

COMPARATIVE ASPECTS REGARDING THE REGIME OF PARTICIPATION IN ACQUISITIONS AND THE REGIME OF SEPARATION OF GOODS

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Abstract: *From the current perspective of harmonizing European provisions on family law, both the conventional community and the separation of goods community are equally capable of achieving the present objectives of matrimonial law. However, the contemporary notion of marriage no longer describes marriage as a traditional relation between the male provider of the family and a female partner, but as a modern union, with an equal division of work inside and outside marriage. This difference between the old and new concept of marriage and between marriage and matrimonial relations inside or outside of marriage require further discussion of the regulation of matrimonial regimes in Europe at present.*

Key words: *patrimonial relations, matrimonial regimes, the regime of participating in acquisitions, European law system, the spouses' community of goods regime.*

1. Introduction

The regime of separation of goods was stated by the old Romanian Civil Code as a common law regime; its enforcement was extensive due to the fact that not many couples had matrimonial conventions which entailed paying prohibitive fiscal taxes. The communist era was an obstacle in emancipating the individual's freedom of opinion; it was believed that the state was the only one who knew what was best for the individuals from the society it represented, thus equalizing its citizens and abruptly eliminating any possibility to support the freedom of speech in the matter of family relations, which were regulated in a unified and predictable manner.

The regime of separation of goods represents the antonym of community regimes. As opposed to other matrimonial regimes, the regime of separation of goods achieves a complete separation of the spouses' interests, by providing patrimonial independence [2].

The profoundly individualistic character of the regime of separation of goods has determined the French author R. Savatier to state, in a rather shocking opinion, that separation of goods is less of a regime than the absence of a matrimonial regime, an opinion which was argued by the entire French doctrine.

The patrimonial relations which arise between the two spouses, who are under the regime of separation of goods, thus

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maintaining the individualist spirit of this regime, will be completely different than the ones which arise between people who have no definite connection, as these patrimonial relations become marital ones [1].

2. The regime of separation of goods

Within the regime of separation of goods, each spouse maintains the independent administration and exclusive property over his/her goods, being able to administer the goods as s/he sees fit at any moment.

This type of regime, configured by article 360-354 of the new Civil Code is inspired by the matrimonial convention concluded before marriage [article 330 alignment (2) of the new Civil Code] or during marriage (article 369 of the new Civil Code or by the court decision pronounced on request of one of the spouses when the other spouse concludes an act which seriously endangers the patrimonial interests of the family; in this case, the regime of separation of goods replaces the regime of legal or conventional community [article 370 alignment (1) of the new Civil Code] [3].

The matrimonial regime of separation of goods is a typical separation regime which provided the spouses with patrimonial independence, limited only by the provisions of the primary regime [7].

While choosing a matrimonial regime which accommodates their life style, the spouses can consider a series of advantages and disadvantages which accompany each regime; we must mention that these advantages or disadvantages can't be equal, as they are personalized for each marriage; this is why the spouses will choose which matrimonial regime suits their marriage [11].

In regard to the main advantage, it is represented by the existence of minimum solidarity in regard to the obligations of

each spouse to cover the daily marriage expenses and those made in order to raise and educate children.

The main disadvantage is clear when one spouse did not work or had a smaller income, as its main preoccupation was that of raising children. The Civil Code tried to bring some equilibrium in this matter by regulating household work as a contribution to the expenses of marriage [7].

The functioning of this regime is not regulated, the only provision being that of article 363 regarding the use of the other spouse's goods, but even in this matter there are no special regulations, only provisions regarding life interest

Article 360 alignment 2 of the Civil Code regulates a fourth matrimonial regime - participation in acquisitions, a regime which at first sight seems to refer to the liquidation of the regime of separation of goods, but is eventually significantly different. In this case, a few notions are presented: net worth of acquisitions, the participation claim [3].

The net acquisition worth is formed of all the goods acquired by each spouse during the matrimonial regime (including individually owned goods and co owned goods); the debt representing marriage expenses and expenses made for raising children are deduced as well as the expenses made in regard to the goods which form the goods' worth (paying the price, taxes and so on).

The participation claim represents the part between the two net worth acquisitions. By matrimonial convention, the parties can state clauses regarding the liquidation of the matrimonial regime, by considering the goods acquired by each spouse during marriage, thus calculating the participation claim. If the parties did not agree otherwise, the participation claim is half of the value difference between the two net worth acquisitions and will be owed by the spouse whose net acquisition

worth is larger, thus being paid in money or equivalent.

- The regime shows all characteristics of the regime of separation of goods, but it adds special liquidation rules;

- The notion of acquired goods is determined by comparing the initial patrimony with the final patrimony of each spouse;

- Proof of acquired goods is done according to the provisions of article 361 of the new Civil Code for movable goods and article 362 of the new Civil Code for immovable goods;

- Separation of goods regards both debts and claims

- unlike French law, there are no limits to the right to administer the goods acquired during this regime, other than those based on article 316 of the new Civil Code - acts which seriously endanger the interests of the family. The spouse who might have the right to the other spouse' participation claim when liquidating the regime is not protected against a fraudulent or selfish administration of goods by the other spouse who, based on the regime of separation of goods, has full freedom to administer his own goods, except for the rules regarding the family's residence.

In regard to liquidation, the separation regime is similar to that of a business venture, as liquidation is achieved the same way, by paying social debts, by returning any input and by sharing any excess resulting from liquidation (articles 1945-1946 of the Civil Code).

Article 361 of the Civil Code regulates the obligation of drawing up an inventory of goods with the purpose of proving the quality of one's own goods, of the commonly used goods and to simplify the liquidation of the regime, because in case there is no inventory, the movable goods would be difficult to separate. This inventory can be drawn up even for movable goods which are acquired during

the regime of separation of goods, a provision which is rather difficult to achieve in practice.

The regime of separation of goods can be assumed by spouses by matrimonial convention, but it can also be the consequence of a court's decision pronounced on request of one of the spouses because the other spouse had concluded acts which endanger the patrimonial interests of the family [article 370 alignment (1) of the new Civil Code]; in this particular situation, the regime of separation replaces a community regime, be it conventional or legal, as a reaction towards protecting the patrimonial interests of each spouse from the reckless actions of one of the spouses. Even if both spouses agreed on this regime, before or during marriage, the reason for this choice might not be petty but they might aim to protect the patrimonial interests of one of the spouses from the financial risks involved by the professional activity of the other spouse, the succession interests of the children coming from a previous marriage [2].

A good is commonly owned in shares if both spouses participate in acquiring it. The shares are presumed to be equal, until proven otherwise which, according to article 634 alignment 2 of the Civil Code, can only be achieved by written proof, if the good was acquired by judicial act.

Any acquired good is the exclusive property of the spouse in whose name it was acquired, even if the price was paid by the other spouse. In this situation, the owner spouse will owe the value of the good to the spouse who paid for it or to the heirs of the spouse who made the payment for that good. The spouse who lent the necessary amount of money to acquire that good will only have the quality of creditor for the money s/he lent.

The principle of separation, the mere essence of the examined regime, brings upon a dissolution of the pecuniary

interests of the spouses which is manifested on both patrimonial claims and debts. But since the holders of these claims are the spouses, there are a series of difficulties which arise when attempting to prove property of goods.[6]

If the spouses are married and their matrimonial regime is that of separation of goods, within the patrimony of each spouse there are no common goods which is a specific feature of community regimes: any good acquired by one of the spouses enters that spouse's patrimony, as the date of acquiring (be it previous or subsequent to the conclusion of marriage) or the cost of the good are completely irrelevant in regard to determining the judicial nature of that particular good.

With some exceptions, the patrimonial relations between spouses who are in a regime of separation of goods take place similarly to those of unmarried people, as the provisions of common law usually apply (the rules regarding accession, mandate and unjust enrichment) [2].

The separation of the spouses' patrimony is not absolute as they can frequently have a community attitude, by acquiring common goods, opening joint accounts, concluding legal acts which are contrary to the spirit of this matrimonial regime. The good's joint property can be imposed on the married couple by a legal act, such as donation, as the will of the person who made the donation was to pass on the good to both spouses. In these situations, the common law rules regarding joint property are applied, namely article 362 alignment 1 of the new Civil Code "The goods acquired by both spouses belong to both of them equally, as stated by law".

In order to prove joint property, an inventory can be used, as it was drawn up for the common goods acquired during the separation of goods regime [10].

According to the provisions of article 364 alignment 1 "Neither of the spouses

can be held accountable by obligations which arise from acts concluded by the other spouse".

Thus, the debts each spouse has at the time of concluding the marriage are still the personal debts of each spouse (regardless of whether they arise from contracts or offenses) and will be governed by common law.

The principle of independence in regard to the passive side has several exceptions [2]:

- The spouses are jointly liable for household debts, under the conditions of article 220 of the French Civil Code;
- The spouses must contribute to the expenses of marriage according to the provisions of the marriage contract and, when unable to do so, they must contribute according to their available means;
- The spouses can decide to be jointly responsible for certain obligations; however, joint responsibility must be proven;
- A spouse is held accountable for the debts made by the other spouse if the latter provided the spouse with a mandate to administer his goods, be it tacit or express;
- As the spouses are not allowed to create a company, their joint responsibility can be engaged in case the company they founded is that type of company where the associates are jointly responsible for the company's debts.

In case one of the spouses uses the goods of the other spouse without resistance from the latter, the first spouse has the obligations of a person benefiting from life interest. As a result, the spouse who uses a good that doesn't belong to him must respect the destination of that good, must compensate the other spouse for any prejudice caused by the wrongful use of the good, must perform the necessary operations for the good, as the major maintenance costs are in the duty of the owner spouse, must pay any expenses occasioned by using the good, to ensure

the good if necessary or to argue the property of the good.

If one of the spouses concluded a legal act on their own, an act by which s/he acquires a good by using the goods which belong to the other spouse, the spouse whose goods or money was used can choose to claim property of that good or to claim interest from the spouse who acquired it.[3] In order not to affect the security of the civil circuit and the rights of the good faith third parties, it is stated that property can't be claimed, if this is the choice of the spouse whose goods were used without right, but only before the acquiring spouse administers the good. In order to protect good faith third parties, the spouse can only claim interest from the other spouse.

3. The Regime of Participating in Acquisitions

Legal ground – article 360 alignment 2 of the new Civil Code

Participating in acquisitions is a separate regime, with its own rules which built a specific architecture in the matter of matrimonial regimes. Participation in acquisitions owes its originality to the fact that it is situated half way between the community regime and the regime of separation of goods, wanting to ensure greater independence as well as the possibility to participate in any marital efforts which are separate but which do not affect parental rights and obligations regarding their minor children .

The causes of the obligation report which arises between spouses regarding participation in acquisitions is the enrichment of one of the spouses as opposed to the other; the goods acquired by donation or inheritance under the rules of article 340 of the new Civil Code can't be subject to liquidation as they are the personal goods of the spouse who acquired

them, thus having an *intuitu personae* character. In order to prove the original patrimony, the provisions of article 361 of the new Civil Code apply as well as those of article 362, alignment 2 of the new Civil Code. By net acquisitions, the French doctrine means the value of the enrichment of the spouse by work and savings and not the value of global enrichment.

There are no rules for evaluating the good, as the acquired ones are just a value, expressed in money, and not a patrimony. The original patrimony and the final patrimony must be evaluated, especially if original goods were sold or new goods were added to the original ones.

The goods which were sold, unless they were replaced, must be listed in the initial patrimony with the value they had at the time when they were sold. If they were replaced, there are two hypotheses: if the new good was financed entirely by the old good, then the value of the old good must be listed in the initial patrimony; if the original good only partly financed the new good, then the original patrimony will only list that part of the replaced good which corresponds to the financing [1].

A paid contract or a payment made in executing such a contract can be declared as non opposable to third parties only when the contracting third party or the person who received the payment knows the fact that the debtor is creating or increasing his state of insolvency [9].

The debt must be certain at the time the legal complaint is filed. If the law does not state otherwise, the statute of limitation for this right is a year from the date the creditor knew or should have known the prejudice which resulted from the contested act.

This act will be declared non opposable to the creditor who filed the complaint and to all other creditors who might have filed the complaint but intervened in this cause. They will have the right to be paid from

the price of the good, by respecting the preference clause.

If a prejudice is proven, the creditor can demand that the legal acts concluded by the debtor by defrauding his rights, be declared non opposable to him. This is the case of acts by which the debtor creates or increases his insolvency [10].

The third party who acquires the good by paying the creditor an amount of money equal to the prejudice suffered by the conclusion of the act can keep that certain good. If not, the court's decision to grant the complaint results in sequestering the good until the good is capitalized on; the provisions regarding publicity and the effects of the not selling clause are applied accordingly.

The procedure by which the regime of acquisition of goods is liquidated has several stages:

- The original passive is deduced from the active. If the original passive is larger than the active, than the net active is considered to be zero.

- The final active comprises all the goods, including the original ones which are left in the patrimony of the spouse and which would have been their own goods.

- The moment when the participation claim arises is the time when the matrimonial regime ends; in case of divorce, the matrimonial regime ends at the time the divorce was filed, according to article 385 alignment 1 of the new Civil Code; based on article 2, any of the spouses can ask the court to acknowledge that the matrimonial regime ended at the time the spouses were separated. In case the matrimonial regime ends by the death of one of the spouses, the right to participation claim arises at the time of death. French law does not contain any specific provision, but it is quite obvious that the right of the deceased spouse to participate in the acquisitions made by the

other spouse is passed on the heirs of the dead spouse.

- The legal action for liquidating the participation claim has a three year statute of limitation, calculated from the date the regime ended, based on article 2517 of the new Civil Code, corroborated with article 2502 of the new Civil Code.

- The spouses can establish other rules for liquidating their regime and calculating the participation claim. There is no express provision which limits the spouses' right to state different rules in this matter; the only limits are those which come from respecting the primary regime or other imperative rules. French practice uses clauses of exclusion of professional goods or liquidating the participation claim in case of divorce or death, as well as clauses for diminishing the original patrimony.

Our legal system did not embrace a certain regime, however the regime of participating in acquisitions is strongly regulated and we can notice its use in practice.

Thus, we present the appearance of the regime of participating in acquisitions with its own characteristics from a legal system in which it is highly regarded and used. This regime is specific to northern countries and German traditional countries. We will present the characteristics of this regime in order to better understand its practical enforcement.

The community of acquisitions (the regime of participating in acquisitions) is that legally established matrimonial regime regulated by German law [4].

In essence, it corresponds to the regime of separation of goods. Neither the goods of the wife, nor those of the husband become common goods of the spouses [article 1363 alignment (2) BGB (German Civil Code)]. The same rule is applied to the goods one of the spouses acquires after celebrating the marriage. Given all these, any increase of the patrimony of the

spouses which occurs after marriage will be divided equally when the matrimonial regime ends, especially as a result of divorce or death of one of the spouses. Generally, the spouses are not subject to any restrictions regarding the selling of the goods and will not be liable for the debts of the other spouse. However, there is a relative assumption in favor of the creditors according to which some of the goods belong to one of the spouses. This is pertinent especially in regard to enforced execution.

The spouses are not obliged to draw up an inventory of the goods. However, such an inventory drawn up at the beginning of the marriage (the initial goods) makes the proving of the contribution to the goods acquired during marriage much easier (see point 5.3.). If there is no inventory of initial goods, there will be a relative assumption that a spouse's final goods form his participation claim [article 1377 alignment (3) BGB] [4], [5].

Generally, the spouses can administer their own goods freely during marriage, provided there is no agreement stating otherwise. However, the principles of the freedom to administer one's own goods are limited as follows:

- The spouse can't entirely administer his/her own goods without consent from the other spouse.

According to jurisprudence, a good which represents 80% of the common goods of the spouse who administers it, can be considered „the wholeness of goods” (article 1365 BGB). In practice, these conditions are often seen in case of immovable goods.

- One spouse can administer goods from the household (which s/he exclusively owns) only with consent from the other spouse (article 1369 BGB). „The matrimonial residence” is not a household good. However, the provisions of article 1365 BGB are rarely seen in practice.

Generally, the obligations contracted by one of the spouses are mandatory just for that spouse. However, if one of the spouses has consent to engage in contract in order to satisfy the daily needs of the family, the obligations which come from these commitments will be mandatory for the other spouse as well [article 1357 alignment (1) BGB].

In the German law system, by concluding a matrimonial convention, the spouses cannot only opt for one of the alternative matrimonial conventions, but they can also modify the individual provisions of their matrimonial regime [article 1408 alignment (1) BGB]. Furthermore, the spouses can choose which law to apply to their matrimonial convention [4].

As an exception from the pre-established regime of participating in acquisitions, the spouses can choose to separate the goods (article 1414 BGB), they can opt for the full community of goods (article 1415 and following BGB) and for the optional French-German regime of participating in acquisitions.

By choosing the separation of goods, the spouses will revoke the legal matrimonial regime. Within this conventional form of matrimonial regime, the accumulated earnings will not be equalized [8].

Contract freedom is limited to the principle of good faith. Thus, a matrimonial convention must respect the basic rules of public policy, but it must also respect stricter demands, which rule out unilateral discrimination by one of the spouses at the time the contract is concluded and while it is being executed.

The regime of participating in acquisitions is similar to that of separation of goods, as the main idea is that of separately administering the goods; when the regime ends, there is a certain turn in the situation and the principles which

govern the liquidation of community regimes are used.

4. Conclusion

As a conclusion, we can state that the regime of separation of goods goes one step further from the individualist spirit; in a superficial analysis, we would be tempted to believe that it provides the spouses with the possibility to organize their patrimonial relations as they see fit, as long as their patrimonies are separate, without ruling out the normal relations of a common household.

However, we must mention that although the Romanian lawmaker wished to liberalize this matter by inserting in the new Civil Code the possibility to choose the matrimonial regime, the people were not very receptive to these changes.

Since the new Civil Code came into force, only about 500 matrimonial conventions that opted for this regime were concluded.

From the practical analysis, we can see that the people who own or acquire a certain fortune which they wish to protect from selfish or extravagant tendencies from the other spouse, choose to conclude such a convention.

When both spouses agree upon such a convention, the traditional spirit of family is no longer a topic of discussion, as each spouse is free to live according to their own conscience.

References

1. Anîţei, N.C.: *Matrimonial regimes according to the New Civil Code*. Bucharest. Hamangiu Publishing House, 2012.
2. Avram, M., Nicolescu, C.: *Matrimonial regimes*. Bucharest. Hamangiu Publishing House, 2010.
3. Bacaci, A., Dumitrache, V., et al.: *Family law in the regulation of the New Civil Code*, 7th edition. Bucharest. CH Beck Publishing House, 2012.
4. Boele-Woelki, K.: *Stichting der Bevordering der Notariële Wetenschap*. In: The Series Ars Notariatus C111 Amsterdam, 2000.
5. Bonomi A., Steiner M., et al.: *Les régimes matrimoniaux en droit comparé et en droit international privé*. Paris. Librairie Droz, 2006.
6. Crăciunescu, C., Lupaşcu, D.: *Family law (Dreptul familiei)*. Bucharest. Universul Juridic Publishing House, 2011.
7. Hageanu, C.: *The regime of separation of property in regulation of the New Civil Code*. In Acta Universitatis Lucian Blaga, nr. 1/2011 Sibiu.
8. Martiny, D., Dethloff, N.: *Germany - Report concerning the CEFL Questionnaire on property relations between spouses, august 2008*. Available at: www.ceflonline.net.
9. Nicolae, I.: *Family law in national and international private law relations*. Bucharest. Hamangiu Publishing House, 2014.
10. Nicolae, I.: *Familii law Institution*. Bucharest. Hamangiu Publishing House, 2009.
11. Nicolae, I.: *Matrimonial convention*. In: *Agora International Journal of Juridical Science* nr.3/2014, p.23-30.
12. Nicolae, I.: *Matrimonial property regimes in the draft of the new Civil Code*. In: *Economica Magazine* no 2(45)2009, ISSN 1582-6260, p.111-119.
13. Nicolae, I.: *Parental rights and obligations of personal nature*, Bulletin of the *Transilvania* University of Brasov (2008), Vol.1 (50), Series VII, p.415-418.