

REVIEW ARTICLE

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PROTECTION OF CONTRACTING PARTY EQUALITY IN MARRIAGE CONTRACTS

Abstract: *The protection of the equality of contracting parties in marriage contracts is a key prerequisite for achieving fairness in such legal relationships. The paper analyzes potential solutions and suggests ways to integrate them into the Serbian legal system, in the absence of adequate mechanisms to protect the equality of the contracting parties. This study focuses on concrete legal mechanisms, providing brief relational contract theory insights about their dynamic nature. The paper presents a thorough analysis of protective measures for both the formation and execution of contracts by drawing essential lessons from German civil law, which has developed sophisticated judicial review systems. The study also assesses how gender equality principles work to resolve the previous legal inequalities that existed in these agreements.*

The paper outlines specific mechanisms that should be implemented in the Serbian legal system, applying doctrinal and comparative legal methods.

Key words: Marriage Contract, Equality of Contracting Parties, Autonomy of Will, Legal Safeguards, Comparative Law, Relational Contract Theory, Property.

1. INTRODUCTION

A marriage contract is one of the most significant legal instruments in modern family law.¹ It allows contracting parties – spouses or future

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1 The marriage contract is one of the key instruments for the harmonization of family law at the EU level. See more: Stjepanović, B., 2024, Bračni ugovor u pojedinim aktima Evropske unije, *Evropsko zakonodavstvo*, Vol. 23, No. 87–88, pp. 62–74;

spouses – to independently regulate property relations, in accordance with their needs and beliefs. In some legal systems, it can also cover other matters that may impact their shared life.²

This contract is based on the freedom of the contracting parties to determine their relationship terms while maintaining legal boundaries and following fundamental principles of equality, good faith and fairness. In this context, the marriage contract functions as a preventive measure against future disputes, while maintaining marital harmony through its role in establishing clear rights and responsibilities of the spouses.

The marriage contract has become more significant in contemporary society because people are motivated to safeguard their property assets during marriage, especially when they bring substantial wealth into the relationship or encounter business uncertainties. Due to this, marriage contracts need to follow fundamental legal and moral standards, especially the requirement for equal treatment of the parties involved in the contract.

Although the law declares equal rights of the spouses, these rights often remain unenforced in practice. The Republic of Serbia lacks explicit legal mechanisms that would protect equality in marriage contract creation and execution. The current legal framework lacks sufficient protections for power imbalances between parties because it does not establish clear safeguards. The legislator failed to identify the potential risks from marriage contracts entering the legal system because it did not establish protective measures for the “weaker” spouse and children born within the union, and third parties who become legally connected to the spouses.

The marriage contract exists as an essential part of marriage law because its terms and conditions stem from the fundamental bond between spouses. The *sui generis* nature of marriage requires more than traditional contract law principles because it stems from a deep and enduring connection between the spouses. The legal framework for commercial contracts between unrelated parties does not fully apply to marriage contracts because their unique dynamics require special fairness mechanisms.³ This

Stjepanović, B., 2024, Harmonization of family law in the EU with special reference to the marriage contract, *Balkan Social Science Review*, Vol. 23, pp. 149–167.

2 Iasechko, S. *et al.*, 2022, Marriage Contract as a Regulator of Non-Property Relations Comparative Characteristics of Ukrainian and European Legislation, *Journal of Interdisciplinary Research*, Vol. 12, No. 2, pp. 17–22.

3 “Where you are dealing with prenups, you are dealing with something special. You are dealing with people’s emotions”, respondent 10, Thompson, S., 2015, *Prenuptial Agreements and the Presumption of Free Choice – Issues of Power in Theory and Practice*, Oxford and Portland, Oregon, Hart Publishing, p. 95.

distinction underscores the need for marriage contracts to account for the dynamic and evolving nature of marital relationships. A marriage contract functions as a tool for achieving mutually fair outcomes only when it remains equitable to both parties, during both the creation and execution phases. This paper examines different legal protections that apply during the contract formation and enforcement phases, through comparative legal analysis of civil law systems, with special focus on Germany.

2. ON GENDER EQUALITY AND ITS IMPACT ON OTHER AREAS

Consideration of the position of men and women, as contracting parties in marriage contracts, is unfeasible without taking into account the principle of gender equality⁴ and its impact on other spheres, such as labor law, which is the source of human existence. Societies have encountered many stereotypes throughout history, which, due to their adoption by the majority, have produced certain consequences for their members. There are practically no systems without gender-based stereotypes that have led to the unequal position of men and women. Such inequality first occurred in the home, where women took on a larger part of the household chores. In addition, women were responsible for raising children and played a key role in their education. Taking care of the elderly and weak members of the household is also the responsibility of women. Traditional societies saw men only as the breadwinner in the family, which meant that only men could be employed. Authors point out that patriarchy is a deeply rooted phenomenon in the Balkans: “It is not symbolic, but materialized in the action of total control that targets the reproductive abilities of a woman and her goods [which is why it is] natural for a woman to fear her husband.”⁵ The same authors point out that in the modern understanding of the countries in the Balkans, following the communist organization of society, patriarchalism touches on the concept of *pater familias* in Roman law, which is often incomprehensible to authors “from the West”. The long emancipation of women enabled them to join the labor market as a workforce. However, unequal treatment at home has also been transferred to

4 More on this topic: Rajić Čalić, J., 2023, The Importance of the Principle of Equal Treatment of Men and Women in European Union Law, *Glasnik Advokatske komore Vojvodine*, Vol. XCV, No. 3, pp. 976–1015.

5 Stanciuлесcu, M., 2009, *Politica si gen in Balcani. Modele patriarhale in Europa de sud-est*, *Jurnalul de Studii Juridice*, Vol. IV, No. 1–2, p. 182, translated by author.

the place where new workers are sought and recruited.⁶ As women were searching for equal status with men, seeking the opportunity to financially contribute to the family budget, they took on the additional obligation of working outside the home, because the division of household chores did not occur. The original role of the woman, as a mother, is often side-tracked in her professional fulfillment, due to the discrimination that she experiences when joining the workforce, using of leave of absence due to family duties, the desire for career advancement, but also keeping her job after having a child – to name a few. The aforementioned stereotype has led to the underrepresentation of women in many spheres of social life where they are considered insufficiently competent, such as politics.⁷ It can be concluded that “there are ongoing changes that are a consequence of understanding the necessity of protecting human rights, especially the rights of women and children in family relationships, which results in a kind of humanisation of rights.”⁸

Modern principles of labor law (e.g. the equality and non-discrimination, the prohibition of discrimination, and special protection of women) play a significant role in correcting the long-standing unequal legal positions.⁹ Some authors see the seeds of inequality in the constitutional treatment of special protection for women provided for in Article 66 of the Constitution of the Republic of Serbia, given that it does not regulate a special degree of protection for men.¹⁰ In this sense, there is a fear that “protective legislation will only reinforce the already existing inequality in society that exists between men and women, and will particularly negatively affect women’s autonomy and the exercise of their right to work, that is, the envisaged possibility of choosing for themselves whether to engage in paid work and what type of work they will perform for an employer.”¹¹ Ljubinka Kovačević draws a similar conclusion, believing that

6 For more on this this topic see Rajić Čalić, J., Bračni i porodični status kao zabranjeni osnov diskriminacije – opšti osvrt, in: Čeranić, D. et al., (eds.), 2024, *Zbornik radova „Pravne praznine i punoća prava“ Vol. 2: XII Naučni skup povodom Dana Pravnog fakulteta*, Pale, Pravni fakultet Univerziteta u Istočnom Sarajevu, pp. 348–366.

7 Kovačević, N., Marković, Ž., Nikolić, N., 2014, *Ljudska prava u Srbiji*, Belgrade, Beogradski centar za ljudska prava, p. 53.

8 Čović, A., Nikolić, O., The Influence of the Crisis of Religion on the Weakening of Patriarchal Family, in: Đurić, V., Đukić, D., (eds.), 2023, *Savremeno državno-crkveno pravo – uporednopravni izazovi i nacionalne perspektive*, Belgrade, Institut za uporedno pravo, Budva, Pravoslavna Mitropolija crnogorsko-primorska, p. 1280.

9 For more: Reljanović, M., Rajić Čalić, J., 2024, Menstrual leave and gender equality, *Strani pravni život*, Vol. 68, No. 1, pp. 1–14.

10 Misailović, J., 2020, Posebna radnopravna zaštita materinstva, *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 86, No. 59, pp. 237–252.

11 Fredman, S., 1997, *Women and the Law*, Oxford, Clarendon Press, p. 68.

the lack of understanding of the special needs of men leads to a simplified understanding of the principle of equality, in the sense of neglecting the importance of the role that men play in empowering women, but also for the consistent application of this principle.¹² In this sense, the recognition of the special needs of men as participants in the labor market is also a prerequisite for eliminating gender-based discrimination, especially in the context of stereotypes related to the enjoyment of the right to leave of absence to care for a child and other rights aimed at reconciling professional and family duties, which are believed to be held only by women. Therefore, gender equality implies a set of principles ranging from equality of men and women in the recruitment process, at work, and upon dismissal, through equal pay for work of equal value and maternity protection, equal access to education, and equal availability of health insurance services, to the reconciliation of the professional and private obligations of employees. Although gender equality is an integral part of the concept of decent work, the ideal of social justice, and human rights, it remains a goal to be strived for and which is still not fully achievable.¹³

The issue of gender equality, as a matter of equal transparency, support, and participation of both sexes in all social spheres,¹⁴ has been addressed by scholars since the recognition of women's rights that men had. "Female labour is still available when needed and dispensable when it is not," is perhaps the maxim that best describes gender inequality in the world of work.¹⁵ The role of women in the home, which some authors refer to as "sacrificial matriarchy", should also be added to this.¹⁶ The latter term is used to denote women's unquestioning commitment to parental responsibilities, with the sacrifice of work and life that exists outside the parental role. Therefore, women often feel guilty when they leave their young children in the care of nannies or nurseries and kindergartens, believing that they are not spending enough time with their children during their "tender years".¹⁷ The status of "more important parent" is particularly present in Serbian society, greatly shaping gender relations and

12 Kovačević, Lj., 2021, *Zasnivanje radnog odnosa*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 1061.

13 Kring, S. A., Kwar, M., 2009, *Guidelines on gender in employment policies*, Geneva, International Labour Office, p. 7.

14 Gender Equality Commission, 2016, *Gender equality glossary*, Strasbourg, Council of Europe, p. 11.

15 Politakis, G., 2001, Night work of women in industry: standards and sensibility, *International Labour Review*, No. 140, p. 407.

16 Blagojević Hughson, M., 2011, *Rodni barometar u Srbiji: Razvoj i svakodnevni život*, Belgrade, UNDP, p. 105.

17 Buddhapriya, S., 2009, Work-family challenges and their impact on career decisions: a study of Indian woman professionals, *Vikalpa*, No. 34, p. 33.

allowing the other parent to participate equally in child raising. Blagojević Hughson particularly emphasizes the importance of jointly carrying out activities related to children and establishing “egalitarian parenting”.¹⁸ The asymmetry of the relationship fostered by the gender positions of the father and mother greatly impacts the development of the child, but also the psyche of women who, unlike their male partners, have more likely to doubt that they are “good mothers” to their children. Given that they bear the greatest burden of upbringing and education, mothers are less likely than fathers to want a larger number of children.¹⁹ This is also reflected in the position of women as contracting parties in marriage contracts. In theory, gender inequality occurs primarily due to the unequal opportunities provided to men and women by social institutions.²⁰ If the chances for equal access to education and employment are disrupted by having children, this can result in shorter employment for women, not having children, and ultimately excluding women from the labor market. Finally, we should not ignore the authors who point out the clear connection between gender equality and equal reconciliation of family and professional obligations, due to the societal expectation for women to be more devoted to children than men, which results in discrimination against women in professional life. The conclusion is that the unequal division of labor in family life leads to direct discrimination between the sexes. This discrimination is already manifested in the employment process – where women are viewed as employees who will often be absent from work due to family duties – and which can appear during the duration of the employment relationship, through denial of career advancement on account of career breaks due to childbirth and a decline in productivity, also due to maternity leave. The connection between gender inequality and the reconciliation of family and professional obligations was also pointed out by the Court of Justice of the European Union, marking the different treatment of a pregnant woman as discrimination on the grounds of sex, in when the Thibault case C-36/95.²¹ In doing so, the Court unequivocally took the position that the issue of gender equality represents an important principle within the framework of the European Union. Instead of separately developing the areas of gender equality and the reconciliation of professional and family obligations, the authors propose that they be united, thus contributing to the effectiveness of the application of the principle of gender

18 Blagojević Hughson, M., 2011, p. 105.

19 *Ibid.*

20 RAND Europe, 2014, *Gender Equality in Workforce: Reconciling Work, Private and Family Life in Europe*, Brussels, RAND, p. 29.

21 Kring, S. A., Kwar, M., 2009, p. 14.

equality in practice, which can be achieved, among other things, through the equal participation of men and women in family obligations.²²

3. POWER IMBALANCE IN MARRIAGE CONTRACTS AND THE NEED FOR LEGAL SAFEGUARDS

The process of creating and finalizing marriage contracts shows a high risk of power differences between the involved parties. The power imbalance between parties stems from economic differences, however, emotional and social elements also play a role that threatens to violate the substantive equality by giving an unfair advantage to one party.²³ The main practical difficulty involves identifying the existence of such imbalances and developing and implementing suitable legal solutions to address them and to safeguard the weaker party.

The marriage contract operates under the premise that two independent parties enter into it to safeguard their assets. Does this situation occur in every real-life scenario? The deep emotional bond between spouses, together with changing financial and life situations during marriage, makes traditional contractual independence both challenging and susceptible to change. The initial financial independence of the spouses when signing the contract does not prevent the development of future dependency, because one spouse may take on greater caregiving duties or experience career interruptions, which tend to impact women more severely.²⁴

Since marriage contracts are often initiated by one spouse, there is an inherent risk that the economically or otherwise more powerful party may leverage their position, leading to terms that are significantly unfavorable

22 *Ibid.*

23 Brian Bix states that entering into marriage with a marriage contract that undoubtedly favors one party is worse than not entering into marriage at all. Bix, B., *The ALI Principles and Agreements: Seeking a Balance between Status and Contract*, in: Wilson, R., (ed.), 2006, *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution*, Cambridge, Cambridge University Press, p. 389.

24 Regarding the variability of various circumstances during the marriage, it is interesting to mention Milton Regan's view on the contractual relationship between spouses and its changeability. He argues that by the end of the marriage, one cannot speak of the same individuals as at the beginning of the marriage, as the circumstances that occur during the marriage influence the spouses to such an extent that they have changed, becoming different people from those who originally entered into the marriage. Regan, M., 1999, *Alone Together: Law and the Meaning of Marriage*, Oxford, Oxford University Press, p. 189.

to the other.²⁵ This necessitates strong legal oversight along with particular safeguards to verify that negotiations were fair and the parties exercised their will freely, as opposed to being coerced or influenced.

To effectively address power imbalances, legal systems need separate mechanisms to handle power imbalances during two stages of contract implementation: its conclusion and its enforcement.

The conclusion of agreements requires protective measures to verify that both parties understand the terms and to prevent any form of excessive pressure. The mechanisms for safeguarding include mandatory independent legal advice for both parties and complete financial disclosure requirements, and possibly a post-signing waiting period before marriage to enable reflection and decrease emotional pressure.

The enforcement phase requires legal systems to establish judicial review procedures focusing on agreements that undergo fundamental changes or produce unconscionable results causing severe disadvantages to one party. The unique relational aspect of marriage contracts requires fairness assessments through dynamic reviews extending beyond the agreement's signing moment.

The assessment of agreement fairness entails more than merely following contractual formalities, requiring the comprehensive evaluation of both parties' positions and the long-term effects of the contract on their lives, when the initial agreement circumstances change.

3.1. THEORETICAL FRAMEWORK FOR OVERCOMING POWER IMBALANCES BETWEEN SPOUSES

The control of marriage contract provisions by a specialized judge is considered as one of the mechanisms for overcoming power imbalances and achieving substantive fairness in the contract terms. The implementation of this mechanism requires clarification of the process to the judge, in order to establish the existence of power imbalances in the marriage

25 The concept of power is difficult to define. It has many facets and can be attributed various meanings. In this paper, we understand it as the dominance of one spouse over the other in the economic, social, and/or emotional sphere. Economic power is a self-explanatory concept and requires no further elaboration. Social power refers to a higher position on the social ladder or a higher level of education of one spouse, which enables them to achieve a better economic position through the marriage contract. Emotional dominance and the ability to manipulate emotions involve one spouse's lack of emotional attachment, allowing them to condition the other spouse (who is completely emotionally devoted and unconditionally trusting), thereby securing greater economic benefits for themselves.

contract, while deciding on which nullifying provisions or invalidating the entire contract, without harming the agreements or the relying party.

The following theoretical discussion addresses situations where marriage contract provisions appear fair yet the judge faces uncertainty regarding the execution process.²⁶

In addressing this matter, it is necessary to first establish a theoretical framework and, within it, determine what freedom of contract between spouses entails. Once the boundaries of freedom of contract between spouses are defined, a foundation for judicial assessment of the fairness of specific provisions of the marriage contract or the contract as a whole will be established.

What factors should be examined when establishing the theory as a solid basis for understanding contract relationships and ensuring fair application of marriage contracts, aligning with their original purpose?

Marriage contracts are concluded between future spouses or existing spouses in cases where these parties wish to regulate their property matters differently from what is prescribed by law. The first issue that arises when concluding such contracts is the question of the existence of freedom of contract, i.e., the autonomy of will. The next problematic aspect arises from the fact that a marriage contract is usually concluded long before the termination of the marriage. In the interim, various life circumstances may change, raising the issue of the applicability of the marriage contract if these changes are not taken into account. The question arises whether these elements should be viewed in the same way as in the case of ordinary commercial contracts and whether general rules relating to autonomy of will and changed circumstances should be applied.

3.1.1. Specificities of the Principle of Autonomy of Will Between Spouses

The principle of autonomy of will between spouses or individuals preparing for marriage cannot be viewed in the same way as the autonomy of parties entering into other legal relationships, as marriage represents a primary and unique relationship that encompasses emotional and social components. While emotional bonds are foundational to marriage,

26 In cases of evident unfairness, the specialized judge could annul an unfair clause or the entire marriage contract and enforce the statutory property regime. Evident unfairness would exist, for example, if the contract stipulates that all assets acquired during the marriage would belong to the wife, while the husband, despite not engaging in commercial activities, cared for four children, managed household tasks, and provided mental support for the wife's career pursuits.

they also represent a legal vulnerability that can influence contractual decisions.²⁷ The traditional legal definition of coercion or duress does not fully explain the delicate yet important ways one spouse can control another in this close relationship.²⁸ The implicit pressure to maintain marital relationships in postnuptial situations reduces genuine consent more than prenuptial agreements do.²⁹

The inherent vulnerability to influence – which does not equate to legal coercion – prevents us from assuming the marriage contract is fair based solely on formal consent. Economic or emotional power exercised by one party during the contract signing process may remain invisible at first but produces major problems throughout long marriages, as life circumstances transform. Marriage contracts handle present and future assets in such a way that predicting all potential life changes and their consequences becomes both difficult and impossible when the contract is first established.

This necessitates a comprehensive understanding of marital autonomy of will in matrimonial law, specifically tailored to the primary relationship between spouses. We propose the implementation of a legal standard of unfairness or unconscionability that extends beyond regular procedural issues. This standard would protect spouses from evident unjust treatment in circumstances stemming from unforeseen events. The evaluation of such scenarios should be conducted by judges who specialize in matrimonial matters, through assessment of indicators established by the law or case law that describe manifest unfairness.

While notaries play an essential part in marriage contract conclusions, because they warn about consequences and check for formal errors,

27 Stjepanović, B., 2024, The Principle of Autonomy of the Will and the Marriage Contract, *Legal gaps and the completeness of law*, Vol. 3, Pale, Pravni fakultet Univerziteta u Istočnom Sarajevu, p. 253.

28 It is reasonable to question whether the influence one spouse exerts over the other can be considered coercion. Emma Hitchings argues that coercion in such relationships is difficult to prove unless a third party is involved. Additionally, she holds that a statement suggesting marriage will not occur without signing a marriage contract does not constitute coercion unless accompanied by other additional factors. Hitchings, E., 2011, *Law Commission Report: A study of the views and approaches of family practitioners concerning marital property agreements*, Bristol, University of Bristol School of Law, p. 67.

29 “Post-nuptial agreements, however, are very different from prenuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.” UKSC, *Radmacher (formerly Granatino) (Respondent) v. Granatino (Appellant)*, 2009 EWCA Civ 649, 10 October 2010, para. 36, (https://www.supremecourt.uk/cases/docs/uksc-2009-0031-judgment_db72197d25.pdf, 3. 10. 2025).

they do not evaluate the core fairness of the contract terms or their future effects. Therefore, the specialized judge plays a fundamental role in establishing higher protection for the “weaker” party, because long-term marriages experience inevitable changes in circumstances.

It is our belief that, in order to protect the essence of the marriage contract and safeguard the “weaker” party, it is necessary to adopt a broader understanding of the autonomy of will, tailored primary to the relationship between spouses. Besides that, it is our opinion that a legal standard for unfairness or dishonesty should be established to handle evident injustices that occur between spouses. This standard would require the application of statutory examples that establish these situations, in addition to enforcement by matrimonial judges who specialize in evaluating all aspects of marriage contracts within specific contexts.

Regarding marriage contract equality between parties, the law fails to address the widespread yet inevitable differences in negotiating power between contracting spouses.³⁰ The existing inequality between spouses makes marriage contracts inherently prone to significant power imbalances between partners, unless the government steps in. The deep-seated nature of this imbalance leads people to ignore it, which damages the fundamental equality between parties and their ability to achieve their marriage contract interests.³¹

3.1.2. Relational Theory and Its Application to the Autonomy of Will in Marriage Contracts

While traditional contract theory often assumes detached rational actors, a relational perspective offers valuable insights into the unique context of marriage contracts. The relational perspective recognizes that the autonomy of spouses is deeply influenced by their interdependence and evolving emotional ties, which can create subtle power imbalances that conventional contract law theory struggles to fully address. This perspective shows that formal equality does not lead to

30 In the legal systems of Nordic countries, marriage contracts are legally binding but can be invalidated if inequality between the parties is established. The German Constitutional Court allows lower courts to review marriage contracts. However, it did not specify the scope of review, leaving this determination to the Supreme Court (Bundesgerichtshof). Pintens, W., *Matrimonial Property Law in Europe*, in: Boele-Woelki, K., Miles, J., Scherpe, J. M., (eds.), 2011, *The Future of Family Property in Europe*, Cambridge, Intersentia, p. 39.

31 A study conducted with a group of attorneys involved in drafting marriage contracts in New York reveals that autonomy is something contracting parties rarely possess, although it is almost always presumed to exist. The marriage contract is often assumed to equally reflect the will of both parties. Thompson, S., 2015, p. 103.

substantive equality because parties exist within a deeply personal and ongoing relationship.³²

The main strength of the relational perspective for legal purposes emerges from its ability to create particular legal standards, which evaluate contract fairness and autonomy. This approach demands conceptual frameworks that move past procedural defect assessments (such as overt coercion), to evaluate the substantive fairness of agreements especially when initial expectations or circumstances undergo significant changes. The approach supports three key measures, which include mandatory independent legal advice and complete financial disclosure at the time of agreement, and judicial review during enforcement – because these measures address real-life relationships.

The understanding that autonomy can be compromised by disparities in power, resources, or knowledge within a relational context strengthens the theoretical argument for judicial intervention based on the principles of unconscionability or material imbalance. The approach requires legal protection to address imbalances between parties regardless of gender so both men and women in disadvantaged positions receive protection.³³ The objective is to protect the interests of both spouses, through marriage contracts, by using a comprehensive legal framework that recognizes relationship specifics without conducting extensive sociological research. This approach establishes a theoretical framework for enhancing fairness and justice in marriage contract legal applications.

4. LEGAL MECHANISMS FOR OVERCOMING POWER IMBALANCES BETWEEN SPOUSES

The legal mechanisms for overcoming power imbalances between spouses and protecting the potentially “weaker” spouse may vary. Gordana Kovaček-Stanić and Sandra O. Samardžić divide them into direct and indirect mechanisms. Under direct legal mechanisms, they refer to such mechanisms where the provisions of the law explicitly take into account the property position of the spouses.³⁴ Indirect protection of the

32 Thompson, S., 2018, Feminist Relational Contract Theory: A New Model for Family Property Agreements, *Journal of Law and Society*, Vol. 45, No. 4, pp. 12–13.

33 Kingdom, E., 2000, Cohabitation Contracts and the Democratization of Personal Relations, *Feminist Legal Studies*, Vol. 8, No. 1, p. 5.

34 Kovaček-Stanić, G., Samardžić, S. O., 2016, Zaštita slabijeg partnera u ugovornom bračno-imovinskom režimu, *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 4, pp. 1047–1048.

weaker spouse is achieved through the prohibition of contracting or excluding certain rules, as well as the possibility of concluding only legally prescribed contractual regimes.

A positive example of direct protection of the “weaker” spouse can be found in Russian legislation.³⁵ Article 44, Section 2 of the Family Act of the Russian Federation allows a court, upon the request of a spouse, to declare a marriage contract null and void, either partially or entirely, if its conditions place that spouse in an extremely unfavorable position.³⁶ This approach represents an important legal protection mechanism that could serve as a model for a solution in Serbian legislation.

In some countries, indirect protection of the weaker spouse is achieved through statutory provisions on certain property regimes that spouses can opt for in their marriage contract. The laws of Sweden and Greece restrict married couples to specific pre-defined property arrangements. This method provides some protection through its restriction of individualized arrangements yet it restricts the freedom to make contracts. On the other hand, in other countries, such as Germany and France, the law determines which property regimes can be agreed upon, while at the same time allowing spouses to contract other regimes of their choosing. The ability to create flexible arrangements requires supplementary safeguards to protect the equal status of parties involved in complex contractual agreements.

At the European level, the Council of Europe has recognized the need to protect the “weaker” spouse in marriage contracts and has adopted two significant acts: the Resolution on Equality of Spouses in Civil law (1978)³⁷ and the Recommendation of the Committee of Ministers to member states on Family Mediation.³⁸ The Resolution on Spousal Equality in Civil Law requires governments to establish appropriate measures that prevent marriage contracts from containing discriminatory provisions

35 Art. 44, pt. 2 Family Act of Russian Federation (Семейный кодекс Российской Федерации), N 223-ФЗ of 29 December 1995.

36 Similarly, indirect protection of the weaker spouse in French law is reflected in the impossibility of excluding the basic property regime, which includes the obligation for spouses to jointly bear household expenses. This regime also includes provisions on child-rearing and the preservation of the family home, thereby providing additional legal security and protection for family relationships. Art. 1387–1581, Code Civil.

37 Council of Europe Committee of Ministers, Resolution (78) 37 on Equality of Spouses in Civil law, (<https://rm.coe.int/res-78-37e-on-the-equality-of-spouses-in-civil-law/1680a3b3f1>, 1. 2. 2025).

38 Council of Europe Committee of Ministers, Recommendation No. R (98) 1 of the Committee of Ministers to member states on Family Mediation, (<https://rm.coe.int/rec-98-1e-on-family-mediation/1680a3b3ef>, 1. 2. 2025).

affecting either spouse, while the Recommendation on Contribution After Divorce suggests member states should create rules about marital property regimes that include provisions for fair property distribution between former spouses.³⁹ The Recommendation on Family Mediation encourages member states to implement mediation as a solution for family disputes, including marital and divorce matters. These recommendations work to safeguard spouses by establishing equal rules for marital asset division and financial responsibility after divorce. The Council has repeatedly emphasized that family relation laws and marriage contracts must provide fair results to both spouses, especially when financial differences or power imbalances exist.

In the following, we identify specific mechanisms that we believe will enhance protection for the weaker spouse when applied in conjunction. The mechanisms are discussed chronologically, starting from the inception of the idea of entering into a marriage contract, through its notarization, duration, and, finally, its enforcement.

4.1. SAFEGUARDS AT THE TIME OF CONTRACT CONCLUSION

The first stage of a marriage contract conclusion significantly determines the fairness of the contract itself. The main goal of the mechanisms during this period focuses on protecting both parties from immediate power differences and ensuring they understand the terms of the agreement.

The most essential mechanism for addressing power imbalance during contract formation requires both spouses to have mandatory independent legal counsel. The provision of professional legal support to each spouse helps them understand the legal content and consequences of the contract, which minimizes the risk of manipulation or misunderstandings regarding their rights and obligations.⁴⁰ The autonomy of the contracting parties' wills would be better achieved through independent legal counsel because this counsel could explain the effects of the marriage contract provisions. Through independent legal advice the parties would gain knowledge about additional consequences that would otherwise remain invisible

39 Kovaček-Stanić, G., Samardžić, S. O., 2016, p. 1048.

40 The Principles of European Family Law state that a notary or another legal professional with a similar function should: provide impartial advice to each spouse individually; ensure that each spouse understands the legal consequences of the marriage property contract; and ensure that both spouses give their free consent to the contract. Boele-Woelki, K., Ferrand, F. *et al.*, 2013, *Principles of European Family Law Regarding Relations Between Spouses*, Cambridge, Intersentia, p. 128.

to an untrained person. Professional advice, combined with constructive dialogue, would assist couples in determining whether to sign a marriage contract or adjust its terms according to their personal interests. Also, a qualified legal advisor could assist the parties in identifying potential future life changes and their effects on the contractual rights and responsibilities. The main advantage of an independent legal counsel consists of warning the parties about hidden consequences that will emerge after the contract creation, impacting their relationship and financial stability.⁴¹

Under the current legal framework in Serbia, the notary is the one who points out to the spouses the possible consequences of entering into a marriage contract.⁴² It is the notary's obligation to notify the parties about contract conclusions that result in abandoning predefined property rights between spouses. The role of the notary ends there. In this way, such counsel fails to meet the criteria for establishing a fairer contract process in the conclusion of marriage contracts. The notary acts as part of an equitable procedure, yet stands alone as an insufficient protection system for the contracting parties. We argue that each party should receive independent legal advice, from separate legal professionals, before signing the contract. The parties should receive counseling before notarizing the contract, while having enough time (30 to 60 days) to consider their decisions. This method would enhance understanding while providing greater freedom to act, which would lower the chances of creating unfair agreements.

A person's free will when signing the marriage contract does not ensure continuous freedom of will during the entire marriage period. The life's uncertainty prevents spouses from predicting future changes, and they cannot update their contract accordingly. Consequently, the law must establish mechanisms that enable changes to marriage contracts as new circumstances emerge.

We recommend that The Preliminary Draft of the Serbian Civil Code should contain detailed and complete rules to protect the interests of the "weaker" party in marriage contracts.⁴³ We suggest that the legislator investigate different comparative law models to create an equilibrium between contractual liberties and essential equal and fair standards between spouses.

41 For example, the parties agree that each spouse's income will be considered their separate property. Subsequently, one spouse gives up their career during the marriage to focus on childcare and upbringing, leaving their job, and at the time of divorce, finds themselves in a significantly disadvantaged and unfair economic position.

42 Art. 188, pt. 2. Family Act of Republic of Serbia, *Official Gazette of the RS*, Nos. 18/2005, 72/2011 – other law, and 6/2015.

43 The Preliminary Draft of the Serbian Civil Code, https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html.

A fundamental protection in the last stage the process requires both parties to provide complete financial disclosure. A party cannot provide truly informed consent unless they possess full knowledge of their partner's assets, along with debts and financial income. The American Law Institute (ALI) has defined principles for handling family dissolution and marital property distribution,⁴⁴ focusing on the reduced rationality that exists between the parties involved in the contract. The principles work to enable the parties involved in a contract while safeguarding their basic rights and freedom of choice, recognizing the existing power differences in that particular situation. The ALI principles state that the party waiving a right must have basic knowledge of the other party's financial situation and assets and should obtain independent legal advice and ensure the agreement uses straightforward language. They also recognize that parties entering into marriage contracts will not make rational decisions without specific procedural safeguards. The proposed 30-day waiting period between signing and marriage serves as a vital recommendation by the ALI, allowing for reflection and possible agreement changes, which we believe would be advantageous if adopted in Serbian law.

4.2. SAFEGUARDS DURING CONTRACT ENFORCEMENT AND JUDICIAL REVIEW

Life circumstances are unpredictable and the spouses cannot foresee all the changes or adjust the contract accordingly. Therefore, it is necessary to ensure legal mechanisms that allow for the modification or judicial review of marriage contracts, in line with unforeseen developments and changed circumstances.

In this regard, we suggest that the Preliminary Draft of the Serbian Civil Code Serbian Civil Code should include more precise and comprehensive provisions, which would clearly protect the interests of the “weaker” party in marriage contracts. This approach is significantly informed by comparative law, particularly the robust system of judicial review of marriage contracts in Germany.

4.2.1. The German Model of Judicial Review: BVerfG Decisions of 2001

The German legal system demonstrates an advanced approach to merging contractual freedom with mandatory fairness principles in marriage contracts. On 6 February 2001, the German Federal Constitutional

44 American Law Institute, 2001, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, *Duke Journal of Gender Law & Policy*, Vol. 8, No. 1, pp. 1–85.

Court (Bundesverfassungsgericht – BVerfG) issued an important decision⁴⁵ which serves as the foundation of this approach. The Court declared that marriage contracts contain contractual autonomy but become subject to constitutional review if they establish unconscionable terms that place an excessive burden on any party involved.

The Court acknowledged that family law contractual freedom has its limits under Article 6 of the Basic Law, which protects marriage and family, and Article 3 of the Basic Law, which enforces equality. Marriage contracts must undergo evaluations that assess their procedural aspects, as well as their substantive fairness elements.

The German judicial review process consists of two separate evaluation phases.

1. The initial validity review (Sittenwidrigkeitsprüfung or contra bonos mores review) assesses contracts for immorality or unconscionability when they are signed. The courts must determine whether one party faced such extreme power imbalance at signing that they have lost their ability to make voluntary decisions. The assessment includes the evaluation of major economic differences, as well as insufficient legal guidance and extreme emotional dependence and forceful situations. The court requires a contract to demonstrate clear unfairness that reaches the level of “manifest one-sidedness” or “patent inequity”. A marriage contract that demonstrates immorality in the course of this assessment automatically becomes null from its inception.
2. A German court may enforce effect control (Ausübungskontrolle or “exercise control”) on a marriage contract if the marriage experiences unforeseen fundamental changes that produce an unconscionable situation for one party, even though the contract remains valid. The enforcement of this principle becomes essential when one spouse becomes completely dependent on their partner because of traditional gender expectations and lacks proper financial support after divorce. The review process relies on both good faith principles (Treu und Glauben, § 242 BGB)⁴⁶ and rights abuse prohibitions. The court maintains the power to adjust or partially invalidate contract terms that would otherwise produce

45 BVerfG, Judgment of the First Senate of 6 February 2001 – 1 BvR 12/92, paras. 1–56, (https://www.bverfg.de/e/rs20010206_1bvr001292en, 3. 10. 2025).

46 German Civil Code, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515).

an unacceptable outcome, based on marriage and family constitutional safeguards.

The German legal system acknowledges that spouses may sign unfavorable contracts when marrying because they want to build or sustain their relationship, while unexpected life changes can make originally fair provisions unjust during the marriage dissolution. The dual review system establishes a powerful framework that maintains party self-determination through substantive family law justice applications, while providing significant grounds value for developing Serbian matrimonial law.

5. CONCLUSION

It is our belief that only a multi-step control process for the conclusion and execution of the marriage contract would allow the achievement of the goal for which the concept of the marriage contract was created – enabling spouses to agree on their property relations in a way different from the one proposed by law, but in a manner that benefits the interests of both spouses, not just one of them. This multi-step review and strict regulation of the process, from the conclusion to the execution of the marriage contract, may be perceived as a restriction of the spouses' autonomy and the undermining of the very essence of the marriage contract. This conclusion could be drawn based on the perception of the marriage contract as just another commercial agreement, and the view that the principle of autonomy of will in the context of classical contract theory is a legally formed, impersonal concept, utopian in nature, considered in complete isolation from external factors.

However, this concept is hard to maintain even in traditional commercial contracts, let alone in a marriage contract. By redefining autonomy of will and viewing it as freedom within the freedom of others – freedom that has multiple limitations (the term “limitation” here is not used with a negative connotation, as in life and, consequently, in marriage, it is necessary to limit many things, and in marriage, this refers to making the right sacrifices for the sake of true coexistence of two individuals) – we allow for a different, more realistic perspective that is closer to the reality of life and, therefore, should lead to a more accurate and just outcome.

For this reason, it is our belief that legally specifying the exact steps would contribute to the autonomy of the spouses' wills and their freedom to contract, rather than restrict it. Such an approach would favor relationally understood autonomy of will, protect the “weaker” spouse, and

preserve the essence of marriage as a union through love, in which both partners are not only equal but are one.

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ZAŠTITA RAVNOPRAVNOSTI STRANA UGOVORNICA U BRAČNOM UGOVORU

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APSTRAKT

Zaštita ravnopravnosti ugovornih strana u bračnom ugovoru je ključni preduslov za postizanje pravičnosti u ovom pravnom odnosu. Rad analizira potencijalna rešenja i predlaže načine za njihovu integraciju u srpski pravni sistem, u nedostatku adekvatnih mehanizama za zaštitu ravnopravnosti ugovornih strana.

Glavni fokus istraživanja je na konkretnim pravnim mehanizmima, uz uzimanje u obzir autonomije volje i kratak prikaz teorija relacionih ugovora o njihovoj dinamičnoj prirodi. Rad sprovodi temeljnu analizu zaštitnih mera kako za formiranje tako i za izvršenje ugovora, izvlačeći bitne pouke iz nemačkog građanskog prava koje je razvilo sofisticirane sisteme sudske revizije. Istraživanje takođe procenjuje kako principi rodne ravnopravnosti doprinose rešavanju prethodnih pravnih nejednakosti koje su postojale u ovim sporazumima.

U istraživanju su izloženi specifični mehanizmi koje treba implementirati u srpski pravni sistem, uz korišćenje doktrinarnih i uporednopravnih metoda.

Ključne reči: bračni ugovor, ravnopravnost ugovornih strana, autonomija volje, pravne zaštite, uporedno pravo, teorija relacionih ugovora, imovina.

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