, A., (2009). Il contratto di donazione, Utet Giuridica.
Sallabanda, A. (1962). E drejta e detyrimeve (Pjesa e përgjithshme). Tirana. Biondo Biondi, "La donazione, Trattato di diritto civile italiano", Trattato Vassalli, Torino, 1961.
Stasa, I. Dedej, A. (2023). Transitional Justice as a tool for polarization in Albania. *European Journal of Economics, Law and Social Sciences, Vol. 7. No. 3.*
DOI: <https://doi.org/10.2478/ejels-2023-0012>
Tutulani-Semini, M. (2016). E drejta e Detyrimeve dhe e Kontratave, Pjesa e Përgjithshme dhe Pjesa e Posaçme. Skanderbeg Books. Tirana.