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## The role of the Notaries in Gender Mainstreaming on Real Estate

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### Abstract

*The legal aspect on protection of women's rights, particularly focused on treating equally the issues of ownership is very sensitive in Albania. This for the story itself that coupled our country, where the dominant role in the profitability of the property has been the man, but also for negligent and unaware of civil society, which with the tendency has given priority to the enjoyment of civil rights (especially those on the property) husband, son, brother, so to the man of the family. This mentality has been difficult to melt and reduced, even after the modest expectations placed in Albanian legislation. Albanian legislation, especially codes and other laws, due to the borrowings content from other European jurisdictions, have provided in their content the rights on protection of ownership benefits. But the main obstacle which is identified in practice is the application through their specific procedures, through guidelines for law enforcement. Such an absence is recorded frequently and has brought serious problems in search of respective women rights. This has prevented the development of treatment to protect the rights of women on gender equality as well as difficulties and slow process of research and recognition of these rights as far as the balance between the long ordeals of the legal procedures for requesting the rights for requesting the rights belonging to them and that the withdrawal from those rights, unfortunately a large number of practice cases, women have chosen renunciation of their rights, especially properties. In this paper is reflected the important role of the public notary institution for practical and legal assistance that provides the process of protection of women rights, in cases of benefit to women on immovable property, in various transactions or other practical cases which will be recorded in this paper.*

Keywords: Public Notary, mainstreaming, gender equality, human rights, discrimination, ownership

### **I. The legal aspect in the protection of the rights of women in Albania.**

Human rights and the rule of law are among the foundational values of the European Union, as is made clear by article 2 TEU, which also states that these values are common to the Member States. Member States, at least since 1993, have to implement those values prior to their accession as per the so-called 'Copenhagen Criteria'. At article 49 TEU, which states: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union" (European Union, 2014, 3). The Union has a number of legal and procedural mechanisms at its disposal to make sure that those 'values' are made operational in the EU, notably in regard of Member States. (European Union, 2014, 3). In

recent years Albania has improved the status of women and promoted gender equality. (UNDP Albania, 2012-2016)

In this regard, are undertaken a series of legal reforms to protect women's rights, gender mainstreaming, where special importance is paid to protection from discrimination, and their right to be part of material benefit, which especially in Albania is lack of practice. Overall, Albania has an adequate legal framework to protect and promote gender equality and women's rights. The country has ratified most of the international and European human rights instruments, including the Convention on the Elimination of all forms of discrimination against Women (CEDAW) in 1994. In 2008, Albania submitted its third periodic report to CEDAW, which is to be reviewed at CEDAW's 46th session in July 2010. Albania underwent in December 2009 its first Universal Periodic Review during the 6th session of the UN Human Rights Council – UPR Working Group. A significant number of the recommendations formulated during the interactive dialogue, endorsed by Albania, covered issues related to gender equality, and called for further efforts to fight against domestic violence. (EU Heads of Mission to Albania, 2010, 1, 2).

Regarding national legislation, Albania has made maximal efforts to approximate national legislation with the European one, concerning the protection of gender aspect in Albania. Reforms undertaken in this field are numerous, but some of them, the most important are: The Domestic Violence Law was approved by the Albanian Parliament in December 2006. In July 2008, the Parliament passed the Gender Equality Law.

More recently, the Parliament approved in February 2010 the Law on protection from discrimination, which regulates the implementation and respect of the principle of equality in connection with a non exhaustive list of grounds, including gender. (EU Heads of Mission to Albania, 2010, 2). In addition, the country still needs to strengthen its legislative and institutional framework pertaining to gender equality and non-discrimination, improve monitoring and accountability of public offices towards women as well as ensure gender mainstreaming in public policies. (UNDP Albania, 2012-2016).

## **II. Specific role of the notary in the protection of rights in terms of gender.**

All citizens may be submitted to the notary office to request notarial services related to their real estate. Albanian citizens are addressed to the notaries offices for legal transactions and acts related to: premarital contract, the changes in the regime of marital property, transfers of property, division of property, creation and transformation of commercial companies in order to circulate the capital and goods, actions related to ensuring the welfare of marriage and the family, acts which related to the transmission of assets from one generation to another surviving through inheritance, and so on. (Mandro & Saliaj & Anastasi, 26).

But about 90% of cases in practice in the notary offices are presented the mens of the family (father, the husband or the son of the family) for the benefit of their property. In this way, the law has favored more beneficiary ownership, neglecting women, which to assert its legitimate right in case of a mate or family conflict for the benefit of the property must be presented in court to prove its joint ownership over property. But even after the exhaustion of judicial instances, in many cases, they have benefited women in search of their rights, because men generally have dominated. In the exercise of the profession of notary public, identified in practice many social problems which are related particularly with female customers. A large part of these problems have become part of the discussions and debates around the table various professionals in Albania (notary, lawyers, employee of the Registry of real estate, etc.), associations and local and

international organizations, they have triggered the changes and reforms encouraging other legal, for the protection of their rights. In this aspect, the notary is a public juridic person, which plays a special role not only in editing legal and professional to the notarial act required by the parties, but in particular has an important role in the editing the notarial act according to the request of the parties, their free will, finding the correct relevant legal basis, but also to preserve the balance between the rights that belong to one party against liabilities pending on the other side. The Notary is a legal person responsible which the law has given the right to regulate and balance such reports, to be sensitive towards the prohibition of such phenomena that affect or undermine gender mainstreaming as: preventing the commission of an act which is stimulant, acts of fraud, actions by which one party tendency aggravated liability to the other party, or in operations that tendency seek to exclude from a series of rights material benefits in terms of women, ect. Based on practice, the latter, constitute the dominant cases in notarial activities, which are worth discussing and prevented through legal provisions, but also through legal consultation that the notaries give. A special role in the public service, plays notary service where with prior advice about current legislation or the legal consequences that may come from the editing of a notary act, helps gender integration, but also orients the classes that are unaware of the law (mostly women) for all the legal consequences that could arise from legal action that they seek to do.

### **III. Problems in practice which are related to the protection of rights in terms of gender recorded in notary offices**

In practice there are many problems which inhibit the consistently mainstreaming gender in Albanian society. The problems, in their majority part, distribute three aspects, which constitute the main obstacles to slow or avoid the mainstreaming of women in Albania.

**Firstly:** The lack of substantive and procedural provisions for handling clearly gender mainstreaming. Deficiency observed between substantive and procedural law. There is no coherence between them. Even when there are both, again the procedural law is not explicit and not intelligible enough to be binding and enforceable. Based on this fact, as a concrete example referring to the law on registration of real estate, no. 33/2012 "*For the registration of real estate*", that in the quality of procedural law where employees of the respective offices of registration of real estate refer, only in 2012 (the year when came a new law for registration of real estate), predicted a new legal provision, namely article 41/2, which provides: "If the property, object of the property transfer contract, made in favor of physical person who in the registration of civil status have the status of married, is an asset acquired during the marriage, in accordance with Article 76 of the Family Code, the registration in the relevant section of the files becomes jointly owned property of both spouses". The article 76 of family code provides that: "The property of spouses presumed as common, unless one spouse proves its personal character". This legal provision has been evident in our country from 2003, but remained passive provision, not applicable by the fact that in special law the one of registration of property, was not provided the concrete processed how the real estate registered in the relevant property files. In this way, the right to benefit from this provision as a presumed common asset, it should require only through the cort. Even though the law for the registration of real estate has provided a important legal provision, which was delayed in time, still it is incomplete in its practical implementation, because this law has the power to apply to all assets that are acquired from the period 2012 onwards (the year in which appear the law), without mentioning and unregulated the property rights that they are obtained before the issuance of the law and now they figure in the registration office of real estate. So in this law is not been determined and provided a transitional provision

which predict what to do with assets that now appear registered in the registration office of real estate, only owned by one spouse. This law has no retroactive effect, therefore remains incomplete in its implementation, for the fact that the majority of the assets are now registered only in the property of one spouse.

In a case from the practice,<sup>1</sup> the spouse, citizen A., seeking to be recognized as co-owner property of an apartment signed and registered in the registration office of real estate on behalf of her husband. In the absence of a precise legal specification for this case, the only way to acquire ownership was through her husband transaction (sale or donation of 1/2 share of ownership). She remained presumed and can not be registered as co-owner to the property because of lack of procedural law, although “de jure” she was presumed as co-owner, but “de facto” was not registered in the certificate for proof of ownership. In this way, citizen A., unable to pay the transaction fee (because it would have to pay sales tax and notary costs) did not do the relevant notary act.

Other problems which were identified in practice due to the lack of relevant legal regulation where the property is registered only in the name of the spouse (although acquiring during the marriage), is when the spouse dies and the corresponding certificate of inheritance opened. Certificate of inheritance, which opened for all decedent’s assets, recorded in the respective in the registration office of real estate, which records shared equally among the inheritors of the immovable of the decedent’s property. In this way, the deduction is not part of the property 1/2 of the presumed wife (or husband), as property acquired during marriage. That is not stated in the procedural legislation or in the relevant guidelines and orders on which works the registration office of real estate. This brings in loss of the co-owner of the wife (presumed co-owner due to the marriage) because the husband died and the property is registered as individual property in his behalf. This is a problem that continues to be of concern to all immovable properties which are registered in the name of one spouse (property which are obtained during marriage, where the other spouse is presumed co-owner).

***In this way***, in a case from practice to benefit from the certificate of inheritance, demanded her co-owner rights as presumed co-owner 1/2 part of the property through the Court, which costs more time and was expensive.

**Secondly**: the administration public problem/state or private, which has the opportunity to implement correctly the law that effects aspects of property rights, but the lack of relevant training and their backward mentality (especially in districts and rural area, but also in Tirana), does not contribute in the implementation of the law, which is clearly expressed in the legal integration, or in other cases they find the wrong way to apply it. Often the administration of public institutions/state or private which serves to different citizens, play a dominant role in the treatment and promotion of specific cases in order to improve gender integration. The administration offices of registration of real estate are specific case which through their service can help in the protections of women’s rights.

In registration office of real estate desk, but also in all other institutions of public administration/state or private (as: office of civil status, notary, lawyer, court, etc.), the biggest part that seeking for services, are of male’s gender. In this way, the female’s gender, being outnumbered requiring such services, but also because of hesitation and reluctance to confront for the first time with

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<sup>1</sup> All practical cases outlined in this paper are taken from the notarial practice of Elona Saliaj office, with address in Fier.

these institutions, being uninformed about which concrete action should seek, neglected and stumble in pursuit of the right to require the administration by employees.

In many institutions of registration office of real estate, is not applicable the Article 41/2 of the law to the registration of the property. So this last, does not require the acquiring party of property related to the family certificate, in order to identify as well as co-owner the wife. So, still in the registration office of real estate in Tirana, but also some registration office of real estate in district, in some desks, employees do not implement the above-mentioned law on the ground that his wife has not signed the contract ossale; therefore it does not have an ownership of the property. It is evident that this has not been just about lack of knowledge of law, which for this case is clearly enough, but has to do with the conviction of their own, where training in which I was present, related with the same problem, they did not accept the legal fact that the wife of the acquiring part, although not present at the signing contract is presumed as co-owner, presumption which should be recorded in the documents of ownership.

There where also cases from practice where the state administration is untrained and prevents the development trend of gender integration are employees of civil status offices. Practical cases recorded especially when marriages or other forms of legal cohabitation, marriage contract, etc. In a case of practice, a woman with Greek citizenship with an Albanian man, asked to sign a cohabitation contract in the Notary office, according to specifications which they set out in their own free will and complete. After signing the relevant agreement, a copy of it, the parties wanted to register in the Office of civil status, where the cohabitant was registered. Officer registrar refuses registration of the contract on the grounds that they do not have instructions for filling such a contract (which says it is the first time that faced like this case) and the only contract that she recognizes and implements is only celebration, marriage. She insisted on the parties that they do celebration, in order to be called married. According to her, the act that was signed was not valid, stating also that the notary had defrauded and had served an act that would not serve. One such flagrant case is an acute lack, not only of the concrete predictions and detailed of Albanian legislation and his procedural practices (relevant guidelines), but also an ignorance of employees of relevant administration especially in the office of civil status. The employee of the civil registry office, argued that there she never encountered such a contract and had no specific guidance on how to proceed regarding there to, although it was a contract provided and recognized by the Albanian legislation, respectively in the Family Code of the Republic of Albania, Article 163-164 "Coexistence". But for the agent of the civil status it was the first time she listened about it and did not know how to act. In family and personal certificates to citizens, issued by the Registrar's office in Albania, there is no section regarding the marital property regime, where to qualify the form of the marital regime, or in this case to be presented the relevant agreement of coexistence. The contract of coexistence was accepted and registered in the registration office of civil status Greece, where it was issued a legal document where was recorded respective contracts, while it is not yet agreed to be deposited as an act in the office of civil status in Albania, for lack of appropriate procedures and guidelines.

In a case from practice, citizen **D.**, appear to sign a mortgage contract of an apartment, for getting a bank loan for her husband. The apartment that the parties will put on mortgage it was the only property that the parties had in owned. This apartment was benefit during the marriage and was registered only on behalf of the husband. After the discussion that Notary had face to face with the wife, the notary understood that she did not have the free will to put this property on mortgage, because it was the only property that the couple had. But according to her, she had accepted the presser of her husband for signing the contract, since she did not have part on the

property, because in the certificate of the property it was register exclusively in the name of her husband. After the notary heard, i understood that she was unaware of the law, and also was forced to sign the contract out of her real will. The notary explained to her that she was owner of that property as same as her husband, because that was a property owned during the marriage. Even if in the property documents was not included her name, she is presumed as co-owner on that immovable property. In this case, if she wanted, was absolutely right not to sign the relevant contract. Without her signature, the apartment will not put on mortgage, because was requested the consent of both co-owners. After this, the women refused to sign the relevant contract and the property was not put on mortgage.

In the case of transaction of immovable property in practice, when the purchasing party is with married status, often they request to the respective spouses to sign the sales contract of immovable property, where is specified a declaration from their side where they will free will require that this property to be register only in the name of one of the spouses, because the monetary value is the reason of their work. A declaration like this, is decided in the contract of sales and is registered the property only in the name of one spouse. But this declaration and this form of declaration is against the law. It affects the right of the co-owner to profit from the property. A thing like this is not allowed to be accepted by the notaries, because it is against the law. In case the parties want to change the regime of marriage property they have to change the regime marriage property that they have to do only through a common agreement, contract for changing the marriage regime of property.

**Thirdly:** Negligence of citizens and to the female to request their rights. This happened because of the financial incapacity but also from the institutional bureaucracy, which for female are always difficult to follow.

***Case from practice,*** citizen E., seeking for information to see the juridical status to an immovable property which was register in the name of her spouse, but was benefit during the marriage. Employees of registration office of real estate refuse to provide such information on the ground that in the property's certificate appears register only one person. She needs to prove her right, to seek from the court the registration as co-owner of the property and than to oblige the registration office of real estate to register her as co-owner in that certificate. Seeing the difficulties encountered and the monetary costs that had to spend to achieve such a service, she gave up looking for her rights to be recognized on a real co-owner which was presumed so.

#### **IV. Conclusions**

From all the above exposition, it is shown that Albania is one of the countries which aim to improve legislation on the protection of the rights of women and gender mainstreaming. Domestic organizations and foreign issued a continuous work in raising awareness of women in this respect, in the awareness of employees of public institutions, state and private, but also in promoting different legal reforms for improving the protection of gender mainstreaming, including the benefit of real estate. Case from the practice, obvious problem is the renunciation of the right of inheritance to the notary statement. Such statement, where declaring for the waiver of the right to the benefit of the decedents when the heir died, is made by female of the family (mother, sister, wife and daughter). Often, they are unaware that such statement, waive any right on the immovable property who would benefit from the certificate of inheritance. If giving up from the right of inheritance they loose any opportunity to benefit from the decedent's assets. Convinced that the property of the decedent belongs to the male of the family, with free will they

make such statement, because they think that the property does not belong to women, but should be inherited only by men.

Given the treatment as above, as conclusion there are a number of cases in practice that should be taken into account in order to contribute in gender integration, to prevent cases of gender discrimination mainly in the recognition and acquisition of property rights and can raise the awareness of women about their rights and existing legal and legal way to follow to seek and protect their legitimate rights. I think the focus should be directed on several key points:

- Procedural law, needs to be improved with detailed practiced of acts (orders and relevant instructions) where the rule of law which includes gender integration and protection to find more space in practice.
- It is required continuous training of public administration/state, public figures and especially specialists who manage and process the data on immovable property, in order to increase the efficiency at work.
- The awareness of women for prevention and care that should show women for protection of their rights. The possibility of creating an explanatory brochure which should be accessible by women and can find in the state public institutions, private but also in notary offices.

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