PROPERTY RELATIONS OF MARITAL PARTNERS THROUGH THE HISTORY OF BOSNIA AND HERZEGOVINA

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Review paper
DOI:10.21554/hrr.091712

Received: 01.07.2017
Accepted: 09.08.2017

ABSTRACT

The institutes of contemporary family law are rooted in Roman law, including the property relations of marital partners. From the historical perspective, the property-legal relations of marital partners in Bosnia and Herzegovina (BiH) were subject to religious regulations and the rules of the General Civil Code and Family Law of the Socialist Republic of Bosnia and Herzegovina. The article analyzes the solutions applied during the Roman, the Ottoman, and the Austro-Hungarian rule as well as the solutions included in the currently valid Basic Law on Marriage and Family Laws in BiH. The authors focus on the development of family law in terms of property relations of marital partners and provide historical-legal overview of the development of family law from the absolute power of pater familias to the full equality of marital partners.
Key words: *family law, marriage, dos, mehr, property.*

INTRODUCTION

As an institute, marriage developed in various cultur long before the written history and was regulated by common law that was codified into written laws later. In the ancient history there was a need for the regulation of property relation between the prospective marital partners. Babylonian law in respect to dowry identified two terms: sheriktum, a dowry as a part of marital property and nudunnum, wife's marital property. Although the husband managed the entire property, in case of a divorce a dowry was returned to the wife or her heirs. The ancient Egyptian law applied numerous customs and tradition in the regulation of marital relations. When the marriage was contracted, the wife would bring certain property including a dowry but also the property which served as an allowance for her and her children. Roman law saw a gradual development of the institutes with a direct influence on legal and property relations of marital partners. Although the issues of property relations were processed in accordance to the custom law, the institutes such as: sponsalia (engagement), donation ante nuptias (a wedding gift to the bride) and dos (dowry). The Twelve Tables did not include specific orders pertaining to the abovementioned institutes, but its content suggests that the institute of a dowry was known. Dowry was later described in details in the Justinian Code.

With time, these institutes of marital and legal relations of prospective partners, established in Roman law, influenced the development of later and some currently valid regulations in family law. In Medieval Bosnia, the issues of marriage and marital relations, including the property relations as well, were regulated by Common Law, with the written records on the absence of a dowry dating back to this period. The property relations on the territory of BiH, from the Ottoman rule to the passing of the Basic Law on Marriage in 1946, were subject to religious rules. The Austrian Civil Code, brought in 1811, which was indirectly applied in Bosnia and Herzegovina (BiH), included the provisions on the property relations of marital partners. The passing of the Basic Law on Marriage brought secular state and the institutionalization of marriage and consequently of all the relations between marital partners on the territory of BiH.

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"In its widest sense, marriage is a permanent union of life between man and woman. The Romans considered marriage to be only the union recognized as such by the law" (Horvat, 2002, p. 131). Man and woman were in de facto union of life with the intention for their union to be considered a marriage. "The Romans knew two forms of marriage – with manus and without manus" (Stanojević, 2000, p. 160). In Roman law the word manus, meaning hand, is a symbol of power, which is why it is used in the names of some legal affairs, manumissio, and even for the marriage with manus[2].

The property relations between spouses are different in cum manu and sine manu marriages. "The marriage cum manu put the wife under the power of her husband (or his pater familias if he had one) and she was given the position of a daughter while her property became his" (Watson, 1991a, p. 27). In such marriage, the wife[3] did not have her property as all the property, whether the one she had before the marriage or the property she acquired during marriage, belonged to her husband or his pater familias, provided he is the person alieniiuris[4]. "In the sine manu marriage, the concept present in the XII Tables, Lexduodecimtabularum, and probably even earlier, which became the rule by the end of the Republic, wife remained alien to her husband's agnate family and did not fall under her husband's ownership, keeping at the same time, regardless of the fact that she was married, her previous agnate membership of her previous family" (Horvat, 2002, p. 132).

This type of marriage recognized the principle of distinct goods, which means that wife's property was managed by her pater familias, if he is the person alieniiuris or by the wife personally, provided that she was sui iuris. "In the event of dispute on the origin of wife's property, the so called praesumptioMuciana applied, the presumption that everything a married woman possessed had been given to her by her husband unless she could prove othervise" (Lučić; Šarac, 2006, p. 77). Husband did not have the right to manage or use wife's property that was not a part of her dowry, which was marked as bona parapherna. The literature states that wife in manus marriage came under the controle of her husband or his pater familias and was given the position of a daughter, filiae locus, along with the inheritance right in that family (http://www.ius.bg.ac.rs/naucni/prilozi/21%20Vojislav%20Stanimirovic.pdfaccessed18/04/2016). On the other hand, woman in marriage without manus remained the member of her own family and as filiaefamilaias kept their inheritance right. Based on these facts, it can be concluded that there was no mutual inheritance between husband and wife in marriage just as the marriage itself was not based on the principle of mutual rights and obligations (Barry, 1963, p. 81 and 250).

There are many views given by the authors writing about Roman law that, besides these two types of marriage there existed a third type, which was marriage for expediency, the marriage contracted only because of wife's property or the dowry she would bring to her husband's family (Carcopino, translated by Lukšić; Buljan, 1981, pp. 103¬–104).

Dos

"Dowry (dos) is the property contribution that wife, her pater familias or her relatives gave to husband for the establishment of the new household.

[2]Previously, a widely accepted opinion in science was that only the marriage with manus was legal, while the marriage without manus was considered a sort of half-marriage which became legal only through a certain period of time. Recent research, supported by rich comparative material of oriental peoples as well as the peoples in the primitive stage of development confirm that most ancient peoples, including Romans, were familiar with the duality of marital forms, regarding husband's authority over wife. In earlier times, other peoples, as well as Romans, saw the marriage with manus as a regular phenomenon conforming to the strict and closed organization of a Roman family in the period of natural economy. More developed economic circumstances that loosened the previous strict agnate family organization brought more independence to family members, including women. Hence by the end of the Republic, sine manu marriage became a rule. (Horvat, 2002, p. 132)

[3]On the position of woman see more Gardner, 2009.

[4]The property which the woman held or which was constituted for her benefit, passed into the possession or ownership of her husband. He became liable on her contracts in the same degree as if the obligations had In this system there were no proper matrimonial relations. The husband's rights were paternal rather than marital, and, so far as the law was concerned, paternal rights were as unlimited as those of a dominus (Loeb, 2004, p. 95-96).

[5]In case a fiancée was the alieniiuris person, all the property she acquired for her engagement or later during marriage still belonged to her pater familias, and only her children had the right to inherit such property. If a fiancée was the suiiuris person, all the property she acquired for her engagement and later during marriage belonged only to her. Such property, except for the dowry was called bona paraphernalia. A fiancée had to possess the document confirming her ownership of the property. If she failed to provide such proof, she might be punished due to praetorian regulations that created the praesumptioMuciana. http://www.prafak.ni.ac.rs/files/centar_pub/Zbornik_LIV_2009.pdf (accessed 15/04/2016)

The dowry given by pater familias was called dos profecticia while dos adventicia was the dowry from other sources" (http://ius-romanorum.blogspot.ba/2007/02/miraz-dos.html accessed 24/02/2016). Although it was not a necessary condition for the validity of Roman marriage, dowry in Rome had a central position in marital givings and it was almost an essential characteristic of marriage. "It is not known if all the daughters received peculium[6]. They had less need for it than sons since they were given dowry for marriage. However, there have been many sources on peculium given to daughters ever since the 3rd century so it may be assumed that it was a common phenomenon" (Antti, 1998, p. 43).

"Dotis dictio is a solemn promise of the dowry given by wife or her family elder" (Stanojević, 2000, p. 301). It is assumed that dowry was promised unilaterally by pronouncing certain words without the concurrence of will, which means that there is no need for the decleration of the other side. There is a difference between delivery and promise of dowry.Dictio is a significant word, different from dictum and promissum, which means that promissio is only a promise, a binding statement, not the delivery of dowry, which makes a clear distinction between a promise and the very delivery of dowry[7]. Regrading the legal sources, it seems that Lex Julia de fundodotali additionally obliged fathers to give their daughters dowry. This law stipulated a possibility that praetors impose tutors on women to be married due to dowry. This as well as the possibility for filing a suit against the father of the family or his heirs in case of not delivering dowry is mentioned in the Digest (the Marcian fragment 23.2.19). Until this law was brought, giving dowry was considered as a moral duty while after it there was the legal obligation of giving dowry since wife was given the possibility for filing a suit for dowry.

There are views that there is a clearly visible evolution of the development of dowry institute in Roman law, while the opposite views state that this is only a change in character and features of this institute rather than its complete change and development (William, 1885, p. 29). In the first stage husband or his pater familias was able to completely assume the dowry wife would broing to marriage and dispose of it freely. Since there are no written sources[8], the conclusion is that the issue of dowry was regulated by Common Law until LexJulia etpapiapoppaea was brought. "It seems that the turning point leading to intervention regarding the regulation of dowry was the case of first divorce without guilt in Rome".
(http://www.ius.bg.ac.rs/naucni/prilozi/21%20Vojislav%20Stanimirovic.pdfaccessed18/04/2016) In the older period of the Roman state, husband was able to divorce and keep dowry or spend it completely during marriage. In order for such behavior of husband to be prevented, two obligations for husband were introduced – limitation of dowry disposition and obligation to return dowry in case of marriage termination[9]. In post-classical law woman was allowed to file reivindicatione suit for individual dowry items[10].

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[6]The increase of social wealth, especially for the members of the elite, broke family cohesion. The influx of slaves, large territories of farmland conquered and the market enabled the survival outside family. Adult men left the family, got emancipated and independent while those who stayed had the possibility to acquire something for themselves rather than for pater familias only. There were earlier cases when the head of the family would give a part of his property to his son, grandson or other family member, on the provision that he had the right to take it back anytime. This was the so called peculium (Stanojević, 2000, p. 143).

[7]Bechman connects dotis diction with the ceremony of sponsio. The dos, he thinks, was promised by a sponsio (Buckler, 1895, p. 34).

[8]A new interpretation is needed of res tuastibihabeto if some such clause were in the XII tables. This cannot refer to the regulating of property. It simply means "Take you things" i.e. you clothing and personal objects.. It is a particulary curt way of telling the wife to get out. Even in marriage cum manu where everything legally belongs to the husband it would be natural to regard the wife's clothing and the small personal items as her own (Watson, 1991b, p. 33).

[9]Special legal actions were used for the return of dowry (actio-reiuxoriae, actiotacita ex stipulata). The procedures pertaining to these legal actions were by no means simple as the plaintiff first had to prove that he constituted dowry, then the contents of the dowry and finally that he had the right to institute a legal action (Deretić, 2011, p. 343).

[10]Reivindicatio, see more Stanojević, 2000, p. 214.

Dowry was wife's ownership and husband had the right to manage her property and the usufruct for mutual marital needs. In this respect, he was obliged to treat it as a good host while having the obligation to compensate for any potential damage[11]. Iustinian is considered the ruler most credited for the codification and reform of Roman law. His Novels introduced many changes in the field of marital law and consequently property relations. "Upper class citizens (Illustres et senators) were ordered to compose a written document about the dowry that bride would bring to groom and the wedding gift by groom in favor of bride" (Deretić, 2011, p. 345). The aim of the introduction of such contracts, including the possibility for contracting a marriage before a church representative, is the need for the prevention of any possible difficulties in proving the existence of marriage or gifts received and dowry given.

Donatio ante/proper nuptias

"The Difest mentions the gift between spouses; giving gifts by husband, before or during marriage, which became the obligation of husband or his pater familias, the same as dowry was the obligation of wife or his father or some other person" (Deretić, 2011, p. 345). There was a rule that husband could give a gift to wife before contracting a marriage, donatio ante nuptias. In time, this rule was changed in the sense that husband could only promise the gift to wife, without the obligation to give it. "In the time of Justinian, the name of this institute was changed into donatie propter nuptias since Justinian allowed for this gift to be established during marriage as well, not only prior to marriage" (Deretić, 2011, p. 341).

This implied that giving gift became the obligation of husband or his pater familias equally as giving dowry was the obligation of wife's pater familias[12]. Gift was wife'w ownership and husband was not allowed to use it even with wife's approval.Giving gift was approved by the fact that wife brought dowry to marriage while husband gave gift[13].

PROPERTY RELATIONS OF MARRIAGE PARTNERS DURING THE OTTOMAN RULE

The characteristic of Islam is granting womanthe rights naturally belonging to her and protecting woman as person. Hence, one of the rights Islam gave to woman is the right to possession and acquiring property. In pre-Islam time, woman suffered injustice of every type and was deprived of her rights. Thus, her guardian freely used her property without the opportunity to earn money or dispose of her property. Islam saved woman from this humiliating position specifying the wedding gift MAHR, making it her own property, not allowing anybody to take it but her next of kin unless she agreed. Mahr is the obligation husband assumes by the very act of wedding. Wife has the right to mahr in case of divorce, even if she did not contract it at wedding.

Mahr is an integral part of marital contract but it is not a prerequisite for its validity. (Tuhmaz, 2003, p. 125). Mahr serves as the material protection of wife against husband's autocracy. Islamic law does not allow for wife to be materially uncared for or blackmailed, or left without resources for life after divorce.

[11]Woman was given the legal inheritance right over the entire husband's property and the advantage over other creditors, in order to be provided with dowry return. In terms of dowry restitution, the rule was that husband would restitute dowry at all times, regarless of whether such action was contracted or not, even in cases when non-restitution was contracted, unless husband was wife's legal heir. In the law of the post-classical period, woman was allowed to bring the vindication lawsuit for individual dowry objects while privileged general mortgage over the entire estate of the husband was introduced in favor of the wife, as an assurance of dowry restitution (Deretić, 2011, p. 341).

[12]If the wife is divorced from the husband without her fault, she is entitled by lae to the donation ante nuptias. She is equally entitled to it, though by special agreement only, in the event of her surviving her husband. The practical result in such cases is that the wife can claim payment of double the amount of her dos (Sohm, 1892, p. 381).

[13]Donatio ante nuptias, of which we first hear in constitution of Theodosius and Valentinian, which speaks of it as recognized by law, was a gift on the part of the husband as an equivalent of the dos. It was the property of the wife but managed by the husband, nad could not be alienated, even with her consent. Justinian provided that the wife, if survivor, should receive an equal value from the donation propter nuptias with that which the husband, if survivor, would have receive from the dos, the actual amount reserved for the survivor being matter of agreement between the parties. By a constitution previous to Justinian the wife had, if survivor, an equal portion of the donation with that her husband had of the dos. Justinian substituted an equality of value for an equality of proportion (Thomas, 2007, pp. 232–233).

Mahr also prevents wife from being left at the mercy of husband's relatives It strengthens the bond between spouses, it is a material bond that strengthens and reinforces the spiritual bond providing wife with everything she needs for her wedding ceremony and the move to her husband's house (Tuhmaz, 2003, p.128). Wife decides on the amount of mahr prior to contracting marriage while husband rejects or accepts the conditions set forth.

There are two types of mahr:

1. El-mehru`l-musemmais the nominated or specified mahr. With this type, the amount, type and procedure of giving mahr are specified.
2. El-mehru`l_misliis the additional contracting of mahr if it was not specified by the wedding act. Woman who did not contract mehr shall do it subsequently, in proportion to the amount of mahr specified for her sister or a close female relative, taking into consideration their age, simial physical appearance, education, etc. (Džananović, 2003, p. 44). The additional mahr is contracted in the following cases:
   a. When people contract a legally valid marriage without contracting mahr, leaving husband to determine the amount of mahr or not determine it at all. This marital contract is called akdtefwie – the contract of trust;
   b. If spouses agree at the wedding ceremony to get married without mahr, or husband makes marriage without mahr conditional for wife and she accepts it. Such marriage shall be valid but husband's condition is null and mahr needs to be additional contracted;
   c. If mahr is contracted but contains the element forbidden by Sharia Law, the additional mahr needs to be contracted since such mahr contract is null.

Islam did not specify the mahr amount as people have different material abilities and the congregation is left to give mahr according to that. That is why the highest and lowest amount of mahr cannot be limited. Giving mahr is not conditioned in the entire amount and its giving can be delayed. "Usually, smaller amounts are giving at contracting a marriage and suchmahr is called mehrmu`adždžel – urgent...". If the urgent mahr is contracted, wife has the right to refuse to enter husband's house until she receives mahr (Džananović, 2003,p. 44). No person has the right to dispose of mahr but wife. She deposes of mahrindependentlyand she can give it as a gift, invest it or spend it. She can give the entire mahr to her husband as a gift or free him of one part of mahr.

Wife disposes of mahr independently on the condition she has the legal capacity. Husband is not allowed to put it into circulation without wife's specific permission. What wife earns is also her property and only she has the right to dispose of it and neither her husband no any other person have the right to take it away unless she is willing to do so (Tuhmaz, 2003, p. 132).

"In Islamic law, mahr is not equal to the obligatory allowance given to wife and it is completely independent from this obligation" (Tuhmaz, 2003, p. 132).

PROPERTY RELATIONS DURING THE AUSTRO-HUNGARIAN RULE

AllgemeinesBürgerlichesGesetzbuch

"The Austrian Civil Code (hereinafter ACC, German the Allgemeines Bürgerliches Gesetzbuch) belongs to an extreme bourgeoisie codification in the 19th century, based on the reformulated Roman law. After many years' work, the Committee[14] came to a single draft which on June 01, 1811 the emperor Franz Joseph I proclaimed the Austrian Civil Code" (Imamović, 2003, p. 224). The first part of the Code was related to persons with the provisions on personal rights and family law that included marital law, relations between parents and children, tutorship and guardianship. The second part dealt with property law and law on obligations, including the provisions on marital contracts. The third part of ACC was related to common provisions of personal rights, property laa, and law on obligations.

[14]During the reign of Maria Theresa, two Committees were established and two drafts of the Civil Code were made (Codex TheresianusIurisCivilis). During the reign of Joseph II, a new, third Committee was established and a new draft was made. The first part of that draft was published in 1786 as "Josefinisches-Gesetzbuch". During the reign of Leopold II, after the Imperial Court appointed the Austrian lawyer Karl Anton von Martini as its head, the fourth draft was made (known as Martini ever since), which was put into effect field tested in Galicia (the so called Western Galicia Civil Code) while at the same time it was given to the public (provinces, faculties, judicial committees, etc.) for assessment. In 1801, a Court chamber was appointed for the draft revision. The result of this revision headed by Zeiller, the highest scientific authority in the history of Austrian codification, was issued after several revisions on June 01, 1811 (Radovčić, 1975, p. 251).

In terms of ACC implementation, it was enforced in the Austro-Hungarian Monarchy and the states with this union. "By issuing a letter patent on November 29, ACC entered into force in Hungary, Croatia and Slavonia, the Serbian Voivodship and the Banat of Temeswar" (Dobrovšak, 2005, p. 78). In Bosnia and Herzegovina, ACC was the additional legal source[15].

ACC allowed spouses to contractually join their separate properties and specify their mutual authorizations for managing and disposing of their property. Failing this, the assumption was that husband had the right to manage the joined property (Austrian Civil Code, 1906, paragraphs 233–236). Consequently, the regime of mutual or separate property of marital partners existed. In the event of non-contracting mutual property, each marital partner retained the ownership of his/her proper[16], while the other partner did not have the right to use such property. Based on the legal assumption and the fact that husband is wife's legal guardian, he had the right to manage wife's separate property until she would specifically object to such practice (Paragraph 1238, ACC). The very act of contracting marriage[17] did not lead to the establishment of spouses' joint property.

Such property required a separate marital contract[18]. Marital contracts included the contracts regulating property issues of future spouses, meaning the issues of dowry, paraphernalia, morning gift, union of property, management and usufruct of one's own property, order of succession or in the event of death, specific lifelong usufruct of the estate and widow support (Paragraph 1217, ACC).

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Dowry included the property wife or some other person promises or hands over to husband, for reducing the costs of living for that marital union. If fiancé had her own property, she and her fiancé agreed on handing dowry and other gifts. If wife was underage, the decision on dowry was made by her father or tutor with the approval of the authorized court (Paragraphs 1219-1220, ACC).

ACC specified the obligation of giving dowry, provided that such practice was contracted and that any dispute would be discussed before a court of law (Paragraph 1220-1224, ACC). If husband, prior to contracting marriage, did not contract dowry, he had no right to demand it. (Paragraph 1225, ACC) During marriage, husband had the right to usufruct and accession. If dowry consisted of money, handed claims or expendables, husband had full ownership over dowry. Consequently, husband managed and used dowry property and he was able to expendables as his own belongings. After husband's death, dowry belonged to his wife or her heir if she died before husband. ACC also specified that after wife's death dowry could be given to husband rather than her heirs, on the condition that such practice was specifically contracted (Paragraphs 1227-1229, ACC). ACC also recognized the term paraphernalia that included the gift man or some other person gave to increase dowry.

[15]There were fice sources of law in Bosnia and Herzegovina during the rule of Austro-Hungarian monarchy: laws, regulations and other acts enacted for BiH by the Common Government, the Ottoman law and the law of Sharia, cannon laws of the Catholic and Orthodox churches, Jewish marital law, Bosnian common law, and ACC (Imamović, 2006, p. 74).

[16]Prior to contracting a marriage a woman (girl) rarely had her own property. If she had her own property, that was most often the result of inheriting it or earning it through some labor outside her home. The specifity of such labor was that girls were sent outside their homes to provide dowry for themselves, especially in the families that were not able to provide dowry from their own resources, since without dowry they would remain unmarries. In such way, the property a woman would bring into marriage was actually the integral and sometimes the solely part of her dowry (Krešić, 2010, p.545).

[17]Pursuant to the provisions of the General Civil Code (GCC), the marriage was contracted by a wedding. It stipulates the legal declaration of two persons of the opposite sex of their will to live in a union, give birth and raise children and help each other. Marriage is then a full and permanent union formed between the persons of the opposite sex. Its purpose is to join the spouses but in such a way that husband is the head of the family. The purpose of marriage is in giving birth and raising children as well as in satisfying sexual urges in a dignified way that would not prevent child birth. The sacrament characteristic of marriage was not mentioned in GCC as this institute defined marriage in general, regardless of different denominations. Hence, the institute of marriage in GCC is applicable for the followers of the denominations that do not recognize the sacrament.(Dobrovšak, 2005, p.79).

[18]The conclusion of the contract on the union of ressources required the definition whether such union includes the present or future property or it includes both the present and future property of spouses. It was therefore necessary to create a list of all the property thus dividing what is to enter the union and what is to be excluded. (Krešić, 2010, pp. 575–576).

Wife did not have the right to use or dispose of paraphernalia but was granted such right in case when marriage was terminated due to husband's death (Paragraphs 1230-1231, ACC). In case of husband's death, wife was granted the amount called widow support. It was granted to wife immediately after husband's death and was supposed to be paid three months in advance (Paragraph 1242, ACC).

ACC according to Roman law

The characteristics of ACC solutions in relation to Roman law are that they recognized the institute of marital contracts that were made when the regime of joint property was contracted. If this regime was not contracted, each spouse retained and manahed his/her property as one's own. However, even in such marriage, wife's property was managed by her pater familias if she was alieniiuris person. Woman in Roman law was never completely independent in managing property; even if she was sui iuris person she needed her tutor's consent for certain actions. In terms of dowry, the Iustinian reforms of Roman law introduced the limitations for husband's management of dowry as well as his obligation to return dowry in case of marriage termination. Such solution was also included in ACC as well as another characteristics taken from Roman law - the over the praesumptioMuciana, a presumption that everything a married woman possessed had been given to her by her husband. Men and women in the Roman state were not equal, men had their own rights that were iuscivile granted to a Roman citizen. On the other hand, women had limited rights that she could exercise only with the consent of her pater familias or tutor. The period of ACC implementation, considering the social and economic development, saw the equality of man and woman in the issue of marital rights and obligations. However, one can still not fully accept the existence of such equality, especially due to the fact that woman was not able to perform all the jobs and that for some jobs she needed the consent of the father of the family.

MARITAL PROPERTY RELATIONS THROUGH HISTORY OF BOSNIA AND HERZEGOVINA

What characterizes the institute of marriage in Medieval Bosnia is the absence of dowry. Woman in Medieval Bosnia did not have economic rights and she brought almost nothing into marriage, as dowry almost did not exist (Kešetović, 2011, p. 300). This was justified by the fact that collective family ownership of the propery was long-kept and that giving dowry would destabilize the economic power of family cooperative, which is why woma was deprived of these rights at the contracting of marriage. The custom of giving dowry did not exist even in the period when private property appeared. A document states that women are not married for their dowry but for their love and the respect of their family[19].

The period of the Ottoman and Austro-Hungarian rule in Bosnia and Herzegovina is characterized by the implementation of religious legislative on family-legal and marital relations of recognized religious communities. Although religious regulations specified the rights and obligations of marital partners in marriage, husband is mainly considered the head of the family and managed the entire property. Although it was not explixitly specified by religious regulations, the custom was made that by marriage woman brought dowry, which was to serve for the costs of common life, and that she ran such property independently, whereby in case of marriage termination dowry was returned to wife or belonged to her heirs.

[19]Valuable data on marriage and inheritance law can be found in the wills made by the members of the noble families. The will made by PribislavVukotić shows that he had offspring from two marriages as well as the inheritance line. The will was made on March 21, 1475 in Padua where he lived with his second wife Dorotea and their children. The will was compiled by the scribe PinniNiccollo in the presence of JacomoTodescco, the abbot of the Church of St Francis in Padua and his best man/godfather Martin from Novo Brdo, the resident of Padua. PribislavVukotić kept some elements of the old indigenous Bosnian way of life but he also accepted something new, influenced by the new living environment. This is indeed confirmed by the will provisions related to his wife Dorotea. The will also specifies that there was no such custom in Bosnia by which the wife is taken for her dowry but for love, goodness, honor and the reputation of her family. This way Pribislav somewhat denied that in his time in Bosnia wife remained her position only as long as she was faithful and kind (Kešetović, 2011, p. 300).

In the state of Yugoslavia in the period of 1918 – 1941, although the constitution principle was proclaimed that marriage is under the protection of the state, the jurisdiction and procedure in marital issues was given to religious courts, meaning that the regulations were applied that were valid in specific territories[20]. The unification of marital law was prevented by the following: the existence of several religious communities that regulated the field of marital law, obligations of the Kingdom of Yugoslavia specified in international treaties (The Treaty of Saint-Germain-en-Laye) and the concordats (the valid concordat for the territory of Bosnia and Herzegovina was the one Asutro-Hungary concluded with the Holy See and the Patriarcate of Constantinople and later the rules of the Serbian Orthodox Church)[21]. In this respect, there is the continuity in the implementation of religious legislative in the issues of marriage and marital relations ever since 1946. The Basic Law on Marriage of the Federal People's Republic of Yugoslavia dating back to 1946 (hereinafter BLM) (Osnovni zakon o braku – „Službeni list FederativneNarodneRepublikeJugoslavije" 29/46, 36/48, 89/48) regulated the norms of marital and family relations for the entire country. BLM clearly regulates separate and mutual property of marital partners. The property one marital partner has at the time of contracting marriage remains his/her own property and that partner keeps the right to manage and dispose of it independently. (Article.12 OCC)

Marital partners can mutually enter into legal contracts in order to specify their rights and obligations. More detailed provisions of property relations between spouses are specified by the Law on Property Relations of Marital Partners. (Law on Property Relations of Marital Partners, Official Journal of the People's Republic of Bosnia and Herzegovina no. 32/50) The enactment of BLM made marital partners completely equal immarrage, with exercising the same rights and obligations, including the option of agreement on mutual property relations based on complete equality[22].

"The Constitutional reform and enactment of constitutional amandments in 1971 transferred the jurisdiction in the field of family law from the Federaal Republic of Yugoslavia to republics and provinces" (Traljić; Bubić, 1998, p. 33). The deadline for the enactment of republic-level laws was too short, which is why the decision was made on the prolongation of the validity of the federal law, which meant that BLM was valid as the republic-level law. BLM suffered slight changes and was valid in Bosnia and Herzegovina until the enactment of the Family Law of the Socialist Republic of Bosnia and Herzegovina (hereinafter FL SR BiH). (Family Law of the Socialist Republic of Bosnia and Herzegovina, Official Journal of the Socialist Republic of Bosnia and Herzegovina no. 21/79, 44/89)

"Marital property law regulates property-legal relations between spouses. The Family Law regulated these relations in the form of legal property regime. This means that spouses were not given the option to regulate these relations by a contract in a way that would be different from the provisions of the Law" (Traljić, Bubić, 1998, 312). FL SR BiH recognizes separate and mutual property of marital partners. The property a spouse has at the time of contracting marriage remains his/ger own separate property (Article 264.section 1. FL SR BiH). The property that spouses acquired by their labor during marriage as well as income resulting from such property make mutual property (Article 264.section 2. FL SR BiH). Gifts given by third parties to marital partners during marriage make mutual property although they can make separate property if such is the result of the nature of gift (Article 264 section 3.FL SR BiH).

[20]The jurisdiction of the ecclesiastical courts in these marital issues was considered a privilege of the religious communities that were given the status of public legal institutions. However, the courts of the recognized religious communities, except for the Islamic community, were exclusively church institutions. Their establishment, organization, and procedures were regulated by church rules. Here lies the essential difference between these institutions and the Sharia courts. The Sharia courts were the emanation of the state rule; their jurisdiction was established by a state law, they declared their verdicts in the name of the king and the verdicts were executed pursuant to state laws. The ecclesiastical courts, even when they executed the power delegated by the state, were primarily church forums while the verdicts were declared in the name of God. (Karčić, 2005, 88.)

[21]The unification of marital law was prevented by the following: the existence of several religious communities that regulated the field of marital law, obligations of the Kingdom of Yugoslavia specified in international treaties (The Treaty of Saint-Germain-en-Laye) and the concordats (the valid concordat for the territory of Bosnia and Herzegovina was the one Asutro-Hungary concluded with the Holy See and the Patriarcate of Constantinople and later the rules of the Serbian Orthodox Church). In this respect, there is the continuity in the implementation of religious legislative in the issues of marriage and marital relations ever since 1946.

[22]Article 4. BLM, Husband and wife are equal in marriage

Family Law explicitly regulated the issue of dowry as a part of property, whereby dowry or the property given as dowry make separate property of wife (Article. 290 FL SR BiH). "Marital partners jointly own, manage, and use mutual property. This includes equality and agreement on the maintenance, usage, improvement, usufruct and settling the costs resulting from the management, etc" (Traljić; Bubić, 1998, p. 318). Marital partners may agree on the division of mutual property (Article. 266, FL SR BiH) or each marital partner may file a complaint before the court for the assessment of his/her own share in mutual property (Article.267.section.1. FL SR BiH).

Since the Family Law made marriage and common-law marriage as equal, the property relations of common-law partners were also regulated by this law. The legal regulations identified the issue of gifts that marital partners gave each other before contracting marriage or during marriage. In other words, the law regulated that such gifts of lower value are not returned in the event of marriage termination (Article.276. section.1. FL SR BiH). The higher-value gifts originating from the separate property of one marital partner are returned, with the exception that they can be kept if their return would impose severe material life conditions on the partner returning it (Article.276.section.2. FL SR BiH).

After the Dayton Peace Agreement[23], family law in Bosnia and Herzegovina has been regulated by three separate laws: Family Law of Bosnia and Herzegovina Federation[24] (hereinafter called FL FBiH), Family Law of Republic of Srpska[25] (hereinafter called FL RS), and Family Law of Brčko District[26] (hereinafter called FL BD).

Family legislative in Bosnia and Herzegovina accepts the regime of mutual property with the differences in the definition of marital property. Namely, while marital property in FL FBiH and in FL BD are considered co-ownership, FL RS defines the property of spouses as mutual property. In the legislative of Bosnia and Herzegovina, the legal property regime includes marital property and separate property. Marital property is acquired by labor during marriage.Labor is the means for acquiring property and as such it can be individual (independent) or mutual, direct or indirect.[27] In terms of managing marital property, the regulations of property law and and law on obligations are applied, if not regulated otherwise by the Family Law. Co-owners have the right to manage the property jointly and they can entrust the management to one or more co-owners or third persons. (Article 16 Paragraph 1, Law on Ownership and Legal Relations). This management is related to making decision on the way of usage, maintenance and keeping, improvement, etc.

Marital property is divided into equal parts. The legislator accepted the system of equal parts, based on the principle of equality of marital partners.[28] According to the system of equal parts, the parts/shares of marital partners are always equal. The situation in which one of marital partners did not participate with his/her labor in the acquisition of marital property is only possible in theory. The fact that one marital partner was frugal during the acquisition of marital property while the other marital partner was a spendthrift does not affect their co-ownership shares (Alinčić, 2006, p. 505).

It is justifiably emphasized that the division into equal parts shall not always be rightful for both marital partners (Traljić; Bubić, 2007, 80. Also see: Alinčić, Mira et al., Mladenović; Panov). In order for marital partners to exclude the legal property regime or create the regime most adequate for them, the legislator created the possibility for the conclusion of marital contract.

[23]The Dayton Peace Agreement dated November 21, 1995 was signed on December 14, 1995 in Paris. The Peace Agreement included 11 annexes. Annex 4 of the Agreement acts as the Constitution of BiH. A separate value is given to the European Convention and its protocols. Like the agreements in annexes to the Constitution of BiH, pursuant to Article II/2. of the Constitution of BiH, the Convention is not only directly legally applicable but it also has the priority over any other law. This raises the issue of its position within the pyramid of the entire legal system of Bosnia and Herzegovina (Vehabović, 2006., p. 25).

[24]Family Law of the Federation of Bosnia and Herzegovina, Official Journal of the Federation of Bosnia and Herzegovina no. 35/05, 41/05, 31/14.

[25]Family Law of Republic of Srpska, Official Journal of Republic of Srpska no. 54/02, 41/08, 63/14.

[26]Family Law of Brčko District, Official Journal of Brčko District no66/07.

[27]For more see: Mladenović, Panov, 2003, p.197.

[28]In terms of marital contract, FL RS included the regulation by which such contract was subject to court or notary certification. It can be concluded that the lawyer ot marital partners themselves were able to draw up the contract which would then be certified by the court or notary public. Unlike FL RS, FL FBiH-specifies that marital contract needs to be made by the notary public. By the amendments to FL RS in 2008, the regulation was taken from FL FBiH.

On the other hand, the system of equal parts/shares is particularly protective of the unemployed woman, providing her with equality in advance. It is particularly emphasized that equal division contributes to shorter court proceedings and eliminates the possibility for their lengthening. Unlike FL FBiH and FL BD, FL RS specifies the following in the division of marital property, "Each spouse is entitled to a half of the mutual marital property."(Article 272. FL RS)However the subsequent paragraph defined that each marital partner has the right to demand the court to assign him/her the share that would be larger than the half, provided that the spouse proves one's contribution in the provision of the mutual property to be obviously higher than that of the other spouse (Article 273 Paragraph 1. FL RS).

Separate property in family legislature in BiH is defined from two aspects: by the time and means of provision. The property a spouse has at the time of contracting marriage remains his/her separate property (Article 254 Paragraph 1. FL FBiH, Article 270 Paragraph 1. FL RS, Article 231 Paragraph 1. FL BD). The property acquired before marriage, regardless of the way it was acquired, remains one's separate property. The application of time framework accepted for the definition of the term marital property, defines the property acquired after the termination of marital union as separate property, regardless of the legal framework for its provision (Traljić; Bubić, 2007, p. 84).

The contractual property regime is a novelty in family legislature in BiH. All three family laws regulate the possibility for the exclusion of legal property regime or its alteration by means of a contract, thus providing a wide freedom in contracting. The contract by which marital partners exclude the legal property regime is called marital contract (prenuptual agreement).

Hence, the domestic legislature enabled marital partners to regulate their marital-property relations by means of marital contract. FL RS was the first that regulated the issue of marital contract in BiH, as early as in 2003. After that, FL FBiHregulated this institute in 2005 and FL BD regulated it in 2007. By the amendments to FL RS in 2008, the regulations of mairtal contract in family legislature in BiH was almost balanced in all its segments.[29]

[29]In terms of marital contract, FL RS included the regulation by which such contract was subject to court or notary certification. It can be concluded that the lawyer ot marital partners themselves were able to draw up the contract which would then be certified by the court or notary public. Unlike FL RS, FL FBiH-specifies that marital contract needs to be made by the notary public. By the amendments to FL RS in 2008, the regulation was taken from FL FBiH.

Common-law marriage partners have the possibility to conclude the contract and regulate their property relations, provided that they live in common-law marriage as regulated by the law. FL FBiH (Article 3) and FL BD (Article 5) specify that such common-law civil union between a man and a woman that are not married to or in another common-law civil union with another person has to last three years minimum or shorter if a mutual child is born in such a relationship. Unlike these laws, FL RS specifies the length of common-law civil union as the only prerequisite. Family legislature in BiH does not state the title of the contract made by common-law partners. Namely, legislators did not have the need to specify the title as they explicitly do not regulate the conclusion of this contract. The legal regulation specifying that all issues related to marital property are also applied to common-law marital property[30], also covers the contract that defines the property relations of common-law partners. In legal theory, the contract between common-law partners is titled common-law contract or just contract (Belaj, 2002, p. 39).

CONCLUSION

In Roman law, society and family, man and woman did not have an equal position. Namely, in the field of public law, woman did not have any political rights, or active or passive vote to right. Woman did not have inheritance rights since she received dowry which excluded her from any other inheritance. Woman had limited business capacity and she was under the authority of her pater familias or husband. Even in the situations when she was suiiuris, she needed her tutor's consent for certain business affairs. Husband and wife were not equal in marriage, wife was under the authority of her husband and he managed the entire property.

[30]Article 263.section1. FL FBiH "The property acquired by common law marriage partners by their labor in a common law marrage as defined in Article 3 of the Law is considered their common law marital property." Section 2. "The property in Section 1 of this Article is subject to the provisions of the Law on Marital Property."

The provisions of the article of FL BD are identical while in Article 284 FL RS regulates the following: Section 1. "The property acquired by the labor of the persons living in a common law marriage for a longer time period is considered their mutual property." Section 2. "The division of the property defined in the previous section is subject to the provisions related to the divison of the common property of marital partners."

As law developed, the position of woman changed, and the Justinian Code introduced certain improvement of her position and rights. Daughters were included in the inheritance line; man had certain limitations in managing dowry, etc. What is indisputable is the fact that ACC when specifying property relations of marital partners. What is different from the period of the Roman state is that in the time of ACC implementation, in accordance to the changes and development of society, women had the right to certain professions and consequently to acquisition of individual property, independent of their family property or some other property managed by her father. Although ACC established equality of legal subjects regardless of gender, this principle of equality was not implemented consistently. Woman still faced certain limitations of her business capacity; she could not be assigned as tutor, witness in making the will or land registry deed. Husband was considered the head of the family and regardless of the fact whether wife brought dowry in marriage or not, he was obliged to support her. Although women were given rights, such situation, in other words an unequal position of man and woman, especially in marriage, remained until 1946 when marriage was institutionalized by the enactment of the Basic Law on Marriage. This law specified that man and woman are equal in marriage. Regarding marital property, it was specified that marital partners have mutual and separate property. Earlier family legislature defined marital property as mutual ownership possessed, managed and used by marital partners. FL FBiH specifies marital property as co-ownership by its nature, with marital partners as co-owners with equal shares, unless they defined it differently. The exception to this is FL RS that kept the solution from the previous law, whereby the property acquired by spouses by their labor during marital union is defined as mutual property. It can generally be concluded that in present-day law men and women, as legal subjects, are completely equal, which is confirmed by the family legislature of BiH in the field of marital property relations.

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