

JOINT PROPERTY OF SPOUSE AND ITS DIVISION - THE CASE OF KOSOVA

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Abstract

The number of violated and discriminated women in Kosovo has increased in the recent years and as a result also the number of divorces has increased. Even though the laws provide equal gender, a significant number of women have encountered injustice during the division of joint property in marriage, which has imposed the change of family law, through which is done the division of joint property of spouse. The aim of this paper is to evaluate the effectiveness of changing the law that has been made in favor of unemployed women and how it will have an effect on their well-being after divorce. Also, it will assess how this law will be interpreted by judicial bodies and whether this will be a disadvantageous law amendment for women working in public or private sectors, as they work outside the home and make a significant contribution to home affairs. The data to be used will be qualitative obtained from already published documents and data obtained from women who are undergoing or have passed the divorce procedure, the experiences they had and the rights they have earned.

Keywords: joint property, spouse, equal gender, family law, amendment of family law, spouse contribution.

JEL Classification: K10, K11

1. Introduction

Man born, grows, educated and dies in family. The family is considered as the core of the society, which is also foreseen in the Declaration on Human Rights, which states that the family is the natural and fundamental nucleus of society and has the right to protect from society and the state². This declaration has been adopted and ratified also in the Constitution of Republic of Kosovo, giving priority to the implementation towards legal provisions of public institutions³. Men and women at a certain age of life (in our legislation is 18 years of age) are entitled to marry and form a family without any discrimination and also the right to treat equal by law⁴. Marriage as an act of union of a man and woman is not intended only the birth of children through which mankind's is ensured continuity but there are many other purposes, as the purpose of common life and family creation, spouse help and social purpose⁵. Marriage as a family law institute produce legal effects regarding to the legal status of spouses and also produces legal effects regarding to personal and property rights and obligations of spouses⁶. The rights and property obligations of spouses are related to the creation of property from the moment of marriage establishment. Exactly here is a distinction between the separate and joint property of spouses.

According to the applicable law of family in Kosovo, as a separate property of the spouses is considering the property that the spouse belonging at the time of entering into wedlock, the property acquired during the duration of the marriage through inheritance, donation or any other form of legal acquisition, a product of art, intellectual work or intellectual property⁷.

While the other property relationship that is created between spouses is the property created by the marriage bond. According to the same law, as a joint property of spouses is the property acquired during the course of marriage, as well as income derived from such property, including

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² United Nation, 1948, December 10, Retrieved from Universal Declaration of Human Rights: <https://www.un.org/en/universal-declaration-human-rights/index.html>, consulted on 1.10.2020.

³ Assamble of Republic of Kosova, 2008, April 09, *Official Newspaper of Republic of Kosova*. Retrieved from Constitution of Republic of Kosova: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>, consulted on 1.10.2020.

⁴ United Nation, *op. cit.*, 1948.

⁵ Podvorica, H. (2011). *Family Rights*. Prishtina: University of Prishtina, p. 78.

⁶ Aliu, G. (2007). *Family Rights*. Prishtina: University of Prishtina, p. 75.

⁷ Assembly of Republic of Kosovo, 2006, September, 01.09.2006, *Official Journey of Republic of Kosova*. Retrieved from Family Law: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2410>, consulted on 1.10.2020.

intangible and obligations rights and property acquired jointly through gambling game⁸. It is precisely this property that will be divided after the divorce. This property can be shared by agreement between spouses or even through a court decision⁹. This property is considered as joint property of spouse because it is considered to be created jointly with the joint work of the spouses. It should also be noted that this property is considered joint because both spouses, husband and wife, participate with their contribution to create of this property, regardless of the way in which they contribute. During married life, some spouses due to problems that may have, decide to end their marriage. In divorce proceedings, apart from the divorce decision, it is also decided to divide the joint property of the spouses.

2. Literature review

According to professor Abdulla Aliu, the joint property of the spouses is considered the property created with joint work of spouses during the duration of marriage union¹⁰. In this part, to consider the joint property of spouse, are required two conditions, the joint work of the spouses and the existence of the marriage, so that, this property is considered as joint property and in the event of divorce this property will be separated equally between the spouses. According to Mandro-Balili, the joint property of spouses is considered any property gained during marriage, even if only one's spouse's income and as such should be separated equally between the spouse¹¹.

According to Whitbread, the marriage community is a pooling of fortunes on an equal basis, according to which each spouse acquires half of the property created during marriage, excluding the gifts or inheritance that one spouse wins, as it does not make any effort to receive that gift or inheritance. Also, a spouse receives compensation for his/her non-financial contribution to the marital community, such as housework and childcare and missed opportunities due to such contributions¹².

3. The division of the joint property of spouses under the Family Law in Kosovo and the amendment of law

According to the Family law of Kosovo, is foreseen the division of the joint property of spouses, which can be done at any time with agreement between spouses (Family Law, No. 2004/32, Article 53, 2004). Through this agreement, spouses have the opportunity to determine, through their free will, how their jointly-created property will be shared. This way of separating property I consider is the best choice since the spouse knows best how much they have contributed to the creation of that property by not allowing the court to decide on the division of property, where it is always necessary to keep in mind that the court can make a mistake around the assessment of the spouse's contribution, as it cannot fully and accurately assess the spouse's contribution to the creation of the joint property of spouse.

Apart from the division of joint property by agreement, the family law of Kosovo has also regulated the way of sharing the joint property of spouses even in cases where spouses fail to make arrangements, which in practice happens very often. Because of the strained relations of the spouses at the moments of the divorce they fail to make arrangements for the division of the joint property and this division of the property is left to the court. The court despite the decision to divorce, also decides on division of the joint property (Family Law, No. 2004/32, Article 54). In the same article of the law it is stated that the court, the decision to divide the spouses' joint property should be based on the spouse's contribution, assessing not only the personal income and the income of each partner, but also the assistance of one spouse to the other spouse, child care, home affairs, property care and maintenance as well as any other form of work and co-operation related to the administration,

⁸ Ibid.

⁹ Ibid.

¹⁰ Aliu, G., *op. cit.*, 2007, p. 76.

¹¹ Mandro-Balili, A. (2014). *Discrimination gender issues in family and marital affairs*. Tirana: School of magistrates & UNDP, p. 121.

¹² O'Brien, C. R. (2010), *Integrating Marital Property into a Spouse's Elective share*, „Catholic University Law Review”, 623.

maintenance and enhancement of the joint property.

Viewed in general we can conclude that the joint property of spouses should be divided equally, because the spouses jointly, according to their ability, contribute to the creation of this property. According to the commentary of the Family Law in Kosovo it is stated that the joint property of spouses should be shared equally. But if one of the spouses disagrees with this equal division, then each individual's contribution to the creation of joint property of spouse must be assessed, which means that each one gets what he/she belongs to. The court in this case must make the assessment of the contribution of each spouse and this assessment will be made not only by taking into consideration the personal income and other monetary income but also the assistance that the spouse affords to the other spouse, childcare, the management of housework, the maintenance and maintenance of property and any other form of work and cooperation related to the administration, maintenance and enhancement of property. Also, in this commentary it is stated that the court made this assessment based on the statements and the evidence that each spouse brings and also on the evaluation made by the experts¹³.

This is precisely the part where Kosovar women have encountered in discrimination by not properly assessing their engagement in housework and childcare because it is in court proceedings to require from them to testify through the evidence for the contribution made to the creation of joint property. In a judgment given by the Basic Court in Prizren it was rejected as unbased the claim of the defendant for compensation in the name of the contribution given for the creation of the joint property with the reasoning that the defendant/wife did not provide any statements regarding the existing the joint property and the contribution to the creation of joint property of spouse¹⁴.

Unlike Kosovo, each state has legal arrangements for sharing the joint property of spouses. Depending on whether the state belongs to the community state or separate-property state system, it is distinguished the possible of the division joint property of the spouses. In states that treat property as a community property, it is considered that married property is the joint property of spouses irrespective of the title held (or who has purchased or possesses the property technically) and all assets are allocated in equal part. While states belonging to the separate-property state system take into consideration legal titles (who belongs the property documents), yet still division their joint property according to equal guidelines. Both legal systems are based on spousal property sharing by providing spousal support, rehabilitation and other reimbursement form¹⁵.

4. Amendment of the family law - what is considered as a joint contribution of the spouses

The woman is considered as the main family pillar. Although its position in the sphere of property has been strengthened through international conventions. The Universal Declaration of Human Rights and the Constitution of the Republic of Kosovo states that no one should be arbitrarily deprived of his property¹⁶. The International Convention on the Elimination of All Forms of Discrimination against Women proclaims equal rights between spouses in relation to property rights, administration and disposition of property¹⁷ again that, woman in Kosovo does not enjoy full property rights.

The family law of Kosovo and the Law on Gender Equality state that men and women have equal participation in all vital areas including the right to property and that the common property of spouses is the property that is created through the joint work of the two spouses, but again the woman in Kosovo is left without property.

In 2016, the Government of Kosovo has issued Administrative Instruction no. 03/2016 on Special Measures for the Registration of Joint immovable property on behalf of two spouses, which

¹³ Gashi, H., Aliu, A., & Vokshi, A. (2012). *Commentary of Family Law*. Prishtina: Giz, p. 142.

¹⁴ Judgment, C.Nr.679/15 (Basic Court October 15, 2015).

¹⁵ O'Brien, C. R., *op. cit.*, 2010, p. 73.

¹⁶ United Nation, *op. cit.*, 1948.

¹⁷ United Nation. (1979). *UN Women. Retrieved from Convention on the elimination of all forma of discrimination against women: <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>*, consulted on 1.10.2020.

aimed to stimulate the registration of immovable property on behalf of both spouses in public registers in order to achieve gender equality and strengthen the economic position of women. Under this instruction, any joint property registered on behalf of one spouse will be considered to be on behalf of both spouses and also spouses who register joint property on behalf of both spouses will be exempted from the registration fee property for two years. Despite these affirmative measures, the number of women registered as property owners in Kosovo remains low¹⁸.

From 525,827 registered properties in Kosovo, only 16.87% of them own women, while 81.12% are male owners and 2.01% are legal persons¹⁹. Despite the affirmative measures, it is again low the number of registered women as owners maybe because the impact of the customary right, where the property is registered only in the name of men. Also in a report issued by the ombudsman, it is considered that women are not treated equally with men in terms of property rights despite the legal equality and affirmative measures taken by the government to strengthen its position. This is considered a major barrier to an independent woman's life and its subordination²⁰. According to author Mandro-Balili, contributions to the family can be visible or invisible. A woman is generally considered to be the main contributor to some work that is unpaid but necessary for the family's interest. Thus, in the event of a divorce, a spouse who has left behind his career and qualifications for family interests, this fact will negatively affect his/her economic and financial status, thereby she giving the message of equality and non-discrimination, which is acquired during marriage is a joint contribution of both spouses²¹.

Based on the level of employment of women in Kosovo in 2018, only 12.3% of women are employed while men 44.3%²². If we look from this point of view the contribution of women with personal income to the joint property will be low because the number of women who are employed is too low. Thus, women in Kosovo, apart from those who are employed, contribute to the creation of joint property through engagement in housework, childcare and other forms of marital support.

But what has happened in practice? According to the initiator for the amendment and supplementation of the Family Law, Luljeta Aliu, injustice to women happens during the request for assessment of the contribution by the courts and its interpretation is mainly based on the monetary contribution of spouse. While the value that is determined for the work of women at home according to the court is equal to the minimum wage in Kosovo - 130 euros a month and for this reason it is shared very little property for women and making it even more difficult life and her existence²³.

The joint property of the spouses, based on the law in force, is created with equal work and contribution of both spouses and the two spouses are joint owner of this property. This property will be shared equally among spouse. The situation varies when one of the spouses disagrees with the equitable sharing of the joint property, where the court then has to assess the contribution of each spouse through evidence and evaluation made by the experts²⁴.

Due to this assessment of the woman's contribution to the joint property and the court's claim that the spouse who claims to have contributed to the joint property to prove through evidence and facts, has changed the family law and this change of law has entered into force in January 2019. Under the amended and supplemented of family law, the joint property of spouses is the property acquired through the joint contribution of spouses during marriage and the income derived from such property. While it is specified that the joint contribution of the spouses is the personal income and other income of each spouse and the spouse's approach to the other spouse, such as childcare, home affairs, caretaking and maintenance of property and any other form of work and cooperation regarding the administration, maintenance and addition of common property. The joint contribution of spouses

¹⁸ Government of Republic of Kosova. (2016, March 3). Official Newspaper of Republic of Kosova. Retrieved from Administrative instruction (GRK), NO. 03/2016 on special measures for registration of Joint Immovable property on behalf of both spouse: <http://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=12418>, consulted on 1.10.2020.

¹⁹ Haliti, A. (2018, April 4). Newspaper JNK. Retrieved from Women's travel to enjoy a piece of property: <https://kallxo.com/gjnk/rugetimi-i-grave-per-te-gezuar-nje-cope-prone/>, consulted on 1.10.2020.

²⁰ Ombudsperson Institution of Republik of Kosova. (2018). Annual Report. Prishtina: Ombudsperson Institucion.

²¹ Mandro-Balili, A., *op. cit.*, 2014, p. 61.

²² Statistics, K. A. (2019). *Labor Force Survey*. Prishtina: Kosovo Agency of Statistics.

²³ Aliu, L. (2019, March 01). *Amendment of Family Law*. Prishtina, Kosova, Kosova: Inject, p. 152.

²⁴ Gashi, H., Aliu, A., & Vokshi, A., *op. cit.*, 2012, p. 125.

during the continuation of marriage to acquire joint property is considered equivalent²⁵.

The purpose of the law amendment was that the courts did not assess only the contribution of spouses solely from the monetary point, but the nonmonetary contribution that women make, through housework, child raising and care, marital support. So that joint property have to be shared in equal parts with the aim that woman after divorce is not left without property and in a worse economic condition.

5. Conclusion

The joint property of spouses is the property which is created by the joint contribution of the spouses from the moment of bonding to the end of marriage. Although the family law in force had regulated the way of sharing the joint property equally between the spouses as a contributor to the creation of this property, again the woman in most cases was left without property. In some cases, the court did not share the property of a woman from joint property because she had failed to prove that this property exists, and in some cases, she has received very little property because she was unemployed and her contribution to housework was assessment very little (130 euros a month). Consequently, the woman has not only been left without family because of divorce but also without property and economic support.

As a result, the law has been amended, so the courts will share the joint property of spouses equally. The change of the family law that was made in 2019, says that the joint property of the spouses is the property that is created by the joint contribution of both spouse and as joint contributions of spouse is the spouses' personal income and the help that each spouse makes to the other spouse as housework, childcare, property maintenance, and any other form of work and co-operation that has to do with for growth of property. This joint contribution of spouses is considered equivalent.

If we take in consider the female unemployment scale in Kosovo, this change will be favorable to these women in case of divorce because their contribution should be assessment as equivalent with man. This should also be like this because the other spouse could not generate income and generate property if it did not have the support of the other spouse who cares about housework, raising children, and maintaining property.

But what will happen with employed women, who are up to 12% of them? Women working in paid work and contribute to joint property of spouses differ from women who are not employed but do only with housework. If we based on a survey make for the commitment of women's employment has resulted that 68% of employed women after the end of their working hours also do their own housework and food preparation²⁶. While in another research that is done by this institute it appears that women, apart from working hours on average 8 hours per day, spend about 3 more hours for housework and engagement on children, a time which is unpaid. If we are based on Kosovo's average salary, it is estimated that the woman for her job-related engagement would have to pay 135 euros a month for this unpaid job²⁷.

If we based in the change of family law, we might consider that it would not be too favorable for women who are employed and contribute significantly more than men to the creation and increase of joint property, regardless of salary differences. In this case the sharing of joint property will equally undermine women's categories.

²⁵Assembly of Republic of Kosovo. (2018, December 21). Official Newspaper of Republic of Kosova. Retrieved from Law on amendment and supplementation of law no. 2004/32 on the family law of Kosova: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18420>, consulted on 1.10.2020.

²⁶Institute for Development Research Riinvest. (2017, Jul 11). Separation of household affairs and economic independence as a means of empowerment. Riinvest Story, pp. <https://www.riinvestinstitute.org/Al/riinvest-story/247/ndarja-e-puneve-shtepiake-dhe-pavaresia-ekonomike-si-mjet-fuqizimi/>, consulted on 1.10.2020.

²⁷Institute for Development Research Riinvest. (2017, May 24). What if the unpaid work was paid? Riinvest story, pp. <https://www.riinvestinstitute.org/Al/riinvest-story/241/cka-nese-puna-e-papaguar-do-te-paguhej/>, consulted on 1.10.2020.

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