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Historical Background on Marriage Contract Development in Albanian Legislation

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Abstract:

The historical study of institutional rights are crucial regarding the progress been through years till the final ratification towards the modern legislations. The time related to this study is based on the first hint of the monogamy contract since 1929 until 2003. With the implementation of the Civil Code in 1929 during the governance of King Zog, not only the monogamy contract, but also other institutions got sanctioned, like other components related to the civil rights.

During the communist regime, all the human rights suffer regression, consequently in the legislation of the monogamy contract; there is no footprint of the wealth administration. This period of relapse is for study purposes is deciphered as an adjournment of the spouses free will and rights to decide for their wealth harbor.

Regardless the progresses achieved towards the democratization of human rights in 1991, certain elements such as monogamy contract, are still not introduced to this new legislation. The influence on this phenomenon are not only transit but they have a shown a stability of 12 years till the actual prearrangement of the Family Code of 2003 regarding the monogamy contract. Rigorously, during these intersections from a period to another, which some of them have distinctively different phases but still with mutual elements with each other, prioritizes the early appraisal and the revolution

during these years of the monogamy contract in the Albanian legislation.

Key words: Marriage contract, agreement, dotal property, paraphernal property.

1. INTRODUCTION

The marital property regime has undergone constant changes and development since 1929 when the Civil Code of King Zog was legitimized until the adoption of the Family Code. The historical-judicial analysis of marital property establishment institute, from the Kingdom of England (1929) Civil Code until the current Family Code, serves to study the evolution that has undergone the legal regulation of this institute in Albania. This study is crucial due to changes underpinning policy-making rights by regressing and bypassing innovations and achievements.

2. Marriage Contract Settlement during 1929-1945

The Civil Code of the Albanian Kingdom came into force on April 1, 1929, also known as the Civil Code of King Zog. This code contained a moderate spirit; not only because King Zog himself wanted his kingdom to become the most advanced kingdom of the time, but also because it was drafted based on the French Civil Code of 1804, known as the Napoleon Code.

Following there is a detailed background of Albanian kingdom legislation. It should be said that the years of the kingdom have been golden years with regard to the development of the justice of the time. Legislation was greatly advanced in all fields, including the family. We say advanced because if we consider the social conditions before it is approved and what it has achieved, it is a relatively considerable difference.

King Zog's Civil Code at that time was of great importance because for the first time it established legal basis on the family relations that would be unique throughout Albania. Also, the Civil Code was very important since the provisions for marriage were unified for the first time, and the law recognized only the marriage celebrated under the Civil Code of time, while marriages celebrated in the church or in any other form would not enjoy the legal protection by law[1].

2.1. Marriage Contract

The special and far-sightedness of time was the Marriage Contract. In order to be valid, the Marriage Contract should be signed with a public act in front of a notary as well as before the act of marriage[2].

The Marriage Contract provided for the arrangement of property between spouses. Also, based on the principle of immutability of marital property regime, during the marriage, the Code provided that the marriage contract could only be modified prior to the marriage bond. During the marriage, any possibility of changing the marital property regime was prohibited[3]. The current Family Code provides for the possibility of changing the marital property regime during the marriage, provides that at least two years shall pass from the previous property regime[4].

The reason for which the marriage contract could not be changed during the period of marriage was based on three main reasons: ***first***, the marriage contract was considered a family pact (agreement), where not only the future spouses participated, but also other persons such as the parents of future spouses, or other persons who donated items to spouses, so that its modification could not be left to the mere will of the

[1] Civil code, 1929, article 1324.
[2] Civil code, 1929, article 1325.
[3] Civil code 1929, Articles 1328 and 1376, paragraph 2.
[4] Family code, Article 74/1

spouses; ***Secondly***, the immutability was envisaged to protect the weaker husband (wife) who, during marriage, could make an inadequate choice and obey the other spouse in his request to change the marriage contract; ***Thirdly***, the principle of immutability also guaranteed the protection of third parties when they contracted with spouses[5].

In the context of the ability to conclude the marriage contract, the Civil Code of Zog, sanctioned the well-known principle of "*habilis ad nuptias habilis ad pacta nuptialia*", which is also found in current legislation (French, Italian, Swiss Civil Code). A different arrangement is made by the current family code, Article 70, which stipulates that, in the case of Child marriage, according to article 7, paragraph 2, the marital property regime of the legal community applies until it reaches the age of 18, after which a change in the legal property regime may be required.

Dotal regime is the only contract property regime adjusted by the Civil Code. In the dotal regime, the wife's property consisted of two parts, Dotal property and the Paraphernalia property.

Dotal Property was the wealth that a wife or others gave or promised on the occasion of marriage, in order to meet the needs of the common life of the new family.

Paterfamilias only gained the possession of "manus" on the dotal property and in no case ownership. As for other items not included in the Dote that the woman may have, remains her property. The range of non included property, which have been referred to as *bona recepticia*, and later *bona extra dotem,* is known by the Greek term παράφερνα (pronunciation paraferna), meaning paraphernalia property (Donatuti, 1936). Comparing this term with today's provisions, it is clearly understood if contrasted with personal property, in the narrowly personal use of women, created after marriage bond

[5] Colomer André, Droit civil. Régimes Matrimoniaux, (2005)

and not by the dotal property, so they are extra dotem. The husband was entitled to the exclusive administration of dotal property and collection of its benefits. Although the woman was excluded from the right to administer her property, if the dota was misused by the husband or it was used solely for the payment of his personal debts, the wife could turn to the court of first instance and request to have her administer the Dota. If the court decides so, then it passed from the administration of the husband or both of them, as provided for in the relevant marriage contract, in the wife's administration[6]. Also, the seclusion of the Dota could be requested by the wife even when the personal seclusion of the husband or both of them was established. When the court decided on seclusion, the woman was obliged to contribute according to her economic power to family expenses and to the wellbeing and education of their children. In this case, the woman took the free administration of her property. The court practice of the Court of Dictation, regarding the Dota is mainly related to the separation of the Dota or its influence on relations with third parties. In Judgement no. 168, dated 07.09.1938, the Court of Dictation, during the examination of the case with subject matter "Cancellation of the contract of sale of a house and a shop", shows that; the house and the shop owned by the male spouse was sold to his wife in the deception of the plaintiffs' rights so that the plaintiffs would not take the payment of money that the defendant owed to them.

While the paraphernal property that was the wife's property was not included in the Dota, it would remain wife's property during the entire duration of the marriage and the husband did not gain any right over it. Referring to article 1370 of the Civil Code of 1929, the woman enjoyed the right to possess, administer and enjoy her paraphernal property. Exceptions were made only when the woman was the one who personally ordered her husband to take her property. In

[6] Civil code, 1929, Article 1361.

contrast to the world, the husband had neither the right to administer nor demanded her credits if he had not been authorized by his wife[7]. Referring to the interpretation of the United Colleges of the Supreme Court, Unifying decision, no. 5, dated 20.01.2009, to distinguish which paraphernal property should be analyzed from the rest of the property if the provision of the property was made and what assets were included. Thus, excluding non-paraphernal property, paraphernal property were all the good things of a married woman that were not defined as dotal.

Based on the interpretation of the Supreme Court, the paraphernal property would be:

a) All the property that the woman had at the moment of marriage, with the exception of the dotal property;

b) Property acquired by a woman, during marriage, with any title, whether by succession, donation, or as a result of her work.

3. MARITAL PROPERTY REGIMES DURING THE COMMUNIST PERIOD 1945-1990

With the end of the Kingdom of Albania in 1939 and the coming of the Communist Party in 1941, legislation changed, which was reflected in family relations as well. "Statement on Citizens' Rights" can be considered as the first act related to family law in this period, adopted at the Berat meeting on October 23, 1944, because among others it stated that the democratic power of the Albanian people guarantees: "Equal rights of wife with those of the husband, both in the political life of the country and in the social activity ..."[8].

The law "On marriage" governed the property relations between spouses, the way of sharing spousal property, the way

[7] Civil code, 1929, Article 1370.

[8] Zaçe Valentina, *Marrëdhëniet martesore sipas legjislacionit shqiptar*, Tiranë, 1996.

of administering it, and granting spouses freedom to maintain the family economy. This law sanctioned equality with regard to the rights of men and women during a common life[9].

Until the entry into force of the Civil Code 1965, the Law "On Marriage" and the Decree "On Property" No. 2083, adopted on August 06, 1955, provided the legal adjustment of property relations between spouses. This decree specifically foresaw the co-ownership between spouses by improving the regulation that the Law "On Marriage" did. This decree stipulated that the property acquired by the spouses during their marriage entirely belongs to the spouses for their personal use as well as the objects and tools of exercising their activity or craftsmanship[10].

As a conclusion, it is seen that from 1945 onwards, it is not encountered any element of the marriage contract since even more important concepts are lost, there was no ownership right in the literal sense of the property right as a real big right which is unlimited in its enjoyment. Also in this period, there was no space for legal actions as it is today, the possibility of creating new law institutes was completely limited, and no legal transactions were needed for transactions of properties, because properties were lacking.

3.1. Family Code of 1965

By Law No. 4020, dated June 23, 1965, the People's Assembly adopted the Family Code of the People's Republic of Albania, which also constituted the first family code in the Albanian legislation. This code entered into force on 1 January 1966 in conjunction with the marital property regime, foreseeing a similar arrangement with the two abovementioned laws[11].

The legal property regime imposed by each of the spouses during the marriage becomes a common property of

[9] Law No. 601, dated 18 May 1948, "On marriage", Article 3.
[10] Zaka, Tefta, *Regjimet pasurore, jurisprudencë shqiptare dhe disa sisteme krahasuese. Disertacion,* Tiranë, 1999.
[11] The Law "On Marriage" and the Decree "On Property", No. 2083.

both spouses and any contrary agreement is invalid[12]. This shows that spouses could not enter into agreements that would damage each other's property interests. Referring to the reasoning of the Supreme Court Civil College[13] it is quoted:

> "The defendant's claim that many of the items earned during the marriage claimed by the other party are only purchased with his income and are therefore not subject to the division, is not fair. During marriage, each spouse can buy household items with his personal income, but that does not mean that these items belong just to him/her. According to the Family Code, that property acquired during marriage with the earnings from the work of both spouses is common and any contrary agreement is considered null and void by the law."

For the above, if we interpret Article 45/2, it is understood that each agreement between spouses, which would have as its object the definition of a marital property regime different from the legal regime, would be invalid, ie null and void, it shall prohibit the contractor adjustment of marital property. This means that the legal regime between the spouses was a kind of co-ownership in parts.

From the above analysis, regarding the legal nature of the marital property regime provided by the Family Code of 1965, we reach three conclusions: ***firstly***, the Regulatory Norms were order provisions, as spouses were prohibited any kind of agreement that established a property regime other than the legal one; ***secondly***, the legal regime was a partial co-ownership regime, where only the wealth acquired through work was included in the community, by marriage, by each spouse and ***thirdly*** this law does not provide anything for the marriage contract that spouses may enter into between them.

[12] Family code, 1965, Article 45/2
[13] Instructions and Decisions of the Supreme Court, 1973, p. 302.

3.2. Civil Code of 1981

People's Assembly with law no. 6599, dated 29.06.1982, adopted the Second Family Code, which entered into force on 1 September 1982. The property relations of the spouses were governed by the Civil Code[14] in the chapter "Co-ownership between spouses". But the only organic law governing the property relations of spouses continued to be the Civil Code of the year 1982, which provided them in Articles 86 and 87[15]. From an interpretation of these two provisions, we can say that: The co-ownership system was accepted where items, savings deposits and anything else acquired by spouses during marriage referred to in Article 86 were considered in joint ownership. This form of regime was mandatory because it was provided by law that any agreement between spouses that violated the mandatory spouses' regime would be considered null and void. Therefore, this part shows that this code did not change from the Family Code of 1965.

Regarding changes that the Civil Code of the year 1982 brought about the joint ownership of the spouses, there were two directions:

a) Accepted, co-ownership in part for spouses and the presumption of equality of parts;

b) The circle of co-owned objects / items was expanded, as they did not include only the assets acquired by the spouses during their marriage, but also the items, savings deposits and anything else acquired by the spouses during the marriage[16].

4. THE TRANSITION PERIOD 1990-2003

The '90s for the Albanian people are very important years as they revolutionized every area of life. The primary change was

[14] This Code entered into force on 1 January 1982.
[15] Omari Sonila., E drejta Familjare, Tiranw, 2008, 106.
[16] Mandro-Balili, Arta, Meçaj Vjollca, Zaka Tefta, Fullani Ariana, *E drejta familjare,* 2006, 312-314.

in politics. Pluralism and the first steps of democracy brought fundamental changes to all legislation. Private property was sanctioned and then all the adjustments that followed. All areas of law were influenced by this change, including family law and all marital wealth regimes.

4.1. Period 1992-2003

With the overthrow of the socialist regime and the establishment of a regime where private property was the basic foundation, the property relations between spouses also changed. Until that time, marital property consisted mainly of household use items, income from work, and any other wealth acquired through donation or inheritance.

The developments of the 90s brought about the discovery of private property[17]. According to the constitutional provisions, the country's economy was based on the variety of properties, the free initiative of all economic entities, and the state's regulatory role.

The legal regime of joint ownership in spouses has a mandatory character and can not therefore be ruled out or amended by agreement of spouses. In addition, any contrary agreement is absolutely invalid, i.e. any agreement that excludes or limits the scope of action or the volume of this co-ownership set by law.

In addition, it is null and void any spouses' agreement, which provides that this joint ownership will not be applied at all, or will be limited to items that would be earned during marriage with the income from work, not extending to the assets that the husband or wife will gain through inheritance or donation or through other legitimate means of gaining ownership. So, in any case of donation, we will have the inclusion of this donation in the spouses property if it is during

[17] Law No. 7491, dated 29.04.1991 "On Major Constitutional Provisions", Article 10.

marriage, regardless of the time of donation, at the beginning or at the end of the marriage[18].

The entry into force of the Civil Code of 1994 did not bring any change in the regulation of the marital property regime. Pursuant to the final provisions of Article 1167, the entry into force of this code brought about the repeal of the Civil Code of 1981, with the exception of provisions governing co-ownership between spouses (Articles 86 and 87 of the Civil Code of 1981). Consequently, property relations between spouses continued to be governed by Articles 86 and 87 of the Civil Code of 1981, until the entry into force of the Family Code, January 21, 2003.

However, from the provisions of the Family Code there is not a definition of a marriage contract.

5. MODERN PERIOD

As a conclusion, legal relations created between spouses, besides the personal nature, have also the property nature. In this period, it is seen that Law No. 9062, dated 08.05.2003 entered into force, adopted the Family Code, which is currently used. Moving from a state-based communist system, besides bringing important changes that appeared immediately in the way of life in social relations, brought also changes in property relations between spouses. Life underwent a change not only from a social, political, but especially economic point of view, as everything was owned by someone (apartments, properties no longer owned by the state). Family law was subject to change, which is reflected above all in the marital property regime, which appears different from the previous regime. According to Family Code, property wealth regimes may be legal when all spousal property relationships are adjusted under a regime

[18] Xhafaj, Pranvera, Evoluimi regjimeve Pasurore Martesore në të drejtën Shqiptare. Rezultate dhe objektiva Tiranw, 2010

provided for in the family code or contractor, when this regime is resolved by agreement between the spouses.

5.1. Contract property regime

Unlike the previous legislation, which provided for a one-of-a-kind co-ownership regime, the Family Code of 2003 allows spouses to choose by agreement a regime other than what the code envisaged. Following is an analysis of the marriage contract referring to the provisions of this code.

5.2. Marriage contract

The legal concept of marriage contract institute is first mentioned in the Civil Code of King Zog I, not surprisingly, knowing that this code was oriented from France, Switzerland and Italy, but on the other hand a completely new attitude regarding the concept of this institute, taking into account all the competitive elements of our society at that time.

Specifically, Article 1321, "M*arital relations, with regard to property are governed by the conventions of the parties and by law*," makes it quite clear that the existence of a marriage contract is a notion of property management that spouses determine during marriage and have full freedom to determine the destination of their property.

This provision is not only legislative but also social innovation, showing the subjects of the "owner" right of their property and free to determine their ownership without being conditional on marriage.

Below it is seen that just the Family Code of 2003 brought forth the novelty to which we will further expand, according to which the husbands can now freely determine the property regime and are no longer subject to marriage necessarily and the joining of properties and the spouses co-ownership, which is joint ownership in its entirety[19].

[19] Civil code, Article 231.

The Family Code in Article 66 states that: *"The marital property regime of spouses is governed by law, in the absence of a special agreement whereby the spouses provide for the regime they wish, which should not be in contradiction with the provisions of this Code and the relevant legislation".*

So, it is clear that through an agreement, spouses have the opportunity to predict what their future marital regime will be, so much so that it is not in contradiction to the respective legal provisions. This right conferred on spouses enables the respect of each individual's freedom to adjust, according to his will, property relations arising from marriage. When analyzing the marriage contract naturally the question arises: If anyone thinks of the divorce before getting married, then what it the purpose of marriage? We know that jurisprudence is a human science that manages hypothetically human relationships, anticipating the possible consequences of actions by individuals (in this case spouses). These predictions have been created by the lawmaker to help solve problems and adjust the consequences precisely from the relationships they create. This need to have a wealth regime different from the previous one came as a result of the problems that previous regimes have brought. For example, the legal property regime since it was automatically applicable from the moment of marriage, it did not allow spouses to take up their share, since in case of divorce everything was divided in half (even though one spouse might not have contributed in any way to the property being shared).

The Marriage Contract brought a revolution in marital relationships. It helped spouses be more clear in how they would look at their property during or even after the end of the marriage. It changed the mentality of the two spouses from the point of view of marriage and above all, their property[20].

[20] Xhafaj, Pranvera, *Evoluimi regjimeve Pasurore Martesore në të drejtën Shqiptare. Rezultate dhe objektiva,* Tiranë, 2010

6. CONCLUSION

Until 2003, the legal establishment of joint ownership in spouses was of a mandatory nature and could not be excluded or altered by agreement of spouses.

Thus, each of their opposite agreements was absolutely powerless, which excludes or limits the action or the intensity of this joint-ownership law.

The legal property regime was automatically applicable from the moment of marriage bond. This excludes every possible opportunity for spouses to take their stake, since in the case of divorce everything was divided halfway (even if one of the spouses had not contributed to the property that would be shared),

The entire deficit and problems brought by the old establishments has prompted the urge for a different government of the assets.

The 2003 Family Code allowed spouses to choose by arrangement a different establishment than the one provided by the code.

The legal concept of the marriage contract institute is first encountered in the Civil Code of King Zog 1st was a revolution in conjugal relations.

It changed the role of the two spouses in a marriage and related to their property, since clarified the image of how manage their wealth during or even after the end of the marital year.

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