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# ASPEKTI HISTORIK I RREGULLIMIT TË MARRËDHËNIEVE PASURORE JURIDIKE

# ИСТОРИСКИ АСПЕКТ НА УРЕДУВАЊЕТО НА ИМОТНО-ПРАВНИТЕ ОДНОСИ

# THE HISTORICAL ASPECT OF THE REGULATION OF LEGAL PROPERTY RELATIONS

**Abstract**

The family as a bio-emotional-socio-economic institution constitutes a primary group relevant to man and society. The great social changes during the history of mankind have determined the different forms of family and marriage in almost every era, every continent and every society.

In the sphere of family and marital relations, relics of the primitive community have long been preserved; marriage was monogamous and was connected with the express consent of the future spouses and their parents.

If we look at the historical development of forms of ownership through different socio-economic formations, the characteristics of ownership are determined according to the relationship in that the members of society have to the means of production.

In periods of rapid social development and in periods of historical turning points, complex marital and family relations also undergo significant changes.

Numerous discussions have been opened about new phenomena in the development of marital relations as well as about important changes in the forms of organisation and functioning of the family; where they have often taken the form of polemics, willingly or unwillingly, women have been put in the spotlight, since traditionally, especially mothers, play a very important role in the realisation of the complex functions of the family.

***Keywords:*** *family, spouse, joint property.*

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## Introduction

Marriage and family are among the most important social institutions for the individual and society.

Marriage is a legally registered union between two spouses of different sexes, through which they freely decide to live together as husband and wife. Marriage is another form of regulating gender relations between a husband and a wife in relation to previous forms, because upon marriage, rights and duties are created for the spouses.

The property of the spouses can be separate or joint. Separate property is considered the property that a spouse owns at the time of marriage, the property that the spouse will receive based on inheritance, in the form of a gift, the property that he acquires in the form of a legacy, the property that he acquires through work, etc. Also considered separate property is the dowry, which the wife has brought into the marriage as a dowry to help the joint family economy, as well as the property that the spouse has acquired after the division of the joint property.

The joint property of spouses is created under the conditions and in the manner determined by law. The joint property of spouses is considered the property that spouses acquire during the duration of the marital community. Property created in marriage is considered joint property if two conditions are met: property acquired through work and property acquired during the duration of the marital community.

The main characteristic of the legal nature of the joint property of spouses is that all items and rights that constitute the property in the marital community belong jointly to both spouses. The spouses are presented as joint owners of movable and immovable items from the joint property.

The spouses jointly and by agreement manage and dispose of the joint property. A spouse cannot independently dispose of his/her share in the joint property.

## Historical treatments of the legal property relations of spouses

Historically, it is observed that each specific social order corresponds to a specific form of ownership, which changes with the corresponding changes of a specific social order.[2] The history of humanity shows that changes in economic-social relations have also caused changes in property relations. The scale and intensity with which these relations have changed, respectively, and the change that has occurred in property relations are a reflection of the corresponding changes in the economic-social relations of a given society.[3]

[2] E. Statovci, Pronësia-origjina dhe zhvillimi-studim komperativ, Prishtinë, 1983, pg. 263.
[3] Ibidem

If we look at the historical development of forms of ownership through various socio-economic formations, the characteristics of ownership are determined by the relationship in which members of society are related to the means of production.[4] In primitive society, the form of common ownership of the means of production and common labour reigned. The necessity of joint labour in order to be able to use the means of production and the objects produced with them together inevitably led to common ownership. This primitive unity between workers and the means of production, says Marx, has two main forms: the Asiatic community (communism in itself) and small family agriculture (with which household industry is connected) in one form or another.

We encounter the institution of property in the early phase of the Frankish state, where collective and feudal ownership of land was dominant.[5] With the establishment of the process of economic and social differentiation, the collective property fund, especially agricultural land, is reduced and distributed to families, while forests and pastures continue to remain in the collective ownership of the marca (rural commune).[6]

The functions and characteristics of a marriage are culturally related and may change over time. There are generally two categories: legal (civil) marriage and religious marriage, or a combination of the two (religious marriage is recognized by state authorities, while civil marriage is less respected without a religious ceremony). Marriages between people of different religions are called interfaith marriages, while marital conversion, a much-discussed concept, refers to the conversion of one partner to the religious faith of the other.[7]

In Asia and Africa, polygamy is allowed, where a man can have more than one wife, a sign of his power and wealth, and their status varies from one society to another.[8]

In 21st-century America and Europe, legally recognized marriages are monogamous, although there are societies that accept polygamy as a social, non-legal phenomenon where some couples enter into so-called "*open marriages*". In these societies, divorce is easily accepted.[9]

In France, as in other countries of developed feudalism, marital and family law was regulated by canon law and fell entirely under the jurisdiction of the church, and it was church law that determined the conditions and provided for the obstacles to marriage, whether the obstacles were absolute or relative.[10]

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[4] Ibidem pg. 270
[5] H.Ismaili&F.Sejdiu, Historia e përgjithshme e shtetit dhe e së drejtës, Prishtinë, 2000, pg. 154.
[6] Ibidem
[7] Revista psikologjia, Tipologjia e martesave, Tiranë, Shtator, 2016.
[8] Ibidem.
[9] Ibidem.
[10] H.Ismaili&F. Sejdiu, Historia e përgjithshme e shtetit dhe e së drejtës, Prishtinë, 2000, pg. 214.

- Absolute obstacles were the existence of a valid previous marriage, belonging to the upper clerical class (later extended to all clerics and monks), and the lack of baptism.

- Relative obstacles were blood relationships and all other relationships. Blood relatives up to the seventh degree could not marry.

Marriage was bound in the church with a special ceremony, and for the marriage to be concluded, the express consent of the future spouses, who were of legal age, was required; the girl gained maturity at the age of 12, while the boy was 14.[11]

Civil and family legal relations, as an integral part of them, during the Ottoman occupation, in the territories inhabited by Albanians, were regulated on the basis of the religious affiliation of the spouses, based on the coexistence of several legal orders:[12]

a) the Ottoman legal order, which in turn consisted of the Sharia (Muslim customary law) and the statutory law of the Ottoman Empire;

b) Albanian customary law; and

c) canon law (church) of the Catholic and Orthodox rite.

Marriage in Roman law was monogamous, a permanent life-long union of a man and a woman. Men could marry at the age of 14 and women at the age of 12. The condition for entering into marriage was the consent of the spouses and their heads of family (*for alieni iuris persons*).[13] Marriages between relatives in the first and collateral lines up to the fourth degree were prohibited. The degree of kinship as an obstacle to marriage is one of the characteristics of Roman law, which significantly differs from canon law.[14]

In Roman law, to enter into a valid marriage, future spouses had to fulfill several essential conditions.[15] Future spouses were required to have the right to use the institution of *ius conubii* (*conubium*), for the husband and wife to agree on the will to enter into marriage – *offectio maritalis* – to be of puberty, and to enter into marriage in the form prescribed by law. The right to enter into marriage – *ius conubii* (*conubium*) – between them was enjoyed by Roman citizens (*cives*) as well as Latin prisci (*Latiniveters*). As a special privylege, *ius connubii* could also be granted to those persons who did not have Roman citizenship, but the Romans rarely allowed this.[16]

In addition to conubium, persons who entered into marriage had to have the capacity to act, to be at puberty, where males reached puberty upon reaching the age of fourteen and females at twelve, while mentally ill and

[11] Ibidem.
[12] Zaçe, Marrëdhëniet martesore sipas legjislacionit shqiptar, pg. 32.
[13] D. Mickovic, Zbornik na Pravniot Fakultet "Justinian Prvi" vo Skopje, 2007, pg. 617.
[14] Ibidem.
[15] A.Bilalli&B. Bahtiri, E drejta romake, Prishtinë, 2015, f. 172.
[16] Ibidem.

*impuberes* persons could not enter into a full-fledged marriage, and according to Justinian's law, even castrated persons, because it was considered that they could not fulfill the function of marriage.[17]

Marriage with manus (*matrimoniumcummanu*) - the woman fell under the power (*manus*) of the husband or head of the family (*coemptio, confarreatio*), while marriage without manus (*matrimoniumsinemanu*) - the woman maintained her previous position (*usus*)[18] The relations of spouses in a marriage with manus- the woman passes completely under the power of the husband and loses any kind of relationship of dependence and connection with the family of origin. Her removal from paternal tutelage meant that the latter's income decreased, which was passed on to the family where she entered as a bride (*dowry*), and this therefore; created an unfavorable situation for the paternal family, not only in the spiritual aspect but also in the economic one.[19] Marriage, therefore, had the purpose of creating a conjugal bond, while *Conventio in manum* had the entry of the woman into an agnate group by submitting to the patria potestas of this group. Therefore, we must bear in mind that essentially these three forms were exclusive forms of *Conventio in manum*, but the proximity and often coexistence that *Conventio* had with marriage meant that they were also considered as part of the form of marital bond.[20]

**Historical- sociological theories on marriage**

The family as a bio-emotional-socio-economic institution constitutes a primary group relevant to man and society. The great social changes during the history of mankind have determined the different forms of family and marriage in almost every era, every continent and in every society.[21] These changes have had a qualitative character, raising the family from its simple forms to the most perfect and humane, both within the relationship that its members create among themselves and also with society. The importance of the family lies in the fact that people are born, grow up, and develop in the family circle. The family is formed through marriage, where children come into the marriage and inherit the family, preserve the human community, and make up for the losses caused by death.[22]

Marriage is another form of regulating gender relations between husband and wife, compared to previous forms, because marriage creates

[17] Ibidem.
[18] I. Puhan, E drejta romake, Beograd, 1969, pg. 372.
[19] Ibidem.
[20] Ibidem.
[21] Gj. Rrapi, Sociologjia, Prishtinë, 1997, pg. 220.
[22] Ibidem.

rights and duties for spouses.[23] Therefore, marriage is the final solemn act of formalising the realisation and legalisation of the predetermined will of the woman and the man based on the laws in force in the country where the marriage takes place, and only after marriage do the woman and the man become husband and wife with duties, responsibilities and rights for their common life, for the family, for the children, for their health and education, and for the family economy and the management of household and family affairs.[24]

From sociological and anthropological literature, we learn that the family has had a historical development, like other institutions of society. Bachoven's idea that the changing forms of the family have been conditioned by changing forms of religious consciousness has long served as the basis for its understanding.[25] Similarly, Luis Morgan defines the phases of its historical development.

The structural definition of the family also includes its "life cycle", where the life stages of the family are as follows:[26]

- The premarital cycle includes the period of marriage until the child is 4 years old, as well as childless spouses.
- The parental phase includes the preschool phase of children, the school phase, and the adolescence phase.
- The post-parental phase that begins with the marriage of the son or daughter, which also includes the grandfather-grandmother phase, and
- The widowhood phase, or the remarriage phase, i.e., after the first marriage.

In recent years, the dynamics of general social development have accelerated in all spheres of social life, starting from industry, economy, information technology, etc., and in these circumstances of development and change, both marriage and the family are faced with various challenges because they are closely related to the changes that occur in contemporary society.[27] Industrial development, which has enabled the inclusion of women in significant numbers, is one of the decisive factors that has influenced and is influencing the transformation of marriage and the family, as well as the changing approach of citizens and spouses towards these two institutions.[28]

To overcome family problems or obstacles with the aim of equality between men and women, some concrete changes must be made in the real life of the family: the man must accept and treat the woman as an equal, and the man and the woman must tolerate and respect each other.[29] However, despite the

[23] Ibidem, pg. 314.
[24] Ibidem.
[25] Ibidem.
[26] Ibidem.
[27] B. Sadikaj, Sociologjia e përgjithshme, Prishtinë, 2016, pg. 318.
[28] Ibidem, pg. 319.
[29] Ibidem, pg. 32.

commitments and changes in the form of marriage and in the organization of the family in this dynamic of family and society development, not all spouses can withstand the waves of life and the changes they bring, and precisely for this reason marriage and the family are faced with serious and unstoppable issues such as divorce, homosexual families and various forms of cohabitation.[30]

**Contractual theory of marriage**

Marital law is a collection of legal norms that regulate marital relations. The legal norms that regulate marriage and marital relations are mainly of a prescriptive nature, which regulate the form of marriage, legal property relations, and the choice of marriage, as well as other important relationships from the sphere of conjugal life.[31]

A contract is a legal relationship that is created by the expression of the will of at least two contracting parties, which applies in all areas of law, with the exception of criminal law. In family law, the contract is expressed in marriage, adoption, and property relations.[32]

According to the contract theory, marriage as an expression of the autonomy of the will of the spouses is nothing more than a contract between them, but it differs from ordinary civil law contracts. There are two main ideas on which the contract theory is based.[33]

- First, marital obligations are voluntary undertakings because they are created based on the free will of the spouses.

- Second, in the conditions where different marital practices and different social concepts of marriage exist in different countries, the selection of a practice, and consequently the imposition of certain legal obligations on the spouses, is morally arbitrary, so it should be left to the spouses to determine the terms of this contract.

The genesis of the contract theory of marriage is linked to the Gallican movement of the 15th century and is based on the principle of contractual freedom and autonomy of the will. The French Enlightenment figures of the 18th century, such as Diderot, Montesquieu and Voltaire, in the struggle with the church's views on marriage, further promoted the idea that marriage is a contract like other civil law contracts, for the conclusion, validity and termination of which the general rules of civil law should apply. The contract notion of marriage is best reflected in the French Constitution of 1791, a product of the French Revolution, according to which the law considers marriage only as a civil contract.

[30] Ibidem.
[31] H. Podvorica, E drejta familjare, Prishtinë, 2005, pg. 59.
[32] A. Jashari, E drejta afariste, Tetovë, 2016, pg. 30.
[33] A.M. Stojanova, punim doktorature, pg. 22, vep, e cituar.

According to the contract theory, the conditions and moral obligations of marriage are conceived as mutual promises that the spouses give to each other at the moment of marriage. Their content depends on social and legal practices and are usually promises related to the exclusivity of intimate relations and the permanence of the marital bond, but the promissory nature means that spouses as contracting parties can negotiate the terms and release each other from marital obligations.[34]

**Theory of mixed marriage**

Marriage cannot be defined in a general sense for all people and all times.[35] In literature, the oldest definition is that of Modestinus, according to which *"Marriage is the union of man and woman, a lifelong partnership, a sharing according to divine and human law"* (*Nuptiae sunt coniuction maris et feminea consortium omnis vitae, divini et humani iuris cominication*).[36] While in the Digest of Justinian, the following definition is given: "Wedlock or marriage is a union of male and female involving an undivided habit of life" (*Matrimonium est viri et muliries coniuctio individuam consuctudinem vitae contines).*[37]

In the case of marriage, the reconciliation of the wills of the spouses is one of the basic conditions for entering into a fully valid marriage; however, the will of the parties prevails only at the moment of entering into the marriage.[38] Marital relations are of a very personal nature, and the assessment of whether or not marital obligations have been fulfilled is very individual and has a strongly subjective character. Only during the judicial review of conflicts between spouses do marital rights and obligations become public and are stripped of the individual and subjective meaning that the spouses give them.[39]

The main difference in the legal regulation between Roman and modern law, on the one hand, and canon law, on the other hand, exists in divorces. While in Roman law, as in modern legal systems, the concept of divorce was very liberalised, in canon law, a marriage could not be dissolved by divorce in any way.[40] In ancient Roman law, marriage could be dissolved by divorce at the will of the husband or his *pater familias*.

In the territories inhabited by Albanians marital relations have been regulated for many centuries by the norms of customary law, which have been applied to Albanians until recently.[41] In the mountainous, southern, and northern regions, the regulation of property, inheritance, family, and obligation

[34] Ibidem.
[35] A. Aliu& H. Gashi, E drejta familjare, Prishtinë, 2022, pg. 104.
[36] Ibidem.
[37] Ibidem.
[38] A.Mandro - Balilli, E drejta familjare, Tiranë, 2006, pg. 225.
[39] Ibidem.
[40] D. Mickovic, Zbornik na Pravniot Fakultet "Justinian Prvi" vo Skopje, 2007, pg. 617.
[41] A. Aliu, E drejta Civile. Pjesa e përgjithshme, pg. 140.

relations was carried out mainly on the basis of customary law, while the law of the Turkish state applied only to those social relations that protected the interests of the Turkish state itself.

Family relationships in modern times have taken on a different dimension compared to ancient law.[42] These relations are based on higher principles of respect for human rights guaranteed by international acts and positive laws. For family relations, it is worth mentioning the following principles: the principle of equality between family members, the principle of gender equality, the principle of social protection of the family, the protection of children, etc.[43] The contemporary family that of the era of globalisation has changed radically; the roles of members and the perception of the family have also changed, given the high number of divorces, the postponement of the age of marriage, etc.[44]

**Conclusion**

The joint property of spouses is the property acquired with joint contribution during the continuation of the marriage, as well as the income derived from such property.

One of the problems in recent years in which we live and continue to live remains the rights of women and equality before the law. As a special characteristic in judicial practice, it has been noted that almost always and increasingly, it is women who are obliged to request the initiation of judicial proceedings for the division of joint property created within the marital community.

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[42]A.Aliu& H. Gashi, E drejta familjare, Prishtinë, 2022, pg. 52.
[43] Ibidem.
[44] A.Pajaziti, Familja e shekullit XXI: Kontesti Global, Ballkanik dhe Shqiptar, Centrum-8, pg. 41.

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