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TRADITION, REFORM AND HARMONIZATION TRENDS IN MATTERS OF LEGAL COMMUNITY REGIME IN ROMANIAN PRIVATE INTERNATIONAL LAW

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TRADITION, REFORM AND HARMONIZATION TRENDS IN MATTERS OF LEGAL COMMUNITY REGIME IN ROMANIAN PRIVATE INTERNATIONAL LAW

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Abstract

The theme is topical and of interest in Romanian legal area since currently there is no work dedicated to matrimonial property regimes in private international law that studies, on the one hand, the legal mechanisms by means which, both in Romania, and abroad, the competent legal system governing matrimonial property with foreign element between spouses is established and, on the other hand, studies the trends of European unification of national legislations in this vast area. The unit and simultaneously the touch of originality of the project will result from the conjunction of three elements: - firstly, we shall pay attention to classical issues involved in determining the law governing matrimonial property regimes; - Secondly, we shall study the legislative reform in matters of matrimonial property regimes in the Romanian private international law as provided in the Civil Code; - Thirdly, we shall analyse the theme of a European and international perspective. In the studies that we carry on this theme we shall start from what is already acquired in the doctrine and jurisprudence, we will discuss new issues and solutions and proposals for lege ferenda, and when we rally to a solution already offered by the doctrine and jurisprudence, we shall try to bring new arguments.

Keywords:

Spouses; Law applicable to the movable and immovable property; The law applicable to matrimonial property regimes; The law applicable to the matrimonial convention; Harmonization of rules in matters of matrimonial property regimes in the EU.

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1. Introduction

In 2011 in **Romania**, the legislative reform of fundamental institutions of civil law was accomplished by adopting the new Civil Code which came into force on October 1, 2011.

The new Civil Code was based on the monistic conception of regulation of private law relations in a single code, an aspect which aims to shape an integrating vision, that will influence the Romanian economic and social life. In the *Civil Code* private international law aspects are treated in Book VII – *Provisions of private international law*. Title III, entitled *Conflict of Laws*, Chapter III, called the *Family* (Articles 2585-2612), studies the law applicable to family relationships.

From the provisions of the articles cited it can be noted that the articles on the effects of marriage (Articles 2589-2596 Civil Code), took over some of the provisions of Law no. 105/1992, conflicting rules set by the provisions of the Hague *Convention* of March 14, 1978 on *the law applicable to matrimonial property regimes*, the solutions offered in the field by a series of laws from different European countries (Switzerland, Italy, Germany, Quebec, France etc.) being most inspired, in turn, by the provisions of the Hague Convention, but they also considered the harmonization tendencies of the European Union area. While during my PhD I suggested as *lex ferenda* in the studies performed on the *property relationships between spouses in private international law*, the amendment of Article 20 (which concerned the personal and property relations between spouses) and of Article 21 (which concerned the matrimonial convention) of *Law no. 105/1992 on the regulation of private international law* (for example, by re-introducing the matrimonial convention in the Romanian legal system, etc.) and we agree with the opinion of the research literature to make a legislative reform in matters of family relationships through the establishment of flexible rules that allow future spouses to organize the economic aspects of conjugal life, we cannot fail to notice the modern dimension of the provisions on family relationships and, consequently, on the effects of marriage in the new Civil Code. Since the provisions of private international law relating to matrimonial established legal system competent to govern such a legal relationship, are important for our study it is determined that the situation in the relevant legal system governing matrimonial with foreign element is Romanian legal system.

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2. Matrimonial property regimes in Romanian Private International Law

Regarding the **Romanian private international law**, the primary classification is performed by *Romanian law*, *the law of the forum* for any Romanian public authority. Thus, according to art.2558 of the new Civil Code "*When the determination of the applicable law depends on the classification that has to be given to an institution of law or to a legal relationship, we should consider the legal classification established by the Romanian law (Article 1). In case of referral, the classification is made by the foreign law that made reference to the Romanian law (Article 2). The movable or immovable nature of property is determined according to the law of the place where it is, or where appropriate, where it is located (paragraph 3). If the Romanian law does not know a foreign legal institution or knows it under a different name or with a different content, they can consider the legal classification performed by the foreign law (paragraph 4). However, when the parties themselves determine the meaning of concepts in a legal act, the classification of these notions will be made respecting the parties' wishes" (paragraph 5).*

Two observations must be made: first, that the term "institution of law" must be interpreted *lato sensu*, including legal terms as well, and the second that the exceptions in paragraphs 2,3,4,5, are strictly interpretative.

So, according to art 2558 paragraph 1 of the new Civil Code, the primary classification is always performed based on the Romanian law, namely in accordance with the terms used by the Romanian legal system. Also, the classification of an issue as procedural or substantive is made by the Romanian law.

In order to clarify the meaning of the concept of matrimonial regime in private international law, we should perform the primary classification of the notion of **property relations between spouses**.

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

1. the legal relationship must be established between spouses or between a spouse or spouses on the one hand, and third parties on the other hand;

2. the legal relationship must find the source in the status of married person that parties possess;

3. the legal relationship has as its object the property of one or both spouses acquired after marriage or obligations contracted in order to achieve marriage tasks.

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At present, the conflict of laws in the matter of patrimonial relations between spouses is set out in Articles: 2590 - 2596 of the Civil Code.

Any legal relationship that fulfills these features can be classified by the Romanian authorities within the category of economic relations between spouses, in order to determine the applicable law, according to the conflict of laws of art.2590 of the new Romanian Civil Code - which provides: "The law applicable to the matrimonial regime is the law chosen by the spouses (paragraph 1). They can choose: a) the law of the State on which one of them has its common residence at the date of election; b) the state law whose citizenship any of them has at the date of election, c) the law of the state where they establish the first common habitual residence after celebration of marriage (paragraph 2) - even if the legal relationship, as such, is unknown to the Romanian family law.

Also, according to art.2953 of the new Civil Code *"the law applicable to the matrimonial regime governs: a) the conditions of validity of the Convention on the choice of the law applicable, except the capacity, b) the admissibility and validity conditions of the marriage agreement, except the capacity c) the limits of the choice of the matrimonial regime; d) the possibility of regime change and the effects of this change, e) the content of each spouse's patrimony, the rights of the spouses on property and spouses' debt regime, f) the termination and liquidation of the matrimonial regime, and the rules on the division of joint property (paragraph 1). However, the formation of lots and their assignment are subject to state law where the property is located at the date of partition "(paragraph 2).*

As an exception, if the law applicable to the patrimonial regime has not been determined according to art.2592 of the new Civil Code "*it is subject to the law applicable to the general effects of marriage."*

If the spouses change their habitual residence or their citizenship, art.2596 of the new Civil Code provides: *"The law of common habitual residence or the common citizenship law continues to govern the effects of marriage provided that one of them changes, as appropriate, their habitual residence or nationality (paragraph 1). If both spouses change their habitual residence or, where appropriate, their citizenship, the common law of the new habitual residence shall apply to the matrimonial regime only in terms of the future, if spouses have not agreed otherwise, and in any case it cannot prejudice the rights of third parties (paragraph 2). However, if spouses have chosen the law applicable to the matrimonial property regime, it remains the same, even if spouses change their habitual residence or nationality (paragraph 3*).

For what concerns third parties, art. 2595 provides: "*Measures for publicity and enforceability of the matrimonial regime against third parties are subject to the law applicable to the matrimonial regime* (paragraph 1). However, if, when a legal relationship is set up between a spouse and a third party, they had their habitual

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residence in the same state, that law of that state applies, except in the following cases: a) the conditions for publicity or registration provided by the law applicable to the matrimonial regime, b) the third party knew, when the legal relationship was contracted, the matrimonial regime or recklessly ignored it, c) immovable publicity rules laid down by the law of the state in which property is located have been complied.

Since the provisions of private international law relating to matrimonial established legal system competent to govern such a legal relationship, are important for our study it is determined that the situation in the relevant legal system governing matrimonial with foreign element is Romanian legal system. The legislative reform offered by the new Civil Code in matters of family relationships (which devotes to them Book II entitled "*About Family*" (Articles 258-534)), Romanian legal system was based on solutions and proposals for *lex ferenda* outlined over time by the doctrine and jurisprudence, and also the provisions of other legal systems: the French Civil Code, the Civil Code of Quebec, the Swiss civil Code, etc.

The notion of **property relations between spouses** is related to another concept of great importance for the study. This is the concept of **matrimonial property regime** (NC., Anitei. (2012): 1-192. NC, Dariescu (2006) :28-31).

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, 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, inheritance law etc.. . As such, the concept of **matrimonial 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 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 regimes** also refer to the

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pecuniary relations between spouses and third parties, *whether they are people completely foreign from marriage or people with specific legal ties to it*. (P., Vasilescu. (2003):17)

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 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)."

Romanian authors (Al., Bacaci. V., C., Dumitrache. C., Hageanu. (2005):46. I., P., Filipescu. A., I., Filipescu (2002): 42-48) define the **matrimonial 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*.

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 spousses* (T., Bodoaşcă *(2005):125*. Al., Bacaci. V., C., Dumitrache. C., Hageanu. (2005):46. I., P., Filipescu. A., I., Filipescu (2002): 42-48; C., Mares (2015):72-73).

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 relations between spouses and their children. (N., C., Dariescu (2008) : 30; O., Ungureanu, C., Jugastru. A.,Circa. (2008):123-133)

Based on the above, we will try to give a definition of the **matrimonial regime**, we consider that **the matrimonial 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* (N., C., Dariescu (2006) : 31.)

We note that the provisions of art.312 of the Civil Code establish: a legal regime that is the community property regime and two types of conventional regimes: the separation of property regime and the conventional community regime (the latter includes conventional exemptions from the community property regime).

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

3. Notions to legal community regime

Community legal regime will apply in all situations in which prospective spouses opt for **separation of property regime** or the **regime of conventional community**.

Separation of property regime is characterized by the fact that each of the spouses is the exclusive owner of their current assets and of those acquired alone after the dissolution 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.

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

In terms of the **matrimonial regime**, the patrimonial relations between spouses are based on **the legal community regime**, including the property acquired by each spouse during marriage, except for goods provided by law, that are each spouse's own assets. This regime has been greatly improved. For example, it has been expressly provided that the spouses jointly, or together with others, may put the basis companies, associations and foundations, according to the law, bringing common goods, but, only with the consent of both spouses[2].

The legal community regime is based on the following principles:

1. the principle of equality between spouses is established by art. 308 of the new Civil Code and includes:

a. the goods of the spouses are common or own goods without taking into account weather they were acquired by the husband or by the wife;

b. the management, use and disposal of common property are regulated so that each spouse is conferred practically the same powers over common property;

c. in case of divorce, of dissolution or termination of marriage, when it comes to the liquidation of the matrimonial regime and division of common property the court cannot make any discrimination based on sex. This does not

[2] Of the Explanatory Memorandum on the draft of the new Civil Code.

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mean that the goods will always be divided in equal shares, as the criterion against which they will determine the share ownership of common assets of each spouse is the actual contribution that each has had in the acquisition and preservation of such property;

2. the principle of subordination of patrimonial relations between spouses to personal relations between spouses. Thus the community of goods was regulated as a mass of goods affected to the accomplishment of marriage tasks;

3. the principle of recognition of any of the spouses' work in the household. According to this principle, as outlined in the provisions of art.326 of the new Civil Code the work of either spouse in the household is a contribution to common property acquisition;

4. the principle of exercise of parental rights and obligations to their children. Parental rights and responsibilities are acknowledged regarding the child's person and its heritage: The distinction between the two categories of rights is useful, especially if parental care is divided, when a specific allocation of rights and duties between the two parents or between them (or one of them) and a third person who provides alternative child protection takes place. According to this principle it can be established each spouse's financial contribution to children's raising and education.

Legal community regime has the following juridical features (M., Avram. C., Nicolescu (2010): 173-182 C., Mares (2015):99-123):

1. *it is a regime of partial community* because: in relation to goods, the spouses have, according to the new Civil Code two categories of goods: common property (art. 339) and own property (art. 340). The rule is that goods are common, and the exception that certain categories of goods are own property. It is a predominantly community regime, in which the separation of goods is limited, subsidiary; spouses have two categories of debts: common debt (Article 352) and own debt (art. 353);

2. *it is a legal regime*. The legal character of the legal community regime should be understood in the context when future spouses or the spouses during marriage are able to choose a certain matrimonial regime. Thus, according to art.312 paragraph 1 of the new Civil Code "Future spouses may choose a certain matrimonial regime: legal community, the separation of goods or conventional community." However, the application of the law is not, legally, an effect of the intending spouses' option (a kind of tacit matrimonial agreement), as paragraph 312 paragraph 1 lets us believe, but a legal consequence of marriage, in the absence of a marriage agreement;

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3. *it is a mutable and flexible regime*. Legal community regime can be replaced during marriage by matrimonial agreement by another matrimonial regime under certain conditions and limitations. According to art.359 of the new Civil Code it is provided that "any agreement contrary to the provisions of this section (the legal community regime) is null and void. This article must be considered in conjunction with art.366-368 of the new Civil Code which allow a derogation from the legal community regime in certain circumstances and within certain limits.

4. *it is an imperatively limited regime*. From the corroboration of art.312 paragraph 1 of the new Civil Code with art.332 paragraph 1 of the new Civil Code according to which "By matrimonial convention one cannot derogate under the sanction of absolute nullity from the legal provisions of the matrimonial regime chosen, except as expressly provided by law"; it means that a marital agreement that would opt for a matrimonial regime other than that provided by law is null and void. For example, future spouses or spouses cannot choose the acquisition regime. However, by agreement spouses may expand or restrict legal community property, they may establish the obligation of agreement of both spouses to conclude certain administrative acts, they may agree to include a preciput clause or determine the way of liquidation of conventional community. So, the imperative character of the legal community regime is limited by the fact that future spouses or spouses are able to regulate, by matrimonial agreement, certain aspects derogating from the legal community regime provisions.

4. Harmonization trends in matters of conflicts of laws relating to matrimonial regimes in UE

In 1990, as a result of political, economic and social changes at European level, the European Commission acknowledged the actuality of finding modern solutions to the conflicts of laws relating to matrimonial property regimes, so that on July 17, 2006 the *Green Paper on conflicts of law on matrimonial property regimes* included the question of jurisdiction and mutual recognition. The Green Paper has opened a broad consultation on all the difficulties faced by couples in the European context. Interested persons answered the questions by November 30, 2006. These responses helped the European Commission formulate the *White Paper* on this subject, namely the document which will contain the regulation draft for the harmonization of the resolution of conflicts of laws relating to matrimonial property regimes. In 2008-2010, the European Commission established an expert group called

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"PRM / III" made up of members from various professions concerned, representing various European legal cultures. Also, on September 28, 2009, the Commission held a public debate during which the exchange of ideas with about a hundred participants confirmed the need for an EU instrument in matters of matrimonial property regimes the object of which is, in particular jurisdiction, applicable law, recognition and enforcement of judgments. UE Citizenship Report from 2010 noted among the obstacles to the free movement, the uncertainties related to property rights of international couples. In this context, due to the particularities of registered partnership and marriage and to the different legal consequences these forms of union determine, the European Commission issued two separate proposals for regulation: *one on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of property consequences of registered partnerships and another on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of matrimonial property regimes*.

Regarding the harmonization of *proposal for a Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of matrimonial property regimes,* **Romania** found that: the Regulation respects both the principle of subsidiarity and the principle of proportionality, however, after the assessment of the proposal the following amendments were adopted: i) in Article 1 paragraph (3) after letter a) a new letter, letter a1) is introduced, as follows: "a1) the existence, validity or recognition of a marriage"; ii) In Article 18 paragraph (1), the introductory part shall read as follows: "After at least one year of the conclusion of marriage, the spouses may subject their matrimonial regime to a law other than the one applicable until then."

The study of the trends of harmonization of rules in matters of matrimonial property regimes is of great interest since the increased mobility of persons in an area without internal frontiers leads to a significant increase of unions between citizens of different Member States, whatever the form of these unions (marriage, actual unions, civil partnerships), and to the presence of such couples in a Member State, without having its nationality, plus often the purchase goods in the territory of several Member States, raising thus the issue of the law applicable to the matrimonial property regimes of such couples. (NC., Anitei. (2012):1-154; O., Ungureanu, C., Jugastru. A.,Circa. (2008):113-133)

Conclusions

In conclusion, the New Civil Code was based on the monistic conception of regulation of private law relations in a single code, an aspect

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which aims to shape an integrating vision, that will influence the Romanian economic and social life. In the *Civil Code* private international law aspects are treated in Book VII – *Provisions of private international law*. Title III, entitled *Conflict of Laws*, Chapter III, called the *Family* (Articles 2585-2612), studies the law applicable to family relationships.

Once the operation of the primary classification is performed, by including the legal relationship of private international law within the conflict of laws of art.2590 of the new Romanian Civil Code and by determining the law applicable under the provisions of that article, the concept of property relations between spouses will acquire new content and a new scope, as a result of the operation of secondary classification, which is done by *lex causae*, namely by the material law applicable to the legal relationship in question. The classification based on *lex causae* is supported by the majority of the private international law doctrine.

The legislative reform offered by the new Civil Code in matters of family relationships (which devotes to them Book II entitled "*About Family*" (Articles 258-534), Romanian legal system was based on solutions and proposals for *lex ferenda* outlined over time by the doctrine and jurisprudence, and also the provisions of other legal systems: the French Civil Code, the Civil Code of Quebec, the Swiss civil Code, etc. The legislative reform in our country in matters of matrimonial property regimes is subject to the harmonization trends in this area.

In particular, for Romania, the harmonization of law in matters of matrimonial property regimes is of particular importance since our country's EU integration prompted more and more Romanian people to settle abroad, but also the foreigners to settle in Romania, which led to a significant increase in the number of disputes with foreign element in matrimonial property regimes.

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Legislation

Romanian Civil Code

Regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matters of matrimonial property regimes.

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