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Comparative Aspects of the Institution of Marriage in Different Legal Systems

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Abstract: Law is a sphere in which people live and in which they have the freedom to move, to transform, to do whatever falls within the parameters of the sphere, any attempt to break this wall is met with a force that repels its action and propel her inwards. We humans live within this sphere and are guided by legal rules that guide our actions so that we do not cross the line of legality, and any deviation is sanctioned as such. People's relationships are not limited only to the perimeter of a country. Thanks to the possibilities offered by the technologies of the 21st century, we can physically be in a state but we can contract from a distance, we can form friendships, we can communicate, more recently in the United Arab Emirates it is even possible to divorce at a distance by sending a message from the husband , to the wife that they are divorcing, however to be effectively divorced a judge's decision will be needed. Technologies make themselves felt more and more in our lives, and we make room for them, because they make our lives easier and offer us possibilities that sometimes we cannot actually fulfill. However, the right cannot be removed, rather, it is extended by the fact that it must also cover actions in the area of technology. Law develops and evolves along with the needs of society. In the times when people with a certain citizenship are not so tied to that state, in the times when they can be anywhere in this world, can work anywhere, in all these places and not only can find happiness and get married. At that moment the physical border between the states has dispersed and that man becomes a simple man living on this earth without being too tied to a certain state jurisdiction. Today, perhaps more than ever, we need states to collaborate, to realize the necessary prerequisites so that people do not encounter legal obstacles in marrying or working in another country. A concerted effort of all legislations is needed to work out the legal aspects involved in a marriage. One of the most beautiful moments in life is getting married. As well as being a personal moment, it involves a number of legal aspects.

Keywords: *marriage; divorce; legal systems.*.

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1. Introduction

Private international law is the branch of law that is increasingly being turned to today, due to the fact that many people travel and settle in other countries, marry and start a family in a country other than their home country, having the freedom to settle anywhere in this world, people give meaning to this freedom and look for their territorial space in which they feel comfortable. The moment a man stepped on the territory of another state (Barbu, 2016), he entered the jurisdiction of another legal system, however, even the laws of his own country did not "abandon" the citizen (Barbu, 2015). Private international law is a very important branch of law that today is sought after more than ever. People have moved out of the geographic space of their home country for various reasons. People need to know that they are "followed" by the law of the country they are from wherever they are on this globe. Information technologies give us the opportunity to establish relationships thousands of kilometers away, so far no state has provided for the conclusion of marriage at a distance, but this possibility is not excluded. However, the law needs transparency, reality and tangible things.

People use up the rights and freedoms offered to them. People need legal protection wherever they go because of being a citizen of a country. Private international law appears as an umbrella that follows its master or a shadow that follows its master. Private international law creates a dialogue so that people are not left out of protection just because they are on the territory of another state. Among the most important institutions of private international law is the family. We are currently witnessing an increased number of international marriages, so that the family matter in international law has become one of the most requested fields. People are free to seek and find happiness anywhere in this world and right is not justified/has no right to stand in the way of people's happiness. However, it is necessary to regulate certain aspects that are meant to regularize and establish the law of the country under which they are getting married, the applicable law in case of litigation and all conflicting aspects that may arise during family life.

Marriage as a legal institution has evolved and enjoyed many regulations and has seen a distinct evolution in various different systems (Apostu, 2016), some countries have broadened the scope of the notion of family and marriage, and others have kept the concept for thousands of years and have been refractory to by the evolution of regulations in the West. All the antagonistic aspects between the West and the Islamic space collide when a non-Muslim marries a Muslim or another religion. Religion

representing a very important factor in shaping social rules that also have a legal nature in some states. In all these situations and not only, private international law intervenes to give an answer or at least offers several solutions from which either the spouses or the judge chooses the most appropriate one that corresponds to the specific situation.

An interesting point of view belongs to the author Liviu-Marius Harosa, in whose opinion, in canon law, marriage is usually accepted as an institution of divine and natural law with a dual aspect, social, legal and moral religious, in that its purpose it is the formation of a family indissoluble to the human will. According to Christian teaching, the family is founded through marriage, being defined in and through love, because „the family presupposes communion and communion is not possible without love" (Harosa, 2022).

International marriage involves the interference of several laws at times, and at other times even distinct legal systems. And this nebula that is being created can be dispersed with the help of regulations in the field of private international law. The personal and patrimonial effects that occur as a result of the conclusion of the marriage will be governed by a law (Huidu, 2019; Terec-Vlad, 2015), the one chosen by the spouses or the one that is presumed. It is also important to know the specific effects that can be nuanced in certain legal systems.

2. The institution of marriage in private international law - aspects of comparative law

JJ Rousseau said that „the family is the oldest of all societies and the only natural one" (Lupaşcu & Crăciunescu, 2022).

„Marriage is the fundamental institution of a society" (Jugastru, 2015). This is more than a legal notion or institution regulated by laws, it represents that union between a man and a woman, or without discrimination, between persons of the same sex, which transcends the legal notion. Marriage is the sublime form under which two people can live together, although marriage also implies a legal connotation due to the act that must be concluded in front of the registrar (Apostu, 2015). In order to be considered married by society, it is necessary to complete some formalities. So feelings are not enough, the law only believes in what is written. Marriage has not always been a legal institution, in the beginning it had a significant secular character, because to be considered married, a few hundred years ago, it was enough, only the religious wedding, thanks to canon law. Today, in different legal systems, marriage has different legal or secular connotations. That is why this dichotomy between legal and religious

creates conflicting situations in private international law. Not in all countries marriage must be based on love, understanding, respect, mutual support and fidelity, foundations of marriage provided in the Romanian Civil Code in art. 309. For example, in Islamic law, marriage is nothing more than a civil contract that unites the will of two people and is subject to registration formalities in the Civil Registry. Islamic jurists do not have a concerted opinion on the notion of marriage, but they agree on its legal nature, the fact that it is a civil contract. Labaca Zabala states that „in Islam marriage is considered a mandate of the Qur'an, however, the fundamental character of marriage is the civil contract that consecrates the union between a man and a woman that establishes personal, family and economic relations". The Egyptian jurist Muhammad Abu Zahra defines marriage as „a contract between a man and a woman to legitimize sexual relations between them, to continue the human species, to cooperate during life, determining the rights and obligations of each", the latter definition also captures the functions of marriage, namely the continuity of the human species, the legitimization of sexual relations between a man and a woman and the establishment of the rights and obligations of each (Rached, 2018). „The essence of Islamic marriage is the dowry that the husband must give to the future wife and an agreement to waive this obligation is considered unwritten" (Panainte, 2014).

Marriage in Islam is a contract concluded by making an offer and its acceptance by the other party. In recent decades, a new type of marriage has spread in Islamic states in addition to the traditional one, namely „Urfi marriage", meaning secret marriage. This phenomenon has boosted young people, because of the high costs involved in a traditional and legal marriage. This type of marriage does not require the presentation of documents before the civil status authorities, the marriage is concluded by the simple agreement of the wills of the parties or in front of a lawyer. The big problem arising from the conclusion of this marriage is the fact that it does not guarantee the legal obligations that the husband has towards his wife and children (Damian et al., 2019). This marriage also raises the issue of evidence in court, in case the wife wants to obtain the obligation to pay the child's father maintenance. Another major issue is the recognition of these marriages by other countries, the effects of this type of marriage and whether it can be transcribed in another country (Rached, 2018).

Marriage in Hindu countries is subject to different rules, it has a distinct legal setup. They have a strong religious note that cannot be opposed, as a rule, to those of a legal nature. The Indian legal system has two basic marriage regulations, the Special Act 1954 and the Hindu Marriage Act 1955 (Enmeida) which was amended in 2010 and 2012 to facilitate the

divorce process for Hindus. Family law in India is divided according to the religious communities existing in India which is mainly based on the customs and religious rules found in the holy books. The Special Marriage Act 1954 in the state of Goa is the only uniform law that does not make these distinctions based on religion. For Hindus, marriage is a sacred relationship, it is the most important transitional moment in the life of a Hindu sanskaras, some Hindu systems do not even have legal regulations on marriage, representing a private aspect in the social community in which they live. Religion has a particular influence on these aspects of social life in the country, it opposes the development of legal norms to regulate marriage. The Hindu Marriage Act of 1955 applies if both spouses are of the religion of Hinduism, Jainism, Buddhism, Sikhism, according to Article 2 of the Act. Muslim marriage in India can only be solemnized if both spouses are of the Muslim religion, according to legal provisions. Christian marriage can be solemnized in India in front of a priest in the church and after the marriage ceremony a marriage certificate will be issued. Parsi marriage is subject to distinct rules, a ceremony called 'ashirvad' will be formalized (Di Matteo, 2017). The legal universe in which people in India live is different from what people in other continents live in, they have well-rooted traditions and rules that cannot be changed overnight, although due to emigration, some have managed to adapt a different way of life, but their predominantly secular legal culture will remain an introverted system for a long time.

In the family of the common law legal system, that of the United States of America, the concept of marriage is based on two axes, one religious and one based on liberal individualism. „In the case of the US states, these two directions complemented each other, liberal individualism led to the improvement of the status of women in marriage, which was a more rigid one due to the Judeo-Christian religion" (Hamilton, 2006). States in the US have adopted different solutions regarding marriage. For example, states that adhere to common law laws do not require a special ceremony to conclude marriage, because they consider marriage to be a contract, therefore, the simple consent of the parties before a magistrate or in front of witnesses is sufficient for there to be a validly concluded marriage, the approval of a cleric is not necessary. Also, the status of married people can be deduced from the fact that two people live together continuously, behave and are recognized by those around them as husband and wife.

In other states, such as Massachusetts, New York, Washington (Legal Information Institute, n.d.) have special regulations regarding marriage. In these states it is mandatory to conclude the marriage in the presence and with the approval of a magistrate or registrar, in other states

the blessing of a priest for the marriage is also mandatory (”Legal Definition”, n.d.). In the state of Louisiana, a license from the authority of any region in the state is required to solemnize the marriage, regardless of the place of solemnization of the marriage or the domicile of the applicants. The notion and idea of marriage has evolved and modernized with American society.

In Chile, marriage from a legal point of view is defined in art. 102 of the Civil Code and has the following content „marriage is a solemn contract by which a man and a woman unite now, indissolubly and for life, with the purpose of living together, procreating and helping each other”. This definition includes the social functions of marriage, but it also refers to a religious aspect, namely the phrase „for all life”. Chile was among the countries that legalized divorce, much later than European or Asian countries. In 2004, through Law 19,947, divorce was introduced as a means of dissolution of marriage. The Catholic Church was against this measure, because it undermines the purpose of a family, namely to procreate and continue the human species, „divorce being considered contrary to the law of nature, morality and divinity” (”Indissoluble Marriage”, 2003). If from a legal point of view marriage is an act to which the law binds several legal and social consequences, from a social point of view, marriage is more than a contract, and from the perspective of religion, it is a divine act of indissoluble communion.

The Netherlands is one of the European countries with well-defined liberal concepts, which has caused controversy by legalizing some aspects of social life, which in other countries are considered contrary to morality and religion. The Dutch Civil Code does not enshrine a definition of family or marriage, but states that a marriage can be concluded between two people of the same or different sex. The law recognizes civil marriages, it makes no reference to the celebration of a religious ritual. The code also stipulates that spouses owe each other fidelity, mutual support and help in everything they need. In the Netherlands, civil partnership is recognized (Civil Code of the Netherlands, 1992). Marriage is an institution protected in each country by its own traditions and laws. Some of them are more conservative, others more liberal, some have adapted to the great changes that have occurred over the years in society, others have isolated their conceptions and have not allowed foreign ideas to enter their social environment. The family is like an island in an ocean, it allows to be visited, but it is very rigid in terms of outside interference of factors that could destroy the well-being and aura within it.

3. The law applicable to the general effects of marriage

The conflict of laws represents that legal configuration in which several laws of different states are involved, in relation to the element of foreignness present in the legal conflict. The source of this conflict is the element of extraneousness, which can relate to any element of the legal relationship. „In the specialized literature it has been shown that the expression conflict of laws is a metaphor. It expresses the doubt that may exist in the mind of the interpreter or the purely psychological struggle between the reasons that militate in favor of the application of one of the laws" (Macovei, 2017). The judge is the one who will have the task of establishing and applying the law that is consistent with the issues in the legal report deduced from the judgment.

Regarding the general effects of marriage, the Civil Code provides in art. 2,589 that they are subject to several laws. According to legal doctrine they are applied successively or in cascade. First, priority is given to the law of the common habitual residence of the spouses, if it does not exist, then the law of the state of which both spouses have citizenship will apply, in the situation where they have separate citizenships, the law of the state on the territory of which will be applied the marriage was concluded. The order of application of the law must be respected, it does not represent alternative options that the judge or the parties could choose. According to paragraph 2 of the same article, it states that the law applies both to the personal and patrimonial effects of marriage. Spouses cannot derogate from this norm, being an imperative one, regardless of the matrimonial regime chosen by them. The Civil Code provides an exception that transcends these rules, the law of the location of the family home of the spouses will be applied regarding the rights of the spouses over it, as well as the regime of the legal acts concluded on this home (Florea, 2017).

Romanian law establishes that the first applicable law will be the law of the common residence of the spouses. The legislator does not define the notion of „joint residence of the spouses", but in conjunction with art. 2570, the common residence of the spouses will be considered the main residence of the spouses. The same law will still be applicable even if there has been a change of residence of one of the spouses. In the event that during the marriage one of the spouses takes up residence in another state, the law applicable to the effects of the marriage will continue to be governed by the law of the state in which they previously had common residence. The mobile conflict of laws will be resolved by the application of the old law and not that of the state where one of the spouses subsequently settled. Importance

is given to the notion of „joint residence", as one of the spouses' personal duties is to live together.

The law of common citizenship of spouses will apply if the spouses do not have a common residence, it applies subsidiarily and not alternatively. According to art. 2.569 Civil Code, the determination and proof of citizenship is made in accordance with the law of the state whose citizenship is invoked. Citizenship being a mobile connecting element that attracts the interference of the applicability of several laws, the situation may arise in which one of the spouses changes their citizenship. Thus, one of the spouses can be a citizen of Romania and the other can later become a French citizen, in this situation, according to art. 2.596 Civil Code, the law applicable to the effects of the marriage will continue to be governed by the old law, i.e. the common law of the spouses prior to the acquisition by one of the spouses of the citizenship of another state, respectively, the law of the Romanian state. The same solution will also be applied in the situation where one of the spouses, since the conclusion of the marriage, has dual citizenship, for example Romanian and French, and the other spouse is only Romanian.

If the spouses do not have a common residence, do not have a common citizenship, the law of the state in whose territory the marriage was celebrated will apply to the general effects of the marriage. In this situation, a mobile conflict of laws cannot intervene, since the place of marriage celebration is a fixed one.

The Civil Code provides an exception to the aforementioned rules, according to art. 2.589 para. (3) the rights of the spouses over the home and legal acts regarding it are governed by the law of the place where the family home is located. According to Cosmin Dariescu (2018) „there is a legislative gap, because the legislator neither defines the notion of family residence nor exemplifies what are the legal acts and rights that can be exercised and fulfilled regarding this residence". To identify what these legal acts are, we must corroborate art. 2,589 with art. 322 of the Civil Code, the husband cannot dispose of the rights to the family home even if he is the exclusive owner, without the consent of the other spouse. He cannot dispose of the goods that decorate the home, he cannot conclude legal acts that would affect the use of the home without the consent of the other spouse, these rules give legal meaning to the principle provided for in art. 308 Civil Code, the spouses decide by mutual agreement in all matters concerning the marriage.

„Personal relations between spouses refer to decision-making by spouses" (Aniței, 2016), the obligation of mutual moral support, respect and fidelity; name change after marriage. The patrimonial relations that take

shape after the conclusion of the marriage are regulated by the rules of the Civil Code and concern the equality between spouses, the exercise of parental authority and the devolution of succession. Within the European Union, regarding the effects of marriage, the legislative norms provided for by European law will be applied, with priority over national regulations. In the case of legal relations under private international law with states that do not belong to the European Union, the international treaties to which Romania is a party will apply.

4. Conclusions

Marriage produces important effects in the patrimonial and personal relationship between the spouses. That is why it is very important that all the actions taken are well thought out and the consequences in the future. Perhaps the most important legal effect that spouses feel and practice relates to the patrimonial relations established after marriage. The decisions made by future spouses must be balanced.

Marriage requires concerted work by spouses, dedication and passion from both parties. An act should not change in any way either the attitude or the behavior of the spouses. That's why when concluding a prenuptial agreement, future spouses must carefully analyze each clause, going beyond the trust and love they have towards the other party. Such decisions accompany and affect the life of each party for life, regardless of whether they will live together for life or at some point that relationship will stop. It is precisely at the time of divorce that the parties realize how much a right decision at the right time is worth.

The rules of private international law have a noble purpose of harmonizing legislation, of creating the necessary levers so that people can enjoy the freedoms offered without encountering legal problems. Private international law represents the middle ground of any private issue between states. Common-law marriage is a mechanism that brings into operation the law or even the legal systems of at least two states.

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