MATRIMONIAL PROPERTY REGIME OF SPOUSES

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Abstract

By matrimonial property regime, we understand the set of legal rules that, on the one hand, regulate property relations between spouses and, on the other hand, property relations between spouses and third parties. The matrimonial property regime represents the set of legal rules governing the relations between spouses concerning the property acquired by each of them during the marriage, as well as the relations established between them and third parties, including the assumption of obligations related to the property acquired during the marriage.
The purpose of this paper is to analyse the legal framework of the matrimonial property regime, focusing on the distinction between the spouses' joint property and separate property, the manner in which such property is administered, and the procedures for dividing property in the event of the termination of the marital relationship. The paper examines the fundamental legal principles governing the property rights and obligations of spouses, the significance of each spouse's contribution to the acquisition and preservation of family property, and the role of legislation in protecting the proprietary interests of both parties. Particular attention is devoted to the statutory regulation of the matrimonial property regime in the Republic of North Macedonia, through an analysis of the relevant provisions of the Family Law and their application in practice.
Through legal analysis and an examination of practical issues, the paper seeks to highlight the importance of legal certainty, equality between spouses, and the need for an equitable regulation of property relations within marriage. In conclusion, the paper aims to contribute to a deeper understanding of the nature and function of the matrimonial property regime, as well as its importance for the protection of the rights and interests of spouses.

Keywords: matrimonial property regime, spouses, joint property, separate property, family law, division of property.

Introduction

Marriage constitutes one of the fundamental institutions of family law, giving rise to a range of personal and proprietary rights and obligations between spouses. In addition to personal and family relations, the marital bond directly affects the economic relations of spouses, particularly the manner in which property is acquired, administered, used, and divided. Within this framework, the matrimonial property regime represents an important legal institution through which the proprietary rights of spouses are determined and their property relations during the marriage and following its termination are regulated.
The importance of the matrimonial property regime lies in the clear determination of property belonging jointly to the spouses and property that remains the individual property of each of them. This distinction is of particular significance not only during the spouses' common marital life but also in cases in which disputes arise concerning the ownership, administration, or division of property, especially in divorce proceedings.
In the Republic of North Macedonia, property relations between spouses are governed by the relevant provisions of family-law legislation. This legal framework establishes the principles and rules applicable to joint property and separate property, the manner of administration of and disposition over property, as well as the conditions and procedures for its division. The application of these provisions is of particular importance for the resolution of specific issues arising in legal practice and for the prevention of property disputes between spouses.
The purpose of this paper is to examine and analyse, in a structured manner, the concept, characteristics, and legal basis of the spouses' matrimonial property regime, with a focus on the distinction between joint property and separate property, the rights and obligations of spouses in the administration of property, and the means of its division in the event of the termination of marriage. The paper also seeks to assess the importance of the legal regulation

of these relations in ensuring legal equality and protecting the proprietary interests of spouses. In pursuit of this objective, the paper employs the legal-analytical method through an examination of the relevant statutory provisions and their interpretation in relation to issues concerning the matrimonial property regime. This approach seeks to provide a clearer overview of the functioning of this legal institution and of its significance for the regulation of property relations within the family.

Property Regime

1.1.The Matrimonial Property Regime of Spouses

The proprietary relations of spouses are, in other words, their proprietary rights and obligations, often also referred to as the spouses' regime.[1] A matrimonial property regime is understood as the body of legal rules governing, on the one hand, proprietary relations between spouses and, on the other, the proprietary relations of spouses with third parties.[2]
Various property regimes operate within marital relations during marriage.[3] In the legal systems of Western countries, matrimonial property is generally divided into two types:

- In countries where each spouse's marital property is held separately, except for items that cannot technically be divided; and; and
- In countries where marital property is held jointly, except in cases where the spouses have agreed to keep their property separate.[4]

The separate-property regime is found in the common-law system and has operated as the prevailing model in most Anglo-American jurisdictions, whereas the joint-property system exists in many Western European states and in certain American states.[5]
Likewise, certain legal systems recognise prenuptial and marital agreements concerning the joint-property regime. Under such a regime, spouses may determine by contract how their property regime is to be regulated during the marriage.[6] In the absence of a specific agreement by which the spouses provide for the regime they wish to adopt, the matrimonial property regime of spouses is governed by law; such agreement must not contravene the provisions of this Code or the relevant legislation.[7]
The community comprises:

a) property acquired by both spouses, jointly or separately, during the marriage;

b) income derived from the separate activity of each spouse during the marriage, insofar as it has not been consumed by the termination of co-ownership;

c) fruits of the property of each spouse which have been received and have not been consumed by the termination of co-ownership;

d) a commercial undertaking established during the marriage.[8]

[1] Abdulla Aliu & Haxhi Gashi, E drejta familjare [Family Law], Prishtinë, 2022, p. 160.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid., op. cit.
[6] Ibid.
[7] Family Code of the Republic of Albania, Arts. 66–72. Spouses may not derogate from the rights and obligations arising from their marriage, or from parental responsibility and the rules governing legal administration and guardianship. Either spouse may authorise the other spouse to represent him or her during the matrimonial property regime, in accordance with the provisions of the Civil Code. The power of representation may be revoked at any time. In the interest of the family, the spouses may agree to amend, in whole or in part, the matrimonial property regime only after two years have elapsed since its implementation. In such a case, the amendments must be made in the same form required for the initial marriage contract. An amendment to the matrimonial property regime takes effect vis-à-vis third parties three months after the amendment has been deposited in the register in which the marriage certificate is recorded. In the absence of such registration, the amendment may not be invoked against third parties, unless, in the instruments concluded between them, the spouses have declared that they have amended the matrimonial property regime.
[8] Ibid.

According to Omari, the matrimonial property regime constitutes the body of legal rules governing relations between spouses in respect of property acquired by each of them individually or by both jointly during the marriage, as well as the relations established between them and third parties as a consequence of assuming obligations connected with the property accumulated during the marriage.[9]

Marriage, as one of the most important branches of family law, pursues numerous purposes that must be fulfilled for it to be regarded as genuine. Among other things, spouses create ownership rights and certain assets through their joint or separate work. The matrimonial property regime comprises the body of legal rules governing relations between spouses about property acquired by each of them during the marriage, as well as the relations established between them and third parties and the assumption of obligations relating to property created during the marriage.[10] Spouses acquire joint ownership of immovable property through registration in the public land registers (iustus titulus). The right of joint ownership in immovable property is registered in the public registers in the names of both spouses as joint property in undivided shares. Based on a contract with the other spouse, one spouse may be authorised independently to administer and dispose of the joint property. Based on such authorisation, particularly in rural areas, it is generally the husband who is registered in the public registers as the principal owner of the immovable property. Despite the foregoing, the legal presumption applies that the registration has been effected in the names of both spouses.[11]

In legal systems which, in addition to the statutory matrimonial property regime, also recognise a contractual regime (France, Austria, Germany, Switzerland, Belgium, the Netherlands, Sweden, Norway, Denmark, Spain, Portugal, Albania, Croatia, etc.),[12] spouses may depart from the statutory matrimonial property regime and opt for a contractual regime. For example, Austrian spouses may derogate from the statutory regime, which provides for a separate-property regime (Gütertrennung), and elect the contractual joint-property regime (Gütergemeinschaft).

The possibility of regulating the proprietary relations of spouses by contract may be realised in legal systems that expressly provide for a contractual matrimonial property regime (Austria, Germany, Switzerland, France, Croatia, etc.). In the legal system of the Republic of Macedonia, spouses do not have this possibility. In regulating their proprietary relations, they are bound to apply the statutory matrimonial property regime set out in Articles 66–80 of the Law on Ownership and Other Real Rights (2001).[13]

1. Characteristics of the Matrimonial Property Regime

The statutory community of property regime ensures the equal division between the spouses of the increase in the value of their property accrued during the marriage as a result of their cooperation and contribution, attributing equal value to both material contributions and contributions in kind.[14]

A characteristic of matrimonial property regimes in judicial practice is that women are those who initiate judicial proceedings for the partition of property and that disputes between the spouses constitute the principal factor prompting them to seek the division of property following the dissolution of the marriage.

In the event of a dispute between the spouses, the court has jurisdiction over the division and valuation of the property (its increase or growth). In assessing each spouse's contribution to

[9] Sonila Omari, E drejta familjare [Family Law], Tiranë, 2012, p. 84.
[10] Pasuria e Përbashkët dhe Mbajtja Financiare [Joint Property and Financial Maintenance], 2009, p. 28.
[11] Ibid.
[12] Emine Zendeli, doctoral dissertation, p. 20, South East European University, Tetovë.
[13] Ibid.
[14] Trabucchi, Istituzioni di diritto civile, p. 303.

the property, several criteria are taken into account, including personal income, care of the children, and the like.

According to the European Court of Justice, the matrimonial property regime encompasses not only the property regime stricto sensu, within the meaning attributed to it by the legislation of the Member States, but also all proprietary relations between spouses arising from the marriage or its dissolution (including interim and final decisions/measures regulating the spouses' proprietary relations following the dissolution of the marriage).

Prospective spouses may decide, even before entering into marriage, through a prenuptial agreement, which regime they will choose to govern their property during the marriage.[15] If they choose the statutory community of property regime, no prior action is necessary, since that regime is presumed to apply whenever no other regime has been selected by contract.[16]

For a regime chosen and established in accordance with the legal requirements to produce legal effects, it must be accompanied by the conclusion of a legally valid marriage.[17] If the marriage is not concluded for various reasons, what has previously been agreed in relation to the regime produces no legal effects; the same applies where a regime is altered before the marriage is concluded.[18]

Any regime selected, whether by contract or by law, acquires legal force from the moment the marriage is concluded. Thus, the intention concerning the matrimonial property regime may be expressed before the conclusion of the marriage, but it produces effects only if the relevant condition—namely, the conclusion of the marriage in the particular case—is fulfilled.[19]

The statutory community of property regime is terminated in the following cases:[20]

- the death of one of the spouses;
- the declaration of one spouse as missing or deceased;
- the declaration of the marriage as void. In this context, it should be borne in mind that, in cases of marriage nullity—with the exception of a marriage contracted in good faith or a putative marriage, the effects of which are almost equivalent to those of the dissolution of marriage—a void marriage has no retroactive effects, thereby also excluding the community of property;
- the dissolution of the marriage;
- the partition of property;
- a change in the matrimonial property regime, where such change results in the termination of the community of property. In this case as well, the procedure for the partition of community property applies. Any change to the matrimonial property regime must be effected in accordance with the criteria set out in the Family Code.

3. Sources Governing the Establishment of the Matrimonial Property Regime

In legal scholarship, matrimonial property regimes are classified according to several principal criteria; according to the source of their establishment,[21] matrimonial property regimes are divided into statutory regimes and contractual regimes. Under a statutory regime, the proprietary relations between spouses are governed by the provisions prescribed by law, which apply from the date of the conclusion of the marriage, irrespective of the spouses' intention concerning that regime. Unlike the statutory regime, under a contractual regime, the rules governing property acquired during marriage are determined by a marriage contract, through

[15] Arta Mandro, p. 218.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid., p. 242.
[21] Sonila Omari, E drejta familjare [Family Law], Tiranë, 2012, p. 84.

which the prospective spouses freely choose the matrimonial property regime to which property acquired during the marriage will be subject.[22]

– Another criterion is the structure of the matrimonial property regime; on this basis, regimes are divided into joint and separate property regimes.[23]

From a comparative perspective, for example, Swiss family-law doctrine defines what spouses may contractually stipulate within the framework of a particular matrimonial property system.[24] The options available to spouses depend on the applicable system of property law, and spouses may agree on the following:

– changing the status of property acquired by the spouses during marriage that serves business purposes;

– changing the status of income derived from their property, which is not included in the community property but remains the separate property of the spouses;

– changing the rules governing the division of property;

– the possible exclusion of the sharing of value, whether arising from an increase or a decrease in value;

– waiving claims relating to the common home and the family household.

4. The Matrimonial Property Regime in North Macedonia

The matrimonial property regime constitutes an important area of civil and family law, as it determines the property rights, obligations, and proprietary relations arising between spouses during marriage. In the Republic of North Macedonia, the proprietary relations between spouses are regulated primarily by the Law on Ownership and Other Real Rights, as well as by the relevant provisions of family-law legislation. The Family Code contains historical provisions on this matter; however, Articles 203–218 thereof have been repealed by the Law on Ownership and Other Real Rights.

Under the legislation of North Macedonia, pursuant to Articles 203–212 of the Family Code, the property of spouses is divided into separate property and joint property.

- Separate property (Article 204): property that a spouse owned before the marriage, as well as property acquired by inheritance, legacy, or gift, in accordance with the law.
- Joint property (Article 205): property acquired by the spouses during marriage.
- Administration of joint property (Articles 207–208): spouses administer and dispose of it jointly, unless they have agreed otherwise within the limits prescribed by law.
- Division of property (Articles 211–212): may be effected by agreement or through court proceedings. As a rule, joint property is divided into equal shares; however, the court may award a larger share where it is demonstrated that one spouse's contribution was manifestly and substantially greater.

5. Property Allocated to the Conduct of a Commercial Activity

Commercial activities constitute the object of a company's business, namely, the activities that define the undertaking of a commercial company.[25] A commercial company may have as its object one or more activities that are not prohibited by law. The company's business activity shall be entered in the Commercial Register by recording the code and designation of the activity, as determined by the National Classification of Activities.[26]

[22] Ibid.
[23] Ibid.
[24] Irena Majstorović, Bračni ugovor [Marriage Contract], Zagreb, 2005, p. 89.
[25] Adnan Jashari, Subjektet e së drejtës afariste [Subjects of Commercial Law], Tetovë, 2009, p. 96.
[26] Ibid.

Where the law provides that certain activities may be carried out only based on a consent, a permit, or another act issued by a state authority or another competent body, such activities may be carried out only based on the consent, permit, or other act of that authority.[27]
Where one of the spouses carries out a commercial activity, amendments to the matrimonial agreement relating to that commercial activity must, in all cases, also be filed in the Commercial Register (Article 71 of the Family Code of the Republic of Albania).
Property acquired during the marriage and allocated to the conduct of the commercial activity of one of the spouses, together with the increments arising therefrom, shall constitute joint property only if it exists as such at the time of the termination of the marriage (Article 75 of the Family Code of the Republic of Albania).
If one spouse refuses to give consent to the performance of an act of extraordinary administration or of other acts for which consent is required, the other spouse may apply to the court for authorisation. The court shall grant such authorisation where the performance of the act is necessary in the interests of the family or of the commercial activity forming part of the community property (Article 92 of the Family Code of the Republic of Albania).
With regard to defining the concept of commercial contracts in comparative law, two systems exist:[28]

a) The objective system for determining commercial contracts is recognised in French law. Under this system, certain contracts are regarded as commercial irrespective of the persons who conclude them, provided that, from their inception, they are capable of generating profit through the exchange of goods and the provision of services. The objective approach to determining contracts has also been adopted in the laws of Switzerland, Belgium, and Spain, as well as in many Latin American states.[29]
b) Unlike French law, German law has adopted the subjective system for determining commercial contracts; under this approach, all contracts concluded by traders are regarded as commercial contracts.[30] Where a civil contract is concluded by traders, that contract, although civil by its nature, is transformed into a commercial contract, as is the case, for example, with contracts of lease, work contracts, and so forth. Notwithstanding the differences between these systems, their outcome is essentially identical, since contracts concluded between persons having the status of traders fall within the category of commercial contracts.[31]

As regards a commercial activity that, before the conclusion of the marriage, belonged exclusively to one spouse but is managed during the marriage by both spouses, the profits and increments thereof immediately enter the community property.[32] The commercial activity as such is and remains the separate property of one spouse where it belonged to that spouse before the marriage; however, where it is managed by both spouses, only the profits and increments arising from that commercial activity enter the community property. Accordingly, the profits and increments of a commercial activity managed by the spouses during the marriage become part of the community property and enter it immediately. The forms and meaning of joint management have not been defined.[33] If the activity is not managed by both spouses, it retains its separate character, and the income generated by the commercial activity of one spouse enters the community property only if it remains unconsumed until the termination of the community.[34]

[27] Ibid.
[28] Adnan Jashari, E drejta afariste (kontraktore) [Commercial (Contract) Law], Tetovë, 2016, p. 31.
[29] Ibid., op. cit.
[30] Ibid.
[31] Ibid.
[32] Arta Mandro, E drejta familjare [Family Law], Tiranë, 2009, p. 229.
[33] Ibid.
[34] Ibid.

Conclusion

In conclusion, it may be observed that the spouses' matrimonial property regime constitutes an important institution of family law, intended to regulate proprietary relations between spouses and to protect their property rights and interests. This regime establishes the legal basis for determining joint property and separate property, as well as for the administration, use, and division of property in accordance with statutory provisions.

The analysis of this subject demonstrates that the distinction between joint property and separate property is of fundamental importance in determining the rights of each spouse. Property acquired during the marriage, under the conditions prescribed by law, constitutes joint property, whereas separate property remains the individual property of the relevant spouse. This distinction assists in avoiding legal uncertainty and resolving disputes that may arise during the marriage or following its dissolution.

Furthermore, it is important to emphasise that the matrimonial property regime is not confined to the spouses' financial contributions but also rests upon the principles of equality, cooperation, and mutual responsibility in family life. A fair regulation of proprietary relations should take into account the spouses' contributions to the acquisition and preservation of property, in accordance with the criteria established by the applicable legislation.

In the Republic of North Macedonia, the statutory provisions governing the matrimonial property regime are of particular importance in ensuring legal certainty and protecting the spouses' property rights. The proper application of these provisions is especially important in cases of dissolution of marriage, when the nature of the property must be determined, and its division effected in accordance with the law.

Refernces

[1] Abdulla Aliu& Haxhi Gashi, E drejta familjare, Prishtinë, 2022
[2] Arta Mandro, E drejta familjare, Tiranë, 2009
[3] Sonila Omari, E drejta Familjare, Tiranë, 2012
[4] Adnan Jashari, Subjektet e së drejtës afariste, Tetovë, 2009,
[5] Adnan Jashari, E drejta afariste (kontraktore), Tetovë, 2016
[6] Irena Majstoroviç, Braçni ugovor, Zagreb, 2005
[7] Emine Zendeli, punim doktorature, 2012-UEJL-Tetovë
[8] Kodi i Familjes i Republikës së Shqipërisë,nr.9062, date 8.5.2003