



The National and International Legal Framework Related to Family Relations Seen from the Perspective of Gender Equality

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Abstract

Gender-based discrimination is a long-standing problem of society and of the family in particular. While the possibilities of identifying the phenomenon of discrimination in public life are more tangible, discrimination in the family remains mostly in the shadows and not easily evident. It is about the relationships that are built between spouses, children, and other family members. This study aims to analyze the factual and legal situation of the dimensions of (lack of) equality between family members from a gender perspective. Seen through the lens of family relations in particular, this study will reflect in general terms the trend and society's approach to gender equality. This is because of imagining and not only the family as the basic and most important cell of society, the one that transmits values and principles to society. Healthy family and marital relations are an important contribution to the elimination of gender stereotypes not only between family members but also in society in general. Although family relations mainly belong to the sphere and private interest, the legislator has always put a strong emphasis on the special protection of the family and marriage, providing for it in the most important normative acts, such as the Constitution and the Family Code, but also in other acts which indirectly regulate family relations. There are also numerous international legal instruments that mainly protect the institution of the family and mainly the sphere of equality in the rights and obligations of its members. See these in the consideration of equality between men and women in several main directions such as equality and non-discrimination between men and women to the relationship that originates from marriage as an act, equality and non-discrimination of men and women to the rights and obligations towards children, equality, and non-discrimination in the consequences of ending a marriage. The elaboration and legal basis of the situations cited above will be the purpose of this paper, seen from the perspective of domestic and international legislation, as well as judicial practice. Legal reforms in the aspects of legal equality and non-discrimination in family and marital life have been and will remain a dynamic and continuous process as long as the dominant elements is human nature. This is reflected in internal normative acts such as the Family Code, but also in ratified international instruments and the jurisprudence of the ECHR. While the facts and results show that there is still significant gender inequality between family members, this should be taken as an incentive not only for other legal reforms but also for social policies in the future.

Keywords: family, discrimination, gender equality, law, reform

1. Introduction

In any sphere of public or private life, gender discrimination is a risk for progress. While the possibilities of confronting the phenomenon of discrimination in public life are more evident, discrimination in the family remains invisible. It is about what happens between spouses and discrimination between children due to gender. Family is not an abstract, utopian, or undefined concept. The family is its members. In this way, this special protection, which is also guaranteed by the

legislation, is in essence, the protection of the human rights of the individuals who make it up, it is the protection of the principles of gender equality starting from the couple, composed of the union of a man with a woman either in marriage or in cohabitation and extending from there to children (daughters and sons) and all members of the family in the broad sense of the word (*communi iure*) (Mandro, E drejte romake, 1998). Gender equality in family and couple life leads to the cultivation, guarantee and respect of these standards in one of the most important basic cells of society such as the family. The family is, in this way, the safe base for the transmission of these principles to children and other members, transforming gender equality in family life into a right and obligation for the education of future generations. Healthy family and marital relationships are a contribution to the elimination of gender stereotypes. Everything starts in the family and is transmitted in society. For this reason, by right, if we want to know how much a society respects the principles of non-discrimination and gender equality, it is very efficient to start this analysis from the family. Although family law and the relationships produced by it belong primarily to the realm of private law, there is a strong public interest in the "special protection of the family and marriage" just as there is a special and primary interest in the protection of children. What was mentioned is a Constitutional, conventional, and legal obligation.

1.1 *The right to marry and the right to have a family. The concept of "free consent"*

The right to marry and the right to have a family are among the basic human rights. Due to the essential conditions that are left to the discretion of each state, there appear to be some legal limitations regarding the realization of this right. Free consent and the age of marriage (Mandro, E drejta familjare, 2009). A woman's right to choose a spouse and freely enter marriage is central to her life, dignity, and equality as a human being (Mandro, 2009). Theoretically, the same applies to the husband, although in no case from the analyzed practice, we have not come across the case of a man who seeks marriage underage. Here we have focused on the guarantee given by the principle/condition of "free consent" according to Article 8 of the FC¹. The absence of free consent, or an implied consent, renders the marriage legally void. An invalid marriage has no legal consequences for the spouses and is usually struck as invalidity. In some areas of the country, the customs and traditions of the past still have an even greater influence. Practice evidence cases where the lack of free consent is encountered not only in the case of marriage but also in the creation of *de facto* relationships through the institution of cohabitation (Luarasi, 2007). What stands out, apart from the fact of matchmaking, is the "use" of the institute of engagement in the texts of judicial decisions. Meanwhile, there is no provision from the FC to adjust for this institute. Albanian legislation, the Family Code [2003] provides for the same conditions and obstacles to marriage without discriminating between husband and wife, as future spouses, court practice and reality reports that customs and traditions still appear and try to play a protagonist role.

2. Equality and Non-Discrimination between Family Members

International instruments refer to the principle of non-discrimination and equality in the family as one of the basic principles for a quality life. When we talk about gender equality, we see this in two dimensions: formal equality and substantial equality [in content] (Balili, 2015). In the formal sense, laws are required to be gender neutral. In the substantial sense, it is required that the results are also like this and that no scuttle of the 'neutral' law is just for the sake of the face but really produces this equality. The provision of justice in family matters should also be seen in this way. What role and weight do the spouses have in various decision-making, from those of radical importance for the quality of life to the most common ones for daily well-being. This part of the life of the spouses is less revealed or less evident. Only the spouses know what goes on in their home.

Equality and non-discrimination in property relations between spouses during marriage brings into focus mainly issues related to the contract regime (Omari, 2006). The premarital contract and the risks of gender discrimination are addressed to be brought to the attention of the court regarding the validity or otherwise of this contract when the assessment is made by it in the court decision. So, what should be evaluated when the marriage or pre-marital contract is drawn up in order not to be struck with invalidity in a judicial process against the principles of equality between spouses.

The analysis stops at issues of equality and non-discrimination in personal relations between spouses, highlighting here the violations of the right to freely practice the profession, pursue education, etc. of the wife [Article 63/1 of the Civil Code]²; in the sensitive issue of spouses' and children's surnames [articles 51 and 52 of the Civil Code]; in matters of

¹ Albanian Family Code, article 8, 2003

² Civil Code of Albanian Republic, no.7850, date 29.07.1994, amended

discrimination related to reproductive function and sexual relations between spouses; the obligation to live together [Article 55/1 CF]; The legal remedies that can be used against the spouse who violates the obligations arising from marriage; The principle of equality and non-discrimination in the assignment of residence [Article 55/2 CF]; in matters related to the child's nationality, etc.

Practice has shown that the consequences of ending a marriage for spouses depend a lot on the gender of the spouse. Here we are talking about both personal and property aspects, related to the personal and financial obligations that they have towards each other or the different abilities that one spouse has in relation to the obligations to other persons who remain dependent on him/her. In this part, the study focuses on the meaning and importance of determining the value of unpaid work against the standards of equality and non-discrimination, relying on this treatment in the text "Gender equality and non-discrimination". It is also intended to provide some alternatives that can be considered by experts received by the court in the assessment of unpaid work. Other issues analyzed in this part are : the obligation for maintenance between spouses, also identifying some calculation instruments to help the court regarding the obligation for maintenance between spouses; Matters of the institute of motherhood and fatherhood against the risks of gender discrimination; Parental responsibility after the dissolution of marriage and the multifaceted difficulties in enjoying the rights and freedoms of ex-spouses, etc.

It is very important that judges and other actors of the justice system know the legal framework and standards related to the principle of gender equality in private, family and marital life.

Knowing them, they have all the opportunities to use them and reflect them in concrete decisions.

It is just as important to be familiar with positive experiences, with the aim of adopting them in favor of the principles of non-discrimination. We do this in the study through the practice of the Supreme Court or the jurisprudence of the ECtHR.

3. International Legislation about Gender Equality

3.1 International Convention Economic, Social and Cultural Rights of 1966

According to Article 3, the States parties to this Covenant undertake to ensure the equal right of men and women to enjoy all the economic, social and cultural rights mentioned in this Covenant. Article 10 some basic rights related to family life, free consent for marriage of future spouses; special protection should be given to mothers during a reasonable period of time before and after the birth of children as well as guaranteed social security; the special protection of children without any discrimination.

3.2 International Convention on Civil and Political Rights. (1966)

This instrument elaborates the principles established in the UDNJ. It was ratified by Albania on 04.09.1991. Regarding family and marital life, Article 23 has a special place. Article 23:

1. The family is the natural and fundamental unit of society and has the right to the protection of society and the state.
2. The right of men and women to marry and to form a family should be recognized starting from the age of maturity.
3. No marriage should be entered into without the free and full consent of the future spouses.

3.3 Convention on the Elimination of All Forms of Discrimination against Women – CEDAW.

The Convention focuses on women and aims to eliminate discrimination against them in all areas. Albania has acceded to this Convention since 1993. There are three articles of this Convention that have special significance for the status of women in the family. These are Article 9, Article 15 and Article 16 of CEDAW. Citing these substantial articles, we underline that they should be seen in close connection with articles 1-5 of the Convention, which are known as its "framework" articles. Article 9 of CEDAW relates to the right of women to acquire, change, or retain their nationality in the same way as men. For this reason, the CEDAW convention requires that it be especially ensured that neither the marriage with a foreigner nor the change of citizenship by the husband during the marriage does not change the citizenship of the wife, does not leave her stateless and does not impose her husband's citizenship. In point 2 of Article 9 of CEDAW, it is emphasized that States Parties must grant women equal rights with men regarding the citizenship of their children. Without citizenship status, women are denied the right to vote or run for public office and may be denied access to public benefits as well as the choice of residence. A woman of adult age should have the right to change her

citizenship of her own free will; it should not be taken away arbitrarily because of marriage or the end of marriage, or because the husband or father changes his citizenship. Article 15 of CEDAW addresses issues of women's equality with men before the law. Also included here is equal legal capacity to act, contractual equality, equality in property administration, procedural equality in judicial processes. This article underlines the importance of states granting men and women the same rights in terms of the law regarding the movement of persons and the freedom to choose residence. Article 16 of CEDAW refers to the importance of eliminating discrimination in marriage and family relations. These include a) the same right to marry; b) the same right to freely choose a spouse and to marry only with one's own free and full consent; c) the same right and responsibility during marriage and in its dissolution; d) the same right and responsibility as parents, regardless of the marital status, for those issues related to children. (In all cases the interest of the children must be primary); e) the same right to freely and responsibly decide on the number and time of births and to receive information, education and necessary tools that make it possible to exercise these rights; f) The same rights and responsibilities for issues related to the supervision, guardianship, preservation and adoption of children, or with similar institutions, where these concepts exist in national legislation. (In all cases the interest of the children must be primary); g) The same personal rights of men and women, including the right to choose the surname, profession and type of work; h) The same rights for each of the spouses regarding the ownership, profit, administration, enjoyment and disposal of the property, both free and paid. In point 2 of Article 16 it is underlined that "Betrothals and marriages of minor children have no legal effect, therefore all necessary measures will be taken, including legislation, in order to set a minimum age for marriage and make it mandatory registration of marriage in an official register". The CEDAW Committee in its latest report has left several tasks and remarks for the Albanian legislator and law enforcer, which refer not only to family life but also to other spheres of life related to gender equality and non-discrimination. But our focus of this lecture will remain mainly the private, family sphere, so below I will present some remarks related to the main topic of this treatment, which is domestic violence. According to the Committee: There are no provisions in the FC that directly link incidents of domestic violence with abuse of parental responsibility or gross negligence in exercising it. There are no provisions in the Family Code that provide for supervised visits of children by the parent, in cases where the parent has been recognized as a violator by the court and a protection order has been issued against him.

The ratification by the Albanian state of the Convention of the Council of Europe "On the prevention and fight against violence against women and violence in the family" lays down the need to harmonize the internal legislation with the standards set forth by this convention, regarding the circle of subjects that enjoy legal protection from domestic violence, compensation for victims of domestic violence, benefit of services, regardless of reporting by the victim, etc. The practice dictates the need for changes in the Family Code, to enable the exercise of the right to visit/meet the children in the conditions of supervision by the psychologist, social worker or another responsible person designated by the court. Supervised visits are also recommended in cases where the victims are accommodated in a shelter while the PO³/IPO⁴ is in effect. In this case, it is recommended that the ex-husband's right of visitation be exercised under the supervision of an employee of the shelter for victims of domestic violence or a psychologist, social worker or a person authorized by the court. It is recommended that in cases where the abusive parent has the right to meet or visit the children, the court decision should be accompanied by a security plan, which would provide protection for the victim and the children and would not confront them with even more extreme violence. Despite the growing number of immediate protection orders or protection orders, the high percentage of dismissal decisions for cases with the object of issuing a PO/IPO continues to raise the issue of the effectiveness of the implementation of this law. "There are still high cases of termination decisions for PO/IPO in general and those where women are plaintiffs in particular. For the Tirana Judicial District Court, in 91-92% of cases, the request for PO/IPO is made by women. For the Durrës Regional Court, in about 84% of leave decisions, the order was requested by women. The effectiveness of the judicial process and the access of victims of domestic violence to the justice system is closely related to the duration of the trial. The inspectorate at the Supreme Council of Justice states that in 183 cases out of 2689 that were the object of the inspection, violations of the legal terms were found, accounting for 6.8% of the volume nationwide.¹⁵⁸ This finding also results from reports of non-profit organizations. Thus, from the reports of NGOs, it has been found that "...failure to prepare evidence in time often becomes an obstacle for postponement of trials. This is the reason that there are more cases of exceeding the legal deadlines, rather in the PO with a 15-day deadline, than in the IPO, with a 48-hour deadline. The duration of the trial of cases with the object of issuing the PO/IPO and exceeding the legal deadlines is contrary to the purpose of the law for taking urgent measures for the prevention and protection from domestic violence. It is recommended a better implementation of sanctions for the

³ PO- Protection Order

⁴ IPO – Immediate protection order

responsible employees, who do not fulfill the legal obligations regarding the execution of the decisions of the PO/IPO. It is recommended that continuously organize trainings for judges, with the aim of recognizing the PO/IPO in every legal proceeding against the same person. It is recommended that the organization of continuous trainings for the police, the prosecution and the entities that are legitimate to file public lawsuits, with the object of issuing the PO/IPO⁵.

D. Convention on the Rights of the Child [CRC] (1989) (Articles 9, 10, 20, 21, 22)

4. Council of Europe Instruments Related to Gender Equality in Family and Marital Life:

a. ECHR

Article 14 of the ECHR is the basic anti-discrimination provision. It states that: "The enjoyment of the rights and freedoms provided for in this Convention will be ensured without discrimination, for any reason such as sex, race, color, language, religion, political or other opinion, national or social origin, associated with the status of national minority, property, birth, or any other status". Protocol 7 to the ECHR, Article 5 expressly mentions the equality between spouses. Article 5 underlines the principle of equality between spouses: "Spouses will enjoy equality of rights and responsibilities of the nature of private law between them and in relations with their children, in relation to marriage, during marriage and in the event of its dissolution. Protocol 12 of the ECHR, Article 1 General prohibition of discrimination.

b. The Convention of the Council of Europe "On the prevention and fight against violence against women and domestic violence" [Law No. 104/2012]

The Convention in Article 3/b underlines that "domestic violence" means all acts of physical, sexual, psychological or economic violence that occur within the family or household unit, or between ex-spouses or ex-partners or between current spouses or partners, regardless of the fact that the perpetrator shares or has shared the same apartment with the victim. In Article 32, the Convention provides for the legal consequences of forced marriages and provides that such marriages may be "annulled, annulled or dissolved." The meaning of forced marriage is given in Article 37 of the convention. The drafters found it important to include in this provision two types of behavior: forcing a person to enter into a marriage and luring a person abroad with the purpose of forcing this person to marry.

c. The jurisprudence of the ECHR

Regarding discrimination in family and marriage [articles 8 and 14 of the ECHR]

Cases: *Airey v. Ireland*, judgment of 9 October 1979, *Cechova v. Slovakia*, *Rasmussen v. Denmark*, *Abdulaziz, Cabales and Balkandali v United Kingdom*. Discrimination against children born out of wedlock in personal property matters [mainly inheritance] has been reflected in several ECtHR decisions. In the case of *Inze v. Austria*, judgment of 28 October 1987, the applicant is a child born out of wedlock. The case presents the difficulties and limitations on his inheritance rights due to this status. Discrimination of a child born out of wedlock regarding inheritance is also reflected in the *Vermeire v. Belgium* case, judgment of November 29, 1991. In this case too, the ECtHR found a violation of Article 14 in relation to Article 8 of the Convention. The applicant was excluded from inheritance rights by being an "illegitimate child". For Albanian judges, the case of *Markxs* against Belgium is also well known²⁴. Discrimination for reasons related to parental responsibilities and balancing them with work relationships was brought up in the case of *SchulerZraggen v. Switzerland*, judgment of 24 June 1993 (ISPL, 2012). The ECtHR found a violation of Article 14 in conjunction with Article 6-1 of the Convention in the case of termination of the applicant's disability pension, based on the mandatory contribution from her salary, after she had given birth to a child. The local court's decision was based on the assumption that women leave work when they give birth. Sometimes the domestic courts [that is, of the member states of the Council of Europe, seem unable to break away from the created stereotypes which do not correspond to reality. This should be in the attention of the Albanian judiciary as well. As we will see in the decisions that we will analyze in the following of this study, from time to time the influences of customs and traditions and stereotypes that are still strong in the Albanian society and family appear in them.

5. Albanian Legislation for Gender Equality

a. Provisions of the Family Code regarding gender equality

Article 1 of the Family Code underlines the principles of moral and legal equality on which marriage should be built and lived as a very important institute of family law. It is underlined: "marriage, as a legal cohabitation, is based on the

⁵ Alternative report on the implementation of the CEDAW convention in Albania 2016 – 2020, UN Woman Albania

moral and legal equality of spouses, on the feeling of mutual love, respect and understanding, as the basis of family unity".

Regarding the rights and obligations of the spouses during marriage, the FC expressly sanctions the same (reciprocal) rights, obligations, and responsibilities for both spouses in relation to each other, the family and the children. The FC encourages the principle of voluntary respect of rights and obligations, but also provides for protection from the abusive spouse in respect of rights and obligations through emergency measures, measures against violence, granting authorization by the court, seizure of goods, leaving the home, etc (Mandro, E drejta familjare, 2009).

See Article 61 of the FC (Emergency Measures) - measures that must be taken quickly to prevent the occurrence of negative and irreversible consequences. Often the court, for various reasons related to the workload, the procedure, the actions of the parties, and other obstacles, acting not so quickly and therefore does not provide quick solutions in cases where the interest of the child and the interest of individuals others in need is at serious risk.

Last name issue:

Spouses have the right to choose to keep one of their surnames as a common surname or to keep each of their own surnames. A surname is not imposed on anyone. The surname of the children is the joint surname of the parents (if this is the case); or the surname of one parent decided by agreement; or father's surname in case of parental disagreement. In this way, the FC still has some discriminatory provision while the last name issue is a sensitive issue.

The issue of contributions during marriage:

The marriage contribution is self-regulated by the spouses in the agreement on the regime; in the absence of adjustments in the contract of employment, according to the possibilities and conditions, which means that in the case of abuse with the individual and subjective understanding of the conditions and abilities, one spouse can abuse and vegetate at the "expense" of the other. The culture of not applying emergency measures makes this unfair advantage even more likely.

Measures against violence in the provisions of the FC:

Article 62 on measures against violence protects both husband and wife as spouses against the violent actions of the other spouse. In fact, this provision stands more as a norm that advertises the anti-violence standard of family legislation, because its application is realized through the law "On measures against violence in family relations [2006], amended.

Financial and personal relationships during marriage seem to rest on neutral norms. None of the spouses can impose on the other the choice of a regime for the property. Deciding on this is the equal right of both spouses.

- a. Law no. 9970/28.7.2008 "On gender equality in society"
- b. Law no. 221/4.2.2010 "On protection against discrimination"
- c. Law no. 9669, dated 18.12.2006 "On measures against violence in family relationships", amended by Law 47/2018, dated 23.07.2018.

This law aims to guarantee the protection by legal measures and other necessary measures of family members who are victims of domestic violence, paying special attention to children, the elderly and persons with disabilities, such as and of every individual, subject to this law, according to its article 3, who presents special protection needs. Article 10 provides for protective measures against domestic violence.

Since its adoption, the law has been amended in almost all its provisions in order to be as efficient and easily applicable for all actors, referring to the difficulties encountered by judicial practice over the years for its implementation. Thus, the law has identified the special subjects that are protected by this law, the authorities responsible for its implementation and their duties and responsibilities (line ministry, courts, police bodies, etc.), the definition of violence and what is included in this term, the measures protection against domestic violence, the effects of the protection order and the guarantees derived from it, procedural elements, etc.

- d. The Criminal Code of the Republic of Albania.

This legal instrument has provided family members as special subjects in the role of the victim or the perpetrator of the criminal offense. The provisions are found in article 130 "Compulsion or hindrance to live together or to enter into or dissolve marriage", article 130/a "Domestic violence."

6. Conclusion and Recommendations

The study evidenced that legal reform in aspects of gender equality and non-discrimination in family and marital life has been one dynamic process. Thus, the provisions of the FC reflect this. Likewise, ratified international instruments define legal obligations and ECtHR jurisprudence remains a safe guide. Meanwhile, as long as the results show a marked

disparity, this should be taken as an incentive for legal and policy reforms in the future. Oftentimes, neutral laws seem to hide discriminatory consequences from gender perspective.

In this regard, we can single out the legal aspects related to:

The legal regulation of the institution of cohabitation as a necessity in the conditions that this form of family life has taken significant proportions in the country. Regardless of whether or not cohabitation is considered as a preliminary stage for the marriage, it is time to make addresses legal adequate for this institute;

The issue of the child's surname in case of disagreement between the spouses. Eliminating the discriminatory clause for the child to receive in these cases automatically the father's surname and finding balanced solutions;

To specify the issue of active legitimation in the cases of the request of underage marriage, because the practice has moved in the direction of different, sometimes legitimizing only parents and sometimes only minors;

Protection of personal data in court decisions mainly where the child's identity is reflected, they may require the preparation of an instruction uniform for all courts in the country, in order to refer to one cryptometric system decipherable only according to legal regulations;

The possibility of adjustments according to the recommendation of the Council Europe regarding emergency measures by providing a kind of discretion court for analogy with the domestic violence law;

Legal interventions should take into consideration the impacts of customary law in order to eliminate them.

Ratification of a large number of conventions does not exhaust it completely the problem, because the applicability of the Conventions is still not appropriate, this is also due to the limited knowledge related to them, but also because their self-enforcement is not possible, because exit is required of a special law. An internal harmonization of the legal framework remains important.

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