Contract for Donation in the Roman Law and its Development in the Positive Law in Kosovo

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Abstract: Contract for donation is one of the oldest as well as the most important contracts in the positive law in Kosovo, for the fact that through a gift deed a person (the donor) carries or is obliged to convey the other contractor (the donee) the right to ownership of a particular object or any other property right. This contract dates back to the Roman law where the foundations of the legal rules regarding the notion of the contract for donation, the subjects that enter into that contract - the donor and the recipient, the types of this contract, which even nowadays are recognized by the contemporary law - both the positive law in Kosovo as well as the comparative one. Contract for donation is a contract on the permanent and free assignment of any thing or right. The aim of entering into this contract will be for one contracting party to gain material (property) benefits free of charge to the expense of the other contracting party. Through the gift, the recipient gains the right of ownership over a given item. The objective of charity (*animus donandi*) shall be the key element to this type of contract, thus being the ground of this contract. Contract for donation is regulated in the positive law of Kosovo through the Law on Obligation Relationships, which was adopted by the Assembly of Kosovo in 2012. The purpose of this paper is to present the development of the contract for donation in Roman law and by focusing on its detailed reflection on the positive law in Kosovo. This contract is extensively applied in practice in Kosovo.

Keywords: Donation; donor; donee; Lex Cincia; LOR; Animus donandi; Kosova

1. Introduction

Contract for donation in the course of history has experienced a specific development, especially in relation to its foundations since the era of Roman Law. Indeed, in contrast to the basic contracts of the law on obligations (such as: sale, loan, etc.), the contract for donation is not encountered among the well-known and independent legal papers until the beginning of IV century when it appeared and

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became a specific form with the price of substantial structural reduction, but gradually taking its form up to the present day (Gorenc, 2005, pg. 744).

The property of one party decreases as the property of the other party is enlarged, and this is done for charity, free of charge. A gift will also be considered when the creditor writes off the debt to the debtor (Milosevic, 1988, pg. 314).

Contract for donation aims at helping and humanizing each other towards one another. It is encountered in daily life in the form of giving without remuneration of movable and immovable items, particularly in relationships between people who are in family, social and other relationships with each other, it is also found in the form of giving different things in favor of museums, religious institutions, archives, libraries. Moreover, by means of donation, legal actions are vested, aimed at passing in favor of various natural and legal entities, food items, financial funds, material bases and others for performing various activities of a health, educational, scientific and other natures (Semini, 1998, pg. 29,30). The scope of the contract may be extensive, it may include the transmission of ownership or other real rights over an item or the assignment of a loan, the creation of a real right over the property that is the property of the donor (e.g. the donation of usufruct) lastly, it may include the assumption of an obligation that may be subject to a single obligation or a periodic obligation (Galgano, 1990, pg. 869,870). Donation (donatio) is a voluntary and unpaid property benefit, which increases the recipient's wealth while decreasing the donor's wealth, such a destination should be made on a liberal basis (animus donandi), which means that it is intended only to add the recipient's wealth. Donation or gift can be realized through various forms of legal affairs with the gift recipient, such as through transfer of ownership or real rights through *mancipatio*, *traditio*ose *in iure cesie (dando)* by giving the property requested (*cedento*), through exemption from an obligation *(liberando)*, or through a promise for donation *(dhurim)* which implies that taking of obligation is a gift (*obligando)*. However, according to the classical law, the claiming obligation rose from the promise for donation only in cases when the promise was covered by the form of stipulation (donation premittendo). However, only after further developments in Justinian's Law, the informal promise of donation was recognized as an appealed obligation, but only up to the sum of 500 solid (pactum donationis, pactum legitimum). In the case of the lawsuit for the donation promise, the recipient of the donation is entitled to benificium competentiae (Horvat, 2002, pg. 369).

2. Contract for Donation in the Roman Law

The concept and historical evolution of "donation" in Rome has been hypothesized and interpreted in different ways. At a primitive stage, before the appearance of Lex Cincia in 204 B.C., there was a so-called real donation that consisted in passing a donor's item to the recipient through formal property transfer actions. This transfer required the action of the one who possessed the item that was accomplished by a donation and a disposition through receiving by the one who obtained (acceptus or captus) (Mandro, 2011, pg. 442).

The Roman law itself in the donation case, here as well as elsewhere, is not static but has gone through different stages of development (Zimerman, 2012, pg. 482). From the real donation it was moved on to the general conception of the cause of donation (causa donationis), through a process of legal thought that differentiates the donation in general from the fact in which it was made concrete. Donation is conceived as a voluntary act that leads to a donor's impoverishment and an enrichment of the one to whom it is donated. In this sense, classic donation is not a typical agreement, but the cause of an action with property attribution or profit (Mandro, 2011, pg. 442). In order to have a gift for Roman jurists, an objective element of giving free of charge is needed, which for Roman jurists demanded a lack of counter-prestation (omission). Papinianus says that "donation is considered what is given without any legal obligation". Above this objective element lies the subjective element or the direct will to give something for free. For the classics, *animus donandi* is sufficient when it is accomplished with the means permitted by the legal order.

The donation, as an important institute of Roman law, has gone through evolution in the treatment and interpretation in relation to other law institutes. According to classical jurists, donation was a pretext for someone else's good, for which the other party was not obliged to give anything in exchange. In Roman law, donation did not have the same treatment in all its periods, it constantly consolidated and strengthened from the primitive stage of the organization until the Justinian period and the elaboration that this Emperor made to Roman law (Licenji, 2013, pg. 14). Initially, there was even some kind of mild prohibition, but it was a forbidden act and regulated by legal rules since 204 B. C. the so-called Cinciae law, which ratio legis had the ban on low class donations, to completely change its function in time and in the classical period through exceptio lex cincie became a means of protecting the donor's free will, thereby banning was revoked. Later, as an important thing for the contract on donation, King Constantine was mentioned,

who had regulated it by law in triplicate form, but Justiniani, who in essence renounced the strict formal requirements by regulating by law a range of exemptions (donation of small values, blood donation, king donation, king's donations in general) (Gorenc, 2005, pg. 744).

2.1. Donatio or Gift

Donatio or deed of gift became source of obligations only at the time of empire. Then the parties' agreements that the donor will give to the recipient any of his property without seeking any compensation, began to be legally protected.

In ancient Roman law and in Roman classical law the deed of gift or agreements on the basis of which the donor promised to convey to the recipient any portion of his property "cum animo donandi" so that himself becomes poorer while the recipient becomes richer: quae et donanten pauperiorem et accipientem faciet locipletiorem, did not exist as a protected legal arrangement. Then the gifts could yield either by the actual delivery of any part of the property (traitio cum animo donandi, mancipatio nummo uno, in jure cessio), either by entering into stipulations, or by formal or informal debt forgiveness (acceptilatio, pactum de non petendo in perpetuum). According to the provisions of some laws, gifts were forbidden. *Lex Cincia de donis et muneribus* (year 204 B. C.) forbade the gift to lawyers, and in rare cases and in a limited amount allowed them when it came to exceptae persons, i.e. for the relatives of the donor. A gift donated with all provisions of *Lex Cincia* could be revoked as long as the donor was alive. *Lex Calpurnia*, banned magistrates from receiving gifts from citizens in provinces, while according to Oratio Antonini the gifts between spouses were also banned (Puhan, 1968, pg. 365). Though the gifts have undoubtedly been practiced throughout Roman history, the Roman law, until the Christian period, attempted to restrict and obey the control: all the provisions that are known to us until that time are only about prohibitions. Of the oldest we know (from 204 BC) bans, under the threat of a fourfold sentence, any gift to advocats. At the same time announced that gifts are over a certain value if they are given to persons outside the family, the natural obligations. The other provision (since 149 BC) has banned the magistrate from accepting a gift from all citizens. Finally, during the classical period, practice banned gifts between spouses. All of these restrictions have been taken to prevent some misuse. The first restriction was taken to prevent unbiased representation of the parties due to money, and to prevent the family's poverty because of depletion of family property. Secondly, to prevent the kind of looting by the magistrate, while the third in order to protect the marriage which was a major concern of this

period. Paulus, quoting Sextus Ceselusin, justifies this prohibition so that: preservation of marriage and the good relations of spouses be bought by money (D, XXIV, 1, 2) whereas Proculus (D, XXIV, 1, 31, 7) justifies it: because of love towards the husband anybody be looted (A.Bilalli, B.Bahtiri, 2015, pg. 500).

Starting from the fourth century A. D., the courses related to gifts changed. All old restrictions towards gift were forgotten. Instead gifts were subject to control: it was foreseen that the deed of gift should have been concluded at the presence of the neighbor as a witness (a condition that later was forgotten), in written form and registered in a special office. In the contrary, the deed was not valid (A. Bilalli, B. Bahtiri, 2015, pg. 500).

Pacta legitima (legal empire pacts) – At the time of the dominant, the emperors with their constitutions established the defense for three pacts: the contract for the selected court *(compromissum),* promise of a gift of 500 solid *(donatio)* and promise of dowry *(pollicitatio dotis)*. These three medieval pacts were called by jurists as *pacta legitima*. The lawsuit on which the emperors have set their defenses, Justinian called it *conditio ec lege* and that is *stricti iuris.*

Pacta legitima or legal pacts were informal agreements from which independent obligations originated, protected by legal remedies instituted in the constitutions of the Roman emperors. The most heard of from these pacts were: compromissum, dotis pollicitatio and donatio (A. Bilalli, B. Bahtiri, 2015, pg. 499).

From what we have pointed out so far, we can conclude that the Roman law itself was not static but it went through various stages of development in terms of donatio or donation. In this aspect, the development of the legal opinion related to *donatio or donation* can be summarized in three different periods: 1) the classical law; 2) Constantine reform and 3) position at the time of Justinian (Zimmerman, 2012, pg. 487).

In the coming sections of this paper, focus will be given to explanation of these periods to present the concept of *Donatio* - Gift

2.2. Donatio – Donation in the Classical Roman Law

The classical jurisprudence elaborated the principles of donation based on the comments of the Cincia Law and the prohibition of donation among spouses (Mandro, 2011, pg. 443).

2.2.1. Lex Cincia de Muneribus

Roman law was not devoted to donations. Various regulations and laws for restricting donations existed, so, at that time, *lex Cincia de donis et Muneribus* (214 B. C.) had banned the donations beyond certain measures (this measure is not known to us) from that ban were excluded only a few persons (personae exceptae): these were the spousal couple and the relatives of the gender in the straight line and in the line of affinity. However, the ban on donations was never declared invalid or punishable under that law *(lex cincia* which was *lex imperfecta)*. Here, the emperor would help if the donatio perfecta did not exist yet, i.e. if the donation had not yet been carried out in full compliance with the rules for the realization of which the court proceedings were necessary, then the emperor protected the donor - if the case was for the forbidden donation - exceptioni legis cinciae (so, if it was a lawsuit because of promise of gift/donation promised with stipulation) (Horvat, 2002, pg. 370).

Lex Cincia de donis et muneribus of the year 204 B. C., text of which is unknown, would ban donation that would exceed a certain limit (modus donationis). Even this amount or limit is unknown, but it can be considered irrelevant since the law intended to prevent or impede the impoverishment in general. This measure was taken to avoid damages deriving from excessive donations. It was intended to protect the donor's free will in cases where, due to the personality of the person to whom it was donated, because a possible fraud or obligation could be presumed (Mandro, 2011, pg. 443).

Lex Cincia was a plebiscite dating back to 204 B.C. This banned gifts that exceeded certain value, the exact amount of which is unknown to us. Only relatives up to the fifth degree, a number of relatives on the part of the spouse and relatives - children on the side of spouse or engaged for marriage, slaves under the authority of the donor or ex-slaves freed from him, and some other exceptae persons were allowed to receive bigger gifts. What was the aim of this act? In 204, the Second Punic War was coming to an end. Agriculture and the economy were destroyed and so Lex Cincia, with the attempt to reduce excessive costs, may have been part of a strict program (Zimmerman, 2012, pg. 485).

Lex Cincia was only applied for dona and for munera. To the latter cf. Marci. D. 50, 16, 214: “Munus proprie est, quod neccessarie obimus lege more imperiovecius, qui iubendi habet pot estatem”; as for the first cf. Pap. D. 50, 17, 82: “Dona rividetur, quod nullo iure cogente conceditur.” Ulpian (D. 50, 16, 194) explains the difference in the following way: “Inter donumetmunus hoc interest,

quod inter genus et speciem: nam genus essedonum Labeo a donado dictum, munusspeciem: nam munusessedonum cum causa, utputanatalicium (birthday present), nuptalicium (marriage gift) (Zimmerman, 2012, pg. 485).

Lex Cincia banned the donation, but did not disrupt the action contrary to its disposition, nor imposed a sanction on the one who violated the law. However, jurisprudence and praetorship determined measures for this ban to realize its consequences (Mandro, 2011, pg. 443).

2.2.2. Donatio and Constantine Reform

From the various concepts of donatio which were en vogue at one time or another during Roman legal history, of course it was Justinian's time that in its own way made the ius commune. Donatio since the Roman law was taken in medieval Europe, was a mandatory transaction which at the same time provided a iusta causa for the transfer of ownership. This transfer could coincide with the contract, but it could have come into effect immediately. Therefore donatio or donation was not conceived as a one-sided act; it was based on an agreement between the donor and the recipient. Such an agreement was not obligatory to be made in any particular form; a simple ("bare") pact was sufficient. However, there was a form of control over the gift transaction that was created in the post Roman classical law then adopted in Europe: demand for insinuatio actis (curiae) for donations exceeding a certain considerable amount. Justinian had set the limit of 500 solid, and there have been constant disputes over how this sum would be "translated" into contemporary currency (Zimmerman, 2012, pg. 495).

With Constantine's reforms, donation exchanged from a cause for benefit into a typical deal that got the contract legal structure with the relevant consequences of the transfer of ownership.

Constantine presents three conditions for the form of donation: written act, public submission and registration in public archives, conditions that can be materialized in the common element.

In the evolution of donation to the East influenced ordinary practices and tendencies, among which is the use of donation rather than wills to dispose of property.

Even in the new tendencies favoring donation influence Christian ideas that favor the generous and kind spirit and aid to the church and the charity institutes (Mandro, 2011, pg. 446).

The legis cinciae principle in the king's period, was replaced by other new forms (starting from sub-paragraph 3, B.C.) in the new form of donation, respectively with insinuation (recording the donation/gift in the minutes to the bodies of power). So, gradually, the insinuatio form became a necessary form for the validity of any gift/donation. Thus, according to Justinian's law, the value of a gift of over 500 solid needed insinuatio, on the contrary, the donor would be able to demand the return of not only 500 solid but even more. At the same time, the informal gift/donation promise (pactum donationis) up to 500 solids became mandatory and appealable (Horvat, 2002, pg. 370).

2.2.3. Donatio - Gift in Justinian's era

Justinian makes a differentiation to donations in values under 500 solid. Only for the latter a written act would be required and its registration to the public records. Delivery is not required that is considered an act of execution of the donation, always in the classical sense. Now donation was only based on *voluntas* or *animius donandi* (so, the wish or will to donate).

Starting as of IV century A.D., the possibility of revoking of donation was accepted if lack of gratitude was noticed on the side of the recipient, if he was a successor. Justinian extended this to any kind of donation and distinguished it in four types of lack of gratefulness: grievous insult, attempted attacks to life, failure to perform duty and intentional property damage.

Classical concepts of full donation, with restrictions on donation and exclusion, gained another meaning in Justinian law. Full donation is one that meets the formal requirements required by law. As long as formalities have not yet been completed, the donation is revocable. Restriction is also determined by law. The exception may be general or legal and the plaintiff prepares the defense (Mandro, 2011, pg. 446).

3. Types of Donation in the Roman Law

The Roman law recognized several types of donation. The most relevant are as follows:

a) Donatio reciproca – mutual (reciprocal) donation,

b) Donatio mortis causa - donation in case of death

Donatio – gift was listed in the group of unnamed real contracts (Puhan, 1980, pg. 343).

3.1. Donatio Reciproca – Mutual (Reciprocal) Donation

It is the donation that imposes on the one who receives the gift, the moral responsibility (modus) to give something to the donor or to someone else. Modus does not actually create a counterweight, because in the case of donation, the freedom or generosity of the act is essential. Otherwise this would turn into an obligation that was formed through a fiduciarius or an agreement. The modus does not create a path for any lawsuit or procedural remedy (Mandro, 2011, pg. 447).

3.2. Donatio Mortis Causa - Donation in Case of Death

Donation in case of death *(donatio mortis causa)* was a special gift contract, entered into between the donor who was at risk of death and the recipient. The donor who was at risk of death handed the recipient any of his items, while retaining the right to take it back if he or she would not die and if the recipient does not live after donor's death. *Mortis causa donatio est, cum magis quis habere se vult quam eum cui donat, magisque eum cui donat quam heredem suum* – the gift in case of death exists when the donor prefers to have the item himself more than the gift recipient, but also prefers more for the recipient to have it than the heir.

The death gift appeared as a legal institution at the beginning of classical law. Regarding the item and the list of donations, all the limitations were foreseen for lege in *lex Furia*, in *lex Vocinia* and in *lex Falcidia*. In addition, in the deed of gift in case of death, the provisions of the laws of Augustus applied.

In Justinian's time the gift in case of death was almost equalized to *lege* and *fideicommissum*. The gift does not relate to the real form, but consisted in the promise of giving the gift if the recipient lives after the death of the donor. Promise of gift must have been made before five witnesses. Declaration on the promise of gift was revocable permanently (Mandro, 2011, pg. 447).

4. Contract for Donation in the Positive Law in Kosovo

In positive law in Kosovo, the contract for donation is a special contract that is regulated by special provisions in the LOR (articles 536 – 548).[1]

4.1. Notion of the Contract for Donation

Through a contract for donation 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 notion of the contract for donation is expressively provided in Article 536 of LOR.[2]

The waiver of a right shall also be deemed a deed of gift if the obliged person consents 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.

4.2. Subjects to the Contract for Donation

Subjects to the contract for donation are *donor* and *donee*. There are no special restrictions as to who is authorized to give or receive a gift. This means that the subject of the contract on both sides may be each with general restrictions (e.g. due to the disposition on behalf of a person unable to work). Each of the parties may consist of one or more persons whether natural or legal persons, there is no obstruction to this contract either personally or through an authorized person (persons able to work) or through a legal representative for persons unable to work. *Donor* is the entity who is obliged to transfer, without remuneration, free of charge any property of his/her own, or any property right to the other party. *Donee* is the entity that takes over the assigned property, or a certain property right, from the other party free of charge. In the contract for donation, *the donor is in debtor's position* because he is obliged to hand over any property or property right to the other party, whereas *the position of the creditor is given to the recipient*, who is authorized to request the handover of the gift (Dauti, 2016, pg. 158).

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

[2] 1. Through a contract for donation 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. 2. The waiver of a right shall also be deemed a deed of gift if the obliged person consents to such. 3. 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.

Persons concluding the contract are called *contracting parties*. One of them is a donor who always has the role of the debtor because he is obliged to give something to the other party. The other party is the donee who in this contract has the role of the creditor because under this contract is authorized to request the handover of the gift.

The contract for donation exists when the contracting parties agree on its conclusion when the transfer of ownership is made without remuneration when the transfer is done due to the charity of one of the contracting parties decreasing the property of one of the parties while the property of other party increases. This happens when one party pays something or gives something to the other party for free, e.g. when the creditor pays the debt to the debtor (A. Alishani, 1990, pg. 114).

4.3. Essential Elements of the Contract for Donation (Animus donandi)

Essential elements of each contract for donation (without which there can be no such contract) are items and animus donadi (the purpose of donation). If it comes to any specific contract for donation, then it is possible that something is an essential element (e.g. the order in the donatio sub modo case, such provision under which the effects enter into force after the death of the donor at the case donatio mortis causa). However, anyway, if there is no agreement of the contracting parties about the essential elements of the contract (its components), then there is no deed of gift. Animus donandi or the will to donate is necessary so that the deed of gift is a contract. Without that will, no such contract may exist, and eventually the terms for any other contract may be mature (conversion) (Gorenc, 2005, pg. 747).

To consider something a gift/donation, it must be free of charge and this is an essential element, and the fact that it is free of charge means that there is no counter-service for that service. Otherwise, when said free of charge, it means a broad notion of donation - any donation is free of charge, but any free possession is not a donation (e.g. the judgment is free of charge but is not a gift, the car parking, if it is free of charge, etc.).

It is precisely the will to donate (animus donandi) that constitutes the establishment of this contract through which a thing or a right is transferred, or wealth from one subject to another. The basic requirement for non-payment does not affect the features provided by the specific types of deed of gift (e.g. donatio sub modo). However, there is no consideration of donating by contract for donation, as something on the basis of another legal basis (i.e. if the donee is entitled to the gift), not even the renunciation of the inheritance , waiver of the right before it is

acquired or waiver of disputable right, fulfillment of any moral obligation and transfer over the other of things or rights in order for him to be liable for service, while donations are considered as gifts, and the payment of the debt with the consent of the debtor (because without this consent, there is no contract which is the consent of the wills). Regarding what is not a donation, it should be noted that this is, however, whether or not it may be free of charge which (under other conditions) is subject to the Paulian claim (Gorenc, 2005, pg. 748).

4.4. Conditions for Entering into a Contract for Donation

The general and specific conditions for the conclusion of the contract must be met in order to conclude the deed of gift. As a general conditions for signing the deed of gift are 1) the working ability of the contracting parties, 2) the willingness to agree, 3) the subject matter of the contract, and 4) the contract basis.

As a special condition for signing the contract for donation is the form for its completeness. If the aforementioned conditions are met, this contract may be concluded between the donor and the donee. Thus, if for entering into this contract, the working ability exists, the will exists, the subject matter, and the basis as the general conditions and the form as a special condition, this contract is concluded and creates certain effects.

In order to create certain effects, this contract must be drafted in a certain form and the signature of the parties must be verified in court. It is implied that before these actions the donor makes an offer to the donee, and if the donee agrees with the promised gift then the contract is concluded. In other words, the proposal of the donor and its acceptance by the donee consists of the contract conclusion. This conclusion, on the other hand, is the creation of a legal relationship between the donor and the donee, a fact which proves that the contract from this moment commences to create certain effects. The form envisaged for this contract is not a real form because it is required that the promised gift be submitted because in our law and in some other laws the delivery of the gift or the transfer of the right does not constitute the real form or execution of this contract (Alishani, 1990, pg. 116).

4.4.1. Ability of Contracting Parties to Work

As regards to the donor's ability in the deed of gift, the donor must have full working ability. Juvenile persons and persons wholly or partly bare of work ability may not be in the capacity of the donor. They can not give a gift, either with the consent of their legal representative or guardian. When it comes to juveniles over the age of 14, they can sign a deed of gift if the gift item is the result of the

earnings realized by the employment relationship or the contract for the work. However, juveniles older than 15 years can not enter into a deed of gift even with the consent of the parents respectively the guardian, if the gift item does not derive from the income earned from the employment relationship or the contract for the work (Dauti, 2016, pg. 160).

Donees may be persons with disabilities in addition to people with full working ability. These persons will not be obliged to seek the consent of their legal representative, but for persons completely stripped of their working skills, the deed of gift most often is concluded by their legal representatives (Milosevic, 1988, pg. 316).

As through the contract for donation, alienation of property takes place, there is a need for the donor to possess full working ability. For this reason, juvenile persons and those who have lost fully or partially their working ability will in no case be a donor. They can not give a gift, either with the consent of their legal representative (Milosevic, 1988, pg. 315).

4.4.2. Consent of will

All mentioned legal matters and ways of raising the wealth of the other serve the realization of the donation, and the donation itself is the cause of the juridical reason (causa) of those legal matters. For a donation toexist (as a legal cause), there is a need to have the will to accept the gift also on the side of the recipient (the donee) because others may even unwillingly increase your wealth, but without your will in no case can they donate anything. Therefore, for the donation it is necessary to agree or agree on the wills, therefore as such the donation is always a contract, (causa) (Horvat, 2002, pg. 369).

Agreeing the will to the contract for donation means that the contracting parties have agreed to the free assignment of ownership of any thing or right. It is therefore necessary to reach agreement on the transfer, that is, the obtaining of material benefit free of charge. The donor must have the purpose of granting the material benefit free of charge, while for the recipient the purpose of obtaining that benefit. The purpose of concluding this contract is that one contracting party acquires material benefit without remuneration to the expense of the other contracting party. In this case, the wealth of one party decreases, while the wealth of the other party increases through charity, free of charge (Dauti, 2016, pg. 158).

4.4.3. Subject of Gift

Subject of gift is for the one the gift is. It is an important condition for entering into this contract. It can be said that the subject of this contract can be anything that is in circulation. The subject of this contract, as well as of any other contract, must be possible, fixed or determinable and permissible. This means that its subject may be an item, a property right or a benefit. The donor without reward bears the ownership to any thing or in any right or in any other way carries any benefit to the burden of his property. The subject of this contract may be a movable or immovable item that usually has its own market value. While we say that the gift item has its value not only when it has value to the donor but also to the recipient. Sometimes in this contract it is important to have value only to the donee, for example when the donated item has an affectionate value to the recipient. The right to transfer, for the item to be transferred, the property value to be granted must exist at the time of the conclusion of the deed of gift. Here it is important that the donor bear the title, i.e. be the owner of the donated item. The subject of the deed of gift can not be the item that is out of circulation. However, if in this case the donee is aware, i.e. when he did not know or did not have the cause to know that the donor gives an item that is not his, then the donee gives the foreign item, then the donee becomes the owner of this item, whereas the donor gives the value of that item to the real owner. Whereas if the recipient is unaware, he not only returns the item but also responds for the eventual damage to the real owner. The subject of this contract may also be the right of petition, or may be the debt forgiveness if it is not intuitu personae. Moreover, the subject of this contract may be the right to invention, the right of exploitation, the right of usus fructus and any factual work performed for the recipient without remuneration in order to increase his wealth (Alishani, 1990, pg. 118).

In principle, all items, virtually (present and future items including energy in various forms) as well as all rights and property may be the subject of a contract on donation, unless otherwise regulated by a special law (e.g. because of future property it may be only half) or results from the nature of things (e.g. personal rights such as usus fructus, but not the benefit until it lasts). This Article specifically regulates the object of donation in such a way that present and future items can be donated (e.g. expected fruits or yields) the transfer of property rights (which, however, also means the conduct of non-transferred rations, e.g. retention), as well as the total present wealth up to half of the future property. Given the certain risks of disposition of what still does not exist, it is foreseen that, in case of

doubt, the object of donation is considered only present property (patrimonium praesens), and if only the future property is intended to be donated (patrimonium futurum) then this should be done through a special statement in the contract or by explicitly mentioning it (Gorenc, 2005, pg. 749)

The subject of gift may be a part of the property of the donor, any item of it, many of his/her belongings, or any of his/her property rights, or many of his/her property rights, or the existing property of the donor. Delivery of the gift item can not affect the term of real rights such as: pledge, servitude, etc., which have the third persons in the donated item. We say so because of the old rule that no one can carry more rights than his own - nemo plus iuris ad alium transfere quam ibse habet. Therefore, if the donor donates something to the donee with a real right, then he must certainly respect the rights of the third person to the recipient.

The subject of the contract for donation may be any thing or property right that can be transferred and the existence or performance of which would not be related to the designated person. Therefore, the subject of the deed on the gift may be any item, regardless of his gift. Considering that in the range of things nowadays are also included different forms of energy, so energy can be subject of deed of gift (electricity, butane etc.).

In addition to items, subject of this contract may also be the transferable property rights (such as claims, real servitudes).

In the legal theory there is an agreement on whether the contract object may be the subject of the contract for donation. Here is thought to carry out the work that is paid to the other person free of charge, such as factual or intellectual action, and not in the performance of any legal action or the preservation of the thing for another party. According to one opinion, work can not be the subject of the deed of gift. Performing free work for the other will present the particular type of contract, rather than the contract on gift. In the opinion that today is applied, the work, i.e. the use of work ability may be subject of a contract for donation (Milosevic, 1988, pg. 316).

The object of the contract for donation can not be a foreign item, because the donor can not transfer foreign property. However, in practice it happens that someone donates a foreign item to another. Between the contracting parties such contract will have the same effect as any other contract for donation. But, the owner of the object would not care about this relationship. If the item is handed over to the recipient, the owner may then request it eventually through a property claim. For

any eventual damage to the foreign item that has been forgiven, the irresponsible gift recipient would respond to the owner of the item, while this does not concern the amenable recipient. If the recipient further alienates the donated item with a chargeable contract, the conscientious recipient will be obliged to hand over to the owner of the item all that he has received in return for the chargeable contract with the third person if that compensation is still in his property at the moment when the owner of the item has asked for his own items; the irresponsible donee will be obliged to pay to the owner of the item the entire reward for his alienated item. If, therefore, the donee would alienate the donated foreign item through a contract without reward, the conscientious donee will not owe anything to the owner of the item, while the irresponsible donee has to give the money reward for the value of the given item (Milosevic, 1988, pg. 317).

4.4.4. Basis to the Contract for Donation

Donation is a contract through which one party transfers to another party without remuneration a certain item or a real right which it accepts in turn.

Donation is a contract that aims at helping and humanizing each other. It is encountered in daily life in the form of giving without remuneration of movable and immovable items, particularly in relationships between people who are in family, social and other relationships with each other, it is also found in the form of giving different things in favor of museums, religious institutions, archives, libraries (M. Semini, 1998, pg. 29).

Moreover, by means of donation, legal actions are vested, aimed at passing in favor of various natural and legal entities, food items, financial funds, material bases and others for performing various activities of a health, educational, scientific and other natures (M. Semini, 1998, pg. 30).

5. Conclusions

This contract dates back to Roman law, where the foundations of the legal rules regarding the notion of the deed of gift appeared, the entities concluding this contract, i.e. the donor and the donee, the types of this contract, which even today are recognized by modern law - both positive and comparative law. The purpose of the paper is to shed some light on the development of the contract for donation of Roman law and focusing on the positive law in Kosovo, based on the national legislation in Kosovo. The contract for donation is one of the oldest contracts but at

the same time amongst the most important, because by contract of gift a person (the donor) carries or is obliged to convey the other contractor (the donee) the right of ownership of a particular object or other property right. Most often through the gift the donee obtains the right of ownership to a particular item. This contract must have the purpose of charity (animus donandi) as a key element of this contract, which is also the basis of this contract. In Roman law, this contract was realized in various ways, notably by the transfer of the right of ownership with mancipatio, traditio, or with in iure cesio (dando), with the transfer of claims "credendo", with the forgiveness of debt (liberanto) or with the acceptance of the gift (obligando). Donatio or agreement on the gift became the source of the bonds only at the time of the Roman Empire. Then the agreements of the parties that the donor will give to the donee any item on his property without seeking any repayment, began to be legally protected. As for donatio or donation, in this aspect, the development of the legal opinion related to donatio or donation can be summarized in three different periods: 1) the classical law; 2) Constantine reform and 3) position at the time of Justinian.

The classical jurisprudence elaborated the principles of donation based on the comments of the Cincia Law and the prohibition of donation among spouses. The Roman law recognizes several types of donation. As the most relevant are as follows: a) Donatio reciproca – mutual (reciprocal) donation, b) Donatio mortis causa - donation in case of death and c) Donatio sub modo – donation by order. Donatio – donation was listed in the group of unnamed real contracts. In positive law in Kosovo, the contract for donation is a special contract that is regulated by special provisions in the LOR (articles 536 – 548). Through a contract for donation 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 notion of the contract for donation is expressively provided in Article 536 of LOR.

Entities of the contract for donation are the donor and the donee. Essential elements of each contract for donation (without which there can be no such contract) are items and animus donadi (the purpose of donation). It is precisely the will to donate (animus donandi) that constitutes the establishment of this contract through which a thing or a right is transferred, or wealth from one subject to another. In order to conclude the contract for donation, the general and special conditions for the conclusion of the contract must be met. As a general conditions for signing the contract for donation are 1) the working ability of the contracting parties, 2) the

willingness to agree, 3) the subject matter of the contract, and 4) the contract basis, whereas a special condition is the form. Since the deed of gift enters into unilateral binding contracts, it imposes obligations only on the part of the donor. The principal task of the donor is to hand over the gift item to the gift recipient. The donee should therefore acquire the right of ownership or the right to use the object of the contract. Duties of the donor to the contract are as follows: 1) obligation to hand over the item or the rights to the donee and 2) obligation to compensate the damage. The contract for donation is widely applied in practice in the Republic of Kosovo.

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