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ПРАВНИ ФАКУЛТЕТ

и

ЕВРОПСКА ОРГАНИЗАЦИЈА ЗА ЈАВНО ПРАВО

МЕЂУНАРОДНИ САВЕЗ ПРАВНИКА

ИНСТИТУТ ЗА УПОРЕДНО ПРАВО

СРПСКО УДРУЖЕЊЕ ЗА КРИВИЧНОПРАВНУ ТЕОРИЈУ И ПРАКСУ

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„Правне празнине и пуноћа права“

Том III

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“Legal gaps and the completeness of law“

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B. M. Stjepanović, *The Principle of Autonomy of the Will and the Marriage Contract*, Collection of Papers "Legal gaps and the completeness of law", East Sarajevo 2024, pp. 251–270.

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ORIGINAL SCIENTIFIC ARTICLE / *ИЗВОРНИ НАУЧНИ РАД*

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THE PRINCIPLE OF AUTONOMY OF THE WILL AND THE MARRIAGE CONTRACT [*]

Autonomy of the will is a key principle in the contractual arrangement of property relations between spouses. One of the most complex, but also the most important questions that arise with regard to the conclusion of a marriage contract and in connection with the autonomy of the will of the contracting parties is the problem of the "dilemma of choice." The "dilemma of choice" consists of a conflict between promoting, on the one hand, women's autonomy and freedom of choice and, on the other hand, protecting women from harmful consequences that would result from the use of autonomy of will in conditions of inequality, i.e., power imbalance.

Competent authorities usually assume that the autonomy of the will exists, and it appears as a presumption. This attitude is particularly harmful in terms of the marriage contract because it can result in economic consequences not only for the "weaker" contracting party, but also for the children and society as a whole. For this reason, it is necessary to review the principle of autonomy of will and adapt it to the peculiarities of the personal relationship of the contracting parties.

In this paper, we will examine the application of the principle of autonomy of will to the spouses in a marriage contract, posing a potentially bold yet feasible question and attempting to provide an answer. Namely, is it possible to talk about the autonomy of the will with regard to the spouses who conclude the marriage contract, i.e., one of its manifestos, freedom of contract in the true sense of the word, and can the question of the existence of autonomy of will in this case be viewed in the same way as in regard to the conclusion of

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legal transactions between persons who are not bound by any previous relationship, or does the validity of a marriage contract need to introduce a new criterion that would enable a fairer outcome?

Key words: Autonomy of will; Freedom of contract; Marriage contract; Relational contract theory.

*** * ***

Autonomy of the will, as one of the basic principles of civil law, enables persons to decide whether to enter into a civil relationship, to determine the content of the rights and obligations from that relationship, to decide whether to exercise them, whether to change the existing relationship and in which way existing relationship will end.[1] Autonomy of will is a key principle in the contractual arrangement of property relations of spouses, which in our law are almost unlimited in their disposition.[2] The

[1] Parties in contractual relationships are free, within the limits of compulsory regulations, public order and good customs, to arrange their relationships as they wish. Art. 10. Law on Obligations, *Official Gazette of the SFRY*, no. 29/78, 39/85, 57/89, *Official Gazette of the FRY*, no. 31/93, and *Official Gazette of Serbia and Montenegro* no. 1/2003, *Official Gazette of the Republic of Serbia* no. 18/20.

In contractual law, the principle of autonomy of will dates back to the 18th century. It developed under the influence of the natural law school. In formulating this principle, we started from the concept that the will of an individual is sovereign, and that as such it does not fall under the will of another. From this statement came the conclusion that what the contracting parties stipulated in the contract is the law for them (contractus contrahentibus lex esto). Bourgeois society was able to realize its conception through the wide acceptance of this principle. This principle found its particular application in the liberal capitalism of the 19th century, with particular favoring of the principle *laiesser faire, laisser passer*. Б. Лоза, *Облигационо право, општи дио, четврто допуњено и измјењено издање*, Београд 2000, 95.

See more about the autonomy of the will: Henrich, D., "Privatautonomie, Parteiautonomie: (Familienrechtliche) Zukunftsperspektiven", *RabelsZ*, 79, 2015.

In addition to the freedom of contract, the autonomy of the will includes the owner's freedom to dispose of things, the freedom of testamentary disposition, the freedom to establish legal entities, etc. В. В. Водинелић, *Грађанско право – увод у грађанско право и општи део грађанског права*, Правни факултет Универзитета Унион и Службени гласник, Београд 2014, 42.

[2] In addressing the principle of autonomy of will, contract law recognizes two main theories: a) the individualism theory and b) the consumer welfare theory. The individualism theory emphasizes that parties are free to determine the content of a contract in all its aspects and can enter into any type of agreement, provided it does not violate public order. This theory advocates for minimal state interference, asserting that no one is better suited to protect their own interests than the parties themselves. On the other hand, the consumer welfare theory acknowledges that the autonomy of will in contracts is not without limits, and the content of a contract must align with principles of fairness and honesty. This theory calls for detailed state regulation of contractual autonomy and the implementation of specific norms to protect consumer rights. L. Hasneziri, "The Principle of Autonomy of

specifics of the manifestation of the principle of freedom of contract[3] with regard to the marriage contract clearly depict the uniqueness of this contract in relation to general property contracts, while the problems encountered in the application of the principle of autonomy of will indicate that the marriage contract is a contract of a special type, on which the personal, previous (emotional) relationship between the contracting parties has a immense influence.[4]

One of the most complex, but also the most important questions that are raised regarding the conclusion of a marriage contract, and in connection with the autonomy of the will, is the problem of the "dilemma of choice". The "dilemma of choice" consists of the conflict between promoting, on the one hand, women's autonomy and freedom of choice, and on the other hand, protecting women from harmful consequences that would result from the use of autonomy of will in conditions of inequality, i.e. power imbalance.[5]

Autonomy of the will is usually assumed by the competent authorities to exist, and it appears as a presumption, which is a particularly dangerous solution with regard to the marriage contract because it can lead to unfair outcomes and make the marriage contract an instrument of inequality, contrary to the purpose for which it was established.

1. LIMITATIONS ON FREEDOM OF CONTRACT CONDITIONED BY THE INSTITUTE OF MARRIAGE

The freedom to determine the content of the contract, according to the rules of contract law, consists in the ability of the contracting parties to freely determine which, what and to whom the rights/obligations from the contract should belong.[6] The contracting parties are free to determine the

Contractual Will", *European Journal of Multidisciplinary Studies*¸Vol 8, Issue 1, 2023, p. 135.

[3] Principle of contractual freedom is accepted by both Western legal systems, civil law and common law as well. *Ibid*, p. 134.

[4] The principle of autonomy of the will is manifested in contract law through three principles: freedom of contract, the principle of the binding force of the contract and the principle of the relative effect of the contract С. Перовић, *Аутономија воље и принудни прописи*, Будва 2007, 26.

[5] G. K. Hadfield, "The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract", *Osgoode Hall Law Journal*, Vol 33, No. 2, 1995, 337.

The aforementioned dilemma should include not only women, but also men because they can also be the weaker side in the relationship.

[6] In Indonesia, couples have the freedom to determine the content of their marriage agreements, provided that it does not conflict with laws, religious principles, morality, decency, or public order. This is due to the lack of specific regulations governing the content of marriage agreements in Indonesia. In contrast, in the United States, while

method of execution of the contract, as well as the sanction for its irregular execution or non-execution. Constracting parties are subject to their own will in the execution of the contract, which makes the contract above the law.[7] Freedom of contract has always been present in law, but always within its flexible limits.[8]

Freedom of contract has never been absolute, because the community needs to enable the free expression of individual will, while on the other hand, the community must take care of the general norms of the community, which must not be left to the arbitrariness of the individual.[9] Freedom of contract in every legal order suffers a general limitation in the form of the principles on which society is built and organized. In Serbian law, freedom of contract is limited by the institution of public order,[10] impera-

spouses can decide the content of their marriage agreements, there are certain restrictions on what can and cannot be included, meaning that the freedom to create these agreements is still somewhat limited. W. Putri Handayani, D. Tantri Cahyaningsih, "Marriage Agreement on Common Property in Marriage (Comparative Study of Indonesia and The United States)", *Al Manhaj: Jurnal Hukum dan Pranata Sosial Islam* , Vol. 6 No 2, 2024, p.321.

[7] Б. Лоза, *Облигационо право, општи дио, четврто допуњено и измијењено издање*, Београд 2000, 96.

[8] С. Перовић, *Облигационо право, књига прва*, Београд 1981,153.

McLean criticized the legal understanding of autonomy, according to which it is assumed that persons are autonomous in decision-making if their consent is valid (if there is no lack of will). She considers this understanding to be an overly simplistic view of the autonomy of the will, as well as that it is incorrect to consider that the validity of consent indicates the existence of the decision-making autonomy of one party. She believes that ignoring the wider context can lead to the wrong conclusion that the parties voluntarily entered into a marriage contract, while a deeper consideration that would include the question of power, the power relationship between the contracting parties, would lead to a different outcome. S. McLean, Autonomy, Consent and the Law, Routledge 2009, 4, et seq.

[9] *Ibid*.

The principle of autonomy in contract law emerged during the classical period (1770-1870). The central idea was that the role of contract law should be to enforce the private arrangements that the contracting parties had agreed upon. During this time, the emphasis was heavily on the agreement and intentions of the parties, with little concern for the fairness or justice of the outcome. However, the contemporary trend (post-1980) has been shaped by a growing concern for fairness and justice, which challenges the classical concept of contractual autonomy. The classical view prioritized the enforcement of agreements, even those that might be unfair or involve undesirable subjects. The negative consequences of this rigid approach have led to a re-examination of how much freedom individuals truly have when entering into contracts. M. Wondmagegnehu Belete, „The "Principle of Autonomy" in Contract under the Civil Code of Ethiopian: Is It an Absolute Principle?", *Beijing Law Review*, 2019, 10, p. 803.

[10] Perović defines public order as "a set of principles on which the existence and duration of a legally organized community is based, and which are manifested through certain social norms that are set in the domain of the goal and subject of the contract in such a way that the contracting parties must respect them". С. Перовић, *Облигационо право – књига прва*, Београд 1982, 169.

tive regulations and good customs.[11] In addition to general restrictions on freedom of contract, contract law also has special restrictions related to the subject, basis, content and form of the contract. The Family Law introduces special restrictions regarding the entities that can enter into the conclusion of a marriage contract, as well as certain restrictions related to the content of the contract.[12]

Actively legitimized persons for concluding a marriage contract are future spouses and spouses. In principle, they are free to regulate their property relations with a marriage contract, although personal relations in marriage and family greatly narrow this field of autonomy of will. Regardless of the fact that persons who have not yet concluded a marriage are legitimized to conclude a marriage contract, it will not produce real effects until the marriage is concluded. Thus, the choice of the other contracting party in the marriage contract is only conditionally free. A person is free to choose with whom he will conclude a marriage, and after that, he is conditioned in terms of choosing the person with whom he will conclude a mar-

[11] Good customs are moral norms that are not provided with legal sanctions, but are part of the values and consciousness of a society and as such represent a component of the protection of general interests. Д. Радић, *Имовински односи у браку*, Бања Лука 2016, 332.

In art. 1 Sketches for the Code of Obligations and Contracts freedom of contract is limited by coercive regulations, public order and morality. М. Константиновић, *Облигације и уговори, Скица за Законик о облигацијама и уговорима*, Београд 1969, 15.

[12] In German law, the spouse's freedom of contract is limited in the interest of public order and good customs. In Italian law, in addition to the restrictions established in the interest of protecting public order, the spouse's freedom of contract is also limited by the obligations arising from marriage. They cannot change the rules related to equal shares in joint property and the rules on property division, nor can they change the rules related to child and spousal support. See more: Г. Ковачек-Станић, *Упоредно породично право*, Нови Сад 2002, 67.

In Russian law, it is stipulated that the following cannot be contracted in a marriage contract: limitation of the legal and business capacity of the spouses, their right to appeal to the court in order to protect their rights, regulation of the personal property relations of the spouses, the rights and obligations of the spouses in relation to the children, the provision of other conditions that place one of the spouses in a disadvantageous position, or which contradict the basic principles of family legislation. СК РФ Статья 42. Содержание брачного договора, "Семейный кодекс Российской Федерации" от 29. 12. 1995 N 223-ФЗ (ред. от 02. 12. 2019) (с изм. и доп. , вступ. в силу с 01. 01. 2020).

See more about ways of restricting the freedom of contract in the marriage contract in the Russian Federation: Ю. С. ,Поваров, «Содержание брачного договора: приемы ограничения свободы определения договорных условий», *Вестник ТвГУ, Серия: Право (2)*, No. 2, 2014; See more about the validity of the marriage contract in comparative law in: A. Čulo, A. Radina, „Valjanost bračnog ugovora", *Imovinski aspekti razvoda braka – hrvatski, europski i međunarodni kontekst*, B. Rešetar, M. Župan (ur.), Pravni fakultet u Osijeku, Osijek 2011, 150–160.

riage contract.[13] The other contracting party can only be the other spouse. In order to gain a more correct insight into the freedom of contract granted to spouses in terms of property relations, the provision of the Family Law of the Republic of Serbia governing the marriage contract should be interpreted in the context of other imperative norms of the Family Law (waiving maintenance between family members has no legal effect;[14] spouses are obliged to they support each other;[15] parents are obliged to support their children[16]).

1.1. Freedom of contract and equality of contracting parties in a marriage contract

The concept according to which the autonomy of the will is propagated as a guiding principle is based on the belief that the existence of freedom of decision is equated with the equality of the parties. This understanding starts from the spouses as neutral parties, who are equal and rational in the decision-making process. Independence and freedom have become the "guiding ideas" of our age, however, in the context of family law, they need to be interpreted in an adapted manner so that they do not turn into their opposite. The fact that a marriage contract is allowed to bypass the property regime provided by law does not mean that both parties have the freedom to decide, the autonomy to establish their terms of the contract, especially if it is concluded on an "unequal field". If the autonomy of the will were emphasized as a decisive principle (the trend of its strengthening is present in modern law) it would not mean that the outcome of such a concluded contract would be fair for both contracting parties. In order for the principle of autonomy of will not to turn into its opposite, it is necessary to analyze it multilaterally and determine whether there is a tendency or existing manipulation of one of the contracting parties, and if it is determined that there is, it is necessary to determine its corrective.

A marriage contract is a legal business in which it is very easy, and there is often an imbalance of power, because it is usually one party who advocates the conclusion of this contract. The autonomy of one party can

[13] That is, if some persons concluded a marriage contract before the conclusion of the marriage, and the marriage did not take place, this contract will not produce legal effects. Therefore, persons can conclude a marriage contract before the conclusion of the marriage, but such a contract will not produce legal effects until the marriage is concluded. In order for the contract to be effective, the persons who concluded the marriage contract must be the ones who later concluded the marriage as well.

[14] Art. 8. pt. 2. Family Law of the Republic of Serbia, *Official Gazette of the Republic of Serbia* no. 18/05, 72/11 and 6/15.

[15] Art. 28. *Ibid*.

[16] Art. 73. *Ibid*.

be limited by using the autonomy of the other party, especially if the spouse possesses the power of negotiation and persuasion. McLean concluded that the moral value of decisions depends, not only on the simple expression of the will, but may also be influenced by the other party's choice made in the matter. For this reason, it is necessary to limit the autonomy of one party, in order for the other party to use its autonomy.[17]

The position of the Law Commission of England and Wales regarding matrimonial property regimes testifies to the problematic application of the principle of autonomy of will, in its unchanged and unrefined form, in relation to the marriage contract. It is stated that the autonomy of the will in the case of concluding a marriage contract can only be apparent, because the marriage contract is concluded by persons who, although they are aware, adults capable of independent common-sense decision-making, being in love with the other party, are willing to agree to things and terms that they would never agree to otherwise.[18]

The difficulty in assessing and contracting certain contractual effects that should occur in the distant future characterizes all people, and if you add to that the hope and faith that such an event will not occur, then the possibility of concluding at the time of the creation of the contract is reduced to a serious minimum.[19] This cognitive limitation means that parties are often unable to make autonomous choices when entering into certain relationships. Such a state is characterized by Eisenberg as "bounded rationality" (bounded rationality)[20] and "rational ignorance" (rational ignorance). Due to these circumstances, it is difficult to talk about the autonomous decision-making of the parties, when they do not believe that the marriage contract will ever be fulfilled. Also, it is difficult to predict all the possibilities that could arise during the marriage, precisely for the reasons mentioned.

From the above, one can clearly see the great, crucial conditionality of the implementation of the principle of autonomy of the will by the institution of marriage. Marriage and what it usually entails (emotions that bind spouses as well as children) decisively shapes the spouses' freedom of contract regarding their property. The autonomy of the will, as a condition

[17] S. McLean, *Autonomy, Consent and the Law*, Routledge 2009, 28.

[18] The Law Commission, Matrimonial Property, Needs and Agreements, Law Com No 343, 2014, par. 5. 26.

[19] *Bix* states that most people are bad at making correct inferences about an event that may happen in the distant future, especially if that consideration involves uncertain events that contradict our optimistic assumptions. B. Bix, "Private Ordering and Family Law", *Journal of the American Academy of Matrimonial Lawyers*, Vol. 23, 2010, 249.

[20] M. Eisenberg, "The Limits of Cognition and the Limits of Contract", *Stanford Law Review*, Vol. 47:211, 213.

for the validity of the marriage contract, can only be discussed if the question of the relationship of power between the spouses is first raised and if it is established that there was no economic, social or "gender" coercion of any party in the contract when the marriage contract was concluded.

2. ADJUSTED RELATIONAL CONTRACT THEORY

Relational contract theory emerged as a means of criticizing the traditional approach to the autonomy of the will. In contract law, autonomy of will includes the idea of free consent and self-interest. Classically understood autonomy concentrates on the individual seeking a solution that is in his best interest. On the other hand, relational autonomy challenges the expectation that individuals act in their own self-interest and instead emphasizes the need to examine the relationships that surround the decision-making process.[21] In the complexity of family relationships, the question of the possibility for individuals to make completely individualized, free decisions can be raised.

The concept of relational autonomy appeared at the end of the 20th century. Mackenzie and Stoljar described relational autonomy as a comprehensive concept, which denotes a series of related perspectives… based on a shared belief that persons are socially determined and that a person's identity is formed in the context of social relations and shaped by a complex of intersecting social determinants such as race, class, gender and nationality.[22] Relational autonomy respects the context in which the decision was made. In The Relational Autonomy of Family Law, Herring contrasted his perspective on relational autonomy with neoliberal perspectives on autonomy. Although neoliberal notions of autonomy are built on the assumption that decision-makers are independent, self-initiated and rational actors, relational autonomy argues that "[t]o be autonomous does not mean being isolated and free from responsibility, but rather being connected in relation to their mutual mutuality and dependent responsibilities".[23] Our autonomy in making those decisions is affected by relationships with others and relationships with those with whom we enter into agreements. This led Herring to use relational autonomy to automatically oppose the enforcement of marriage contracts where there is an imbalance of power between the parties. The main difference between neoliberal autonomy and

[21] S. Thompson, "Feminist relational contract theory: A new model for family property agreements", *Journal of Law and Society* 45 (4), 2018, 12–13.

[22] C. Mackenzie and N. Stoljar, "Autonomy Refigured", *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, (eds. C. Mackenzie, N. Stoljar), 2000, 4.

[23] J. Herring, *Relational Autonomy and Family Law*, Springer 2014, 68.

relational autonomy seems to be that in the case of adopting relational autonomy, the state is forced to ask why the decision was made.[24]

A key element of relational contract theory is the importance it attaches to context, so that before looking at the transaction itself, it takes into account the relationship between the contracting parties. This approach differs from the traditional approach, which, although it respects the context of the contract, does not focus on inequalities that may arise in intimate relationships. Criticism of the traditional approach arises, not because it ignores context – it is criticized because it does not prioritize context.[25]

The relational contract theory developed by Macneil examines the contract as a whole.[26] Macneil's model is based on the contract law principles he relies on in practice, but extends it "to include a much broader and richer social or perhaps philosophical relational contract that more accurately explained how the exchange took place" in the agreement being evaluated. Macneil's theory questions the neoliberal foundations of the contract and its individualized model of autonomy.

Relational contract theory overcomes the difficulties that Macneil calls "presentation".[27] It refers to long-term contracts that deal with the future as if it were the present. A marriage contract is an example of a presentation because it is concluded with respect to a future situation that may or may not occur in the future – divorce. But that contract which is tied to a future uncertain event is concluded in the current circumstances of the parties – before they are married or during the marriage and at a time when divorce seems remote and unlikely. Relational contract theory helps highlight the fact that marital contracts can be complex because of the many unpredictable ways in which a marital relationship can develop.[28] Marriage contracts cannot be interpreted only within the framework of the promises that the parties make to each other in the agreement they sign. As Leckey explains,

[24] Edgar v Edgar [1980] 1 W. L. R. , 1420.

[25] H. Beale, "Relational Values in English Contract Law", *Changing Concepts of Contract: Essays in Honour of Ian Macneil*, (eds. D. Campbell et al.), 2013, 116.

[26] I. Macneil, *Contract: Exchange Transactions and Relations*, Foundation Press, 1978.

[27] I. Macneil, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law", *Northwestern University Law Rev*., Vol. 72, 1978, 854.

[28] Parties to a marriage contract often have an unrealistic view of the present and also do not know how circumstances will change. G. Hadfield, "Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law", *University of Pennsylvania Law Rev*., Vol. 146, 1998, 1258.

When circumstances change, it is often to the economic detriment of the spouse who takes care of the household as well as child-rearing.

the content of a relationship "simply evolves from the interactions of the parties throughout his life".[29]

Feminist perception of relational theory is also used in order to gain insight into the "power imbalance" in the marriage contract and adapt the relational theory to the specifics of the marriage contract.[30] Feminist perception is useful because it points to an imbalance of influence between the contracting parties, which does not necessarily have to be on the side of the man either.[31] It illuminates the gender assumptions that are contained in business and social relations.[32] Conagan believes that traditional contract theories (which he calls „traditional academia") are gender neutral and are unable to deal with the emotional complications of marriage contracts.[33] Feminist perception of relational theory helps us to see more realistically importance of the power that conditions the existence of autonomy as one of the key principles of contract law.

Some feminist views go quite far. Paterman believes that contract law, like most branches of law, is a male construction that places women in the position of the object of male oppression.[34] Paterman is not the only one who advocates this point of view according to the classical conception of the contract. Tidewell and Linzer believe that the classic view of contracts associated with standards such as individual autonomy, difficult negotiation, self-confidence, etc.[35] Code argues that our view of the autonomy of

[29] R. Leckey, "Relational Contract and other models of marriage", Vol. 40, *Osgoode Hall Law J. 1*, 2002, 8.

[30] It is difficult to talk about a feminist view of an issue because within the feminist movement there are several currents and views on certain problems. They consider the impact of the development of contract theory on the position of women, but each in its own way. For us, those views that observe the imbalance of power while simultaneously considering the autonomy of the parties will be relevant.

Fredman points out how neo-liberal perspectives emphasize women's freedom of choice, instead of talking about the impact that social systems have on these "freedoms". S. Fredman, *Woman and Law*, Clarendon Press 1998, 288–290. Listed by: S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice – Issues of Power in Theory and Practice*, Hart publishing, Oxford and Portland, Oregon 2015,147.

[31] On a feminist view of family law: A., Diduck, K., O'Donovan, "Feminism and Families: Plus Ca, Change?", *Feminist perspectives on Family Law*, Diduck, A., O'Donovan, K. (eds.Taylor & Francis e-Library), 2007.

[32] J. Conaghan, "Reassessing the Feminist Theoretical Project in Law", *Journal of Law and Society*, Vol. 27, No. 3 (Sep., 2000), 35 –385.

[33] *Ibid*., 359.

[34] C. Pateman, *The Sexual Contract*, Stanford University Press, 1988. From this point of view, it follows that the conclusion of a marriage contract with an unchanged classical conception of the contract would be favoring male arbitrariness and possibly violating women's rights.

[35] P. Tidwell, P. Linzer, "*The Flesh-Colored Band Aid-Contracts, Feminism, Dialoge and Norms*", Huston Law Review, Vol. 28, 791.

the will is idealized by men directing their efforts toward maximizing their own interests.[36]

The feminist view of the conclusion of the marriage contract places the focus of its objection on the assumption of the way people negotiate and enter into intimate agreements, and because of this, the feminist view can recognize the imbalance of power that exists at the moment when the agreement is concluded. This view notes that contracting parties are humans and not rational negotiating machines.

The feminist view emphasizes the importance of recognizing the gender dimension of the marriage contract for two reasons: firstly, because the man is usually the richer and more powerful party,[37] and secondly, because it is more likely that it is the woman who will sacrifice her career in order to take care of the home and parental responsibilities, and that she will be damaged by the conclusion of a contract that does not take into account these activities of hers. On the other hand, Kingdom believes that the feminist point of view, according to which a woman is provided with legal protection only because she is a woman, is not correct, and she believes that the correct use of the conclusions would be the one that would focus on all persons who are affected by the imbalance of power (so also on men). In judging the imbalance of power and the gender approach, one must proceed in a way that recognizes the imbalance without creating gender stereotypes and viewing the woman as the weaker side, only in this way both spouses would be in an equal position.[38] If the imbalance of power was not taken into account and contracts were concluded in such a state, then concluding a marriage contract would only legally strengthen the inequality of the spouses, and the marriage contract would become a means of manipulation and endangering the freedom of persons, and not an expression of their autonomy.

By combining relational theory and feminist criticism of it, Thompson builds the theoretical foundation of feminist relational contract theory.[39]

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[36] L. Code, "Second Persons", *What Can She Know? Feminist Theory and the Construction of Knowledge*, Cornell University Press 1991, 78. Stated according to: S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice – Issues of Power in Theory and Practice*, Hart publishing, Oxford and Portland, Oregon 2015, 149.

[37] *Lady Hale* states that the man is the richer party to the contract. *Radmacher (formerly Granatino) (Respondent) v Granatino (Appellant)*, 2009 EWCA Civ 649, 2010 UKSC 42, 137.

[38] E. Kingdom, "Cohabitation Contracts and the Democratization of Personal Relations", *Feminist Legal Studies*, Vol. 8, 2000, 5.

[39] Feminist relational contract theory is formulated in the book Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice – Issues of Power in Theory and Practice*, Hart publishing, Oxford and Portland, Oregon 2015, but it is elaborated in more

Feminist relational theory recognizes that persons do not enter into contractual relations in a vacuum, and that their will cannot be viewed individualistically and unrelated to the context in which contracting takes place. According to this theoretical position, autonomy is more than just rational decision-making, it is exposed to emotions, interdependence and pressures of future spouses or spouses in marriage contracts. As a result of the above, feminist relational contract theory believes that it is necessary to recognize the contextual concept of autonomy in order to propose an imbalance of power between the contracting parties of this contract. The goal of feminist relational contract theory is to create a concept of autonomy of will that will be applicable throughout the "lifetime" of the marriage contract.

Feminist relational contract theory is conceived on the basis of relational autonomy and relational contract theory by combining these approaches and overcoming their shortcomings from a feminist point of view. The author of the feminist relational contract theory states that this theory is useful not only as a means of criticizing the traditional contract theory, but also as a way to provide solutions that can empower the parties to the contract in everyday relationships, especially those parties who, in the case of a traditional formulation that does not take into account the wider context in which the concluded contract was the weaker party due to the power imbalance.[40] Thompson states that an individualistic approach to the marriage contract is inadequate.[41] She emphasizes that the concept of autonomy in itself is not bad, but that its application in law is problematic.[42] A marriage contract is taken as evidence of the autonomy of the parties, provided that the parties have been adequately informed and that no party has been unlawfully pressured to sign it. However, this assumption of autonomy serves to exclude contextual factors such as how and why the agreement was made and the changing power dynamics that occur over the course of the relationship.[43] Assuming the autonomy of the contracting parties, the question does not arise as to why an individual would knowingly sign a bad agreement or remain a party to it. But as McLean notes, the context in which the choice is made must be respected, otherwise autonomy is reduced to a matter of informed consent.[44] Thus, if autonomy

detail in the article S. Thompson, "Feminist relational contract theory: A new model for family property agreements", *Journal of Law and Society* 45 (4), 617–645.

[40] S. Thompson, "Feminist relational contract theory: A new model for family property agreements", *Journal of Law and Society* 45 (4), 2018, 4.

[41] *Ibid*., 10.

[42] *Ibid*., 11.

[43] *Ibid*.

[44] S. A. M. McLean, *Autonomy, Consent and the Law*, Routledge-Cavendish, 2010, 215.

and consent are equated, we are left with a simplistic view of autonomy in which individuals either consent or they do not. The author considers the feminist aspect of this theory to be crucial, because it introduces the gender dimension into the concept of relational contractual theory. She points out that it cannot be said that the current concept is not capable of solving the consequences of gender inequality in intimate relationships. Relational theory can, through looking at the gains and losses that come from a relationship, recognize that post-divorce changes all too often lead to poor economic conditions for women. If relational theory were not applied, and if its meaning was not enriched by consideration of gender equality, something would happen in intimate relationships that can be labeled as a kind of absurdity. Namely, if the marriage contract did not include an economic interest for the party engaged in housekeeping and raising children, that party would be significantly impoverished after the divorce and its rights would be violated. McLean questions whether a contribution that generates direct income should not be measured in the same way as a contribution aimed at maintaining family unity. Thus, if the classical conception were to be applied, without considering the contractual context, it would show that the party who invests in his career and does not deal with raising children after the end of the marriage earns at the expense of the spouse who, for example, sacrificed his career in order to devote itself to the family. The goal of feminist relational theory is to provide an alternative analysis of traditional doctrinal concepts in contract and to give them new meaning.

Feminist relational contract theory is commendable in that, in addition to pointing to gender differences (which are natural),[45] it also points to the context through which it sets a wider angle of view and therefore does not have to react "female-centric". Properly observed, this theory is not the

[45] A feminist approach gives the gendered power imbalance between the parties a central place. We are of the opinion that this is an overemphasis of exclusively gender influences and that, just like any overemphasis, leads to unfairness for one side, in this case it would be for a man. Of course, gender differences have an impact on the power imbalance and on the provisions of the marriage contract, but it is only one of the factors that must be taken into account. There is an undoubted benefit of paying attention to the power imbalance, which is due to the feminist relational contract theory, but, as we stated earlier, it does not have to be conditioned only by the economically better position of one spouse.

About the terms "gender" and "gender", which in the general and usual meaning, implies a petrified distance, insurmountable, despite the power of voluntarism, distance, in the context of the topic, the word "gender" implies an initial separation, which, by the power of (fine/happy) atavism, with the power of biological, natural laws that do not command but state, with free will and the desire for a symphony, in general, in the finale, it always successfully overcomes the initial distance. Bad principles in one sphere are the etiology of the badness of the whole society. С. И. Панов, „Гендерско васпитање/родна сензитивност: редефиниција демократије и ет(н)ички идентитет", *Српска политичка мисао*, бр. 1/2013. год. 20. vol. 39, 30–31.

basis of female chauvinism, and putting men in a subordinate position, and therefore it achieves the goal of its formation, which is the equality of the contracting parties and the fairness of the outcome of the contract. Feminist relational contract theory thus encourages putting the relationship of the contracting parties at the center of consideration, and focusing on the right balance of power, not giving an unnatural advantage to either the female or male side of the contract. The essence of the feminist relational contract theory is that it looks at the marriage contract as a whole, from creation to execution, with a special reference to the process of execution, in which the whole contract and the position of the spouses in it can be evaluated again.[46]

Applying the concept of feminist relational contract theory to the marriage contract would benefit both contracting parties, as well as the financial well-being of the entire family in case of divorce. In assessing the autonomy of the contracting parties, the feminist relational contract theory is not limited to the process of concluding a marriage contract, but it is also reviewed during the marriage. Since the center of this theory is the relationship between the parties, it is logical that the relationship and the positions of the spouses are reviewed throughout the period, and not just at the beginning, because circumstances can change.

A nuanced and complex view of the autonomy of the will and the consent of the contracting parties should be taken from the feminist theory. Feminist relational theory recognizes not only weaknesses of will, but also subtle methods by which one side exerts pressure on the other.[47]

Feminist relational contract theory should serve to recognize and prevent the use of power by any party to the contract who is found to have used their power to induce the other party to enter into a marriage contract of a certain content. What we don't like about this concept is the word "feminist" in the name of the theory itself because it can cause confusion regarding the determination of this theory, and the unfair and artificial favoring of women by the name of the theory itself, indicating that they are always the weaker party in the contract. For this reason, we are of the opinion that the mentioned concept of feminist relational contract theory should be adopted in the part where it points to the inequalities that can occur when concluding a marriage contract, while omitting the term feminist. We are in favor of omitting the word "feminist" for the reason that a man, not just a woman, can appear as the weaker side, moreover, we think that in

[46] S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice*, Hart publishing, Oxford and Portland, Oregon 2015, 173.

[47] O. Gan, "Contractual Duress and Relations of Power", *Harvard Journal of Law and Gender*, Vol. 36, 201–202.

the coming time, it may be men who will be the weaker side more often. The aggressive politics of most feminist conceptions today turns into something different in relation to the initial motive of the emergence of feminist movements. Today, the feminist movement is increasingly taking on the contours of a movement for the humiliation of men, their subjugation, to the extent of endangering their rights. If the views of some extreme feminist currents were followed,[48] and if women were exclusively cited as the weaker side, the feminist concept itself would inevitably be challenged and the inequality and subjugation of the other, male side, inevitable. Thus we would go round and round and never achieve a balance of power, at least in this aspect. For this reason, it is convenient to take from the feminist conception what is useful in it for achieving fairer outcomes in the marriage contract, and to take into account the gender aspect, but not limiting it to women but to extend it to men as well, taking into account the possibility, especially today, that and the male side is the weaker side even in the economic aspect. As marriage is the union of a woman and a man, and how they are different, yet one, and how the beauty is in that diversity and in the very unity achieved by marriage, we are of the opinion that the theory that will deal with the marital property contract must exude the spirit of the institution itself in the benefit of which the marriage contract was formed, and with it the theoretical foundation – relational contract theory. In order for the marriage contract to be a means of promoting equality and preventing the violation of the rights of spouses, we believe that it is necessary to recognize the imbalance of power and prevent it, but that it is by no means desirable in the first moment, before the circumstances of a case are examined, either the female or the male side of the contract. characterized as more or less dominant, ie. "weaker". Men in non-traditional roles must also be protected. The position of a large number of feminist theorists is wrong, that it is the woman who is subjugated in every marriage relationship, and that men cannot be the weaker party in the marriage contract. If a feminist "woman-centric" approach were to be applied, without respecting the circumstances of the case (which the relational theory insists on), then in cases where the man does not play a traditional male role, and where he is the more passive and weaker party in the relationship, the outcome of the negotiation and concluded marriage contract would could be on his walk.[49]

[48] See more: С., Антонић, *Искушења радикалног феминизма: моћ и границе друштвеног инжењеринга*, Службени гласник, Београд 2011.

[49] *Garrison* believes that legal systems that are based on the assumption that women need special and additional protection compared to men are very paternalistic, and that they are based on classic female stereotypes – weakness, dependence, vulnerability, irrationality, precisely those stereotypes that were the previous legislation which denied women numerous rights, precisely because of the aforementioned characteristics, thus harming women. In

In this regard, we advocate that the name of the theory should be adjusted relational contract theory. An adjusted relational contract theory would represent a relational theory enriched with the conclusion that the feminist conception reached, namely that there is an imbalance of power and that it can be "gender-sexual", respecting the life possibility that the man is also the "weaker" side in the relationship.

3. CONCLUSION

Although the autonomy of the will is a key principle in the contractual arrangement of the property relations of the spouses, the specifics of the marital relationship mean that its application in its unchanged form would lead to potentially unfair outcomes for one of the spouses (the "weaker" spouse), and for this reason, with regard to the conclusion of the marriage contract it should not assume that the autonomy of the will exists (autonomy of the will as a legal presumption).

The conclusion of a marriage contract leads to a conflict between, on the one hand, the promotion of women's autonomy and freedom of choice, and on the other hand, the protection of women from the harmful consequences that would result from the use of autonomy of will in conditions of inequality, i.e. power imbalance ("dilemma of choice"). Therefore, if the principle of autonomy of the will were applied in its unchanged form (as well as when the contract is concluded by persons who are not bound by a previous emotional bond), the marriage contract could turn into a means of inequality and falsification of the meaning and purpose of its existence. In response to the challenges posed by the personal relationship of the contracting parties in the marriage contract to the principle of autonomy of will, the relational contract theory emerged. Relational contract theory prioritizes the context in which the contract was concluded.

Feminist perception of relational theory is also used in order to gain insight into the imbalance of power in the marriage contract and adapt the relational theory to the peculiarities of the marriage contract. Feminist perception points to an imbalance of influence between the contracting parties, which does not necessarily have to be on the side of the man either. By combining relational theory and feminist criticism of it, Thompson builds the theoretical foundation of feminist relational contract theory.

Feminist relational contract theory recognizes that persons do not enter into contractual relations in a vacuum, and that their will cannot be viewed

an era based on gender equality, policy makers should think carefully before relying on such negative stereotypes and using them as a means of creating certain legal policies. M. Garrison, "Cohabitant Obligations: Contract versus Status", *The Future of Family Property in Europe*, K. Boele-Woelki (eds. J. Miles, J. M. Scherpe) Intersentia 2011, 131–132.

individualistically and unrelated to the context in which the contract takes place. Feminist relational theory encourages putting the relationship of the contracting parties at the center of consideration, and focusing on the right balance of power, not giving an unnatural advantage to either the female or male side of the contract. The essence of the feminist relational contract theory is that it looks at the marriage contract as a whole, from creation to execution, with a special reference to the process of execution, in which the whole contract and the position of the spouses in it can be evaluated again.

Due to the fact that the word „feminist" in the name of the theory itself can cause confusion regarding the understanding of this theory (understanding of women as always "weaker" parties in the contract), we are of the opinion that the name feminist should be omitted from the name of the theory and the theory should be titled adjusted relational contract theory. An adjusted relational contract theory would represent a relational theory enriched with the conclusion that the feminist conception reached, namely that there is an imbalance of power and that it can be "gender-sexual", respecting the life possibility that the man is also the "weaker" side in the relationship. A theory titled and conceived in this way would favor more legal outcomes and a more certain realization of the purpose for which the marriage contract was established.

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НАЧЕЛО АУТОНОМИЈЕ ВОЉЕ И БРАЧНИ УГОВОР[*]

Сажетак

Аутономија воље јесте кључно начело у уговорном уређењу имовинских односа супружника. Једно од најсложенијих, али и најбитнијих питања која се у погледу закључења брачног уговора, а у вези са аутономијом воље уговорника поставља, јесте проблем „дилеме избора" („dilemma of choice"). „Дилема избора" се састоји у конфликту између промовисања са једне стране аутономије жена и слободе избора, и са друге стране заштите жена од штетних последица које би произилазиле из употребе аутономије воље у условима неједнакости, односно дисбаланса моћи.

Надлежни органи обично узимају да аутономија воље постоји, те се она јавља као претпоставка. Овакав став је у погледу брачног уговора нарочито штетан, јер може резултовати у економским последицама не само по „слабију" уговорну страну, већ и по децу као и друштво у целини. Из тог разлога је нужно преиспитати начело аутономије воље и прилагодити га особеностима личног односа страна уговорница.

У овом раду ћемо анализирати примену начела аутономије воље на супружнике у брачном уговору, уз постављање можда изузетно смелог, али опет могућег питања (уз покушај давања одговора на исто), да ли се у погледу супружника који закључују брачни уговор може говорити о аутономији воље, односно једном њеном манифесту, слободи уговарања у правом смислу те речи, те да ли је питање постојања аутономије воље у овом случају могуће посматрати на исти начин као и у погледу закључења правних послова између лица које не везује нека претходна веза или је у погледу пуноважности брачног уговора потребно увести нови критеријум који би омогућавао правичнији исход?

Кључне речи: *Аутономија воље; Слобода уговарања; Брачни уговор; Релациона теорија*.

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