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Marital Property Regime in North Macedonia and in Kosovo

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Statement of authorship

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Abstract

Despite the fact that marital law is one of the most important institutes of family law, this institute should be regulated in the best possible way. But this has not happened, because there are still many legal gaps and uncertainties in the regulation of this institute. These legal gaps are mostly presented in the regulation of property relations between spouses, presenting problems in the application of these provisions in court practice. The marriage has the effect in creating property relations between the spouses and their regulation is inevitable and on the other hand, the better these relations are regulated, the less problems the spouses will have in the event of the termination of the marriage.

It is obvious that the regulation of property relations between spouses has not been the focus of the legislator because the laws issued in North Macedonia and Kosovo were issued many years ago, when the number of divorces was not very high. But with the change of economic relations of the market and with the emancipation of women this number is increasing and the demand for the regulation of property relations is increasing.

For this reason, through this paper, legal gaps will be identified and recommendations for their improvement will be given. These recommendations will be given by making an in-depth analysis of the laws that regulate property relations between spouses in North Macedonia and Kosovo and their application in practice on the one hand while on the other hand a comparison will be made with several countries of Europe and USA. The methodology that will be used in this paper will be historical, analytical and comparative methods.

From the analysis made and comparison with other countries of the world we will give recommendations for the improvement of the legal infrastructure. Above all the recommendations will be given in the importance of legal regulation of the family house which does not enjoy the necessary protection and the importance of incorporating the marriage contract in legislation, as an alternative for spouses to autonomously regulate their property relations.

Dedication and Thanks

This dissertation is dedicated to my daughters Driana and Roza who have missed parenthood for as long as this journey has lasted. It is also dedicated to my husband Betim for all the motivation provided. Many thanks also to my Father and Mother for continuous support.

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Gratitude!

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1. Introduction

Marriage is considered as one of the most important institutes of society since the ancient times until the present day. Due to its importance, this institute is defended not only socially but also stately. While in ancient times the marriage was considered a relationship between a man and woman with the main purpose to create a family and the birth of children, in modern times this worldview has changed, giving another dimension to marriage¹. With the conclusion of marriage for both of the spouses are created rights and obligations which are personal and property nature and which are regulated by the legislations of the states.

The legal regulations of marriage are very old, starting from Roman law to the most modern laws but the development of society and social changes have made marriage a legal institution open to legal changes². In addition to personal relationships that are created between spouses, special importance is given also to the property relations which results to the creation of marital property. The personal relationships created between the spouses are mainly regulated by agreements between the spouses themselves, such as the assignment of the marriage surname, profession, place of residence and the maintenance of the family economy and in case of the end of the marriage there are no problems encountered for these issues³. However, the property relations that are created between the spouses at the time of the marriage, in cases when they are not regulated by the will of the spouses, then are created problems and dissatisfaction when come the time for their separation.

For this reason, this doctoral thesis is aimed to analyze the legal regulation of marital property regime in North Macedonia and in Kosovo. Is also needed to include into the framework of the law, prenuptial and marital agreements for the regulation of marital property because both countries, North Macedonia and Kosovo, do not have in their legislation the possibility of using these agreements.

Based on the applicable laws of North Macedonia and Kosovo, there is marital property relations governed by the Law on Property and Other Real Rights of North Macedonia of 2001 and the Law on Family in Kosovo of 2006. In both legislations, the regulation of the property

¹ Bashkim Selmani and Bekim Rexhepi, *Roman Law* (Ferizaj: INSH, 2014), pg. 309.

² Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 179.

³ Hamdi Podvorica, *Family Law* (Prishtina: University of Prishtina, 2006), pg.67.

relations of the spouses is done with the legal property regime which is divided into separate and joint property.

Regarding the European countries, there are mainly two fundamental types of matrimonial regimes, some of them opt for a limited community system such as the French example followed by Czech Republic, Russia, while the German System is followed by Greece, Austria, Switzerland some other Scandinavian legal systems⁴. In Germany, based on their Civil Code, there are three types of property regimes: the community of accrued gains, separation of property, and community of property, in Croatia are distinguished two types of matrimonial property regimes: legal matrimonial property and a marital property agreement while in Bulgaria the regimes of property relations between spouses shall be of: legal matrimonial regime, legal regime of division, and contractual regime⁵. In different European countries are identified several types of property regimes of spouses and in these dissertation I will try to propose through analysis and comparisons of North Macedonia and Kosovo law to eliminate deficiencies that may be in the legal framework and to get the best experiences from other countries. Also special attention will be paid to the principles of European family law regarding property relations between spouses. These principles are recommended from the European Commission on Family Law which are based on the national's reports of European states. The purpose of these principles is to contribute to the equality of spouses, their autonomy, the well-being of the family, the protection of the family home, and the protection of property acquired during marriage. But above all, these principles are aimed at harmonizing family laws in Europe⁶. These principles must be followed because in case of unified the family law in Europe the citizens of the Republic of Northern Macedonia and Kosovo do not have legal problems for family matters if they change their place of residence.

Marital property and marital agreements are topics that at the local level are not properly researched despite the importance they have in social aspect. Considering that the number of divorces in recent years has drastically increased, it is necessary to share the marital property created by the spouses during the marriage^{7 8}. Also in a report issued by the Ombudsman in

⁴ Katharina Boele-Woelki, ed., *Perspectives for the unification and harmonization of family law in Europe* (Antwerp-Oxford-New York: EFL, 2003), pg.9.

⁵ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 258.

⁶ Commission on European Family Law, <http://ceflonline.net/> (accessed Jan. 10, 2019)

⁷ State Statistical Office, *Marriages and divorces in Republic of North Macedonia, in 2019 - final data*, 2019, Skopje.

⁸ Kosovo Agency of Statistics, *Divorce statistics in Kosovo*, 2018, Prishtina.

Republic of Kosovo, 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 her position. This is considered a major barrier to an independent woman's life and her subordinates⁹. Thus no concrete legal steps have been taken to improve this area which is considered insufficiently regulated for maintain the principle of equality in marriage.

The joint property of the spouses is considered the property created with joint work of spouses during the duration of marriage union. 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 separation equal between the spouses¹⁰. From the other author, the joint property of spouses is considered any property gained during marriage, even if only one spouse's income and as such should separate equal between the spouses¹¹. In addition, 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 inheritance¹². 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 contributions¹³.

Through marital contracts, spouses will be able to regulate their property relations depending on their needs and interests and to allow spouses to choose or create a model of marital property regime¹⁴. For the case of the Republic of North Macedonia, there are no satisfying reforms regarding the legal regulation of marital property regimes against economic and social changes and proposing that in addition to the compulsory legal regime, contracted subsidiary regimes will be determined where spouses would decide through contract their property regime or other modalities to be created¹⁵. On the other hand, the marriage contract in the Republic of Kosovo is considered as the best way to avoid disputes regarding the division of property of the spouses

⁹ Ombudsperson Institution of the Republic of Kosovo, *Annual Report of 2018*, 2018, Prishtina.

¹⁰ Abdulla Aliu and Haxhi Gashi, *Family Law* (Prishtina: University of Prishtina, 2007), pg. 139.

¹¹ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 227.

¹² Raymond C. O'Brien, "Integrating Marital Property into a Spouse's Elective share", *Catholic University Law Review*, Vol 59, Issues no. 3 (2010), pg. 623.

¹³ *Ibid.*, pg. 623.

¹⁴ Dejan Mickovik and Angel Ristov, "Family Law in the Civil Code of the Republic of Macedonia", *Journal of Civil & Legal Sciences*, Vol. 5, Issue no.1 (2016).

¹⁵ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019).

acquired during the marriage and will enable the spouses with their free will to determine the parts in the joint property and harmony in the general marital relations¹⁶.

In Europe, the marriages are based in modern model of partnership which requires equality, autonomy and independence and the concept of the community of the property is the best solution for the most current problems especially to protect women and the non-equality between men and women which is dominant EU ideology¹⁷. Premarital and marital property agreements are very supported by the court in case of division of joint property of the spouses but these agreements have to be drafting and execution in great care¹⁸. Rasmussen and Stake (cited in Alexander, 1998) argue in favor of permitting marriage contracts that regulate intra marital conduct where theoretically, a marriage contract could in some cases neutralize inappropriate behavior of men in marriage. The same authors also point out that marriage is a very unpredictable and too complex relationship to allow the parties to draft a long-term contract that would regulate all relevant points of conduct and specify significant standards of performance¹⁹.

Despite the fact that marital property is regulated by law in North Macedonia and in Kosovo, it is still noticed a lack of regulation of this issue. The marital property is regulated by imperative norms, preventing the spouses from expressing their will to determine their property regime, since the Law on Family in Kosovo and the Law on Property and Other Real Rights of North Macedonia with marriage, spouses entered under the legal property regime which distinguishes between separate property and joint property. These deficiencies can be eliminated by allowing the conclusion of the premarital or marital contract through which the spouses can decide their property regime and the determination of ownership in the parts of the joint property. According to Mandro-Balili, "it is the right of spouses to autonomously choose the property regime they prefer". Respecting the will of the spouses would also solve the problems with the division of their joint property²⁰. Spousal agreements are real contracts that will be subject to the rules of norms on contracts in general, but in order to be valid, the form of the notarial deed is required²¹. According

¹⁶ Bedri Bahtiri, *National and international aspects of the marriage property regime of the spouse* (Prishtina: University of Prishtina, 2013), pg. 188.

¹⁷ Branka Rešetar, "Matrimonial Property in Europe: A Link between Sociology and Family Law", *Electronic Journal of Comparative law*, Vol 12, Issues 3. (2008), pg. 13.

¹⁸ Kathryn J. Murphy, *Marital property agreements* (San Diego: New Frontiers in Marital Property Law, 2018), pg. 32.

¹⁹ Gregory S. Alexander, "The New Marriage Contract and the Limits of Private Ordering", *Indiana Law Journal*, Volume 73, Issues 2. (1998), pg. 508.

²⁰ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg.253

²¹ Mustafë Musa, *The rights and Notarial* (Gjilan: Kurora, 2011), pg. 89.

to United State law the premarital agreements must be in the written form, must include certain technical criteria, must be written before marriage and marriage must happen and must contain essential standards²². Since marriage contracts are used by many European countries, it is important that this practice to be applied in the Republic of Northern Macedonia as well, as a country that claims harmonization of legislation with the legislation of European countries through which the principle of autonomy of the will of the spouses would be respected²³.

Another important issues is that through the use of prenuptial and marital contract, will be avoided the possibility of leaving the woman without property, which is very evident in both North Macedonia and Kosovo. In these two countries, only around 16% of women own property even though the law proclaims equality between women and men²⁴. From 525,827 registered properties in Kosovo, only 16.87% is owned by women while the rest (81.12%) is owned by male owners and 2.01% are legal persons²⁵. Despite the affirmative measures, the number of registered women owners is very low which may be due to the impact of the customary rights, where the property is registered only in the name of men²⁶. In Kosovo, in 2019, the Law on Family was amended by replacing the term "work" with the term "contribution" to the joint property of spouse, aiming to protect the position of women who contribute to the creation of common property through the housework, maintenance and child care. The joint contribution of spouses during the continuation of marriage to acquire joint property is considered equivalent²⁷. This came as a result where in many cases of the separation of the joint property of the spouses by the court the value that is determined for the work of women at home according to the court is equal to the minimum wage in Kosovo of 130 euros a month and for this reason it is shared very little property for women, making it even more difficult for her the life and her existence²⁸. The joint property of the spouses, based on the family law, 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 spouses. The

²² Gary A. Debele and Susan C. Rhode, "Prenuptial Agreements in the United States", International Academy of Family Lawyers- Marital Agreements. <https://www.iafl.com/resources/articles/marital-agreements/> (accessed on 02.02.2020) pg.7.

²³ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg.70.

²⁴ Kosovo Agency of Statistics, *Women and Men in Kosovo 2016-2017*, 2018, Prishtina.

²⁵ Naser Sertolli and Albert Haliti, "Women's journey to gain a piece of property" *Kallxo*, 04 November, 2018, <https://kallxo.com/gjate/mendime/rrugetimi-i-grave-per-te-gezuar-nje-cope-prone/> (accessed 20 June, 2019).

²⁶ Ombudsperson Institution of the Republic of Kosova, *Annual Report of 2018*, 2018, Prishtina, pg. 83.

²⁷ Assembly of the Republic of Kosovo, *Law on amendment and supplementation of Law no. 2004/32 on the family law of Kosova, article. 1. 2018*, Prishtina: Official Newspaper of Republic of Kosova.

²⁸ Luljeta Aliu, *Amandament of Family Law* (Prishtina: Inject, 2019).

situation varies when one of the spouses disagrees with the equitable sharing of the joint property, in which case, the court then has to assess the contribution of each spouse through evidence and evaluation made by the court experts²⁹³⁰. If we based in the change of family law, one 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. 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 preparation³¹. This presents a situation which will be problematic in the case of the division of the joint property of the spouses in relation to the employment status of the women. A similar situation is foreseen in the legislation of North Macedonia where the joint property of the spouses can be divided by agreement between the spouses, while in case of disagreement the separation is done by the court³².

In principle, joint property under the law is divided equally but at the request of one spouse, the court may determine a larger share to one spouse, if he/she proves that his/her contribution is significantly greater than the other spouse³³. The procedure for the division of joint property is done in a non-contentious or contentious procedure, depending on the situation that arises³⁴³⁵. Another important issue to pay attention is the separation of the family home or the apartment where the couple has lived. If we based on Kosovo legislation if the spouses do not agree who will live in the future in the apartment from the marriage, the court will decide it, taking into consideration each individual case and the well-being of the children. While in the Macedonian legislation it does not recognize the institute of family house. According to the Ristov (2012), the legal status of the marital home is essential for the existence of marriage, family and the realization

²⁹ Haxhi Gashi, Abdulla Aliu and Adem Vokshi, *Commentary of Family Law* (Prishtina: Giz, 2012). Pg.152

³⁰ Faik Brestovci, Iset Morina, and Rustem Qehaja, *Civil Procedural Law* (Prishtina: University of Prishtina, 2017), pg. 454

³¹ Institute for Development Research Riinvest, *Separation of household affairs and economic independence as a means of empowerment, Riinvest Story*, 11 July, 2017. <https://www.riinvestinstitute.org/Al/riinvest-story/247/ndarja-e-puneve-shtepiake-dhe-pavaresia-ekonomike-si-mjet-fuqizimi/> (accessed 30 July 2018).

³² Arsen Janevski and Tatjana Zoroska-Kamilovska, *Civil Procedural Law* (Skopje: Faculty of law- EJU University, 2009) . pg. 447

³³ Assembly of the Republic of North Macedonia, *Law on Property and Other Real Rights of North Macedonia*, 2001, article 18, Skopje: Official Gazette of the Republic of North Macedonia. .

³⁴ Assembly of the Republic of North Macedonia, *Law on non-contentious North Macedonia*, 2008, nr. 9, Skopje: Official Gazette of the Republic of North Macedonia.

³⁵ Assembly of the Republic of North Macedonia, *Law on contentious North Macedonia*, 2005, nr. 79, Skopje: Official Gazette of the Republic of North Macedonia.

of family relationships and the problem in practice it is necessary the legislator to predict special legal protection of the marital home³⁶. These reasons make that family home has to enjoy legal protection in both states.

1.1 Aim and objective of the dissertation

Marriage as a legal institute dates since the early times and due to its importance and the effects that it produces, it has been regulated legally. Historically, the legal regulation of marriage is even older however it was not regulated in the same way that it is regulated today. Due to the legal effects that marriage produces in terms of rights and obligations between spouses, it has imposed that this institute, which is the basis for families, be given great importance in the legislation of all countries. Social development has influenced the marriage institute to undergo changes and transformations which has resulted in equality between spouses which did not exist before or existed in the minimum principle. It has also been noted that there is very little research in our country regarding the regulation of marital property which has prompted me to research this field. In addition, the evaluation of the historical development of property relations and its impact on current legislation is an added value to this dissertation.

Marriage is a constitutional category and as such enjoys legal protection. Article 40 of the Constitution of Republic of North Macedonia states that “Legal relations in marriage, family and extramarital union is regulated by law”³⁷. Whereas in the Constitution of the Republic of Kosovo in its article 37 it is stated that “Based on free consent, everyone enjoys the right to marry and the right to create a family in accordance with the law. Marriage and its dissolution are regulated by law and are based on in the equality of spouses”³⁸. While the laws that most closely regulate marital relations are the Laws on the Family and the Law on Property and Other Real Rights. Despite the legal importance of the institution of marital property, there are still shortcomings that have been reflected in their application in practice and in the autonomy and equality of spouses.

³⁶ Angel Ristov, “The Legal Status of the Marital Home in the Macedonian and Comparative Law”, *Iustinianus Primus Law Review*, No. 5, (2012).

³⁷ Assembly of the Republic of North Macedonia, *Constitution of the Republic of Macedonia*, Article 40, 1991, Skopje: Official Gazzete of the Republic of North Macedonia. .

³⁸ Assembly of the Republic of Kosova, *Constitution of the Republic of Kosova*, 2008, Article 37, Prishtina: Official Newspaper of the Republic of Kosova. .

In addition to personal relationships that are regulated by marital law, an important focus is on the regulation of property relations. Due to the fact that the number of marriages have increased together with the number of divorces³⁹, the object of this dissertation is precisely the matrimonial property which is created by the marriage and the division of this property in case of divorce, focusing on finding shortcomings by comparing them with the legislation of other European countries

The aim of this dissertation is to analyze the property regimes of the spouses in the framework of the legislation in force and the possibility of its improvement, especially in the case of division of joint property in order to maintain the equality of spouses. This is because despite the equality of spouses on a legal basis, in practice inequality and lack of appreciation of women's contribution to the creation of marital property has been evidenced. In addition to the division of the joint property of the spouses, the legal regulation of the status of the marital home will be analyzed, where through practical cases it will be seen how it is divided between the spouses, since the marital home in Kosovo or Macedonia does not enjoy proper legal protection.

The objective of this dissertation will be the marriage contract, which is not foreseen in the legislation of Macedonia and Kosovo, but which is being used in many European countries and USA as a way to regulate property relations, emphasizing the free autonomy of spouses in determining their property regime. Special attention will be paid to the analysis of marital contracts in other European countries and through comparison to give recommendations for their application in Macedonia and Kosovo. Both, North Macedonia and Kosovo are in the process of Codifying Civil law and it is seen as a good opportunity to introduce them in the legal framework, enabling spouses to regulate their property relations by agreement.

³⁹ State Statistical Office, *Marriages and divorces in Republic of North Macedonia, in 2019 - final data*, 2019, Skopje.

1.2 Hypothesis and research questions

The main purpose of this paper is to analyze the legal framework for the regulation of marital property regime and through comparison to point out the deficits and the possibility of its improvement, especially taking from the experience of other European countries and USA. Considering that the Republic of Macedonia and Kosovo are mostly young countries, the experience of European countries and USA would be a good opportunity to improve the legal framework regarding the regulation of property relations between spouses.

The regulation of marriage and marital property has been done since Roman law and then continued with the religious regulation made through Canon law and Muslim law or Sharia law. Since the norms for the regulation of property relations have a long history, the way of regulating these issue in the past will be researched and its purpose will be whether history has influenced the way of their regulation in our countries. Given in mind that in both North Macedonia and Kosovo only 16% of women have property registered in their name, it is thought that this has come as a result of the influence of men's power over women (Statistics, Women and Men in Kosovo 2016-2017 2018). Also, special attention will be paid to the research of customary law that has existed in the past and its impact on today's regulation of marital relations. For this reason the first hypothesis will be:

H1: Regulation of marital property changed throughout history but has impact on today's legislation

Despite significant legal changes, gender gaps and inequalities continue across all levels. In Macedonia, the laws through which the regulation of marital property has been regulated, has shortcomings that have been identified and it is necessary to analyze these laws and through the method of comparison to make recommendations for their improvement (Women n.d.). The more perfect the legal regulation of marital relations is, the better judge practice will be. It is said that because the courts are facing with large number of requests for divorce and the division of marital property and due to deficiencies in the law, an unequal treatment between spouses has been reported. Because of that the second hypothesis is:

H2: Legal regulation of marital property in North Macedonia has deficits which have affected the application of these norms in an unfair manner by the courts, especially the division of the joint property of the spouses

In Kosovo the family 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 cooperation 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? Women working in paid work and contribute to joint property of spouses differ from women who are not employed but do only with housework. Despite the legal regulation of marital property in Kosovo and the legal changes made in the law on family, there is a lack and ambiguity in this aspect which have resulted and because of that the thirds hypothesis is:

H3: Legal regulation of marital property in Kosovar has deficits which have affected the application of these norms in an unfair manner by the courts, especially the division of the joint property of the spouses

Given that the countries we treated in this desertion, North Macedonia and Kosovo, do not have in their legislation, premarital and marital contracts we consider that their inclusion in the legislation of these countries will be a good solution for regulation of marital affairs. Through these contracts, the autonomy of the will of the spouses in the regulation of property relations and the equality of the spouses would be emphasized. Through analyzing the way of regulation of premarital and marital agreement in some European countries and USA, we will propose that

Macedonia and Kosovo to include these agreement in their legislation. Because of that the forth hypothesis will be:

H4. The application of the prenuptial and marital contract would emphasize the autonomy of the will of the spouses in the regulation of marital relations and would ensure even greater gender equality. Applying a marriage contract is the most effective way to protect spouse's property.

1.3 Methodology

In this dissertation various scientific and contemporary methods will be used in order to analyses the topic and to arrive at the conclusions and recommendations.

In general, this doctoral dissertation is based on a working methodology, which has been developed using scientific and professional literature, scientific journals, normative acts primary and secondary, reports, strategies and other relevant documentation in the field of marital and family law. The methods that will be used and intertwined in the treatment of the issues raised in this dissertation will be: historical, qualitative, analytical, comparative methods and data collection methods.

The historical method will reflect the birth and creation of marital property and the marriage contract from antiquity until its full formation in today's legislation. Through this method we first understand how these institutes were developed and what their position in today's legal system is. Through the analytical method, an in-depth analysis of the legal provisions in force will be made. This method will help us to determine the meaning, role and position of marital property and marital agreements in North Macedonia and Kosovo. The use of qualitative method is based on the collection of data which will benefit from different texts, books or various works, case law that have been taken into study, ie from primary and secondary sources and which will help in reaching the conclusions of required.

Since in this doctoral dissertation as a case study we have the marital property and martial agreement in Macedonia and Kosovo, through the method of comparison it will be aimed to compare the legal norms in these two countries and also to compare with the legislation of some

European countries. This method will highlight the similarities and differences in the legal framework of the marital property and marital agreement in Macedonia and Kosova. While through comparisons with other European countries we will highlight the shortcomings and ambiguities that exist in our country and the recommendations for their improvement based on European legislation.

2 Historical and religious development of marital property and marital agreement

Marriage as a social institution has existed a long time ago and the relationships that exist between spouses both personal and property have been characteristic also in the past. We will not be able to do an analysis of property relations between spouses if we do not start this analysis from the ancient times. Although marriage has existed since the beginning of humanity, it has not been like today. Knowing that initially marriages were as group marriage and evolved into monogamous marriages⁴⁰. This transition of marriage from group to monogamy has also the effect in creating and dividing property between spouses. Since in group marriages it is not possible to talk about the property relations of the spouses, then this analysis will initially focus on its regulation in the first slave-owning states, such as in Babylonia, Rome, then in the feudal states as Frank State, Byzantine, Ottoman Empire etc.

The first slave-owning states of the ancient east are the first slave-owning states but also the first countries in the world which are also known as eastern despots such as Egypt, Babylon, India, Persia, etc. The development of law in these countries is more dependent on their economic development, where among these countries Babylon was the state which had developed both criminal and civil law. In addition to other branches of civil law, marital and family relations were also regulated. According to Babylonian law, more specifically according to the Code of Hammurabi⁴¹, marriage is concluded in the form of a contract between the groom, bride and the bride's parents. On the occasion of concluding the marriage contract, the groom gave to the future bride the *tirhata* (gift and not the purchase price of the wife) but also gave the gift to the family of the fiancée *bi-bla-ma* which consisted of movable items. While the wife when she went to the husband's house took with her the ribbon (a kind of dowry), the purpose of which was to facilitate the married life. The husband also gave to the wife *nudunu-n* during the marriage, through which the husband secured the wife in case of his death. With all these gifts the husband administered

⁴⁰ Abdulla Aliu, *Family Law* (Prishtina: University of Prishtina, 2007).

⁴¹ The Code of Hammurabi was issued in the first half of the 18th century BC (1794-1750) by Hammurabi, the ruler (head) of Babylon. This code consists of three parts Prologue, Normative text and Epilogue. Articles 127-194 regulated marital affairs, family, dowry and inheritance.

but he couldn't sell them or alienate them because through these gifts the marriage was secured materially and in particular the wife will have all of this, in case when her husband died⁴².

According to this code, the wife could not seek divorce from the husband due to adultery by the husband, but could only do so if the husband had left the house and children for a long time. In this case the wife would receive the ribbon while the husband lose tirhaten (Article 142). If the dissolution of the marriage was done because the wife was a pervert and did not take care of the family, she lost the ribbon and the husband had the right to return the tirhate (Article 141). Another situation was when the wife separated from the husband through no fault of her own and if she had minor children, the husband was obliged to give her a portion of the usufruct real estate to raise the children. Whereas when the children were growing up, the woman kept a necessary part of the usufruct and could remarry (Article 177). So, as can be seen in the first state, the woman had a favorable position, although not equal, but at least through the contract, the property relations between the husbands were regulated.

Within the slave-owning states, except in the east, where Babylon was one of the most developed, the state of Athens developed in the western states (IX-VIII century B.C.). In Athens, law was developed which was acceptable to all Greeks because it was based on customary law, while the most well-known sources of law were the Laws of the Dragon and the Laws of Solon. In Athens the family was considered the basic cell of society while marriage was obligatory⁴³. The marriage was entered into in the form of a contract between the groom and the daughter's guardian (kyrious). In the Homeric period, the conclusion of the marriage contract is done by giving a gift (hedna) which corresponds to the purchase of the wife. While later this gift began to have less value and represented symbolically the marriage bond. The bride was not forced to bring a dowry, but in practice it was encountered a lot while her husband was administering it. Characteristic of this period was that the husband had the right without any reason to dissolve the marriage and return the wife to her parents but at the same time he was obliged to return the dowry⁴⁴.

One of the most developed and powerful slave-owning states was definitely Rome (753B.C-565). Rome is considered as the state which in perfection had regulated the slave-ownership relations by giving them legal form. It is thought that Roman jurists were influenced by customary

⁴² Hilmi Ismaili, *History of state and of law* (Prishtina: University of Prishtina, 2005), pg. 58.

⁴³ Alber Vajs and Ljubica Kandic, *General History of the state and law* (Prishtina: University of Prishtina, 1984), pg. 60.

⁴⁴ Hilmi Ismaili, *History of state and of law* (Prishtina: University of Prishtina, 2005), pg. 90.

and religious rules in issuing the first legal rules, because before the creation of legal rules, marriage was mainly regulated through customary or religious norms. This is confirmed by the fact that before the creation of the first written rules there were differences between customs of a religious nature or otherwise called by the Romans with term "Fas" and the rules of conduct that regulated relations between the Roman state and its citizens called by the term "Jus". Whereas in ancient times all customary rules had a religious character with the passage of time and with the division of people into classes and the regulation of relations between classes the rules of Jus were established⁴⁵. Due to the importance of the legal regulation of marriage under Roman law, a more in-depth analysis will be made in the following part of the thesis which will exclusively tell about the property relationship between spouses under Roman law.

After the destruction of Rome another socio-economic formation developed more progressively than the slave-owning formation called Feudalism. Feudalism was born in Europe in the 5th century and lasted until the 18th century. Due to the differences that existed between the feudal states according to theorists and historians, the states were categorized into a) barbarian kingdoms, b) the Arab state, c) Byzantium. In order not to indulge too much in state regulation in the time of feudalism, what interests us more is the regulation of marital relations in this formation⁴⁶. The Frankish state (from the 5th to the 9th century, extending into the territories of present-day northern France, southern Belgium, and southern parts of Germany as far to Switzerland) is considered a typical state of early feudalism and belongs to the group of "barbarian kingdoms". Marriage in this state was monogamous and was associated with the expression of the will of future spouses and their parents. According to the law of the Salix, the bride was bought with a number of cattle or products in nature, while the marriage was led by engagements where the bride's family was given numerous gifts. According to the laws of the Franks, the woman was more protected than the man but is observed a church intervention in marital matters in order to protect marriage and sexual morality⁴⁷.

In Byzantium, family and marital relations were largely governed by canon law. The marriage was ruled by the engagement, which was performed according to church rituals and had the importance of marriage. While marriage was entered into with a church ritual respecting the

⁴⁵ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 48.

⁴⁶ Hilmi Ismaili, *History of state and of law* (Prishtine: University of Prishtina, 2005), pg. 110.

⁴⁷ *Ibid.*, pg. 119.

conditions for marriage and marriage was allowed up to three times. Divorce was also allowed and was divided into divorce through the fault of one spouse and divorce at the will of both spouses. The woman in case of divorce sine damno was entitled to alimony, could enter into a new marriage and keep the surname of the husband⁴⁸. As far as feudalism is concerned, marriage was mainly regulated under the influence of canon law, and this is also noticed in the state of France, where the regulation of marriage falls under the jurisdiction of the church.

2.1 Marital property relation according to Roman law

Rome is considered a slave-owning state which had managed to turn the contradictions between customary and religious rules into legal rules in the most perfect way of that time. Due to the differences that existed between the customary and religious rules and due to the efforts of the plebeians to write the customary legal rules, the law was written or fixed, which resulted in the issuance of Law of XII Tables. Law of XII tables, which was issued in 451 of the old era and throughout the history of Rome was considered as "Fons omnis publici privatique juris", also regulated family issue as one of the most important institutes of Roman society, namely tables 4-5 were dedicated to this⁴⁹. Since the history of the state and of Roma law is divided into three main periods, the ancient, classical and postclassical, the treatment of marriage also varies depending on the time period.

When we talk about marriage we cannot escape the most significant definition of the most famous jurists of Rome, Modestinus. According to Modestinus, "Marriage is the union of woman and man, an eternal bond and communication of divine and human right" and by this definition we mean that woman even though she entered into the power of man at the time of marriage, still had an important role in marriage because without her marriage would not be formed⁵⁰.

In the ancient period, the consent of the heads of the family was required for marriage, while over time also the consent of the spouses was required, and in the end only the consent of the

⁴⁸ Ibid., pg.144.

⁴⁹ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 49.

⁵⁰ Arta Mandro-Balili, *Roman Law* (Tirane: Emal, 2007), pg. 124.

spouses was necessary for the marriage⁵¹. Knowing that the position of the woman in the Roman state was not equal with man, it is still noticed that in the Roman state the conditions for marriage were the same for both spouses. Initially, in the case of marriage, special importance is given to the entry of the wife into the home of the husband, which is also considered the beginning of the marriage. After the marriage, the legal position of the woman in the husband's family has been determined. In ancient law, the woman at the time of marriage became an alien juries person and was subject to the power of the pater families of the husband's family, while in the classical and postclassical period this dependence of the wife on the pater families of husband was lost⁵². Exactly the legal position that the woman had at that time determines the property relations of the spouse.

The marriage which meant the establishment of a legal relationship between husband and wife had to be done on the basis of certain conditions which were: *Affectio maritalis* or consent for marriage which was given by the paternal relatives of the families of the future spouses but later also by the spouses themselves; *Ius Connubium* which mean the right to marry and which initially had only Roman citizens with ius civiles but later all Roman citizens began to have it; *The age of puberty* where for males it was 14 years old while for females 12 years old; *The prescribed form* of marriage which were confarreatio, coemptio and usus⁵³. All the required conditions had to be met cumulatively in order to be valid marriage, but they also gave the marriage a legal character. Among these conditions, the property relations between the spouses are not mentioned because the relations between the spouses in the ancient period corresponded to the principle of the unity of the family property which was administered by the paterfamilias⁵⁴. Later in the classical and post-classical period, due to the importance of the woman in marriage, she was given a more favorable position, where the woman could remain sui juris, that is, not to enter into the power of the husband if he had such a status even before marriage. In the case of marriage, the wife brought into the marriage a relatively large property which the wife's paterfamilias gave to the husband's paterfamilias and this property became the property of the owner of the manus⁵⁵.

Based to custom, the husband must leave this property brought by the wife back to the wife in the will. According to Republican lawyers, it is said that the property acquired by the wife came

⁵¹ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 184

⁵² Bashkim Selami and Bekim Rexhepi, *Roman Law (Ferizaj. INHSH, 2014)*, pg.309.

⁵³ Enkelejda Olldash, *Roman Law* (Tirane: Mediaprint, 2015), pg. 94.

⁵⁴ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 180

⁵⁵ Ibem., pg.184.

from the husband and that the husband in the will appointed a tutor to take care of the wife's property. With all these rules, an attempt was made to strengthen the position of women in property relations, and in this context, the legal regime of marriage and gifts of marriage is discussed.⁵⁶

2.1.1 Spouses' relationships in marriage with manus and without manus

According to Roman law to enter into a valid marriage, it was required to fulfill conditions for marriage and at the same time there should be no marital barriers. In addition to the other conditions for a marriage to be valid, it had to be entered into according to the legally prescribed form. The form provided for the marriage was a necessary condition that affected the property relations of the spouses. Although these forms of marriage have changed over time, still depending on the form of marriage, the power that the husband would have over the wife and the rights that the wife would have in the marital property are determined.

If the marriage was conducted in the form *coemptio* or *confarreatio*, the wife was placed under the authority of the husband's *paterfamilias* or under the husband's *manus*, if he was *sui juris*. The forms of marriage according to *coemptio* and *confarreatio* were considered as the oldest forms issued by the *conventio in manum* which was otherwise known as marriage with *manus* or *matrimonium cum manus*⁵⁷. In a marriage with *manus*, the wife was not only placed under the authority of the husband or the head of his family but all contact with her family was cut off. The *paterfamilias* sometimes had a right to the wife's life or death. Also, all the property of the woman passed on to the husband's *paterfamilias* who was considered the owner of all the economic goods that the woman could create in the marriage⁵⁸. The only right that the wife had in this form of marriage was the right to inheritance⁵⁹. Everything that she possessed or created during the married life belonged to the husband, thus preventing the wife from participating in the joint marital property⁶⁰. This form of marriage was typical of the ancient period and it is seen that the woman not only had

⁵⁶ Arta Mandro-Balili, *Roman Law* (Tirane: Emal, 2007), pg. 138.

⁵⁷ Andrew T. Bierkan, Charles P. Sherman and Emile Stocquart, Jur., "Marriage in Roman Law", *The Yale Law Journal Company, Inc*, 1907, pg. 310.

⁵⁸ Bashkim Selami and Bekim Rexhepi, *Roman Law (Ferizaj)*, INHSH, 2014), pg. 317.

⁵⁹ Arta Mandro-Balili, *Roman Law* (Tirane: Emal, 2007), pg. 130.

⁶⁰ Paul H. Dué, "Origin and Hist Origin and Historical De orical Development of the Community Prelopment of the Community Property System", *Louisiana Law Review*, Volume 25, Article 17. (1964), pg.80.

no property rights but for her decide the husband or his paterfamilias. This is because the woman did not gain the ability to act and was considered an incompetent person to decide for herself.

While if the marriage is conducted in the form of *usus* (which is mostly used by the poor strata of the population), the wife was not placed under the *manus* of the husband or husband's paterfamilias but remained a *sui juris* person if she had this status before the marriage or remained under the authority of her paterfamilias, if she had alien *juris* status⁶¹. This marriage was known as marriage without *manus* or *matrimonium sine manus*. In this form of marriage which was characteristic in the classical and post-classical period, the woman maintained relations with her family, lived with her husband and had the right to demand alimony from him. The husband administered with the wife's dowry while using the *ad onera matrimonii sustinenda* while for the other property the woman could enter into a mandate or depositum contract for the way of its use⁶². This position was considered the most independent of the wife in the husband's family, where according to the edict of Augustus and Claudius women could not get into debt and guarantee the obligations of husband and also gifts between spouses were forbidden. But this position caused the wife to lose the right to inheritance and the right of inheritance between mother and child because the mother and the child were not relatives in the genus agnate but cognate⁶³. Thus, according to this form of marriage, there was an advancement of the position of the woman in the marital property relations, because she could manage a part of the property herself, but she could not inherit property from the husband's family, which is considered deficiencies in hereditary system.

2.1.2 Dos, donatio ante nuptius and the legal consequences in case of divorce

The marriage created rights and obligations between the spouses and in fact represented a burden on the husband's family. For this reason in Rome it was customary on the occasion of the marriage to create property to cover the expenses which will be created between husband and wife. Initially in agnate families in Rome, at the time when the alien *juris* person could not be separated from their paterfamilias, i.e. the property community was not separated, the wife was obliged to

⁶¹ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 183.

⁶² Bashkim Selami and Bekim Rexhepi, *Roman Law* (Ferizaj, INHSH, 2014), pg. 319.

⁶³ *Ibid.*, pg.130.

bring property on the occasion of marriage expenses which was intended to facilitate marital life. Over the time, alien juris person could seek to divide from the property community of the family and to form their own economy. From this moment the obligation to bring wealth to the marriage belonged to the husband as well. The property measure brought by the spouses at the time of marriage was dual: the dowry (*dos*) brought by the wife and the premarital gift (*donatio ante nuptias*) brought by the husband⁶⁴.

Dowry (dos) was the property that the woman brought to the husband's house on the occasion of the marriage. This wealth that the wife brought to married had two main purposes, firstly this wealth had the effect of the inheritance that the daughter received from her family, while secondly it was intended to facilitate the marital expenses. Since women did not have the right to inherit in the parents' family, they exercised this right by receiving the dowry and sending it to the husband's family. However, even though the dowry had the effect of inheritance, the woman still did not become the owner of that property but handed it over to her husband's or husband's family. Through the dowry the wife contributed to the economy of the husband's family⁶⁵. The dowry consists of the goods that existed at the time of the marriage and these were solemnly handed over to the husband, but this transfer was done like any transfer of property through *mancipatio*, in *iure cessio* and *tradito*⁶⁶. Although dowry had as its main purpose the facilitation of maternal life and was present in all marriages, it was characterized in different forms depending on the period of development of the Roman state, so the rights that the woman had over dowry were distinguished.

In ancient times, the dowry at the time of marriage became the property of the husband or his *paterfamilias*, which means that even in the death of the wife or divorce the dowry remains to husband. In the classical period the husband or *paterfamilias* did not become the owner of the dowry but only had the right to administer it, while in the event of the wife's death the dowry had to be returned to the wife's paternal family. Since the husband or the paternal family of the husband had the right to administer the dowry, they were obliged to use the goods obtained from the value of the dowry and if they did not do so, the administration of dowry could be taken over. In this period was created a new access to the dowry which was achieved through the institute of restitution of the dowry in case of dissolution of the marriage. If the marriage ended due to the

⁶⁴ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 186.

⁶⁵ Enkelejda Ollashi, *Roman Law*, (Tirane: Mediaprint, 2015), pg. 103.

⁶⁶ *Ibid.*, pg. 103.

death of the wife, the *dos profecticia* (the dowry which was assigned by the woman's paterfamilias) must be restituted, while *dos adventicia* (dowry determined by other sources) was restored only if it was specified in the contract (*dos recepticia*). In the case of the restitution of *dos profecticia*, the husband had the right to keep one-fifth of the dowry for each child born in the dissolved marriage. Whereas in case of divorce, the rule applies that in any case the limited restitution of the dowry is allowed (the contract of restitution of the dowry divides the *dos adventicia* into two groups: *dos recepticia* and *dos non recepticia* which always remained the property of the husband).

The wife or the woman's paterfamilias (if she was an alien juris person) had the right or active legitimation for the restitution of the dowry. The verdict issued by the court for the restitution of the dowry also regulated the issue of retention that belonged to the husband. The quota that belonged to the husband in the values of the dowry reached the value of one sixth of the dowry for each child born in wedlock if the marriage was dissolved by divorce due to the fault of the wife⁶⁷. This period of development of the state and Roman law marks a turning point in terms of women's rights in marital property. Although not at the right level but the fact that the dowry began to be considered the property of the wife and the husband only administered with it while the wife had the right to return it, represented an advancement of her rights. While in the post-classical period the husband was obliged to return the dowry if the wife was not his heir, while the wife was allowed a vindicator lawsuit to secure the return of the dowry and also the general mortgage on all the husband's property⁶⁸.

Premarital gift (donatio ante nuptias) it was a part of wealth that the husband gave to his future wife and which has the similar value to the dowry. Like the dowry, the premarital gift was intended to facilitate married life, but which became a custom in the time of Emperor Constantine. Even with this property, the husband administered but if the husband died, this property passed to the children while the wife retained the right of usufruct. If the marriage ended with divorce through the fault of the husband, this property belonged to the wife⁶⁹. It is thought that through this institute to favor the position of women in case of divorce through the fault of men and that she be stronger economically.

⁶⁷ Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 187

⁶⁸ Arta Mandro-Balili, *Roman Law* (Tirana: Emal, 2007), pg. 131.

⁶⁹ Bashkim Selami and Bekim Rexhepi, *Roman Law* (Ferizaj, INHSH, 2014), pg. 323.

2.2 Marital property relation according to Canon law

Canon law was a right which occupied an important place in feudalism and especially in Christian states. This right was developed more in XI-XV century and consisted of legal norms which were issued by the church (Catholic and Orthodox), mainly to regulate relations within the church but which then extends their jurisdiction to the regulation of other relations also family and marital ones. Due to the importance of canon law in the regulation of marital law, especially property rights between spouses, an important question has been devoted to whether this right could be called “*Right*”. Knowing that the right or law is a norm which is issued and applied by the state, the same does not happen with canon law. The meaning that law has today did not exist even in the Middle Ages because at that time state power was based on the Christian ideology where the state was a creature of God while the ruler was the messenger of the god⁷⁰. This ideology spread to many countries of Western and Central Europe which recognized the sovereignty of the church, making the church not only a spiritual organization but also a state one. Due to the disputes that have existed regarding the domination of the church over the state and their division into Eastern (Greek Orthodox) and Western (Roman Catholic) churches and the influence that the churches had on the state, it is concluded that the church in the feudal period have been related to the state, so the church and the state were two pillars of a social order. The church offered ideological support to the state while the state gave it the strength to implement the norms issued by the church⁷¹.

Because of the position that the church had at that time, as general sources of ecclesiastical law were first the Holy Scriptures (the Bible), the Apostolic Tradition, the Ecclesiastical Legislation and the customary law. However, in the 11th century, there was a division between the Catholic and Orthodox Churches, and each church, in addition to the above-mentioned sources, began to create separate sources. Thus the Catholic Church as a source of law except the New and Old Testaments (Dhjata) also used the Decrees of the Pope of Rome, the decisions of the gatherings of the Catholic Church. He also paid special attention to Roman law because of the influence it had on the creation of canon law⁷².

⁷⁰ Hilmi Ismaili, *History of state and of law* (Prishtina: University of Prishtina, 2005), pg. 184.

⁷¹ *Ibid.*, pg. 184.

⁷² Vajs, Alber and Ljubica Kandic, *General History of the state and law* (Prishtina: University of Prishtina, 1984), pg. 129.

Since these sources were scattered, their compilation began, where was distinguished the Garcian Decree (1150), which was accepted as an official codification by the Church and was implemented as such. Then Gregoriana or Sexta (1234) was codified by Pope Gerguri where in one of the chapters he had summarized the norms for marriage. Another summary was made by Pope Bonafacie called the Liber Sextus, which in addition to the papa's decrees included the appendix "De reguli Iuris" taken from Roman law through which was accepted the connection between canonical and Roman law. Another summary of ecclesiastical law was made by Pope Clementine (1317) who was called as Clementine and review the question of "whether canon law is the source of all other rights"⁷³.

Many summaries of ecclesiastical law were made and as the result the material of Catholic ecclesiastical law was distributed in several summaries. To reinforce the influence that the Catholic Church had on ecclesiastical states and to impose its ideology, in XVI century, it's done the codification of all canon law which resulted in the issuance of the "Corpus Iuris Canonici" (1500-Paris). This corpus, in addition to the above acts, also contained norms from civil, procedural, criminal law, and especially norms that regulated family, marital and inheritance relations⁷⁴. From the name of this collection we can see the influence that Roman law had on the creation of this collection and especially the influence of Justinian's codification which was called Corpus Juris Civilis⁷⁵. "Corpus Iuris Canonici" was accepted in many Catholic countries starting from Germany, Hungary which incorporated it in their civil codifications and was in official use until 1918. Exactly in this year another codification came into force called "Codex iuris canonici", which is a summary of all canon law but which contains norms with legal character while the norms with religious character have been removed. This code is still in official use⁷⁶.

On the other hand, the Orthodox Church, in addition to the general sources, it used as special sources the decisions of the patriarchs of Constantinople (Istanbul), the decisions of the general assemblies of the Church and the nomocanons. But this church was not unique because within it was created the autocephaly (national churches were created) and the decisions of the patriarchs of these churches were valid only within the church, they did not have the influence that the

⁷³ Muhamet Kelmendi, *History of state and Law* (Prishtina: AAB College, 2015), pg. 182.

⁷⁴ Hilmi Ismaili, *History of state and of law* (Prishtina: University of Prishtina, 2005), pg. 193.

⁷⁵ Joseph n. Perry, The canonical concept of marital consent: roman law influences, *The Catholic Lawyer*, Volume 25, no. 3, (1980), pg. 229.

⁷⁶ Vajs, Alber and Ljubica Kandic, *General History of the state and law* (Prishtina: University of Prishtina, 1984), pg. 129.

Catholic Church had⁷⁷. The main source of Orthodox Church was the 12 learning of apostils, the canons of ecumenical synods and the canons of local synods which was summarized in different collection. More useful is the Greece Orthodox Church called “Pedalion”⁷⁸. While marital relations were regulated by applying the canonical norms which were summarized by the jurist Kostanidnos Armenopoulos in his work Heksabiblos, which were Byzantine origin⁷⁹.

One of the most important codifications, which is still in official use by Catholic Church, is the Codex Iuris Canonici, which also regulates marriage and relationship between spouses. According to the Code of Canon law, marriage is considered a relationship between man and woman, bound for whole life for the good of the spouse and their offspring, which is raised by Christ the Lord of dignity of sacrament between the baptized. The main characteristic of Catholic marriage is its unity and indissolubility, as a result of the sacrament⁸⁰.

According to St. Aquinas marriage is considered a spiritual institution precisely because of the sacrament and for this reason it is considered an unbreakable union and a channel of grace⁸¹. Due to this characteristic of marriage, each property of the family is characterized as common property and as such no member of the family cannot have any rights into any part of this property⁸². According to canon law, marriage cannot be dissolved due to the divine nature it has and for this reason it is not foreseen what rights and obligations spouses have over marital property, thus, spouses have equal rights to their property⁸³. Whereas according to canon 1062 is foreseen the engagement which is considered only as a promise for marriage and is only the moral obligation for the future spouses. If one spouse breaks the promise of the engagement then he is responsible for compensation of damage e.g. financial expenses of the wedding preparation⁸⁴.

As a result of the non-dissolution of the marriage, there is no separation of the joint property of the spouses, but instead the church had foreseen another institution, which is the separation

⁷⁷ Hilmi Ismaili, *History of state and of law* (Prishtina: University of Prishtina, 2005), pg. 194.

⁷⁸ Lewis J. Patsavos, *The Canon Law of the Orthodox Catholic Church*, (Mimeographed Notes), (Brookline: Mass-Holy Cross Bookstore, 1975).

⁷⁹ Ibid.

⁸⁰ The Holy See, “Code of Canon Law”, canon 1055, 1056. http://www.vatican.va/archive/ENG1104/_P3V.HTM, (Accessed on 21 November, 2020)

⁸¹ Roberto Rosas, “Matrimonial consent in canon law juridical aspects”, *Revista Juridica*, Volume XLIII, No. 3 (2009), pg. 425.

⁸² Dalia Perkumienė, *The institution of marriage in the canon and Lithuanian civil law with regard to the international relations*, PhD Thesis, Ghent: Ghent University. Faculty of Law, 2014, pg. 145

⁸³ Ibid., pg.145.

⁸⁴ The Holy See, “Code of Canon Law”, canon 1055, 1056. http://www.vatican.va/archive/ENG1104/_P3V.HTM, (Accessed on 21 November, 2020).

from the bed and the table (separation quod thorum et mensam)⁸⁵. Through this institution the marriage entered according to canon law did not end but ended temporarily or forever the factual life of the spouses. As for the contractual agreement between the spouses regarding the division of property of the future spouses has been prohibited since according to ecclesiastical law any document that protects the special property of the spouses can damage the living community of the spouses and can make invalid marriage⁸⁶. For this reason, marriage according to canon law, although it has provided for the possibility of non-dissolution of marriage on the grounds that married spouses can only be separated by death, has still neglected the regulation of property relations, which has great importance in marital life. Although spouses express their willingness to marry, the fact that divorce is prohibited makes it impossible for either spouse to take the property he or she owns or has created during marital life. So with the fact of the prohibition of divorce we cannot even talk about property relations between spouses because all the property is considered joint.

⁸⁵ Gani Oruci, Family law- authorized lecture (Prishtina: 1999), pg. 92.

⁸⁶ Bedri Bahtiri, *National and international aspects of the marriage property regime of the spouse* (Prishtina: University of Prishtina, 2013), pg. 32.

2.3 Marital property relation according to Sharia law

Another right which was developed within the feudal states was the Ottoman law. This law was developed into Ottoman state. The Ottoman state was created at the end of the 13th century until the end of the 19th century, which was a state with a pronounced theocratic character. This empire reached the culmination of territorial expansion at the beginning of the 17th century, where in addition to the conquest of Byzantine, its sovereignty was accepted and its power extended to three continents: in South Africa, in the Near East, in some parts of the Middle East and in Europe as far as Vienna⁸⁷. In addition to the extent of her power in these countries, she had a well-developed right. Since this empire had a strong religious character as the most important source of law was the Sharia Law. This right was based on the Qur'an, Hadith (Sunnah-tradition), Ijma or doctrine and Qiyas or legal analogy, but the Qur'an and Hadith is considered more important⁸⁸.

The Qur'an is the holiest and most important book of Islamic law which contains about five hundred legal verses which clearly regulate the life of Muslim believers from birth to death. Also an important source of Muslim law, which contains legal provisions is the Sunnah. The Sunnah represents the deeds and sayings of the Prophet Muhammad which are created in the form of narrations and also is known as Hadith. Among the other relationships that are regulated through the Qur'an and Hadith also marriage is regulate more specifically the rights and responsibility that spouses have in marriage⁸⁹. According to Islam, marriage is considered the foundation of the family while the family is the foundation of the human community and as such has made the institution of marriage obligatory, in order to continue humanity⁹⁰.

Islamic law according to Sharia law, although it did not prohibit polygamy, but managed to give marriage a different character, especially in terms of women's rights in marriage. Through this right, the power of the man over the woman was diminished, especially in the property issue where the dowry is not considered a price for the purchase of the woman but is considered a marital

⁸⁷ Hilmi Ismaili, *History of state and of law* (Prishtina: University of Prishtina, 2005), pg. 197.

⁸⁸ Rafat Y. Alwazna, "Islamic Law: Its Sources, Interpretation and the Translation of It into Laws Written in English", *International Journal of Semiotic Law*, Vol. 29, (2016).

⁸⁹ *Ibid.*, pg.1.

⁹⁰ Shefket Kurdiq, *Marriage and intimacy in Islam (Switzerland: Shb Sira, 2003)*, pg. 11.

gift which is kept by the woman and was part of her separated property⁹¹. Also one of the purposes of mehr is to preserve the marriage. In case of divorce it belongs to the wife.

Marriage was considered as a relationship between Allah and human parties, and to be valid, certain conditions had to be met. First, the marriage has to be concluded in the form of a contract, which is preceded by a sincere, clear and direct proposal, while on the other hand, the response to the proposal should have been such. Another condition requested was that the marriage have to be entered into in the presence of two witnesses through which the right of legitimate descendants was protected and this condition had the importance of publicity. While another condition was the giving of mehr (dowry) the marital gift that the groom gives to the bride⁹². Contrary to the meanings of dowry in other systems (which was considered as a price for the purchase of a wife, or property through which married life was helped), in Islamic law it is used in the sense of the gift that the husband gives to his wife and which becomes the separated property of the wife⁹³. According to the Qur'an, the dowry is obligatory and may contain money, property, movable property or services performed for the bride. The amount of the gift is not specified but can be determined according to the circumstances and prudence. This is the exclusive right of the bride who has the authority to act with her as she wishes and to use her as she pleases⁹⁴. The giving of mehr or dowry is considered a fundamental change for the rights of women and their economic independence. According to Islam this is an ordinance and not a custom by minimizing the power of the husband and his family over the wife.

The right to mehr is a right due to marriage and this right does not mean that she loses her previous rights as a person and the rights to property and private gains. Married or unmarried women have the right to own property in their own name, to spend it as they wish, to preserve their property and to remain the owners of mehr or any wealth they may acquire through inheritance, gifts or the fruits of labor and investment. According to the Lichtenstadter, "the Prophet preceded the Western legislature" by deciding in favor of women's right to separated property⁹⁵. In Islamic law, more specifically in the Qur'an, the term marital property is not mentioned, as each spouse holds the property he acquires, as separated property. Exactly in Qur'an 67:15 it is commanded

⁹¹Majid Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints", *The American Journal of Comparative Law*, Vol. 26, No. 2, (1978). pg.213

⁹²Hamude Abdulati, *Family structure in Islam* (Skopje: Logos-A, 1995), pg. 67-68.

⁹³Ibid., pg.71.

⁹⁴Hamude Abdulati, *Family structure in Islam* (Skopje: Logos-A, 1995), pg. 73

⁹⁵Ibid, pg. 171

that both men and women must work to survive⁹⁶. The husband is obliged to support the wife, to fulfill all the conditions she needs for a good life and he is obliged to pay all the expenses for the fulfillment of the needs of the family. While the wife, even if she has her own property, she is not obliged to spend it for the needs of the family. For this reason the husband inherits twice as much as the wife in order to be able to cover the family expenses⁹⁷

But what happens to marital gifts or dowry in the event of divorce, even this issue is regulated in detail by sharia law. Divorce is a universal and unavoidable right, and as such Islam has taken a moderate stance between its categorical prohibition and unqualified divorce liberalization⁹⁸. Although according to the Pejgamber (the messenger of Allah) divorce is considered the most hated thing, but it is permissible. In case of divorce, after the fulfillment of the marriage, the wife receives the full dowry, while in the case of divorce without the marriage being fulfilled (ie, without having sexual intercourse between the spouses), the wife receives half of the dowry. But even in the face of divorce, the Qur'an instructs husbands to treat divorced women with generosity, piety, kindness and mercy, and to meet their needs as much as possible⁹⁹.

Based on the sources of Islamic law, there is an improvement in the position of women in terms of property rights. One of the advantages of this right is that the woman can have separated property and that she can dispose of it freely. As far as inheritance is concerned, the wife inherits less than the husband for the reason that the husband is responsible for all family expenses while the wife is not obliged to spend her separated property for the needs of the family. For this reason, according to Islamic law, a woman inherits less than a man. While the marital gift that the wife receives on the occasion of the marriage from the husband is intended to empower the woman financially, especially in case of divorce.

⁹⁶ Mwanamkuu Sudi Mwakwambirwa, *A focus on law, Islam and women's matrimonial property rights in Mombasa, PhD Thesis*, Zimbabwe: University of Zimbabwe, Faculty of Women's Law, 2014, pg.15.

⁹⁷ Shefket Kurdiq, *Marriage and intimacy in Islam* (Switzerland: Shb Sira, 2003), pg. 42.

⁹⁸ Hamude Abdulati, *Family structure in Islam* (Skopje: Logos-A, 1995), pg. 224

⁹⁹ *Ibid.*, pg. 249.

2.4 Marital property relation according to Albanian customary law

Customary law is considered as one of the oldest sources which consists of unwritten rules of conduct which were established between members of a society and due to their long application were obliged to be respected¹⁰⁰. According to Bogishic, "the people strongly adhere to their custom as a product of their own and for this reason they hate or view with distrust any new rule, especially when it is contrary to their worldview". The Albanian customary law according to the author Statovci, it represents a "Corpus Iuris", through which the social and economic life is regulated. This Albanian customary right was born at the time of the disintegration of the tribal system, which is considered a time of great social contradictions¹⁰¹.

The norms of the Albanian customary law are summarized in many canons when the most important and used canons is the Canon of Lekë Dukagjini. In addition to this well-known canons are also the Canon of Laberia, the Canon of Skenderbeu, the Canon of the Mountains which are considered as the immortal inheritance of the Albanian customary law¹⁰². The implementation of these canons has been done in different times and spaces, but among them dominates the Canon of Lekë Dukagjini which has left traces even in contemporary times.

The Canon of Lekë Dukagjini is considered as a unique work with a human spirit of the European Renaissance period in the Albanian language. Otherwise, Lekë Dukagjini is a historical figure who had lived in the years 1410-1481, who in addition to his deeds for the protection of Albanian lands after his death, left the Canon legacy. The essence of this canon were the proverbs that came out of his mouth and were preserved generation after generation for almost six centuries. Their summary was made by Shtjefen Gjecovi in the XIX-XX centuries¹⁰³. The Canon of Lekë Dukagjini contains institutions such as joint ownership and private ownership and the norms for their regulation were applied almost everywhere regardless of the social and political order. This canon has been valid in the tribal society and rural organization of North Albania, as well as among the Albanians in Kosovo, Serbia, Montenegro and a part of western Macedonia¹⁰⁴.

¹⁰⁰ Abdulla Aliu, *Family Law* (Prishtina: University of Prishtina, 2007), pg.35.

¹⁰¹ Abdulla Aliu, *Civil Law* (Prishtina: University of Prishtina, 2013), pg.131.

¹⁰² Ismet Elezi, *The Customary Law of Laberia in the Comparative Plan* (Tirana: Toena, 1994), pg. 29.

¹⁰³ Shtjefan Gjecovi, *Canon of Leke Dukagjini* (Shkoder, 1933).

¹⁰⁴ Abdulla Aliu, *Civil Law* (Prishtina: University of Prishtina, 2013), pg. 136.

According to the Canon of Leke Dukagjini, marriage means to make (create) a home, adding to the house one more person who will serve as a labor force and make children¹⁰⁵. Although according to the canon the wife was considered a person just to do the housework and give birth to a kid, the husband was obliged to take care of the wife and maintain her. In Albanian customary law, the power of the father of the house was strong, who had the right to decide on the marriage of children. In this case if the parents of the son and daughter agreed then the engagement bond. The engagement was considered binding at the time when the groom's father gave Sheya (considered the ring given to the bride) to the bride as evidence of the engagement. If the groom decided to terminate the engagement, he lost the Sheya and money he had donated to the bride and was obliged to inform the girl's father that the engagement had been annulled¹⁰⁶. On the other hand, the girl has no right to break the engagement even if she does not like the fiancé. If the girl refuses to marry her fiancé, according to the canon she can never marry again while her fiancé is alive. While the Sheya that the girl received on the occasion of the engagement will remain with her until the day of the groom's death so that it is known that she has been engaged¹⁰⁷.

Relationships between husband and wife are personal even though the husband had far more rights than the wife. The marital property was in the hands of the husband except the personal things belonging to the wife which were given on the occasion of the marriage¹⁰⁸. Another issue that was important regarding the property relations of the spouses was what happens with the gifts given to the wife in case of the death of the husband and vice versa. In this case, different situations were distinguished. If the groom dies before taking the bride home, then the bride's parent is left the Sheji (the ring) while the other money given on the occasion of the engagement is returned to the groom's parent. On the other hand, if the groom dies and spend at least one night with the bride, then the bride's parent returns half of the money received on the occasion of the daughter's engagement. If the groom dies in the first year of marriage, the bride's parent must return 1/4 of the money received on the occasion of the girl's engagement, while if the groom dies in the second year of marriage, the girl's parents must return 1/3 of money to the groom's parents. Whereas if the groom leaving children, then the bride's parents owe nothing to the groom's family¹⁰⁹.

¹⁰⁵ Shtjefan Gjecovi, *Canon of Leke Dukagjini*, Book Marriage, article 28, (Shkoder, 1933).

¹⁰⁶ Shtjefan Gjecovi, *Canon of Leke Dukagjini*, Book Marriage, article 42, (Shkoder, 1933).

¹⁰⁷ Ibid, 1933, article 43

¹⁰⁸ Bedri Bahtiri, *National and international aspects of the marriage property regime of the spouse* (Prishtina: University of Prishtina, 2013), pg. 39.

¹⁰⁹ Shtjefan Gjecovi, *Canon of Leke Dukagjini*, Book Marriage, article 56, (Shkoder, 1933).

Whereas if the wife dies within three years of marriage and had no children, then her parents had the right to take the bride's items, except a pair of clothes that would remain in the husband's house. But if the wife dies and has children then the bride's parents have the right to receive only a few clothes while the other things remain in the husband's house¹¹⁰.

As we can see according to the Canon of Leke Dukagjini due to the dominance of men power or patria Potestat, there is no place to talk about marital property between spouses because large families have dominated and wealth was shared only between male members. Except that the wife has no right to decide on engagement and marriage she has no right to inherit at her parents' house.

¹¹⁰ Shtjefan Gjecovi, *Canon of Leke Dukagjini*, Book Marriage, article 57, (Shkoder, 1933).

2.5 The historical development of the regulation of marital property in North Macedonia and Kosovo until now

Kosovo and Macedonia are considered as two relatively new states that have emerged from the former Yugoslavia. The Law of the Ottoman Empire has been applied in these two countries for a long time. Kosovo and Macedonia after the Balkan wars of 1912-1913 came under the jurisdiction of Serbia. Until these years, Turkish civil law called Mexhele has been valid. Upon entering in the Kingdom of Serbia, it began to apply the Civil Code of Serbia (1884) until 1945. Through decrees and special laws expanding jurisdiction, Serbia began to impose its jurisdiction on these two countries¹¹¹. From 1918-1946 in these countries the Civil Code of the Kingdom of Serbia was implemented, which distinguished the duality of legal regulation of marriage and marital relations. Marriage and divorce were regulated by ecclesiastical norms while property relations were regulated by state norms. This period is characterized by the attitude that all the property of the spouses belonged to the husband¹¹². According to the Code of the Kingdom of Serbia (1844) the spouses had the opportunity to be determined by contract for the general marital regime, the regime of miraz or that of mehr¹¹³. Entry into these contracts was done on the basis of free will, although at that time the patriarchal system dominated.

The general property community regime was created by merging the assets of both spouses while its administration is done by the spouse. The Miraz regime was created in cases when the wife brought wealth to the marriage, where this wealth was called miraz. This regime could be created only by contract and it was important that in this contract the husband was given the right to use the property brought by the wife in marriage. Depending on the type of thing that was the object of the inheritance, the rights that the husband had over this property were also determined. For example, if the items were not consumable, the wife remained the owner while the husband had the right to use¹¹⁴. While the Mehr Regime was mainly implemented by the Muslim peoples living in the Kingdom of Serbia which was derived from Sharia law. According to this code, the

¹¹¹ Abdulla Aliu, *Civil Law*, (Prishtina: University of Prishtina, 2013), pg. 155.

¹¹² Albana Meta Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation*. (Tirana: UET, 2019), pg 52.

¹¹³ Code of Kingdom of Serbia, 1884, article 771,772.

¹¹⁴ Ibid, 1984, pg. 769-776.

husband could make a wedding gift to his wife, but which would be considered the wife's miraz. But the woman lost this gift in case of abandonment, or divorce through the fault of the woman¹¹⁵.

The year 1946, in addition to other reforms in the People's Federal Republic, brought changes in the field of family law. In addition to equality between men and women, the relationship between them was regulated by the Basic Law on Marriage. Based on this law, the property of the spouses is considered joint, while in case of dispute, the division will be made by court decision and the contribution will be evaluated not only through the work of the spouses but also assistance in performing household chores, property maintenance and child care¹¹⁶. The constitutional amendments of 1971 led to the issuance of a Marriage Law of the Socialist Republic of Macedonia (1973) which regulated in detail the personal and property relations of the spouses. According to this law, two legal regimes were known, the joint property regime and the special property regime and the contractual regime¹¹⁷.

Since these states have now emerged from the former Yugoslavia and function as two independent states with their own legislations, in the other parts of this paper each positive law will be treated separately, but it should be borne in mind that all the legislation so far has had a major impact on the laws in force today. Although these states now have different laws, it has been noted that the existence of a federation has left its mark on legal regulation.

¹¹⁵ Code of Kingdom of Serbia, 1984, pg. 770.

¹¹⁶ Basic Law on marriage of the RFPJ, article 8, 1946

¹¹⁷ Albana Meta Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation.* (Tirana: UET, 2019), pg. 58.

3. Marital property under positive law in Kosovo

Kosovo as one of the youngest countries in Europe is distinguished by a relatively new legislation. Part of this legislation is also the family law through which is regulated family and all other relations that arise from the family. The family is considered one of the main institutions of family law or as the oldest cell of social organization¹¹⁸. The Universal Declaration of Human Rights defines the family as the fundamental and natural unit of society and has the right to be protected by the state and society¹¹⁹. Due to the importance of family in society, this institute enjoys legal protection also in Kosovo legislation. More precisely, the family law protects the family and all other institutions that originate from the family.

According to the positive legislation of Kosovo, the family is defined as a vital community of parents and their children as well as other persons of the kin¹²⁰. From the nature of the family and from the definition made by the law, it is noticed that the family differs from other social organizations due to the composition of its members and the connection that these members have with each other. Also, from the specific connection that family members have with each other, some features of the family stand out. The important feature of the family is the foundation on which it is built. Thus, the family as a social community is created by persons who have entered into marriage and persons who are related by kin. While what gives the family its legal character or legal nature is that family members have rights and obligations among themselves which are regulated by law, such as rights and obligations between spouses, parent and child, etc.¹²¹.

Family is created on several bases, but marriage is considered the main basis for establishing the family. In addition to marriage, the extramarital union is considered the basis for creating a family. It is important that with the connection of marriage or extramarital union and the birth of children, the family is created and it expands. From the definition given in the Constitution of the Republic of Kosovo, everyone enjoys the right to marry and the right to found a family in accordance with the law. It is natural for these two institutes to be inseparable from

¹¹⁸ Abdulla Aliu and Haxhi Gashi, *Family Law* (Prishtina: University of Prishtina, 2007), pg. 41.

¹¹⁹ United Nations General Assembly, *The Universal Declaration of Human Rights*, Article 16.3, 1948

¹²⁰ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, article 2. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹²¹ Abdulla Aliu and Haxhi Gashi, *Family Law* (Prishtina: University of Prishtina, 2007), pg. 42.

each other and as such they are regulated by the same law. Marriage as one of the bases for establishing a family in Kosovo legislation is regulated within the family law. The same treatment is found in the Universal Declaration of Human Rights which states that a man and a woman at a certain age, regardless of race, nationality, religion, have the right to marry and to found a family¹²². The same legal protection for marriage is provided by the European Charter of Human Rights which in its article 12 states that "Husband and wife who have reached the age of marriage have the right to marry and to found a family according to the national laws governing the exercise of this right "¹²³. Since these international acts have been ratified by the Constitution of the Republic of Kosovo¹²⁴, family and marriage are regulated in more detail through the Law on Family in Kosovo. Not to mention the fact that Kosovo is in the process of adopting the Civil Code and that in some points differs from the law on family which is now in force.

Marriage, that it takes place in international conventions on human rights is considered a fundamental human right. Since these conventions have given states the right to determine the conditions for its conclusion, then each state through national laws has defined the conditions, rights and obligations arising from marriage. Always in the spirit of international human rights conventions. Even in the Law on Family in Kosovo, which is considered to be in the spirit of international conventions and the constitution has regulated in detail marriage and the rights and obligations arising from marriage. Marriage is considered a legally registered union between two persons of the opposite sex, who freely decide to live together and start a family¹²⁵. From this definition made by law it is clear that cohabitation is the main purpose of marriage which results in the creation of the family.

Since marriage is considered both a solemn legal act but also a legal relationship. When we say that marriage is a solemn legal act, we mean that its marriage must be done according to the form required by law¹²⁶. Its solemnity is included in the marriage because it is connected in front of the registrar in the locality designated for this purpose and is done according to the defined legal procedure. Only after it has been ascertained that the conditions for the marriage

¹²² United Nations General Assembly, *The Universal Declaration of Human Rights*, Article 16.1, 1948.

¹²³ Council of Europe, *European Convention on Human Rights*, Article 13, 1950, Rome.

¹²⁴ Assembly of the Republic of Kosova, *Constitution of the Republic of Kosova*, Article 22, 2008, Prishtina: Official Newspaper of the Republic of Kosova

¹²⁵ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, article 14. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹²⁶ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 86.

have been fulfilled and the confirmation of the non-existence of obstacles and prohibitions of marriage, the official declares the marriage as concluded. This moment is recorded in the registered books of the married couple which is signed by the spouses¹²⁷. Marriage is also a legal relationship because it creates rights and obligations for spouses but which differs from other relationships because it is not bound by terms and conditions. While the wealthy elements occupy a secondary place¹²⁸.

According to the author Giovanni Bonilini "the property plan should not be the cause of the marriage but simply a consequence of it"¹²⁹. Spouses must express their free will to enter into marriage because of the purposes of the marriage but that the conclusion of the marriage also leads to the creation of the property of the spouses. Knowing that marriage is a legal relationship between two spouses, consequently, rights and obligations are created, which according to legal science are divided into personal rights and obligations of spouses and property rights and obligations of spouses. According to the Family Law, personal rights include marital cohabitation, where in this respect spouses are equal, including fidelity to each other, assistance, financial support and solidarity with each other. This part also highlights the purpose of marriage so that it is concluded for the whole life and cohabitation of the spouses. The personal right of the spouses is also the issue of determining the surname. Spouses by agreement may specify their common surname or retain their surname. Also included in the group of personal rights is the determined determination of the place of residence of the spouses and the management of the household. Here it is pointed out that both spouses contribute to the family maintenance in proportion to their individual ability¹³⁰.

The rights and obligations of a personal nature, although numbered taxatively in the law, in some of them the spouses can make agreements while for some rights and obligations the legislator does not give the spouses the right to make agreements and as such they should be respected as provided by law¹³¹. So, these norms have a binding character despite some issues that are left to the discretion of the spouses to agree. In the group of rights for which the spouses cannot make an

¹²⁷ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, article 35. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹²⁸ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 86.

¹²⁹ *Ibid.*, pg.87.

¹³⁰ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, article 44.4. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹³¹ Abdulla Aliu and Haxhi Gashi, *Family Law* (Prishtina: University of Prishtina, 2007), pg. 87.

agreement are the equality of the spouses, cohabitation, maintenance of marital fidelity, mutual assistance of the spouses and the right of the spouse to practice his profession¹³². The fact that these rights and obligations cannot be changed by the will of the spouses makes the marriage achieve its goals. From the content that marriage has, its goals also result, where in the scientific literature its main purpose is cohabitation and the creation of a family. In this way the couple must live together but also fulfill one of their needs, the need for intimacy and the increase of family. This purpose of marriage is of social importance because it ensures social renewal. Also another purpose of marriage is marital assistance and social purpose¹³³. Knowing that marriage creates family obligations which can be unaffordable for a spouse and especially if they have children, then marital assistance is mandatory in relation to each other and children born into the family.

The main reason that the legislator has not left the possibility that for these rights and obligations the spouses can make an agreement is the imposition on the spouses that they be equal in the marital relations. While in the group of rights and obligations for which the spouses can decide by agreement is the determination of the surname, the choice of the place of residence, the choice of the citizenship and the maintenance of the family economy and the family planning¹³⁴. Even in this case the legislator has tried to emphasize the equality between the spouses and the decisions not to be made only by the husband, as has happened in the past. According to Albanian customary law, a woman was obliged to take her husband's surname and her place of residence was determined according to her husband's place of residence. While now through the agreement the spouses by agreement can freely decide on the appointment of their joint guardian but also on the place of residence. While the management of the household by agreement contributes to the regular functioning of the marital life and as such it is left to the discretion of the spouses for them to decide on the manner and form of management of the household¹³⁵. In this case each spouse according to the skills and opportunities has to contribute in the family economy and through this they achieved the fulfillment of family needs. This makes the family happier but also less likely to get divorced.

¹³² Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 106.

¹³³ Abdulla Aliu and Haxhi Gashi, *Family Law* (Prishtina: University of Prishtina, 2007), pg. 87.

¹³⁴ *Ibid.* pg.131.

¹³⁵ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 106.

3.1 Property relations of spouses according to family law in Kosovo

Marriage has a financial impact on the relationship between spouses. Knowing that the main purpose of marriage is cohabitation and the creation of a family, this would not be possible even without the financial contribution that spouses make from the moment of family connection. Although at the time of the marriage the property issues should not have an impact or should not affect the marriage. Nevertheless, this aspect should be regulated by law in order to make the property qualifications of the spouses which are mostly expressed in situations of crisis or dispute between the spouses. Knowing that spouses are obliged to live together and contribute to the family economy as a result also comes to the creation of their marital wealth. But it is also known that spouses created wealth before marriage or acquired it during marriage but in some other form.

The legal effects that marriage creates are not only personal but also have property effects. In this way a set of legal norms is dedicated to the regulation of these relationships that have an impact on the relationship of spouses. These rules constitute the marital property regime which includes the entirety of the legal provisions related to the property relations between the spouses during the marriage or in case of termination of the marriage¹³⁶. Personal relationships between spouses cannot develop or thrive as these relationships are also affected by their economic side. Since at the moment of marriage, in addition to personal relations, property relations are also created and for these reason the law on family in Kosovo has dedicated a set of norms for the regulation of these relations.

The treatment of property relations in the Law on Family in Kosovo is done from article 45-57, paying special attention due to the importance they have in the relations between spouses¹³⁷. Exactly Article 45 has stated that the property of the spouses can be a separate and joint property. In this way the law has made it possible to qualify the property that the spouses have created together or in their own way. Especially this qualification is more useful in case of division of property of spouses either in case of divorce or in case they want to share their property and know what belongs to each spouse.

The possibility of the division of joint property is also a result of the influence of the European Convention on Human Rights which in Article 1 of the Additional Protocol provided

¹³⁶ Iosif Florin Moldovan, "Matrimonial regimes", *Journal of Legal Studies*, Volume 16, Issue 30, (2015), pg. 47.

¹³⁷ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

the possibility that every person has the right to enjoy his property and that no one can be deprived of this right except for reasons of public interest¹³⁸. Since joint property is ownership where some persons have the right of ownership over an item in such a way that no one knows their parts of the ownership, too often there can be a claim for its division so that each owner enjoys the right of ownership over his own property or to become sole owner¹³⁹. Joint property is also regulated by the law on property and other property rights which stipulates that this property can be created on the basis of law or contract (when it is allowed by law). The joint owners dispose together with the property and are jointly liable for the obligations related to this property¹⁴⁰. Knowing that one of the forms of joint ownership is also matrimonial property which is more specifically regulated by the Law on Family, but even this law has addressed and regulated joint ownership. The difference is that based on the law on property and other property rights, joint property can be created through law or a contract, in the law on family, joint property of spouses cannot be created through a contract but only through the law. Although the legislation does not distinguish between the word property and wealth, it should be made clear that we are dealing with the same institute, but this terminology may have been taken from the European Convention on Human Rights¹⁴¹.

According to the Kosovar legislation, precisely based on the law on the family, the basic principle is "Joint ownership of property acquired later" make the division of the property of the spouses in separate property or joint property. In this way, according to the law, the spouses at the time of marriage can have separate property and joint property, while their differentiation is done according to the law. So, it is determined what is considered a separate property and what is considered a joint property that can be divided between the spouses and turned into a separate property.

¹³⁸ Council of Europe, *European Convention on Human Rights*, Additional Protocol, Article 1, 1952, Paris.

¹³⁹ Abdulla Aliu, *Property Law* (Prishtina: University of Prishtina, 2014).

¹⁴⁰ Assembly of the Republic of Kosovo, Law no. 03/1-154 on property and other real rights, Article 77, 2009. Prishtina: Official Gazette of the Republic of Kosovo

¹⁴¹ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ and Ministry of Justice, 2012), pg. 106.

3.1.1 Separated property

According to the manner of creation and the time of creation, the Law on Family in Kosovo has made the division of the property of the spouses into separate and joint property. This differentiation of property according to the law makes the spouses know which property is their own and which property is common in order to remove the dilemmas regarding their property. Article 46 of the Family Law shows more precisely what is considered separated property, what are the ways of creating this property and at what time it should be acquired in order to be considered as a separate property. Thus, in this article it is specified that the property that belonged to the spouse at the time of marriage will remain his separated property¹⁴². While the interpretation made to this article states that the property that the spouse had at the time of the marriage remains his separated property, regardless of whether he has not yet made the register of this property in his name. In this way the main criterion for a property to be a separated property is the time of acquisition of this property. Also according to this interpretation, the profit realized later from the separated property is considered a separated property¹⁴³. This interpretation implies that the spouse who has separated property should be the owner of this property and dispose of it freely throughout his life. In this case, the rules of the law on property and other real rights are also taken into consideration, where ownership is defined as a complete right over the thing¹⁴⁴.

In addition to property created by the spouse before the marriage, property acquired through inheritance, donation or any other legal form of property acquisition is considered a separate property. A slightly different interpretation is made in the Commentary of the law where it is proposed that if the donated items do not represent great value compared to joint ownership even though they have been donated to one spouse but are items for joint use this property should be considered as joint property. And the opposite, if one spouse has received a gift which has a great value in relation to the joint property, even if it is intended for the joint use of both spouses, it should be evidenced as a separate property¹⁴⁵. In this case, although the law does not differentiate

¹⁴² Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁴³ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo (Prishtina: GIZ and Ministry of Justice, 2012)*, pg. 120.

¹⁴⁴ Assembly of the Republic of Kosovo, Law no. 03/I-154 on property and other real rights, Article 18, 2009. Prishtina: Official Gazette of the Republic of Kosovo

¹⁴⁵ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo (Prishtina: GIZ and Ministry of Justice, 2012)*, pg. 123.

in terms of the value of the gift, such a thing is done by the commentary of the law, which determines the ownership depending on the value of the gift and its destination.

Another way of creating separated property is through the division of joint property. Regardless of whether the separation is done by agreement or by a court decision, the parts divided between the spouses will be a separate property¹⁴⁶. The procedure of division of joint property can be done during marriage or in case of divorce

While the part which presents the most dilemmas and ambiguities is the ownership of a work of art, intellectual work or intellectual property, which according to the Law on Family is considered a separated property. The first part of this article is clear because any intellectual work be it in the field of art, science or literature (copyright) or any discovery that is usable in industry (industrial property right) created by a spouse will be his separated property. The same regulation is foreseen by the Law on Copyright and other related rights which states that copyright belongs to the author for the fact of its creation. But from the fact that copyright contains moral, property and other rights, then conflicts can arise here as well¹⁴⁷. If a spouse is the author of a deed and from this deed he realizes income then the profit realized from this property will be a separate or joint property? In this case, the legislator has not provided a solution for these cases when the author (spouse) has created the intellectual work during the marriage. Although the intellectual work is a product of his mind, but in some way the other spouse may have contributed to its creation. This contribution may have been given through the time he was absent until the work was created, or through inspiration. A different approach that is most reasonably proposed by law commentators is that of family law in Croatia. According to the legislator in Croatia, the author's work is considered a separated property, while the profit realized from this property is considered as the joint property of the spouses¹⁴⁸. Even though family law has provided as a separated property the object of intellectual property, it would be more reasonable that the profit realized from this property to be considered joint by the fact that the spouse live together and in some way contribute to the creation of intellectual property.

¹⁴⁶ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 46.3. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁴⁷ Assembly of the Republic of Kosovo, *Law no. 04/l-065 on copyright and related rights*, Article 6. (Prishtina: Official Gazette no. 27/30 of the Republic of Kosovo, 2011).

¹⁴⁸ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo (Prishtina: GIZ and Ministry of Justice, 2012)*, pg. 125.

3.1.2 Joint property of spouse

The property relationship between the spouses which arises as a result of the marriage bond is also the creation of joint property. The main purpose of marriage is to live together and start a family. However, the cohabitation of the spouses also leads to the creation of property, which according to all legislations is considered the joint property of the spouses. Since in Kosovo the property regime by contract is not yet regulated by law, then from the moment of marriage the spouses enter into legal property regime. According to the law on the family in Kosovo, in addition to the personal rights and obligations that are created between the spouses, the rights and property obligations are also created. Thus spouses from the moment of marriage begin to create their wealth.

Joint property of spouses is regulated by the family law, but since we are dealing with property, the norms of the law on property and other property rights are also related here. According to this law, ownership is the full right to an item, where the owner can dispose of the item at will, especially to own and use it, to dispose it and to exclude others from any influence¹⁴⁹. Whereas in cases where several persons have the right of ownership over an item in such a way that their parts are not fixed, then they are joint owners¹⁵⁰. In this case it is stipulated that joint ownership can be established either by law or by contract. Regarding ownership of spouses is created through the law, where the norms of family law apply to the spouses, when it is shown more specifically how this property can be created and how it can be divided.

The family law in Kosovo, in addition to regulating separate property, has regulated also joint property, defining how it is created and how it can be divided. Due to the importance it has in the marital life, article 47 of the law stipulates that the joint property of the spouses is the property acquired through work during the continuation of the marriage, as well as the income deriving from such property. Also in the same article it is defined that as common property are considered the real and obligatory rights as well as the property gained through gambling. Spouses are joint owners in equal parts of the joint property unless otherwise agreed¹⁵¹. This part

¹⁴⁹ Assembly of the Republic of Kosovo, *Law no. 03/l-154 on property and other real rights*, Article 18. (Prishtina: Official Gazette of the Republic of Kosovo, 2019).

¹⁵⁰ *Ibid*, 2009, Article 77

¹⁵¹ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 46.3. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

of the law, respectively Article 47 which defines the way of creating joint property is amended and supplemented by explaining more precisely the ways of gaining and sharing this property between spouses. The reasons that led to the amendment of this law will be elaborated in other part of this paper.

The Law on Amending and Supplementing the Law on Family has defined the joint property of spouses a little differently. Here the joint property of the spouses is the property acquired with the joint contribution during the continuation of the marriage as well as the income deriving from it¹⁵². The essential change in this case has occurred through the change of the way of creating the joint property. While the basic law states that the joint property of the spouses is created through work, now the joint property is created through the joint contribution of the spouses in the creation of the joint property. Also through the change of the law on family are specified the ways of contribution which can be made through personal income and other incomes of each spouse and the help of the spouse close to the other spouse, such as child care, housework, care and maintenance of property, as well as any other form of work and cooperation related to the administration, maintenance and enhancement of common property¹⁵³.

If we go back to the Commentary on the law to see how the joint property of the spouses is interpreted, two conditions emerge which are required in order to create the joint property of the spouses. These conditions are the existence of marriage and the acquisition of property by joint work during marriage¹⁵⁴. The existence of marriage is very necessary because without marriage, we cannot even talk about the joint property of the spouses. However, the reason why the existence of marriage is required is that the couple has entered into marriage for the purpose of living together, which is the main purpose of marriage. So, cohabitation is a precondition for the creation of common property. What should be emphasized is that if the spouses have entered into marriage but they do not live together and do not want to live together and they have made this known to each other, so the main purpose of marriage is not fulfilled, then the wealth created in these circumstances is considered separated property¹⁵⁵.

¹⁵² Assembly of the Republic of Kosovo, *Law no. 06/1-077 on amending and supplementing the family law of Kosovo no. 2004/32*, Article 1. (Prishtina: Official Gazette of the Republic of Kosovo, 2018).

¹⁵³ *Ibid*, Article 1, 2018.

¹⁵⁴ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo (Prishtina: GIZ and Ministry of Justice, 2012)*, pg. 127.

¹⁵⁵ *Ibid.*, 2012, pg. 127.

The second condition which is required to exist in order to create joint property is work. Although in the basic family law the joint property is created through joint work during the continuation of the marriage, the commentator of the law specifies that in case of work we should understand not only the activities that bring economic value but also actions and activities that affect the fulfillment of family needs such as home maintenance, care and education of children, care and protection of property, etc. The work that spouses can do in order to create joint property can be individual and joint. So, the main difference that exists between the basic law of the family and the Law on amending and supplementing of Law on the Family is only the specification of how the joint property can be created.

Thus, through the change, the dilemmas that the judge may have during the application of the law have been removed in order to differentiate which property is a separate property and which is joint. In a judgment of the Basic Court in Prishtina, in the lawsuit filed by the plaintiff for the division of the joint property of the spouses, the court has rendered a judgment for the division of the joint property equally between the spouses. The court came to this decision through the evaluation of the financial expert who evaluated the contribution of each spouse as well as the help of one spouse to the other spouse, managing household chores, raising and caring for children and the spouse's contribution through work in the outside world¹⁵⁶. Although in this situation the financial expert has evaluated the contribution of both spouses, what is unacceptable is that one spouse (husband) has contributed to the creation of marital wealth through work in the outside world, while the wife has also created income through work but has also contributed to the maintenance of the family, the upbringing and maintenance of children which contribution should be appreciated. As can be seen, the common property is divided equally because the criteria required by law for the creation of the common property are met, but the evaluation of the contribution is not done fairly. The court took into account the contributions of both spouses but did not evaluate them properly.

According to many evidences, if a spouse is not employed, then his / her contribution to household chores is estimated as a minimum wage in Kosovo. For this reason it would probably be much more reasonable for the joint property of the spouses to be considered all the property that the spouses have created from the moment of the marriage. So, as criteria not to consider their contributions but only the moment of entering the marriage.

¹⁵⁶ Basic Court of Prishtina, Judgment, C.nr.48/2008, (Prishtina: 24.01.2018).

Another way to create joint property of spouses is through gambling. Although the Law on Family does not further specify this article but only states "Spouses' property acquired jointly through gambling is considered joint property". An important explanation is given by the word "jointly", which should mean that if the spouses with their joint property have played and gained wealth then this property it will be joint property. However, in order to remove the dilemmas, it would be much better to clarify in which cases the wealth gained through gambling will be common and in which situations the situation will be separated.

The spouses are joint owners in equal shares in all the joint property unless otherwise agreed. Although the marriage contract is not yet allowed in the Kosovo legislative system, spouses can make agreement for the administration or division of joint property. In cases when the spouses do not reach an agreement for the division of the joint property, then it is the court that makes the division of the joint property of spouses. Since the property of the spouses is the totality of things and other property rights, then in all the property of the spouses the principle of unity of property is realized and in this way it is divided proportionally between the spouses based on their contribution. So the court determines the contribution to all the items that are the object of the common property¹⁵⁷. This practice should be followed in cases when the spouses do not reach an agreement for division of property according to their will but leave it to the court.

3.1.2.1 Administration of joint property and contractual agreements for possession and administration

The joint property of the spouses is the property which is created with the work and contribution of the spouses during the married life. This property is created as a result of the law and its owners are the spouses. Spouses as owners of this property are called joint owners since they are owners of an item but their parts are not fixed¹⁵⁸. Since the spouses are joint owners of the property that they create together, then by law are determined the manner of administration and disposition of this property. The law on the family, which regulates the joint property of the

¹⁵⁷ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 129.

¹⁵⁸ Assembly of the Republic of Kosovo, *Law no. 03/1-154 on property and other real rights*, Article 77. (Prishtina: Official Gazette of the Republic of Kosovo, 2009)

spouses, has determined that the spouses administer and dispose of the joint property jointly and by agreement (article 49). If the question arises what we mean by property administration, we could probably be guided in the Law on Property and other property rights where administration means the care, maintenance, use and regular repair of joint ownership, entering into various contracts, etc.¹⁵⁹. While the right of disposition means the highest authorizations that the holder has on the right of ownership, which includes sale, donation, destruction, pledge¹⁶⁰. In this case the spouses are authorized to jointly and by agreement administer and dispose of the joint property. They must administer and dispose it by agreement, which in this case means understanding between them, because it is known that this property was created jointly and both spouses have equal rights over this property.

The rights that the spouses have over their joint property but which is immovable must be registered in the name of both spouses. The purpose of registering in the public book is to know who the owner of that property is and what rights the holders have over that immovable property. Since the joint property is owned by the two spouses who administer and dispose of their property, then the law stipulates that this property be registered in the name of both spouses¹⁶¹. However, the law in this case has also provided the case that if the joint property of the spouses is registered only in the name of one spouse, it is considered that the registration is done in the name of both spouses. This is done to make it impossible for the registering spouse to alienate the joint property without the consent of the other spouse.

The registration of a property is done in the municipal cadastral office by submitting certain documents based on law no. 2002/5 on the establishment of the register of property rights Immovable¹⁶². In addition to other data required by the cadastral office is the contract concluded before the notary. In this case this contract must be concluded in the presence of the seller and the buyer, where both parties must be present with their spouses. The presence of the spouses is done in order to meet the legal criteria for the registration of joint ownership to be done in the name of both spouses or not to alienate the property without the consent of the other spouse. Despite this,

¹⁵⁹ Ibid, Article 77, 2009

¹⁶⁰ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo (Prishtina: GIZ and Ministry of Justice, 2012)*, pg. 133.

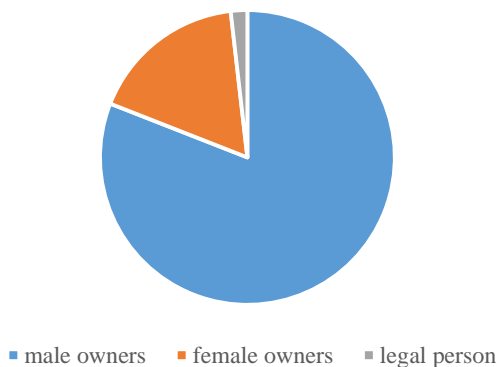
¹⁶¹ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 50. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁶² Assembly of the Republic of Kosovo, *Law no. 2002/5 On the establishment of the register of property rights Immovable*, Article 2. (Prishtina: Official Gazette of the Republic of Kosova, Year III / no. 34 / 01, 2008).

our legislation does not provide any mechanism to prevent the alienation or registration of joint ownership without the consent of one spouse. Perhaps it would be appropriate for the contracting parties to present a certificate of marital status in the case of concluding contracts for the revocation of property. In case when it is evidenced that one of the contracting parties is married, the contract should not be allowed without the consent of the other spouse.

The registration of joint property of the spouse in the name of only one spouse has also been a concern of the Government of Kosovo. This concern has come as a result of the extremely low number of female owners. To increase the percentage, in 2016 the Government of Kosovo issued an administrative instruction to remove registration fees for properties registered in the name of both spouses. Thus all properties registered in the name of both spouses are exempt from the registration fee¹⁶³. This guideline was implemented by the Kosovo Cadastral Agency and represents an affirmative action to increase gender equality in property rights. Initially, this instruction was issued for a period of one year, but due to its effectiveness, it was continued for another three years. In this way, through another instruction, these affirmative measures are continued until 2021¹⁶⁴. Affirmative measures for the registration of property in the name of both spouses has raised the awareness of citizens about their property rights and has increased the number of female owners.

Fig.1. Registered properties in Kosovo- 2021



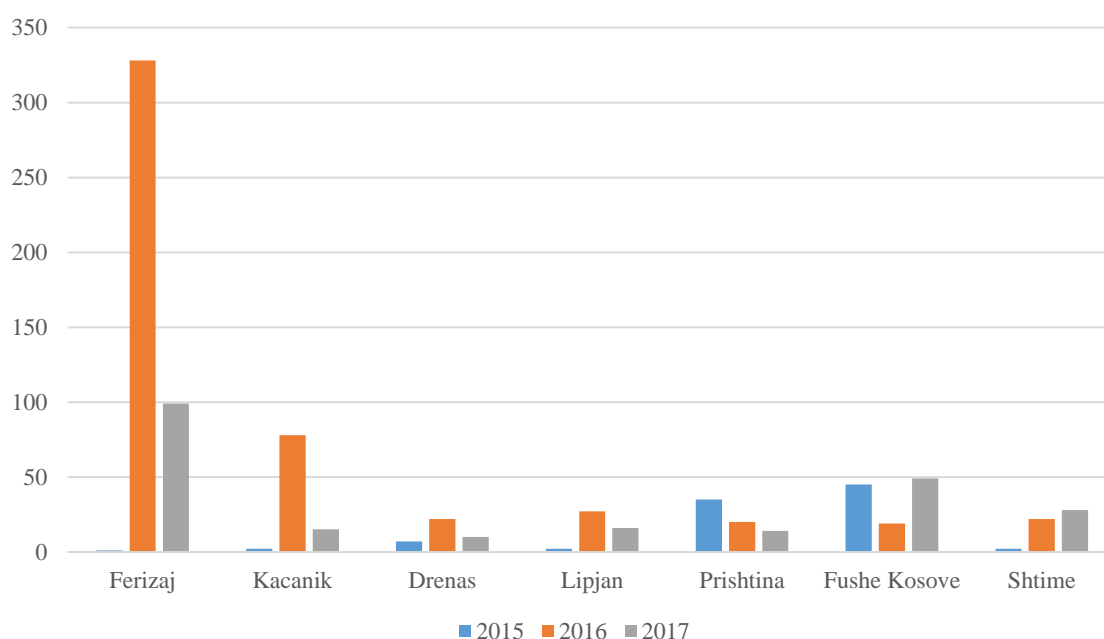
Source: Kosovo Cadastral Agency, Total number of owners, 2021

¹⁶³ Administrative Instruction (QRK) No. 03/2016 on Special Measures for Registration of Immovable and Common Property in the name of both spouses.

¹⁶⁴ Administrative Instruction (QRK) No. 08/2018 regarding amendment of administrative Instruction (QRK) No. 03/2016 on Special Measures for Registration of Immovable and Common Property in the name of both spouses.

In the cadastral agency in Kosovo in 2021 out of 560,097 registered properties, 80.26% are male owners while 17.87%¹⁶⁵ are female owners. While the number of cases of registration of joint ownership in the name of both spouses differs from municipality to municipality but there is a significant increase in numbers. In the municipality of Ferizaj in 2015 were registered in the name of two spouses' only one property while in 2016 this figure increased to 328, while in 2017 to 99. In the municipality of Kaçanik in 2015 only 2 properties were registered in the name of both spouses, in 2016 there were 78 cases while in 2017 this figure was 15 cases. In the municipality of Drenas from 7 cases it increased to 22 cases, while in the municipality of Lipjan from 2 cases to 22¹⁶⁶.

Fig.2. Registration of property in the name of both spouses



Source: Organization Polis, *Equal Property Rights, Report on the implementation of Administrative Instruction 03/2016, 2017.*

These statistics show an advancement of Kosovar society and a better opportunity to implement family law. In cases where the property is registered in the name of both spouses, it is

¹⁶⁵ Kosovo Cadastral Agency, *Total number of owners*, <https://akk-statistics.rks-gov.net/> (accessed on 19.02.2021).,

¹⁶⁶ Organization Polis, *Equal Property Rights, Report on the implementation of Administrative Instruction 03/2016,2017.*

impossible to alienate the joint property without the consent of both spouses and on the other hand it shows that the measures imposed by the government have reached to some extent to increase the number of women owners.

The only contract that the spouses can enter into regarding the joint property is the contract for administration and disposition of the joint property. According to the law on family, it is allowed to enter into a contract between spouses where the administration and disposition of property is entrusted only to one spouse. This contract can only be made for administration or only for disposal¹⁶⁷. Such a contract which is concluded before the notary gives the right to one spouse to administer or dispose of the joint property but also on the other hand to appear as a representative of the other spouse¹⁶⁸. The contract which is concluded for administration includes the possession within the framework of regular activities, unless otherwise provided in the contract. For this reason the contracts for administration and disposal must be precise and detailed in order to be fulfilled properly.

3.1.2.2 Division of joint property of spouse

The joint property of the spouses is created as a result of the work, contribution and joint life of the spouses. This wealth will not be able to be created if the spouses do not live together or aim at living together and without their joint contribution. The fact that this property is called joint property is because spouses do not know their real parts. Thus, property includes the totality of things and other subjective rights and the principle of unity of property is applied to it. Which means that the spouses are the owners of all the property and not on the items separately.

Since the spouses as owners of this property do not know the real parts of the property, this property at a certain moment may even be divided. The division of joint property means that each spouse becomes the owner of a part of the property in order to freely administer and dispose of that property. The spouses have the right to divide the joint property during the marriage but also after the dissolution of the marriage.

¹⁶⁷ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 51. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁶⁸ Assembly of the Republic of Kosovo, Law no. 06/1 –010 on Notary, Article 41, no. 23. (Prishtina: Official Gazette of the Republic of Kosovo, 2018).

Regardless of when the division of the joint property is requested, the Kosovar legislator has reminded that the right to property is a fundamental human right and that neither of the spouses can be deprived of his property arbitrarily¹⁶⁹. This principle is based on the Constitution of the Republic of Kosovo, which states that no one can be deprived of property arbitrarily except in cases provided by law¹⁷⁰. This right is also enjoyed by the spouses in relation to the joint property. In addition to what is provided in the Constitution, this principle also derives from international conventions¹⁷¹. Through international protection, spouses enjoy the right to request the division of joint property at any time in order to become the owners of the part that belongs to them from the joint property. The protection that spouses enjoy does not only mean the protection that spouses have against each other but also against third parties.

The law on family has provided the possibility that spouses can divide their joint property where the main principle is that neither spouse is deprived of the right of ownership arbitrarily. Through this principle is achieved not only equality between spouses but also the protection of spouses in terms of property rights. In this way the spouses cannot be deprived of the right to joint ownership regardless of the actions that have taken place between the spouses. The right to property is guaranteed even if the marriage is dissolved due to the violation of fidelity, extramarital union, etc. So in our legal system there is no provision that the denial of property to spouses be seen as a sanction. There is never a possibility that a spouse will be deprived of his right to joint property unless the general interest is in question or if the item has been used to commit a criminal offense and is confiscated by the competent authorities¹⁷². Spouses enjoy protection even if their joint property is endangered by third parties. They can exercise this protection by using all lawsuits for the protection of their joint property but also lawsuits for the protection of possession¹⁷³. In this way the spouses can enjoy their property but also to exclude others from unauthorized use, but at the same time to protect themselves from each other whenever one spouse intentionally or by negligence wants to deprive the other spouse of the right to joint property.

¹⁶⁹ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 51. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁷⁰ Assembly of the Republic of Kosova, *Constitution of the Republic of Kosova*, 2008, Article 46.2. Prishtina: Official Newspaper of the Republic of Kosova.

¹⁷¹ Council of Europe, *European Convention on Human Rights*, Additional Protocol, Article 1, 1952, Paris.

¹⁷² Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo (Prishtina: GIZ and Ministry of Justice, 2012)*, pg. 143.

¹⁷³ Faik Brestovci, Iset Morina, and Rustem Qehaja, *Contentious Law of Kosovo* (Prishtina: University of Prishtina, 2012).

3.1.2.3 Division with agreement

The division of the joint marital property can be done in two ways: by agreement and by court decision. The division of the joint property can be done at any time when this is requested by the spouses themselves or a third person who has a legal interest for the division of this property. The first way to divide the property is through an agreement between the spouses. The spouses are authorized by law at any time to share the property which is created during the marital life and thus create separate property from the joint property¹⁷⁴. This way of dividing the property is considered as a peaceful division of the joint property since the spouses, based on their will and understanding, make an agreement to share their property created in the marriage.

The division of joint property through the agreement of the spouses comes as a result of not being able to enter into a marital or premarital contract. In this case the only option that the spouses have to share their property is through the property sharing agreement. The difference between an agreement for the division of joint property and marital contracts is that in these agreements the spouses only share their joint property which has already been created. This agreement can be made during the continuation of the marriage or in case of divorce. As a result of the conclusion of this agreement, the joint property is extinguished and the creation of separate property is created, where the spouses gain authorization in the parts that have divided them.

If we start from article 47 which states that "the spouses are joint owners in equal parts of the joint property, unless otherwise agreed", then we can conclude that the spouses through this agreement can make the division of property according to their assessment. In fact, this way of dividing the joint property gives the spouses the opportunity to share the joint property according to their assessment. Otherwise, who knows better than the spouses the contribution that each spouse has given in the creation of the joint property. Also, through this way of dividing the joint property, the spouses escape the court procedure and even the unfair division that the court can make. If the agreement for the division of the joint property is made while the spouses are still married, then the joint property terminates until the moment of the conclusion of this agreement. Since the spouses are still married they start creating the joint property again. Whereas if the

¹⁷⁴ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 53.1. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

spouses are divorced then the agreement for division of property applies to all joint property and in this case between the spouses is not created joint property jet.

Agreements for the division of joint property spouses have the right to make it at any time, so that they become the owners of separate parts¹⁷⁵. By agreement they can divide the items and in this way they create separate ownership in each item, as opposed to separation by court decision, where the division of property is done by determining the shares of the spouses in the joint property¹⁷⁶. Thus, the agreement for division of property is considered as an opportunity not to create co-ownership but separate property.

The law on family does not mention it, but if we are based on other laws, depending on the type of thing, the difference is made in the formal aspect of the agreement. The commentary of the family law does the same, where it is quoted that the distribution of movable property can be done by verbal, written or notarial agreement. But the same cannot be applied when dealing with immovable property. When we are dealing with immovable property, a contract for division of the common property is obligatorily required, since this serves as a legal title for the registration of ownership. In fact, the law on the family has stipulated that all agreements for the division of joint property have to be made in writing in accordance with the formal requirements set out in the applicable laws. In this case, the legal norms of other laws are expressed, which regulate in more detail the conclusion of contracts and the acquisition of property.

The agreement for division of the joint property can be concluded before the notary who is authorized by law to enter into such an agreement¹⁷⁷. Since this agreement creates separate property, this must be registered in the register of immovable rights in the name of the winning spouse. In this case, in order to acquire the right of ownership over immovable property, a valid legal work is required and the registration of this right in the register of immovable rights¹⁷⁸. As for the conditions that a contract must fulfill in order to be valid, they are defined in the law on obligatory relations, where the contract for the transfer of the immovable title must be in

¹⁷⁵ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 53.2. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁷⁶ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 145.

¹⁷⁷ Assembly of the Republic of Kosovo, *Law no. 06/l –010 on Notary*, Article 41-1.2, no. 23. (Prishtina: Official Gazette of the Republic of Kosovo, 2018).

¹⁷⁸ Assembly of the Republic of Kosovo, *Law no. 03/l-154 on property and other real rights*, Article 77. (Prishtina: Official Gazette of the Republic of Kosovo, 2009).

¹⁷⁸ Ibid, 2009, Article 36.1

writing¹⁷⁹. If this is not done, except for the violation of the law which requires the formal side of the conclusion of this contract, it will not be possible to register the property, already separate in the name of the spouse.

In this way the spouses are encouraged to divide their joint property by agreement, not only because the separation is done fairly but also because of the speed that this way of separation has. In this way the spouses manage to properly share their wealth created together, but also save time from court proceedings which are longer, and in the end the decision may be unfair to one spouse. The possibility is not ruled out that for a part of the common property an agreement will be concluded, while for the other part the court will decide with its division. But it should be known that for property issues the court does not take care ex-officio and for this reason they should with lawsuit the court for the part of the property for which there is a dispute to decide the court. In this case the decision of the court will have the force of legal title for the acquisition of ownership over that property.

3.1.2.4 Division of joint property when there is no agreement and its evaluation

Spouses from the moment they enter into marriage and start living together begin to create their common wealth. However, since the legislative system in Kosovo does not provide the possibility of concluding a marriage contract, then they are forced to enter into legal regime, so they begin to create joint property. As a result, the spouses with their contribution create the joint property, but which can be divided at any time. The division of this property can be divided by agreement between the spouses, but there may come a time when the spouses cannot reach such an agreement and for this reason they can go to court for the division of joint property. Since in the case of spouses we are dealing with the creation of joint property and the spouses as its owner do not know the parts of the property, in different situations they may ask to know which part of this property is theirs. The purpose of the division of joint ownership is to turn it into separate property. Especially the division of the joint property is expressed in cases of divorce but it does not mean that only in case of divorce they can share the joint property.

¹⁷⁹ Assembly of the Republic of Kosovo, *Law no. 04/1-077 on obligational relationship*, no. 16, Article 52, 2012. Prishtina: Official Gazette of the Republic of Kosovo.

By law, spouses may at any time determine or request that their shares in the joint property be determined¹⁸⁰. According to this legal definition, the spouses can by agreement determine their shares in the joint property, while in case of disagreement they can ask the court to divide the joint property. In this situation the court must divide the joint property of the spouses whenever this is requested by the spouses themselves. This division of the joint property is requested by the spouses when they have failed to make an agreement. The court is obliged to base its decision on the division of the joint property on the contribution of each spouse and this should also include the assistance provided by the spouses to each other such as child support, household chores and co-operation in administration, maintenance and increase of common property¹⁸¹. The family law only stipulates that in case of disagreement between the spouses over the division of the joint property, this division is made by the court. But it has not been determined according to which procedure this division will be made. But knowing that spouses are owners of joint property equally then it is thought that the procedure for the division of joint property begins in a non-contentious procedure with a written proposal. This proposal can be made by one spouse or both together¹⁸². More precisely, if the right to an item is disputed between the parties or the volume of the right is disputed, then the court instructs the parties to initiate contentious procedures within 15 days for the determination of this right¹⁸³. Although this solution is not foreseen exclusively for the issues of joint ownership of the spouses, but in its absence this solution foreseen by the law of uncontested procedure can be expressed.

The determination of the shares in the joint property is determined using the criteria defined in the Law on Family, where the spouses are owners in equal parts of this property. However, considering that this property is created with the joint contribution of the spouses and this contribution is different, because the spouses never give the same contribution, then the law has provided a deviation from equal separation. Although the main principle is that the court divides the property equally, the court is still given the opportunity to determine a larger part of the property to one spouse over an item or right, if that item or right is economically independent from

¹⁸⁰ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 53.2. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁸¹ *Ibid*, article 54.1.

¹⁸² Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 150.

¹⁸³ Assembly of the Republic of Kosovo, *Law no. 03/1-007 on out contentious procedure*, Article 194. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2009).

other items and rights and the spouse for the acquisition of that item or right has participated with his income from the special property. In this situation the court may give to one spouse the right to one thing more than the other spouse or the proportion of separation will not be 50:50 if the spouse proves that he has committed income from his separate property for the acquisition of that item. While another interpretation given in the commentary of the law is that one spouse can be given the right of ownership in the proportion 2/3 while the other 1/3, if the spouse has committed to the acquisition of that thing is with his special property in addition to the joint contribution in the acquisition of that item.

The joint property of the spouses can be claimed at any time, i.e. during the marriage but also after the end of the marriage. Unfortunately, no case has yet been identified in court that the spouses have sought the division of the joint property while they are still married. For this reason the division of the joint property comes into expression after the end of the marriage. The marriage ends in several ways, such as death, the declaration of the missing spouse as die, and the divorce or annulment of the marriage. The most frequent cases in the courts are related to the request of the spouses for division of the joint property after they are divorced. This division of the joint property is as a consequence of the divorce, where the law on family states that one of the consequences of the divorce is the division of the joint property¹⁸⁴. Therefore, the spouses at the time of divorce can ask the court to make the division of the joint property, if they have not reached an agreement on this issue. But spouses can also ask the court to divide the joint property even after the divorce process is over. However, since the procedure for the division of the joint property is extended, then the court instructs the parties to resolve this dispute in another procedure, ie separately from the divorce procedure¹⁸⁵. This has been the case in most court decisions taken by the courts in Kosovo. In the judgment given by the Basic Court in Prishtina, the court in separate proceedings from that of divorce has decided to divide the joint property of the spouses with the initiation of the procedure through the lawsuit¹⁸⁶. The Law on Family has also determined what will happen to the debts deriving from the common property. More specifically, the debts of the

¹⁸⁴ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 89. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁸⁵ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 229.

¹⁸⁶ Basic Court in Prishtina, Judgment C.nr.48/2008. (Prishtina: 24.01.2018).

joint property will be calculated in the share of each spouse¹⁸⁷. By this we mean that each spouse, in addition to the share he receives from the joint property, is also charged with the debts deriving from this property that he receives. This burden is also provided in Article 57 of Family Law which defines the responsibilities of the spouses, which states that the spouses are responsible for their personal obligations resulting from the divided property and for their obligations resulting from their share in the joint property. In this case the court must distinguish whether the obligations created by the spouses are joint obligations or are obligations that the spouse has created for personal needs. For this reason, individual obligations must be differentiated from the joint obligations that spouses have for third parties.

The division of joint property has an impact, including the division of items which are part of the joint property but which are used only by one spouse for the exercise of his profession or craft. In this situation, the legislator has foreseen that these items belong to the spouse who uses them, while exceptionally when the value of these items is proportionally greater than the total value of all the common property, then the court divides these items as well. But if the spouse who uses these items agrees that he / she will compensate the other spouse a sum of money so that these items belong to him / her then the court can act in this way¹⁸⁸. This way of dividing the property is done in order not to damage the exercise of the profession or craft of one spouse, but on the other hand if this wealth was created with the contribution of both spouses, then the other spouse should be compensated for these items. As for personal belongings, although it is understandable that they belong to the spouse who used them, in cases where their value is proportionally greater than the total value of the joint property, it should also be divided between two spouses.

¹⁸⁷ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 90. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁸⁸ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 231.

3.2 Judicial decision on disputes over who will give the right to live in the future in the marital home

The house where the spouses lived and considered it as their family home is one of the biggest problems of the court. Basically, if the house was built with the contribution of both spouses, then both spouses are joint owners of that house. But at the moment of the couple's separation, then the biggest fight is over who will have that house left. This problem always comes to the fore when there is disagreement between the couple. The Family Law regulates this issue but minimally stipulating that the court must decide on these issues in each individual case and that the decision must be made taking into account the welfare of the children and the social welfare of the spouse¹⁸⁹. The court has the discretion to decide to whom will be left the house, but the decision will be made in each case separately. The law in this case obliges the court to make this decision taking into account the welfare of the children and the social position of the spouse. So, based on what is defined in the law, it is meant that the parent whose children are left in the care of him should also be given priority to live in the marital home. It is important that the well-being of the children is a priority when deciding who have the right to live in the marital home. Although this court decision must come after one spouse has made a request to be given the right to live in the marital home and that this request has been made after there is a dispute between the spouses regarding this issue. In most cases couples who share their property, the only joint property they have is the house in which they lived. If we start from this perspective, it means that the spouse who leaves the children in care also gains the right to continue living at home.

But how does this issue stand in practice, or how have the courts acted, in its implementation? In many judgments where couples are divorced, the spouses have not applied for the right to live in the marital home. In these judgments, the court according to the lawsuit of the spouses has only decided for divorce and for the trust of the child to one parent. The court gives the trust of the child to the parent according to the proposal of the center for social work¹⁹⁰. This court decision comes in cases when there is a dispute between the parents regarding the trust of the children. In Judgment C.nr.566 / 15 given by the Basic Court of Prishtina, it was decided only for the dissolution of the marriage and the trust of the children. In this case, the court has decided that

¹⁸⁹ Assembly of the Republic of Kosovo, *Family Law of Kosovo, Law No.2004/32*, Article 95. (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2004).

¹⁹⁰ Basic Court of Prishtina, C.nr. 3140/18, 2019:191578. (Prishtina: 29.11.2019).

the minor child should be entrusted to the mother after assessing that the mother meets the conditions that ensure the well-being of the child¹⁹¹. But in another judgment, the court ruled that the minor children be entrusted to the custody and education to the father on the grounds that the mother does not have the financial condition to care for them¹⁹². The same practice is followed in many court decisions, as parents have not claimed the right to continue living in a marital home.

Since in the family law in Kosovo, no greater attention has been given to who should be left to the marital home or in what conditions and circumstances, then it would be reasonable and necessary to pay more attention to this issue. This issue should be treated more carefully and given greater protection because in these issue customary law also has a great influence. This is because it is common that whenever the relationship between the couple is aggravated or broken, it is the woman who takes the children and leaves the house. Mostly the wife returns to the parents' house while the husband continues to live in the house where the couple lived until the moment of separation. In this circumstance if the children are taken by the wife then the children can be traumatized because they change their place of residence and also the district where they lived. So, it changes the way of life. Although the law states that the court decides who will live in the marital home at the request of one of the spouses and makes the decision by evaluating each individual case, it would be more reasonable for this issue to be dealt with more widely as in other European countries. It is natural that the court should decide about the marital home, but this decision should be made in favor of the spouse who has the most needs, especially the one who leaves the minor children under guardianship. Through this mechanism, a special protection is provided to the marital home and encourages the spouses to invest in this property for the whole family¹⁹³.

If the Swedish legislature is taken into account, it has provided that the marital home be given for use to the spouse who is most in need to continue living in that home by reducing it from joint ownership¹⁹⁴. A different regulation is provided in French legislation, where it is provided that if the marriage house is a joint property the court may decide that it be left to use one spouse for a

¹⁹¹ Basic Court of Prishtina, C.nr.566/15. (Prishtina: 18.05.2017)

¹⁹² Basic Court of Ferizaj, C.nr. 273/17. (Ferizaj: 14.11.2017).

¹⁹³ Brett R. Turner, "Unlikely Partners: The Marital Home and the Concept of Separate Property", *Journal of the American Academy of Matrimonial Lawyers*, Vol. 20, (2006), pg. 69.

¹⁹⁴ Angel Ristov, "The Legal Status of the Marital Home in the Macedonian and Comparative Law", *Iustinianus Primus Law Review*, No. 5, (2012), pg.10.

period of 5 years and then court decided on its separation¹⁹⁵. While a more detailed and different arrangement than some European countries is in Bulgaria. Under Bulgarian law in divorce cases, the court has the official duty to decide who will be given the right to live in the marital home. The criteria of who should be given the right to continue living in the marital home are also set in detail, and this decision is always made taking into account the needs of each spouse and especially the interests of the child. So in cases where the spouses did not have children then the marital house is left to the spouse who needs it most, while when the spouses had children then the house should be given to the spouse whose children are left in custody and education (for a period of set time)¹⁹⁶.

What should be appreciated is that the marital home has been given a special treatment through which the interests of both children and parents are protected. Considering the treatment given to the marital home in many European countries, it would be reasonable for the marriage house to enjoy a special treatment in Kosovo as well. This treatment would be necessary in the first place to remove the mentality that the woman is the one who should leave the house regardless of whether she takes the children with her or not. Also the special treatment of the marital home would make the spouses aware to claim their rights but always keeping in mind the interests of the children.

It is important for the law to specify precisely who has the priority to continue living in the marital home, under what circumstances this right ends and within what timeframe the court must decide on these issues. This is because these procedures are considered urgent and the court should not extend them as much as those for the division of common property. While the most important thing is that the issue of marital home to be an official duty of the court. So, the court has to decide on the marital home *ex officio* despite the request of the spouses.

¹⁹⁵ Angel Ristov, "The Legal Status of the Marital Home in the Macedonian and Comparative Law", *Iustinianus Primus Law Review*, No. 5, (2012), pg. 10.

¹⁹⁶ *Ibid*, pg. 11.

3.3 Causes for changing the Family law with an emphasis on the notion of joint property and its effects in practical cases

The joint property of spouses should be divided equally, because the spouses jointly, according to their ability, contribute to the creation of this property. If we based 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 to¹⁹⁷. 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 experts¹⁹⁸. Such an interpretation of legal provisions has caused confusion in court proceedings because they have required from spouses to prove through financial evidence their contribution to the creation of marital property¹⁹⁹. And this is even more difficult when it is known that the contribution to household chores has no invoice. These jobs in most cases are done by women and they find it difficult to prove this in court.

Based on this interpretation, the Basic Court in Prizren also acted, rejecting as unfounded the wife's request for division of marital property because it failed to provide evidence for the contribution it has given in the creation of this property²⁰⁰. 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 aimed to stimulate the registration of immovable property on behalf of both spouses in public registers in order to achieve gender

¹⁹⁷ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ, 2012), pg. 154

¹⁹⁸ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ and Ministry of Justice, 2012), pg. 154

¹⁹⁹ Detrina Alishani, *Joint property of spouse and its division - the case of Kosova* (Perspectives of Law and Public Administration Volume 9, Issue 2, December 2020, pg 295)

²⁰⁰ Basic Court of Prizren, C.nr.679/15. (Prizren: 08.12.2015).

equality and strengthen the economic position of women²⁰¹. 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 low.

From 525,827 registered properties in Kosovo, only 17.09% of them own women, while 80.23% are male owners and 1.87% are legal person²⁰². 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 subordination²⁰³. 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 spouses²⁰⁴.

Based on the level of employment of women in Kosovo in 2018, only 12.3% of women are employed while men 44.3%²⁰⁵ (Statistics, 2019). 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, 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

²⁰¹ Administrative Instruction (QRK) No. 08/2018 regarding amendment of administrative Instruction (QRK) No. 03/2016 on Special Measures for Registration of Immovable and Common Property in the name of both spouses

²⁰² Kosovo Cadastral Agency, *Total number of owners*, <https://akk-statistics.rks-gov.net/> (accessed on 19.02.2021).

²⁰³ Ombudsperson Institution of the Republic of Kosova, *Annual Report of 2018*. (Prishtina: 2018). pg. 11.

²⁰⁴ Arta Mandoro- Balili, *Discrimination gender issues in family and marital affairs* (Tirane: UNDP, 2014), pg. 101

²⁰⁵ Kosovo Agency of Statistics, *Labor Force Survey*, 2019, Prishtina.

of spouse²⁰⁶. 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 existence²⁰⁷. Based on some research that has been done and that has result to the proposal for the change of family law, precisely in the change of articles related to common property have to do with discrimination and injustices that have been done to women in terms of appreciation of their contribution to the creation of the joint property. The biggest injustices are that most women have not managed to get a share of the joint property because they have failed to prove that they have contributed to the creation of this property. Some women have not been able to participate in the joint property because their property was not registered in the name of both spouses but in the name of husband parent²⁰⁸. All these difficulties that women have encountered in gaining part of their joint property and the low appreciation of their contribution have led to the amendment of the Family Law.

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 experts²⁰⁹

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

²⁰⁶ Luljeta Aliu, *Amandament of Family Law* (Prishtina: Inject, 2019).

²⁰⁷ Inject, *Legal research on division of common property and financial maintenance*, 22 June 2021. <https://inject-ks.org/> (accessed 23 June, 2021)

²⁰⁸ Ibid, 2021, pg.47

²⁰⁹ Haxhi Gashi, Abdulla Aliu and Adem.Vokshi, *Commentary on the Family Law in Kosovo* (Prishtina: GIZ and Ministry of Justice, 2012), pg.149

contribution of spouses during the continuation of marriage to acquire joint property is considered equivalent²¹⁰.

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.

²¹⁰ Assembly of the Republic of Kosovo, *Law on amendment and supplementation of Law no. 2004/32 on the family law of Kosova, Article. 1.* (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2018).

3.4 Innovations in the regulation of property relations of spouses according to the Draft Civil Code of Kosovo

The need to complete the legal infrastructure in the field of civil law has pushed the Government of the Republic of Kosovo to take an important step, that of issuing the Civil Code. Thus, the Ministry of Justice with decision no. 09/18 of 11.03.2015 has established a commission for the drafting of the Civil Code in cooperation with the EU project "Support to the drafting of the Civil Code and regulation of property issues"²¹¹. After two years of work for the drafting of the Project, the initial draft of the Civil Code of the Republic of Kosovo has been finalized, while with decision no. 10/115 dated 09.11.2016 the government authorized the Minister of Justice to finalize the final draft. With this authorization, the Ministry established a working group divided into several subgroups who worked in a transparent and comprehensive manner and on 29.11.2019 the final draft of the Civil Code of the Republic of Kosovo was finalized. Although this Draft Code has not yet been approved by the Assembly of Kosovo, but from the fact that it is final draft we will see what are the innovations or changes that differ from the current legal regulation especially in matters of marital property.

The first innovation that is noticed and has been added to the Draft Civil Code of Kosovo regarding the property regime, is the procedure for marriage. More precisely, Article 1150 stipulates that it is the official duty of the registrar (the official person who binds the marriage), to notify the future spouses that with the conclusion of the marriage they enter into the legal property regime of the marriage (where the share in ownership is equal) unless they have concluded a contract for the special regime²¹². So, the most important innovation that represents a turning point for the property life of the spouses is the possibility that they can enter into other regime the one provided so far, through the conclusion of a contract.

Since spouses through this Code have the right to enter into a marital contract to regulate their property regime, then the property regime of the spouses has been clarified in more detail.

The property of the spouses can be separate and joint. Separate property will be property acquired before the marriage or the property which is created after the marriage through inheritance, gift or any other form defined by the Code. Whereas the joint property is the property

²¹¹ Ministry of Justice, *Project- Civil Code of the Republic of Kosovo*. <https://md.rks-gov.net/page.aspx?id=2,94>, 24 September 2018 (accessed 03 March 2020).

²¹² *Ibid.*, 2018, article 1150

acquired by joint work or divided work as well as the incomes deriving from this property unless otherwise determined by a premarital or marital contract²¹³. This definition of joint property of spouses differs from the one that is currently in force, because with the law on amending and supplementing of the family law, it is determined that joint property is property acquired with the joint contribution of spouses and income derived from this wealth²¹⁴. This law also defines the forms of contribution that a spouse can give to the creation of joint property. So, the civil code does not include the change of the law regarding this part, with the reasoning that now the spouses will have the opportunity through the premarital or marital contract to change the property regime and its administration.

Another innovation that does not exist in the current law is the definition regarding the separated property which has been invested for the increase of the joint property. Thus, the separated property which is invested to increase the value of the joint property will remain separated while its value will remain unchanged despite the increase of the common property. Also in this part it is determined that a product of art, work or intellectual property is a separated property while the beneficiaries from it are the joint property of the spouses. This change is welcome because the current law only defines that a production of art or intellectual work is a separated property but it is not defined what kind of property is the profit realized from intellectual property.

The joint property of the spouses is considered as the most important part of the property relations of the spouses. In this part, through the civil code is defined the manner of concluding the prenuptial and marital contract. Spouses before or during the marriage can enter into a contract to regulate the property issues that will be created during the marriage. This contract must be concluded before the notary and enters into force at the time of marriage, or if the couple are married at the time of signing it. This contract must be in writing and signed by the spouses after the notary is convinced that the spouses have understood the consequences that may arise from the conclusion of this contract²¹⁵. Even in spite of how much this will be practiced by the spouses it is a good opportunity for the spouses to have the right to regulate their property relations. This is due

²¹³ Ibid., 2018, article 1170

²¹⁴ Assembly of the Republic of Kosovo, *Law on amendment and supplementation of Law no. 2004/32 on the family law of Kosova, Article. 1.* (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2018).

²¹⁵ Ministry of Justice, *Project- Civil Code of the Republic of Kosovo. Article 1185.* <https://md.rks-gov.net/page.aspx?id=2,94>, 24 September 2018 (accessed 03 March 2020).

to the fact that the number of educated and employed women is increasing and this will affect couples to arrange property relations in advance in case of separation.

The Civil Code, among other things, has provided the protection of spouses during the resolution of marital disputes regarding the right to live in the marital home. Thus a spouse can request to be allowed to use the marital home alone until the marital dispute lasts. Here the court decides taking into account each case separately but above all the interest of the children, the violence exercised against one of the spouses, the financial interests. This protection of the spouses or the possibility for one spouse to continue living in the marital home lasts until the resolution of the marital dispute. This is considered a good solution because until now, during process of divorce or division of joint property, the spouses have made alternative solutions according to their possibilities or have been placed in the center for social work. But what seems to be lacking is the duration of this defense. It would have been more reasonable for this protection of the spouse to be done for a longer period of time, especially in cases when he is left in the care of children or his financial possibilities are small to make housing choices.

The division of joint property is the key point of the spouses' property relations. In many divorce judgments the court has not divided the joint property because this was not requested by the spouses. There are also few cases when a spouse has requested the division of joint property. Due to this problem in the civil code it is provided that on the date of dissolution of the marriage will be divided the joint property of the spouses. Consequently, it is implied that in the procedure of dissolution of the marriage, the joint property of the spouses will be divided in order not to leave the possibility that it will be done later or that its separation will not be required at all.

Although the Civil Code has not yet entered into force due to non-approval by the Assembly of Kosovo, the innovations that have been made will affect the well-being of spouses and especially women who are often excluded from the right to property, whether due to ignorance or due to the influence of customary law. Although this code could be even more perfect or in more detail to regulate the property issues of spouses, but the very fact that it has adopted the prenuptial and marital contract is considered sufficient for this period of development of the state of Kosovo.

4. Marital property according to positive law in North Macedonia

Marriage as one of the most important institutes of family law is regulated by law in North Macedonia. Due to the importance that this right has for spouses, it has gone through several stages of its historical development. This means that the legislative system that exists today in North Macedonia has come as a result of some laws which have previously regulated the relations between spouses and the property rights and obligations that arise as a result of marriage.

An important turning point in the history of family and marriage law is considered to be the year 1946 when the Constitution of the Federal People's Republic of Yugoslavia entered into force, of which Macedonia was a part. This made the Constitution of Republic of Macedonia to equalize men and women in terms of rights and obligations in the family and marriage. Consequently, the Basic Marriage Law of 1946 provided the creation of joint property of spouses²¹⁶. This law instructed that property relations between spouses be regulated by Republican laws. The Law on Property Relations of Macedonian Spouses was of special importance in regulating the property relations between spouses in Macedonia²¹⁷. However, in 1973, as a result of several Constitutional reforms in Macedonia, the Marriage Law of the Socialist Republic of Macedonia entered into force²¹⁸. This law also regulated personal and property relations between spouses. This law made a division between the joint property and the separate property regime. While the creation of agreements between the spouses regarding the administration and disposition of the joint property was also allowed.

The year 1991 brought great changes in North Macedonia. The Constitution of the Republic of Macedonia (1991) was created as a result of the market economy, which was also reflected in the regulation of the spouses' property relations. Thus, under a new Constitutional spirit, family relations began to be regulated by the Law on Family issued in 1992. Family law regulates family relations in general and marital relations in particular. In a similar way to the previous laws, it regulated the personal and property relations between the spouses according to the principle of equality. But unlike the Law on Marriage (1973), the extramarital union which has lasted for more

²¹⁶ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019), pg. 55.

²¹⁷ Sluzben Vesnik, nr 16/1950

²¹⁸ Mile Hadzivasilev, *Family Law* (Skopje, 1987), pg. 24.

than 1 year and the marital union were equalized in terms of rights and obligations, and the division of joint property offered greater protection to the spouse whose children were left in care²¹⁹. But it did not take long time and the legislator in North Macedonia in 2002 issued the Law on Property and Other Property Rights, and including the regulation of property relations between spouses in this law. Thus, with the issuance of this law, the property relations between the spouses are regulated by the Law on Property and other property rights²²⁰. The regulation of property relations with the Law on Property and other property rights was intended to regulate the property relations of spouses through a property law. This way of regulation, although it has met with criticism because the property relations of the spouses should not be treated the same as other property relations, or to differentiate between property and ownership, but there is still no initiative to change it. As such, this law continues to be in force and to further regulate property relations between spouses.

According to this law, spouses at the time of marriage enter into the legal property regime, a regime which does not give them the right to enter into a contract regarding the change of their property regime²²¹. Due to the imperative nature of the legal property regime, the property of the spouses can be separate property and joint property²²². The spouses have the right to enter into a contract only to regulate the issues of administration and disposition of their joint property, but according to the law they cannot change the property regime. As a result, both North Macedonia and Kosovo continue to be two countries where spouses do not have the right to choose the regime they would prefer based on their autonomy. In comparative terms, these two countries do not differ in terms of the property regime of the spouses where most European countries have been practicing for years.

Since according to the legislation in force, the spouses at the moment of marriage enter into the legal property regime then their property can be separate property and joint property. Depending on how they acquire the property, it is determined which property is separate and which is joint. For this reason, the law on property and other property rights has determined the manner

²¹⁹ Assembly of the Republic of North Macedonia, *Family law*. Article 13, 248. (Skopje: Official Gazette of the Republic of North Macedonia, no 80, 1992).

²²⁰ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 70.

²²¹ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia*, Article 59-81. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²²² *Ibid*, 2001, Article 66.

of gaining each property. So, depending on the way of gaining property, the rights and obligations that spouses have towards their property are differentiated.

4.1 Separated property

The separated property is the property which the spouses did not create during the married life. Traditionally, a separated property is considered to be the property that the spouse acquired before the marriage or that they acquired during the marriage but on other legal grounds, such as through inheritance, gift or any other form defined by law²²³. This definition of separated property is also found in most legislations of different countries, but only the legal bases differ on how this property is acquired. The same definition of separated property is made by the legislator in the Republic of North Macedonia. More precisely, the law on property and other property rights has determined that all assets that were acquired before the marriage or which were created during the marriage but not through work are considered as separated property of the spouses²²⁴. So, any wealth that the spouse has created or acquired before the marriage will be his separated property.

For the property that he has created or acquired during the marriage, the law has shown the ways of how this property should be created or acquired in order to be considered as separated property.. Thus, any property that is created through legal work without compensation, such as through inheritance, legacy, gifts, games of chance, will be the separate property of the spouse²²⁵. There is no dilemma about the wealth that the spouses acquire during the time they have been married through inheritance because it is considered as a separate property, such is determined by the Law on Property and other property rights but also the Law on Inheritance. The biggest dilemma has been regarding the gifts that spouses have received during their marriage. This problem has arisen because the gifts that spouses receive from others may have been donated for different purposes. For this reason, the judicial practice has determined the right of ownership

²²³ Thomas, Featherston Jr., *Separate property or community property: an introduction to marital property law in the community property states, Texas*: Baylor University, School of Law (2017), pg. 8.

²²⁴ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 68*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²²⁵ *Ibid*, 2001, Article 68.2.

over the gifts that the spouses receive based on the criterion for what purpose the gift was made. Thus, gifts that a spouse receives at the time of marriage or during the marriage and are personally dedicated to him will be considered a separated property. While the gifts that the spouses received at the moment of marriage or during the marriage but that this gift is made to facilitate marital life is determined to be as joint property of both spouses because it is considered to have been done on purpose for both spouses²²⁶. This decision is based on the law which stipulates that only items that are used exclusively for the personal needs of the spouse but do not represent a greater value than the value of joint ownership in general²²⁷.

Another exception is made in the case of determining ownership over items used for the personal needs of the spouse. Two parallels are drawn here, depending on the value of the item. Thus items which are acquired through joint ownership but are used to meet the personal needs of one spouse will be considered the property of the spouse who uses them. While items which are acquired through joint property and are dedicated only to one spouse but their value is high in proportion to the value of the joint property will be considered the joint property of the spouse²²⁸. Such determination is made in order to avoid problems that have occurred in court practice as a result of legal gaps, so that each spouse receives what belongs to them or who have contributed to the creation of that property.

The separate property is not considered only the property which is created before the marriage or the one which is created during the marriage through inheritance or gift, it is also created in the case of the division of the joint property. Since in the Republic of North Macedonia the spouses with marriage they enter into legal property regime, it means that at the moment of marriage they start to create joint property as a result of work and living together. But this wealth anytime can be shared. Spouses can exercise this right at any time not only during the termination of the marriage but also during the continuation of the marriage²²⁹. But in the case of the division of the joint property, as a consequence, the parts that they receive from the joint property turn into separate property. Thus, the agreement for division of joint property or the court decision for this

²²⁶ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019), pg. 94.

²²⁷ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 68.2*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²²⁸ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 359.

²²⁹ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 74.1.2*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

division serves as a legal title for the acquisition of property. The law on property and other property rights also regulates the issue of copyright. If one of the spouses creates a work which is the result of his mind and creativity then the ownership over this work is determined to be the separated property of the spouse who created it²³⁰. But it is disputed that the issue of income that the author creates through his work. Knowing that the author has the right to reproduce the work he creates, a right which brings material income. The wealth that he realizes from his work are not specified by the law on property and other property rights whether they will be separate property or joint property.

A solution to this problem has been made by the law on copyright and other similar rights where it has determined that ownership over the copyright work is a separate property while the property benefits that come as a result of using the copyright work through reproduction will be joint property²³¹. This solution made by the legislator in the Republic of North Macedonia is considered a proper solution, although it was not made by the Law on Property and Other Property Rights. It is important that in this way the legislator has taken into account the contribution of the other spouse who in any way contributes to the creation of the author's work. This contribution is mostly expressed in the form of care and maintenance of the house and children during the time that the other spouse creates the work of the author. It is true that the work of the author is a product of the human mind but that this product cannot be realized without the help of the other spouse. Thus, the solution provided in the law on copyright and other related rights is considered adequate, which has determined that the copyright work is considered special property, but if this work is copied and income is generated, then this income will be the common property of the author.

²³⁰ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 69*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²³¹ Assembly of the Republic of North Macedonia, *Copyright law and other similar rights, Article 8*. (Skopje: Official Gazette of the Republic of North Macedonia no. 115, 2010).

4.2 Joint property of spouse

Marriage creates rights and obligations for spouses. These rights and obligations are also of a property nature. Due to the marriage, the spouses enter into the legal property regime. This regime is defined by law and as such is regulated by imperative norms. As a result, spouses from the moment of marriage begin to create their wealth. Since in the Republic of North Macedonia only the legal property regime is foreseen, their property can be separate and joint. In order to understand which property is a separate property and which joint legislature in Macedonia has set some criteria in order to differentiate between joint and separate property. The legislator has defined only the ways of acquiring the separated property, implying that the other property will be considered a joint property. The property that the spouses had before the marriage, or acquired during the marriage but through inheritance, legacy, gift and copyright will be considered separated property²³². While the property which is acquired on other bases but during the marriage will be joint property.

Article 69 of the Law on Property and Other Property Rights provides that spouses may have joint and separate property. While Article 70 has stipulated that the property that the spouses will acquire during the marriage will be their joint property. According to this definition which is the only one that determines the belonging of the joint property means that the property that they will acquire during the marriage will be their joint property of the spouses. Since the legislation has not defined the criteria on how joint property can be created or what are the legal bases to be considered joint property in the scientific literature are determine two. Thus, in order for a property to be a joint property, that property must be acquired by fulfilling these conditions, work and duration of the marriage²³³. Although the law does not define work as the criteria for gaining joint property, this conclusion has come as a result of many opinions and especially the interpretation made by the court. To the conclusion that the joint property is created by work during the married life has come as a result that since the separate property is created through legal work without remuneration then the joint property is created as a result of remunerated legal work²³⁴. But here work means

²³² Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 69*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²³³ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 348.

²³⁴ *Ibid.*, pg.350.

any activity which brings property income or indirectly affects the creation of property income. The same logic has been used in court practice, considering the contributions that spouses make in any way, whether through caring for household chores, raising and educating children is considered as indirect work which increase the income of joint property²³⁵. The fact that the legislator did not foresee work in the narrow sense as a criterion for the creation of joint property but only determined that any property created during married life will be considered as joint property, has left space for the spouse who is not employed but contributes in any other way to the creation of this property to count as work. This way of defining the creation of joint property has left the possibility that any contribution that the spouses give in the creation of this property starting from doing household chores, caring for children, working outside the home but with a lower salary than the other spouse is taken as an equal contribution to the creation of wealth. The same has not happened in the legislation in Kosovo, where the law stipulates that the joint property of spouses is created through work and during marriage. This fact has led in some cases the courts to take into account only the contribution of the spouse given through direct work while the contribution of the other spouse who has been unemployed is valued at a minimum wage. Thus, indirect work has been converted into monetary value, leaving the unemployed spouses in an unfavorable position. This was the reason why the law was changed and the word "work" was changed to the word "contribution".

In addition to work as a criterion for the creation of joint property, it is required that this property be created during marriage. Article 67 of the Law on Property and Other Property Rights of the Republic of North Macedonia stipulates that property to be considered as joint property must be created during the marriage. In this case the law has used the term marriage but based on the court interpretations given to, it this means that the property was created during the marital life or marital union. In this case the term marriage is used in a broad sense because it means marital union. Even in the legal literature as a second condition for the creation of joint property is required marital union, which in this case means the joint life of spouses where the purposes of marriage are realized. In cases where the marital union has ended before the end of the legal marriage, the proof of this argument falls on the spouse who thinks that this union has ended on a certain day. This is because the case law considers that only the property that was created during the marital

²³⁵ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019), pg. 94.

union will be considered as joint property²³⁶. The same argument has been used by other courts, deciding that only property created during the marital union should be considered joint property despite the fact that the marriage has not yet ended in divorce²³⁷.

Practice is what has determined or given the required explanation as to whether joint property should be created while the spouses are in a marital union or only in marriage. In this case, the law only stipulates that the joint property must be created during the marriage, but that space is left for different interpretations. These court decisions and many other decisions have narrowed the meaning defined by law, thus excluding from the joint property the cases when the property is created while the spouses are still married but have terminated the joint life. This explanation will find more expression when the spouses have terminated their cohabitation while due to the prolonged divorce proceedings they create property which should not be considered as joint property. In this context, the Kosovar legislator has determined that the joint property is acquired during the continuation of the marriage²³⁸. In this case a narrower term is used than marriage, stipulating that only the property acquired during the continuation of the marriage will be considered joint property.

The legal nature of joint ownership makes the spouses have rights and obligations over all the property they have created during the marital life. As such it makes them unaware of the parts of their property. Due to this legal nature, the legislator in North Macedonia has stipulated by law that the spouses register the joint property in the name of both spouses. More precisely, article 69 stipulates that the joint property of the spouses must be registered in the public registers in the name of both spouses, but even if this does not happen, it will be considered that it is registered in the name of both spouses²³⁹. It is also stipulated in this section that if they have registered joint ownership in the name of both spouses in certain parts, it is considered that they have agreed on such a thing. This way of legal determination makes the spouses unable to independently dispose of their joint property, without the consent of the other spouse. Protection is also given to the spouse who has not presented as the owner of the joint property that without his consent cannot be sold or disposed the property to which he has contributed. As long as they are in the legal property

²³⁶ Decision of the Supreme Court of Macedonia, no. 174/82, dt.16.09.1982

²³⁷ Decision of the Basic Court of Gевгели, no. 407/07, dt.23.12.2009

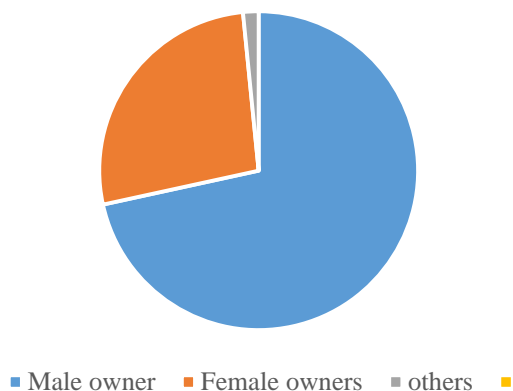
²³⁸ Assembly of the Republic of Kosovo, *Law on amendment and supplementation of Law no. 2004/32 on the family law of Kosova, article. 1. 2018*, Prishtina: Official Newspaper of Republic of Kosova..

²³⁹ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 69.* (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

regime, they are holders of the right of joint ownership and with the fact that they in any way contribute to the creation or addition of that property will be considered joint owners, regardless of the fact in whose name it is registered joint ownership.

On the other hand, the spouse in whose name the joint ownership is registered does not enjoy more rights just for the fact that he is registered as the sole owner of the joint property. Special protection is given especially to women where according to the latest statistics they are significantly to a lesser extent presented as owners compared to men. In fact only 27.27% of properties are registered in the name of women while 72.73 are owned by men²⁴⁰.

Fig. 3. Registered property in North Macedonia



Source: Agency for Real Estate of the Republic of North Macedonia, 2021

Due to the very low number of female owners, the legal definition that regardless of in whose name the joint ownership is registered will be considered to be registered in the name of both spouses is appropriate, but that this number should be increased. Also through other affirmative measures in order to stimulate women to register themselves as owners and not to continue the mentality of patriarchal power that property should be registered only in the name of men. In addition to increasing the number of female owners through affirmative action or stimulation the couples to register joint property on behalf of both spouses, the principle of publicity will be highlighted where everyone else will know that the property is joint property of the spouses.

²⁴⁰ Agency for Real Estate of the Republic of North Macedonia, https://www.katastar.gov.mk/wp-content/uploads/rodova_ednakvost/izvestai/Tabela_so_broj_i_procent_na_zapisani_prava_po_pol_i_po_katastars_ko_oddelenie_2019.pdf, (Accessed on 10.04.2021).

4.2.1 Administration of joint property and contractual agreements for administration and dispose

North Macedonia is one of the few countries that still does not have in the legal system the possibility for the spouses to change the legal property regime by agreement. At the moment of marriage the spouses enter into the legal property regime without having the opportunity to enter into contract marriage to determine their ownership in their joint property. But even though the spouses do not have the right to enter into a marriage contract through which they could change the property regime, they have the opportunity to agree on the administration and disposition of the joint property through agreements. Spouses have this opportunity due to the legal nature of joint ownership.

The right that the spouses have in the administration of the joint property means that they have the right and obligation to maintain the items that make up the joint property and that this maintenance includes the care, repair, processing of the joint property. While through the disposition the spouses have the right to exercise in the joint ownership the highest authorizations that the owner has over his property²⁴¹. Because the administration and the disposition differ due to the rights and obligations that the owners have over their property, where the administration includes activities which are undertaken regularly while the disposition is presented in specific cases, the law gives the possibility that these activities spouses undertake together and by agreement.

The Law on Property and Other Real Rights authorizes the spouses, as joint owners of the property they create, that the administration and disposition be done jointly and by agreement²⁴². So the spouses with the fact that they are joint owners of their property can administer and dispose jointly the joint property. But administration and dispose can also be done by agreement. This means that through an agreement they can leave the administration and disposition to one spouse. Since disposition involves higher authorization than administration, then neither spouse can dispose of or charge the joint property with any inter vivo legal work. This is done to protect the other spouse from legal actions that may leave him without property or that the joint property is

²⁴¹ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 353.

²⁴² Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 70*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

alienated without his will. This issue is regulated in more detail through other articles of the law on property and other property rights.

More specifically, through Articles 71 and 72, the law gives the spouses the right to authorize one spouse to administer and dispose of the joint property. However, due to the importance of this agreement, it is required to be made in writing and can be limited to only a part of the property. Also through the agreement the spouses can agree to authorize one spouse only for the administration, as an activity which has to do mainly with the maintenance of the thing in a regular way, while with the same agreement they can agree on the disposition only within the usual limits works. The administration and disposition agreement does not entitle the authorized spouse to dispose the joint property in situations where the disposition exceeds the regular disposition. Since the law on property and other real rights requires that the spouse authorized for administration and disposition should have a special authorization for extraordinary disposition. In fact, this special authorization is required by the Law on Obligations Relationship, which requires special authorization to undertake works which are not considered part of regular work, namely the connection of legal work related to guarantees, agreements for the election of a court or waiver of a right to compensation²⁴³.

In addition to the above situations, the legislator has provided that in situations where the regular mood is exceeded, the spouse must obtain the consent of the other spouse for unusual mood, such as the alienation or encumbrance of the main items or real estate. This consent must be given in the form provided by law²⁴⁴. This makes it possible for the spouse who is registered as the owner of the joint property to not be able to sell or dispose of the joint property even without the expression of the will of the other spouse. This actually protects the interest of the spouse who is not registered as the joint owner of the joint property. Although in practice this is difficult to prove and on the other hand the buyer in good faith can be harmed, through court practice, some issues have been settled which have been expressed more in practice. For example, through court decisions it has been determined that in case of sale or mortgaging of the joint property there must be the consent of the other spouse²⁴⁵. Also, through court decisions, mortgage contracts that have

²⁴³ Assembly of the Republic of North Macedonia, *Law on Obligations Relationship*, Article 84.3.4. (Skopje: Official Gazette of the Republic of North Macedonia, Nr.18, 2001).

²⁴⁴ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019), pg. 120.

²⁴⁵ Decision of the Supreme Court of the Republic of Macedonia, nr.282 / 86

been entered into without the consent of the other spouse have become invalid. Whereas in situations when the item from the joint property was sold without the consent of the other spouse through the court decision, the right of compensation was created for causing the damage to the spouse who did not express the will to sell that item²⁴⁶.

Due to these legal shortcomings which have brought problems in the case law, it would be more reasonable to stimulate the increase of the number of registration of joint property in the name of both spouses in order to prevent the sale or encumbrance of the joint property without the consent of both spouses. This is because according to Article 59 of the Law on Property and Other Real Rights, as joint property is considered the property acquired during the marriage regardless of in whose name it is registered, but in this case the interests of third parties are not affected, who did not know or could not have known that this wealth is common. In this situation, third parties who are in good faith are protected from the actions that can be performed by the spouse who has not obtained the consent of the other spouse. In this case the most protected should be the spouses who contribute to the creation of joint property. In addition to the right of the spouses to authorize one spouse to administer and dispose the joint property, they have the right at any time to terminate the contract of administration and disposition²⁴⁷. By this right the spouses protect their rights against the joint property whenever they assess that the authorized spouse fails to administer or dispose of the joint property properly or is incapable of doing this. Although the agreement for administration and disposition is considered as an efficient tool that only one spouse takes care of the joint property because in this way a higher efficiency in its management would be achieved. But this goal is not always achieved. For this reason, the possibility is provided for this agreement to be terminated whenever it is considered that it is more beneficial for the spouses, but even in this case the law provide a restriction. Termination of the contract for administration and disposition cannot be done when this harms one spouse. This damage must be clearly seen to be caused through the termination of this contract.

²⁴⁶ Decision of the Basic Court of the Skopje, nr.3091/06, date. 10.04.2008

²⁴⁷ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 71.* (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

4.2.2 Division of joint property of spouse

The joint property of the spouses which was created during the marital life with the work and contribution of both spouses is administered and disposed of by both spouses unless otherwise agreed. However, the spouses may at a certain moment share this property and each of them knows his share that belongs to him and becomes the sole owner of that share. The legal nature of joint ownership makes the spouses unaware of their parts, where in reality they are the owners of an inseparable thing, but their parts are determinable but have not been determined in advance²⁴⁸. This means that spouses as joint owners, even though they do not initially know their shares in the joint property, have this possible through the division of the joint property. The right of the spouses to request the division of the joint property enables them to become sole owners but in a certain part and through this to exercise the highest authorizations given to them by the law on their property. In fact, they acquire the right to have separate property and to administer and dispose of that property independently at the moment of the division of the joint property without the need for the consent of the other spouse. The spouses have the right to request the division of the joint property at any time, and this can be done during the marriage and at the moment of the end of the marriage²⁴⁹. The spouses may request the division of property during the marriage, while they are still married and may also request it when the marriage has ended in any of the ways prescribed by law. In both situations the division of the joint property can be done by agreement between the spouses and in case no agreement is reached then this division can be requested from the court.

The division of the joint property can be done during the marriage, and this means that the spouses are still in the marriage, but this division only applies to the property that they have created until the moment of separation. This means that after this division they continue to create joint property again as the agreement for division of property has no effect for the future property. This is because in North Macedonia there is not applying marriage contract which would allow spouses to contract a regime other than that provided by law. While the division of property after the marriage ends is required in all cases provided by law for the termination of the marriage. Thus marriage can end through the death of one spouse, the declaration of the missing spouse to die, the

²⁴⁸ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 59*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001.

²⁴⁹ *Ibid*, 2001, Article 74.

annulment of the marriage and the divorce²⁵⁰. In cases where the marriage ends with death or with the declaration of the missing person to die, the division of the joint property in addition to the surviving spouse has the right to claim it also by the heirs of the deceased spouse. But in general, regardless of the manner of the end of the marriage, the creditors of the spouse also have the right to request the division of the joint property when from their separate property they have not managed to fulfill the claims²⁵¹. But regardless of whether the marriage has ended or the manner of termination of the marriage, the spouses have the possibility to make the division of the joint property by agreement, and in case no agreement is reached between them, then this issue is resolved by the court in uncontested procedure at the request of one of spouses. Where the court decision will be considered as a legal title for the registration of separation property in the name of each spouse to whom the property has been divided.

Since the law provides two ways of sharing common property, each way will be discussed separately due to the importance they have in addressing this topic although in the end both ways of division of property result in the creation of separate property of the spouses. But to this conclusion comes in different ways.

4.2.2.1 Division with agreement

Spouses during marital life, no matter how long it lasts, create joint property. But in every moment of it they have the right to share this property and determine their rights. The first way to divide marital property is through agreement. This means that spouses have the right at any time, except when this harms one spouse, to make agreement for the division of joint property. This right can be exercised by both spouses and through the agreement can divide the joint property during the marriage but also in case of the end of marriage²⁵². The division of joint property either during the marriage, or in case of its termination through agreement is considered as the most efficient way of separation, as it is considered that the spouses are the ones who know best the contribution they have made in creating of that property. Thus each spouse receives the share that

²⁵⁰ Assembly of the Republic of North Macedonia, *Family law*, Article 34. (Skopje: Official Newspaper, no 80, 1992).

²⁵¹ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 355.

²⁵² Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 74*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

belongs to them and it is not necessary for a third person, in this case the court to divide their property. The legal effect produced by the agreement for division of joint property is that the spouses pass from the regime of joint property to the regime of separate property. So, the parts of the property that they receive after making a division of property will be their separated property and as such they register it in the public books, and from that moment they independently administer and dispose this property, regardless of the consent of the other spouse.

In the division of joint property by agreement, the spouses are free to decide for themselves how they will divide their property. Since the law does not set limits on the division of joint property, the spouses by agreement determine their shares and agree on all matters arising from the joint property. Unlike the division of property through court proceedings, where the principle of equal division of joint property is applied, in this case the spouses by agreement or contract can agree in several ways on the division of joint property. Ways of sharing joint property vary depending on the wealth they have created. In cases where the spouses have real estate they can divide it in proportion to their contributions or agreements by converting that ownership from joint property to co-ownership. Where in this case each spouse will know the ideal part and will be the owner of that part²⁵³.

On the other hand, because that property cannot be realistically divided, they will remain co-owners of that property. In addition to this way where joint ownership becomes co-ownership and each spouse becomes the owner of the part that belongs to them, they can actually share the property, when it is possible, and each spouse becomes the owner of the property they have shared. In this case each spouse independently administers and disposes of the items he she has received from the joint ownership. This way of dividing the joint property is easily applicable when the spouses do not have real estate in their joint property. Whereas in situations when things in joint property cannot really be divided, the spouses may by agreement transfer these items to the ownership of one spouse while the other spouse receives cash compensation for the part that would belong to him. In this case, the spouse to whom the compensation in cash belongs, through the law, has the right of pledge on the items that the other spouse has taken the ownership, until he receives the compensation²⁵⁴. In this case, the law stipulates that if the spouse who has received the items from the joint ownership does not make monetary compensation to the other spouse, he

²⁵³ *Ibid*, 2001, Article 63.2.

²⁵⁴ *Ibid*, 2001, Article 52.

/ she has the right to forcibly execute the agreement or request the return after the expiration of the deadline of the item²⁵⁵. The right of pledge which is created by law in this situation, makes the execution of the contract safer and also makes it possible that the spouse who has not received items from the joint ownership is not left without compensation.

The division of property by agreement between the spouses causes them to change their property regime and through them they turn into the separated property regime. In fact, the contract for the division of property is concluded by the spouses based on their will and depending on its content, the form of this contract is determined. Thus, if through the contract the spouses have made the distribution of movable things, they can bind it orally or in writing form. But since the contract for the division of joint property is a legal title for the acquisition of property, then for the division of immovable property it is required that it be done in writing and according to the form provided by law because through it the registration in public books is done²⁵⁶. According to the law for the notary this contract in order to produce legal effects must be verified by the notary and after that the spouses become owners of the property acquired from the joint ownership.

4.2.2.2 Division of joint property when there is no agreement and its evaluation

The property that the spouses create during the marriage can be shared at any time, either during the marriage or at the moment when the marriage has ended. The first way of sharing joint ownership is through agreement. But not every time between spouses there is a calm relationship that leads them to enter into a contract for division of property. The relationship between spouses sometimes can be so strained that may come to a point where they cannot agree on the division of joint property. Disputes over the division of joint property may result as they have terminated the marriage for various reasons and their broken relationship makes it impossible for them to agree on the division of property. Also failure to reach an agreement on the division of property may come as a consequence of what is opposed to the contribution of one spouse in the creation of joint property. For this reason, the legislature has foreseen the possibility that in cases when the spouses

²⁵⁵ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 355.

²⁵⁶ *Ibid.* pg. 366.

cannot enter into an agreement for the division of joint property, they can do it through the court decision.

First of all, it should be known that the law has determined that this right of the spouses is not prescribed²⁵⁷. Thus, they can at any time request to divide their property. This right comes as a result that the right of ownership is a right of absolute character and as such are not prescribed. The procedure for the division of the joint property, when no agreement has been made between the spouses, takes place in the non-contentious procedure²⁵⁸. This procedure is applied until there is no dispute between the parties. The dispute can be made in situations when one of the spouses has demanded that he owes more property. Consequently, this dispute may arise because the court in the division of joint property starts from the fact that the property of the spouses has to divide in equal parts²⁵⁹. It is therefore the duty of the court to divide the joint property into equal parts between the spouses. But it is the right of each spouse to request from the court that the division of the joint property not be done equally. This right can be exercised if the spouse, who seeks more wealth, manages to prove that his contribution is significantly greater than that of the other spouse.

And if in this case a dispute arises between the spouses for the unequal division of the joint property, or the court confirms that ownership of the joint property is disputed, then this procedure must be conducted according to the Law on Contested Procedure²⁶⁰. This procedure must be initiated within the deadline set by the court, and if it does not act according to the instruction of the court, it will be considered that the proposal for division of the joint property has been withdrawn.

The proposal for division of the joint property can be requested by each spouse but this right also has the creditor, in relation to his debtor and the legal heirs in relation to the inheritance right²⁶¹. In fact, the proposal for the division of joint property is intended to give the court the right to decide on the manner and conditions of the division of joint property. But this issue can be resolved through a notary only in cases where there is no dispute between the parties²⁶². It would

²⁵⁷ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 63*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²⁵⁸ Ibid, 2001, Article 75.

²⁵⁹ Ibid, 2001, Article 75.

²⁶⁰ Assembly of the Republic of North Macedonia, *Law on non-contentious procedure*, Article 217. (Skopje: Official Newspaper nr.9, 2008).

²⁶¹ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 64*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²⁶² Assembly of the Republic of North Macedonia, *Law on non-contentious procedure*, Article 213. (Skopje: Official Newspaper nr.9, 2008).

be much faster and more efficient if the procedure were conducted before the notary and the decision will be made in the form of a notarial deed, if there was no dispute between the spouses regarding the division of their property. The notary will conduct the procedure as the court, where the joint property will be divided into equal parts according to the legal presumption that both spouses according to their possibilities contribute together in the creation of the joint property.

Although the law on non-contentious procedure in Article 221 states that the division of property will be done in such a way as to satisfy the reasonable demands of the participants, it should not be forgotten that this division should be done in equal parts, as we are dealing with joint property which is based on marriage. Even though the division must be done in equal parts, the law has provided for some situations where due to the importance of the items they must be given to the spouse who uses them. Thus, the court must take into account that when the division of the items that constitute the joint property begins, the items that one spouse has used to exercise his activity must be given to him. Therefore, in addition to the items he gains from the division of the joint property and items which serve exclusively him, the spouse will also be given the items with which he has performed his professional activity²⁶³. This separation is made only if such a thing is requested by the spouse. Otherwise, if the spouse does not request that these items be shared with him because he carries out a certain activity, they will be considered as joint property and will be shared between the two spouses.

Through this legal regulation it has become possible to protect spouses in terms of exercising their professional activities. Otherwise, if it wasn't like this regulation, the activity exercised by one of the spouses would be endangered. But even here a restriction has been made. If the value of these items, whether those used by one spouse to carry out an activity, or the items which are exclusively used by one spouse, have a relatively large value in relation to the value of the entire joint property, then these items will also be the object of division. But even here it is possible to make an agreement, when these items will be given to the spouse who needs them but who will be obliged to compensate the value in money to the other spouse, if for this it is given the consent by the spouse to whom the compensation in money belongs. While the situation changes when immovable items are presented as items. If an immovable property is given to only one spouse for any reason, the other spouse, in addition to the compensation that will receive in monetary value

²⁶³ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 76*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

equivalent to the part that will belong to him, has the right of pledge until he receives all the compensation²⁶⁴.

Another situation which is regulated by the law on non-contentious procedures is the issue of items that cannot be divided, or the division significantly reduces the value of the item. In this case, the court may leave the item to only one spouse while the other will receive compensation for the value that belongs to him. The court may also decide to sell the whole thing in public auction and the monetary value realized from the sale to be distributed equally to the spouse's.²⁶⁵ Otherwise, in all cases, the procedure for division of property ends with a court decision, respectively with a notary deed of the notary, which provides data on the property which is divided, the manner of division and the rights and obligations that each spouse has. Complain may be made against this decision by any participant who does not accept such a division²⁶⁶.

The division of joint property brings consequences not only to the property relations of the spouses but can also bring consequences to the children. This situation can be expressed in cases when the marriage has ended and the spouses seek to share the joint property. In this case, the law stipulates that the spouse to whom the children are left in care, education and trust, in addition to the part that belongs to them, must also be given items that are exclusively dedicated to the children. Also, the spouse who has custody, education and care of the children should be given the items which will undoubtedly be of interest to the children²⁶⁷. Such a legal solution contributes greatly to the well-being and well-raising of children, as they are considered to be the ones most affected by parental separation. However, the law is deficient or is not well clarified in the part where it is said that the items that are destination for children should be given to the spouse who has the right of custody of the children and the part of the law where it is said that the items that undoubtedly serve interests of children. In this case, an ambiguity is created as to which items are considered items that are intended for children and which items undoubtedly serve the interests of children. If the spouse to whom the children are left in the care belongs the items which are destination for the children and also the items which are obviously in the interest of the children, a great value of the property can be created and in this way can it happens that such a value is

²⁶⁴ Assembly of the Republic of North Macedonia, *Law on non-contentious procedure*, Article 223. (Skopje: Official Newspaper nr.9, 2008).

²⁶⁵ Ibid, 2008, Article 224.

²⁶⁶ Ibid, 2008, Article 225, 226.

²⁶⁷ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia*, Article 77(Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

proportionally larger compared to the total value of joint property. On the other side if we start from the previous logic that the items which are used to practice the profession belong to that spouse, and in case their value is large compared to the value of all the common property, those items will also be divided. Consequently, items that are intended for children and items that are of interest to children should be separated when their value will be relatively large in relation to the total value of the common property. For this reason it would be much more reasonable to give these items a special protection in order to protect the interests of more powerful children.

For this reason it would be much more reasonable to give these items a special protection in order to protect the interests of children more powerful. This protection would be granted if the legislator would lose the right of the other spouse to request the separation of these items, regardless of the value that would be created. It is important for children to have all the conditions they had as long as their parents did not share the common property. At least this protection of the interests of children lasts until the children reach a certain age.

During the division of the common property on the basis of the law on property and other real rights, which takes place in uncontested procedure, the court starts from the principle that the division is done in equal parts (Article 75). The law assumes that the division is done equally with the reasoning that each spouse in any way contributes to the creation of joint property. The contribution that spouses can make is not defined by law but it is important that each spouse can contribute. We can see this in the case law that as a contribution is calculated the conducted of household chores and care for children and household chores²⁶⁸. So, as a contribution is calculated not only the work that the husband does outside the home which is valued in monetary value, but also the work that the wife does around the housework and child care.

The division of property in principle is done equally, but exceptions are allowed here as well. These exceptions are made to protect the spouse who has contributed significantly more than the other spouse to the creation of the joint property. In this case, if a spouse does not agree to the division of property equally, he has the right to claim a larger share of the property. He may claim this right based on article 75.2, which states that one spouse may be given more shares if he requests it, but he must prove that he has contributed significantly more than the other spouse²⁶⁹.

²⁶⁸ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 358.

²⁶⁹ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 77*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

In this situation, the court may terminate the non-contentious procedure when it considers that the size of the parts is disputable and instructs the parties to start the contentious procedure within the deadline set by the court²⁷⁰. In this case, the spouse must prove that he / she has contributed significantly more than the other spouse in order for the court to recognize the right of ownership in more than ½ of joint property. This solution would be very favorable for women who are employed and on the other hand take full care of household chores, raising and educating children. Their contribution is twofold because they also generate income through work but on the other hand most of the time they take care of housework and raising children. This solution would be very favorable for women who are employed and on the other hand take full care of household chores, raising and educating children. Their contribution is twofold because they also generate income through work but on the other hand most of the time they take care of housework and raising children. But how much this right is exercised by women depends on each couple and the commitments they have in creating common wealth. But it is important that they have legal support and if it can be proven that their contribution is significantly greater than that of the other spouse to exercise this right.

4.2.3 Spouses' responsibilities and duties regarding marital property

The marriage bond produces legal effects between the spouses. As a result, personal rights and obligations are created between the spouses, but on the other hand, property rights and obligations are also created. In addition to the obligation that spouses have to each other such as respect, fidelity and help to each other they are also obliged to take care of family needs²⁷¹. To meet family needs spouses can commit with their separate or joint property. Thus, in addition to rights, spouses can also create obligations and in the other hand the spouses can also create obligations to third parties. To meet family needs spouses can commit their separate or joint property. In this way, the spouses must fulfill the obligations they have created with third parties,

²⁷⁰ Assembly of the Republic of North Macedonia, *Law on non-contentious procedure*, Article 217. (Skopje: Official Newspaper nr.9, 2008).

²⁷¹ Assembly of the Republic of North Macedonia, *Family law*, Article 33. (Skopje: Official Newspaper, no 80, 1992).

but depending on the purpose for which they have created these obligations, it also depends on what property they will be responsible for.

If the spouses have entered into obligations with third parties but have created these obligations to meet family needs, then these obligations have to be fulfilled by the joint property of the spouses²⁷². Regardless of which spouse has taken the responsibilities, if it was created to meet the needs of the family or the general needs of the family, both spouses will be responsible. Consequently these obligations will be settled through the joint property of the spouses. Or on the other hand the creditor can demand that this obligation be fulfilled by the joint property of the spouses. This obligation comes as a result of both spouses being obliged to meet the needs of the family. These needs they must meet depending on the skills they have. But it is also known that joint property is created with the contribution and work of both spouses. At this moment it is pointed out that since the obligation to meet the needs of the family is common then the obligation to fulfill the obligations with third parties must be fulfilled by the joint property.

Since marriage creates obligations towards marital property, through law the protection of the spouse who has not taken on obligations is done. Thus, one spouse is not obliged to fulfill the obligation of the other spouse, who created the obligation before the marriage²⁷³. The spouse is released from this obligation as the obligation was created before the marriage and was not intended to meet family needs. Thus for this obligation will be liable only the spouse who has assumed the obligation with his separated property or on the other hand his creditor has the right to request the division of joint property in order to fulfill his claim from the part that belongs to the spouse debtor. Also, the spouse who has not taken the obligation is released from this obligation even if the spouse has entered into obligations during the marriage but has entered for personal purposes.

The law also provides for the possibility that if one spouse has paid the solidarity obligation with his / her special property, he / she has the right to request compensation for the part he / she has paid for the other spouse as well²⁷⁴. In this situation the spouse is liable for the joint obligation with his separate property, but who acquires the right to compensation from the other spouse to return the difference or the part that the other spouse had to fulfill.

²⁷² Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia, Article 79.2*. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

²⁷³ *Ibid*, 2001, Article 79.1.

²⁷⁴ *Ibid*, 2001, Article 79.3.

Otherwise it is considered the hard work of the court to determine which obligations are joint and which are personal obligations in order to determine who must fulfill these obligations and which assets will be attacked in this situation.

4.3 Regulation of marital home in case of division of marital property

Marital home is the place where spouses live and raise their family. All their contribution and work is concentrated in the marital home. This is because they live there and try to create a suitable family environment. In fact, one of the rights of spouses is to decide where they will live together, since the main purpose of marriage is to live together and start a family²⁷⁵. This cohabitation takes place at home which has the meaning of marital home. In general, spouses give the greatest contribution to the creation of the marital home. Or on the other hand the greatest wealth that spouses can have is their marital home, or the apartment where they live.

Knowing the importance of the marital home for a couple and their children, it is the object of separation. This is due to the fact that the marital home does not have a special treatment and as such is subject to the rules of division of joint property. So, at the moment when the spouses ask for the joint property to be divided, the marital home is one of the things that should be divided. The division of the marital home must be done for reason because like other things it follows the same fate. If we based on the rules defined by law, the joint property of the spouses is divided equally (75) between the spouses. However, this proportion can be broken at the moment when one spouse demands that a larger part of it belong to him if he manages to prove that his contribution is significantly greater in the creation of that wealth than the other spouse²⁷⁶. In this situation the joint property is either divided between the spouses or in other cases when the thing cannot be divided is given to one spouse while the other spouse receives compensation in cash for his share. Thus, in all situations the joint property of the spouses is divided and at no point the marital home excluded. This means that despite the legal regulation of marital property, the spouses' house does not enjoy legal protection. Especially when the couple divorces and they have children.

Having a legal protection of the marital home is not necessary when the spouses share the property by agreement. At this moment it is left to them to voluntarily decide on the affiliation of the marital home. Also a special protection is not necessary in this situation because it is considered

²⁷⁵ Assembly of the Republic of North Macedonia, *Family law*, Article 32. (Skopje: Official Newspaper, no 80, 1992).

²⁷⁶ Assembly of the Republic of North Macedonia. *Law on Property and Other Real Rights of North Macedonia*, Article 75. (Skopje: Official Gazette of the Republic of North Macedonia no. 18, 2001).

that the couple still have a good relationship between them and can reach a proper agreement that would satisfy the desires of both. It is important that special protection be given to the marital home when the couple has asked the court to share their property, as they have not reached an agreement to make such a separation. So the court is obliged to divide the property of the spouses since the law does not provide any protection to the marital home. As a result, the non-owner spouse is obliged to leave the house regardless of whether the children are entrusted to him or not. Thus the parent to whom the children are entrusted has only the right to request that items which are intended for the children or even others which are undoubtedly of more interest to the children be given to him²⁷⁷.

Since the law does not specify which items are considered items that undoubtedly serve for the interests of children, leave space that marital home not to be counted here. This is mostly argued through court decisions, where in most cases of divorce, the mother who has won the trust of the children had to leave the marital home because that house has been the object of separation, or even sale²⁷⁸. Regardless of the conditions that the parent or in most cases the mother will have, she must leave the house and create a new environment for her children. The new environment in which children have to live as a result of divorce is not considered to be easy and moreover may have consequences on the emotional condition of the children. Here children are not only emotionally affected because they start living with separated parents but on the other hand they are forced to change the living environment and adapt to a new way of life. Through this lack of legislation can be caused violation of children's rights as every decision must be taken in the interest of children²⁷⁹. And here it is difficult to make such a decision as there is no legal framework for such protection.

The marital home should enjoy special protection during the marriage but also in the event of the marriage ending. Giving a special treatment to the marital home, in case of division of property it should be left to the use of the spouse who needs housing, or the spouse whose children are left in care. This protection should continue until the spouse is able to create a living environment or until the children reach adulthood²⁸⁰. In this way, if the marital home would enjoy

²⁷⁷ Ibid, 2001, Article 77.

²⁷⁸ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg 358.

²⁷⁹ General Assemble of United Nation, *Convention on the Rights of the Child*, Article 3. (1989).

²⁸⁰ Brett R. Turner, "Unlikely Partners: The Marital Home and the Concept of Separate Property", *Journal of the American Academy of Matrimonial Lawyers*, Vol. 20, (2006), pg. 70.

special protection, at the moment of division of the joint property, the court divides all the property of the spouses but is obliged not to include in this division the marital home due to its legal title. Through this the spouse who in case of divorce will not have shelter but also the children will continue to live in the marital home until a certain point of time, enabling them an adequate upbringing and education.

In most European countries, the marital home enjoys legal protection but in a different way. Starting from the Swedish state where regardless of who owns the marital home, at the time of divorce the court can decide that it be given to the spouse who is in need, but by reducing the share in the joint property. Another solution is provided in the French state, where the marital home is given for use to the spouse who has custody of the children but the other spouse has the right of leases. In Italy, regardless of who owns the house, at the time of divorce it will be left to the spouse who has custody of the children²⁸¹. So, regardless of the specific way of treating the marital home, an important step is to enjoy special protection through which the best interests of the children will be protected but also the spouse who is in need would be protected.

²⁸¹ Angel Ristov, "The Legal Status of the Marital Home in the Macedonian and Comparative Law", *Iustinianus Primus Law Review*, No. 5, (2012).

5. Marital property regime according to the law of some European country

The institution of marriage as one of the basic human rights is also one of the oldest institutions of humanity. Due to its antiquity, this institute of law has managed to undergo many changes over the years, not only within a state but also in different states. While this institute was originally under the guise of religion it is now under the protection of the state and regulated by legal norms. As such, this institute, despite the same meaning that exists, has differences in terms of its legal regulation. The personal and property relations of the spouses are regulated separately, so that all the norms that refer to the regulation of the property relations of the spouses are differentiated into property regimes. Each state has determined which property regimes they have integrated into their legal system and thus the spouses decide on their own will how to regulate their property relations.

Each state, based on its constitutions and codes or laws, has determined the property regimes of the spouses and the manner of division of property into marital and personal property. The issue of classifying assets into common and separate assets is probably the biggest challenge for states. Another challenge is the division of common property in case of divorce or death of one of the spouse. Also the special importance is the protection of the spouse who does not have good conditions in cases of divorce and the welfare of children. In principle, the separated property of the spouse is considered the property that he/she had before the marriage or that he acquired during the marriage through a gift or inheritance²⁸². Whereas property which is used or owned by both spouses is presumed to be joint ownership unless proven otherwise. In the practice of most states, the classification of assets into common and separate assets is based on the manner and time of acquisition. But still most spouses fail to keep evidence and they fail to prove that an asset is personal and because of that it will be considered as joint property²⁸³. For this reason, below we have analyzed some countries how they have regulated the property relations of spouses and what rights and obligations they have towards family obligations and children in particular.

²⁸² Oliver Heard, Richard Strieber and Richard, "Characterization of Marital Property", *Baylor Law Review*, Vol. 39, no. 4, (1987:909-944), pg. 7.

²⁸³ Max Rheinstein, "Division of Marital Property," *Willamette Law Journal*, 413 (1975), pg. 420.

5.1 Austria

Austria is one of the European countries which has marital relations regulated by the Civil Code. The Austrian Civil Code is considered to be one of the earliest code which dating from 1811. Despite some changes, most of the spouses' property relations are regulated by this Code. While through the other law, the Marriage Act, regulates the manner of division of marital property of spouses. The Austrian Civil Code defines the family as a community between their ancestors and their descendants²⁸⁴. This bond between family members is created through the marriage contract²⁸⁵. Because according to the legislation in Austria marriage is considered as a contract which is concluded between the spouses through which they receive rights and obligations between themselves.

But in addition to marriage as a legal bond between spouses, in Austria there are several other forms of family ties such as civil partnership and cohabitation. More important is the decision of the Constitutional Court of Austria which in 2017 decided to allow marriage between persons of the same sex and the same rule applies to civil partnership²⁸⁶ thus giving the right to marriage and partnership to another group of citizens because of their gender beliefs. Although they have some types of families, still civil marriage is the one which with its connection creates rights and obligations between the spouses. Spouses are obliged to live together, to be faithful, to respect and help each other and these obligation are mandatory for them²⁸⁷. Spouses can exceed these obligations, but an agreement is always required between the spouses, which are also regulated by law.

In addition to personal relationships that arise as a result of the marital relationship, property relations between spouses are also regulated. Spouses to regulate their property relations can be determined for one of the property regimes provided by the legislator in Austria. Thus they can decide between separation of property regime, the community of property regime or conventional property regime²⁸⁸. With their own free will they can be appointed to one of these regimes. This determination they make about how they will manage their wealth after entering into marriage.

²⁸⁴ Civil Code of Austria. 1881, article 40.

²⁸⁵ Ibid, Article 44.

²⁸⁶ Austrian Constitutional Court , 2017

²⁸⁷ Civil Code of Austria, 1881, article 90.

²⁸⁸ Ibid, article 1233

If the spouses are not defined for any specific property regime then the separate property regime applies to them. This means that the separate property regime under Austrian law is a legal or default regime. If the spouses are not destined for any other regime then their property will be divided. Each spouse will dispose and administer with the property that he had before the marriage but also the property that they will acquire during the time they are married²⁸⁹. Although each spouse dispose and administer with their property, ie the joint property is not created, they can agree that the administration can be done by agreement. Thus, through the agreement they can agree that the administrations become joint but that the disposition of the property is kept by each spouse for himself²⁹⁰. But in this case, even though the spouses are free to dispose of their property, the legislator has provided some restrictions regarding the disposition of the family home. If one spouse has the right of dispose the marital home, he / she is not allowed to dispose this house if caused a damage to the other spouse²⁹¹. Thus, through the regime of separated property, each spouse remains the owner of his / her property, but there are limitations in the case of the marital house.

What makes this regime special is that it gives the right to the spouse who deals with household chores and who does not have enough income to enter into a legal transaction for daily household matters, but who do not exceed the standard of living of them, and the represented spouse is contracting partner²⁹². Through this, the right is given to the spouse who deals with household chores and has no income, to be able to perform legal work and not to remain hostage to the other spouse who has a higher income. So in this way the spouse is protected who does not contribute to the creation of wealth through income but through housework.

In addition to the regime of separated property, the spouses through the marriage contract can be determined for another regime, or property regimes of community property. Through this type of regime, spouses can define community of property during life and community of property after death²⁹³. Thus, if the spouses have chosen property regimes of community property during their lifetime, then this regime can be contracted as general or limited. In the case where the spouses are designated for property regime of community of property during life in general, this

²⁸⁹ Ibid, article 1237

²⁹⁰ Ibid, article 364c

²⁹¹ Ibid, article 97

²⁹² Ibid, article 96

²⁹³ Ibid, article 1233

means that all the property brought by the spouses and acquired during life the spouses will be the joint property of the spouses. The spouses in this case will be joint owners of their property but their parts can be specified in the marriage contract, if they want it. In this case, restrictions are made between the spouses regarding the right to dispose of this property. The spouses are jointly responsible for all the obligations they have towards third parties, so they are liable with their joint property regardless of who created these obligations. Whereas if the spouses are determined that their regime of community property is limited, this means that some assets are not included in the joint property but remain as their separate property. In this way the spouses will create the joint property but on the other hand they keep some properties as separate property with which they administer and dispose of themselves.

Another way of regulating property relations is when the spouses are assigned to the community of property after death regime. Through this regime the spouses while they are alive manage and dispose of their property separately, but at the moment that one of the spouses dies, then their joint property or united property is created. The debts will remove and the remaining property will be divided into two parts²⁹⁴. So in this case the regime of separate property regime and community of property. This enables the surviving spouse to receive half of the joint property while the other half participates in the inheritance procedure.

Determining the spouses for a property regime other than the legal or separated property regime, the spouses can do it through the marriage contract. Through this contract the spouses can be determined the community of property regime during life or after death regime. Also through the marriage contract they can be determined for general or limited community of property regime²⁹⁵. The marriage contract here is defined as an agreement that the spouses can enter into in relation to their marital property and this contract has to be made in form of notarial deed. The norms of contract law apply to the conclusion of this contract. Or that this contract must meet the conditions required for concluding contracts in general. Spouses have the right, through an advanced agreement, to share their joint property in the event of divorce or termination of cohabitation. In this arrangement they can include sharing the items they use on a daily basis, as

²⁹⁴ Ibid, article 1234

²⁹⁵ Ibid, article 1217

well as sharing their savings or even the bridal house. In this case, a notarial deed is necessary when the marriage house is divided, while for other items a written agreement is sufficient²⁹⁶.

Although the spouses can share their property through the agreement, still in the situation when there is no agreement between them, then it is the court, the body which divides the property of the spouses²⁹⁷. The request for division of property can be made by the spouses within one year from the moment when the marriage has ended with an unappeasable decision²⁹⁸. The court conducts this procedure in a non-contentious procedure, the division of the spouses' property in accordance with the Marriage Act, as a law through which the spouses' property is divided. The division of the spouses' property does not include items that one spouse has brought into marriage or acquired through inheritance or gift, as well as items that are personal or are items that the spouse uses to exercise his profession²⁹⁹. The object of the division will be the savings, assets and items that the spouses use on a daily basis, including the marriage house. While the date taken as a basis to determine which items will be divided or not will be the date of marriage and the date when the marital relationship ended³⁰⁰.

Characteristic of the legislation in Austria is that it offers adequate protection to the spouse who does not have good living conditions after divorce. Thus, this legislation stipulates that if the marital home is the separate property of one spouse, but if the other spouse does not have a suitable place to live or because the interests of the children require him to continue living in that home, then the home marital even though it is separate property will be subject to division as if it were joint property³⁰¹. Spouses' contributions are counted as equal regardless of the income provided by the spouses and this is best seen when in almost all decisions this contribution is considered equal even when one spouse has not worked but has taken care of housework and child rearing.

²⁹⁶ The Austrian Marriage act, article 97

²⁹⁷ *Ibid*, article 81

²⁹⁸ Alfred Kriegler, Family Law in Austria, *Practical Law, Thomson Reuters*, November 2020, [https://uk.practicallaw.thomsonreuters.com/75680448?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a430948](https://uk.practicallaw.thomsonreuters.com/75680448?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a430948) (accessed 15 December, 2020)

²⁹⁹ The Austrian Marriage act, article 82

³⁰⁰ Alfred Kriegler, Family Law in Austria, *Practical Law, Thomson Reuters*, November 2020, [https://uk.practicallaw.thomsonreuters.com/75680448?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a430948](https://uk.practicallaw.thomsonreuters.com/75680448?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a430948) (accessed 15 December, 2020)

³⁰¹ *Ibid*

5.2 Belgium

Belgium is another country which has regulated family and marital relations through its Civil Code and legal acts. According to the Belgian civil code, marriage and legal cohabitation are considered communities which enjoy legal protection and produce legal effects between spouses or cohabitants. While de facto cohabitation is not regulated through marital norms but that they can regulate their relationship through agreements³⁰². Marriage can be entered into by any person who has reached the age of 18, regardless of gender, but as such creates rights and obligations of a personal and property nature³⁰³. Personal relationships between spouses are mandatory regardless of the property regime they choose, and this includes assistance between spouses, and each spouse must contribute to the expenses incurred around household chores in proportion to his or her ability³⁰⁴. As for the property relations of the spouses, according to the civil code of Belgium they have the opportunity to choose between three regimes that it offers through the legislation. These three regime are: community of the property acquired during the marriage, the separation of property, the universal community of property³⁰⁵.

Regime community of the property acquired during the marriage is considered a legal regime into which spouses enter if they are not designated for any other specific regime. According to this regime, the property that the spouses acquire after concluding marriage forms their joint property³⁰⁶. In this property does not include the property that the spouses have before the marriage or those that are acquire through the gift or inheritance during the marriage, as well as the personal items of tem, so these are considering as separated property of spouses. But in order not to misinterpret through an amendment it has been clarified exactly which items are considered common and which items are in separate property³⁰⁷. Thus each spouse has the right to freely administer and dispose of his or her separate property with the exception of the marital home, where the consent of both spouses is required. While on the other hand the common property is administered and disposed jointly but that this should be done in the interest of the family³⁰⁸. Also,

³⁰² Belgian Civil Code, article 143 and 1475

³⁰³ Ibid, article 212

³⁰⁴ Ibid, article 213

³⁰⁵ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 31.

³⁰⁶ Civil code of Belgium, article 1405

³⁰⁷ Ibid, article 1400

³⁰⁸ Ibid, Article 1417

despite the joint administration and disposition, each spouse is allowed to individually undertake daily legal actions related to the maintenance of the house and the education of the children. The administration and disposition of this property can be allowed to be done by only one spouse, but in special cases such as the sale of a marital house or mortgaging into marital home, the consent of both spouses is always required³⁰⁹. Through this it is impossible to leave the other spouse in an unfavorable position or to endanger the well-being of the family, especially the children. Also for debts they are responsible depending on how they created them. So for the debts which he/she has created in relation to their separated property they are liable individually, while for the common debts they are liable with their common property.

This property regime can be changed or modified through a marriage contract. So if the spouses want to enter into another property regime or to modify the legal regime at some point, they must enter into a marriage contract which must be made in the form of a notarial deed and the same one must be registered in the register³¹⁰. The registration of the marriage contract makes possible for third parties the existence of this contract and the opportunity to realize their interests in a safer way. Spouses may, of their own free will, decide to enter into a property regime through a premarital or post-marital contract into separation property regime or the universal community of property³¹¹. If the spouses have chosen to regulate their property relations through the marriage contract according to the regime of separate assets, this means that at the moment this contract enters into force their assets are separated. Thus, each spouse has the right to freely administer and dispose of his property. However, although each spouse remains the owner of the property they acquire during the marriage, they can also create their joint property. But in this case their joint property is considered as co-ownership³¹². The universal community of property regime is a kind of regime where all wealth is common. So only joint property is created here regardless of how the spouses acquired the wealth. Since in this type of regime the spouses enter a regime where everything they have is common property and according to statistics is considered as one of the regimes that is least applied by the spouses in Belgium³¹³. This is because as joint property is considered the wealth that they had before the marriage and what they gain during the marriage

³⁰⁹ Ibid, article 1418

³¹⁰ Ibid, article 1392

³¹¹ Ibid, article 1466 or 1454

³¹² Ibid, article 577

³¹³ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 31.

through inheritance or gifts. As such it makes it impossible for spouses to freely administer and dispose of their property, or rather simply strip themselves of the right to separate property.

The spouses, in addition to being able to choose a certain property regime, can also decide to end of such a regime and request the division of their property. Consequently, their joint property is divided based on the rules of division of co-ownership which is based on the principle of equal division between spouses. Thus the legal regime ends in cases when the one of the spouses death, with divorce and legal separation, with judicial division of property, approving another marital regime³¹⁴.

If the legal property regime ends with death then the joint property is divided in equal parts while the surviving spouse participates as heir in the part of the deceased spouse³¹⁵. In cases of divorce, the division of property will be done by the notary public but which is based on the divorce judgment³¹⁶. In this case, the spouses have the possibility to divide the joint property by agreement, but if an agreement is not reached, then the division of property is done by the court at the request of one of the spouses³¹⁷. The lawsuit for the division of joint property can come for various reasons, such as due to the disorder of relations between the spouses, mismanagement of property, distribution of income and which endangers the interest of the other spouse³¹⁸.

³¹⁴ Belgian Civil Code, article 1427.

³¹⁵ Ibid, article 1457

³¹⁶ Alfred Kriegler, Family Law in Austria, *Practical Law, Thomson Reuters*, November 2020, [https://uk.practicallaw.thomsonreuters.com/75680448?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a430948](https://uk.practicallaw.thomsonreuters.com/75680448?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a430948) (accessed 15 December, 2020)

³¹⁷ Judicial Code, article 1207.

³¹⁸ Belgian Civil Code, article 1470.2.

5.3 Germany

Germany is another country in Europe where marriage and marital relations are regulated by their Civil Code. Marriage creates rights and obligations for spouses and as such it is regulated in detail through legal norms. The purpose of marriage is to be bound for life and as such spouses are responsible for each other³¹⁹. The rights of spouses are also defined through the ability to determine their surname, to manage household chores through agreement and to enter into transactions which are intended to meet the needs of the family³²⁰. While the obligations that arise from marriage are mainly summarized in the obligations to take care of the family, to meet the needs of spouses and children, to pay family expenses and other obligations which arise from the marriage³²¹. These rights and obligations fall into the category of personal rights and obligations which are created as a result of marriage which is considered as the only relationship which produces legal effects. But in addition to these personal rights and obligations, property rights and obligations are also created between the spouses. For this reason, Germany, as one of the countries that has served as a model for the regulation of marital relations, has provided several property regimes through which it has regulated property relations between spouses.

Germany has provided in its legislation three types of property regimes which are: community of accrued gains, separation of property and community of property³²². But spouses can also enter into the Optional Matrimonial Property Regime of the Community of Accrued Gains through a marriage contract, if the spouses agree³²³. If the spouses have not contracted any other regime then it is defined as a legal regime community of accrued gains³²⁴. According to this regime, after the marriage, the property of the husband and wife does not make the joint property, and also the property acquired after the marriage is not considered joint, but the accrued gains that the spouses acquire will be equalized, if this regime ends³²⁵. This term which is used in German legislation means that the difference that exists between the initial property (in time of marriage)

³¹⁹ German Civil Code, 1896 article 1353

³²⁰ Ibid, article 1356,1357.1358

³²¹ Ibid, article 1359,1360

³²² Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 281.

³²³ Ibid, article 1519

³²⁴ Ibid, article 1363

³²⁵ Ibid, article 1363.2

and the final property (in time of end of regime) is called accrued gains³²⁶. Since under this regime each spouse remains the owner of his property, then it means that each spouse has the right to administer his property independently. But even though the spouse has the right to independently manage his property he is still limited in its disposition as a whole³²⁷. Which means he cannot dispose of his property in its entirety without the consent of the other spouse. Exclusion of disposition without the consent of the other spouse is allowed by the court when the refusal to consent is unreasonable or the disposition is in accordance with the principles of proper management. In order to protect the interest of the spouses in terms of disposition without consent and to protect the interest of third parties, the possibility of ratification of contracts which have been made without the consent of the spouse is given. If the spouse refuses such ratification that contract will be ineffective³²⁸.

Another regime which is different from the legal one is the regime of separate assets. This regime comes into expression when spouses do not enter into the legal regime through the marriage contract. Also this regime comes into expression when spouses exclude the sharing of accrued gains or when community of property ends³²⁹. In fact spouses can be determined for this regime through the marriage contract. In this case, each spouse remains the owner of his property, which includes the property he brought to the marriage and what he created during the marriage. Everyone has the right to administer and dispose of his property until the end of this regime³³⁰. But despite the fact that the spouses are determined for the regime of the separated property, they are still obliged to jointly meet the needs of the family and that of the children.

Through the marriage contract spouses can also be determined for the regime of community property. This contracted regime enables spouses to pool their assets and create marital property. Their property will be joint without the need to make any legal transaction³³¹. Excluded from marital property is separated property which is property which cannot be transferred through legal transactions. But even though the spouses have the right to independently manage his separated property he must do it for the account of the marital property³³². Through this legal definition, the

³²⁶ Ibid, article 1373.

³²⁷ Ibid, article 1365.

³²⁸ Ibid, article 1366.

³²⁹ Ibid, article 1414.

³³⁰ Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 366.

³³¹ German Civil Code, 1896 article 1416.

³³² Ibid, article 1417.

spouses are obliged that the management of the separated property be done for the benefit of the common property.

In German legislation, in addition to the separated property, a group of items called reserved property is defined. Reserved property includes items that the spouses have declared in this category through the marriage contract, or items that they have acquired through inheritance or gift but that have been specified by the testator or a third party to be counted as reserved property or acquired in basis of any right from the reserved items³³³. But unlike separate property where the spouses had the right to manage independently but on account of the marital property, with the reserved property the spouses manage but on their own account. The administration of the joint property can be done depending on how it is defined in the marriage contract. But it is important that the spouse who has the right of administration and disposition can take legal action related to marital property but in case of disputes the other spouse is not personally bound by the management acts. In order to protect the interests of the other spouse, which is not determined for the management of the joint property, the legislator has determined that the disposition of the marital as a whole property cannot be done without the consent of the other spouse³³⁴.

The division of marital property is made depending on the property regime that the spouses have been. If the spouses have been in the property regime of community of accrued property then the equivalence of this property is divided depending on the termination of this regime. With the death of one spouse then the equivalence of the accrued gains is done through the division of the inherited property and the property of the living spouse increases by one quarter of the property³³⁵.

In cases when the spouses divorce or decide to end the community of accrued gains then the equivalence of assets is done. Since the spouses are in the regime of accrued assets they are valued initial assets and final assets. The initial assets are considered the assets that they had before entering into the regime of accrued assets after deducting debts³³⁶. While the final property is calculated the property that belongs to the spouses at the moment of the end of the property regime, after deducting the obligations³³⁷. Thus, if the accrued earnings of one spouse exceed the accrued earnings of the other spouse, half of the surplus will go to the spouse who seeks equivalence³³⁸.

³³³ German Civil Code, 1896 article 1418.

³³⁴ Ibid, article 1423.

³³⁵ Ibid, article 1371.

³³⁶ Ibid, article 1374.

³³⁷ Ibid, article 1375.

³³⁸ Ibid, article 1378.

Thus, the spouses will again remain the owners of their property but that the increased value of their property during the marriage will be shared between the spouses. For this reason, the legislator has foreseen the possibility of evidencing these assets through the list of assets where the assets and their value are marked at the beginning of the regime and the facilities that will be added to this property³³⁹.

If the spouses are designated for the regime of separate assets then we have no division of property as each manages and disposes of his property independently. But such a thing does not happen in the case of the community property regime. Since here we are dealing with joint property then in case of divorce or termination of this regime the division of marital property must be done. Initially, it is required to pay the debts from the marital property and then to divide the property³⁴⁰. The remaining part of the property after the debts have been paid is divided into equal parts. But this does not include personal items that spouses, items acquired on the basis of inheritance or any gift dedicated to him and items they have brought to the marriage³⁴¹. The German legislator pays special attention to the marital home and household object. In case of divorce, regardless of to whom the marital home belongs, at the request of one of the spouses it can be given to him if he needs more or for the best interests of the children. It is also possible to establish a rental relationship if it is more reasonable³⁴². In this way the spouse who is most in need for various reasons but also the children can continue to live in the marital home enabling good living conditions but also the upbringing of children.

³³⁹ German Civil Code, 1896 article 1377.

³⁴⁰ Ibid, article 1475.

³⁴¹ Ibid, article 14770

³⁴² Emine Zendeli, et al., *Family Right* (Tetovo: Arbëria Design, 2020), pg. 366.

5.4 France

France is another country which regulates marriage and relations between spouses through the Civil Code. Under French law there are three unites of people through which relationships between couples are established, marriage, civil partnership and cohabitation. The difference between these unites is because for the conclusion and dissolution of marriage, conditions and procedures are strike required rather than for civil partnership and cohabitation. Civil partnership, although regulated by law, offers spouses, especially homosexuals, an opportunity to organize their lives more freely. While cohabitation is provided by law but not regulated by it³⁴³. The main difference between marriage and civil partnership is the purpose, where the law specifies that the purpose of marriage is cohabitation and family creation, while the civil partnership is the organism of the couple's life³⁴⁴. By implying that the couple in marriage also intend to have children, unlike civil partnership, where it is only cohabitation but not the birth of children.

The marriage which is considered as in the institute of law creates rights and obligations of a personal but also property nature. By marriage spouses have accepted the obligation for food, support and education of their child³⁴⁵. The spouses are also obligated to each other for fidelity, support, assistance and respect which is characteristic for the marriage³⁴⁶. In addition to these personal obligations, spouses are jointly obliged for the material and moral maintenance of the family, including the education of children and their preparation for the future³⁴⁷. However, the material support of the family and the education of the children create costs to achieve this goal. Thus, the legislator has foreseen that unless otherwise agreed, the spouses contribute to the coverage of these expenses in proportion to their possibilities. Otherwise, if neither spouse doesn't do this, the other has the right to enforce it through civil proceedings³⁴⁸. For this reason, even in the French system, some property regimes are provided through which the spouses can regulate their property relations, depending on their desire. According to the civil code, in addition to the

³⁴³ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 238.

³⁴⁴ French Civil Code, 1804 article 515-1

³⁴⁵ Ibid, article 203.

³⁴⁶ Ibid, article 212.

³⁴⁷ Ibid, article 213.

³⁴⁸ Ibid. article 214.

legal regime, spouses can be determined to regulate their property relations through other regimes such as the conventional community, the separation of property, the participation in acquisitions.

Community of property is the legal or statutory regime into which spouses enter when they have not entered into a marriage contract for any other regime or when they declare that they accept this property regime³⁴⁹. According to this regime, as assets of the community are considered all the acquisitions that the spouses make together or separately during the marriage, including the income from their personal activity, from the saving made on the fruits and the income from the personal assets³⁵⁰. Otherwise all assets which cannot be proved to be assets of one spouse will be considered as community assets. But it should be known that the spouses remain the owners of their property but as the property of the community remain only the fruits collected and not consumed by their property. While more precisely the law has enumerated which assets are separated property of the spouses starting from clothing and personal items, compensation for material or moral damage, items for professional use and items that he had until the day of marriage or has acquired them through inheritance, gift or legacy³⁵¹. The liabilities of the community include the obligatory maintenance between spouses and the obligation to support the family and children as well as other debts created by the family. The debts that a spouse had on the day of marriage or those that were created from the inherited or gratuitous transfers remain personal debts and must be fulfilled from their separated property³⁵². This way of regulating property relations protects the property of the community from the actions or debts that a spouse may have or create.

Regarding administration and dispose, the legislator has given the opportunity for each spouse to administer and dispose of the community property alone, but by obliging the spouse to be responsible for mismanagement of administration and disposition³⁵³. While legal actions which are performed in good faith are also obligatory for the other spouse. Although administration and disposition can be done independently, there are still some prohibitions regarding administration and disposition without the consent of the other spouse. For example, the community of property cannot be gratuitously inter vivos, the inheritance cannot be left except for his part, it cannot be transferred or encumbered with immovable property rights, can't rent it out rurally or an

³⁴⁹ French Civil Code, 1804 article 1400.

³⁵⁰ Ibid, article 1401.

³⁵¹ Ibid, article 1404-1408.

³⁵² Ibid, article 1410.

³⁵³ Ibid, article 1421.

immovable property for commercial use without the consent of the other spouse³⁵⁴. Otherwise, the legal actions of one spouse through which the competencies regarding the community have been exceeded, may be ratified by the other spouse or annulled within the deadline determined by law³⁵⁵.

Spouses through the ante nuptial agreement can be determined for the conventional regime for the regulation of their property relation Through this agreement the spouses can not only leave the statutory community regime but they can also agree on some issues, such as the community to include movables and acquisition , to exclude the rules of administration, that one spouse has the right to acquire a property in condition for compensation, that the spouses will have equal shares or will have a universal union³⁵⁶. Thus, if the spouses decide to have a community of movable and acquired assets between them, then the common property will be not only the joint property according to the statutory regime but the movable and acquired assets that they will have on the day of marriage or that they will acquire through inheritance or gift unless otherwise provided³⁵⁷.Also the spouses through this regime can be determined that the administration and the disposition are done jointly which means that no transaction is done without the signature of both spouses. In the agreement, the spouses can also include the clause for appropriation with whom to compensate. Through this clause the spouses can agree that the surviving spouse or in case of termination of the community, appropriates a certain property with the responsibility of accounting of in the community according to the value it will have on the day of portion³⁵⁸.

Another regime that can be chosen by spouses is the universal community. According to this regime, spouses can establish a universal community of their assets, movable and immovable assets, present and future, except the assets which according to the statutory regime are considered as separated.

Regime that is encountered in most Europeans is that of separate property. Under this regime each spouse remains the owner of his or her property, regardless of when that property was acquired, before or during the marriage. Also spouses manage, dispose and enjoy their property independently³⁵⁹. But on the other hand they are themselves responsible for the debts with their separated property. If the spouses in their agreement have not foreseen the issue of expenses related

³⁵⁴ French Civil Code, 1804, article 1422-1426.

³⁵⁵ Ibid, article 1427.

³⁵⁶ Ibid, article 1497.

³⁵⁷ Ibid, article 1503.

³⁵⁸ Ibid, article 1515.

³⁵⁹ Ibid, article 1536.

to the marriage, then it is obligatory for them to jointly cover these expenses.³⁶⁰ They are obliged to contribute to these expenses depending on the possibilities they have but on the other hand the spouses have the right to force the spouse who does not contribute through civil procedure³⁶¹.

Another situation is if the spouses get married and they decide that their property relations be regulated through the regime of separation in acquisitions. Under this regime each spouse remains the owner of his property regardless of the moment when they acquired that property or how they acquired it. Realistically during the marriage the regime of separate property applies to them. But in case of dissolution of this regime then each spouse is entitled to participate by halves in value in the net acquisitions found in the patrimony of the other, and estimated owing to the double appraisal of the original patrimony and of the final patrimony³⁶².

Spouses who have decided that their property regime is a community of property or statutory regime then the dissolution of this regime can come for several reasons. These causes are enumerated in the civil code and which are; by the death of one of the spouses; by declared absence; by divorce; by judicial separation; by separation of property; by change of matrimonial regime³⁶³. If the spouses divorce then the community of property ends and for this reason each spouse will receive his property and then through liquidation the joint assets are divided where the assets and debts are included³⁶⁴. Then in the name of each spouse a reimbursement account is created that the community owes to them and vice versa. While after all the acquisitions have been completed the rest is divided equally between the spouses³⁶⁵. Whereas in the situation when the community ends with death, then the property is divided in half, while the other half is divided between the heirs. Although practice has shown that this does not happen in most cases as it is left the joint property to be divided after the death of the other spouse³⁶⁶. But the spouse also participates in the inheritance as the heir of the deceased spouse.

³⁶⁰ French Civil Code, 1804, article 1537.

³⁶¹ Ibid, article 214.

³⁶² Ibid, article 1569.

³⁶³ Ibid, article 1441.

³⁶⁴ Ibid, article 1467.

³⁶⁵ Ibid, article 1468, 1475.

³⁶⁶ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 244.

5.5 Poland

Marriage, due to its importance, has been placed under the care of the state in Poland as well. But unlike other states, family and marriage are regulated by the Family and Guardianship Code, which differs from the civil code. In this way the Poland state has separated the family law from the civil code by regulating it in a special way, but it should not be ruled out that the civil code is also considered as a source of family law. It is also important to mention that this state recognizes only marriage as an institution which creates rights and obligations between spouses and also allows marriage only between a man and a woman³⁶⁷. According to the Polish legislation only marriage is a legal relationship between spouses, as opposed to cohabitation which is considered only as a social relationship and as such is not regulated by law and does not create rights and obligations between cohabitants. Spouses are part of the family and as such, together with the children they create the family and have rights and obligations towards each other. Spouses are obliged to live together, help each other, be faithful to each other and work for the good of the family³⁶⁸. Spouses also have the right to use their apartment together and also have the right to represent each other and on the other hand the obligation to jointly bear the responsibility to meet the current needs of the family³⁶⁹. These rights and obligations are considered personal and that the spouses can use or share depending on their capabilities.

In addition to personal rights and obligations between spouses at the time of marriage are also created relationships of a property nature. Spouses can regulate their property relations through several regimes which have been foreseen by the Polish legislation starting from the community regime, the contractual arrangement, the compulsory system³⁷⁰. According to the family code, the community regime is considered a legal or statutory regime. In fact this regime is a regime of common property. If the spouses have not entered into a marriage contract to change their property regime then *ex lege* means that they have entered into the legal regime of the joint

³⁶⁷ Wojciech Kosior and Jakub M. Łukasiewicz, *Family law in Poland* (Rzeszów: Legal Publishing House, 2018), pg. 23.

³⁶⁸ Family and Guardianship Code of Poland, 1964 article 23.

³⁶⁹ *Ibid*, article 28-30.

³⁷⁰ Wojciech Kosior and Jakub M. Łukasiewicz, *Family law in Poland* (Rzeszów: Legal Publishing House, 2018), pg. 25.

property community³⁷¹. According to this regime, the spouses at the moment of marriage begin to create their joint property, which includes all assets acquired during marital life. But apart from the community property which consists of the assets that the spouses acquire during the marriage, the other assets remain the separate property of each spouse. For this reason, the legislator has determined what constitutes the community property of the spouses and which assets remain the separate property of the spouses. The joint property of the spouses consists of remuneration received for work and income from other gainful activities of each of the spouses; income from joint property as well as the personal property of each of the spouses; amounts collected in an account or an employee pension fund for either of the spouses³⁷². Through this definition, the legislator has specified which assets will be considered as joint property of the spouses in order not to leave dilemmas in the future. Thus the spouses from the moment they get married and during the time they are married create their joint property.

Spouses remain the owners of their separated property. In this way it is determined by law more precisely which assets will remain their separated property regardless of the fact of marriage. Thus as personal property are considered, property acquired before the statutory joint property regime arose; property acquired by inheritance or donation, unless the bequeathed or donor decides otherwise; joint property rights that are fully covered under separate provisions; property that is used exclusively to satisfy the personal needs of one of the spouses; rights that cannot be transferred and may only be exercised by one person; items received as damages for bodily injury or triggering a health disorder, or as compensation for harm suffered; this does not include disability benefit due to an injured spouse through a partial or total loss of earning ability or an increase in needs or a decrease in prospects for the future; debts concerning remuneration or other gainful activities by one of the spouses; property received as a prize for individual achievement by one of the spouses; the copyrights and related rights, industrial property rights and other rights of a creator; property acquired in exchange for elements of personal assets, unless particular provisions state otherwise³⁷³.

³⁷¹ European Commission, Couples in Europe, Is there a statutory matrimonial property regime and if so, what does it provides? <http://www.coupleseurope.eu/en/poland/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide/> (accessed on 08 February, 2021)

³⁷² Family and Guardianship Code of Poland, 1964 article 31.2

³⁷³ Ibid, article 33.

An important issue is the management of common property. In Polish legislation earlier there was a division of joint property management, where each spouse had the freedom to administer and dispose of the joint property and the management was divided into ordinary management and activities beyond ordinary management where the consent of the other spouse is required³⁷⁴. But because it has not been specified which activities are considered ordinary and which are not then they have become changes by now defining only the principles regarding the management of the common property. Now each spouse can manage the joint property themselves but with four restrictions in mind. These restrictions include the obligation of each spouse to inform the other spouse about management and otherwise sanctions are provided, the spouse's right to oppose the other spouse's actions (except for certain actions eg. everyday matters), the spouse's inability to administer joint property for business purposes, and the obligation of the spouse to obtain consent for legal action defined by the Code (mainly related to the disposal, encumbrance, or donation of joint property³⁷⁵).

Special attention is paid to the debts and responsibilities that spouses have in relation to the joint property. Thus according to the law if one spouse has entered into obligations with the consent of the other spouse then this means that the creditor can claim the fulfillment of this obligation from the joint property³⁷⁶. While in the absence of this consent then the spouse is responsible with his personal property or the part of the joint property³⁷⁷. In this way the spouses are protected from illegal actions through which the joint property can be damaged.

Joint property means that the spouses are joint owners of this property and are not co-owners. For this reason at some point it may even come to the division of the joint property so that each spouse knows his share in the joint property. The division of the joint property can come mainly in two moments, when the marriage ends and when they jointly decide to divide the property despite the continuation of the marriage. Joint property is divided when the marriage ends through divorce, annulment or death of one spouse. While the joint property regime may also end when

³⁷⁴ Wojciech Kosior and Jakub M. Łukasiewicz, *Family law in Poland* (Rzeszów: Legal Publishing House, 2018), pg. 29.

³⁷⁵ Family and Guardianship Code of Poland, 1964 article 36,37

³⁷⁶ *Ibid*, article 41.1.

³⁷⁷ *Ibid*, article 41.2.

the spouses through prenuptial have chosen the other regime that of separate assets or financial separation with the compensation of achievements, and also a compulsory system³⁷⁸.

In cases where the marriage is dissolved through the divorce, the division of the joint property is made by the court. The separation can be done in the same divorce procedure or in another procedure if there is a dispute³⁷⁹. The division of the common property is done in equal parts unless otherwise provided by agreement. But spouses can also share their wealth through agreement and this contract must be concluded in the form of a notarial deed³⁸⁰. Each spouse has the right to claim an unequal share or compensation for the part he / she did not receive through the division of property³⁸¹. But spouses also have the right to seek compensation for expenses incurred from personal property for joint property in addition to expenses incurred to meet the needs of the family³⁸².

In addition to the division of joint property, an important issue is the division of the joint house or apartment where the spouses lived. Thus, if there is no agreement between the spouses on who will live or to whom the marriage house will be given, then this decision is taken by the court together with the divorce decision. The court may decide that the apartment be used by both spouses, but at the request of one of the spouses, it may decide to evict the other spouse from the apartment if he / she has behaved violently or makes his / her life unbearable. But also at the joint request of the spouses, the court may decide that the apartment be left to one spouse or, if possible, to be divided between the spouses. But what is important is that in case of separation of the marital apartment, the court must take into account the interests of the children and the interests of the parent to whom the children are entrusted³⁸³.

Spouses may decide before marriage or during marriage through a marriage contract which must be concluded in the form of a notarial deed that their property be extended community, limited community, full resolution, and separation of property with the balance of acquisitions. This marriage contract can be broken and the spouses return to the legal property regime³⁸⁴. However, in Poland there is another regime called the compulsory regime which is created

³⁷⁸ Wojciech Kosior and Jakub M. Łukasiewicz, *Family law in Poland* (Rzeszów: Legal Publishing House, 2018), pg. 31

³⁷⁹ *Ibid.*, 2018, pg. 31.

³⁸⁰ Family and Guardianship Code of Poland, 1964 article 47

³⁸¹ *Ibid*, article 50.4.

³⁸² *Ibid*, article 45.1 and 45.2.

³⁸³ *Ibid*, article 58.2 and 58.4.

³⁸⁴ *Ibid*, article 47.

rigorously for cases determined by law which cannot be regulated through the marriage contract. These situations are provided by law and spouses cannot make an agreement but must act as defined in the Family Code. So in these cases the compulsory regime must be created; of determination of separation must be created, the decision to totally or partially incapacitate a spouse, bankruptcy declaration of a spouse, upon request of one of the spouses for important reasons, and upon request of the creditor of one of the spouses if he or she is satisfied that the satisfaction of the enforceable title requires the division of common property³⁸⁵. Although the legislation in Poland differs from the legislation we have reviewed so far, more specifically that of Austria, Germany, France, the fact that it offers the possibility of a marriage contract is considered a good opportunity for spouses to choose the property regime that it suits them better spouses despite the limitations they have.

³⁸⁵ Family and Guardianship Code of Poland 1964, article 52

5.6 Croatia

Croatia is a European country which is characterized with an old legislation which has served as an example for many other countries. Despite the long experience in the field of legislation in many respects differs from other European countries. In Croatia, family relations are regulated by law, i.e. the Law on Family. According to this law, marriage is also a legal union between a man and a woman³⁸⁶. According to this law, marriage is allowed and creates rights and obligations only between a man and a woman, while marriage between persons of the same sex is not allowed. But despite the fact that in civil marriages cannot be enter the persons of the same sex, they are entitled to another type of connection which is called life partnership between persons of the same sex. Their relationship is regulated by the Same Sex Life Partnership Act³⁸⁷. While the same act regulates the non-formal partnership between persons of the same sex, if the same have not registered their community but whose life is extended for more than 3 years and who have met the conditions for partnership.

Civil marriage can be entered into only by persons of the opposite sex, which is also one of the conditions for marriage³⁸⁸. As a result of the marriage, personal and property rights and obligations are created between the spouses. The rights and obligations of a personal nature, among others, are the determination of the surname, the determination of the family home where the spouses will live and exercise the parental right, the choice and exercise of the profession³⁸⁹. But in addition to the rights and obligations of a personal nature, property relations are also established between spouses. For their regulation the spouses can choose between two regimes, the legal and the contracted one. Otherwise, if the spouses have not chosen the contracted regime, then their relationship will be regulated according to the legal regime. According to the legal regime, spouses can have two types of property, joint ownership and personal ownership³⁹⁰. As marital property is considered the ownership that they have acquired during their married life through work and the wealth that derives from this wealth³⁹¹. So, through this legal definition are defined two criteria

³⁸⁶ Family Act of 22 September, Text No. 1992, (Zagreb: Official Gazette website, 2015).

³⁸⁷ Croatian Parliament, *Same Sex Life Partnership Act*. Zagreb, (2014).

³⁸⁸ Family Act of 22 September, Text No. 1992, article 23. (Zagreb: Official Gazette website, 2015)

³⁸⁹ *Ibid*, article 30, 31, 32.

³⁹⁰ *Ibid*, article 35.

³⁹¹ *Ibid*, article 36.1

for the creation of marital property, work and cohabitation. In this way the legislator has excluded that as marital property to be considered the property which is acquired if the spouses are not living together even despite the existence of the marriage. Marital property is also created through gambling profits and copyright benefits. Although the legislature has not precisely defined what constitutes marital property in general this includes wages, movable and immovable items, stocks and income arising from this property³⁹².

Since this property is acquired during the marital life then the spouses are equal owners of this property unless otherwise agreed and also its registration must be done in the name of both spouses or depending on how the spouses agree³⁹³. In terms of management, the legislation in Croatia has divided it into two types. Ordinary management where spouses can independently take actions related to the maintenance and use of marital property according to its purpose. While extraordinary management can be done only with the consent of the other spouses and where they enter, changes in the purposes of things, major repairs, renovations, alienation of things, giving or renting things, creating a mortgage, giving real estate in mortgage, and the creation of property rights over marital property. The consent of the other spouse must be given in the form of a notarial deed before the notary public³⁹⁴. But it should be known that extraordinary legal actions which are taken without the consent of the other spouse do not affect the rights of the third party, but in this situation the spouse without whose consent these actions were taken has the right to compensation³⁹⁵. So these legal works, although they must be performed with the consent of both spouses, still preserve the rights of third parties who were not aware that such property is marital property, but on the other hand the spouse acquires the right to seek compensation for damage that may have been caused.

According to the legal regime, in addition to the marital property, the spouses can also have their own property. Thus, the property that the spouse had before the marriage is considered as own property, as well as the property that they can acquire during the marital union, but in any other legal basis which is not included in the marital property. Also includes the work of the author which is considered as own property. According to this definition, the author's work will be

³⁹² Branka Rešetar and Una Josipović, "Controversial issues of maritime acquits with reference to banks of spouses", *Zbornik radova Pravnog Fakulteta u Splitu*, Vol. 50, Issue 1, (2013).

³⁹³ Family Act of 22 September, Text No. 1992, article 36.3. (Zagreb: Official Gazette website, 2015)

³⁹⁴ *Ibid*, article 37.

³⁹⁵ *Ibid*, article 37.3.

considered as the property of the spouse who created it, while the profits of the author's work will be considered as marital property³⁹⁶.

In addition to the legal regime, the legislation in Croatia gives spouses the right to regulate their property relations through a marriage contract. Spouses who wish to regulate property relations other than the legal one, must enter into a marriage contract before the notary public. For the content of the contract, the spouses are not limited only to the fact that the contract must be concluded taking into account the legal norms and that they must not be in conflict with the Constitution, legal norms and moral norms³⁹⁷. Through the marriage contract, the spouses are free to regulate the property relations by best adapting them to their life together and the goals they have in the future, as they have the opportunity through this contract to determine the fate of existing assets and those that will be acquired in the future³⁹⁸.

In addition to the rights that spouses have over their joint property, obligations are also created for them. The obligations that a spouse has taken before the marriage and the obligations that the spouse has taken during the marriage but that do not relate to the current needs of the community and family needs are the responsibility of the spouse who has undertaken these obligations³⁹⁹. In this case the spouse who has assumed these obligations is released from liability. But in the case where the obligations are undertaken to meet the needs of the community and the family or are taken with the consent of both spouses, then both spouses are jointly and severally liable for these obligations with their joint property and their assets⁴⁰⁰.

The joint property created during the marital life can be divided. Divides can be made during the marriage or on the occasion of the termination of the marriage. Thus, each spouse has the right to request the division of marital property. The division of marital property can be done by agreement between the spouses or in cases when there is no agreement then the separation is requested by the court. Thus the court at the request of the spouses makes the division of the marital property in civil proceedings. If the spouses do not agree otherwise then the separation is

³⁹⁶ Ibid, article 36.2.

³⁹⁷ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 76.

³⁹⁸ Family Act of 22 September, Text No. 1992, article 36.3. (Zagreb: Official Gazette website, 2015)

³⁹⁹ Ibid, article 43.

⁴⁰⁰ Ibid, article 44.

done equally. Separation can be done physically, or by selling the item and sharing the profits⁴⁰¹. Whereas in cases when the marriage ends with the death of one spouse then the surviving spouse has the right to request the division of marital property during the inheritance procedure. After the division of the marital property then the surviving spouse participates as heir in the property of the other spouse⁴⁰².

Despite the legal provision for the division of marital property, special attention has been paid to the rights of children and their well-being. Initially, the legislator determined that all movable items that have been used or are used for children will not be included in the marital property during division but they will remain in the ownership of the child or the parent to whom the children are entrusted⁴⁰³. As for the family home, the legislator has determined that the court at the request of one parent can allow to stay in the family home of the parent who lives with the children and exercises parental care. However, this right may last until the process of division of marital property is completed. After this procedure has been completed, the court is authorized to give the right of residence to the parent who has custody of the children, but on the other hand also to oblige the spouse to pay the rent⁴⁰⁴. But also the court is obliged to evaluate these situations well and always decide for the benefit of the children. For this reason, the legislator, despite the importance it has given to the marital home, has given the right to the parent to whom the children are entrusted, to continue living in the marital home for the benefit of the children. It is in the competence of the court to always value this right of the parent in the interest of the children.

Since in Croatia it is allowed the connection between persons of the same sex, but who do not have the right to marry but only to live and to register their partnership in the competent body as such creates rights and obligations in terms of property. As a community of persons who, despite their gender, have the right to live together, by coexistence they create their common wealth. Thus, as their common property is considered the property that they acquire through work during the partnership and that both partners have equal rights in this property unless they have determined otherwise⁴⁰⁵. Copyright and gambling assets are also considered property of the partnership. In

⁴⁰¹European Commission, Couples in Europe, How is the property divided?, <http://www.coupleseurope.eu/en/croatia/topics/5-what-are-the-consequences-of-divorce-separation> (accessed on 08 February, 2021)

⁴⁰² Inheritance Act, 2003 Article 9. (Zagreb: Official Gazette website)

⁴⁰³ Family Act of 22 September, Text No. 1992, article 36.3. (Zagreb: Official Gazette website, 2015)

⁴⁰⁴ Ibid, article 46.3.

⁴⁰⁵ The Croatian Parliament, *Same-sex life partnership act*, article 51, Zagreb, (2014).

addition to the partnership property, the partners remain owners of the assets that they had until the moment of entering into the partnership or the assets that they acquire through a legal work which does not fall into the category of partnership assets⁴⁰⁶. Also same-sex partners with the fact that they have no right to marry but only to live together, their property relations can be regulated through an agreement. This agreement must be concluded before the notary public and it is not allowed that any law of a foreign country is applied in this agreement⁴⁰⁷. So even though same-sex marriage is not allowed, their partnership is still regulated by a special law and the rights and obligations arising from this partnership are almost the same as those of married couples.

⁴⁰⁶ The Croatian Parliament, *Same-sex life partnership act*, article 52

⁴⁰⁷ *Ibid*, article 54

5.7 Bulgaria

Bulgaria is another country which regulates Family Code. Characteristic of this state is the living of family members in a family community regardless of whether the parents are married or not and that their relations are regulated by the Family Code in contrast to other states where family relations were regulated by a civil code or by law. According to the family code in Bulgaria, only marriage between persons of the opposite sex is recognized as a form of family relationship. According to the family code in Bulgaria, only marriage between persons of the opposite sex is recognized as a form of family relationship. In fact, a marriage entered into according to legal procedure creates rights and obligations between the spouses of a personal and property nature. As a personal rights between spouses are equal rights that spouses have in marriage⁴⁰⁸. Also, spouses should, based on their free will, regulate their relationships and jointly take care of the family. But in the other hand spouses are obliged to live together unless reasonable reasons and are free to choose and practice the profession they desire⁴⁰⁹.

In addition to the personal rights that are created with the conclusion of a civil marriage, property relations are also created between the spouses. Property relations spouses can regulate in several ways, as the legislator has provided three property regimes through which they can regulate their property relations. According to the Family Code, property regimes between spouses can be community property regime, separate property regime, and contractual regime⁴¹⁰. Community property regime, otherwise known as legal regime, is expressed when the spouses have not contracted any other regime or there is no agreement between the spouses to regulate property relations. Initially this regime is registered in a central electronic register at the Registry Agency⁴¹¹. Under this regime spouses create their joint property based on their joint contributions regardless of who acquires that wealth. This contribution can be made through work, covering expenses, childcare and housework. For this reason it is assumed that the contribution of the spouses is equal if the opposite is not proven⁴¹². Thus, the spouse who claims to have contributed

⁴⁰⁸ Bulgarian Family Code, 2009, article 13

⁴⁰⁹ Ibid., article 15 and 16

⁴¹⁰ Ibid, article 18

⁴¹¹ European Union's Justice Programmed, *Personalized Solution in European Family and Succession Law*, (2014-2020), https://www.euro-family.eu/atlas_scheda-bg (accessed 30 January 2021).

⁴¹² Bulgarian Family Code, 2009, article 21

more than the other has the right to prove his / her greatest contribution, also the spouse's heirs have this right. While as personal property of the spouses will be considered all the assets that the spouses had before the marriage or the assets that they acquired during the marriage through inheritance or gift⁴¹³. Here are included the moveable items of the spouse for daily use and items that they use to practice their profession.

Under the community property, spouses have equal rights in the management and disposition of marital property. For this reason, neither of the spouses can independently dispose of the part that would belong to them in case of separation of marital property, or in the end of this regime. In case when one of the spouses has disposed with the immovable property, the other spouse has the right to oppose those legal actions within the subjective deadlines 6 months and the objective deadlines 3 years. Whereas if one spouse has disposed with the movable items of the marital property, the third party who was not aware of the other spouse's dislike acquires the right over this item⁴¹⁴. While an acceptable approach the legislator has provided for the marital home. Spouses do not have the right to dispose of the marital home, despite the fact that it may be the personal property of only one spouse. This is expressed when both spouses do not have other privately owned homes. In this case, the right of dispose of the owner spouse will be given by a court decision considering the interests of children and family are not harmed⁴¹⁵.

The end of this regime comes in some situations which vary from those with the will of the spouses and those without the will of the spouses. Thus the statutory regime ends with the termination of the marriage, with a court decision for any significant reason, with the change of the property regime, with the request of a creditor for the debts of one of the spouses or with the opening in the procedure for the inability of a spouse to fulfill his obligations if he is the sole owner or partner in a company⁴¹⁶. All these situations as a consequence have the division of the common property, and in principle this property will be divided in equal parts. However, despite this legal provision, one spouse can receive a larger share of this property if he or she has been given the exercise of parental rights or when his / her contribution is significantly greater than that of the

⁴¹³ Ibid, article 22.

⁴¹⁴ Ibid, article 24.

⁴¹⁵ Ibid, article 26.

⁴¹⁶ KGMP law firm, *Property regime between spouses in Bulgaria*, 2019. <https://www.kgmp-legal.com/en/property-regimes-between-spouses-in-bulgaria/> (accessed 5 February, 2021)

other spouse⁴¹⁷. If the marriage ends with divorce each spouse has the right to receive a part of the value of the objects for exercising profession or trade and deposits if their value is substantial and the spouse has contributed to the purchase of that property either through work or through childcare or household chores⁴¹⁸. This right can be exercised by the spouse even before the divorce if the other spouse through his behavior endangers this property or the interests of the spouses and their children. In marital life, it can happen that one spouse gives his / her personal property to the other spouse in use and does not make any agreement. In this situation the legislator has foreseen that to the users are left only the results at the moment when the return of the items to the owner spouse is requested⁴¹⁹. Through this regulation the personal of the spouses are protected and which are used by the other spouse.

An important issue is the separation of the marital home where the legislator has paid special attention. Thus, in the case of a divorce, if both spouses cannot live separately in the marital home, then the right to live in that home belongs to the spouse who needs the house the most, especially towards this decision are influenced by the existence of children under the age of majority. Thus, the court is authorized to give the marital home to the spouse to whom the minor children are left in the care, regardless of which spouse owns the house. If the house is owned by the relatives of one of the spouses, the marital house will be given for use to the spouse whose children are left in the care, but this right can last up to 1 year. The right to use the marital home may expire before that time if the needs to use the home have ended or the spouse enters into a new marriage⁴²⁰. In these situations the court determines the tenancy relationship which must be registered in the property register⁴²¹.

Another regime is that of separate property regime. According to this regime, each spouse remains the owner of the property acquired during the marriage. But even though each spouse is the owner of his property, he still has the right to claim from the other spouse a part of his property if he considers that he/she has contributed to the acquisition of that property through work, through housework or in any ways. Also although spouses do not create joint property, they are jointly

⁴¹⁷ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 57.

⁴¹⁸ Ibid, pg. 57, Bulgarian family code 2009, article 30.1

⁴¹⁹ Bulgarian family Code 2009, article 35

⁴²⁰ Angel Ristov, "The legal status of martial home in Macedonia and comparative family Law", *Iustinianus Primus L. Rev.* Vol 1, (2012), pg. 12.

⁴²¹ Bulgarian family Code 2009, article 57

obliged to share in the expenses of family needs and the needs of children⁴²². Through this regime it is possible for the spouses to remain the owners of the assets that they will gain during the marriage but since during the marital life the spouses live together, the property that the spouses acquire can also come as a result of the help or contribution of the other spouse. For this reason the legislator has found it reasonable to give one spouse the right to claim part of the property from the other spouse if he consider that he has contributed to the creation of that property.

The newest regime that has been introduced into Bulgarian legislation is the contractual one. Therefore, the spouses have the right to regulate the property relations through the marriage contract and that they can enter into this agreement before the marriage or during the marriage. If the spouses decide to regulate the property relations through the marriage contract, the law has specifically specified what this contract should contain. In this way, the spouses can find out through the contract what rights the spouses have in the property they will acquire during the marriage, what rights the spouses have in the property they had before the marriage, in the way of administration and disposition of the property, including marital home, maintenance of marital children, participation of spouses in expenses and other obligations, property consequences in case of divorce and regulation of other relations if they are not in contradiction with the Family Code⁴²³. But on the other hand it is forbidden for spouses to prescribe provisions in cases of death⁴²⁴. The marriage contract must be made in writing before the notary and signed in the personal presence of both spouses and this enters into force on the day of marriage or on the day of its signing by the spouses⁴²⁵.

The marital contract can be changed and this change must be done in the same way as its connection and it can end if the spouses have expressed the will to change their property regime or by entering into another marital contract. Also the marriage contract may end at the request of one spouse if the material circumstances have changed and the contract may be detrimental to them or to the children and family and also terminates with the termination of the marriage in addition to the provisions having effect in the event of termination of this contract⁴²⁶.

⁴²² KGMP law firm, *Property regime between spouses in Bulgaria*, 2019. <https://www.kgmp-legal.com/en/property-regimes-between-spouses-in-bulgaria/> (accessed 5 February, 2021)

⁴²³ Bulgarian Family Code 2009, article 38.1

⁴²⁴ Tsvetalina Petkova, "Regimes of Property Relations between Spouses according to the Bulgarian Family Law", *Acta Universitatis Danubius*, Vol. VII, No.1, (2011), pg.107.

⁴²⁵ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 55.

⁴²⁶ Bulgarian family Code 2009, article 42

Marriage contracts and applicable legal regimes are registered in the central register at the Registration Agency. The registration is done automatically through the notification received from the Municipality or the city council where the civil status books are kept⁴²⁷. Through this system, which is public, the rights of the spouses are protected, but also of the third parties who can enter into any contractual relations and who can get the information about the ownership from the agency.

⁴²⁷ Bulgarian family Code 2009, article 19

5.8 Albania

Albania is a country which borders with North Macedonia and Kosovo. According to the geographical extent, the proximity that these countries have with each other would leave the impression that they are similar in legislation, but that in fact they differ in terms of regulation of property relations between spouses. This is due to the fact that Albania, unlike Kosovo and Northern Macedonia, has implemented the marriage contract, which in these two countries has not yet started to be applied as in other European countries.

Family law in Albania is regulated by the family code which, in addition to family relations, also regulates marriage and the rights and obligations arising from marriage. According to this Code, marriage is considered as a legal cohabitation between a man and a woman who have reached the age of majority. Marriage is based on the consent of both future spouses and which are equal in terms of rights and obligations⁴²⁸. While with the marriage according to legal procedures are created the rights and obligations of personal and property nature. Spouses are obliged to fidelity, assistance and cooperation, have the right to choose the surname and determine the surname of their children and decide on their place of residence⁴²⁹.

In addition to the impact that have on personal rights, the marriage also has an impact on the couple's property relations. For this reason, a set of legal norms is dedicated to the regulation of property relations through which spouses decide that they know they will regulate property issues arising from marriage. Although property issues are not determinants of a marriage but that in various situations may come to the fore and especially in situations of crisis or uncertainty. According to Albanian legislation, there are two main regimes, the legal regime and the contract regime⁴³⁰. Legal regime always comes into play when the spouses have not chosen the contract regime or have voluntarily chosen this regime. In this case, the joint property of the spouses is created and where the law has determined which assets will be joint and which assets will remain separate⁴³¹. Spouses know from the moment they are determined for this regime which assets will create the legal community and which assets will remain under personal administration and

⁴²⁸ Family Code of Albania, Assemble of Republic of Albania, 2003, article 7 and 8

⁴²⁹ Ibid, article 50,51,52 and 55.

⁴³⁰ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 216.

⁴³¹ Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.4

disposition. Thus the legal community consist of property acquired by both spouses, together or separately during marriage, income from the special activity of each spouses during marriage if it has not been consumed until the end of the co-ownership, the fruits of the property of each spouse and commercial activity created during the marriage⁴³². If the commercial activity was owned by one spouse but after the marriage is run by both spouses, as joint property will be calculated only the profits and the increase of production⁴³³. This presumption of common property will be such until proven otherwise⁴³⁴. If they have proven that a property from the common property is a separate property they can separate it from the common property presumed by law.

In addition to the joint property in the case of marriage, the spouses remain owners of their separate property. As separated property are considered assets that one spouse had in partnership with other persons or was the holder of a real right of use, the assets that the spouses acquire during the marriage through inheritance, gift or legacy unless they were intended in favor of community, assets for personal use or and assets acquired as an accessory of personal property, tools necessary for the exercise of the profession other than those for the administration of commercial activity, assets acquired from the compensation of personal damage with the exception of income received from the pension earned due to full or partial inability to work, assets acquired from the alienation of own assets and their exchange⁴³⁵.

Both spouses are responsible for the obligations deriving from the legal community equally and which include the obligations of the spouses regarding the purchase of the property, the expenses related to the administration of the joint property, the expenses related to the maintenance of the joint property of family and for family-related obligations regardless of by whom they are made and for all obligations except those specified s personal⁴³⁶. Also excluded are the obligations that the spouses had before the marriage and the obligations that aggravate the inheritance or the gifts that the spouses receive during the marriage. Creditors have the right to demand the fulfillment of an obligation by a spouse initially through his own property, and when this is not sufficient he has the right to demand its fulfillment from the joint property but not more than half of the joint property. Creditors have the right to demand the fulfillment of an obligation by a debtor

⁴³² Family Code of Albania, Assemble of Republic of Albania, 2003, article 74.

⁴³³ Ibid, article 74.

⁴³⁴ Ibid, article 76.

⁴³⁵ Ibid, article 77.

⁴³⁶ Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.5.

spouse initially through his own property, and when this is not sufficient he has the right to demand its fulfillment from the joint property but not more than half of the joint property⁴³⁷. And if the personal obligations of the debtor spouse have been paid from the joint property, the other spouse has the right to compensation. While the own property of one spouse will not be affected by the creditors of the debtor spouse only if the obligation has been contracted for the maintenance of the house and the interests of the family⁴³⁸.

The administration of the joint property of the spouses is done equally. This means that each spouse has the right to administer their joint property. However, they have this right only in terms of ordinary administration, since the legislation has provided three ways of administration, ordinary administration, administration that exceeds the limits of ordinary or extraordinary administration⁴³⁹. In this case the law presumes that each spouse is the legal representative of the other spouse in terms of the ordinary administration of the joint property⁴⁴⁰. In this case the law presumes that each spouse is the legal representative of the other spouse in terms of the ordinary administration of the joint property. As the usual administration is considered the administration of property which aims to meet the daily requirements of the family through the alienation or donation of small value items, daily purchases that have to do with the normal fulfillment of family requirements⁴⁴¹. While for legal actions that go beyond the usual administration, the consent of both spouses is required, which mainly includes legal actions related to the alienation of immovable property or movable property but with great value, the donation of these properties, leave mortgage or mortgage, obtaining loans, etc.⁴⁴². But the legislator has provided some exceptions here, and that these exceptions have to do with the distance of one spouse or in the absence of a power of attorney or authorization, the other spouse is given the right to take actions that are of an extraordinary nature if this is necessary for family interests⁴⁴³.

Another practice can be followed if one spouse does not give consent to take extraordinary actions or is unable to give such consent, then the spouse can go to court to obtain a consent. In this case the court decides depending on how necessary it is for the good of the family to take this

⁴³⁷ Family Code of Albania, Assemble of Republic of Albania, 2003, article 83

⁴³⁸ Ibid, article 86

⁴³⁹ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 235.

⁴⁴⁰ Family Code of Albania, Assemble of Republic of Albania, 2003, article 90

⁴⁴¹ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019), 130.

⁴⁴² Ibid, pg. 132.

⁴⁴³ Family Code of Albania, Assemble of Republic of Albania, 2003, article 91

action or not⁴⁴⁴. In this case the consent of the spouse can be replaced by the answer given by the court. Usually this can be required when a spouse unreasonably refuses to give consent to take an action that is of an extraordinary nature. Whereas in situations when one spouse has exceeded his / her authorizations regarding the right of administration, the other spouse has the right to oppose these actions within the legal deadline and to request that they become invalid through the filing of a lawsuit⁴⁴⁵. As for the administration and disposition of separated property, each spouse is independent to freely and independently administer and dispose of his property. This right can also be exercised by the other spouse if he / she is authorized to do so by the owner spouse. But here can also be expressed silent administration, when one spouse with the knowledge of the other administers and uses his property but is excluded from the right of disposal⁴⁴⁶. However, the owner spouse has the right to oppose the actions of the other spouse and also has the right to file a lawsuit if actions have been taken and the spouse owner of the special property has been harmed.

The legal regime of the community at a certain point in time may end, and for this reason the law provides the moments of the end of legal regime. Thus, based on the family code, the legal regime of the community may end with the death of one of the spouses, the declaration of missing or dead of one of them, declaring the marriage invalid and dissolving it; with the division of property; and with the change of the marital property regime, when it brings about the end of the community⁴⁴⁷. Unlike other European countries, the legislation in Albania has prohibited the division of joint property during the continuation of the union, even if the spouses have provided for an agreement⁴⁴⁸. Exceptions may be made if one spouse has mismanaged the joint property or when such administration puts the other spouse or family at significant risk, or in cases where one spouse hasn't contributed proportionately to the needs of the family with its possibilities⁴⁴⁹. Whereas in situations which are not mentioned in the law, the spouses do not have the right to request the division of property until some other fact such as death, divorce or other situations mentioned in the law.

⁴⁴⁴ Ibid, article 93.

⁴⁴⁵ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 236.

⁴⁴⁶ Family Code of Albania, Assemble of Republic of Albania, 2003, article 95

⁴⁴⁷ Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.7.

⁴⁴⁸ Family Code of Albania, Assemble of Republic of Albania, 2003, article 97

⁴⁴⁹ Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.8.

One of the situations which most often leads to the division of joint property is divorce. The division of the marital property is done starting from the equality of the asset and the liability, where initially the community deducts its obligations to the spouses or third parties, the remaining property is divided in equal parts between the spouses⁴⁵⁰. Also during the separation process, the court, taking into account the needs of the children and the fact to whom the children will belong for care, can share the care and property from the other spouse. All this is done for a better well-being of children and their interests. Also in the case of separation, the spouses are entitled to compensation to each other for the obligations they have paid from their property or from the property of the community.

Spouses may, with their own free will, decide to settle their property relations through a marriage contract. Thus, the spouses through the marriage contract are determined for a different regime from the legal one. However, despite the fact that the spouses decide to regulate their property relations through the marriage contract, they cannot through this contract avoid the rights and obligations arising for them from the marriage, as well as parental responsibility and the rules of legal administration and custody⁴⁵¹. In fact, through the marriage contract, which can be concluded before the marriage and produce legal effects at the moment of the marriage or can be concluded during the marriage through which the property regime is changed, the spouses can agree about that the community includes movable property before marriage and gains from personal property during marriage; change the rules regarding administration; have unequal parts; to this between them universal community⁴⁵².

Despite the fact that through a marriage contract the spouses can settle many issues such as deciding whether to leave their child at home, or they can decide that one spouse should continue to live in the marriage house until he or she remarries, they can also determine the destination and addressing of the income earned during the marriage as well as to limit the income that can pass to the community. But in no way a marriage contract should mean to be seen as a tool by which a spouse puts his or her interests first because above all in a marriage contract there must be justice, reciprocity and equality. Since this type of regime is considered to provide peace and security

⁴⁵⁰ Family Code of Albania, Assemble of Republic of Albania, 2003, article 103

⁴⁵¹ Ibid, article 66 and 67.

⁴⁵² Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.8.

against the other spouse's own obligations⁴⁵³. Due to the advantages that this regime has such as the freedom and autonomy of the spouses who depending on their situation to regulate their property relations and to predict the future what will happen in case of death or divorce, spouses have the opportunity to they choose as a regime even after they have entered into a marriage, but they can do so only two years after the marriage, arguing why they have decided to change their legal property regime⁴⁵⁴. As for the form of the marriage contract, it must be concluded in the form of a notarial deed, before the public notary and in the presence of both spouses and their representatives. After signing the contract, the Notary Public issues a certificate to the spouses, which must be deposited in the registry office before which the spouses entered into the marriage⁴⁵⁵.

Through the marriage contract the spouses have the opportunity to be determined for the regime of separate estates. Through this regime each spouse remains the owner of their property which they acquired before marriage or during the marriage. Thus, each spouse retains for himself the right to administration, disposal and free use of their assets⁴⁵⁶. In this case each spouse is liable for the obligations arising from his property while for the obligations arising from the marriage they are liable according to the agreement in the contract or according to the legal definition. If this regime ends with the death of one of the spouses, then the division of property is done according to the rules of inheritance law, but the form is regulated, which includes the storage of indivisible goods, the system of preferences, and auction sale of inseparable items, separation effects and grants. While if this regime ends with the dissolution of the marriage the same rules apply except the system of preferences⁴⁵⁷.

Although the legislation in Albania is advanced and similar to that of European countries, still the regime of legal property remains the most used in contrast to that of separate assets which is applied very little⁴⁵⁸. While the marriage contract which in European countries is considered the most applicable due to the freedom that spouses have in regulating property relations remains as a

⁴⁵³ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 255.

⁴⁵⁴ Ibid, 2009, pg. 255.

⁴⁵⁵ Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.8.

⁴⁵⁶ Blerina Dodaj, *Marital Contract, Development and his application in Republic of Albania*, PhD Thesis. (Tirane: European Univeristy of Tirana, 2019), pg.140.

⁴⁵⁷ Ledina Mandia, "Marital property regimes in Albania" *International Survey of Family Law*, Vol.1, no. 12, (2017), pg.11.

⁴⁵⁸ Ibid, 2017, pg.11

regime with a limited application due to prejudice against this regime. Special attention is paid to the family home, determining who has the right to use it in case of dissolution of marriage or termination of the legal regime. In such situations, according to Albanian legislation, if the family home is owned by one spouse, the court may decide to give it to the other spouse for use if he / she does not have another suitable home to live in and the children are left in care for upbringing and education. , or when the request for divorce was made by the former owner spouse or if a professional cabinet has been installed in the family apartment by the non-owner ex-spouse and his / her move will cause great expenses⁴⁵⁹. In these cases for all situations the court sets the deadline for how long the non-owner spouse has the right to use the marital house and how much he has to pay the rent which is determined in accordance with his income for the use of this apartment. In these cases for all situations the court sets the deadline for how long the non-owner spouse has the right to use the marital house and how much he has to pay the rent which is determined in accordance with his income for the use of this apartment. On the other hand, this right can be terminated by a court decision if the districts change or if the non-owner ex-spouse remarries⁴⁶⁰.

It is important that the issue of marital house is regulated by giving priority to the spouse who is in need and has no other means of livelihood and also by giving priority to the spouse whose children are being cared for. Through this solution, the interests of the spouse are protected, who will continue to take care of the children, but also the interests of the children are protected so that they do not change their place of residence or way of life because their parents are divorced or their marriage has ended.

⁴⁵⁹ Albana Metaj-Stojanova, *Marital property regimes not by contract. The case of the republic of Northern Macedonia with a comparative focus on Albanian legislation* (Tirana: UET, 2019), pg. 128.

⁴⁶⁰ Family Code of Albania, Assemble of Republic of Albania, 2003, article 153

5.9 Comparison of property regimes between European countries and North Macedonia and Kosovo

All European countries that we have taken for analysis of how they have regulated their property relations have paid significant attention to this legal institution. Each country starting from Austria, Belgium, France, Germany and others have foreseen in their legislations some types of property regimes which are some extent similar to those defined by North Macedonia and Kosovo. But unlike those, North Macedonia and Kosovo in their legislation have provided only the legal property regime which is mandatory for spouses who enter into marriage. According to this regime, the property of the spouses can be joint and separate, determining not exactly which assets remain separate property and which assets will be considered joint, which at the end of this regime must be divided between the spouses.

European countries are distinguished for the possibility that spouses have to be determined in the regime that best suits their case. And that enables the spouses in the future not to have problems or uncertainties regarding the way of regulating property relations. The state of Austria allows spouses to be defined for three types of regimes which are separation of property, community of property and conventional property regime. Unlike many other states, this state as a legal regime has foreseen the regime of separate assets. Which means that each spouse remains the owner of his property and has the right to dispose of and administer it freely. But despite this, the spouses cannot dispose of the marriage house regardless of who owns that property. Another regime is that of community property which is divided into community property during life and after death. In addition this regime can be general and limited. While what is most important is the conventional regime where the spouses through the marriage contract can regulate the property relations by determining themselves what rights and obligations they have towards their property from the moment of marriage.

In another way it has regulated the property relationship in Belgium which has defined three regimes that of the community of the property acquired during the marriage, the separation of the property and the universal community property. As a legal regime this state has defined the community of the property during the marriage. Thus, with the marriage, the joint property of the spouses is created, while on the other hand, they remain the owners of the property that they had before the marriage. With separated assets they can administer and dispose independently but in

with the limitation to the marital home, which requires the consent of both spouses. Special in this system is the universal community of property regime where all the assets of the spouses become joint property, regardless of how the spouses acquired the property or when they acquired it.

Germany, unlike the above-mentioned countries, has a different system of regulation of property relations between spouses. According to the Civil Code, spouses can choose between these regimes community of accrued gains, separation of property and community of property. While as an additional regime is also the Optional Matrimonial Property Regime of the Community of Accrued Gains through a marriage contract, if the spouses agree. This state has defined as a legal regime that of the community of accrued gains. The peculiarity of this regime is that after the marriage the spouses remain owners of their property, but the accrued gains that the spouses acquire will be equalized, if this regime ends. But even though the spouses have the right to administer and dispose of their property, there are still restrictions where no spouse can dispose of his property in its entirety without the consent of the other spouse. What distinguishes the German legal system which has not been encountered in other countries are reserved property. Spouses have the right to define certain assets as reserved property at the moment of entering into a marriage contract or as such they can also declare the items they have acquired through inheritance or gift and have had this destination. The purpose of this institute is that in principle these items are considered as separated property, but to distinguish them from the separated property which must be administered and disposed in the interest of joint property, with these assets the spouses can dispose on their own account. This state has also paid special attention to the marital home, stating that regardless of who owns it in case of separation, it should be given to the spouse who needs it most or the children have been left in care.

Poland is another country which gives spouses the opportunity to decide between three property regimes which are the community regime, the contractual arrangement, the compulsory system. The legal regime envisages a community regime which means the creation of common property. Apart from what constitutes the joint and separate property and how the administration and disposition are done, special attention has been paid to the marital home. According to this legislation, at the request of one of the spouses, the court may decide to evict from the marital apartment the spouse who has exercised violence or has made the marital life unbearable. While it has also provided the possibility of giving marital housing to a spouse who needs it or has children in care. Another regime which has not been seen in other countries is that of the compulsory regime

which is foreseen for some situations where the spouse is not allowed to include in the marriage contract. While countries like Bulgaria, Croatia and Albania have similar legislation regarding the regulation of property relations, the three states have provided in their legislation three property regimes, community property, separated property and contractual regime. What distinguishes these countries is the attention paid to the marital home. Where in case of division of joint property the marital house can be given to the spouse who needs it the most or has been given custody of the children. But even here there is a difference, where in Bulgaria if the marriage house is owned by the parents of one spouse it can still be given for use to the other spouse whose children have been left in care for up to 1 year. As for the marriage contract in Bulgaria it is forbidden to include provisions relating to the death of one spouse.

These and many other features make the legal regulation of European countries different from that of North Macedonia and Kosovo. Above all the biggest difference is that Northern Macedonia and Kosovo do not have in their legislation the marriage contract which is the regime where almost all countries have it. This gives the spouses the opportunity to adjust their relationship to the way they want and also to set the rules regarding the way of administration and the mood. Also where more attention should be paid to the marital home, where in countries like Kosovo and Macedonia it is decisive who should be given custody of the children. So, there are many cases in Kosovo where to the mother has not left the children in care because she did not have a home because the marriage house was owned by the husband or relatives of the husband. These and many other changes need to be made so that the legislation of Kosovo and North Macedonia to be closer to the legislation of European countries.

6. Meaning and legal nature of marriage agreements

Contracts are one of the mechanisms through which rights and obligations are created between the subjects of law. Contracts have been implemented in many areas of law, starting from obligations, economic, labor, international relations, etc. But apart from the fact that contracts are considered as one of the most efficient means for the exchange of goods and obligations, they have also started to be applied in family law. Although there have been many opinions that marriage itself is a contract between spouses through which rights and obligations are created between spouses but this idea which is not so much supported because in many points civil contracts are different from marriage. However, the contract has been implemented in the regulation of property relations between the spouses. Marriage is characterized by cohabitation and the creation of a family between two people. But the cohabitation of spouses makes them to unit their property and also to create new wealth during their life. Because marriage has also economic importance, it has made many countries in the world enable spouses to regulate their property relations by agreement.

But what exactly is a marriage agreement or what is its importance in the life of the spouses? The term marital agreement is used to refer to pre-nuptial agreements and post-nuptial agreements, where in some legal systems the term “nuptial agreements” is used. Generally the term marital agreement is used to denote an agreement between spouses which refers to the regulation of property relations from the moment of marriage⁴⁶¹. States which have in their legislative system the contracted regime or spouses have the possibility to regulate their property relations through a marriage contract have also determined what type of contract they can enter into. This is because some countries allow to enter into a marriage contract before marriage and this contract is called prenuptial agreements, while some state only after the marriage is entered into.

The marital agreement is considered one of the greatest reforms that has taken place in family law. Although it has existed a long time ago but its empowerment and use as a contract to regulate in more detail subsequent relations has been a topic of discussion for a long time. Marriage agreement it is predicted in many countries of the world both in the US and in European countries, there is still criticism about its use. Among the most serious criticisms is that these agreements

⁴⁶¹ Law Commission, Reforming the Law, Act 1965, “Marital property agreement”, Consultation Paper No 198, www.lawcom.gov.uk/docs/cp198.pdf (accessed 30 June 2020).

highlight the material interest between the spouses, thus removing the love or purpose of cohabitation⁴⁶². It is also emphasized that these arrangements are a preparation for divorce by enabling the spouses to protect their property. But despite the criticism, these agreements are still considered as one of the most effective tools for regulating property relations between spouses in the way they best think about themselves and the future of their family.

The marriage contract is a special type of contract which differs from the compulsory contracts because this can be concluded only between spouses who are either married or in the future will enter into marriage. Through this contract, only property issues are regulated and in some countries there are restrictions in this aspect as well. Since this contract produces legal effects only between the spouses, then its termination may come as a result of the death of one of the parties, divorce, voluntary consent, or even in case when the fiancés do not enter into marriage. For this reason, the marriage contract must be viewed in a general and specific context, because this contract must also meet the general conditions required for the legal validity of a contract as legal work, but on the other hand must also look at the specific conditions required by family law⁴⁶³. The general conditions are mainly defined by the laws on obligatory relations, while the special conditions are defined by the laws of family law, but which varies from state to state. The marriage contract is considered as a contract through which the spouses are free to regulate their property relations and with a focus on property issues after the marriage ends. For this reason there are opinions that this contract is considered as a contract of separation as it is mainly used as a mechanism to protect the property of spouses in case of divorce. World experience shows that this contract is mostly used by couples who have a good economic status and also by persons who have had a first marriage and from their experiences the legal regime has not been fair⁴⁶⁴. These contracts make the spouses comfortable in regulating their property relations as it is left to them to determine the scheme that suits them best. Thus, the spouses themselves think about their future and the determinations of their assets.

On the other hand, the contract should not be considered as an instrument where the spouses prioritize their interests as the other spouse will always be harmed. Although this contract is related

⁴⁶² Dejan Mickovik and Angel Ristov, "Family Law in the Civil Code of the Republic of Macedonia", *Journal of Civil & Legal Sciences*, Vol. 5, Issue no.1 (2016).

⁴⁶³ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 253.

⁴⁶⁴ *Ibid*, 2009, pg. 255.

to their free will, it should not be contrary to the general norms of family law but also not contrary to the rules of morality, much less contrary to constitutional principles.

6.1 Legal regulation of marriage agreements under USA law

The marital arrangements through which spouses can arrange their property relations can be of several types. Spouses have the opportunity to regulate property relations between them through premarital agreement, post marital agreements or partition agreements⁴⁶⁵. Depending on when the marriage contract is concluded or how the property relations between the spouses will be regulated, it also depends on what kind of agreement the spouses will make. Marriage contracts have started to be used especially at a time when in the USA the number of divorce cases has started to increase, where about 50% of marriages end in divorce, which mainly occur in the first seven years of marriage⁴⁶⁶. In fact, these contracts are seen as a promotion of divorce because through them the spouses foresaw the financial consequences of the divorce. For this reason they have been treated as against public policies and as such are considered invalid. But in 1970 the case of *Posner v. Posner* changed this view by stating that public policy should not harm the husband and wife all their lives as an alternative to overcoming divorce. So the parties should be free to discuss and decide on the disposition of property and the right to alimony of the other spouse in case the marriage fails. This decision was also supported by the Court of Appeal of Illinois in the case *Valid v. Valid* 1972 confirming that no evidence exists that prenuptial agreements promote divorce⁴⁶⁷.

Premarital arrangements are one of the instruments through which future spouses are enabled to settle their property marital relations. Since this type of agreement is entered into before the marriage is considered as a specific agreement due to the effects it produces in the future. Characteristic of this agreement is that it produces legal effects after another legal action, ie after

⁴⁶⁵ Kathryn J. Murphy, *Marital property agreements* (San Diego: New Frontiers in Marital Property Law, 2018), pg.3.

⁴⁶⁶ Hedied Nasheri, "Prenuptial agreements in the United States: A need for closer control?" *International Journal of Law, Policy and the Family*, Vol 12, Issue 3, (1998), pg. 307–322.

⁴⁶⁷ *Ibid*, 1998, pg. 8.

the marriage⁴⁶⁸. This contract is concluded between two persons who in the future will enter into marriage. Through this agreement they determine how their property relations will be regulated during the time they will enter into marriage. But this contract does not produce legal effects until the date when these persons will enter into a civil marriage. And this characteristic makes this contract special from other contracts. Entering into a prenuptial agreement enables prospective spouses to enter into a contracted property regime. So, through this contract the future spouses with the expression of free will decide on their property regime, determine the list of assets belonging to the bride, the list of assets belonging to the groom, the determination of the gifts they will receive and the settlement of the issues of other such as determining costs, etc.⁴⁶⁹.

Historically, the prenuptial agreement was created as a mechanism to limit men's rights in managing and disposing of the joint property of the spouse⁴⁷⁰. Considering marriage as an important institution for the state and the family, the application of marriage contracts has been very skeptical. But since the US Supreme Court ruled that contracts could only be used to settle property issues, it allowed states to each set their own rules for settling marriage contracts. And this is the reason that each state has its own rules and that some regulate marriage contracts by law and some by statute⁴⁷¹.

Through these agreements the spouses could, before entering into the marriage, determine the rules related to the administration and disposition of the joint property and on the other hand they could determine in advance which property was personal and did not allow it to be administered and to disposal of the other spouse. Because this agreement creates rights and obligations at the moment when the marriage is concluded it must be concluded in writing form and concluded before the notary.

According to the Texas family Code, the prenuptial agreement enables the spouses to determine more precisely how the property will be characterized at the moment they enter into the marriage. They are allowed through these agreements to determine the manner of giving alimony, to determine who will administer the property during the marriage, and also to determine about

⁴⁶⁸ Blerina Dodaj and Emiljana Kane, *Prenuptial agreement, promotion of gender equality, towards spouses independence, Manage Knowledge and Learning*, Joint International Conference, 2015, Italy.

⁴⁶⁹ Nicolas Fremeaux and Marion Leturcq, "Prenuptial Agreements and Matrimonial Property Regimes in France, 1855 – 2010", *Explorations in Economic History*, Vol. 68, (2018), pg. 132-142-5.

⁴⁷⁰ Ibid, 2018, pg.6.

⁴⁷¹ Hedied Nasheri, "Prenuptial agreements in the United States: A need for closer control?" *International Journal of Law, Policy and the Family*, Vol 12, Issue 3, (1998), pg. 307–322.

the rights they will have in the marital home and in some cases to determine that the law which country will apply if there is a dispute between them⁴⁷². This right of the spouses is also guaranteed by the constitution, but with whom this instrument should not be used to deceive or to escape any obligation they have towards their creditors. In a marital agreement the spouses can regulate their property relations in any way but provided that public policy is not violated, or that this agreement adversely affects the rights of the child or of any creditor. While in more detail has defined what this agreement may contain⁴⁷³. Thus the spouses in this agreement may determine the right to buy, sell, rent, and incur any burden, disposition in case of divorce, death or any other matter which is not contrary to public or criminal policy. In drafting this contract, attention should be paid to the interests of the children, as any provision that reduces the obligations of one parent to support the child will be invalid⁴⁷⁴.

In addition to the premarital agreement, spouses have the possibility that after they have entered into marriage can decide to regulate their property relations through the marriage contract. The marital contract entered into after the marriage and is also called as post martial agreement or postnuptial agreement. The characteristic of this contract is that the spouses appear as a party while it enters into force immediately at the moment of its connection and signature by the spouses. Through these contracts the spouses after entering into the marriage can decide how their assets and liabilities will be divided in the event of divorce. The use of marriage contracts in the US has marked an increase where spouses through marriage contracts have aimed to punish the other partner for misconduct or by guaranteeing more wealth for the spouses if things do not go as planned⁴⁷⁵. Although there are many reasons that lead spouses to enter into a post-marriage contract, mainly the purpose of concluding these contracts is to either change the pre-marriage contract or make a post-marriage contract because there is no pre-marriage contract⁴⁷⁶. According to Texas Family code through marital agreements, the spouses can at any time share or exchange any joint property which they have or will acquire in the future, as they wish. This property which is distributed or exchanged to the spouse will become his separated property. Through this

⁴⁷² Kathryn J. Murphy, *Marital property agreements* (San Diego: New Frontiers in Marital Property Law, 2018), pg. 3.

⁴⁷³ Ibid, 2018, pg. 5.

⁴⁷⁴ Texas Family Code 4.003(b)

⁴⁷⁵ Veronica Dagher, "Why Postnuptial Agreements Are on the Rise", *Wall Street Journal*, 10 March, 2016. <https://www.wsj.com/articles/why-postnuptial-agreements-are-on-the-rise-1457616414> (accessed 25 March 2021).

⁴⁷⁶ Stephen Gary, "To Agree or Not to Agree: Treatment of Postnuptial Agreements Under Oklahoma Law", *Oklahoma Law Review*, Vol. 63, no. 4, (2011).

agreement it is possible that property interests from community property to be turned into separate property. In addition, the spouses may, through the marriage contract, stipulate that the property interests from the transferred property to be the separated property of its owner⁴⁷⁷. Although each state regulates post-marital agreement by statute or by law, but there are generally based on five principles on the basis of which these contracts should have content. These agreements must be made in writing, must be done voluntarily, full and fair disclosure of relevant information at the time of execution, not be unfavorable for one party, and be signed by both parties⁴⁷⁸.

6.1.1 Uniform premarital and marital agreement act (UPMA)

In the United States, more precisely in Texas, the Uniform Premarital agreement Act has been issued, which is part of the Texas family code. Though this act is intended to clarify the issues of premarital agreements between spouses. More specifically to clarify the issues related to the rights that arise as a result of marriage and that the spouses want to change or give up through these agreements⁴⁷⁹. But in addition to regulating contractual relationships between spouses in Texas, the act has been adopted by 26 other states in the United States⁴⁸⁰. This act aims to treat premarital agreements in the same way and principles by all states. Premarital agreements have been treated with a dose of suspicion, especially those that have provided for the division of property in the event of divorce, thinking that they promote the increase of divorce in the country. However, since they began to be allowed in some American states and their treatment was done according to the statutes or court decisions through the Uniform premarital Agreement, it has been attempted to set the same standards for all states⁴⁸¹. The Uniform law Commission (ULC) in 1983 issued the Uniform Premarital Agreement Act (UPAA) which aimed to unify the rules of prenuptial agreements for couples who were married in one country and living in another, and they contracts to be accepted by the courts of other states. While in 2012 it was updated and revised UPAA and ULC issued the Uniform Premarital and Marital Agreements Act (UPMAA) through

⁴⁷⁷ Texas Family Code 4.102.

⁴⁷⁸ Julia Kagan, *Postnuptial Agreement*, Investopedia, 18 May 2021. https://www.investopedia.com/terms/p/postnuptial_agreement.asp (accessed 25 June, 2021).

⁴⁷⁹ National conference of commissioners on uniform state laws, *Uniform premarital agreements act, Florida, 1983*

⁴⁸⁰ Kathryn J. Murphy, *Marital property agreements* (San Diego: New Frontiers in Marital Property Law, 2018), pg. 5.

⁴⁸¹ Barbara A. Atwood, "Marital contracts and the meaning of marriage", *Arizona Law Review*, Vol. 54 (2012), pg. 3.

which procedural and substantive safeguards were imposed which would be in line with prenuptial agreements⁴⁸². This revised act was adopted by 28 states by 2013⁴⁸³.

Uniform premarital and marital agreement act clarified what is meant by marital agreement and prenuptial agreement. More precisely, the marital agreement means an agreement between the spouses who intend to remain in the marriage but who intend to confirm, change or waive any right or obligation during the marriage or in case of separation, termination of the marriage or in case of the death of one spouse or whatever situation may occur. While the prenuptial agreement regulates the same issues as the post-marital agreement but this is related between the persons who intend to enter into the marital relationship⁴⁸⁴. Such definition of premarital and marital arrangements is made in order to make distinguish between cohabitation agreements, separation agreements and day-to-day commercial transactions between spouses, which are not covered by this act. For this reason it has been specified that these agreements are concluded between the spouses who intend the marriage or who will enter into the marriage in the future. This act does not apply to agreements by which spouses approach, change or waive a marital right or obligation which requires the approval of the court to be effective and also does not apply to agreements between spouses aimed at a dissolution of marriage or separation from the court and who are expecting such a thing from the court⁴⁸⁵. Among other things, through this act it is specified that the marriage and premarital contracts must be made in written form, signed by both parties and that the parties have signed it of their own free will⁴⁸⁶.

Through marital and prenuptial agreements the parties can determine the rights and obligations of the property aspect, but in these agreements are not allowed to introduce provisions related to the responsibility of guardianship, more specifically with these agreement it is not allowed to negatively affect the rights of child support and custody. Nor can spouses change the grounds for divorce set by the courts or penalize a party to initiate legal proceedings for divorce or dissolution of marriage⁴⁸⁷. Despite the fact that premarital and marital contracts are considered as a solution which allows spouses to settle their property relations in case of divorce or death of

⁴⁸² National conference of commissioners on uniform state laws, *Uniform premarital and marital agreements act*, Nashville, Tennessee, 2012

⁴⁸³ Ibid

⁴⁸⁴ Ibid, pg. 3

⁴⁸⁵ National conference of commissioners on uniform state laws, *Uniform premarital and marital agreements act*, 2012, pg. 6

⁴⁸⁶ Ibid, pg. 15

⁴⁸⁷ Ibid, pg. 22

one of the spouses, there is still a risk that these contracts are misused and that in some cases the court leaves difficult to verify whether these contracts are related to the will of the parties or not.

According to J. Thomas Oldham the spouse can be found in a locked position when only a short time before the marriage is presented to him/her a premarital contract and as such he/she signs it. In case *Liebelt v. Liebelt*, the court has accepted a prenuptial agreement even though it was signed by the wife only two days before the marriage and that in fact she had been threatened that if she did not do so the marriage would be annulled by the husband. Whereas in the case of *Fechtel v. Fechtel*, the court had enforced the prenuptial contract through which the woman had waived her right to alimony even though the contract was entered into only a few hours before the couple's marriage⁴⁸⁸. And to avoid these situations where one spouse under the fear of annulment of marriage signs the prenuptial agreement, researcher Kaylah Campos Zelig proposes that states must decide a time before which the prenuptial agreement should be made, and on the other hand the couples will have space to think about the consequences that this contract will produce.

6.1.2 Legal regulation of marriage agreements in European countries

In general, European countries differentiate rights and obligations between spouses of a personal and property character. While the rights and obligations of a personal nature are defined by law and as such cannot be changed by the will of the spouses, the rights and obligations of a property nature are regulated by law but on the other hand the spouses themselves can make arrangements for the regulation of tire. The matrimonial property regime classifies the assets of the spouses into the joint assets of the spouses, the assets of the husband and the assets of the wife⁴⁸⁹. It also determines which assets fall into the category of joint property and which assets fall into the category of separate property of spouses depending on the manner of acquisition of these assets and the time when it was acquired. Most countries in Europe have in their legislative system three types of marital regimes, the legal one, the separate property and the contracted one.

⁴⁸⁸ Hedied Nasheri, "Prenuptial agreements in the United States: A need for closer control?" *International Journal of Law, Policy and the Family*, Vol 12, Issue 3, (1998), pg. 307–322.

⁴⁸⁹ Nicolas Fremeaux and Marion Leturcq, "Prenuptial Agreements and Matrimonial Property Regimes in France, 1855 – 2010", *Explorations in Economic History*, Vol. 68, (2018), pg. 132-142-5.

But what assets create the legal regime depends on each state how it is defined in their legal system. But it is important that most states in their system also have the contracted marital regime.

The introduction of prenuptial and marital contracts is considered one of the greatest reforms in family law where its main purpose was to restrict the husband's right to manage the joint property of the spouses. Initially, making a prenuptial agreement meant changing the definition of joint property and thus restricting the husband's right to manage this property⁴⁹⁰. Another reason for starting the application of marital and premarital contracts is to protect the spouse from the negative consequences of the joint property, mainly to be protected from the debts of the other spouse. Also these contracts are used in cases when the division of property according to the legal regime is seen as inappropriate due to the personal and financial circumstances of the couple and especially in cases of death of one spouse⁴⁹¹.

Despite the way in which marital agreements are regulated in each jurisdiction and regardless of how they are regulated by these contracts or the purpose for which these contracts are concluded, it is important that in all European jurisdictions the result of concluding these contracts is similar. Generally, through these contracts are regulation the property relations of the spouses, the tax planning or the way of dividing the property of the spouses in case of the end of the marriage.

Regarding the form of the marriage contract, in almost all legislations in Europe it is required that this contract be concluded in the form of a notarial deed⁴⁹². This is because the notary is considered a neutral person who has a legal responsibility to give advice to the spouses in case this contract will be unfavorable for one spouse. So, the notary is supposed to be the official person who will maintain the equivalence of the rights and obligations of the spouses. On the other hand, to inform the spouses about the consequences that will have in case of renunciation of any right through marriage contracts.

An important issue of marital contracts has to do with fairness, at the time of drafting these contracts. Most jurisdictions in Europe require that these contracts must be fairness. They have done this by stating that these contracts will be invalid if there is no right or injustice. Austria considers marriage contracts invalid if they are inequitable, in Sweden if they are unreasonable, in

⁴⁹⁰ Nicolas Fremeaux and Marion Leturcq, "Prenuptial Agreements and Matrimonial Property Regimes in France, 1855 – 2010", *Explorations in Economic History*, Vol. 68, (2018), pg. 132-142-5.

⁴⁹¹ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 43.

⁴⁹² *Ibid*, 2016, pg. 47.

Spain if the other spouse is harmed by the marriage contract, in the Netherlands and Germany these contracts are considered invalid if they are contrary to god faith⁴⁹³. So, most states have defined the framework within which these contracts should be drafted. All this to maintain justice and equality between spouses.

Pre-marital contracts and marital contracts are widely used in many European countries. This is because couples adjust their property relations according to the needs and circumstances in which they find themselves. In Austria spouses can enter into a marriage agreement but which can be done as a general agreement and limited in terms of community property. Also through the agreement they can choose the community regime during life and after death. Spouses can also be set up for an advanced arrangement to share their assets in the event of divorce⁴⁹⁴. Belgium allows the conclusion of premarital and post-marital agreements through which spouses can be determined for any property regime other than the legal one or to modify the legal regime⁴⁹⁵. Premarital and marital contracts are considered a novelty in Bulgaria. This state also allows spouses to regulate their property relations through marital contracts, but it is limited to the division of property between spouses, what rights and obligations do spouses have in property acquired before marriage and that acquired after marriage, rights in the marital home, in the sharing of expenses and family obligations, in the consequences of in case of divorce, in the alimony of the spouse during the marriage and in case of divorce, and in the maintenance of the children born in the marriage⁴⁹⁶. Croatia allowed spouses to enter into premarital and marital contracts. According to the Family Act of Croatia, spouses can enter into a marriage contract for existing assets which differs from legal property regime. Spouses are free to decide the content of the contract but provided that they are not contrary to constitutional, legal and moral rules⁴⁹⁷. Since in this state there is no body where contracts can be registered, it is difficult to know the number of spouses who have entered into marriage and premarital contracts, but according to data from spouses they are not used much in practice. Denmark is another state which allows premarital and marital contracts but which must be registered in court. Through these contracts spouses can be determined

⁴⁹³ Ibid, 2016, pg. 50.

⁴⁹⁴ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 23.

⁴⁹⁵ Belgian Civil Code, article, 1392

⁴⁹⁶ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 68.

⁴⁹⁷ Family Act of 22 September, Text No. 1992, (Zagreb: Official Gazette website, 2015 article 30)

for any regime other than the legal one, which can be property divided by modifications. These arrangements may be made for each spouse to keep his or her separate property in the event of divorce or death, or it may be determined that they retain their property in any case of termination of the marriage. Although the spouses are free to decide what the content of the contract will be, they are forbidden to impose obligations under the contract on the maintenance of the spouse or lump-sum compensations⁴⁹⁸.

Estonia allows the conclusion of premarital and post marital agreements, but according to this system, spouses can enter into only those contracts which are defined by law. Spouses are allowed to enter into marital contracts to complete an earlier property selection, or to establish a new property relationship or to change the selected property relationship⁴⁹⁹. Even here the marriage contracts must be concluded as a notarial deed. While France, which is considered one of the countries that has previously started to apply prenuptial and marital agreements, has a slightly different system of contracting. Spouses are free to decide on the management of property relations and can decide on this through the conventional community, universal community, separation of property and participation in acquisitions⁵⁰⁰. The application of premarital contracts has changed over the years, where in the mid-nineties about 40% of couples have practiced while after the reforms of 1967 it has dropped to 10%. While in 2010 it marked an increase of 20%⁵⁰¹.

In Sweden, marriage contracts are often used by spouses. The marital agreement is considered as a special agreement through which the spouses can decide that some property or all the property remains the separated property of the spouse⁵⁰². This agreement must be made in the past and registered with the Tax Agency. If the spouses make a prenuptial agreement, it must be registered with the Tax Agency one month before the marriage celebration and enters into force on the wedding day. The German state also enables spouses to use marriage contracts, which are mostly used to modify the status regime or to determine the regime of separate estates⁵⁰³. In Germany, spouses can change their property regime from that prescribed by law through a

⁴⁹⁸ Linda Nielsen, *Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, PhD Thesis*. (Kopenhagen: Jurisdiske Fakultete, Kobenhavens Universitet, 2019), pg. 4.

⁴⁹⁹ Estonia Family law Act, 2009, article 59

⁵⁰⁰ French Civil Code, 1804, art 1387

⁵⁰¹ Nicolas Fremeaux and Marion Leturcq, "Prenuptial Agreements and Matrimonial Property Regimes in France, 1855 – 2010", *Explorations in Economic History*, Vol. 68, (2018), pg. 132-142-5.

⁵⁰² Ministry of Justice, *Sweden Family Law*, Justitiedepartementet, SE-103 33 Stockholm, pg.15

⁵⁰³ Branka Rešetar, "Matrimonial Property in Europe: A Link between Sociology and Family Law", *Electronic Journal of Comparative law*, Vol 12, Issues 3. (2008), pg. 14.

marriage contract. So, even here the spouses are free to regulate the property relations through the marriage contract by changing the provisions that are defined by law and can also equal the pension rights in the contract⁵⁰⁴. Even in the Netherlands, marital and prenuptial agreements are allowed and through them one can deviate from the legal regime of the community. Spouses can freely decide on the content of the contract and adjust their relationship freely as it suits you best provided they are not contrary to public norms and good morals⁵⁰⁵. Research shows that about 25% of couples have chosen to regulate their relationship through a marriage contract. While from the couples who have already chosen the contracted regime, 34% of them have decided that in case of divorce nothing will be divided, while 66 of the couples have foreseen in the marriage contract the division of property⁵⁰⁶.

In general, European countries allow the conclusion of prenuptial and marital contracts, where some of them have provided the limitation in matters that can be regulated through these contracts and some are cheaper. Especially there are restrictions on the issues of maintenance the other spouse, where in some states the spouses cannot include in the contract this issue as it is considered mandatory for them. But what is common in these countries is that these contracts are concluded in the form of a notarial deed and the spouses can through these contracts change the legal regime and where most prefer to determine for the regime of separate assets because the purpose of these contracts is to protect their separated assets.

⁵⁰⁴ Ibid

⁵⁰⁵ Ian Sumnet, Hans Warendorf, Family Law Legislation of the Netherland, Intersentia, Anwerp, Oxford, Newyork, 2003, ISBN 90-5095IAN-340-9, pg.90

⁵⁰⁶ Lucia Ruggeri, Ivana Kunda and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: Faculty of Law of University of Rijeka, 2019), pg. 507.

6.2 Marriage agreement in Draft Civil Code of North Macedonia and Kosovo

The marriage contract as a contract which gives the spouses the right to voluntarily decide how to regulate their property relations different from the one provided by law. Despite the fact that in other countries of the world these contracts are applied and regulated by law, in North Macedonia and Kosovo their implementation has not started yet. This is because these contracts are not provided by law and as such are not allowed to be used by couples. One of the reasons why these contracts are not provided by law is because both countries are still considered as transitional states and as such are still advancing human rights and freedoms, especially women's rights. What these two states have in common is that they are in the process of drafting the Civil Code and as such have foreseen to introduce in their system the marriage contract.

North Macedonia is in the process of drafting its Civil Code, which envisages differences and reforms in family law. One of the biggest reforms that is foreseen to be done through the Civil Code, is the incorporation of the marriage contract, through which the spouses will be enabled to make an agreement regarding the regulation of their property relations⁵⁰⁷. Despite the criticism, it is thought that the marriage contract is considered as a tool that enables spouses to regulate their property relations as it suits those best, as couples are different and as such have different needs and for this reason they can best arrange their own relationships⁵⁰⁸. The introduction of the marriage contract, in addition to contributing to the regulation of marital relations, will have a significant impact on the advancement of women's rights. This is because through marriage contracts it will be possible for women to express their will in regulating property relations and on the other hand to preserve their assets. In this way, those familiar with family law are of the opinion that marriage contracts should be included in the civil code, also for the reason that through them a step closer to the legislation in Europe will be achieved.

As in other European countries, the number of divorces has increased in North Macedonia and such a phenomenon causes problems in the judicial system regarding the division of joint

⁵⁰⁷ Dejan Mickovik and Angel Ristov, "Family Law in the Civil Code of the Republic of Macedonia", *Journal of Civil & Legal Sciences*, Vol. 05, Issue 01 (2016), pg. 3.

⁵⁰⁸ *Ibid*, 2016, pg. 3.

property. For this reason the marriage contract will be considered as a way to solve the problems related to the property of the spouses. Another reason which influences the marriage contracts to be provided in the Civil Code is that the couples already from the moment of marriage buy their apartment together and create all the property together. In this way, through the marriage contract, the spouses are resolved in advance the property issues that in case of divorce or termination of marriage are not afraid of how their property will be divided or whether their contribution to the creation of joint property will be properly valued. . But what should be kept in mind is that the Civil Code of North Macedonia, in addition to allowing the conclusion of the marriage contract, some issues such as the maintenance of the spouse, the marital home and the issue of children have limitations because they are considered sensitive issues and should not spouses to be free to decide through the marriage contract.

Kosovo is another country in Europe which does not yet have a marriage contract in the legislative system. The reasons that led Kosovo not to allow the use of the marriage contract are many, but among other things is that the spouses even after marriage lived in a large family community where in addition to the spouses also lived the parents of the spouse and other relatives. Also another reason was that women were less employed and as such were mainly engaged in housework and raising children. Under the influence of customary law and religion women have no right to property and inheritance and in case of divorce they have returned to live in their parents' house. Very few women have been informed that even the contribution to household chores is a contribution to the creation of common wealth and as such have not sought it. This unfavorable position of women in Kosovo has made this state enable to strengthen the position of women in the family and marriage through marriage contracts.

Although the civil code of Kosovo has not yet been adopted, one of the biggest reforms in family law is the introduction of premarital and marital agreements. In this way couples in the future will have the opportunity through these agreements to regulate their own property relations. The reasons that led to the introduction of premarital and marital agreements in the Draft Civil Code are numerous, ranging from the underestimation of the contribution of women in the creation of special property to the numerous frauds that have been committed so that a husband is left without his share of the common property. The courts have faced many problems during the division of joint property and it is estimated that mainly only couples who have divorced by

agreement have managed to share the joint property, while others for years have faced problems for the division of joint property.

Future spouses and spouses according to the draft Civil Code will be able to enter into premarital and marital agreements for the assets they will acquire during the marriage⁵⁰⁹. In this way is entitled the right to enter into these marriages. So, spouses can enter into premarital and marital contracts only for the assets they will acquire in marriage. Fiancés or spouses may at any time enter into premarital and marital arrangements for matters relating to property acquired during the marriage. As such this agreement begins to produce legal effects at the time of the marriage or if it is entered into during the marriage at the time of its marriage. Here we have restrictions only in terms of the content of this agreement and which should not be concluded in violation of legal provisions⁵¹⁰. But since we are still in a draft which has not received the final approval verdict, there is still room for improvement, because these contracts are considered as a solution to many problems of spouses and as such the conclusion of these contracts should be as long as clear.

It would be much more valuable that in this case the legislator does not allow legal loopholes but to be more concert in terms of issues that can be regulated and the content of these agreements. It would also be important to determine the limits within which spouses have the right to decide on their property relations. This is because their implementation will be a challenge for the spouses on the one hand and for the notary before whom these agreements will be concluded. The main reason that has led to the proposal to introduce marriage contracts in the legislation is that the spouses voluntarily regulate their property relations, in order for them to regulate these agreements and through these agreements to be exactly the means where perhaps even more problems will be caused in practice. The judiciary in Kosovo needs to reduce the number of cases related to joint ownership and not to increase them, as it is regulated so far, which will leave room for problems of a property nature. These agreements are also envisaged as an instrument through which the weakest spouses will be protected, in this case women, a deeper adjustment will contribute to their application and will increase the confidence that these will be applied in practice. Otherwise, it may be risked that these contracts are provided only in the Code and not applied at all in practice due to the fear that the goal that the spouses will want to regulate will not be achieved.

⁵⁰⁹ Government of the Republic of Kosovo, Draft civil Code of the Republic of Kosovo, (2018) Prishtina, article 1183

⁵¹⁰ *Ibid.*, 2018, article 1183.5

The opportunity to improve them is great as we have examples of many other countries in Europe which apply for a very long time but on the other hand there is time to complete this part because the Civil Code is still under review and there is time for advancing their regulation.

6.2.1 Marital contracts and gender equality

The marriage contract as a special contract which can be concluded only between spouses or persons who in the future will enter into marriage and which is concluded only for matters of marital property has begun to be implemented in order to soften the patriarchal power of the husband over the wife. In fact, this contract was intended to weaken the husband's power in the administration and disposition of the joint property of the spouses. This is because the woman, despite her contribution to the creation of this property, did not have the right to administer and dispose of this property. Initially, it was differentiated that the husband is the person who worked and was considered the breadwinner of the family and the wife, mainly dealing only with housework, was considered as a person who don't contribute to the creation of marital wealth. But over time it has been seen that the woman, even if she has not worked outside but has only dealt with household chores, has been the key person as not only has she contributed to the maintenance of the property but on the other hand with her stay at home the husband had opportunities to work and generate income for the family. But despite the equivalence of contributions, in practice the woman was the one whose work was not appreciated enough. For this reason, European countries, starting from France, Germany, Austria, Belgium, began to apply the marriage contract in order for the spouses to have the opportunity to regulate their property relations as they see fit.

In other European countries, issues of gender equality have been overcome, but North Macedonia and Kosovo are still in stages where there is still space for equality between women and men in the family. Despite the fact that laws and other acts operate on the basis of the principle of gender equality, in practice we still have the problem that women are oppressed and do not exercise the rights guaranteed by law. Of particular importance in the rights and obligations of spouses is the implementation of the convention on the elimination of all forms of discrimination against women, which has been ratified by North Macedonia and Kosovo. According to this Convention, states must take all measures to eliminate all forms of discrimination against women

in marriage and in the family⁵¹¹. More specifically, the wife has the rights to enter into marriage, to freely choose her husband, the same rights and obligations as the husband in marriage and in its dissolution. Also the same rights in terms of ownership, administration and disposal.

Ratification of this convention has obliged the states that in laws and other legal acts to ensure equal rights for men and women, which in fact it is. The Family Law in North Macedonia and Kosovo regulates marriage, the conditions for marriage, and the rights and obligations of husband and wife on the principle of equality. Both spouses in the same conditions enjoy the right to marriage and to its dissolution. In some cases, through administrative instructions, couples are encouraged to register ownership in the name of both spouses so that this principle is even more applicable. But in practice it turns out that women are discriminated against in terms of marital property rights. Despite the fact that in laws the rights and obligations of husbands are equal, many women have not requested the division of joint property, considering that they have been unemployed and have not contributed to the creation of this property. For this reason, the Law on Family in Kosovo has been amended, which has clarified more specifically how the joint property of the spouses is created and how the spouses can contribute to the creation of this property. In fact, caring for families, managing household chores and maintaining wealth is considered a contribution and is equivalent in creating this wealth⁵¹². This legal change was made in order for women to have equal rights to joint ownership regardless of whether they are employed or not. In reality, through this change, a great deal of support has been given to unemployed women, whose number is high in Kosovo.

The common flaw of the two countries, North Macedonia and Kosovo, is that in their system they have only the legal property regime. According to this regime, the spouses at the moment of marriage create the joint property while the assets that they had before or that they acquire through gift or inheritance remain separate assets. These states do not yet have the possibility for couples to enter into a marriage or prenuptial agreement where the spouses will express their will on how to regulate their property relations.

Applying marriage contracts will enable couples but especially women to determine their property regime and be more protected in relation to their property. Entering into a marriage

⁵¹¹ UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, article 16

⁵¹² Assembly of the Republic of Kosovo, *Law on amendment and supplementation of Law no. 2004/32 on the family law of Kosovo, article. 1.* (Prishtina: Official gazette of the provisional institutions of self-government in Kosovo, 2018)

contract will increase the confidence of women and will make them more economically powerful. The biggest fear of women is the economic situation after divorce. Although marriage is associated with the goal of lasting forever but not always it has a long life. If couples are able to enter into a marriage contract and determine for themselves how their property will be divided in the event of divorce or termination of marriage, women will not live in fear that their entire contribution will not be valued or they will not receive their share of the property. Below we will see what are the advantages and disadvantages of using marital contracts to see more closely the effect they will have on the economic life of spouses. But despite the objections or advantages they are continuing to be applied in other countries of the world.

6.2.2 The pros and cons of applying a marriage contract in North Macedonia and Kosovo

The use of the marriage contract either by the future spouses or by the spouses has not been left without being criticized or supported in many countries of the world. Many authors have pointed out the disadvantages or advantages of couples who decide to enter into a marriage contract through which they will regulate property relations. The purpose of these contracts has been the possibility for couples of their own free will to decide for themselves how to regulate the property relations that will be created from the moment of marriage. The use of these contracts is intended for the spouses to express their will for the assets that they will have during the marriage. But even in spite of the purpose of marriage contracts, many authors give numerous arguments for the flaws and consequences that these contracts may have in the life of the couple.

The biggest criticism of marriage contracts is that they increase divorce. According to some authors, spouses who regulate marital relations by marriage contract are prepared to one day divorce and prepare for such a thing. For this reason marriage contracts are seen as a path to divorce and as such these couples do not consider marriage as a lifelong bond but financial interest is more important than the emotional life and love between them⁵¹³. Through this finding, contracts can be thought of as a means used by spouses to preserve their assets and not to think about the well-

⁵¹³ Dejan Mickovik and Angel Ristov, "Family Law in the Civil Code of the Republic of Macedonia", *Journal of Civil & Legal Sciences*, Vol. 05, Issue 01 (2016), pg. 2

being of the family. This influences the spouses to think only of themselves and the purpose of the marriage is not to live together but to take care of how to keep the property from the other spouse.

A serious criticism of these contracts has been made because through these contracts it cause economic damage to women. This is because these contracts are mostly used by the spouse who is richer in order to preserve his assets. In this case, the poorest spouse, who is often the wife, is harmed because the distribution of wealth will not be done equally and as a result, the economic status and well-being of women will be endangered. This is because the richest husband through these contracts will try to preserve his assets which he gains through business while on the other hand the wife can suffer economic damage if they enter into prenuptial agreements through which they exclude the division of property⁵¹⁴. If indeed these contracts will be used only for the purpose of protecting the property of the spouses then they may cause inequality between the spouses and it would not be in the interest of any state to allow their use. Because even so, the legal regime stipulates that the joint property will be divided equally and it would not be in the interest of any spouse, especially the wife, to allow an unequal separation.

These contracts are also criticized for regulating uncertain issues of the future and that circumstances may change until the end of the marriage, if this happens⁵¹⁵. Because it is known that these contracts are concluded before the couple gets married or during the marriage, but the factual basis around which this agreement was reached may change over time as it depends on how the couple's life will develop. For this reason, marriage contracts may regulate issues that in the future do not exist at all or will be completely different. If we compare them with civil contracts, the change of some circumstances can lead to the invalidity of these contracts.

These and many other criticisms have in common that it is thought that these contracts enable the spouses to think that the marriage will be dissolved and that they think more about the material consequences of divorce than the emotional or moral ones. It should not be forgotten that marriage .n addition to the creation of cohabitation, it also has an impact on the financial aspect, so regardless of whether the spouses provide for a marriage contract or not, at the moment of the termination of the marriage they will also deal with the financial consequences of the marriage. While the criticism that is made regarding the marriage contract spoils the romance between the

⁵¹⁴ Gail Frommer Brod, "Premarital Agreements and Gender Justice", *Yale Journal of Law and Feminism*, Vol. 6, Issue 2, (1993) pg. 240.

⁵¹⁵ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 50.

couple because they concentrate more on property and financial issues, it should not be forgotten that making a contract contributes to a discussion between the couple. They discuss with calmly when there are no problems between them and it is considered that this discussion will be important if the marriage ends one day.

Despite criticism of marriage contracts, they are permissible in almost all countries in Europe and the United State. The exact number of spouses applying for this option is not known as very few countries have a state register for their registration. The very fact that these are used means that these contracts also have their advantages because otherwise they would have to be banned. The first advantage is that through these contracts it is possible for the spouses to regulate their own property and financial relations by bypassing the legal regime defined by law⁵¹⁶. This is because the law has provided one legal regime and it is impossible that this regime to suit all couples, when it is known that they may have different assets, different incomes and different purposes. So whenever the couple deems that the legal regime will not be suitable for them it is easy for them to change and modify and adapt it to their needs⁵¹⁷. Opponents of marital contracts say that through these contracts spouses want to preserve their assets and that in fact this can be considered as an advantage which allows spouses to protect their assets or businesses by determining that the income remains a special property of the spouse. Premarital contracts are also considered as a means by which spouses who are entering into a new marriage have the opportunity to protect their property and children from the previous marriage from conflicts that may occur with the new spouse⁵¹⁸. And that this opportunity can be used enough knowing that in both Kosovo and northern Macedonia the number of divorces has increased in recent years.

These contracts increase the cooperation between the spouses because the dialogue they make, makes them more responsible for their actions and in the end everyone will know what belongs to them and what will happen to them if the marriage ends. Each spouse will have obligations regarding the fulfillment of family needs and there will be no ambiguity between them. The purpose of marriage is to create a family and live together and that actually makes the spouses think that everything they will have will be common. But if their marriage is going to face a crisis,

⁵¹⁶ Dejan Mickovik and Angel Ristov, "Family Law in the Civil Code of the Republic of Macedonia", *Journal of Civil & Legal Sciences*, Vol. 05, Issue 01 (2016), pg. 3

⁵¹⁷ *ibid.*

⁵¹⁸ Gail Frommer Brod, "Premarital Agreements and Gender Justice", *Yale Journal of Law and Feminism*, Vol. 6, Issue 2, (1993) pg. 239.

the fear will start to grow because everyone will think how much he has contributed and what is his and what will be the other spouse's. If they have foreseen a marriage contract this fear will not be because they have only determined at the beginning which property belongs to one spouse and what will belong to the other spouse. Because in the end we know that the biggest problem of the courts is exactly the division of the joint property when the couple requests it and even bigger is the problem when one spouse opposes the equal division thinking that he has contributed significantly more than the other spouse. If the spouses are only determined to enter into a contract and do so freely, the divorce process will be easier and they will not lose time by facing with litigation.

In reality these contracts increase the trust between the spouses because they will not have secrets between them as all the properties and goods they will create will know their destination, and they do not live in anxiety that they will lose any assets or I will be charged with obligations they did not know in the beginning⁵¹⁹. Marriage contracts make the spouses vision of the future as they voluntarily decide on marital ownership⁵²⁰. Despite the criticism and the advantages, North Macedonia and Kosovo have decided to include premarital and marriage agreements in their Civil Codes. It is known that these institutions will be unknown to the spouses, but awareness campaigns should be made about the advantages and disadvantages of these agreements. It is believed that young couples will apply more this contract as most spouses work and generate income and will see their application as a solution to problems that may occur in the future. More challenging will be their application in rural areas when there is a lower level of education and information of the spouses but it is important that the legal framework is sufficiently completed and the notary before whom this contract will be concluded to guide the spouses to the pros and cons of making a marriage contract.

Also, the application of the marriage contract will enable the legal gaps that exist in the legislation to be overcome through the marriage contracts, especially in the issue of division of joint property, classification of separate assets, income from family businesses and from the works of the author, keeping spouse and fulfillment of family obligations. According to world experience, this contract is mostly used by couples who are better off economically and by couples who come

⁵¹⁹ Dejan Mickovik and Angel Ristov, "Family Law in the Civil Code of the Republic of Macedonia", *Journal of Civil & Legal Sciences*, Vol. 05, Issue 01 (2016), pg. 3.

⁵²⁰ Arta Mandro-Balili, *Family Law* (Tirana: EMAL, 2009), pg. 255.

from previous marriages⁵²¹. For this category of couples the legal property regime will either not be fair or has been unfair in the previous marriage, so it is in their interest to regulate this issue precisely so that the same problems do not recur. Also in these contracts there should be justice and equality and not be used as a means to cause injustice to the other spouse or to worsen the well-being in case of termination of marriage. To achieve this, the law must define the limits within the spouses can decide through the contract. Their main advantage is that the spouses have free autonomy in drafting the contract in order to adapt the property regime to themselves, but that this autonomy must have limitations so that will be harmful for the other spouse.

⁵²¹ Ibid., pg. 255.

7. European family law – Commission on European Family Law

Family law is a right which is regulated in all European countries according to the laws which they have in force. Each state has decided according to the autonomy they have, how to regulate family law in its own country. After a general analysis of family law, it turned out that all European countries, even though they belong to the same union, had differences regarding the regulation of family law. Knowing the importance of family law for human life and knowing the freedom of movement that the citizens of the European Union have, it has been necessary to harmonize and unify family law in all European countries. This initiative was taken by a group of scholars who decided to gather in 2001 and establish a Commission for European Family Law. In fact, this commission aimed to establish the principles of European family law through which they would make the unification of European family law⁵²². The reasons for calling for an initiative are numerous, ranging from the guidelines given by the legal literature for a harmonization of the Family Law in Europe to the numerous Conventions and resolutions issued by the Council of Europe and the Hague Conference on Private International Rights to the decision of the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg⁵²³. According to the Commission on European Family Law, another reason for the harmonization of European family law is the issue of European integration, which states that the lack of harmonization of family law has created obstacles for the free movement of citizens and the creation of a European identity⁵²⁴. This is due to the fact that people are having trouble dealing with family matters if they change their place of residence.

CEFL is a committee which consists of the Organizing Committee and the Group of Experts⁵²⁵. The organizing committee coordinates the work of the commission in general while the group of experts consists of experts in the field of family law and comparative from EU member states and other countries in Europe. This commission functions as a scientific and

⁵²² Katharina Boele-Woelki, “The Principles of European Family Law: Its Aims and Prospects”, *Utrecht Law Review*, Vol. 1, No. 2, (2005), pp.160-168.

⁵²³ Ibid, 2005.

⁵²⁴ Ibid, 2005.

⁵²⁵ Commission on European Family Law, <http://ceflonline.net/> (accessed Jan. 10, 2019)

research process and historical development, future trends and social aspects giving legitimacy to this scientific commission.

This commission had started the work with the harmonization of legislation through principals in matters of divorce and maintenance between ex-spouses after it was seen that most have divergences in this area. The first three volumes were published in 2003 and 2005 based on national reports on the grounds for divorce, maintenance between former spouses and parental responsibilities, from which the Principles of European Family Law regarding Divorce, Maintenance between Former Spouses and Parental Responsibilities the recognition and execution of judgments in marital matters and matters of parental responsibility⁵²⁶. While the fourth volume by the same commission prepared a comprehensive report based on a detailed questionnaire on how European countries regulate relations between spouses in the field of property law. It follows that European countries apply different property regimes such as the community of property, the community of accrued gains, the participation in acquisitions, the deferred community of property, the separation of property and the separation of property. Seeing these differences, the Commission insists that a unification or the creation of two systems, one based on the community while other based on division, will be the solution to many problems faced by the spouses of different European countries⁵²⁷.

Through the principles recommended by the Commission for European Family Law, it is thought that the unification of family law will be achieved, especially in the property issues of spouses. This unification will contribute to the freedom of movement of European citizens not to be hindered by convergences in law, and will also contribute to the establishment of a balance between the private autonomy of spouses, the well-being of the family, the protection of the family home and the strengthening of citizens' rights⁵²⁸. Thus, the Commission has presented some principles which can be taken into account by the states in order to contribute to the unification of family law within the European states.

⁵²⁶ Katharina Boele-Woelki, Bente Braat Ian Curry-Sumner, *European Family Law in Action, Volume IV: Property Relations between Spouses*, 2009, <http://ceflonline.net/wp-content/uploads/Questionnaire-Property-Relations-between-Spouses.pdf>

⁵²⁷ Ibid

⁵²⁸ Commission on European Family law, *Principles of European Family Law regarding property relations between spouses*, (2009).

7.1 General rights and duties of the spouses

The principles laid down by the European Family Law Commission are principles which guide European countries on how to regulate property relations between spouses. Given that the set of legal norms governing property relations between spouses may be different then the Commission on Family Law has determined that these principles to apply to all regimes⁵²⁹. The Commission on European Family Law principles which are based on research and comparative discussions among national experts of European countries offer two options for marital property regimes a participation in acquisitions (Principles 4: 16-4: 32) and a community of acquisitions (Principles 4: 33-4 : 58) and principles applicable to Marital property Agreements⁵³⁰.

Thus, in order for European countries to unify European law, the principles set out by the commission must be respected regardless of which regimes are defined in their legislation. Applying the same principles to all property regimes will enable the spouses not to be discriminated against in the rights and obligations arising from a particular regime. In fact, spouses will be calmer and more relaxed in choosing the regime that suits them when they know that the same principles apply in all regimes. Thus, even the legislations of the countries will not be able to differentiate in their legislations when they apply the same principles in all property regimes.

7.1.1 Equality of the spouses

The most important principle that the Commission has issued is that both spouses have equal rights and obligations. Thus, regardless of the property regime that they choose, both spouses should have equal rights and obligations⁵³¹. Although so far this obligation which derives from many international conventions, that spouses should have equal rights and obligations, in this case it is required that equality of spouses should exist in all property regimes.

⁵²⁹ Commission on European Family law, Principles of European Family Law regarding property relations between spouses, principles 4:1, (2009).

⁵³⁰ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 30.

⁵³¹ *Ibid*, principles 4:2

The Convention on the Elimination of All Forms of Discrimination against Women proclaims that women should have all equal rights with men in marital and family matters⁵³². Also in this convention it is emphasized that women have the same rights as the husband to enter into marriage, to choose a spouse, the same rights during marriage and in case of its dissolution⁵³³. A special importance in this convention is given to personal rights between spouses where women have the right to choose their last name, profession and work⁵³⁴. But this convention has not left aside the property right where it has specified that the woman has the same rights as the man regarding the ownership, purchase, administration, enjoyment and disposition of property, both free and paid⁵³⁵.

This convention generally obliges states to take all measures to ensure that women have equal rights in marital and family matters in general. But unlike the convention which aims to provide for women equal rights with men in marital and family matters and more specifically in personal relations between them, through the principle of equality between spouses proclaimed in the Principles of Law family tends to equalize the rights of spouses in property relations in marriage. Spouses, in addition to being equal at the time of the election of the property regime, through this principle it is required that all rights and obligations arising from any regime, the spouses must be equal. Since the main purpose of the Commission is to start the unification of family law through these principles, then the property issues that arise at the time of marriage should not be overlooked. Thus states are obliged that their property regimes to be designed so that at no point don't be inequality between spouses in terms of property rights and obligations. Equality between spouses is not only required for the selection of the marital property regime, but equality is also required in matters of administration, disposition, management of marital property, in covering family expenses, and around the marital home.

⁵³² UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), (1979), article 16.

⁵³³ Ibid, 1979, article 16 (a), (b), (c)

⁵³⁴ Ibid, 1979, article (e)

⁵³⁵ Ibid, 1979, (ë)

7.1.2 Legal capacity of the spouses

Spouses in addition to having equal rights in property matters they have also full legal capacity to enter into transactions between themselves and others⁵³⁶. Thus spouses regardless of gender or any other basis will have full legal capacity to enter into legal transactions not only among themselves but they are also free to enter into transaction with third parties. Each state in its legislation has determined the age when spouses have the right to enter into marriage and this coincides with reaching adulthood. This age not only gives the right to enter into a marriage but free to do. But the spouses also have the right to enter into legal transactions for marital property issues, except to some legal work for which the consent of the other spouse is required. So, it should be borne in mind that for matters which are determined to require the consent of the other spouse, they cannot perform these transactions without this consent, while for other matters relating to property, the spouses are free. Spouses are generally free to enter into legal transactions in matters relating to their separate assets or in matters of management and administration of the joint property.

7.1.3 Contribution to the needs of the family

The main purpose of marriage is to live together and start a family. No matter what country in Europe marriage is entered into, this goal is the same which has its origins in the first societies of mankind. Although the characteristics of marriage have changed and in parallel with it other forms of life have been created between couples, and also the gender between the spouses may be the same, but the purpose remains the same. So, every marriage aims at living together. But this cohabitation also has property consequences. By the very fact that spouses begin to live together and are determined for a certain property regime, they still create common expenses. This is inevitable. These expenses incurred by the family must be covered by both spouses. Thus, regardless of how the states have regulated the issue of spouses' contributions to the needs of the

⁵³⁶ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:3.

family, this commission has foreseen that the spouses should contribute to the needs of the family⁵³⁷.

It should be known that people are different and have different abilities. It should also be noted that spouses can practice different professions and the income they can generate may vary. These differences have an impact on their ability to contribute to meeting the needs of the family. For this reason spouses cannot be required to contribute equally, as this will cause inequality between spouses. For this reason, the Commission on the Principles of Family Law in Europe has determined that each spouse is obliged to contribute to the needs of the family, but this contribution must be made in proportion to the ability of the spouse⁵³⁸. This way of determining is considered fair as each spouse depending on the ability should contribute to the needs of the family. But it must be borne in mind that the spouse cannot be released from this obligation without any reason. Perhaps there will be dilemmas between the spouses as to what are the needs of the family for which they are obliged to contribute together, always bearing in mind that this contribution should be made regardless of the property regime they have chosen. For this reason, in the framework of this principle, the details are given for which needs, the spouses should contribute together, and these are the contribution for the running of the household⁵³⁹, the personal needs of the spouses and the maintenance, upbringing and education of the children.

Contribution to meet the needs of the family is mandatory, although it depends on the ability of the spouse, but on the other hand if one spouse does not contribute without any reason, the other spouse has the right to ask the competent authorities to compel the spouse⁵⁴⁰. So, states should create mechanisms in order for both spouses to contribute to the fulfillment of family needs because regardless of the property regime they choose, they cannot give up the non-fulfillment of family needs.

⁵³⁷ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:4.

⁵³⁸ Ibid, 2009, principle (1).

⁵³⁹ Ibid, 2009, principles 4:4 (2).

⁵⁴⁰ Ibid, 2009, principle 4:4 (3).

7.1.4 Protection of the family home and household goods

Among the most important principles which must be implemented in all legislation in European countries is the protection of the marital home and household good. Spouses at the time of marriage decide of their own free will where they will live. Marriage aims the cohabitation of the spouses because only through cohabitation can the other goals of the marriage be achieved. The place where the spouses and their family will live is considered as a marriage home. All family activities take place there and one of them is the upbringing of children. For this reason this house requires a special protection, because it has a special importance for spouses and especially for children. For this reason, the commission, due to its importance, has envisaged a special principle for the protection of the marital home and household goods. This protection is done by the actions that spouses can do to each other. Knowing that spouses can enter into different legal transactions because they have full capacity to act, some restrictions have been placed on the issue of the marital home. These restrictions have to do with the disposition of the right of the marital home. Thus any spouse can't dispose with the family home and other household goods without the consent of the other spouse⁵⁴¹. This restriction is made so that no spouse can sell, donate, alienate or encumber the family home without the knowledge of the other spouse and without his consent.

Through this principle, the spouses are protected from the legal actions of the other spouse, through which one of the spouses may be left homeless, but on the other hand, the well-being of the children is also endangered. If one of the spouses has disposed with family home without the consent of the other spouse, this legal action can remain valid only through subsequent ratification. So, if the other spouse ratifies the legal work afterwards, then this disposition can be valid. Otherwise, if the spouse does not ratify such an action, it will be considered invalid. This protection of the family home also aims not to make an agreement to exercise the separation of the family home but by limiting the ability of each spouse in relation to the disposition of the family home without the consent of the other spouses⁵⁴².

Sometimes the relationship between the spouses may be strained and spouse refuse to give the consent or one of the spouses may not be able to give such consent, then the spouse has the

⁵⁴¹ Ibid, 2009, principles 4:5.

⁵⁴² Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 30.

right to request this consent from the competent authority. In this case, the competent authority, evaluating all the circumstances, can decide whether to give consent or not for the dispose of the family home⁵⁴³. On the contrary, in order to protect the family home as one of the most important assets of the family, any legal action that has been committed in violation of this principle will be considered invalid and will not create any legal consequences⁵⁴⁴.

7.1.5 Protection of the leased family home

Another important issue which is related to the family home is the issue of lease. If the spouses live in a lease house, but only one spouse has participated in the lease contract, then the lease will be considered joint⁵⁴⁵. But both spouses must also participate in the lease even if the lease contract was concluded before the marriage. In principle, the obligations that one spouse has before marriage are considered as special obligations, where the other spouse has no obligation to participate in its fulfillment. But here we are dealing with another situation, because the object of the rent is the family house which is used by both spouses and both spouses must participate in the payment of the rent.

Due to the importance of the family home for the spouses and their children, one spouse cannot terminate or change the rent without the consent of the other spouse⁵⁴⁶. So, even in this situation when the family home is not owned by either spouse, still, since we are dealing with a family home then the consent of both spouses is required. While the right to terminate the lease has the owner of the family home. But in this case the owner of the family house has to notify both spouses to terminate lease⁵⁴⁷. So, even if the rent is entered into only by one spouse, if a family lives in it, then both spouses must be notified of the termination of the lease. Although through this principle the rights of the owner of the house are limited, but since we are dealing with a house where a family lives, then it is required that both spouses be notified of the termination of the lease, not only the spouse who has entered into the lease.

⁵⁴³ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:5 (3).

⁵⁴⁴ Ibid, 2009, principles 4:5 (4).

⁵⁴⁵ Ibid, 2009, principles 4:6 (1).

⁵⁴⁶ Ibid, 2009, principles 4:6 (2).

⁵⁴⁷ Ibid, 2009, principles 4:6 (3).

7.1.6 Representation

Among the principles set out by the Commission for European Family Law is the right of spouses to enter into legal transactions based on their own free will. But in some cases a spouse cannot or don't have time to participate in any transaction. So he/she can transfer this right to the other spouse through authorization⁵⁴⁸. The granting of authorization must be done on the basis of free will and in this case the spouse can also take legal actions on behalf of the other spouse.

Sometimes it is possibilities that the spouse may be in a position when he/she cannot give the authorization and in this situation the commission has provided that this authorization can be requested by the authorized bodies⁵⁴⁹. Thus, the state must determine which body is competent to respond to such requests, because it is known that in case the authorization is given, the spouse can enter into various legal transactions. On the contrary, if there is no such authorization, for legal works when the authorization is requested, it makes that legal work invalid. The authorized body, at the request of the spouse, may authorize him to perform legal actions only for legal actions when the consent of both spouses is required or for one spouse to represent the other spouse even when the latter has the power to act alone in performing legal work⁵⁵⁰.

⁵⁴⁸ Ibid, 2009, principles 4:7 (1).

⁵⁴⁹ Ibid, 2009, principles 4:7 (2).

⁵⁵⁰ Ibid, 2009, principles 4:7 (2) (a),(b).

7.2 Marital property agreements

The Commission on European Family Law has originally defined the general principles which apply to all marital property regimes. But in addition to the general principles, the commission has set out the principles that apply to each regime separately. One of the general principles of this commission is the right of each spouse to determine through property agreement for property regime. So, spouses are free to determine through the marriage agreement the regime that they have more favorable or more suitable for them⁵⁵¹.

Thus the spouses in agreement with each other can decide which property regime they will choose and this agreement must be made in accordance with the principles proclaimed by the commission. In this way a unification of agreements can be achieved which can be implemented in all European countries. This is because most countries in Europe, with the exception of Kosovo and North Macedonia, have provided the possibility of concluding a marriage contract, but even within these countries there are differences in terms of how to draft marriage contracts, their content and the definitions that are made in those contract.

Based on the principles given by Commission on European Family Law, spouses can enter into a pre-marriage and post-marriage marriage contract. The future spouses can enter into a pre-marriage marriage contract through which they can be determined for the marital property regime⁵⁵². So the prenuptial agreement can be concluded to determine the property regime which will be valid during the marriage. While spouses who are already married can enter into a marriage contract to modify the chosen property regime, or can change the property regime⁵⁵³.

The conclusion of a marital property agreement creates rights and obligations between the spouses regarding the marital property and thus it must be compiled before a person who is authorized to enter into these agreements. For this reason and because of the importance that these agreements have for the property of the spouses it must be done by a notary or by a professional with a similar function and it is also required that this agreement be dated and signed by both spouses⁵⁵⁴. The reason why this agreement is required to be made by an authorized person is done

⁵⁵¹ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:9.

⁵⁵² Ibid, 2009, principles 4:10 (1)

⁵⁵³ Ibid, principles 4:10 (2)

⁵⁵⁴ Ibid, principles 4:11

in order for the spouses to be instructed during the making of the agreement and the notary or other profession which exercises a similar function must inform the spouses in advance about the legal consequences of a certain regime, legal consequences that may occur as a result of waiver of any right or obligation. Also the presence of the notary makes the conclusion of this agreement more secure because it is done in the spirit of laws and the equivalence of rights and obligations is preserved. As for the dating of this agreement, this is doubly important. On the one hand, the date confirmed, whether the agreement was made before or after the marriage, and on the other hand, it is especially important whether the spouses had the full ability to act and to freely express their will. While the issue of signing indicates that this agreement cannot be concluded through representatives, which in fact should be related to the physical presence of both spouses because their presence is confirmed through their signing of the agreement.

Entering into an agreement on marital property spouses are obliged to inform each other about the assets and debts they owe⁵⁵⁵. This obligation that the spouses take upon themselves with the fact that they enter into a property agreement makes the spouses more aware but on the other hand they get acquainted with the property and debts that the spouses have and thus make the relations of the spouses safer knowing that nothing is hidden. This principle enables spouses not to misuse marital arrangements to mislead the other spouse or to avoid any obligation they may have.

The marital property agreement, in addition to creating rights and obligations for the spouses, also affects the obligations of the notary or the profession that makes the conclusion of the agreement. Due to the importance of the agreement in the life of the spouses, states must ensure that the connection of this agreement is done from a profession to make sure that do not have abuse of law by spouses. Thus it is defined as a principle that the notary or other profession which exercises a similar function is obliged that during the time of the marriage agreement is obliged to give impartial advice to both spouses⁵⁵⁶. Also, notaries and other professionals are obliged when concluding this agreement to be sure that each spouse has understood the legal consequences deriving from the conclusion of the agreement⁵⁵⁷. While it is important for the notary or professional to ensure that both spouses are entering into this agreement of their own free will⁵⁵⁸.

⁵⁵⁵ Ibid, 2009, principles 4:12.

⁵⁵⁶ Ibid, 2009, principles 4:13 (1).

⁵⁵⁷ Ibid, 2009, principles 4:13 (2).

⁵⁵⁸ Ibid, 2009, principles 4:13 (3).

Although this task is difficult for notaries because they need to understand the psychological side of the spouses but since they have contact with the spouses, if at any time the freedom of the spouses is questioned then measures must be taken to prove that the spouse is constrained any reason to enter into such an agreement.

What most states have lacked and what is attempted to be regulated through these principles is the occurrence of some exceptional hardship. Knowing that in civil contracts the occurrence of any extraordinary circumstance can lead to the annulment of contracts, such a thing was not even foreseen in the marriage contracts. Because some countries have not provided for such a thing in their legislation, then Commission on European Family Law has in principle foreseen exceptional hardship. So, taking into account the circumstances of the case when the agreement was concluded or later, then it should be the competent body to leave aside the agreement or to regulate such an agreement⁵⁵⁹. This principle will be of particular importance knowing that marital agreements are concluded for long time. Couples can stay in marriage for a long time but on the other hand different things can happen which can complicate the fulfillment of the agreement. For this reason, the difficulties that may arise during the time when the spouses are in the contracted marital regime will not be an obstacle as it will be resolved by the authorized bodies.

⁵⁵⁹ Ibid, 2009, principles 4:15.

7.3 Matrimonial property regimes

Commission on European Family Law was established as a commission which aims to unify family law. One of the parts of family law is the issue of property regimes between spouses. For this purpose, initially this commission has issued some principles which pave the way towards the unification of family law in general. To these principles this commission has come after a comparative analysis between different European countries. The unification of wealth regimes will only be achieved if the same regimes are defined in all European countries. For this reason, in order for the citizens of Europe not to have a problem with free movement or change of residence, this commission has foreseen two property regimes between spouses. The first regime is the regime in participation in acquisition while the second regime is Community of acquisitions⁵⁶⁰. Through these two regimes, property relations between spouses could be regulated in a unique way in all European countries. These two regimes will be challenging for European countries to make legislative changes in order to implement them in the future. Although these regimes are encountered in some European countries, but not in the same way as foreseen by this commission. However, this proposal of the commission has come because these two regimes have been more pronounced in European countries, perhaps not in the same way, but on the other hand they are considered as two regimes that best protect equality between spouses as one of the most important principles of this commission. For both regimes, the general principles of the rights and obligations of spouses apply, from the principle of equality to the protection of the family home.

7.3.1 Participation in acquisitions

The first regime defined by Commission on European Family Law is participation in acquisition. This regime is considered as default regime, whenever the spouses have not made an agreement for any other property regime⁵⁶¹. This means that if the spouses have not made an agreement for another regime then is consideration that they have agreed to regulate their property relations according to the regime participate in the acquisition. Although this regime is not very

⁵⁶⁰ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:16, 4:43.

⁵⁶¹ Ibid, 2009, principles 4:16.

pronounced in European countries as a default regime, it still represents a modern view of the treatment of marriage taken from the jurisdictions where the division of property is default⁵⁶².

Despite the criticism, the determination of the commission to consider this regime as default has some strong reasons. Among other things, through this regime, each spouse is independent in his / her separate property, but on the other hand, each spouse is encouraged to increase his / her wealth, but he / she is always obliged to contribute equally to the needs of the family⁵⁶³. So, on the one hand each spouse will remain the owner of his property, while on the other hand he is obliged to contribute to the needs of the family and which is considered as one of the most important principles envisaged by this commission.

But what exactly does this regime mean or how does this regime work? Under this regime each spouse remains the owner of his or her separated property. Each spouse's property also includes acquisitions and reserved property⁵⁶⁴. Whereas in the event of the dissolution of this regime which may come as a result of several reasons, each spouse participates in the purchases made by the other during the regime in accordance with Principle 4:31. This regime ensures the spouses to remain the owners of their property, without having to mix their assets, but on the other hand the purchases made during the marriage will be divided at the moment of the end of this regime. In order for this regime to be as clear as possible and in order not to create dilemmas between the spouses, what are considered acquisitions are also defined. Thus according to the principles 4:18 of Commission on European Family Law, the acquisitions consist of all the assets which are acquired during this regime except the reserved property and in particular the acquisitions include the income and profits of either spouse, whether derived from profits or property; assets acquired through the income or earnings of the spouse while the assets are presumed to be acquisitions unless proven to be reserved property⁵⁶⁵. But to better understand what is included and what is excluded from the acquisitions we must know what is included in the reserved property. In relation to the preliminary principle which defines what is included in the acquisition, the reserved property is excluded and where the assets that remain as reserve property

⁵⁶² Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 30.

⁵⁶³ Ibid, 2016, pg. 31.

⁵⁶⁴ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:17.

⁵⁶⁵ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:18, (1), (2).

and the spouses of which are assets acquired before the commencement of the regime; gifts, inheritances and bequests acquired during the regime; assets substituting reserved property; assets that are personal in nature; assets exclusively acquired for a spouse's profession; increases in value of the property included in property below⁵⁶⁶. According to this regime it is no longer important how the assets are acquired because as the income from the reserved property is also considered as an acquisition but according to the commission it is considered as one of the most suitable regimes compared to that of Germany and the optional Franco-German regime because the property which will be divided is smaller⁵⁶⁷. On the other hand, the burden of proving that a property is a reserve property and not included in the acquisition falls on the spouses, while if the spouse fails to prove that a property is a reserve property, it will be considered as acquisition.

Each spouse for the very fact that he remains the owner of his particular property is liable for the debts he has created or arising from his property but also has the right to administer his property independently⁵⁶⁸. An important issue is the treatment of the dissolution of this regime. As provided in most European jurisdictions, this regime ends with the death of the spouse, divorce, annulment of marriage or legal separation, change of property regime⁵⁶⁹. In addition to these ways of ending this regime, these principles also provide for another way of ending this regime, which has to do with the decision of the competent authority based on serious grounds. It would probably be much more practical to determine which are the serious grounds that may lead to the end of this regime but nevertheless this may be related to issues which are not mentioned above but which may be circumstances that aggravate the existence or continuity of this regime. Here can help the other principle where the dates are determined when the regime of participation in acquisition ends where among other situation, it is mentioned that this regime ends in the case of a decision by the competent authority, at the date of the application⁵⁷⁰. Through this definition it is understood that this regime can end even with the request of one of the spouses addressed to the authorized body, where due to some serious grounds it demands that this regime be dissolution.

⁵⁶⁶ Ibid, principles 4:19.

⁵⁶⁷ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 50.

⁵⁶⁸ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:21, 4:23.

⁵⁶⁹ Ibid, 2009 principles 4:24.

⁵⁷⁰ Ibid, 2009, principles 4:25 (d).

Spouses who decide to have their relationship regulated through this regime are interested in knowing how their acquisitions will be divided if the property regime ends. The distribution of acquisitions can also be done through the agreement, as the spouses are free to decide through the agreement for participation in acquisitions⁵⁷¹. Among other things, special attention has been paid to the family home. One of the general principles of the Commission on European Family Law provided that any act of disposition of the family home could be final only with the consent of both spouses, thus giving a special protection to the family home. As for the division of the family home, if the spouses are under the regime of participation in the acquisition, the authorized body has the right to give the right to the family home only to one spouse in case of the interest of the family or depending on the payment of compensation⁵⁷². The determination to give the family home to one of the spouses, or that it should not be divided between the spouses, when this is in the interest of the family, is given to the protection of the spouse who needs the house the most or the spouse who may have custody and trust children. So, unlike the legislation that is in force where the priority is the spouse in need or the spouse who takes care of the children, here more emphasis is placed on the family interest. Another important issue is participation in the net acquisitions. Through this part, it is attempted to divide the acquisitions equally between the spouses. But here the acquisitions become themselves in the net acquisitions, after the debts have been reduced. The division is made equally between the spouses unless one spouse's net acquisitions exceed the value of that of the other, the latter participating in the surplus to the amount of one half⁵⁷³. But what is new in most legislation in Europe is the 4:32 principle or adjustment by the competent authority which has the right to regulate the participation of the spouses or to avoid or change any agreement made between the spouses if any case of extraordinary⁵⁷⁴. Cases of exceptional hardship are intended to be used in limited cases and if we start from the current practices it can be thought that here they can enter for example when the marriage lasts too short or when one spouse with his behavior has caused harm to the other spouse. It is important to have a mechanism through which the state can avoid equal division when this is justified by the occurrence of a circumstance which is considered extraordinary. Perhaps it is

⁵⁷¹ Ibid, 2009, principles 4:29

⁵⁷² Ibid, 2009, principles 4:30

⁵⁷³ Ibid, 2009, principles 4:31

⁵⁷⁴ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 32.

reasonable not to count the extraordinary cases because the limitation would be made only in the counted cases and it can cause harm to the spouses through the equal division. Thus, the authorized body, at its discretion, decides whether or not to equate the acquisition equally.

7.3.2 Community of acquisitions

The other marital regime which is defined by Commission on European Family Law and for which spouses can be determined through the marital agreement is Community of acquisitions. Through this regime, the spouses remain the owners of their personal property, while the property that create from the moment of marriage is considered as community property⁵⁷⁵. In fact the community of acquisition consists of community assets and personal assets. This regime is considered as a regime which is more suitable for spouses who do not have the same income or when one spouse works and the other deals with household chores. This type of regime is considered as marital solidarity, where the property is divided from the beginning not itself in case of divorce, but still through the principles of Commission on European Family Law a balance has been made between the solidarity and independence of each spouse⁵⁷⁶. Since the community of acquisition consists of community property and personal property, it is important to know what assets belong to these categories, so that each spouse at the time of selection of this regime knows how his property will be destined.

Although the principles of Commission on European Family Law have clarified that community property consists of movable and immovable property which is acquired during this regime and which is not personal property still has made the number of assets that fall into the category of community property . This is because this property will be divided between the spouses. Thus community property consists of the income and profits of the spouses regardless of whether they come from the profits of the community property or personal property, all assets acquired jointly or individually by the spouses with the income and profits of the spouses and gifts

⁵⁷⁵ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:34 (1),(2),(3).

⁵⁷⁶ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing, 2016), pg. 33.

or amulets of both spouses, if these belong to the property of the community⁵⁷⁷. While as personal property which remain in the ownership of each spouse include the assets acquired before entering in the regime, gifts, inheritances and bequests acquired during the regime, assets received through replacement, investment or reinvestment, personal assets acquired during the regime and assets which are acquired exclusively for the occupation of the spouse⁵⁷⁸.

Since according to this regime the property of the communities is created, including the income of both spouses, then it is important to determine the obligations deriving from these assets. For this reason, through these principles, it has been determined which obligations are considered as joint obligations for both spouses and which obligations are considered individual. Consequently debts are divided into community debts which must be repaid from the community property and individual debts which must be repaid from the individual property of the spouses. However, in order to know whether a debt is a joint or individual debt, it is necessary to know for what reason that debt was created.

Thus, community debts are considered debts that have been created jointly by both spouses, debts created by one spouse to cover the needs of the family, debts related to the maintenance of families, debts created by one spouse and related to administration and use of community property, debts related to the professional activities of one spouse, debts related to gifts and charities for community property and all debts that cannot be proven to be individual debts⁵⁷⁹. The spouses who are designated for this regime remain the properties of some assets which they administer and dispose of independently. From the very fact that they have special property in ownership, it can happen that from this property liabilities are created.

For this reason, the debts which originate from the special property and which are considered as individual debts are also defined. Individual debts are debts that are repaid from individual property. Individual debts are debts that the spouse had before entering the regime, debts related to gifts, inheritances and charities he acquired during the regime, debts from individual assets, debts of a personal nature and debts created without the consent of the other spouse⁵⁸⁰. It is easy to pay off debts when it is known whose debts they are or for what reason those debts were created.

⁵⁷⁷ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:35.

⁵⁷⁸ Ibid, principles 4:36

⁵⁷⁹ Ibid, Principles 4:40

⁵⁸⁰ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:41.

The principles of Commission on European Family Law have managed to make the separation of community debts and personal debts but there is still a risk that sometimes personal debts will be required to be repaid from the community property and that this risk exists whenever this type of regime exists. To avoid these situations which have been identified in many European countries which have this type of regime Commission on European Family Law has limited the recovery of debts from community property. For this reason in principle 4:43 has determined that personal debts can be recovered from the personal property of the debtor spouse, from the income and profits of the debtor spouse, community assets to the extent of their union with the personal property of the debtor spouse, personal debts in connection with the breach or crime may also be recovered from half the net worth of the community property where the personal property, income and profits of the debtor spouse are insufficient for recovery⁵⁸¹.

Through this definition, a restriction has been made regarding the coverage of debts which are personal and which can be presented as joint debts. This is considered as the hottest point which can also cause problems between spouses. Debt creation in some cases can be created for personal interests which on the other hand are required to be covered by community property. Whereas at the moment when the law determines which are the joint debts which are special are, it is easier for the spouses to differentiate between what is a joint debt and what is not.

An important issue is the administration of assets. As we have clarified above and as it is clarified in the general principles, each spouse administers and dispenses with his / her separate property independently. As far as the administration of community property is concerned, in this case due to the very type of regime, the administration of property is done by each spouse. But even here there are limitations. Since we are dealing with the wealth of the communities which is created by the work and profits of both spouses, they have the right to do the administration but the limits are set for some issues of high importance. For matters of special importance it is required that the administration be made joint⁵⁸². Since we are dealing with the property of the communities which is created by the work and profits of both spouses, they have the right to do the administration but the limits are set for some issues of high importance. For matters of special importance it is required that the administration be made joint⁵⁸³. For matters relating to purchases,

⁵⁸¹ Ibid, 2009, principles 4:43.

⁵⁸² Ibid, 2009, principles 4:44.

⁵⁸³ Ibid, 2009, principles 4:44.

alienation, encumbrances, loans and significant gifts, this is required to be done with the consent of both spouses⁵⁸⁴. Alternatively, if one spouse refuses to do the joint administration of these matters, the other spouse may request from the competent authority the authority to take such legal action⁵⁸⁵. This practice is encountered in most jurisdictions which have provided for the regime of joint property, where the spouses are authorized to administer the joint property, but in matters of disposition of this property the consent of the other spouse is required. The purpose of this is to guarantee equal rights for both spouses to the property to which they contribute.

The property regimes offered in each European jurisdiction are intended to instruct spouses on how to regulate their property relations. While spouses depending on their needs and preferences can decide which property regime to choose. The selection of the property regime aims to offer the spouses solutions in regulating their property relations. They also intend that the property regime they choose does not harm them financially. Knowing that marriage should not be entered into for a certain period of time, but spouses are aware that in different situations it can even come to the end of the marriage. But spouses should also know that at some point they may consider that the property regime they are in may not be appropriate and decide to change the property regime. In any situation if the property regime ends, the division of property must be done. The same will happen in case of community of acquisitions regime.

If spouses have decided that their property regime is a community of acquisitions regime, they need to know in which cases this regime may end. For this reason Commission on European Family Law has foreseen several cases for the termination of this regime and as such are counted the death of the spouse, annulment or divorce or legal separation, change of property regime through agreement, decision of the competent body based on serious reasons for division of property⁵⁸⁶. Such situations are not unknown as in most jurisdictions that have provided for the regime of common property have provided for these cases of termination of this regime. But what is important and which has not been encountered before is the principle Determination and valuation of the community property. Through this principle is determined the time when the determination of the property of the community and the valuation of that property should be done. Thus it is stipulated that community property should be determined at the date of dissolution while

⁵⁸⁴ Ibid, 2009, principles 4:45.

⁵⁸⁵ Ibid, 2009, principles 4:44(2).

⁵⁸⁶ Ibid, 2009, principles 4:49.

community assets should be valued at the date of dissolution⁵⁸⁷. This principle will give the results at the moment of division of property so that the valuation of property is done on the date of dissolution of property and not at the time when it is acquired or at the time when it will be given to the spouses.

Unlike some principles which are a novelty, in the part of the division of community property there is no surprise since even according to the principles of Commission on European Family Law where the division of property can be done by agreement of the spouses or in case of dispute it will be divided according to the equality principles⁵⁸⁸. So, the division will be done in equal parts but in some cases, such as the marital home, or professional property, the competent authority can decide for compensation if it is given to one spouse due to the interests of the family⁵⁸⁹.

Since the basic principle of community property sharing is equality between spouses, the Commission on European Family Law has also provided for exceptional hardship cases. Thus in case of exceptional hardship the competent authority has the possibility to regulate the division of property or even to set aside or change the agreement of the spouses for the division of community property⁵⁹⁰.

⁵⁸⁷ Ibid, 2009, principles 4:52 (1), (2).

⁵⁸⁸ Ibid, 2009, principles 4:55, 4:56.

⁵⁸⁹ Jens M. Scherpe, ed. *European Family Law – Vol III- The Financial Consequences of Divorce in a European Perspective-*, (Cambridge: Edward Elgar Publishing 2016), pg. 35.

⁵⁹⁰ Commission on European Family Law, Principles of European Family Law regarding property relations between spouses, (2009), principles 4:57 (2).

8. Conclusion and recommendations

Marriage is one of the most important institutes of family law not only in North Macedonia and Kosovo but in all countries of the world. Thus, each state in their legislation has paid attention to the regulation of this institute because it creates rights and obligations between spouses and children. The rights and obligations arising from marriage are of a personal and property nature. Our focus is on the property relationships between spouses created by marriage. The regulation of property relations has resulted in different regimes which are encountered in different states. But what they have in common is that they are regulated and spouses must respect them.

The regulation of property relations between spouses is not only done today but it has its origins since the time when marriage began to be regulated in general. For this reason, an analysis of the regulation of property relations has initially been made since the earliest times until today.

This analysis was done to see if the historical development of marital law has influenced the regulation that exists today in our legislations.

Knowing that marriage has been regulated since the first slave-owning states until today, an influence of the past has been noticed in the treatment of property relations between spouses.

This regulation of property relations between spouses has not always led to the advancement of rights and obligations, but from time to time due to the economic and religious influence they have been aggravated.

Rules for the regulation of property relations are found since Babylon, where marriage is concluded in the form of a contract (The Code of Hammurabi). But for the conclusion of this contract the groom had to give to the bride a gift while after the marriage gives another property. The administration of these gifts was done by the husband but he did not have the right to dispose with them, as their purpose was to support the wife if the husband died (articles 127-194, the code of Hammurabi). In the same way, marriage was concluded in Athens. The marriage takes place in the form of a marriage contract where the husband gives a gift to the bride while the bride also brings to the marriage property from the parents' family⁵⁹¹. The administration of this property is done again by the husband but in case of termination of the marriage, the return of gifts is done

⁵⁹¹ Alber Vajs and Ljubica Kandic, *General History of the state and law* (Prishtina: University of Prishtina, 1984), pg. 60.

depending on the reasons for the dissolution of the marriage. These forms of marital contracts are found in the first slave-owner states, but which have had an impact on the later development of marital law. Here it is seen that there was a property relationship between the spouses and since then a differentiation has been made between the administration and disposition of the property. The same exists today where the administration of the property of the spouses is done by the spouses but the disposition of the property is done only with the consent of both spouses. The essential difference is that spouses are now equal in terms of property rights and obligations which has not existed in the past.

Roman law also has an influence on the regulation of property relations between spouses. The impact of this right in today's relations is indisputable, knowing that Roman law is considered as an essential right that has influenced the creation of advanced law today. Initially, according to Roman law, a woman was a person who was always under the power of the father or under the power of the father. But her position began to improve during the classical and postclassical period when she gained the status of a civilian. The regulation of property relations between spouses began to be important in the period when the conditions for the marriage are required for a valid marriage. The form of marriage was one of the conditions required for marriage and one of the forms was *usus*⁵⁹². The *usus* form of marriage prevented the wife from coming under the authority of the husband while through the Edicts of Augustus and Claudius, the husband could administer the wife's property but could not charge it as guarantees to fulfill the obligations created by him. This advancement of the position of women by enabling her to manage a part of her wealth made her not have the right to inherit the wealth of the husband's family. A more genuine adjustment of the property relations between the spouses is encountered even in the period of the dissolution of large families in Rome and thus the premarital gifts and dowry for the marriage became obligatory. A major turning point was made through the institute of restitution of the dowry in the event of the termination of the marriage⁵⁹³. This is considered as one of the points where the dowry is considered as one of the property rights that she had in the marital property. The purpose of these gifts was to improve marital life but it was still the man who administered these assets. In case of death or divorce, the dowry is returned to the bride's family, while in case of divorce due to the husband's fault, the premarital gift and dowry remained with the wife.

⁵⁹² Ivo Puhan, *Roman Law* (Prishtina: University of Prishtina, 1972), pg. 183.

⁵⁹³ *Ibid.*, pg. 189.

If such a development continued, property rights would probably be further advanced, but the same did not happen in canon law. This is because from the 11th century marriage was placed under the protection of the church and as such was regulated according to church norms. In order to give importance to marriage, according to church norms, divorce was prohibited, as it was considered that marriage is a permanent relationship which is not resolved by the will of the people but only by God which derived from the *Codex Iuris Canonici*. The sovereignty of the Church extended to many Western and Central European states with the ideology that the state is a creature of God and considered marriage as such. Marriage is considered a spiritual bond precisely because of the sacrament, and this character of it has made the property issues in the family not to be discussed, as every family property is considered common and no member of the family has the right to seek separation (The Code of Canon law). The division of family property would lead to the division of the family which was prohibited under canon law. This regulation of property relations between spouses under canon law, although in order to protect marriage as one of the most important institutions of society, did not advance the regulation of property law as it had begun in Roman law. This right influenced by Roman law has given a religious character to marriage and has differentiated it from the legal rules issued by the state.

Another approach from canon law to marital law is given by sharia law or Islamic law. This right, which began to develop in the 13th century from the Ottoman Empire, has its source in the religious book, that of the Qur'an. The flaw of Islamic rules was the permissibility of polygamy, but on the other hand women's property rights were given priority. The prenuptial gift which originated in Roman law was not considered as the purchase price of the wife, but was considered as the separated property of the wife⁵⁹⁴. Also, the dowry brought by the wife to the marriage was not administered by the husband but remained under the wife's own management. According to the law of Shari'ah, divorce, even though it was considered one of the most hated actions of the Prophet, the Messenger of Allah, was still allowed because through it chose unwanted marriages. According to the Qur'an, the holy Islamic book, from which the rules for the regulation of marriage are derived, the term joint property is not used since each spouse remained the owner of his property. In fact, we can say here that the property regimes of separate assets are also derived. But unlike these regimes that exist today in most European countries, the husband is the spouse who

⁵⁹⁴ Majid Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints", *The American Journal of Comparative Law*, Vol. 26, No. 2, (1978). pg.213.

is charged with all the expenses of meeting the family needs while the wife was not obliged to spend her personal wealth for the needs of the family. But on the other hand the wife inherited twice as much as the husband after she was released to cover the family expenses (Qur'an 67:15).

Sharia law had regulated intimacy between husband and wife and there were rules for the return of gifts in case of divorce and this depended on how long the marriage had lasted. But what is important was that even after the divorce the husband was obliged to support his ex-wife if she needed maintenance.

Beyond the influences of canon law on the one hand and sharia law on the other, Albanian customary law had a different direction of the development of marriage law in general and property law between spouses in particular. Since our focus is the development of property law between spouses in North Macedonia and Kosovo, we cannot deny the influence of Albanian customary law, which developed for a long time in the Albanian and Macedonian fields. The development of Albanian customary law was characterized by the canon of Leke Dukagjini, a summary of customary rights developed in different territories as a reaction to the Ottoman and Serbian invaders. But despite the fact that this canon aimed at unifying the right which was applied by Albanians, it was characterized by a denial of women's right to property. According to this Canon, a woman was considered a person just to do the housework and give birth to children. This rightful approach denied women the right to inherit and, moreover, did not even have any right to marital property. The woman was considered only as a person who had only domestic obligations but no rights. She only enjoyed the right of maintenance from her husband. But beyond this discrimination against women, this perception still exists in our society. Despite the fact that there are already equal rights and obligations between the spouses, in practice the opposite happens. Many women do not claim property in the name of their contribution to the family, due to the influence of Albanian customary law. The influence of the historical development, especially of the customary law is seen in the researches, where only in the Basic Court of Prishtina during the years 2010-2020 only 124 requests were made for the division of the joint property, which turns out to be a very small number compared to the number of divorces⁵⁹⁵. The advancement of women's rights made through international conventions has not yet achieved their full awareness.

⁵⁹⁵ Inject, *Legal research on division of common property and financial maintenance*, 22 June 2021. <https://inject-ks.org/> (accessed 23 June, 2021)

Looking at the long historical development of marital law and the way in which property relations between spouses are regulated, we can conclude that despite the fact that property rights and obligations between spouses today are equal, still the historical aspect has had an impact on today's legislative regulation. Such a conclusion is also found in the work of Paul H. Dué , where it was found that the characteristics of the form of marital union were found and was present in ancient Egypt, Greece and Babylon and especially in the Code of Hammurabi⁵⁹⁶.

Marriage contracts encountered in the slave-owning states, gifts and dowries which existed in Roman law and property rights in canon law and sharia are still encountered today in our legislation but with an advancement in terms of equality. The property regimes that we encounter today in the legislations of North Macedonia and Kosovo have historically existed before but in a different dimension. Although legislation has been created in the spirit of international conventions on equality between men and women, the norms that have governed property relations between spouses throughout history have left their mark on judicial practice, as evidenced by the very small number of registered women, as owners or a very small number of women who seek to share the joint property of the spouses. This is because they still believe that women do not have the right to joint property or their contribution to household chores is not considered as a contribution made to the increase of marital property.

The most important part of this paper is the analysis of the legislation regarding the regulation of property relations between spouses in Kosovo and Macedonia. Initially this analysis was done in Kosovo and then in Macedonia. Kosovo has regulated property relations between spouses through the Law on Family. This law is considered to be in the spirit of international conventions which have been ratified by the Assembly of the Republic of Kosovo such as The Universal Declaration of Human Rights, European Convention on Human Rights, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and many agreements other which it is obliged to respect.

As a result of the marriage, rights and obligations of a personal and property nature are created between the spouses. In the group of personal rights and duties, the legislation of Kosovo has enumerated cohabitation, marital surname, place of residence, family economy and choice of profession (article 42-44, Family law of Kosovo). While in terms of contribution to the

⁵⁹⁶ Paul H. Dué, "Origin and Historical Development of the Community Property System", *Louisiana Law Review*, Volume 25, Article 17. (1964).

maintenance of the family, each spouse contributes in proportion to his ability. This definition of Kosovo legislation is not the same as that of European countries as this obligation is categorized in the group of property and personal rights and obligations. Despite the categorization of this obligation, a solution has been provided by Commission on European Family Law (principles 4: 4), where each spouse, regardless of property regime, is obliged to contribute to the fulfillment of family needs, especially those related to the upbringing and education of children. For this reason, it is recommended that the principle derived from Commission on European Family Law to be provided in the legislation of Kosovo in this way “*This contribution is made depending on the abilities of the spouse, but it is important that if one spouse does not fulfill this obligation, the other spouse has the right to oblige the spouse to fulfill this obligation by the competent authority*”.

Property relations which are created as a result of marriage are regulated by Article 45-57 of the Law on Family in Kosovo. According to the legal definition, the conclusion of the marriage, the spouses enter into the legal property regime, concluding that in Kosovo only one property regime is envisaged. We have encountered the same regime in Albania and Croatia but unlike Kosovo it also offers the contracted regime. In Kosovo, this regime makes the differentiation of the spouses' property into a separate and joint one (article 45, family law of Kosovo). In principle, the determination of property in separate or joint property is based on the time when the property was acquired, before or after the marriage. Thus, any property that the spouses had or acquired before the marriage is a separated property, but also the income generated from this property is considered a separated property. This category also includes assets that spouses acquire during marriage through gift, inheritance or any other legal form of wealth acquisition, works of art, intellectual work or intellectual property with which the spouse freely administers and dispenses (article 46, Family law of Kosovo).

But the law lacks explanations regarding the acceptance of gifts, especially in situations when they are done for one spouse but in order to be used by both spouses. In the commentary of Family Law is an interpretation which is based on the solutions provided in other legislations in Europe say that “*if the donated items do not represent great value compared to joint ownership even though they have been donated to one spouse but are items for joint use this property should be considered as joint property. And the opposite, if one spouse has received a gift which has a great value in relation to the joint property, even if it is intended for the joint use of both spouses, it should be evidenced as a separate property*”. This legal gap will have to be filled through the legal

solution as proposed by the commentator of the law. The same solution was made by Commission on European Family Law (principle 4:35) where it is specified that gifts or bequests that are given to both spouses or are given for the marital union to be considered as community property. An ambiguity has also been identified in other legal forms of gaining separated property. *Here it is recommended to specify other legal forms of gaining separated property as in practice we may have uncertainties in the identification of these forms.*

Uncertainty regarding the definition of separated property we also have to the issue of intellectual property works. The law stipulates that each work of art or intellectual property will be a separate property but on the other hand for the benefits realized from this property are not determined whether it will be joint or separate property. *For this reason in this part the law will have to be clearer in determining that benefits of intellectual property will be. It would be suggested to follow the experience of the Legislation in Croatia where it is determined that the income from intellectual property is the joint property of the spouses (article 36, Family act of Croatia).*

According to the legal regime in which the spouses enter at the moment of marriage, the manner of creating the joint property is also determined. This property is created with the joint contribution of both spouses, which includes the income of the spouses and the help that the spouses provide with household chores, child care, property maintenance and any other form of work and cooperation between the spouses (article 47, law on amending and supplementing the family law of Kosovo). While an interpretation that has been made in the Commentary but that is not defined in the law is that the property which is acquired by spouses who are not living together and they have informed each other will be considered as separated property despite the fact that the marriage has not yet been dissolved (article 47 of Commentary of family law of Kosovo). Such a definition is also provided in the legislation of Poland, Croatia when it is specified that the joint property is the property which is acquired during the married life. *For this reason, the law should stipulate in the legal provisions that any property acquired during the time that the spouses are not living together and are aware of this fact should be considered as a separate property.*

There is also a legal gap in gaining common property through gambling. The law has specified that the property winning through games is considered a common property but it should be differentiated with what property is invested in that game (article 47, Family law of Kosovo). *If the spouse has used his / her separated property in games and has won then there will be*

problems in determining the ownership of the wealth gained through games. Croatia has also determined that property acquired through gambling is considered joint property (article 36, Family act of Croatia).

An issue which causes confusion is also the issue of registration of joint property. The joint property is considered to be registered in the name of both spouses, regardless of whether it is registered in the name of only one spouse (Article 50, Family law of Kosovo). This designation was intended to protect the interests of women who are rarely listed as joint owners of property. Another reason is that with the joint property they administer and dispose both spouses equally and to enable this the law has provided the assumption that any joint property regardless of the fact in whose name it is registered will be considered to be in the name of both spouses. But this is causing confusion in public registers, especially in relation to third parties, because they cannot know exactly whether it is the joint property or separate property of the registered owner. Even worse is the situation when the spouses have not entered into marriage but only cohabit but have created joint property and have registered it only in the name of one spouse. *For this reason, it is suggested that the registration of the joint property to be done in the name of both spouses and this should become mandatory for the spouses.* So far, approximate measures for exemption from property tax have been applied for spouses who register the joint property in the name of both spouses, but are still in a low degree of progress (administrative instruction nr.04/2021).

Joint property due to the fact that it is joint, it is assumed that the spouses do not know their shares in this property. For this reason they have the right to make the division of this property at any time through an agreement which must be concluded in the form of a notarial deed. But in cases when no agreement can be made, the separation can be done by the court at the request of the spouses (article 53 of Family Law of Kosovo). The most serious and which is considered challenging by the court is the division of property in case of disputes between spouses. Cases of division of property by the court are few in court practice and their duration is evident. From the found data this number varies around 124 requests for a period of 10 years in the Municipality of Prishtina, as one of the largest municipalities in Kosovo and with only 17 cases resolved⁵⁹⁷. The evaluation of the contribution of the spouses in the creation of the joint property is done also

⁵⁹⁷ Inject, *Legal research on division of common property and financial maintenance*, 22 June 2021. <https://inject-ks.org/> (accessed 23 June, 2021)

through the evaluation of the assets they have but also based on the evaluation of the financial experts who make the evaluation of the contribution in the household affairs⁵⁹⁸.

In cases where the spouse has opposed the division equally, then the financial expert evaluates the contribution of each spouse and proposes to the court the division of the joint property. But again this is considered unreasonable because injustices are being identified in the division of joint property and this comes as a result of legal shortcomings and the failure to provide in law a financial expectation which will assess the contribution of spouses. If they take the experiences of other European countries, such as Germany, Austria, Belgium, Poland, Bulgaria, Albania, the division of the joint property is done equally unless one spouse proves that he / she has contributed significantly more in the creation of that property. . But in the division of property, the marital house, which has been given a special protection, is always excluded. Even in the case of Kosovo, if the marital home were to be given special protection and other rules were issued for the division of the marital home, the division of the joint property would be easier.

Legal shortcomings have been identified in the regulation of marital home. Where, unlike European jurisdictions in Kosovo, this issue is regulated by only one article, specifying that in case of dispute the marital home will be given to the spouse taking into account the needs of the spouse and children. But this legal solution is not seen as suitable for Kosovar society, when it is known that the largest number of families live in family communities, where the husband's parents are included, and where in most cases the parents are the owners of the house. And in this case the court takes this fact as decisive for the appointment of child custody. Cases in practice show that the custody of children is entrusted to the parent who owns the house, while the interests of the children are not decisive in deciding who should own the marital apartment. *Here it would be good to follow the legal provisions set in Bulgaria, Sweden, France and other country, where the parent to whom the children are entrusted will also have the marital home until the age of majority, even in cases when the marital home is registered in the name of the spouse's parents.* So, even when the marital home is a separated property of one spouse, it can be given for use to the spouse who needs it or has been given custody of the children. Terms of use or rent can be given here as in Bulgaria, Albania, Poland and other European country.

But above all, *the marriage home must be given a special protection and it must be determined more precisely to whom this house will belong if there is a dispute between the spouses.*

⁵⁹⁸ Ibid, 2021.

Not only to take in considerations the needs of the children but also of the spouse who needs this house be taken into account. To determine the time limits until when the spouse who is given the married house in use has the right to use it. While the most important thing is that the marital home should not determine who will be given custody of the children, but custody of the children should determine who will be given the marital home. Also determine the time when the right to use the marital home ends, such as when the children reach the age of majority, with the remarriage of the spouse to whom the house has been given, or voluntarily to the spouse to whom the marital home has been given.

Property relations between spouses are also regulated in North Macedonia. The regulation of these relations dates from 1946 when the Constitution equalized the rights of men and women in property relations, from which the legal property regime was derived, which differentiated between the separate and joint property of the spouses. A major turning point came in 2002 when property relations between spouses were introduced into the Law on Property and Other Property Rights due to their property character. This reform was not left without criticism but on the other hand there is no jurisdiction in Europe that has made the separation of the regulation of property relations from other relations between spouses. *It is therefore recommended that property relations be placed under the umbrella of family law as they are the result of marriage, thus, to unite all the legal norms that refer to the relations between the spouses.*

Even the Macedonian legislation has provided only the legal property regime in the case of marriage by not allowing the spouses to enter into a marriage contract. The moment of marriage determines which assets are separate assets and which will be the joint assets of the spouses (art.67, Law on property and other real rights). More specifically, the way of gaining these assets leads to the division of assets. A different definition from that of the family law in Kosovo is made by the legislation of northern Macedonia. Here it is defined that the separated property is any property that the spouses have created before the marriage or have acquired during the marriage but not on the basis of work. Furthermore, it has been determined that any property acquired through legal work without compensation during the marriage will remain the separated property of the spouse. But the dilemma still remains the profit of the gift that is made for one spouse but the purpose of the gift is to meet the needs of both spouses. Unlike the legislation in Kosovo, which could have been resolved through the Family Law Commentary, in North Macedonia it has been resolved through practical case. Thus it is determined that gifts given to one spouse but intended to meet

the needs of both spouses will be considered joint property. But here another parallel is raised by defining the value of the item which is acquired, determining that if the value of the gift is proportionally greater than the value of the common property and if it is used for the needs of only the winning spouse will be considered joint property. For this reason and the dilemmas that arise in resolving these cases, this issue will have to be regulated by law, stipulating that gifts that are given to one spouse but are intended to meet the needs of married life will be remain a separated property or joint property of spouses. Here, *they can consider the solution offered by Commission on European Family Law (principle 4:35) where it is specified that gifts or bequests that are given to both spouses or are given for the marital union to be considered as community property.*

Copyright is also considered a separated property. A solution which was made through the Copyright Law was appropriate by stipulating that copyright is the separate property of the spouse while the income generated by the copyright will be considered as joint property (art.8 of Copyright law of North Macedonia). This solution would be more appropriate to be incorporated in the part of the provisions that regulate the property relations in the spouses. While a legal shortcoming which has been identified is the issue of industrial property. *Works created through industrial property are not foreseen whether they are common or separate property. It is therefore recommended that all issues arising from intellectual property be regulated by provisions, including both copyright and industrial property. The same solution should be made in the legislation in Kosovo, where there are no provisions to define ownership in the benefits created by industrial ownership.*

Regarding the joint property, the legislation in Macedonia has determined that as the joint property are all assets that the spouses acquire during the married life (art.67 of Law on Property and other real right). This legislation has defined more precisely how the separate property is created while all other assets acquired during the marriage will fall into the category of joint property. *But even here it will be necessary to specify more specifically which assets are the joint assets of the spouses, including the income from their personal activity, from the saving made on the fruits and the income from the personal assets amounts collected in an account or an employee pension fund for either of the spouses*

This way of defining has made that any kind of contribution, whether monetary or contribution about household chores, be considered the joint property of the spouses. While the legal definition that the joint property is created during the marriage has left dilemmas in the cases

when the cohabitation has actually ended while the civil marriage has not been resolved yet. For this reason, the practical case has determined that the joint property is created only during the time when the couple are living together, while in order to determine the time of the end of the cohabitation, the spouses are obliged to prove it. *For this reason, the law should be clarified regarding the second criterion, defining cohabitation as a criterion for the duration of marriage.*

The same problem as in Kosovo is in North Macedonia. Joint property even if it is not registered in the name of both spouses is considered to be registered as such. This is done to prevent the disposition of joint property by one spouse without the consent of the other spouse. But in practice this is a problem, so an obligation of the spouses to register the joint property on behalf of both spouses will solve the problem of free disposal of the joint property and on the other hand will ensure the spouses that their property does not will be alienated in any way without their consent *This may also take into account the possibility that legal action relating to the disposition of property may be refused by the other spouse who has not given consent to the conclusion of those legal action. Or if consent has not been given without any reason to ask the competent authorities to take the decision on the disposition of the joint property by the other spouse.* Such a solution has also been made by the Commission on European Family Law (principle 4:5).

The division of joint property can be done by agreement and by court decision. *Regarding the division of property by agreement, the legislation of North Macedonia has made a good solution which can be followed by Kosovo in terms of mortgaging items which are divided by the spouses by agreement.* So, if the spouses agree on the division of the joint property and one receives the property and is obliged to compensate the other spouse half of the value, in this case the spouse who will receive the compensation has the right of pledge on the other property. If the compensation is not executed, then the spouse has the right to execute it by force.

An important issue which needs to be clarified is the division of the joint property of the spouses. Apart from the fact that the division can be done through a notarial deed when there is no dispute between the spouses and the basic principle is that the joint property should be divided in equal parts, an important issue is the division of items which serve for the children. The law stipulates that items used exclusively for children must be given to the parent to whom the child has been placed in care. Also items that are obviously intended for children should be given to the custody parent. *In this case we may have dilemmas as to which items are the items that belong to the children and which are obviously intended for the interest of the children.*

The experiences of other European countries vary between several types of property regimes. These regimes may be similar in nature but the mode of regulation differs from one another. But above all, a deeper analysis has revealed some advantages which can be used by North Macedonia and Kosovo to fill the legal gaps they have in the legislation or to anticipate them in the Civil Codes they have in process. A list of items that should belong to the parent to whom child custody has been assigned would solve the problem which is define in generally in law.

In Austria there is another system of regulation of property relations between spouses as the legal regime is the regime of separate property. So, based on Civil Code of Austria, if the spouses have not contracted the other regime, they will remain the owners of their property throughout the existence of this regime. But even though they are the owners of their separated property there is an exception as far as the family home is concerned. *If the marital home is the separated property of one spouse, he/she cannot freely dispose of that house if it causes harm to the other spouse.* This protects the interests of the spouse who cannot contribute to the property through income but through household chores.

Belgium differs from Austria because the community regime is a legal regime. Based on Civil Code of Belgium the regime of separate assets and the universal community of assets remain regimes which the spouses can choose through the marriage contract. Joint property is considered the property acquired after the marriage and that acquired during the marriage through gift, inheritance and items in daily use. Even in Belgium, spouses cannot freely administer and dispose of the marriage house even if it is the personal property of one spouse. This practice is very necessary to be included in the legislation of Kosovo and North Macedonia, through which it is impossible for the owner spouse to dispose of the marital house, through which harm can be caused to the other spouse. Based on statistical data where in North Macedonia and Kosovo the largest number of owners are men this approach will mostly contribute to the well-being of the wife by limiting the right of disposition by the husband regarding the marital home.

Germany has another regulation of property regimes as the legal regime is the community of accrued gains regime. According to Civil code of Germany this regime, does not create joint property, but the earned profits will be divided equally at the moment of the end of this regime. The term accrued gains in German legislation is used to differentiate between initial property and property at the end of this regime. Thus, the spouses remain the owners of their assets which they administer independently but their disposition is limited as it must be done with the consent of the

other spouse. But in cases when the spouse does not give consent without any reason then for the disposition of the separated property the spouse can ask to get it from the court. The second regime that can be chosen through the marriage contract is the community property regime where the spouses create their joint property but without the need for any legal transaction. Based on Civil code of Germany there is also a category of items which is also provided according to Commission on European Family Law (principle 4:19), the reserved property, where spouses can keep some items under their administration and disposition which differs from the separated property because the administration and disposition of them can be done without being obliged to do it in the interest of the common property. Even in Germany, spouses can have separate property regimes, but as far as the marriage house is concerned, they cannot dispose it freely, despite the fact that it may be a separate property. In case of division of property, it can be left to the non-owner spouse if he / she needs a house or taking into account the interests of the children.

France, despite the fact that it has provided in its Civil code three property regimes, has determined that *each spouse is obliged to contribute to the needs of the family and the upbringing of children, and if this is not done by one spouse, the other spouse has the right to ask the court obliges the spouse to fulfill this obligation. This definition is also provided by Commission on European Family Law (principles 4: 4) as such, it is recommended that Northern Macedonia and Kosovo also provide as a principle in regulating property relations between spouses.* Even in France community of property regime is a legal regime according to this regime, as assets of the community are considered all the acquisitions that the spouses make together or separately during the marriage, including the income from their personal activity, from the saving made on the fruits and the income from the personal assets. While through the marriage contract they can be determinate for conventional regimes through which they can create the community of movables and acquisition, exclude the rules of administration, that a spouse may be entitled to acquire property on condition of compensation, that the spouses can share wealth equally or to have a universal wealth. In the regime of separate assets, the spouses remain the owners of their assets while on the other hand they are obliged to contribute to the family expenses. While a slightly more special regime is the regime of separation in acquisitions. Realistically during the marriage the regime of separate property applies to them. But in case of dissolution of this regime each spouse is entitled to participate by halves in value in the net acquisitions found in the patrimony

of the other, and estimated owing to the double appraisal of the original patrimony and of the final patrimony.

In Poland there are three property regimes where the community regime is a legal regime. As in Kosovo and North Macedonia, spouses under this regime from the moment of marriage begin to create joint property. This property consists of the assets they acquire during their married life but more specifically consists of remuneration received for work and income from other gainful activities of each of the spouses; income from joint property as well as the personal property of each of the spouses; amounts collected in an account or an employee pension fund for either of the spouses. Here also made a more detailed explanation of the separated property which includes property acquired before the statutory joint property regime arose; property acquired by inheritance or donation, unless the bequeathed or donor decides otherwise; joint property rights that are fully covered under separate provisions; property that is used exclusively to satisfy the personal needs of one of the spouses; rights that cannot be transferred and may only be exercised by one person; items received as damages for bodily injury or triggering a health disorder, or as compensation for harm suffered; this does not include disability benefit due to an injured spouse through a partial or total loss of earning ability or an increase in needs or a decrease in prospects for the future; debts concerning remuneration or other gainful activities by one of the spouses; property received as a prize for individual achievement by one of the spouses; the copyrights and related rights, industrial property rights and other rights of a creator; property acquired in exchange for elements of personal assets, unless particular provisions state otherwise.

Legislation in Kosovo and North Macedonia lacks a definition of amounts collected in an account or an employee pension fund for either of the spouses, which according to Polish legislation are defined as common property. *Such a solution would be recommended for Kosovo and Macedonia as well, defining these assets to be categorized as common assets.* Also issues related to inheritance or gifts which according to the legislation in Poland are separated property unless the testator or the donor has determined otherwise. So, if the testator or the donor has determined that the inheritance or gift is the joint property of the spouse to be categorized as joint property. *This solution would help categorize the inheritance or gift as a separate or common property depending on the will of their giver.*

Also in the legislation of Kosovo and North Macedonia are missing provisions for the determination of assets regarding items received as damages for bodily injury or triggering a health

disorder, or as compensation for harm suffered. *For this reason it is recommended that these issues be resolved as well.* A slightly different arrangement exists on the issue of joint property management. Legislation in Poland has provided that each spouse is free to manage the joint property but has provided four restrictions. These restrictions relate to the obligation of the spouse to notify the other spouse for management, the spouse's right to oppose the other spouse's legal actions, the inability of the spouse to use the joint property for business, and the spouse's obligation to dispose of the property with the consent of the other spouse. There are same restrictions in the legislation of Kosovo and North Macedonia except that the spouses are prohibited from using the joint property for business purposes. *This solution contributes to the preservation of the common property and especially to the well-being of the family and children.* But what is most important has to do with the division of the marital home. *Legislation in Poland has provided that if spouses cannot reach an agreement on the separation of the family home, they can ask the court to remove one spouse from the family home if the same has caused domestic violence or made life unbearable.* This solution is considered very necessary in Kosovo and North Macedonia, making family life safer, but on the other hand to remove the abuser from the house regardless of whether the house will be owned by him. This is because cases of domestic violence have increased and as a result very often it has had the victim to leave home even though the divorce has come as a result of violence or unbearable life caused by the perpetrator.

Unlike the aforementioned countries, Croatia has provided in its legislation only two property regimes, the legal and the contracted one. The legal regime is a regime which makes the differentiation of the joint and separate property of the spouses by determining which assets belong to each category. Similar to Kosovo and Macedonia, joint property is created from the moment of marriage, but cohabitation is also defined as a criterion. *This means that joint property cannot be created if the spouses are not living together. This criterion should be clarified in Kosovo and North Macedonia as well.* The management of this property can also be ordinary and extraordinary by determining which actions are considered ordinary and which are extraordinary and for which the consent of both spouses is required. Otherwise, if extraordinary actions are taken without the consent of the other spouse, the latter has the right to compensation for the actions taken without his consent. Croatian legislation also stipulates that the division of joint property can be done by agreement or by court decision but based on the principle of equality, while the division can be done through the sale of the thing, the division of profit or physically.

As in all other states, the marital home is given special protection, where the court is authorized that at the request of one spouse the marital home is given for use to the spouse who has custody of the children until the end of the division of property. After the completion of this procedure, the court is authorized to give the right to life to the parent who takes care of the children, but on the other hand he is obliged to pay rent. The court is obliged to always decide in favor of the child and his interests.

What sets Bulgaria apart from some European countries is the registration of the property regime. Since spouses have the opportunity to choose their preferred regime from the three offered regimes, this regime must be registered in the Registration Center. This enables third parties to know the rights and obligations that spouses have in a concrete property. *This practice will be seen as favorable for Kosovo and Macedonia, where all couples would have to register their property regime, where on the one hand the principle of publicity will be achieved and on the other hand it will be easier to extract statistics for property regimes in these two Republics.*

Based on Family law of Bulgaria, the administration and disposition of immovable property of the joint property is done freely but on the other hand has set time limits (6 months-3 years) to oppose the legal actions of one spouse who has taken inappropriate legal actions for the other spouse. In fact, this way of opposing can cause confusion in relation to third parties and for this reason a registration of joint property in the name of both spouses will make it impossible to carry out legal actions without the consent of both spouses. But also the right to oppose the legal actions must be provided in the legislation in order to have legal mechanisms to protect the common property of the spouse. *The novelty of the Bulgarian legislation, which would be very suitable for Macedonia and Kosovo as well, is the division of the family home. in the case of division of joint property it is stipulated that the marital home (even if it is the separate property of one spouse) can be given to the other spouse if he has no other private property and taking into account the interests of the family and children. But there is another exception when the house is owned by relatives of one spouse. Then the marriage house will be given for use to the spouse who has and has parental care for a period of 1 year.* In cases when the legal property regime ends, the joint property is divided equally but exceptionally one spouse can receive a larger share if he / she has been given parental care or when his / her contribution is significantly higher than that of the other spouse.

Two property regimes are also foreseen according to the legislation in Albania, namely the legal regime and the contracted one (Family code of Albania). The legal regime makes the difference between joint and separate property, but unlike other states, joint property can also be created through commercial activities that are created during marriage. It is also specified here that even if business is the separated property of one spouse, the benefits realized from this activity (done by both spouses) during married life and the increase of productivity will be considered joint property (art.74 of family Code of Albania). While as separated property are assets that one spouse had in partnership with other persons or was the holder of a real right of use, the assets that spouses acquire during marriage through inheritance, gift or legacy unless they were intended in favor of community, assets for personal use or and assets acquired as an accessory of personal property, tools necessary for the exercise of the profession other than those for the administration of commercial activity, assets acquired from the compensation of personal damage with the exception of income received from the pension earned due to full or partial inability to work, assets acquired from the alienation of own assets and their exchange. *The recommendation made based on the legislation of Poland is applicable also in the Republic of Albania in terms of income generated from compensation for personal damages with the exception of income received from the pension earned due to full or partial inability to work, assets acquired from the alienation of own.*

What distinguishes the legislation in Albania is the issue of division of joint property which spouses do not have the right to do at any time but only in case of divorce, death of one spouse or unless the administration of this property endangers the well-being of the family or when a spouse does not contribute proportionately to meeting the needs of the family.

Special protection in the Albanian Legislation is given to the marital home where according to the Family Code if the division of the house is impossible then it will be given for use to the spouse who needs it most, taking into account the interests of children even in cases where it is the separated property of one spouse, or even in cases where a professional cab is installed there and its removal is costly. In these cases the court sets the time of extension of the right of use by the non-owner spouse and the rent to be paid.

While the most important issue which is recommended to be incorporated in the legislation of Kosovo and Macedonia are the contracted regime. From the analysis made in some countries of Europe and that of the USA it has resulted that the marriage contracts which include premarital contracts and the marital contract is necessary to be introduced as a property regime. Premarital

and marital contracts are found in all legislations but they are not yet applicable in North Macedonia and Kosovo, making it impossible for spouses to independently and autonomously regulate their property relations.

Pros and contra ideas for the application of these contracts have not influenced any state to remove them from their legislation but on the other hand Commission on European Family Law itself has recommended that these contracts be included as a property regime for spouses. All European countries, in addition to the legal regime, also offer the contracted regime, leaving the spouses the opportunity to choose another property regime through this contract.

Through the marriage contract the spouses in Austria can choose the property regime of the community, but in this case they can decide that the community property becomes the property for life and death. Even in Belgium, the change of legal regime can be done through the marriage contract, in the form of a notarial deed and which must be registered. Through this contract, the spouses can decide between the regime of the separated property or the universal community property. In Germany, spouses through a marriage contract can decide between the regime of separate assets and the community, since the legal regime in this country is the regime of community of accrued gains. France through the marriage contract enables the spouses to decide on their property regime. Through the marriage contract can be defined for conventional regime, in the regime of separate assets, regime of separation in acquisitions. Poland also has three regimes where one of them is legal while through the marriage contract the spouses can be determined for separate property and compulsory regimes. While Croatia and Albania have foreseen only two regimes, legal and contracted. The contracted regime enables the spouses to regulate according to their free autonomy their property relations but this contract should not be used for the interests of only one spouse, or be done in contradiction with the constitutional and moral principles. More precisely through the marriage contract the spouses can change the legal union by agreement and can agree that the union includes movable property before the marriage and profits from personal property during the marriage, change the rules regarding the administration, have unequal shares, this between them universal community (art. 108 of Family Code of Albania).

Marriage contracts are considered as one of the biggest reforms made in family law but despite the criticism that these are considered as a mechanism to increase divorce are still considered as a mechanism to regulate property relations between spouses. In order to give the desired effect, these contracts must be concluded as provided by law so that they do not become a

mechanism to benefit only one spouse. . In the way they have it most appropriate. This can be achieved by taking into account the principles of Commission on European Family Law that spouses be equal, contribute equally to meeting the needs of the family and children, and pay attention to the issue of family home regulation.

The termination of this contract can be done only in case of death of one of the spouses, in case of divorce, with the will of both spouses or in case the fiancés do not enter into marriage (in cases of prenuptial contract). The conditions for concluding this contract can be divided into general conditions (defined by the laws on obligatory relations) and the specific conditions to be determined through the Civil Code or the law on family.

Although these contracts are considered as a preparation for divorce but on the other hand are being considered as a tool that spouses decide their future assets through determined the affiliation of the assets that they will create in the future. In the United States, marriage contracts are considered as an instrument that is solving the property problems of spouses, especially now when about 50% of marriages are ending in divorce. This trend of increasing divorce is present in North Macedonia and Kosovo and for this reason it is recommended that this institute be regulated and allowed in these countries as well. Through marriage contracts, spouses can decide on their property regime, determine the list of assets that will be left to the husband, wife, determine the gifts they will receive and other issues related to the administration and disposition of assets. if they take into account the USA experience, through premarital dispute the future spouses can decide the manner of giving alimony, to determine who will administer the property during the marriage, and also to determine about the rights they will have in the marital home and in some cases to determine that the law which country will apply if there is a dispute between them. Marriage contracts have the same function, but with the difference that this ties after the spouses are married and want to change the legal property regime. In the USA these contracts can be entered into for various purposes ranging from share or exchange any joint property which they have or will acquire in the future, as they wish, property interests from community property to be turned into separate property. These contracts should be concluded keeping in mind 5 principles. These agreements must be made in writing, must be done voluntarily, full and fair disclosure of relevant information at the time of execution, not be unfavorable for one party, and be signed by both parties (Texas Family Code). But regardless of how these contracts are regulated in other countries, a proper adjustment will be made if the principles which are given by Commission on

European Family Law are followed. These principles will not only enable the contracted regime to be included in the legislations of Kosovo and North Macedonia, but on the other hand will enable this regime to be in line with European family law. According to the Commission on European Family Law, the marriage property agreement is intended for the future spouses to be determined for a certain property regime or for the spouses to change the regime in which they are. These agreements must be concluded before a notary or a legal professional, be dated and signed by both spouses.

Through marriage contracts, spouses are enabled to protect their assets from the other spouse's creditors, to protect their assets from the actions of the other spouse, to have complete independence in terms of the management and disposition of their assets and also to be protected even third parties. Spouses freely express their will and regulate their property relations without having to go to court to determine the shares in their property. Countries such as Kosovo and North Macedonia are instructed in their legislation to determine the content of these contracts, ie to determine, for example in Albania, on what issues spouses can agree on a contract. Such restrictions have also been introduced by the Commission on European Family Law that spouses should be equal in terms of rights and obligations, should contribute equally to meeting the needs of the family while stricter limits should be introduced in the case of adjustment of marital home, as this institution should enjoy special protection. It is also recommended to act like Belgium and Bulgaria where these contracts be registered, so that third parties are informed of the existence of these contracts.

North Macedonia and Kosovo are in the process of codifying the Civil Codes and since this process has not yet been completed, the recommendations for these countries is to provide in their legislation marriage contracts through which the spouses will be able to decide themselves the regulation of relations. The introduction of these contracts in the legislation should be done based on the practices of other countries but above all taking into account the principles given by the Commission on European Family Law. Marriage contracts will enable the spouses to adapt the property regime to their interests, as it is known that a legal regime may not be suitable for all couples. Through marital contracts, court practice will make it easier to resolve disputes and thus to end the division of joint property unfairly between spouses. For the implementation of these contracts, a general campaign will have to be made, through which the future spouses will be made aware, and the spouses will resolve their property relations in advance. Also a challenge for their

application will have notaries or other professionals who will be obliged to inform the spouses who want to enter into a marriage contract about the consequences that will have their relationship and also to be ready to inform about the consequences that the renunciation of the legal regime defined by law will have.

Such a reform to allow freedom of contract for property relations between spouses and the approximation of the autonomy of the will of the spouses will be in accordance with the changes of social regulation in our societies that are dictated by the market economy.

Appendix I - How to write a marriage contract

Marital and premarital contracts are institutes which are expected to be used very soon in the Republic of North Macedonia and in Kosovo. Due to the importance that this institutes will have in the life of the spouses and the fact that this institutes will be new in these two republics, special attention should be paid to the way in which these contracts will be drafted. The drafting of these contracts will imply several laws starting from the law on obligatory relations, the law on notary, the law on civil procedure and the law on family. For this reason, several steps must be considered in order for these contracts to have the intended effect and based on the law.

A restriction regarding the drafting of these contracts still remains with the nonexistence of the Civil Code through which it is intended to allow the marriage contract. Without having the marriage contract regulated by law to know more closely which types of property regimes will be applicable in North Macedonia and Kosovo, we will try to show approximately what couples should consider at the moment who decide to regulate their property relations by contract. The marriage contract should be in function of facilitating the procedures related to the property of the spouses and setting the limits by law which issues they can regulate at their own will. While from the moment that the law defines the issues in which the spouses can make an agreement, then each couple can sit down and discuss what the marriage contract will contain, since each spouse is different from the other and for this reason no marriage contract can suits to everyone.

But regardless of who will be a party to these contracts, the authors Stoner and Irving have given some instructions on what a marriage contract should contain or what it is preferable for couples to consider when they start thinking about entering into a marriage contract. These authors have presented eight steps that must be followed to draft a marriage contract.

The first step - *Start Early* - Couples who want to enter into a prenuptial agreement should start thinking about this at least 3-8 months in advance, because according to the authors if the drafting of a contract is done only a few days before marriage you will be at risk to forget things that may bring you problems in the future⁵⁹⁹. Drafting a contract earlier will make you review it

⁵⁹⁹ Katherina E. Stoner J.D.& Shae Irving J.D. Prenuptial Agreement, 5th Edition, Nolo, ISSN 9472-596X USA, pg.35

several times, to be fair for both spouses until the moment of signing the contract. But even writing a contract long before the marriage would not be preferred because over time the financial situation of the spouses changes so the drafting of the contract a long time ago will bring you problems the moment you sign it.

The second step - *Decide Whether You Need a Prenup*- Not every couple needs a premarital or marital contract and for this reason every time we think of making a marital contract we have to evaluate well whether we need one⁶⁰⁰. Everyone is well aware of the financial capabilities they have and for this reason sometimes entering into a marriage contract is not necessary or indispensable. It should be borne in mind that through marriage contracts it is intended to maintain finances separate, to protect one spouse from the debts of the other spouse, to protect the rights of children if one spouse has children from a previous marriage, to define what each holds in case of divorce, and to define the responsibilities of each spouse in the event of termination of marriage⁶⁰¹. If the couple has property that they created before the marriage and want to keep that property only for themselves, or have children from a previous marriage, or it has been announced that the other spouse has debts and wants not to be harmed by his debts then a marriage contract will enable you to resolve problems which may even end in court process.

The third step- *Agree on the Specifics*- If the couple has decided that concluding a marriage contract is necessary to regulate their property relationship it is necessary to understand exactly what this agreement means for each spouse. In this case it is necessary to compile a list of what is required from a marital contract and essential is communication between the couple⁶⁰². The couple is instructed to make a list of assets, list of debts, list of incomes, and list of expenses and this lists to discuss these lists between the couple. E.g. through the marriage contract you can be assured that marriage will not interfere with the plan you have made to leave a large part of your property to your children or that you do not want your spouse and children to have a dispute about who will have your property in case of death. So, the purpose of these agreements is for each spouse to know what he / she wants to achieve through the marriage contract.

⁶⁰⁰ Katherina E. Stoner J.D.& Shae Irving J.D. Prenuptial Agreement, 5th Edition, Nolo, ISSN 9472-596X USA, pg. 36

⁶⁰¹ Ibid, pg.43

⁶⁰² Ibid, pg. 44

Fourth step- *Create a Draft Agreement* - Spouses are instructed that the prenuptial or marital contract to be drafted by the spouses themselves by raising the issues which they wish to settle. But it is necessary that before signing this contract be reviewed by a lawyer (or each spouse has his own lawyer). This makes this contract not illegal and regulates the issues which are allowed to be included in a marriage contract. The lawyer can also assess the pros and cons of the contract by advising the spouses on what they lose or gain through the draft contract.

In the framework of this step we will present some issues which are instructed to be included in the draft of a prenuptial or marital contract as they are considered to be similar for all future spouses. In the *first paragraph* should be given the following information: name, surname and address of each spouse, professions, date when the marriage will be entered into or the marriage is concluded and the name of children or children if they have from a previous marriage. The *second paragraph* should indicate the date when the contract will be effective and the date of termination or the manner of termination of this contract. The *third paragraph* may indicate who is the lawyer who assisted in drafting this contract or who will be your representative in any case. In the *fourth paragraph* you can indicate that you are disclosing personal and financial information and which should be attached to this contract. In the *fifth paragraph* you can clarify which assets will remain the separated property of the spouses and which assets will become marital assets and which will be subject to separation in case of termination of marriage. In the *sixth paragraph* it can be clarified whether the assets that you had before the marriage will remain a separate property or will become the joint property of the spouses. In the *seventh paragraph* it can be specified whether the assets that you earn through work during marriage will be subject to separation or will remain the separated property of the spouses. Whereas in the *eighth paragraph* you can define what will happen to the debts that you have before the marriage and with those that will be created after the marriage. Other paragraphs may be added which may differ depending on the situation and the wishes of the spouses⁶⁰³. These data are considered to be basic and must be contained in each marriage contract which will be drafted but which does not mean that it will be the same for all couples as each couple differs from the other and their needs are different.

⁶⁰³ Katherina E. Stoner J.D.& Shae Irving J.D. Prenuptial Agreement, 5th Edition, Nolo, ISSN 9472-596X USA, pg.164

The fifth step- *Write Up the Formal Agreement*- Once the draft marriage agreement has been made, it should be read again, either by a lawyer or by the spouses themselves, to see if anything needs to be changed and at the end the final act should be drafted and signed. Since in northern Macedonia and Kosovo the marriage contract is not yet regulated by law, but it is likely that they will be made in the form of a notarial deed and which means that these agreements will be concluded before the notary.

The sixth step - *signing the agreement* - after a long work and a necessary review if the agreement will be not illegal or unconstitutional and in order that it will meet the needs you have, its signing will mark an important date in your married life. Its signing must be done in a way that is above all not done under pressure⁶⁰⁴. This agreement is considered to solve many problems that may occur during the marriage and through it you will protect your property or even that of your children. The signing of the agreement means that it now becomes a binding act and which must be respected by both spouses. For this reason, its signing should make the spouses happy as this agreement is considered a key not to end up in court for property issues.

The seventh step- *Enjoy Your Wedding*- once you have signed the prenuptial agreement and done it in the best possible way then there is nothing left but to enjoy your wedding⁶⁰⁵. Spouses will be more relaxed as they will enter in another phase of life and this promises to be better if you have managed to settle all property issues through the contract. Property issues should not be left to chance or legal solutions which are provided in the legislation, as it may harm you and cause problems in the future. If the couple at a certain point in the married life decides to end the marriage then all they have to do is to disclose the marriage contract and resolve the issues as they have foreseen in it.

Despite the steps we have presented other authors have different approaches for drafting a marriage contracts. According to the author Larry Elkin, not all couples need a marriage contract, but he recommends that this contract be concluded when we are dealing with couples who will get married but who already have children, when one of the spouses has a business or expects shares from a family business, when one of the spouses has a professional license or advanced degree, or when one of the spouses has much more assets or debts than the other, when one of the spouses is

⁶⁰⁴ Katherina E. Stoner J.D.& Shae Irving J.D. Prenuptial Agreement, 5th Edition, Nolo, ISSN 9472-596X USA, pg.39

⁶⁰⁵ Ibid, pg. 39

much older than the other or one of the spouses is a public figure and that divorce can hurt⁶⁰⁶. But we should not limit ourselves to these cases, as the future spouses can assess for themselves whether they need such a contract or not, and then start drafting them. Since in the legislation of North Macedonia and Kosovo is not yet regulated by law marriage contracts, it is still not known exactly which issues can be regulated through contracts and which not, for this reason we cannot give examples of marriage contracts as they vary from property regimes to be provided with legislation.

⁶⁰⁶ Larry Elkin, Follow these guidelines to draft a harmonious prenuptial agreement, HCP live, 2018, retrieved from <https://www.hcplive.com/view/guidelines-to-draft-a-harmonious-prenuptial-agreement>

Appendix II - Summary in Macedonian language

Брачниот имотен режим во Северна Македонија и Косово

Докторанд – м-р Детрина Алишани Сопи

Бракот е еден од најважните институти за семејното право не само во Северна Македонија и Косово, туку и во сите земји во светот. Токму поради тоа, секоја држава во своето законодавство посветува внимание на регулирањето на овој институт, бидејќи тој создава права и обврски помеѓу сопружниците, кои посредно се одразуваат и на децата. Правата и обврските што произлегуваат од бракот се од лична и имотна природа. Нашиот фокус во направеното истражување во докторската дисертација е на имотните односи помеѓу брачните другари создадени во текот на бракот. Уредувањето на брачните имотни односи резултираше со појавата на различни брачни имотни режими, кои се среќаваат во законодавствата од споредбеното право. Сепак, заедничко за сите нив е тоа што регулираните брачни имотни односи мора да се почитуваат од страна на сопружниците.

Регулирањето на брачните имотни односи помеѓу сопружниците не постои само денес, туку има потекло од времето кога бракот започнува да се регулира воопшто. Поради оваа причина, анализата на регулирањето на имотните односи првично беше направена уште од најраните времиња до денес.

Оваа анализа беше направена за да се види дали историскиот развој на брачното право има влијание врз регулативата што постои денес во нашите законодавства.

Знаејќи дека бракот е регулиран уште од првите држави сопственици на робови до денес, забележано е влијание од минатото во третманот на имотните односи меѓу сопружниците.

Ова уредување на имотните односи помеѓу брачните другари не водеше секогаш кон унапредување на правата и обврските. Повремено, поради економското и верското влијание на брачните односи, тие беа отежнати, особено во однос на положбата на жената.

Правилата за регулирање на имотните односи своите почетоци ги наоѓаат уште од Вавилон, каде што бракот се склучува во форма на договор (Кодексот на Хамураби). Но, за склучување на овој договор младоженецот требаше да и подари на невестата одреден имот. Управувањето со овие подароци го вршел сопругот. Но, тој немал право да располага со нив, бидејќи нивната цел била да ја поддржат финасиски жената доколку сопругот умре (членови 127-194, Хамурабиев кодекс). На сличен начин, бракот беше склучуван во Атина. Бракот се склучувал во форма на договор каде мажот и давал подарок на невестата додека невестата исто така носела брачен имот од семејството на родителите. Администрацијата на овој имот повторно ја вршел сопругот. Но, во случај на прекин на бракот, враќањето на подароците се вршело во зависност од причините за разводот на бракот. Овие форми на брачни договори се среќаваат во првите робовладетелски држави. Но, тие подоцна имаат големо влијание врз подоцнежниот развој на брачното право. Од овие историски податоци се гледа дека уште од дамнина постоела имотна врска помеѓу брачните другари. Оттогаш се прави разлика помеѓу управувањето и располагањето со имотот на брачните партнери. Истото постои и денес. Управувањето на брачниот имот го вршат брачните другари, но располагањето со имотот се врши само со согласност на двата брачни другари. Суштинската разлика е во тоа што сопружниците сега се еднакви во однос на имотните права и обврски што не било случај во минатото.

Римското право, исто така, има големо влијание врз регулирањето на имотните односи меѓу сопружниците. Влијанието на ова право на уредувањето на брачните и семејните односи е неспорно. Затоа римското право е од исклучително значење за развојот и унапредувањето на брачното и семејното право. Првично, според римското право, жената била личност која секогаш била под власта на таткото или под власта (моќта) на таткото. Но, нејзината положба започнала да се подобрува за време на класичниот и посткласичниот период, кога добива статус на граѓанин. Регулирањето на имотните односи меѓу сопружниците почна да биде важно во периодот кога се потребни услови за брак за валиден брак. Формата на бракот беше еден од условите потребни за олноважност на бракот и една од неговите форми беше узус. Оваа форма на брак ја спречувал жената да биде под

власта на сопругот, додека со прописите на императорите Август и Клаудиј, сопругот можел да управува со имотот на сопругата, но не можел да го наплати како гаранција за исполнување на обврските создадени од него. Ваквото унапредување на положбата на жената со тоа што и се овозможило да управува со дел од своето богатство влијаело да таа да нема право да го наследи богатството на семејството на сопругот. Промени во уредувањето на имотните односи меѓу сопружниците се среќава дури во периодот на распаѓање на големите семејства во Рим. Со тоа предбрачните подароци и мираз за бракот станаа задолжителни. Голем исчекор беше направен преку воведувањето на можноста за враќање на миразот во случај на развод на бракот. Миразот се смета за едно од имотните права што ги имала жената а кој влегувал во брачниот имот. Целта на овие подароци беше да се подобри брачниот живот, но сепак мажот управувал со овие средства. Во случај на смрт или развод, миразот се враќал на семејството на невестата, додека во случај на развод поради вина на сопругот, предбрачниот подарок и мираз останувале кај сопругата.

Доколку во понатамошниот период од човековата цивилизација продолжеше ваквиот развој на настаните, сопственичките права на жената во брачниот имотен режим веројатно ќе беа дополнително напреднати. Сепак, истото не се случи поради влијанието на учењето на канонското право. Ова од причина штоа почнувајќи од 11-тиот век бракот бил ставен под заштита на црквата и како таков бил регулиран според црковните норми. Со цел да се даде поголемо значење и важност на бракот, според црковните норми, разводот беше забранет. Според учењето на канонското право се сметаше дека бракот е постојана врска која не може да биде раскината со волјата на луѓето, туку само од Бога, што произлегуваше од Кодексот Иурис Каноници. Она што Бог ќе го спои, човекот не може да го раздвои. Влијанието на Католичката црква се прошири на многу западни и централно-европски држави со идеологија дека државата е Божјо суштество и го смета бракот како таков. Бракот се смета за духовна врска и света тајна. Овој негов карактер направи прашањата за имотот во семејството да не се дискутираат бидејќи секој семеен имот се смета за вообичаен и ниту еден член од семејството нема право да бара разделба (Кодекс на канонско право). Поделбата на семејниот

имот ќе доведе до поделба на семејството што беше забрането според канонското право. Оваа уредување на имотните односи меѓу сопружниците според канонското право, иако со цел да се заштити бракот како една од најважните институции на општеството, не го унапреди регулирањето на правото на сопственост како што започна во времето на римското право. Ова право под влијание на римското право му даде верски карактер на бракот и го разликува од правните правила создадени од државата.

За разлика од канонското право, сосема друг пристап во уредувањето на брачното право беше даден со шеријатско право, односно исламското право. Ова право, кое започна да се развива во 13 век од Отоманската империја, го има својот извор во верската книга, онаа на Куранот. Пропустот на исламските правила беше дозволеноста на полигамијата, но од друга страна, на сопственичките права на жените им беше даден приоритет. Предбрачниот подарок, кој потекнува од римското право, не се сметал за купопродажна цена на сопругата, туку се сметал за посебен имот на сопругата. Исто така, мирзот што го донела сопругата на бракот не бил управуван од сопругот, туку тој останувал под управување на сопругата. Според шеријатското право, разводот, иако се сметаше за едно од најомразените постапки на пророкот, Аллаховиот гласник, сепак беше дозволено, бидејќи преку него се им се ставаше крај на несаканите бракови. Според Куранот, светата исламска книга, од која произлегуваат правилата за регулирање на бракот, терминот заедничка сопственост не се користи бидејќи секој брачен другар останува сопственик на својот имот. Всушност, овде можеме да кажеме дека се изведуваат и брачните имотни режими на на разделен (посебен) имот. Но, за разлика од овие брачни режими што постојат денес во повеќето европски земји, мажот е брачниот другар кој се грижи и ги подмирува сите трошоци за задоволување на потребите на семејството, додека жената не беше должна да го троши своето лично богатство за потребите на семејството. Меѓутоа, од друга страна, жената наследува два пати помал дел од мажите (Куран 67:15).

Шеријатското право ја регулира интимноста меѓу мажот и жената и предвидува правила за враќање на подароците во случај на развод, што зависи од тоа колку долго траел бракот. Но, она што е важно беше дека дури и по разводот, сопругот

беше должен да ја издржува својата поранешна сопруга доколку и е потребно одржување.

Надвор од влијанијата на канонското право од една страна и шеријатското право од друга страна, албанското обичајно право имаше различна насока во развојот на брачното право воопшто и имотните односи помеѓу сопружниците. Бидејќи во нашиот фокус на истражување е развојот на брачниот имотен режим помеѓу сопружниците во Северна Македонија и Косово, не можеме да го негираме влијанието на албанското обичајно право, кое се развивало долго време на албанските и македонските простори. Развојот на албанското обичајно право се карактеризира со канонот на Леке Дугаѓини, збирка на обичајни правила кои настанале како реакција на османлиското и српското влијание. Но, и покрај фактот дека овој канон имаше за цел обединување на правото што го применуваат Албанците, тој се карактеризира со негирање на правото на сопственост на жените. Според овој Канон, една жена се сметала за личност само за да ги извршува домашните работи и да роди деца. Овој пристап на обичајното право им го ускрати правото на жените на наследство и, згора на тоа, жените немаа ниту право на брачен имот. Жената се сметаше само за личност која имаше само домашни обврски, но немаше права. Таа го уживаше само правото на издршка од нејзиниот сопруг. Но, надвор од оваа дискриминација врз жените, оваа перцепција сеуште постои во нашето општество. И покрај фактот дека веќе постојат еднакви права и обврски меѓу брачните другари, во пракса се случува спротивното. Многу жени не бараат имот во име на нивниот придонес во семејството, поради влијанието на албанското обичајно право. Влијанието на историскиот развој, особено на обичајното право се гледа во истражувањата, каде што само во Основниот суд во Приштина во текот на 2010-2020 година биле поднесени само 124 барања за поделба на заедничкиот имот, што излегува дека е многу мал број во споредба со бројот на разводи. Унапредувањето на правата на жените направено преку меѓународни конвенции сеуште не ја постигна нивната целосна свест и реалност.

Анализирајќи го долгиот историски развој на брачното право и начинот на кој се уредуваат имотните односи меѓу брачните другари, можеме да заклучиме дека и покрај фактот дека имотните права и обврските меѓу брачните другари денес се

еднакви, сепак историскиот аспект има влијание и врз денешното законско уредување. Таквиот заклучок се наоѓа и во делото на Пол Х. Дуге, каде што е откриено дека карактеристиките на формата на брачна заедница се пронајдени и била присутна во древниот Египет, Грција и Вавилон и особено во Кодексот на Хамураби.

Брачните договори кои се среќаваат во робовладетелските држави, подароците и миразите што постоеле во римското право и имотните права во канонското право и шеријатот, сеуште се среќаваат денес во нашето законодавство, но со напредок во однос на еднаквоста помеѓу брачните другари. Имотните режими со кои се среќаваме денес во законодавството на Северна Македонија и Косово историски постоеле порано, но во друга димензија. Иако законодавството е создадено во духот на меѓународните конвенции за еднаквост меѓу мажите и жените, нормите што ги регулирале имотните односи меѓу сопружниците низ историјата оставиле свој белег во судската пракса, за што сведочи многу малиот број регистрирани жени, како сопственици или многу мал број жени кои бараат да го поделат заеднички стекнатиот имот за време на брак. Ова е затоа што тие сеуште веруваат дека жените немаат право на заеднички имот или нивниот придонес во домашните работи не се смета за придонес во зголемување на брачниот имот.

Најважниот дел од овој доторски труд е анализата на законодавството во врска со регулирањето на имотните односи меѓу сопружниците во Косово и Македонија. Првично оваа анализа беше направена на Косово, а потоа и во Македонија. Косово ги регулира имотните односи меѓу сопружниците преку Законот за семејство. Овој закон се смета дека е во духот на меѓународните конвенции што се ратификувани од Собранието на Република Косово, како што се Универзалната декларација за човекови права, Европска конвенција за човекови права, Конвенција за елиминација на сите форми на дискриминација врз жените (CEDAW) и многу други договори што е должна да ги почитува.

Како резултат на бракот, меѓу брачните другари се создаваат права и обврски од лична и имотна природа. Во групата лични права и должности, законодавството на Косово се предвидени заедничкиот животот, брачното презиме, местото на

живеење, семејна економија и изборот на професија (член 42-44, Семејно право на Косово). Додека во однос на придонесот за изржување на семејството, секој брачен другар придонесува пропорционално на неговата способност. Оваа дефиниција за законодавството на Косово не е иста со онаа на европските земји бидејќи оваа обврска е категоризирана во групата на имотни и лични права и обврски. И покрај категоризацијата на оваа обврска, решението е дадено од Комисијата за европско семејно право (принципи 4: 4), каде што секој брачен другар, без оглед на имотниот режим, е должен да придонесе за исполнување на семејните потреби, особено оние поврзани со воспитување и образование на децата. Поради оваа причина, се препорачува принципот што произлегува од Комисијата за европско семејно право да биде уреден во законодавството на Косово на овој начин „Овој придонес се дава во зависност од способностите на брачниот другар, но важно е ако еден брачен другар не ги исполни оваа обврска, другиот брачен другар има право да го обврзе брачниот другар да ја исполни оваа обврска од надлежниот орган “.

Имотните односи што се создаваат како резултат на бракот се регулирани со член 45-57 од Законот за семејство на Косово. Според законската уредба, со склучувањето на бракот, брачните другари влегуваат во правен имотен режим. Притоа, во семејното право на Косово е предвиден само еден режим на сопственост – законски брачен имотен режим. Се сретнавме со истиот режим во Албанија и Хрватска, но за разлика од Косово, во овие законодавства го пропишуваат и договорниот брачен имотен режим. Во Косово, овој законскиот брачен имотен режим прави диференцијација на имотот на сопружниците на посебен и заеднички (член 45, Закон за семејството на Косово). Во принцип, определувањето на имотот на посебен или заеднички имот се заснова на времето кога имотот е стекнат, пред или по бракот. Така, секој имот што сопружниците го имале или стекнале пред бракот е посебен имот, но и приходот што се генерира, произлегува од овој имот се смета за посебен имот. Оваа категорија, исто така, го вклучува и имотот што сопружниците ги стекнуваат за време на бракот преку подарок, наследство или која било друга правна форма на стекнување богатство, уметнички дела, интелектуална работа или интелектуална сопственост со кои

брачниот другар слободно управува и располага (член 46, Закон за семејство на Косово).

Но, во законот недостасуваат прецизни одредби во врска со прифаќањето подароци, особено во ситуации кога тие се направени за еден брачен другар, но со цел да ги користат двата брачни другари. Ваквите правни состојби во практиката се разрешуваат врз основа на толкување кое се базира на решенијата дадени во другите законодавства во Европа, во кои се вели дека „ако подарените предмети не претставуваат голема вредност во споредба со заедничката сопственост иако се донирани на еден брачен другар, но се предмети за заедничка употреба на овој имот треба да се смета како заедничка сопственост. И спротивно, ако еден брачен другар добил подарок кој има голема вредност во однос на заедничкиот имот, дури и ако е наменет за заедничка употреба на двата брачни другари, треба да се докаже како посебен имот. Оваа правна празнина ќе треба да се надополни преку законско решение како што е предложено во коментаторот на законот од страна на теоријата и практиката. Истото решение го пропишува и Комисијата за европско семејно право (принцип 4:35) каде што е наведено дека подароци или оставини што им се даваат на двајцата сопружници или се дадени во брачната заедница да се смета за сопственост на заедницата. Исто така, идентификувана е двосмисленост во други правни форми за стекнување посебен имот. Тука се препорачува да се наведат други правни форми за стекнување посебен имот, бидејќи во пракса може да имаме неизвесности и правна несигурност поради ваквите правни празнини.

Несигурност во однос на дефиницијата за посебен имот имаме и во однос на прашањата за делата од интелектуална сопственост. Законот предвидува дека секое уметничко дело или интелектуална сопственост ќе биде посебен имот, но од друга страна за придобивките што се остваруваат од овој имот не се определува дали ќе биде заедничка или посебна сопственост. Поради оваа причина, во овој дел законот ќе мора да биде појасен при утврдувањето на придобивките од интелектуалната сопственост. Во таа смисла сметаме дека би требало да се даде следни искуството од законодавството во Хрватска каде што е утврдено дека приходот од интелектуална сопственост е заедничка сопственост на сопружниците (член 36, Семеен закон на Хрватска).

Според законскиот брачен имотен режим во кој влегуваат брачните другари во моментот на венчавката, се одредува и начинот на создавање на заедничкиот имот. Овој имот е создаден со заеднички придонес на двата брачни другари, кој ги вклучува приходите на брачните другари и помошта што сопружниците ја даваат во домашните работи, грижата за децата, одржувањето на имотот и која било друга форма на работа и соработка помеѓу брачните другари (член 47, Закон за изменување и дополнување на Законот за семејство на Косово). Според толкувањето што е направено во Коментарот на овој закон, се истакнува дека не е дефинирано во законот дека имотот што го стекнуваат брачни другари кои не живеат заедно и меѓусебно се информирале, ќе се смета за посебен имот и покрај фактот дека бракот сеуште не е разведен (член 47 од Коментарот на семејното право на Косово). Таквата дефиниција е дадена и во законодавството на Полска, Хрватска кога е прецизирано дека заедничкиот имот е имотот што се стекнува за време на брачниот живот. Поради оваа причина, законот треба да предвиди во законските одредби дека секој имот стекнат во текот на времето кога брачните другари не живеат заедно и се свесни за овој факт, треба да се смета како посебен имот.

Исто така, постои правна празнина и по однос на прашањето за стекнувањето заеднички имот преку игри на среќа. Законот прецизира дека имотот што се добива преку игри на среќа се смета за заедничка сопственост, но треба да се разликува со кој имот е инвестирано во таа игра (член 47, Семејно право на Косово). Ако брачниот другар го искористил својот / нејзиниот посебен имот во игри на среќа и добил, тогаш ќе има проблеми во одредувањето на статусот на сопственоста на имотот стекнат преку игри на среќа. Хрватска, исто така, утврди дека имотот стекнат преку игри на среќа се смета за заедничка сопственост (член 36, Семеен закон на Хрватска).

Прашање што предизвикува конфузија е и прашањето за регистрацијата, односно запишувањето на заедничкиот имот на брачните партнериво јавната

книга. Заедничкиот имот се смета дека е регистриран на име на двајцата брачни другари, без оглед дали е запишан, регистриран на име само на еден брачен другар (член 50, Закон за семејство на Косово). Оваа одредба имаше за цел да ги заштити интересите на жените кои во практика многу ретко се наведени како заеднички сопственици на недвижниот имот. Друга причина е што со заедничкиот имот управуваат и располагаат двајцата сопружници подеднакво. За да се овозможи ова, законот обезбеди претпоставка дека секој заеднички имот, без оглед на фактот во чие име е регистриран, ќе се смета дека е во име на двата брачни другари. Но, ова предизвикува конфузија во јавните регистри, особено во однос на трети лица, бидејќи тие не можат точно да знаат дали станува збор за заедничка сопственост или посебна сопственост на регистрираниот сопственик. Уште полоша е ситуацијата кога вонбрачните другари кои не склучиле брак, туку само живееле заедно, создале заеднички имот и го регистрирале само на име на еден вонбрачен другар. Поради оваа причина, се предлага запишувањето, регистрацијата на заедничкиот имот да се направи на име на двата брачни другари и тоа треба да стане задолжително за брачните, односно вонбрачните другари. Од таа причина беа воведени повластени мерки мерки за ослободување од данок на имот за сопружници кои заедничкиот имот го регистрираат на име на двајцата брачни другари, но сеуште се во низок степен на напредок (административна инструкција бр. 04/2021).

Во заедничкиот имот поради фактот што е заеднички, се претпоставува дека брачните другари не ги знаат своите удели во овој имот. Поради оваа причина тие имаат право да ја направат поделбата на овој имот во секое време преку договор што мора да се склучи во форма на нотарски акт. Но, во случаи кога не може да се постигне договор, делбата може да ја направи судот на барање на брачните другари (член 53 од Законот за семејство на Косово). Праведната поделба на заедничкиот имот на брачните партнери е голем предизвик за судот. Случаите на делба на имотот од страна на судот се малку во косовската судската пракса и нивното времетраење е очигледно долго и неизвесно. Од статистичките податоци, оваа бројка варира околу 124 барања за период од 10 години во Општина Приштина, како една од најголемите општини во Косово и со решени само 17

случаи. Евалуацијата на придонесот на брачните другари во создавањето на заедничкиот имот се врши и преку евалуација на средствата што ги имаат, но и врз основа на проценка на на финансиските експерти, проценители. Тие ја прават проценката на придонесот и во работите на домаќинството.

Во случаи кога брачниот другар се спротивставил на поделбата подеднакво, тогаш финансискиот експерт го оценува придонесот на секој брачен другар и му предлага на судот поделба на заедничкиот имот. Но, повторно ова се смета за неразумно бидејќи во пракса се идентификуваат неправди при поделбата на заедничкиот имот и тоа доаѓа како резултат на правните недостатоци и неуспехот да се обезбеди во законот финансиско очекување и можност што ќе овозможи вистински да се процени придонесот на сопружниците. Ако се земат искуствата од другите европски земји, како што се Германија, Австрија, Белгија, Полска, Бугарија, Албанија, поделбата на заедничкиот имот се прави подеднакво, освен ако едниот брачен другар не докаже дека тој / таа придонел значително повеќе во создавањето на тоа сопственост. Но, при поделбата на имотот, брачниот (семејниот) дом, на кој му е дадена посебна заштита, секогаш е исклучена. Тоа не е случај со правото на Косово. Доколку на брачниот дом во иднина му се даде посебна заштита и се предвидат други посебни правила за поделба на брачниот дом, поделбата на заедничкиот имот ќе биде полесна.

Направеното истражување во докторската дисертација идентификува постоење на правни недостатоци и по однос на регулирањето на брачниот дом. За разлика од голем број европски законодавства, во Косово ова прашање е регулирано со само еден член, со наведување дека во случај на спор брачниот дом ќе му се даде на брачниот другар земајќи ги предвид потребите на брачниот другар и децата. Но, ова законско решение не се гледа како соодветно уредено за косовското општество, кога е познато дека најголем број семејства живеат во семејни заедници каде што се вклучени родителите на сопругот и каде во повеќето случаи родителите се сопственици на куќата. И во овој случај судот го зема овој факт како одлучувачки за назначување на старателство над деца. Случаите во пракса покажуваат дека старателството над децата е доверено на родителот кој е

сопственик на куќата, додека интересите на децата не се пресудни во одлучувањето кој треба да го поседува брачниот стан. Тука би било добро да се почитуваат законските одредби утврдени во Бугарија, Шведска, Франција и друга земја, каде што родителот на кој им се доверени децата, исто така, ќе има право да продолжи да живее во брачниот дом до полнолетство на децата, дури и во случаи кога брачниот дом е регистриран на име на родителите на брачниот другар. Значи, дури и кога брачниот дом е посебен имот на еден брачен другар, може да се даде на користење на брачниот другар на кој му е потребен или има старателство над децата. Условите за користење или изнајмување треба да се уредат по примерот на Бугарија, Албанија, Полска и други европски законодавства.

Врз основа на наведеното, сметаме дека е потребно на брачниот дом да му се даде посебна заштита и мора попрецизно да се утврди на кого ќе му припадне брачниот дом доколку по однос на него се појави спор меѓу сопружниците. Притоа, не само што треба да се земат предвид потребите на децата, туку и брачниот другар на кого му е потребна оваа куќа. За да се одредат временските ограничувања до кога брачниот другар на кој му е даден брачниот дом има право да ја користи. На мислење сме дека најважно е брачниот дом да не одредува на кого ќе му се даде старателство над децата, туку старателството над децата треба да определи кому ќе му се даде брачниот дом. Исто така, потребно е да се определи и времето кога завршува правото на користење на брачниот дом, како на пример кога децата ќе наполнат полнолетство, со повторно венчавање на брачниот другар на кого му е дадена куќата, или доброволно.

Имотните односи меѓу сопружниците се регулирани и во семејното законодавство на Северна Македонија. Регулирањето на овие односи датира уште од 1946 година кога Уставот ги изедначи правата на мажите и жените во имотните односи, од кои произлезе законскиот брачен имотен режим, кој разликува посебен и заеднички имот на брачните другари. Во македонското законодавство значајна новина настана во 2001 година кога одредбите со кои се уредуваа имотните односи меѓу сопружниците беа неоправдано преместени од Законот за семејство во Законот за сопственост и други права, само поради нивниот имотен карактер. Оваа реформа не беше оставена без критика во македонската наука. Во Европа не

постои законодавство што го прави одвојувањето на регулирањето на имотните односи од другите односи меѓу сопружниците. Затоа се препорачува имотните односи да се стават под чадорот на семејното право бидејќи се резултат на бракот. Со тоа ќе се обединат сите правни норми што се однесуваат на односите меѓу брачните другари.

И македонското законодавство пропишува единствен законски брачен имотен режим, со што изрешно не дозволува брачните другари да склучуваат брачен договор. Моментот на склучувањето на бракот одредува кои средства се посебен имот, а кои заеднички имот на брачните другари (чл.67, Закон за сопственост и други стварни права). Поконкретно, начинот на стекнување на овој имот води кон начинот на поделба на имотот. Поинаква дефиниција е направена со законодавството на Северна Македонија од онаа на Семејниот закон во Косово. Во македонското право е предвидено дека посебен имот е секој имот што брачните другари го создале пред бракот или го стекнале за време на бракот. Но, законодавецот заборавил како клучен критериум за поделбата на видот на имотот да го предвиди трудот, односно работата на сопружниците. Понатаму, утврдено е дека секој имот стекнат со подарок за време на бракот ќе остане посебен имот на брачниот другар. Но, дилемата што останува е каков е статусот на имотот кога подарокот е направен за еден брачен другар, но целта на подарокот е да ги задоволи потребите на двата брачни другари. За разлика од законодавството во Косово, кое можеше да се реши преку Коментар за семејно право, во Северна Македонија е решено со помош на судската пракса. Така, се утврдува дека подароците дадени на еден брачен другар, но наменети за задоволување на потребите на двата брачни другари, ќе се сметаат за заедничка сопственост. Но, овде се поставува друга паралела со дефинирање на вредноста на предметот што се стекнува, одредувајќи дека ако вредноста на подарокот е пропорционално поголема од вредноста на заедничкиот имот и ако се користи за потребите на само едниот брачен другар, ќе се смета за заедничка сопственост. Поради оваа причина и дилемите што се појавуваат при решавање на овие случаи, ова прашање ќе треба да се регулира со законски измени, одредувајќи дека подароците што се даваат на еден брачен другар, но се наменети за задоволување на потребите за брачниот

живот, ќе останат како посебен или заеднички имот на брачните другари. Тука, тие можат да го земат предвид решението што го нуди Комисијата за европско семејно право (принцип 4:35) каде што е наведено дека подароците или наследствата што им се даваат на двајцата брачни другари или се дадени за брачната заедница да се сметаат за сопственост на заедницата.

Авторските права исто така се сметаат за посебен имот. Решението што беше направено преку Законот за авторски права беше соодветно со одредување дека авторските права се посебна сопственост на брачниот другар, додека приходот генериран од авторските права ќе се смета за заедничка сопственост (чл.8 од Законот за авторски права на Северна Македонија). Ова решение би било посоодветно да се вгради во делот на одредбите што ги уредуваат имотните односи кај брачните другари. Додека идентификуван правен недостаток е прашањето за индустриската сопственост. Делата создадени преку индустриска сопственост не се предвидуваат дали се заедничка или посебна сопственост. Затоа се препорачува сите прашања што произлегуваат од интелектуалната сопственост да бидат регулирани со одредби, вклучувајќи ги и авторските права и индустриската сопственост. Истото решение треба да се донесе и во законодавството на Косово, каде што нема одредби за дефинирање на сопственоста во придобивките создадени од индустриска сопственост.

Во врска со заедничкиот имот, законодавството во Македонија утврди дека како заеднички имот се сите средства што сопружниците ги стекнуваат за време на брачниот живот (чл.67 од Законот за сопственост и други стварни права). Оваа одредба попрецизно дефинира како се создава посебниот имот додека сите други средства стекнати за време на бракот спаѓаат во категоријата заеднички имот. Но, дури и овде ќе биде неопходно поконкретно да се прецизира кои средства се заеднички имот на брачните другари, вклучувајќи го и приходот од нивната лична активност, од заштедата направена на плодовите и приходот од личните средства износите собрани на сметка или пензиски фонд за вработени за секој од брачните другари

Овој начин на дефинирање придонесе секој вид придонес, без разлика дали е паричен или придонес за домашните работи, да се смета за заедничка сопственост

на брачните другари. Додека правната дефиниција дека заедничкиот имот е создаден за време на бракот, остави дилеми во случаите кога соживотот всушност завршил, а граѓанскиот брак сеуште не е формалноправно разведен. Поради оваа причина, судската пракса утврди дека заедничкиот имот се создава само во времето кога брачниот пар живее заедно, додека за да се утврди времето на крајот на соживотот, брачните другари се должни да го докажат тоа. Поради оваа причина, законот треба да се разјасни во однос на вториот критериум, дефинирајќи го соживотот како критериум за времетраењето на бракот.

Истражувањето во докторската дисертација покажа дека исто како и Косово и Северна Македонија се соочува со ист проблем во сферата на запишувањето на правата на недвижностите на брачните другари во јавната книга. Заедничкиот недвижен имот, дури и ако не е регистриран на име на двата брачни другари, се смета дека е во заедничка сопственост на двајцата брачни другари. Ова е направено за да се спречи располагање со заеднички имот од едниот брачен другар без согласност на другиот брачен другар. Но, во пракса ова е проблем, така што обврската на брачните другари да го регистрираат заедничкиот имот во име на двајцата брачни другари ќе го реши проблемот со бесплатно располагање на заедничкиот имот и од друга страна ќе им обезбеди на брачните другари дека нивниот имот нема да се отуѓат на кој било начин без нивна согласност. Ова исто така може да ја земе предвид можноста правните дејствија во врска со располагањето со имотот да бидат одбиени од другиот брачен другар кој не дал согласност за склучување на тие правни дејствија. Или ако не е дадена согласност без пресуда, побарање од надлежните органи да ја донесат одлуката за располагање со заедничкиот имот од другиот брачен другар. Такво решение, исто така, донесе Комисијата за европско семејно право (принцип 4: 5).

Поделбата на заедничкиот имот може да се направи со договор и со судска одлука. Во однос на поделбата на имотот по договор, законодавството на Северна Македонија донесе добро решение што може да го следи Косово во однос на хипотекарни предмети што ги делат сопружниците по договор. Значи, ако брачните другари се согласат за поделба на заедничкиот имот и едниот го прима имотот и е должен да му надомести на другиот брачен другар половина од вредноста, во овој

случај брачниот другар кој ќе го добие надоместокот има право на залог на другиот имот. Ако надоместокот не се изврши, тогаш брачниот другар има право да го изврши присилно.

Важно прашање што треба да се разјасни е поврзано со поделбата на заедничкиот имот на брачните другари. Освен фактот дека поделбата може да се направи преку нотарски акт кога нема спор меѓу брачните другари и основниот принцип дека заедничкиот имот треба да се подели на еднакви делови, важно прашање е поделбата на предметите за да им служат на децата. Законот предвидува дека предметите што се користат исклучиво за деца мора да му се дадат на родителот на кого детето му е ставено под грижа. Исто така, предметите што очигледно се наменети за деца треба да му се дадат на родителот -старател. Во овој случај може да имаме дилеми за тоа кои предмети се предметите што им припаѓаат на децата и кои очигледно се наменети за интерес на децата.

Искусствата од споредбеното право, на другите европски земји, покажуваат неколку видови режими на сопственост. Овие режими може да бидат слични по природа, но начинот на регулирање се разликува еден од друг. Но, пред се подлабока анализа откри некои предности што може да ги искористат Северна Македонија и Косово за да ги пополнат правните празнини што ги имаат во законодавството или да ги предвидат во граѓанските законици што ги имаат во процес.

Во Австрија постои дополнителен систем за регулирање на имотните односи меѓу сопружниците, бидејќи правниот режим е режимот на разделен (посебен) имот. Значи, врз основа на Граѓанскиот законик на Австрија, ако брачните другари не склучиле брачен договор тие ќе останат сопственици на нивниот имот во текот на постоењето на овој режим. Но, иако тие се сопственици на нивниот посебен имот, постои исклучок што се однесува до семејниот дом. Ако брачниот дом е посебен имот на едниот брачен другар, тој/таа не може слободно да располага со таа куќа ако предизвикува штета на другиот брачен другар. Ова ги штити интересите на брачниот другар кој не може да придонесе за имотот преку приход, туку преку домашни работи.

Белгија се разликува од Австрија бидејќи режимот на заедницата е законски режим. Врз основа на Граѓанскиот законик на Белгија, режимот на одделни средства и универзалната заедница на средства остануваат режими што брачните другари можат да ги изберат преку брачен договор. Заеднички имот се смета за имот стекнат по бракот и тој стекнат за време на бракот преку подарок, наследство и предмети во секојдневна употреба. Дури и во Белгија, сопружниците не можат слободно да управуваат и да располагаат со брачниот дом, дури и ако тоа е лична сопственост на еден брачен другар.

Оваа практика е многу неопходна и сметаме дека треба да се вклучи во законодавството на Косово и Северна Македонија. Со тоа ќе биде оневозможено сопругот -сопственик да располага со брачниот дом, со што може да се причини штета на другиот брачен другар да се доведат во неизвесност односите во семејството. Врз основа на статистичките податоци каде во Северна Македонија и Косово најголем број сопственици се мажи, овој пристап најмногу ќе придонесе за благосостојбата на сопругата со ограничување на правото на располагање од страна на сопругот во врска со брачниот дом.

Германија има уште еден специфичен брачен имотен режим бидејќи правниот режим е заедница на стекната тековина. Според Граѓанскиот законик на Германија, овој режим не создава заеднички имот, но заработената добивка ќе биде поделена подеднакво во моментот на крајот на овој режим. Терминот тековина (стекнат имот) во германското законодавство се користи за да се направи разлика помеѓу почетниот имот и имотот на крајот од овој режим. Така, брачните другари остануваат сопственици на нивниот имот што го управуваат самостојно, но нивната диспозиција е ограничена, бидејќи тоа мора да се направи со согласност на другиот брачен другар. Но, во случаи кога брачниот другар не дава согласност без никаква причина, тогаш за располагање со посебниот (разделениот) имот брачниот другар може да побара да го добие од судот. Вториот режим што може да се избере преку брачен договор е режимот на сопственост на заедницата каде брачните другари го создаваат својот заеднички имот, но без потреба од каква било правна трансакција. Врз основа на Граѓанскиот законик на Германија, постои и категорија на предмети што исто така е дадена според Комисијата за европско семејно право (принцип

4:19), резервиран (посебем) имот, каде брачните другари можат да чуваат некои предмети под нивна администрација и диспозиција што се разликуваат од одвоен имот бидејќи администрацијата и располагањето со нив може да се направи без да бидат обврзани да го прават тоа во интерес на заедничкиот имот. Дури и во Германија, брачните другари можат да имаат посебни режими на сопственост, но што се однесува до брачниот дом, тие не можат слободно да располагаат, и покрај фактот дека тоа може да биде посебен имот. Во случај на поделба на имотот, може да му се препушти на брачниот другар што не е сопственик, ако има потреба од дома имајќи ги во предвид интересите на децата.

Франција во своето право, и покрај фактот што во Граѓанскиот законик има предвидено три режими на сопственост, предвидува дека секој брачен другар е должен да придонесе за потребите на семејството и воспитувањето на децата, и ако тоа не го стори едниот брачен другар, другиот брачниот другар има право да бара од судот да го задолжи брачниот другар да ја исполни оваа обврска. Оваа дефиниција е дадена и од Комисијата за европско семејно право (принципи 4:4) како таква, се препорачува Северна Македонија и Косово, исто така, да обезбедат како принцип во регулирањето на имотните односи меѓу сопружниците. И во Франција е предвиден режимот на заедница на имотниот режим. Според овој режим, како средства на заедницата се сметаат сите стекнувања што сопружниците ги стекнуваат заедно или одделно за време на бракот, вклучувајќи го и приходот од нивната лична активност, од заштедата направена на плодовите и приходот од личните средства. Преку брачниот договор тие можат да бидат определени за конвенционалните режими преку кои можат да создадат заедница на движни ствари и во стекнување, да ги исклучат правилата за управување. Во режимот на поделен (разделен) имот, сопружниците остануваат сопственици на нивните средства, додека од друга страна се должни да придонесат за семејните трошоци. Додека малку поспецијален режим е режимот на раздвојување при престанок на бракот. Реално за време на бракот за нив важи режимот на одделен имот. Но, во случај на раскинување на овој режим, секој брачен другар има право да учествува со половина во вредноста во нето -стекнувањата што се наоѓаат во наследството на

другиот, и се проценува поради двојното оценување на првичното наследство и конечното наследство.

Во Полска постојат три сопственички режими каде што режимот на заедницата е правен режим. Како и во Косово и Северна Македонија, сопружниците под овој режим од моментот на бракот почнуваат да создаваат заеднички имот. Овој имот се состои од средства што ги стекнуваат за време на нивниот брачен живот, но поконкретно се состои од плата добиена за работа и приход од други профитабилни активности на секој од брачните другари; приход од заеднички имот, како и личен имот на секој од брачните другари; износи собрани во сметка или пензиски фонд за вработени за кој било од брачните другари. Тука, исто така, се вклучува имотот стекнат пред да се појави законскиот режим на заедничка сопственост; имот стекнат со наследство или донација, освен ако оставителот или донаторот не одлучи поинаку; заеднички имотни права кои се целосно опфатени со посебни одредби; имот што се користи исклучиво за задоволување на личните потреби на еден од брачните другари; права што не можат да се пренесат и може да ги остварува само едно лице; предмети добиени како оштета за телесна повреда или активирање на нарушување на здравјето, или како надомест за претрпена штета; ова не вклучува надоместок за попреченост поради повреден брачен другар преку делумно или целосно губење на способноста за заработка или зголемување на потребите или намалување на перспективите за иднината; долгови во врска со наградување или други профитабилни активности на еден од брачните другари; имот добиен како награда за индивидуално достигнување од еден од брачните другари; авторските права и сродните права, правата од индустриска сопственост и други права на креаторот; имот стекнат во замена за елементи на лични средства, освен ако во одредени одредби не е поинаку предвидено.

Законодавството во Косово и Северна Македонија нема дефиниција за износите собрани на сметка или пензиски фонд за секој од брачните другари, кои според полското законодавство се дефинирани како заеднички имот. Такво решение би било препорачано и за Косово и за Македонија, дефинирајќи ги овие средства да се категоризираат како заеднички средства (имот). Исто така, прашања поврзани со наследство или подароци кои според законодавството во Полска се

посебен имот, освен ако оставителот или донаторот поинаку определиле. Значи, ако оставителот или дарителот утврдил дека наследството или подарокот се заедничка сопственост на брачниот другар за да се категоризираат како заедничка сопственост. Ова решение би помогнало да се категоризира наследството или подарокот како посебен или заеднички имот во зависност од волјата на нивниот давател.

Исто така, во законодавството на Косово и Северна Македонија недостасуваат одредби за утврдување на имотот во врска со предметите примени како оштета за телесна повреда или предизвикување здравствено нарушување, или како надомест за претрпената штета. Поради оваа причина, се препорачува и овие прашања да се уредат при идната реформа на семејното право. Постои малку поинаков аранжман за прашањето за заедничко управување со имотот. Законодавството во Полска предвидува дека секој брачен другар е слободен да управува со заедничкиот имот, но има предвидено четири ограничувања. Овие ограничувања се однесуваат на обврската на брачниот другар да го извести другиот брачен другар за управување, правото на брачниот другар да се спротивстави на правните дејствија на другиот брачен другар, неможноста брачниот другар да го користи заедничкиот имот за деловна активност и обврската на брачниот другар да располага со имотот со согласност на другиот брачен другар. Постојат исти ограничувања во законодавството на Косово и Северна Македонија, освен тоа што на брачните другари им е забрането да го користат заедничкиот имот за деловни цели. Ова решение придонесува за зачувување на заедничкиот имот и особено за благосостојбата на семејството и децата. Но, она што е најважно има врска со поделбата на брачниот дом. Законодавството во Полска предвидува дека ако сопружниците не можат да постигнат договор за разделба на семејниот дом, тие можат да побараат од судот да го отстрани едниот брачен другар од семејниот дом, доколку истиот предизвикал семејно насилство или го направило животот неподнослив. Ова решение сметаме дека е неопходно во Косово и Северна Македонија, за да го направи семејниот живот побезбеден, а од друга страна да се отстрани насилникот од куќата, без оглед дали куќата е во негова сопственост. Тоа е затоа што случаите на семејно насилство во практиката постојано се зголемуваат.

Како резултат на тоа многу често жртвата мора да излезе од дома ако дојде до развод како резултат на насилство или неподнослив живот предизвикан од сторителот.

За разлика од гореспоменатите земји, Хрватска во своето законодавство обезбеди само два режими на сопственост, законскиот и договорниот имотен режим. Законскиот имотен режим е режим што прави диференцијација на заедничкиот и посебниот имот на брачните другари со одредување на тоа кои средства припаѓаат на секоја категорија. Слично како и на Косово и на Македонија, заедничкиот имот се создава од моментот на венчавање, но како критериум се дефинира и заедничкиот живот. Ова значи дека заедничкиот имот не може да се создаде ако брачните другари не живеат заедно. Овој критериум треба да се разјасни и во Косово и во Северна Македонија. Управувањето со овој имот може да биде редовно и вонредно, со одредување кои дејствија се сметаат за редовни и кои се вонредни и за кои е потребна согласност од двата брачни другари. Во спротивно, ако се преземат вонредни дејствија без согласност на другиот брачен другар, тој има право на надомест за дејствијата преземени без негова согласност. Хрватското законодавство, исто така, предвидува дека поделбата на заедничкиот имот може да се направи со договор или со судска одлука, но врз основа на принципот на еднаквост, додека поделбата може да се направи преку продажба на стварта, поделба на добивката или физичка поделба.

Како и во сите други држави, на брачниот дом му се дава посебна заштита, каде што судот е овластен дека на барање на еден брачен другар брачниот дом се дава на користење на брачниот другар кој има старателство над децата до крајот на поделбата на имотот. По завршувањето на оваа постапка, судот е овластен да му даде право да живее во домот на родителот кој се грижи за децата, но од друга страна тој е должен да плаќа закупнина за користењето на станот. Судот е должен секогаш да одлучува во корист на детето и неговите интереси.

Она што ја издвојува Бугарија од некои европски земји е регистрацијата на брачниот имотен режим. Бидејќи сопружниците имаат можност да го изберат својот претпочитан режим од трите понудени имотни режими, овој режим мора да биде регистриран во Централниот имотен регистар. Ова им овозможува на третите

страни да ги знаат правата и обврските што ги имаат брачните другари во однос на конкретен имот. Оваа законско решени ни се чини дека би било поволно и за Косово и Македонија, каде што сите брачни парови би морале да го регистрираат својот режим на сопственост, каде што од една страна ќе се постигне принципот на публицитет, а од друга страна ќе биде полесно да се извечат статистики за сопственичките режими во овие две републики.

Врз основа на Законот за семејство во Бугарија, управувањето и располагањето со недвижниот имот на заедничкиот имот се врши слободно, но од друга страна има поставено временски рокови (6 месеци-3 години) за да се спротивстават на правните дејствија на еден брачен другар кој презел несоодветни законски дејствија за другиот брачен другар. Всушност, овој начин на спротивставување може да предизвика збунетост во однос на трети страни и поради оваа причина регистрацијата на заеднички имот во име на двата брачни другари ќе го оневозможи извршувањето на правните дејствија без согласност на двата брачни другари. Но, исто така, правото да се спротивстави на правните дејствија мора да биде предвидено во законодавството за да има правни механизми за заштита на заедничкиот имот на брачниот другар. Новината на бугарското законодавство, која би била многу соодветна и за Македонија и за Косово, е поделбата на семејниот дом. Во случај на поделба на заеднички имот, предвидено е брачниот дом (дури и ако е посебна сопственост на едниот брачен другар) да му се даде на другиот брачен другар на користење, ако нема друга приватна сопственост и земајќи ги предвид интересите на семејството и деца. Но, постои уште еден исклучок кога куќата е во сопственост на роднините, родителите на едниот брачен другар. Тогаш брачниот дом ќе биде даден на користење на брачниот другар кој има и кому децата се доверени во старателство во период од 1 година. Во случаи кога престанува правниот режим на сопственост, заедничкиот имот се дели подеднакво, но исклучително еден брачен другар може да добие поголем удел ако му е доверена родителска грижа или кога неговиот / нејзиниот придонес е значително повисок од оној на другиот брачен другар.

Предвидени се и два режими на сопственост според законодавството во Албанија, и тоа законскиот и договорниот (Семеен кодекс на Албанија). Законскиот

имотен режим прави разлика помеѓу заеднички и посебен имот, но за разлика од другите држави, заедничкиот имот може да се создаде и преку комерцијални активности што се создаваат за време на бракот. Исто така, тука е наведено дека дури и ако бизнисот е посебен имот на еден брачен другар, придобивките остварени од оваа активност (направени од двата брачни другари) за време на брачниот живот и зголемувањето на продуктивноста ќе се сметаат за заедничка сопственост (чл. 74 од Семејниот законик Албанија). Додека како посебен имот се средствата што: еден брачен другар ги имал во партнерство со други лица или имал вистинско право на користење, средствата што сопругниците ги стекнуваат за време на бракот преку наследство, подарок или наследство, освен ако не се наменети во корист на заедницата, средства за лична употреба или и средства стекнати како додаток на личен имот, алатки неопходни за вршење на професија различна од оние за управување со комерцијална активност, средства стекнати од надомест на лична штета со исклучок на приходот добиен од пензијата остварена поради до целосна или делумна неспособност за работа, средства стекнати од отуѓување на сопствените средства и нивна размена. Препораката дадена врз основа на законодавството на Полска е применлива и во Република Албанија во однос на приходот остварен од надомест за лична штета со исклучок на приходот добиен од пензијата остварена поради целосна или делумна неспособност за работа, средства стекнати од отуѓување на сопственото.

Она што го разликува законодавството во Албанија е прашањето за поделба на заедничкиот имот што брачните другари немаат право да го прават во секое време, но само во случај на развод, смрт на еден брачен другар или доколку управувањето со овој имот не ја загрози благосостојбата на семејството или кога брачниот другар не придонесува пропорционално за задоволување на потребите на семејството.

Посебна заштита во албанското законодавство му се дава на брачниот дом, каде што според Семејниот законик, ако поделбата на куќата е невозможна, тогаш ќе биде дадена на користење на брачниот другар на кој му е најпотребна, земајќи ги предвид интересите на децата дури и во случаи кога таа е посебен имот на еден

брачен другар, или дури и во случаи кога таму е инсталирана професионална дејност и нејзиното отстранување е скапо. Во овие случаи, судот го одредува времето на продолжување на правото на користење од страна на брачниот другар што не е сопственик и закупнината што треба да се плати.

Најважното прашање што се препорачува да се вклучи и предвиди во законодавството на Косово и Северна Македонија е договорниот брачен имотен режим. Од анализата направена во некои земји во Европа и во САД, произлезе дека брачните договори што вклучуваат предбрачни договори и брачен договор е неопходно да се воведат при уредувањето на брачните имотни односи. Предбрачните договори пред бракот и брачните договори за време на бракот се пропишани речиси во сите законодавства, но тие сеуште не се применливи во Северна Македонија и Косово. Овој пропуст на законодавецот ги оневозможува сопружниците самостојно да ги регулираат своите имотни односи.

Аргументите за и против примена на овие договори не влијаеле на ниту една држава да ги отстрани од нивното законодавство. Од друга страна, Комисијата за европско семејно право препорача овие договори да бидат вклучени во брачниот имотен режим на сопружниците. Сите европски земји, покрај законскиот имотен режим, исто така го нудат договорениот режим, оставајќи им на сопружниците можност да изберат друг режим на сопственост преку овој договор.

Со брачниот договор, брачните другари во Австрија можат да го изберат сопствениот режим на заедницата, но во овој случај тие можат да одлучат имотот на заедницата да стане сопственост за живот и смрт. Дури и во Белгија, промената на правниот режим може да се направи преку брачен договор, во форма на нотарски акт и кој мора да биде регистриран. Преку овој договор, брачните другари можат да одлучат помеѓу режимот на раздвоениот имот или имотот на универзалната заедница. Во Германија, сопружниците преку брачен договор можат да одлучуваат помеѓу режимот на одделни средства и заедницата, бидејќи правниот режим во оваа земја е режим на заедница на натрупана добивка. Франција преку брачниот договор им овозможува на сопружниците да одлучат за својот имотен режим. Преку брачниот договор може да се определат за договорен режим, во режим на одделни средства, режим на разделба при преземања. Полска,

исто така, има три режими каде што еден од нив е законски, додека преку брачниот договор сопружниците можат да се определат за имотниот режим. Додека Хрватска и Албанија предвидоа само два режима, законски и договорен. Договорениот режим им овозможува на брачните другари да ги регулираат своите брачни имотни односи според нивната слободна волја, но овој договор не треба да се користи за интересите на само еден брачен другар, или да се прави во спротивност со уставните и моралните принципи. Поточно преку брачниот договор брачните другари можат да се согласат дека заедницата вклучува подвижен имот пред бракот и профит од личен имот за време на бракот, да ги менуваат правилата во врска со управувањето, различни удели, или да предвидат универзална заедница (чл. 108 од Семеен законик на Албанија).

Брачните договори се сметаат за една од најголемите реформи направени во семејното право. И покрај критиките дека тие придонесуваат за зголемување на бројот на разводи, сепак се сметаат за механизам за регулирање на имотните односи меѓу сопружниците. За да бидат полноважни и да се добие посакуваниот ефект, овие договори мора да се склучат како што е предвидено со закон. Тие не смеат да бидат механизам за корист само на еден брачен другар и неговите интереси и во спротивност со јавниот поредок. Ова може да се постигне со земање предвид на принципите на Комисијата за европско семејно право, брачните другари да бидат еднакви, да придонесуваат подеднакво за задоволување на потребите на семејството и децата и да обрнат внимание на прашањето за регулирање на семејниот дом.

Раскинувањето на овој договор може да се направи само во случај на смрт на еден од брачните другари, во случај на развод, со волја на двајцата брачни другари или во случај свршениците да не склучат брак (во случаи на предбрачен договор). Условите за склучување на овој договор може да се поделат на општи услови (дефинирани со законите за облигациони односи) и конкретни услови што треба да се одредат преку Граѓанскиот законик или законот за семејство.

Иако овие договори се сметаат за подготовка за развод, од друга страна се сметаат за алатка со која сопружниците одлучуваат за нивните идни средства преку утврдување на поврзаноста на средствата што ќе ги создадат во иднина. Во

Соединетите држави, брачните договори се сметаат за инструмент што ги решава имотните проблеми на сопружниците, особено сега кога околу 50% од браковите завршуваат со развод. Овој тренд на зголемен развод е присутен во Северна Македонија и Косово и поради оваа причина се препорачува овој институт да се регулира и дозволи и во овие законодавства. Со брачните договори, сопружниците можат да одлучат за својот имотен режим, да ја одредат листата на средства (имот) што ќе им бидат препуштени на сопругот, сопругата, да ги одредат подароците што ќе ги добијат и други прашања поврзани со управувањето и располагањето со имотот. Ако се има предвид искуството во САД, со предбрачниот договор идните сопружници можат да одлучат за начинот на давање алиментација, да одредат кој ќе управува со имотот за време на бракот, како и да утврдат за правата што ќе ги имаат во брачниот дом и во некои случаи да се утврди дека законот за која земја ќе се применува ако има спор меѓу нив. Брачните договори ја имаат истата функција, но со таа разлика што ова се поврзува откако сопружниците се венчаат и сакаат да го сменат законскиот режим на сопственост. Во САД овие договори може да се склучуваат за различни цели, почнувајќи од удели или размена на заеднички имот што го имаат или ќе го стекнат во иднина, како што сакаат, имотните интереси од имотот на заедницата да се претворат во посебен имот. Овие договори треба да се склучат имајќи ги предвид следните пет принципи. Овие договори мора да бидат склучени во писмена форма, мора да се направат доброволно, целосно и правично откривање на релевантни информации во времето на извршување, да не бидат неповолни за едната страна и да бидат потпишани од двете страни (Тексашки семеен законик). Но, без оглед на тоа како овие договори се регулирани во други земји, ќе се направи соодветно прилагодување доколку се почитуваат принципите што ги дава Комисијата за европско семејно право. Овие принципи не само што ќе овозможат договорниот режим да биде вклучен во законодавството на Косово и Северна Македонија, туку од друга страна ќе овозможи овој режим да биде во согласност со европското семејно право. Според Комисијата за европско семејно право, брачниот договор е наменет за идните брачни другари да се определат за одреден режим на сопственост или брачните другари да го сменат режимот во кој

се. Овие договори мора да бидат склучени пред нотар или правен адвокат, датумирани и потпишани од страна на двата брачни другари.

Преку брачните договори, на брачните другари им е овозможено да ги заштитат своите средства и посебен имот од доверителите на другиот брачен другар, да ги заштитат своите средства од постапките на другиот брачен другар, да имаат целосна независност во однос на управувањето и располагањето со нивните средства, а исто така да бидат заштитени дури и трето забави. Брачните другари слободно ја изразуваат својата волја и ги регулираат своите имотни односи без да мора да одат на суд за да ги одредат уделите на нивниот имот. Поради тоа сметаме дека е неопходно Косово и Северна Македонија во своите законодавства освен да ги предвидат и да ја определат содржината на овие договори, за кои прашања брачните другари можат да се договорат со овој договор. Вакви ограничувања воведат и Комисијата за европско семејно право, дека брачните другари треба да бидат еднакви во однос на правата и обврските, треба да придонесат подеднакво за задоволување на потребите на семејството, додека треба да се воведат построги ограничувања во случај на располагањата со брачниот дом, со оглед дека оваа институција треба да ужива посебна заштита. Исто така, сметаме дека треба да се следи и добриот пример кој прозлегува од Белгија и Бугарија каде што се регистрирани овие договори, така што третите страни ќе бидат информирани за постоењето на овие договори.

Северна Македонија и Косово се во процес на кодификација на Граѓанските законици и бидејќи овој процес сеуште не е завршен, препораките за овие земји е во нивното законодавство да бидат предвидени и уредени брачните договори преку кои сопружниците ќе можат сами да одлучат за регулирање на односите. Предвидувањето на овие договори во законодавството треба да се направи врз основа на практиките на другите земји. Но, пред се имајќи ги предвид принципите дадени од Комисијата за европско семејно право. Брачните договори ќе им овозможат на сопружниците да го прилагодат режимот на сопственост според нивните потреби и интереси, бидејќи е познато дека правниот режим можеби не е соодветен за сите парови. Преку брачните договори, во судската практика ќе се олесни решавањето на спорите и со тоа ќе стави крај трауматичната и неизвесна

поделба на заедничкиот имот помеѓу брачните другари. За спроведување на овие договори, ќе треба да се направи медиумска кампања, преку која идните сопружници ќе бидат запознати за ваквата можност, а сопружниците однапред ќе ги разрешат своите имотни односи. Исто така, предизвик за нивната примена ќе имаат нотарите и адвокатите кои ќе бидат должни да ги известат брачните другари кои сакаат да склучат брачен договор за последиците што ќе ги има нивната врска, а исто така да бидат подготвени да се информираат за последиците што ќе ги има откажувањето од законскиот имотен режим.

Ваквата предложена реформа која произлезе како генерален заклучок од направеното истражување ќе овозможи поголема слобода на брачните партнери во уредувањето на брачните имотни односи согласно нивната слободна волја, желби и потреби, што ќе придонесе за порелаксирани и похармонични односи во семејството. Предложените реформи ќе ги приближат законодавствата на Косово и Северна Македонија кон современите европски семејни законодавства и ќе придонесата тие да се усогласат со современите тенденции во брачните и семејните односи и новите општествено економски односи и капиталистички околности.

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