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Primary Qualification of Matrimonial Regime Notion

Nadia Cerasela ANIȚEI[1]

Abstract

By adopting Law no. 287 of July 17, 2009 on the Civil Code republished by Law no. 71/2011 the new Civil Code is subject to the modern legislations tendencies to create a triple balance in terms of property relations between spouses by means of the matrimonial property regimes established:

1. between spouses: through the appearance of matrimonial agreements, which have led to the adoption of more flexible legal rules which allow spouses a certain freedom to choose the regime of patrimonial relations between them;

2. within the family: to protect the interests of the family, they resorted to mandatory rules providing for limitations and prohibitions (art.321-322 on the family home - a new notion in the Romanian law, art.316 on the acts of disposal seriously threatening family interests);

3. between family and society-third parties: by establishing formal requirements of legal acts, including matrimonial agreements to be concluded by notarial act that must be given to publicity afterwards.

Also, considering the fact that Romania is a member state of the European Union and that more and more Romanian people are living abroad or marry foreigners, we consider the harmonization of legislation in order to determine the law applicable to such relationships as a highly important requirement.

Given these issues we will devote the present study: to primary qualification of the matrimonial regime notion.

Keywords:

primary qualification of the matrimonial regime notion; scope of matrimonial property regime notion in Romanian private international law.

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1. Introductory concepts

In order to clarify the meaning of the conflict of laws from art.2590 of the new Civil Code, first of all we have to make the primary qualification of the matrimonial regime notion. According to art.2558 paragraph 1 of the new Civil Code, primary qualification is always performed following the Romanian law, namely in accordance with the notions used by the Romanian legal system.

In the past 50 years Romanian experts have equated the notion of *property relations between spouses* with the notion of *matrimonial regime*. The Romanian contemporary doctrine regarding the notions of *matrimonial regimes* and *property relations between spouses* is more nuanced than in the past, claiming that the two notions are closely linked, but not identical. Thus, the matrimonial regime should designate a system of legal rules that govern the property consequences of marriage (Aniţei, 2011; Aniței 2012b), but not of any consequences (there are some pecuniary reports that are not of interest for the matrimonial regimes for example the obligation of maintenance between spouses, as well as those have in relation to other people: children, relatives, etc.).. Consequence: *matrimonial regime* is part of the rules that systematize the "patrimonial relations between spouses", relationships which are the subject matter of more disciplines: property right of the family (Florian, 2008; Frenţiu, Moloman, 2008; Fuerea, 2005), inheritance law etc... As such, the concept of **matrimonial property regime** may be perceived in a narrow sense, as it may also have wider significance. In a narrow sense –the sense preferred by the author - the **matrimonial property regime** is *a set of legal rules governing the relations between spouses regarding the pecuniary rights and obligations of conjugal life and the relations concerning their management*. In a wider sense, the **matrimonial property regimes** (Vasilescu, 2003: 56-106) also refer to the *pecuniary relations between spouses and third parties*, *whether they are people completely foreign from marriage or people with specific legal ties to it*. (Vasilescu, 2003 :17)

Romanian authors (Bodoaşcă, 2005:125; Bacaci, Dumitrache, Hageanu, 2005: 46; Filipescu, Filipescu, 2002:46) define the **matrimonial property regime** *as the totality of legal rules governing relations between spouses on their property and those established between spouses, on the one hand, and the third person on the other hand, also regarding the spouses goods*.

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Based on legal provisions in effect, other authors consider that the **matrimonial legal regime** *consists of all legal rules governing property rights and obligations of spouses* (Bodoaşcă, 2005: 125; Bacaci, Dumitrache, Hageanu, 2005: 46; Filipescu, Filipescu, 2002: 47).

It follows that the concept of matrimonial regimes, has a wide range of meanings, from the largest one containing all the rules governing economic relations arising from marriage, until the narrowest, referring only to the rules on spouses' property, excluding other economic relations existing between spouses (such as those resulting from maintenance, donations, bequests, etc..) or patrimonial re lations between spouses and their children.

Based on the above, we will try to give a definition of the **matrimonial property regime**, we consider that **the matrimonial property regime** means *all legal rules governing the relations established between spouses, or between one or both spouses, on the one hand, and third party, on the other hand, relations which have as object existing assets at the contracting of marriage or acquired during it and the obligations contracted in connection with such goods for carrying out the duties of marriage.*

Generally, the matrimonial regime will be subject to the following rules:

- After the contracting of marriage, the spouses will declare the chosen matrimonial regime, which is mentioned in the marriage document;
- Regardless of the matrimonial regime chosen, the spouses will not be allowed to derogate from the laws laid down for that regime;
- Between spouses, the chosen matrimonial regime will become effective only after the contracting of marriage and in relation to third parties only after the accomplishment of advertising formalities prescribed by law;
- matrimonial regime chosen will be changed whenever they want wives, but only after at least one year after marriage and only authentic notary;
- the chosen matrimonial regime will be changed whenever the spouses want so, but only after at least one year after the contracting of marriage and only by an authentic notary document;

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- A spouse can give a mandate to the other spouse to represent him/her in the exercise of rights he/she has under matrimonial regime;
- If one spouse is unable to express their will, the other spouse will be able to obtain court permission to represent him/her to exercise his/her rights it has under matrimonial regime. This court decision will determine the conditions, scope and duration of the judicial mandate. This mandate will end when the spouse represented will be in a position to express his/her will or when a guardian or a curator will be appointed;
- At the request of a spouse the court may condition the provision acts of the other spouse to his/her express consent. The measure will be imposed only if a spouse contracts legal acts which seriously endanger the interests of family and only for a fixed period. Documents concluded in breach will become void. The right to action will be barred within one year, starting from the date the injured husband became aware of the act;
- The matrimonial regime will cease with the cancellation, termination or cessation of marriage. The matrimonial regime will end according to law in the event of termination or change.

The New Civil Code establishes the property relations between spouses on the basis of the principle of autonomy of will, predicting a real legislative reform of matrimonial property regime existing at present in Romania (Bodoaşcă, 2005: 139).

By means of the matrimonial regime it establishes, the new Civil Code is subject to the modern laws (Lupascu, 2009, 2012) tendency to create a triple balance:

a. between spouses: the emergence of marital agreements, which led to the adoption of more flexible legal rules that allow spouses a certain freedom to choose the property relations regime between them;

b. within the family: to protect the interests of the family, they resorted to mandatory rules that provide for limitations and prohibitions (Art. 321-322 on the family home - new concept in the Romanian law, art. 316 on documents seriously threatening family interests);

c. between family and society-third parties: by the establishment of formal requirements of legal documents, including marriage

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agreements concluded by notarial act, and with the obligation of making it public.

Taking into account the international conventions to which Romania is party and the principles contained in the European recommendations in the field the new Civil Code replaced the regulation of the Family Code with modern regulation harmonized with European law (Sitaru, 2001; Ungureanu, Jugastru, Circa, 2008) rules. Thus, according to art. 312 of the new Civil Code "The future spouses can choose as matrimonial regime: legal community, separation of goods or conventional community (paragraph 1). Regardless of the matrimonial regime chosen, one cannot derogate from the provisions of this section, if otherwise provided by law (paragraph 2)."

Paragraph 2 of art. 312 of the new Civil Code provides that regardless of the chosen matrimonial regime one cannot derogate from the provisions of this section. Section I of Chapter VI called *Patrimonial rights and obligations of the spouses* is entitled *Common provisions*. Articles 312-338 of the new Civil Code are dedicated to this section. We note that this section brings under regulation the **primary regime** that we define as *the set of legal norms governing the relations established between spouses*, *or between one or both spouses*, *on the one hand*, *and third parties on the other hand*, *relationships which refer to property existing at the contracting of marriage, acquired during it and the obligations and in connection with such goods or for the accomplishment of the duties of marriage and that apply to all marriages*, regardless of the marital regime to which the spouses are subjected.

From the provisions of art. 312 par. 1 of the new Civil Code we notice that future spouses can choose as matrimonial regime: **legal community, separation of property or conventional community**.

We note that by means of the provisions of art. 312 of the new Civil Code it is established: a legal system that is the community property regime and two types of conventional types of regimes: the regime of separation of property and the regime of conventional community (the latter includes conventional derogation from community property regime) (Aniței, 2012 : 18-41).

Legal matrimonial regime includes assets acquired by each spouse during marriage, except property required by law, that represents each spouse's own assets.

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Community legal regime shall be applies in all situations in which prospective spouses do not opt for **separation of property regime** or the **conventional community regime**.

The separation of property regime is characterized by the fact that each of the spouses is the exclusive owner of his/her current assets and of those they acquire on their own after the contracting of marriage, for the adoption of this regime the spouses being forced to draw up an inventory of movable property belonging to each one at the contracting of marriage.

The conventional community regime is applicable when by matrimonial agreement, derogates from the provisions on the legal community regime, and the matrimonial convention concluded in this case can narrow or broaden the community of goods.

In conclusion, the legislative novelty of the new Romanian Civil Code which reformed the Regulation of the Family Code of patrimonial relations between spouses in Romania, lies *in the possibility of future spouses to choose between several matrimonial regimes, responding thus to the continuous need for adaptation of existing legislation to socio-economic needs and to the trend manifested in this field at European level.*

2. The notion of matrimonial regimes in different legal systems (Anitei, 2012 : 172-176).

Comparative law studies show that in many legal systems the concept of *property relations between spouses* includes legal relationships concerning spouses' heritage assets and liabilities, the powers that each spouse has on those goods, and the obligation to contribute to marriage expenses (Droz, Georges, 1974:84).

In the foreign legal doctrine the notion of matrimonial regime has been defined differently. While two foreign experts consider that the matrimonial regime is the relationship between the spouses arising from their marriage in terms of their property, another proposes a lapidary definition easy to remember: a set of rules aimed at governing monetary relations between spouses (Crăciunescu, 2000 : 3-4; Terré, Simler, 1989 : 1).

In *French law* (Lamboley, Laurens-Lamboley, 2006: 23-47; Vasilescu, 2003 :56-106; Crăciunescu, 2000: 9) matrimonial regimes are

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defined as the rules governing monetary relations maintained between the spouses between themselves and with others.

Some *legal systems* make no difference between personal and pecuniary relations between spouses. Thus, in Madagascar, pecuniary relations between spouses are part of the personal status and are subject to personal law.

In the *CIS*, the Family Code of 1969 devotes only a few articles to the property regime of spouses in a set of rules on personal relationships.

In various legal systems matrimonial property regimes are classified according to the following criteria (Vasilescu, 2003 :56-106; Crăciunescu, 2000 : 9):

Depending on their source, we have:

- *legal matrimonial regime* which consists of all the rules governing property relations between spouses and between them and third parties, being established by rules contained in legislation;
- *conventional matrimonial regime* represented by all economic relations established between spouses and between them and third parties; they are governed by rules established by the spouses through a special contract, also called matrimonial agreement.

Depending on their internal structure we have:

- *The matrimonial regime of community* which is characterized by the fact that some assets acquired during marriage with a specific title are considered to belong in co-ownership to spouses, forming a mass of assets that is treated separately from the assets of each spouse;
- *matrimonial regime of separation* which is characterized by the fact that there is no mass of assets to concurrently belong to both spouses, regardless of title, and the time when assets had been purchased;
- *the dotal matrimonial regime* (was defined in art. 1234 of the Civil Code. "as the fortune that a man received from a woman to help him support the tasks of marriage").
- *eclectic matrimonial regime,* combining the separation of property during marriage with the community principle manifested at its dissolution.

Depending on the degree of malleability we have:

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- *the mutable matrimonial regime*, namely the regime which may change during the marriage;
- *the immutable matrimonial regime*, meaning that regime which cannot be changed during marriage.

By trying to group states according to their legal regime, research literature (Crăciunescu, 2000: 1-167; Vasilescu, 2003: 105-108; Andone, 2006: 3-64) placed *the property matrimonial regime of common law and Islamic countries* outside any typology. The characteristic element of these systems is the idea of separation and the fact that matrimonial regimes (in terms of legislation, doctrine or practice) do not have an actual autonomy, as they are embedded in the general law relations that are established between spouses.

In *English law*, the term of matrimonial property regime is unknown, as the rules on the patrimonial status of the spouses are not systematized; family law itself received recognition only after 1950. These regimes are characterized by the fact that there isn't a mass of goods that belongs to both spouses, but only the personal property of each spouse. They preserve the exclusive ownership of all goods in their possession at the time of marriage and those they acquire during marriage by onerous or gratuitous title, each having the right to use, manage and dispose freely of their property.

In *Muslim law* even if theoretically, the notion of a matrimonial property regime does not exist, however there is a unique matrimonial regime which represents the separation of spouses' goods combined with a specific dotal regime. The dotal regime is required by law as a condition for the validity of marriage for people belonging to rite *Malekit*, or as a biding effect of the marriage contract for people belonging to other rites.

Community legal regimes are the most common ones, being found in many legal systems. This kind of regime has the following forms:

- universal community, including all property of spouses, whether acquired before or during marriage, as in Denmark, Norway, Finland, Sweden, Belgium, Holland, Luxembourg, Brazil and Uruguay;
- reduced community for property acquired during marriage, applied as a legal regime in Romania, France, Spain, Poland, Bulgaria, Portugal, Russia, China, Venezuela, Peru, Mexico and Chile.

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Legal separation regimes are relatively isolated, being found in Japan, Turkey and Greece, the latter being the only European country that still regulates the dotal regime. In Germany, the separation regime is a conventional one, which applies if spouses refuse the legal regime of participation in acquisitions. In Switzerland this type of system has a conventional or extraordinary law status, the latter being ordered by the judge at the request of either spouse, as a protective measure against the other spouse.

Mixed matrimonial regime (expressed through participation in acquisitions) borrows rules from the separatist regimes and from the community ones, generally applying provisions specific to first regime for asset management during marriage and provisions of the second regime for the liquidation of the mixed regime. This regime can be found in countries such as Switzerland, Germany, Norway, Finland, Sweden, Paraguay, Colombia, Uruguay and Quebec in Canada.

Another mixed matrimonial regime is *the matrimonial regime of participation in movable property and acquisitions from Senegal*, which appears during marriage as a separatist regime, but involves a system of co-management of property similar to community property regimes, and in case of dissolution spouses' property is liquidated as in case of community systems.

However, we note that the notion of matrimonial property regime *is not a universal legal concept*. There are legal systems which are not aware of this notion, such as the common law legal systems, where rules pertaining to the matrimonial property regime in Roman-German law are dispersed in different chapters or Islamic legal system where marriage does not change in any way the powers that each spouse has on his/her property.

We conclude that the scope of the Romanian matrimonial property regime is equivalent with the scope of the same term in other legal systems.

3. The scope of matrimonial property regime notion in Romanian private international law

Currently, the conflict of laws in matrimonial matters is stated in art.2589-2596 of the new Civil Code.

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From the provisions of art.2590 of the new Civil Code, we can see that the law applicable to the matrimonial property regime is, as a rule, the law chosen by the spouses (*lex voluntatis*). However spouses have the option limited to the following laws:

- the law of the State where one of them has their habitual residence at the date of choice;
- the law of the State whose citizenship each one of them has at the date of choice;
- the law of the State where they establish the first common habitual residence after marriage celebration

From the provisions of art.2591 paragraph 3 thesis I of the new Civil Code we can see that spouses can always choose another law applicable to the matrimonial property regime, in compliance with the observance of the convention of choice of applicable law conditions. So, spouses can choose only one of the laws applicable to matrimonial regime according to art.2590 of the new Civil Code.

According to art.2591 paragraph 3 thesis II of the new Civil Code the new law takes effect only for the future, if spouses have not decided otherwise, and shall not prejudice in any way the rights of third parties.

If the spouses have not chosen the law applicable to their matrimonial regime, this is governed by the law applicable to the general effects of marriage. [2]

The provisions of art.2591 paragraph 1 of the new Civil Code show that the choice of law applicable to matrimonial regime is made by concluding an agreement before the celebration of marriage or at the time of the conclusion of marriage or during marriage.

According to art.2593 paragraph 1 of the new Civil Code the law applicable to matrimonial regime governs:

a) the limits of the choice of matrimonial regime;

b) the possibility of matrimonial regime change and the effects of this change;

c) the content of the patrimony of each spouse, the property rights of spouses and the debts of spouses;

d) the termination and liquidation of the matrimonial regime and the rule on the division of common property (except the establishment

[2] Art. 2592 of the new Civil Code.

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of lots and their distribution which are subject to the law of the State where the property is located at the date of partition) [3];

e) publicity measures and enforceability of matrimonial regimes in relation to third parties[4].

However, as a protective measure for third parties, when at the date of conclusion of the legal relationship between a spouse and a third party they had their common residence in the same State, the matrimonial law of this state, with the following exceptions should be applied:

a) the publicity or registration conditions required by the law applicable to matrimonial regime have been met;

b) the third party knew, at the date of conclusion of the legal relationship. the matrimonial regime or recklessly ignored it;

c) the estate publicity rules laid down by the law of the State where the property is situated have been complied[5].

The essential *features* that a legal relationship must meet in order to be qualified by the Romanian authorities in the conflicting category of patrimonial relations between spouses are:

- legal relationships should be established between spouses or between a spouse on the one hand and third parties on the other;
- legal relationships should result from the status of married person that the parties have;
- the purpose of the legal relationships should be the property of one or both spouses acquired after marriage or obligations contracted for accomplishing the tasks of marriage.

Any legal relationship that meets these features can be included by the Romanian authorities in the category of economic relations between spouses, to determine the applicable law based on the conflict of laws from art. 2590-2596 of the new Civil Code, even when the legal relationship as such is unknown to the Romanian Family Code.

Once the operation of primary qualification is completed, by framing the legal private international law in the case of conflict of laws of art. 2589-2596 of the new Civil Code and the determination of the applicable law, the matrimonial property regime notion shall acquire a

[3] Art. 2593 paragraph 2 of the new Civil Code.
[4] Art. 2595 paragraph 1 of the new Civil Code.
[5] Art. 2595 paragraph 2 of the new Civil Code.

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new content and a new scope, as a result of the operation of secondary qualification which is achieved by *lex causae*, namely after the substantive law, applicable to the legal relationship in question. The solution of qualification by *lex causae* is supported by most private international law doctrine (Filipescu, 1999: 109; Jakotă, 1997: 223; Audit, 1997: 203-204; Loussouarn, Bourel, 1996: 201-203).

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