



Legal Effects, Types and Revocation of the Deed of Gift under the Legislation of the Republic of Kosovo

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Abstract: The gift contract is a separate positive law contract in Kosovo, which is concluded between two entities, the donor and the recipient. Given the fact that gift contract falls in the group of unilateral binding contracts, it only creates obligations on the part of the donor. The principal duty of the donor is to transfer the subject of the gift into the ownership of the donor. The legal effects of the gift contract are reflected in the rights and obligations of the contracting parties. As the gift contract falls in the group of charitable contracts, there would be no guarantee of physical or legal deficiencies for the donor. In Kosovo positive law, the following types of gift contracts apply; reciprocal gift contract, mixed gift contract, rewarding gift, posthumous gift contract, gift order contract. In this paper we will examine the legal effects, rights and obligations of contracting parties to the gift, the specific types of gift contract applied in practice in Kosovo, the revocation and causes of the gift contract revocation, and ways of annulment of the gift contract, specifically the voluntary and non-voluntary ways of the contracting parties.

Keywords: deed of gift; legal effects; revocation; types of deeds gift; LOR

1. Introduction

In the positive law in the Republic of Kosovo, the deed of gift is a special contract governed by specific provisions of the Law on Obligations (Articles 536 - 548).²

Through a deed of gift one person (the donor) undertakes to transfer title or any other right free of charge to the donee or in any other manner enrich the donee at the expense of the donor's assets, and the donee declares to consent to such. The waiver of a right shall also be deemed a deed of gift if the obliged person consents

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²The Law on Obligational Relationships was adopted by the Assembly of Kosovo in 2012, Law no. 04/L-077, (hereinafter the LOR).

to such. The waiver of a right regarding which there is no obliged person and that is not ceded to another shall not be deemed a deed of gift. The notion of the deed of gift is expressly provided for in Article 536, paragraphs 1, 2, 3 of the LOR. Waiver of a right is considered a gift if the obliged person consents to it. The waiver of a right regarding which there is no obliged person and that is not ceded to another shall not be deemed a gift.

Parties of a deed of gift are the donor and the donee. The donor is the entity that is obliged, without remuneration, free of charge, to transfer ownership of anything of his/her own, or any property right, to the other party. The gift recipient is the entity that takes free ownership of the designated item, or certain property right, from the other party.

The deed of gift is a *unilaterally binding contract, a free remuneration, a formal, charitable, nominated and real contract.*

2. The Legal Effects of the Deed of Gift, the Rights and Obligations of the Donor and the Donee

Given the fact that deed of gift falls in the group of unilaterally binding contracts, it only creates obligations on the part of the donor. The principal duty of the donor is to transfer the subject of the gift into the ownership of the donor. The donee must therefore acquire the right of ownership or the right to use the subject matter of the contract. Therefore, the donor is obliged to hand over the subject of the gift to the donee. If the donor does not hand over the item at all, or the delivery is delayed, he would respond only if he did so on purpose or by gross negligence. Its liability is therefore milder than that of the seller or the exchanger. (Milošević, 1988, p. 317).

As the deed of gift falls in the group of charitable contracts, there would be no guarantee of physical or legal deficiencies for the donor. But if the donor has maintained silence in respect to certain things which have been known or should have been known, the donee shall be entitled to claim damages for him. In the deed of gift, the donee has no obligations towards the donor. The duties of the donor in a deed of gift are: 1) the obligation to hand over the item or rights to the donee and 2) the obligation to compensate the damage.

2.1. Hand-Over of the Item or Rights to the Donee

By entering into this contract it is the duty of the donor to deliver the donated item, or to transfer the assigned right to the donee. In this contract, the promise of the gift is not important, but its delivery. The donor transfers the right of ownership of the item to the donee. The moment of delivery of the item is taken as the moment of transfer of ownership. If the subject matter of this contract is immovable, then the delivery shall take place at the place where the land books are recorded. If any request is transferred, then it is assumed that the transfer is at the time the contract is entered into, and if any movable item is delivered, then it is considered that the item was delivered to the recipient's place of residence. This preservation of the donated item must be done in accordance with the standard of conduct as a good housekeeper, *bonus pater familias*. Since the donor is the owner until the moment of delivery of the item, the risk of loss or damage of the donated item is not a burden over the donee. The donor also carries the cost of keeping the item up to this moment. When the delivery deadline is set by the agreement of the donor and the donee, then the donor must deliver the item until the expiration of this deadline. If the delivery deadline is not set then the delivery time is set according to the mores, given the circumstances of the particular case. This is usually considered by the court in any particular case given the circumstances of the particular case. Otherwise, the donor or the person authorized by the donor must conduct the delivery. (Alishani, 1990, p. 121).

2.2. Obligation to Indemnify

The deed of gift is a contract without remuneration. The donor is not responsible for the legal and physical deficiencies of the donated item. The donee is entitled to claiming compensation for the damage suffered due to deficiencies of the donated item. In order to exercise this right, the donor must be informed of the deficiency or to obtain information of such deficiency and duly notify the donee thereof. (Alishani, 1990, p. 122).

1. In some cases, the donor is obliged to guarantee the ownership of the object of the donation regarding the ownership of the item, as well as in regard to infringement of the rights of third parties.

2. The donor is obliged to deliver the item of the obligation in due time. (Semini, 1998, p. 37).

The donor liability for the damage is provided for in Article 540 of the LOR.¹

3. Types of Deed of Gift

The positive law in Kosovo recognizes the following types of gift contracts: 1) Reciprocal gift contract, 2) Mixed gift contract, 3) Reward gift, 4) Posthumous gift contract, and 5) Gift order contract.

3.1. Reciprocal Gift Contract

A reciprocal gift contract exists when the contracting parties mutually promise or give a gift. Both are at the same time the donor and the donee. In the reciprocal gift contract we deal with the conclusion of two gift contracts, in which the contracting parties assume alternate roles. (Milošević, 1988, p. 318).

3.2. Mixed Gift Contract

A mixed gift contract is established when one of the contracting parties gives the other much more than the value of what the other party would receive in order to enable the other party greater financial gain. In this contract, the gift would exist only in surplus which would exceed the value of what is received. Such a contract is commonly associated with a contract of sale or a contract of exchange. The mixed gift contract is expressly provided for in Article 538 of the LOR.²

3.3. Reward Gift

In practice it is known as rewarding gift. This is the gift for the purpose of rewarding its recipient for gratitude, reward, or other merit (literature cites the example of the Nobel Prize). It is known that the case between these categories is quite difficult to distinguish. What is important, however, is that there is no right to claim remuneration since there is no contract for the gift at all. (Gorenc, 2005, p. 754).

¹Donor's liability for damage:

1. Any person that knowingly gives another's thing and conceals this circumstance from the donee shall be liable for the damage.

2. If the gifted thing has a defect or a dangerous attribute owing to which damage is incurred to the donee, or to a third party injured, the donor shall be liable for the damage if the donor knew or should have known of the defect or dangerous attribute and failed to warn the donee.

²If under the same contract or another contract the donee is obliged to enrich the donor it shall be a matter of a deed of gift only in respect of the surplus value.

3.4. Posthumous Gift Contract

It is a special gift contract provided for in Article 548 of the LOR¹, in which the donor promises that after his death he will donate a certain gift to the donor. Delivery of gift item is deferred until the donor dies. Such contract is entered into in the prescribed form (notarial deed), but without delivering the object of the gift. The effect of this contract is deferred until the donor dies.

In this case of donation the promise of the gift is made, while the realization is carried out after death. For this contract is essential to conclude a contract, as this contract is executed upon the death of the donor. (Alishani, 1990, p. 129).

3.5. Gift Order Contract

The contract for a gift with an encumbrance order exists when the contract would stipulate the duty of the donor to use the donated object or part of its value for a specific purpose. In such a gift contract, certain tasks are created for the donee; carrying out the order, which does not exist in the usual gift contract. By entering into a gift order contract, the donor may reserve for himself or for any person any right or order the gift recipient to do or release something to another. When the order requires some benefit for the third party, then the contract is for the benefit of the third party.

If the donee would not execute the order, even at a later date, while the object of the gift has already been delivered, the donor can annul the contract and request the return of the object. If the gift item has not been delivered to the donee and the donee has not acted as per the order of the donor, he would not be obliged to deliver the item and would be considered that the contract has never been concluded. (Milošević, 1988, p. 318).

A characteristic of this type of donation is that failure to comply with the condition can also lead to failure of implementation of the donation contract. For example, the donor may set a condition that the donated item be returned due to the death of the recipient before the death of the donor, or the death of the beneficiary's heirs before the donor. (Semini, 1998, p. 39).

In the case where the donation is accompanied by the condition of return of the item, such return may be made only in favor of the donor. If the latter expressly

¹Gift in event of death: A deed of gift to be performed after the donor's death shall only be valid if concluded in the form of a notarial protocol and if the document on the concluded deed is delivered to the donee.

provided in the contract that the return in the case mentioned above be made in favor of third parties, then the contract of donation for this part of it shall be null and void and shall be deemed not to have been entered into at all on such condition.

It should be noted that the burden or condition always weighs on the recipient of the donation. When the beneficiary is burdened, the lien can only be fulfilled within the limits of the value of the donated item. If the donation has been burdened by an unlawful or physically or potentially impossible burden, then the lien shall be deemed unenforceable unless the lien constitutes a determining cause of the donation contract and is provided as a suspensive condition thereof. In this case it will result in the donation contract itself being considered null and void. (Semini, 1998, p. 39).

The lien (*modus order*) is a supplementary legal work agreement free of charge, which in the case of a donation contract may oblige the donor or recipient of the gift to perform for the benefit of the donor or a third party, or in the personal or public interest to carry out the designated action or waive the designated action, in which case it is a contract for a donation with a lien (*donatio sub modo*). It is always about the obligation of the recipient of the gift who accepts it with the acceptance of the contract of gift itself which would not exist without the consent and will of both parties (otherwise the burden as such is possible in other free of charge legal matters e.g. at orders). (Gorenc, 2005, p. 752).

The burden or lien may affect the donation in its completeness, or being incomplete, but may also lead to any paid or unpaid contract nominated or without nomination or any combined contract with its payment and non-payment elements. The exception may be (in the sense of the classic donation with no payment elements) e.g. if it is a burden on the recipient's own benefit (e.g. from the fruits of the gift the recipient buys anything else for himself) - in this case it is for the benefit and on the account of the recipient, nevertheless, it is for a certain restriction as well. However, if it comes to the burden placed on the recipient of the gift by some omission (which is not yet an action) then it is possible that it is really about the gift reduction and the situation in which the general rule would apply - that it is not a donation or a full donation, but a contract with the nominee or non-nominee for payment or however a combined contract with elements of payment and non-payment which can have a range of serious legal effects (to begin with the form of contract, through liability for material and legal deficiencies, and so on). (Gorenc, 2005, p. 752).

4. Revocation of the Deed of Gift

It is a rule that the valid deed of gift cannot be revoked. But as the gift contract enters into benevolent contracts that alienate things and rights, there are exceptions to this rule that allow its revocation. We will distinguish two groups of cases of gift revocation, taking into account the category of persons to whom the right of revocation belongs. This right belongs on the one hand to the donor and on the other to third parties. (Milošević, 1988, p. 319). But there are gifts that can never be revoked; ordinary gifts, rewarding gifts, gifts made for good purposes, those given to legal persons. Cases of revocation of the gift contract are set out in the LOR in the Articles 542, 543, 544.

Revocation of the deed of gift can take place by the donor *because of gross ingratitude (Article 543 of LOR), because of constraint on the part of the donor (Article 542 of LOR), because of subsequent births (Article 544 of LOR), due to the annulment of the marriage and the divorce by the interested third parties and the revocation of the gift by the indispensable heirs.*

4.1. Revocation Because of Gross Ingratitude

Article 543 of LOR expressly determines the possibility of revocation of the gift for non-acknowledgment.

The donor may also revoke the deed of gift because of gross ingratitude if after the conclusion thereof the donee behaves towards the donor or a person close thereto such that according to fundamental moral principles it would be unjust for the donee to keep that which was received. This revocation case is expressly provided for in Article 543, paragraph 1 of the LOR.

The deed may also be revoked by the donor's heir for reason of the behaviour towards the donor, Article 543, para. 2 of LOR. Revocation because of the donee's behaviour shall also be possible against the donee's heir, Article 543, para. 3 of LOR.

Revocation shall not be possible if the donee's behaviour of gross ingratitude towards the donor ceases, Article 543, para. 4 of LOR. If the recipient of the gift was to show extreme ingratitude to him. It must be a matter of great ungratefulness, and it would exist when the donee intentionally caused the donor some bodily harm, dignity infringement, deprived his life, or damaged his property. Revocation of the gift for reasons of gratitude also takes into account actions that would be

done to any person close to the donor (spouse, children and parents). (Milošević, 1988, p. 139).

Otherwise revocation of the gift due to non-recognition of the donor is accomplished by the lawsuit filed by the donor against the gift recipient. This request or claim may be filed with the court or to the donee himself. Therefore, it can also be said that revocation can be judicial and extra-judicial. Revocation has a retroactive effect which means that it generates effects from the moment the contract is concluded. If the gift is to be revoked then the recipient must return what he has received. If it happens that the item has been alienated by the donee, then he shall return the value of the item itself, otherwise he must return the donated item. (Alishani, 1990, p. 129).

Revocation must take place within one year, from the day the donor has found out about the ingratitude of the donee (Article 546 of the LOR). If the gift is to be revoked then the recipient must return what he has received. If the item has been alienated by the donee, he must return the value of the item in cash. (Dauti, 2016, p. 166).

4.2. Revocation Because of Constraint or Impoverishment on the part of the Donor

This revocation case is expressly provided for in Article 542 of the LOR.¹

In order for the gift to be revoked due to the impoverishment of the donor, certain conditions must be met: 1. the donor and the donee must conclude the contract of donation, 2. the donor must, after concluding this contract, remain without the means necessary for his living or lacks the means to fulfill his legal obligations towards third parties; 3. he must be impoverished after the conclusion of the contract; 4. the donee must have possession of the donated item or a portion thereof, 5. the donor must file a request for revocation of the gift with evidence of the condition caused. If the above conditions are cumulatively fulfilled then the obligation of the donee for the donated item is established. By this we understand that the donee returns all what he has received from the donor. If the donated item

¹Revocation because of constraint:

1. A donor that after the conclusion of the deed comes to a position whereby the donor's maintenance is endangered may revoke the deed of gift.
2. The revocation specified in the previous paragraph shall not be possible if the donee would thereby come to a position in which the donee's maintenance would be threatened.
3. The donee may keep a gift if the donee ensures the donor's maintenance.

has been spent or consumed, then the donor returns the value of the donated item. (Alishani, 1990, p. 131).

According to positive law in Kosovo, the donor must file a request for revocation of the gift. In such request, the donor must provide details proving the conditions for the realization of the gift revocation due to his impoverishment. Otherwise *the revocation can be conducted in a judicial and extra-judicial manner. This right of the donor is a personal right and cannot be inherited by his heirs.* The right to revoke a gift due to the donor's impoverishment is his personal right and does not pass on to his heirs. Given that it should be said here that the revocation of the gift in this case can also be done by the heirs of the donor if the object of the gift is under the measure of inheritance. (Alishani, 1990, p. 131).

4.3. Revocation of Gift because of Subsequent Births

This revocation case is expressly provided for in Article 544, paragraph of the LOR, stating that: A donor who has a child after the deed was concluded and had none before may revoke the gift. If the donor divorces, the donor may revoke the gift. In order for the spouse-donor to be entitled to revoke the gift in the event of a divorce, the following conditions must be met: a) that the spouse-donee to be found guilty of the divorce while the spouse-donor is not found guilty for it and b) that the gift is of greater value. (Milošević, 1988, p. 321).

If the marriage resulted in divorce on the fault of the donor-spouse, the donee-spouse would withhold the given gift. If, however, the divorce were to be done without the blame of any of the spouses, the gifts received can not be revoked, but they would remain with any of the spouses. We would be in a different situation if both spouses were guilty of the divorce. In that case the gifts received may be revoked. Ordinary gifts of lesser value that the spouses would give to each other before and during the marriage may not be revoked if the divorce takes place, regardless of the reason for which it takes place.

Unlike the case of annulment, third parties, in case of divorce, will not be entitled to revoke the gift, regardless of the reason for the divorce. (Dauti, 2016, p. 167).

4.5. Revocation of the Gift by Interested Third Parties

The third parties interested in revoking the gift are: 1) indispensable heirs, 2) persons whose essential part of the inheritance has been violated, and 3) persons enjoying the right of retention by the donor, the creditors of the donor. These persons are authorized by law to request the revocation of the gift if it is

established that the gift donor violates their interest by donating such gift. (Alishani, 1990, p. 132, 133).

4.6. Revocation of Gift by Indispensable Heirs

The heirs may request the return of the gift due to the breach of the necessary part within three years after the decedent's death, respectively the decision on declaring his death. (Dauti, 2016, p. 168).

Persons whom the donor is obliged to providing with the living on any basis (by law, contract, will and court decision) revoke the gifts he has given to fulfill the task of providing the required care.

4.7. Revocation because of Infringement of the Obligation for Retaining

This represents another case of gift revocation. Persons whom the donor is obliged to retain and care for by law may revoke the gifts they have given for the purpose of fulfilling the task of retention.

4.8. Revocation because of infringement of the creditor requirements

This represents the last type of gift revocation. The donor's creditors may revoke the gift given by their debtor in order to fulfill their claims. Here we deal with the Pauliana lawsuit, which is filed against the donee and is intended to invalidate the contract for the gift as far as is necessary for the creditor's payment.

The deadline within which the gift must be objected to is *two years from the date of the gift donation*. (Dauti, 2016, p. 168).

4.9. Deadlines for Revocation

Article 546 of the LOR defines the period within which the gift contract may be revoked. According to this article, *A deed of gift may be revoked within one (1) year of the day the donor learnt of the reason for revocation*. The law only stipulates the subjective deadline, but not the objective, within which the gift contract can be revoked, so the day when the reason for the revocation occurred and the time elapsed from that day is not relevant to the revocation of the gift, what matters is the day the donor learned of its existence.

Revocation of the donation is done by a statement which must be presented in written.

4.10. Waiver of Revocation and The Consequences of Revocation

The waiver of revocation is expressly provided for in Article 547 of the LOR, which states that *A waiver of revocation shall be null and void.*

Consequences of revocation are regulated by Article 545, paragraphs 1 and 2 of LOR, stipulating that: 1. Through the declaration of revocation the donor shall demand the return of the gifted thing or right or the payment of the value by which the donee was enriched on the basis of the deed of gift and 2. If the deed of gift has not yet been performed, revocation shall have the consequence of the termination of the donor's obligation.

5. Termination of the Deed of Gift

There are two types of ways to terminate a deed of gift; voluntary and non-voluntary ways of the contracting parties. The termination of the gift contract may be due to the performance of the contract as a voluntary way of termination and non-execution of the contract and by revocation - as a voluntary termination.

5.1. Performance of the Contract

Usually the gift contract is terminated upon fulfillment of obligations by the donor. Article 539 of our LOR provides for the periodic fulfillment of this contract, stating that: If the donor's obligation comprises periodic performance it shall expire upon the donor's death. Donation is a contract whereby one party transfers to the other party without remuneration a particular thing or real right which in turn the donee receives.

5.2. Non-execution (non-performance of contract)

Non-execution or non-performance of the gift contract by the donor is a way of terminating the contract. Non-execution or non-performance of the gift contract results in the definitive termination of the gift contract.

6. Distinguishing the Deed of Gift from the Sales Contract and the Will

The deed of gift is similar to the contract of sale, because in both of these contracts the transfer of ownership takes place, but at the sale this transfer is made in exchange of remuneration while in the deed of gift the transfer of ownership is without remuneration.

The deed of gift is very similar to the will, but they differ from one another in the following respects:

- a) the will is one-sided legal act, and the donation is a two-way contract;
- b) a will is a legal act that brings consequences after the death of the testator, while donation is an act that takes place between the living;
- c) the deed of gift provides for transferring the property of any person without any legal limitation, while the will provides for transferring the property of a person only after certain legal conditions have been met, such as legal reservations, inheritance order, etc.;
- d) the person who benefits by testament is also responsible for the obligations of the testator always within his inheritance, while the person who benefits from the donation has only rights and not obligations. (Semini, 1998, p. 39, 40).

Unlike a will that is a one-sided act, donation is a contract. (Galgano, 1999, p. 869).

7. Conclusions

In the positive law in the Republic of Kosovo, the deed of gift is a special contract governed by specific provisions of the Law on Obligations from 2012 (Articles 536 - 548). The subjects of the deed of gift are the donor and the donee. The donor is the entity that is obliged, without remuneration, free of charge, to transfer ownership of anything of his/her own, or any property right, to the other party. Given the fact that deed of gift falls in the group of unilaterally binding contracts, it only creates obligations on the part of the donor. The principal duty of the donor is to transfer the subject of the gift into the ownership of the donor. The donee must therefore acquire the right of ownership or the right to use the subject matter of the contract. As the deed of gift falls in the group of charitable contracts, there would be no guarantee of physical or legal deficiencies for the donor. The duties of the

donor of the deed of gift include: the obligation to deliver the item or rights to the donee and the obligation to compensate for the damage.

Kosovo positive law recognizes the following types of gift contracts: 1) Reciprocal gift contract, 2) Mixed gift contract, 3) Reward gift, 4) Posthumous gift contract, and 5) Gift order contract.

It is a rule that the valid deed of gift cannot be revoked. But as the gift contract enters into benevolent contracts that alienate things and rights, there are exceptions to this rule that allow its revocation. We distinguished two groups of cases of gift revocation, taking into account the category of persons to whom the right of revocation belongs. But there are gifts that can never be revoked; ordinary gifts, rewarding gifts, made for good purposes, those made to legal persons. Cases of deed of gift revocation are provided in the LOR. Revocation of the deed of gift can take place by the donor because of gross ingratitude, because of constraint or impoverishment on the part of the donor, because of subsequent births, due to the annulment of the marriage and the divorce by the interested third parties and the revocation of the gift by the indispensable heirs. Article 546 of the LOR defines the period within which the gift contract may be revoked. According to this article, *A deed of gift may be revoked within one (1) year of the day the donor learnt of the reason for revocation.* The law only stipulates the subjective deadline, but not the objective, within which the gift contract can be revoked, so the day when the reason for the revocation occurred and the time elapsed from that day is not relevant to the revocation of the gift, what matters is the day the donor learned of its existence. Revocation of the donation is done by a statement which must be presented in written. Waiver of revocation is expressly provided for in Article 547 of the LOR, which states that a waiver of revocation is null and void. Through the declaration of revocation the donor shall demand the return of the gifted thing or right or the payment of the value by which the donee was enriched on the basis of the deed of gift and if the gift has not been fulfilled yet, revocation has the effect of terminating the donor obligation.

There are two types of ways to terminate a deed of gift; voluntary and non-voluntary ways of the contracting parties. The termination of the gift contract may be due to the performance of the contract as a voluntary way of termination and non-execution of the contract and by revocation - as a non-voluntary termination. Usually the deed of gift is terminated upon fulfillment of obligations by the donor. Article 539 of our LOR provides for the periodic fulfillment of this contract, stating that: If the donor's obligations constitute a fulfillment in stages, that obligation

shall expire at the death of the donor. Donation is a contract whereby one party transfers to the other party without compensation a particular thing or a real right which the donee accepts. Non-execution or non-performance of the deed of gift by the donor is a way of terminating the contract. Non-execution or non-performance of the deed of gift results in the definitive termination of the deed of gift. The deed of gift is similar to the contract of sale, because in both of these contracts the transfer of ownership takes place, but at the sale this transfer is made in exchange of remuneration while in the deed of gift the transfer of ownership is without remuneration.

The deed of gift is very similar to the will, but they differ from one another in the following respects: the will is one-sided legal act whereas the donation is a two-way contract; a will is a legal act that brings consequences after the death of the testator, while donation is an act that takes place between the living; the deed of gift provides for transferring the property of any person without any legal limitation, while the will provides for transferring the property of a person only after certain legal conditions have been met, such as legal reservations, inheritance order, etc.; the person who benefits by testament is also responsible for the obligations of the testator always within his inheritance, while the person who benefits from the donation has only rights and not obligations. Unlike a will that is a one-sided act, donation is a contract.

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