

THE LEGAL REGIME OF WOMEN PROPERTY RIGHTS – KOSOVO CASE

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Abstract. Possession of a movable or immovable property gives to everyone the opportunity to create financial capital and the power of women to be part of decisions in family and society. Despite the comprehensive legal framework, still exists gaps created by an adequate system of practical appliance of the responsibilities from different actors (administrative and judiciary institutions), the lack of awareness and insufficient understanding of the position of women according to the law, the prevalence of traditional attitudes and practices, the discriminable arguments and/or improperly use of evidences. With the scope to realize a comprehensive study on protection of property and inheritance rights mainly are using methods of theoretical and empirical analysis of the legal framework and social norms in Kosovo to address as recommendations to achieve bigger results in protection of the rights of women in the inheritance or marital property.

Index terms: women, inheritance and marital property, rights, legal framework, Kosovo

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1. INTRODUCTION

Globalization and industrialization have led to an increase of the number of women engaged in different economic sectors, and despite this, women own only about 1-2 percent of all world-registered land and are constantly denied the right to Inherit wealth. Moreover, the denial of women's property rights has always been linked to developmental problems faced by countries all over the globe, including mainly the education level and the customary pressure.

The importance of guaranteeing property and hereditary rights has been increasingly recognized over the last decades by a number of legal acts at the national level as well as by international legal instruments in the development of the principle of equality between women and men.

The progress in the legal regulation of property rights especially during the last decade was accompanied by a complex of measures with the aim to ensure the appropriate legal and institutional provisions, as well as to reform the traditional attitudes in society.

Property rights of women are fundamental rights guaranteed by the Constitution of the Republic of Kosovo, the Law on Inheritance of Kosovo, the Law on Non-Contested Procedure and the Law on Contested Procedure. Despite the full legal framework, the existence of dimly norms or sometimes the lack of control over the judiciary and public institutions, favors the influence of the customary law and tradition. The right to own property remains an important factor for the economic empowerment of women, and the response and taking of measures against this phenomenon is also a priority in the path of the country development in line with the international standards.

Globally, an estimated 41% of women headed households live below the locally defined poverty line [1]. Systems and property rights vary from one society to another, being influenced by cultural, racial, political and legal factors.

In the historical context the Kanun has been defined as a code of customary law, deeply planted in the conscience of the Albanian people. Consolidation of the state modernized the legislation due to the social development, but this codification of customary regulation it was never entirely out of people's consciousness. This fact is emphasized even more by the population, motivated to preserve these ethical and moral rules as one of the ways of survival of occupants or external factors. In this logic, the gap between the regime established in the law for the fulfillment of women's rights and social norms or customary practices in these issues is embedded as a result of regenerate nationalism in the context

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of Kosovo's independence war and the idea of strengthening the role of men in the family and society.

The confrontation between the legal resources related to the property rights in Kosovo on one hand and the traditional norms and mentality on the other hand, puts women in an unfavorable position to own property rights and consequently at a reduced level of access to economic activity. Land ownership rights, wealth distribution, and market development have evolved as prerequisites for economic growth and have impacted on poverty reduction at different stages of social development.

Despite the efforts of state structures, international organizations and civil society, Kosovo's women wander in the long run of obstacles to enjoy their property rights acquired during the course of a marriage or from an inheritance.

The dynamics of developments in terms of gaining and exercising this right is positive, as long as the issues are ascertained and the measures are constantly proposed, which are in line with the mentality and the formation of the population. At this point, through this research we have undertaken to define the remaining barriers to change and how to interact against:

§ The existence of a legal corpus in the face of the implementation systems classified as inadequate;

§ Lack of awareness that there are legal guarantees and insufficient understanding of options for resolving disputes and resolving disputes;

§ The spread of traditional attitudes and practices, many of which directly contradict statutory laws and established civil rights; and

§ Decisions on property cases, which specifically demonstrate a trend of defective reasoning and erroneous weighting of evidence, resulting in lengthy processes in time, costs, controversial procedural mechanisms and, above all, reduction of trust of women that will enjoy their rights [2].

2. PROPERTY RIGHTS FROM MARITAL COMMUNITY AND COHABITATION

Marriage is a legal action of each of the spouses, which results in changing their personal status and also changing the legal regime that will apply to their property rights acquired during marriage. Through the institute of "marital property regime"[3] spouses acquire legal certainty of determining the rights on property that will be acquired during marriage. According to the European Court of Justice [4], the marital property regime includes not only the property regime in its narrow sense, but it also includes all property relations of spouses arising from marriage or its resolution (provisional and definitive arrangements for the regulation of property relationships of spouses after the marriage settlement).

The property community set up in the Family Law is considered to be the most appropriate regime for regulating

the property relations of spouses, as a property regime that guarantees the moral and legal equality of spouses during marriage. Thus, Kosovo it is not yet among the countries that have foreseen the contractual regime as a conventional spousal solution for the regulation of property relations in marriage.

Constitutional protection [5], and family law protects women's rights not only for free will to marry, but also to own together the property gained during their marriage, and to preserve the special ownership of property that they bring in marriage.

Based on Article 45 of Law no. 2004/32 Kosovo Family Law, spouses may jointly own the property acquired during their marriage, and retain the special property ownership of marriage. Moreover, spouses are guaranteed in their rights not only by establishing a joint ownership system on the property acquired by each spouse during marriage, but also by establishing equality in the administration of this property [6].

What is more important, the regime of joint property also guarantees equal recognition and appreciation not only to the spouses' monetary contribution to the acquisition of property during marriage, but also to the contribution in nature, in terms of household activity and growth and education of children, assuming in absolute terms that this contribution has made possible the acquisition of property by spouses during marriage [7].

We started from this systematic analysis to highlight arguments, which at the moment of the theoretical analysis of the issues, still result in unresolved issues. They also result as allegations unfounded in law and completely against the right of women to be together with their spouses as title holders of property acquired during marriage.

The claims to avoid women from common marital property, which are encountered in practice and are based on the strict argument of the lack of financial contribution, emphasize the need to:

- Underline the equality between the financial and in nature contribution in the property of the family; and
- Avoid the possibility provided by the law in paragraph 4 of Article 47 for the possibility of agreement between spouses to have equal shares in the property.

As noted above, the equal importance of financial and in-nature contributions to the family, guarantees women to claim property rights even in the absence of financial contribution from work [8].

In the conditions of the high number of unemployed women or who do not seek employment due to various circumstances, such a condition would guarantee them unconditional fulfillment of the right to participate in the joint matrimonial property. Also, in spite of the legal importance that the autonomy of spouses' willingness carries, the introduction of permissible provisions for the avoidance of the spouse's right to equal shares of property, would pave the way for the conclusion of agreements under the intervention of external factors (threats, coercion or by mistake, which lead to

the invalidity of the agreements, but which often remain uncontested).

In the course of the problems encountered in gaining property rights of married women, there are some gaps in these rights in created extramarital communities or factual marriages.

Article 14 of the Family Law establishes marriage as "a legally registered community between two persons of different sexes, by which they freely decide to live together for the purpose of creating a family." Nevertheless, both husband and wife, who, according to Article 39 of the Family Law, live in couples, are characterized by a common life that represents a character of stability and continuity. This factual community enjoys a status equal to the marital status in terms of rights and obligations for care, mutual financial support, and property rights as specified in the law.

What is clearly apparent from the interpretation of these provisions is:

- the aim to equalize the conditions and effects of marital and extramarital communities;
- the lack of compliance with the inheritance law, which establishes the highest standards for the recognition of a spouse in factual communities.
- the tendency to equalize two kinds of relationships, which are similar in substance, but not in the consequences for "all persons"[9], especially in the conditions of the high number of factual family relations in Kosovo.

This aspect shows the importance of customary norms in terms of creating marital relations without performing their formalization in the Municipality. We consider this factor important, which can be avoided as an obstacle with a more precise definition of these factual family relationships, we should also classify the formal conditions under which the spouse would acquire rights over the property acquired in cohabitation and over property acquired in the event of the death of the cohabiting partner.

At present, based on Article 89 [10], and particularly in Article 90 [11], paragraph 2 of the Family Law, the property rights that are foreseen for spouses during marriage or after divorce imply that these rights may be claimed in the event of a marriage or otherwise stated for persons who have the status of spouses. While in the other clauses, the law is clear that property relations between spouses in factual communities must be the same as those in a legally registered marriage. This legal situation in the special law on family relations leaves without regulating the property relations between persons living in extramarital communities and more specifically women as the most vulnerable category in them.

Analysis of these issues from the legal doctrine has found the solution to the provision 28 of the Law on Inheritance, which has conditioned the right to inherit for the cohabiting man or woman. According to this provision, "A man and woman who live in an extramarital community may inherit

one another as a spouse if:

a. The extramarital community until the death of the decedent has lasted for at least 10 years, and if from this relationship children have been born for at least 5 years; and

b. At the time the decedent dies, none of the cohabiting persons has been legally married to a third person or if the decedent has been legally married to the third person, he/she has filed a lawsuit for divorce or nullity of marriage and after death it is established that the claim has been supported. On the other hand, the cohabiting persons are not considered as indispensable heirs. Also, the cohabiting person has no inheritance right if the couple has not lived together for a long time.

First, the prediction of the right to inherit in terms of point (b) of paragraph 1 does not guarantee an absolute right to inherit the cohabiting person. It would not sound a threat, as long as in some other countries the right to inherit is one of the effects of marriage establishment. Moreover, it would not be considered a threat if the number of couples living in factual communities would not be so high.

Second, the juridical situation of the institute of factual community needs to be treated in accordance with the Law on Inheritance and above all to be defined in a clearer regime. By this we mean the introduction of the factual community within a more rigorous and clear legal framework, to turn this institute into a continuous relationship that can be consolidated and automatically take on the effects of marriage. Thus, based on the experience of other countries, a solution could be accepted as a condition for enrolling factual communities and recognizing these effects after several years of coexistence.

Moreover, we would like to extend the legal analysis to another legal provision, seemingly fair.

Referring to paragraph 1 and 2 of Article 14 of the Law on Inheritance of Kosovo, if the decedent do not leave other heirs besides the spouse, his property shall be inherited by his parents and spouse.

The problem in this provision lies in the fact that in any case, the decedent's parents shall inherit half of the property in equal shares, and only the other half of his property shall be inherited by his spouse. Moreover, according to the Article 15 of the special law, exist a contradiction of provisions that not only creates uncertainty and different interpretations, but also reduces confidence in a well-regulated legal framework. So, in case one of the decedent's parents died before him, the part of hereditary property that would have belonged to him if he had survived the decedent, shall be inherited by his children (the decedent's brothers and sisters), his grandchildren, and great-grandchildren, and further descendants, according to the principles of the right of the representation [12]. In case that both parents of the decedent have died before him, the part of hereditary property that would have belonged to each of them if they had survived the decedent shall be inherited by their respective descendants in the manner set out under the

previous paragraph of this Article.

The legal situation is clarified in this systematic interpretation through Article 17, where the legislator's will for the decedent's spouse is clarified. Based on this provision if both parents of the decedent have died before him and did not leave any other descendant, the entire property shall be inherited by the decedent's spouse. So, he will be the only heir, not in any case as is foreseen in paragraph 4 of Article 14, but only in cases when he shall inherit with second-generation heirs (decedent's parents) and they have not left any offspring.

Thus, the position of the spouse cannot be allowed to deteriorate by the fact that he does not remain the sole heir of the first row. This represents one of the most up-to-date models of legal support for the heir spouse.

In Kosovo's reality [13] this would help women strengthen their positions in front of other heirs and give them time to defend their rights even when faced with certain injustices by spousal family members [14]. Thus, the position of the spouse cannot be allowed to deteriorate by the fact that he does not remain the only heir of the first rank.

At the end of this issue's treatment we consider that the coordinated legal basis between the two laws is a precondition for exclusion from the right to inherit the cohabitants, if one of them dies. The focus of this study are women and since they still appear at a very low level as holders of property and the large number of deaths from the Wartime in the country has affected mainly the men, enables a better understanding that these arrangements directly and disadvantageously affect women in Kosovo. The exclusion from the right to inherit in the cases of factual communities represents a considerable proportion of women who are in the condition of lack of financial resources or at least the home of residence, thus at the mercy of destiny and humanity of the family members.

In these conditions, we consider the reaction in two ways indispensable:

1. Changing the legal framework both in terms of precision and terminology clarity of forecasts, as well as balancing the conditions for recognizing the factual communities and the legitimate consequences of the couple and husband living in the couple.

2. Encouragement of married couples or who are in promise for marriage to go to formalizing the family life through the most legitimate instrument known in the world, the civil marriage. This can be achieved through certain facilitations for couples who are already living in factual communities or raising awareness of those who enter into couple relationships to change the effects of these family relationships, similar to the essence, as well as various forms.

The rule of law in Kosovo is characterized by poorly defined and implemented property rights, especially the property rights of women and minority groups. In 2016, women owned only 18% of real estate in Kosovo, including land (Cadastral Property Agency Report in Kosovo).

Lack of an effective application of property rights weakens

the democratic governance, adversely affects human rights, abolishes women, and hinders sustainable economic growth.

3. VIOLATION OF INHERITED PROPERTY RIGHTS

The position of women in relation to their right to inherit is guaranteed based on clearly defining provision of the special law, that all physical persons under the same conditions are equal in inheritance. Thus, the inheritance of the members of the family is done without excluding heirs on a basis gender.

The origins of the problems encountered in practice relate to two legal institutes of the Kosovo Law on Inheritance. Specifically, they relate to the institute of "renounce to inheritance" and the "deflection from inheritance".

Renounce to inheritance is a unilateral expression of will that results in irretrievable loss of all rights deriving from inherited property. This action has the effect of leaving the circle of heirs and dividing part of it through other heirs. As mentioned, the renunciation of the inheritance under the pressure of male heirs to attain the woman's avoidance of inheritance is accomplished by legal means, but often contrary to the purpose of the law. We argue in the light of cases where women renounce their inheritance in the name of family or fraternal congruence, in the name of tradition or in the face of deception, fear or violence by male benefiting members of the inheritance.

Pursuant to Article 130 of the Law on Inheritance, the heir, who has given up on his behalf, is considered to have not been the heir. He may renounce the inheritance by a statement given to the court until the inheritance hearing is completed. The waiver also applies to the offspring of the one who has given up, unless expressly stated that he has renounced only on his own behalf.

Analyzing this provision will highlight two issues, with the solution of which and in conditions of Kosovo the situation would be eased directly.

Thus, the long period of time during which the inheritor reserves the right to give up. Taken from other legal models in the region, there is a possibility that this length of exercise of the right may be shorter by reducing the chances of domestic pressure or other circumstances that will cause the female heir to give up. The reduction of this deadline, would affect the reduction of cases when the heirs give up. Let's emphasize that, this institute was born with the aim of protecting heirs from burden-bearing financial burdens, and that the latter does not turn in a way to harm the heir's interests. So, giving up on a subject is not considered as a possibility based solely on the will or the moral weight of the female heir, as long as it is essentially a legal remedy to deprive itself of a right. In this regard, it is a matter of time to raise women's awareness that renunciation of inheritance leads to deprivation of property rights and the economic dependence upon which they decide upon renunciation of rights and narrows the space of many other rights in the family and society.

The benefit of this mechanism or legal remedy, coming out of the context for which it is foreseen or excluding the heirs without formally exercising the right to give up, such as the cases when they are living abroad, has become a "malformation" of the legal possibility.

What about the avoidance and at the same time the exclusion of women from inheritance in special ways has been realized through the actions that carry elements of the criminal offense themselves, and that with all this happens to be applied. Thus, with the death of the decedent and the procedure for the opening of the inheritance begins after the Act of death is drafted. The latter contain in its substantial part also the annotation of the inheritors upon the rank of inheritance. If at this stage of the procedure the certificates of birth of female heirs are not deposited in the civil status office, the latter may be removed from the inheritance without being listed in the Act of Death.

In cases of notary's opening, Act of Death constitutes an act from which begins the process of preparing the Heritage Declaration, formally separating property based solely on the listed heirs. Based on the interviews of judges and notaries conducted by the Balkan Investigative Journalism Network in 2016 year, there were ascertained cases in their experience when families tried to hide them as heirs [15]. This fact makes the situation even sharper, as long as such actions are not reported and denounced under the pressure of various factors such as the lack of knowledge of the right and the avoidance of it, fear, family pressure or the suppression of women's freedom.

In this situation the one of the most important guaranties to protect women in such cases from violating the legal right remain the right of appeal and the prescription of this right within one year from the day the heir knew about his right, or about who is the possessor. In any event no later than within ten years counted, for the legal heir from the death of the decedent, and vis-à-vis a mala fide possessor, this right is prescribed within twenty years from the dates mentioned before.

4. CONCLUSION

The Constitution of the Republic of Kosovo clearly defines the equal role of women and men in society, excluding any discrimination as a fundamental value sanctioned through special legislation and the ratification of the international conventions mentioned therein.

Legal acts regulating property and inheritance rights have formalized a complex system of rules, which often creates space for misrepresentation, distortion or even deliberate deviation from the lawmaker's scope.

Existence of a gap between legal framework and the mechanisms for its enforcement, which continues to be emphasized. Women face serious challenges in fulfilling their

rights when the law contradicts social or customary norms.

The basic obstacle to women's property rights remains high trust in patriotic norms and consequently the difficulty of dismantling or modifying the latter. We recommend that this can be supporting through the following actions:

- Education and raising the level of information on property rights and their benefit, which is realized through awareness of women about the consequences of their decision-making in the future and the expand of their knowledge on the legal provisions.

- Improving the social and institutional climate for supporting women in this challenge through the compatibility between the legal framework and the mechanisms for their practical implementation and strengthening of human capacities in the country;

- Realization of procedural guarantees. Reconsideration of court cases in a cavalry of judiciary session, which evokes the demoralization of women to claim their right.

REFERENCES

[1] Benschop, M. (22 April 2004), "women's rights to land and property", in UN-HABITAT, women in human settlements development - challenges and opportunities, New York: Commission on Sustainable Development

[2]. Litigating ownership of immovable property in Kosovo, OSCE Prishtina, April 2009, p. 4 available at <http://www.osce.org/kosovo/36815> (last seen September 2017)

[3]. With marital property regime we will understand the whole legal norms, which have as their object the regulation of property relations between spouses during marriage, and the relationship between them and third parties. For more information see: Omari S. Family Law, Morava Publications, Tirana 2010

[4] ECJ Judgment C-143/78, 17 March 1979 "Jacques de Cavel vs. Louise de Cavel"

[5] Refer to Article 37 (2) of Constitution "Marriage and divorce are regulated by law and are based on the equality of spouses"

[6] According to Article 47, joint property of spouses is property acquired through work during the continuation of marriage, as well as income derived from such property; Joint property may also include property rights and obligations; The property of spouses acquired jointly through gambling is considered a joint property.

[7] Omari S., Family Law, Morava Publishing, Tirana 2010, page 57 - 112

[8] Kosovo Statistics Agency For more see http://askdata.rks.gov.net/PXWeb/pxweb/sq/askdata/askdata_Labour%20market_Quarterly%20labour%20market_Employment/Ifsq01.px/table/tableViewLayout1/?rxid=a98567f0-5ade-480f-b2ea-d8d314769ffa (last seen September, 2017)

[9] The applicable family law uses the term "husband and

wife live in pairs" or "persons", which are not adequate terms to describe cohabitants or otherwise stated cohabiting partners. These persons cannot get the spouse status, so they remain categorized as partners. While Article 11.2 of the Law on Inheritance defines it as "the factual community of the unmarried woman and of the unmarried man who has been lasted for a long time and who has ceased with the death of the decedent, provided that the presumptions for the validity of the marriage have been fulfilled", by giving the status with an ambiguous formulation as "extramarital spouses". This term normally lies far from the truth of relations in extramarital communities, who live as a man and woman despite the situation created in the country due to the underestimation of the connection of civil marriages.

[10] Article 89 - Apportioning of joint property of spouses may be requested during marriage or after marriage ends by divorce.

[11] Article 90 - (1) When dividing joint property, the debt of the joint property shall be calculated in the shares of each spouse. (2) When dividing the property upon request of one of the spouses of a legally registered marriage, consideration should be given to ensure that his/her share includes those objects of the joint property which serve his/her craft or vocation. (3) If the value of objects provided for in Paragraph (2) of this Article is disproportional high, compared to the value of general joint property, those objects shall also be apportioned, except in cases when the spouse to whom such shares should belong to does not ensure pecuniary compensation of the relevant or approximate value to the other spouse, respectively does not transfer another object or share with relevant or approximate value to the other spouse. For these compensation purposes consent of both spouses is required. (4) When apportioning is initiated upon the request of one spouse, he shall be provided with those objects of the joint property which exclusively serve for personal use.

[12] The right of the representation provided by Article 13 of the Inheritance Law of Kosovo foreseen that if one of the children died before the decedent, his place is taken by the decedent's grandchildren from the deceased child, but if specific circumstances foreseen by this law do not provide for these grandchildren, then the great-grandchildren will inherit without any limits.

[13] In all cases the legal definitions are more or less similar, but based on EULEX's report, Kosovo stands in the worst position in the region when it comes to women owning property, which comes in at 16%. Compared to the surrounding countries, including Macedonia and Albania, Kosovo is in the last place when it comes to property owned by women. See <http://advocacy-center.org/wp-content/uploads/2017/02/Inheritance-Rights-Report.pdf>

[14] Referring to public discussed cases against discrimination of women in inheritance rights, as in the cases of Shyrete Berisha and Shukrie Berisha. See BIRN Report on Women's Right to Property Injury, July 2016

[15] BIRN Report on Women's Right to Property Injury, July 2016, page 8

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