

Research Article

The Dowry and Its Securing According to the Josephine Code of 1787

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Abstract

The study is dedicated to highlighting the provisions on the legal regime of dowry (the so-called marital property) and its security, enshrined in the third chapter "On the rights of spouses" of the first part "On personal law" of the Josephine Code of 1787, which regulated marital relations in the Habsburg monarchy. First of all, the author analyzed the state of scientific research of the specified problem both in the European science of the history of law, and in Ukrainian in particular. The main attention of the study is focused on the characteristics of the features of the legal regime of dowry, as well as the conditions for its securing according to the Josephine Code. The article sets out provisions on the persons obliged to provide dowry, on the type and size of dowry property, on the terms of its provision, on the procedure for using it, including the husband's right to usufruct, on compensation for damage caused to dowry property, on the conditions of return dowry, etc. Norms on the procedure and conditions for securing of dowry, on the persons obligated to such securing, on the terms of its securing, on the amount of such securing, etc. were also considered. In conclusion, the author substantiates the historical and legal significance of the Josephine Code. It was found that the provisions of the Josephine Code on dowry and its securing were the basis of the corresponding norms of the following civil codes of the Habsburg Monarchy – the Civil Code for Galicia of 1797 and the General Civil Code of the Austrian Empire of 1811.

Keywords

Josephine Code, Marital Property, Dowry, Matrimonial Property, Property Rights of Spouses, Property Relations of Spouses, Habsburg Monarchy

1. Introduction

The Josephine Code of 1787 (named after Emperor Joseph II) was adopted in the Habsburg Monarchy in the form of its first part "On Personal Law". It was introduced after long codification work aimed at significantly revising the Draft of the Codex Theresianus of 1766. In fact, it became the first unified and codified civil law act in the history of modern

European private law that regulated marriage and family relations, that is, relations between spouses and parents and children, as well as the institution of guardianship. In particular, the third chapter of the Code "On the Rights of Spouses" covered marriage law and property relations of spouses; it contained 126 paragraphs. Namely, it regulated

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the conditions and procedure of concluding a marriage, including the conditions and legal consequences of recognition of a marriage to be invalid; established the grounds, conditions, and procedure for dissolution of marriage, including the regime of separate residence of the spouses (the so-called separation from board and bed). And it also regulated a property relations of spouses, namely: established the legal regime of various types of property of the spouses (dowry (so-called marital property) and its securing, maintenance of the wife, own property, joint property, widow's maintenance), as well as the property rights of the widowed spouse, and in addition, the procedure for administrating the wife's property and the peculiarities of the right of usufruct.

Later, in the period of the still ongoing codification process in the Austrian Empire, norms of marriage and family law of the Josephine Code were refined, and soon most of its improved provisions became the basis of the Civil Code of Galicia of 1797 and, finally, the General Civil Code of the Austrian Empire of 1811. At the same time, it should be noted that despite the primacy of the Josephine Code in this area and despite the fact that it was in effect in the Habsburg Monarchy for a quarter of a century, relatively little attention was paid to it in the history of Austrian law. In our opinion, this Code requires a separate study, and above all, a detailed elucidation of the provisions on the some peculiarities of the property relations of spouses. Therefore, our article is devoted to clarifying the legal regime of dowry and its securing according to the Josephine Code, since this legal institution retains its importance in marriage law even today, so it is relevant to study the suitable historical experience and trace its historical continuity.

It should be noted that the text of the Josephine Code, its first part approved of 1787, has been kept till our days in the form of an authentic edition made by the courtier printer of Joseph II, the book publisher Johann Thomas Edler von Trattner, which was digitized in 2017 by the National University Library of Slovenia in Ljubljana [1]. In addition, the Josephine Code and the imperial patent for its implementation were published in the Collection of Legislative Acts (Justizgesetzsammlung) of 1786 [2]. Later, in 1817, the Imperial-Royal Courtier and State Serial Printing House presented a facsimile of the specified edition of the Josephine Code, which has been digitized by the Austrian National Law Library as a historical-legal and legislative text [3]. The modernized reprint of this digitized facsimile of the Josephine Code was carried out by Gerhard Kebler, who is a professor of Innsbruck University of Leopold and Franz, a specialist in Austrian law and integrative European legislation [4]. The conducting of the research of the Josephine Code content, in particular a thorough study of its provisions on the legal regime of dowry and its securing became possible due to the familiarization with mentioned above publication.

It should be noted that modern European researchers of the history of Austrian law, it seems to us, do not focus their attention much on the study of the property rights of spouses

according to the Josephine Code. Among them can be singled out only the Austrian scientists Wilhelm Brauner [5, 6] and Anna Margaretha Sturm [7]. And in the Ukrainian historical and legal science there are no separate studies aimed at studying the Josephine Code of 1787, although the western Ukrainian lands were part of the Habsburg Monarchy during 1772-1918. Probably that can be explained by the fact that this Code was in effect on the territory of Western Ukrainian lands for only 10 years – until the introduction of the Civil Code of Galicia of 1797. At the same time, it should be noted that my scientific research within the framework of writing a doctoral thesis on the topic "The reception of Roman private law in Austria and Austria-Hungary and its spread in the Western Ukrainian lands in 1772-1918: a historical and legal study" among other things, is aimed at the studying of the Josephine Code [8-13]. And therefore, given the lack of thorough study of the content of the Josephine Code, we consider it necessary for the first time in Ukrainian historical and legal science to pay attention to a comprehensive study of the provisions of the Code on the legal regime of dowry and its securing.

2. Materials and Methods

The main research material was the text of the Josephine Code, namely the modernized reprint of the digitized facsimile of the Code [4]. Accordingly, the main method of research was the theoretical analysis of this legal document.

3. Results

The main result of the conducted research is our presentation in the article of all the main provisions of the Josephine Code on the legal regime of dowry and its securing. The article will be of scientific interest to both – for historians of law, as it traces the history of the legal regulation of property relations between spouses, namely dowry and its securing, during the Habsburg Monarchy; and for civilians, since this legal institution remains relevant for modern marriage law and can be the subject of marriage contracts.

4. Discussion

4.1. The Legal Regime of Dowry

Paragraphs 51-79 are devoted to the regulation of the legal regime of dowry and its securing in the Josephine Code. It was assumed that, if the bride and groom owned their own property, they could use it freely, independently establishing its legal regime; in particular, it depended on their will whether the bridegroom would demand a dowry for the marriage contract and what kind, and what property the bride would define as her dowry. If the bride was under guardianship, then the guardian had to dispose of the estate in accordance with her fortune and the nature of the marriage. If the bride owned property under the

control of her father/guardian and married against his will or with the consent of the court, then the father/guardian had to provide her with a decent marriage amount from this property with the consent of the court. If the bride did not have her own property or such property was not enough, then the father/grandfather who supported her was obliged to assign her the marital property (that is dowry. – Remark by R. S.) in the necessary amount. It should be noted that parents were released from the maintenance of their children, and therefore from the obligation to provide them with property for marriage under the following circumstances: in the case of their own funds lack if this reduced the maintenance they themselves needed or made it difficult to provide maintenance to other children; if the matrimonial property was already given to a previous marriage, even if that dowry had already been lost, and not because of the fault of the daughter; in the case of a clear refusal of marital property in old age; in case of children's refusal to receive the inheritance of those testators who were obliged to provide marital property. If the person who was obliged to provide marital property refused to do so, the court, at the request of the bride and groom or their guardians, initiated an amicable settlement of the parties to such court proceedings. In case of an unsuccessful attempt of mediation and the presence of sufficient reasons to satisfy the claim, the court determined the matrimonial property officially and obliged the responsible person to provide it within a set period, after which, in case of failure to provide it, judicial coercion was applied to the person. However, such a person can file an appeal.

The criteria for determining the amount of marital property were primarily the legal status of the person obliged to provide it and the size of her property, as well as the number of children still dependent on her, and other circumstances related to expenses in the household. In the case of out-of-court, voluntary determination of marital property, its larger or smaller size depended on the will of the father/grandfather. If they provided too little property, which the bridegroom/bride did not agree with, then the case was decided by the court in the manner described above. The attention should be paid to the interesting provision of the Josephine Code that the amount of marital property could be determined or increased during the marriage, or what had already been determined could be increased. However, if the decision about this was not made or proposed by the husband before the marriage, then he did not have the right to file a lawsuit against the wife or her parents.

Those who are obliged to provide matrimonial property cannot put forward any conditions during the provision of it without the consent of the groom. However, even that what was established with the consent of the groom cannot infringe the rights of the bride when she had not reached the age of majority and had not directly accepted the marital property, especially if it was determined on such terms as deduction from her future inheritance or her complete rejection of it. Moreover, if the marital property was determined from the underage bride's own funds, she may find herself in a disadvantageous position as a result of such conditions. On the other hand, if it was about the bride's own priorities, which cannot be achieved without adding certain

conditions that may seem disadvantageous, then the permission of the court should be obtained for them. A third party who makes decisions about the matrimonial property on their own decision, as well as a major fiancé or wife, were free to add conditions and ancillary agreements at their discretion. However, these conditions and agreements on marital property must be included in the determination of the inheritance mass. Conditions that had already been added, which may cause harm to a third party, can no longer be changed in order to give them an advantage. However, if these conditions relate to the benefits of one or both of the spouses, they may waive this supposed benefit not only when the conditions were made by themselves, but also if they were established by parents, guardians or a third party.

The parties may set a certain deadline to settle the issue of marital property. If it was not stipulated, the party, obliged to provide such property, can be prosecuted in court in six weeks after the date of marriage. After the end of this period, the marital property can be confiscated on legal grounds, together with all the income received from its use for the period after the deadline for its provision or, if it was not stipulated, from the date of marriage. After the transfer of matrimonial property, which consisted of money or things that were valued in commercial circulation by weight, quantity or a certain value, or from assigned debt claims, that was, in general, from any movable or immovable property, its recipient acquired full and irrevocable ownership of it, and therefore must bear all costs and damages from it, and can use it as freely as his own property. However, after the dissolution of the marriage, the matrimonial property provided, and of the same quality and quantity or its estimated value, must be returned. Movable property must be returned in the condition in which it was given, but if these things have already been worn or damaged by the husband, then the value they had at the time of transfer should be returned.

If the granted marital property or the rights related to it were determined as a haymaker's property without an assessment of its value, then the husband received a simple usufruct, that is, the right of ownership of it remained with the wife or with the one who allocated her dowry. During the marriage the usufruct of marital property granted the husband not only the right to administer it, but also the right to use at full extent all property derived from it (that is profits and gains from it. – Remark by R. S.). At the same time, the Code emphasized that those which was inseparably combined with marital property by its nature or by law was also considered marital property, and the husband had the right to use only these appendages.

The Josephine Code established that a man must exercise all diligence, care and caution in the administration of the estate given to him for use; and in all matters related to its legal regime, to represent its interests in court and out of court with the consent of the owner. Moreover, a man must refrain from any alienation and all actions that may lead to deterioration or encumbrance of the property. A man is responsible if certain actions or inactions of the husband cause damage to the property, reduce it or deteriorate its quality. However, the occurrence of such damage as a result of an accident does not bind the man to any

responsibility. The expenses incurred by the man for the permanent maintenance and improvement of the use of the estate must be reimbursed to him after its return.

4.2. The Legal Regime of Dowry Securing

Let's pay attention that the Josephine Code provided the means of securing marital property, namely a pledge in the form of a mortgage or the so-called insurance. Thus, if the marital property was to be returned in the same amount or value, then the person who provided it could indicate its provision in the marriage letter or in another way, in particular in the insurance certificate registered in the land cadaster, or if there are no land registers in the given region, then in another order. Moreover, if the marital property was not insured from the very beginning, then at any time it was possible to impose a pledge in the form of a mortgage, entered in the land register, on the property of the husband, which he already had at the time of giving him the marital property or acquired it later (§ 70). If the bride and groom were independent owners of their property, then the provision of marital property was at their discretion. In the case of the marriage of a minor-age woman, her guardian had to take care of securing her immovable matrimonial property *ex officio* and register it with the authorities within six weeks from the moment of the marriage. If he did not do this, then he was responsible when the marital property was in danger before the spouses reached the age of majority. Such securing had to be imposed on the husband's own property by himself, if it was under his control, or by his father or guardian, who was responsible for the care of his property. If the husband did not have his own or sufficient property, then the father/grandfather were obliged to provide securing in accordance with the amount of the counterclaim, however, only to the extent that he would not cause significant damage to himself.

The Josephine Code emphasized that marital property cannot be demanded during the marriage. However, in the case of significant waste of the husband or in another case, if there is a decrease in his property, as a result of which there is a threat to the uninsured marital property, it can be secured on the basis of § 70. If such securing is impossible due to the lack of his property, then other reliable securing may be required. Particular attention is drawn to the provision of the Code that the groom can also present a counterclaim to the bride regarding the securing of marital property. The fulfillment of the counterclaim can be demanded only if the marital property was spent by her. Instead, the bride's voluntary securing of marital property without a counterclaim by the groom can be made in the amount and value of the marital property or in a larger or smaller amount than the marital property. A father/grandfather can also make a counterclaim to secure the marital property of their son/grandson's bride. If it was not possible to agree on the amount of securing, it was a subject to a judicial assessment, which must be based on taking into account the property of the obligated person (that is the bride herself, if the property is in her possession, or her father/grandfather or guardian. – Remark by R. S.) and other fair circumstances. It should be noted that during marriage, a woman

could neither demand the transfer of securing for her marital property, nor make claims regarding its use and claim income from it, because its administration and use belonged to the one who assigned it.

Summarizing what has been said, it is worth to be noted that the provisions of the Josephine Code on dowry and its securing, after a number of amendments, formed the basis of the corresponding norms of the following civil codes of the Habsburg Monarchy, namely, they were enshrined in Chapter X "On Marriage Contracts" of the third part of the Civil Code for Galicia of 1797 [14], as well as in the 28th chapter "On Marriage Contracts" of the second part of the General Civil Code of the Austrian Empire of 1811 [15]. Moreover, in order to guarantee the return or increase of the bride's dowry, instead of the securing of the dowry, the Galician Code provided for counter-support, or allocation, and in the Austrian Civil Code – counter-dowry of the groom.

5. Conclusions

Summarizing the historical and legal significance of the Josephine Code of 1787 both for the Habsburg Monarchy and for European private law in general, we can assert that the Josephine Code of 1787, if not the primary nationwide code of private law in Europe in modern times (because, after all, it was only part of it), then at least it was the first model for subsequent European civil codifications. So, this document of Austrian law has significant cognitive, theoretical-scientific and practical value, which calls for the need of its deeper research in order to update the significance of the Josephine Code for modern European historical-legal and civil sciences.

Author Contributions

Roman Savuliak is the sole author. The author read and approved the final manuscript.

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The data supporting the outcome of this research work has been reported in this manuscript.

Conflicts of Interest

The author declare no conflicts of interest.

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Biography



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Research Fields

history of the state and law of Ukraine, history of private law of the Habsburg Monarchy, reception of Roman law, civil law, marriage and family law.