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## **The Rule of Disposal of the Matrimonial Property**

*Legal norms governing relations between spouses are considered to be the acquisition of civilized states from ancient times. Numerous principles and regimes have been developed in the modern legal systems of the world in order to regulate the property relations of spouses. Accordingly, for Georgian family law, as one of the young systems, it is necessary to study the relevant experience of the states with leading jurisdictions through the use of the comparative legal method. Also, the decisions made in the Georgian court practice in this direction requires critical understanding, identification of problems, and development of ways to solve them. The study aims to present and solve the problematic issues of spouses' co-ownership disposition based on the above-mentioned legal sources.*

**Keywords:** *Disposing transaction, Non-Contractual and Contractual Property Regimes, The Nature of Matrimonial Property, Criterion of Covering Family Needs, Conflict of interest between non-alienating spouse and bona fide purchaser, The Regime of Community of Accrued Gains.*

### **1. Introduction**

Family law, in both academic and practical contexts, belongs to exceptionally rapidly evolving subject of study as it reflects the real lives of human beings and does not set abstract rules for the society – this is a trend that was first identified in Henry James Sumner Maine's classic legal text, called “Ancient Law.”<sup>1</sup> This field serves to regulate the legal aspects between the persons who are related to each other by social, political and economic units – households.<sup>2</sup> The idea that was declared in the Age of Enlightenment, according to which each and every person has a dualistic character (he is an individual and at the same time a member of society), also led to the creation of appropriate philosophical foundations for the family law.<sup>3</sup> Despite of the high level of development and rich history, the family law still has the number of problematic issues that are resolved in different ways. For instance, the notion of the family itself, regardless of its fundamental meaning, has often become the subject to various interpretations. As an example, we can provide English law, sources of which, propose different methods and content of the definition of the family concept. 1. Definition of a randomly selected person; 2. Formal definition on which the law must be based; 3. Functional

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<sup>1</sup> *Burton F.*, Family Law, London, 2003, 4.

<sup>2</sup> *Frier B. W., McGinn T. A. J.*, A Casebook on Roman Family Law, Oxford, 2004, 3.

<sup>3</sup> *Muller-Freienfels W.*, Family Law and the Law of Succession in Germany, International and Comparative Law Quarterly, Vol. 16, 1964, 409.

definition; 4. Idealistic definition and 5. Definition on the basis of self-determination.<sup>4</sup> It should be noted that the leading case in the field of definition of the notion of family in English law is *Fitzpatrick vs. Sterling Housing Association Ltd.* In this case, according to the definition of the majority of judges, the notion of a family does not include only the relations between persons who are related to each other by marriage or blood relationship.<sup>5</sup> Also, according to Judge Slinn's legal assessment, family cohabitation between persons generates a high degree of interdependence, devotion, care and support, which is why temporary superficial relationships cannot be considered a family relationship. It is on the basis of this definition that it has become possible to consider a possible long-term actual cohabitation between same-sex persons as a family.<sup>6</sup>

The above-mentioned example of the family notion is a clear illustration how the family legal issues can be interpreted in different perspectives. Another problematic area relates to the property relations between spouses and the regulation of their legal status as co-owners. This area covers a wide range of property rights and obligations of spouses, including the issue of matrimonial property administration/disposal. With regard to the concept of disposal in the Georgian law, first of all, its connection with the principle of causality must be taken into account.<sup>7</sup> The main goal of this thesis is to define the correct definition of the article 1160 of the Civil Code of Georgia on the basis of analysis of national and foreign legal sources, as well as its sphere of activity and importance in family legal relations of spouses.

## **2. Content of the Article 1160 of the Civil Code of Georgia in the Context of Legislative Amendment**

The chapter regulating the property rights and duties of spouses established by law is presented by 14 articles, of which only Article 1160 of the Civil Code of Georgia (herein CCG) has been amended since 1997 (i.e. since the adoption of the Civil Code of Georgia) to the present day. The referred legislative change was approved by the Parliament of Georgia on June 29, 2007, which substantially changed the structural as well as contextual aspects of the Article 1160 of the Civil Code of Georgia. Particularly, before, the article under discussion was presented in two provisions (sentences), but as a result of the legislative change, it was developed into three parts. As for the contextual side of the article 1160, its initial edition defined that the administration of matrimonial

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<sup>4</sup> For detailed information about the methods and content of the definitions of the family notion, see., *Herring J.*, Family Law, Oxford, 2017, 2-4.

<sup>5</sup> *Fitzpatrick vs. Sterling Housing Association Ltd*, United Kingdom House of Lords, 1999, <[www.publications.parliament.uk](http://www.publications.parliament.uk)> [11.09.2021].

<sup>6</sup> Note: It is noteworthy that use of this definition for the Georgian law in the context of same-sex family relations, first of all, will contradict the content of the first paragraph of the article 30 of the Constitution of Georgia as well as the concept of marriage defined in the article 1106 of the Civil Code of Georgia.

<sup>7</sup> *Maisuradze D.*, Condictio of Infringement by Disposal in Georgian and German Law, “Georgian-German Journal of Comparative Law”, 8/2020, 12 and the following pages (in Georgian); *Rusiashvili G.*, Principle of Separation in Georgian Law of Property, “Georgian-German Journal of Comparative Law”, 1/2019, 20<sup>th</sup> and the following pages (in Georgian); *Rusiashvili G.*, Cases in the General Part of the Civil Law, Tbilisi, 2015, 257-th and the following pages (in Georgian).

property by spouses shall be provided by mutual agreement of spouses, regardless of the fact, which spouse is administering this property. Besides, any transaction made in relation to the administration of the property by one of the spouses had to be declared null and void at the request of the other spouse only if the property disposing spouse did not have such authority and it could be proved that he knew or should have known he had no such right. First of all, on the basis of the comparative analysis of the initial and current editions, it must be mentioned that the rule of administration of the matrimonial property by mutual agreement of parties has not changed, however, the substantial change applied to the provision related to the possibility of annulment of the claim on disposing transaction by non-disposing spouse concluded without notifying and obtaining the consent of the latter. In particular, according to the initial edition, the subject of legal evaluation was the presence/absence of the authority for the administration of the matrimonial property by the disposing spouse (objective component) and the issues related to knowledge/lack of knowledge (subjective component) of such authority. Respectively, the issue of recognition of the transaction null and void had to be decided from the perspective of the spouse disposing the property. Pursuant to the legislative amendment, these circumstances do not belong to the subject of court evaluation and the attention is moved to the evaluation of the authenticity of the disputable transaction deal from the perspective of the non-disposing spouse. The provision defines the list of only those cases, when the disposing transaction is authentic, regardless of the objection of the non-disposing spouse.<sup>8</sup> However, in this case, the paragraph 2 of the article 1160 of CCG clearly requires additional explanation, because, as of today, unfortunately, Georgian case law is not developed in the right direction in terms of application of this norm. It is also notable that paragraph 3 of the article 1160 of CCG is the additional protective leverage of the non-disposing spouse, who had no such leverage before the legislative change. Respectively, according to the initial edition, if he could request in cases defined by the law, the recognition of the administration transaction null and void and in this way, protect its right as a co-owner to the matrimonial property, with the new legislative change, the interest of the non-disposing spouse in relation to the protection of matrimonial property is foreseen even in case if the recognition of the transaction annulment is inadmissible due to the bona-fide acquirer. This has been achieved by assigning the right to the non-disposing spouse to request the gain received on property administration. The referred edition of the article 1160 of CCG was reflected in the law as a result of the change made on July 29, 2007 and together with this change, paragraphs 3 and 4 of the following content were added to the article 312 identifying the presumption of the veracity and completeness of the Register entries.<sup>9</sup> It is noteworthy that Georgian legal doctrine offers substantially similar interpretations of the article 1160 of CCG, however, these interpretations require further specification and improvement.<sup>10</sup>

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<sup>8</sup> *Rusiashvili G.*, Property Relations of Spouses, “Georgian-German Journal of Comparative Law”, № 10, 2020, 12 (in Georgian).

<sup>9</sup> Decision № 2B/211-12 of 29 March 2012 of Chamber for Civil Cases of Tbilisi Court of Appeal.

<sup>10</sup> *Shengelia R., Shengelia E.*, Family Law, Tbilisi, 2011, 158-159 (in Georgian); *Ninua E.*, Some of the Legal Aspects of the Relations of Spouse, “Justice and Law”, № 03(34), 2012, 50 (in Georgian); *Bichia M.*, Peculiarities of Identifying Matrimonial Property Regimes in accordance with Georgian Case Law, “Justice and Law”, № 01(61), 2019, 90 (in Georgian); *Phkhaladze N.*, Legal Regime of Matrimonial Property, “Justice and World”, № 14, 2020, 168 (in Georgian); *Kantaria G., Jgerenaya V.*, Some Problematic

### **3. Interpretation of the Article 1160 of CCG in the Georgian Case Law and its Critical Understanding**

First of all, it is interesting to look at the provisions defining the matrimonial property in the Georgian law. In particular, the first part of the article 1158 of CCG and the 3<sup>rd</sup> paragraph of the article 1176 both offer the content of regimes regulating the matrimonial property relations: 1. First paragraph of the article 1158 states that any property acquired by the spouses during their marriage shall be treated as their joint property (matrimonial property), unless otherwise determined by the marriage contract. The joint property of spouses belongs to each spouse equally, without the pre-defined share.<sup>11</sup> 2. Third paragraph of the article 1176 states the possibility to agree the regimes different from the legal property regimes on the basis of the marriage contract. These regimes are: regime of the united property (when the individual property of the spouses become a joint property on the basis of agreement), share-based property regime (when the share of each spouse is defined for the property under the joint ownership based on the agreement) and separate ownership regime (when the joint property becomes an individual property of one of the spouses based on the agreement). It is allowed to use the combination of all the above-mentioned regimes foreseen in the law, but it is inadmissible to agree an exclusive regime (different from the above-listed) by the spouses. Such agreement will be declared void. This is based on the “typological rule” construction identified in the German Law, by which it is forbidden to make “fantasy property regime” agreement.<sup>12</sup>

When discussing the interpretation of the article 1160 of CCG in the Georgian case law, first of all, it must be mentioned that the interpretation of the paragraph 2 of this article is particularly actual, in the context of the bona-fide acquirer. In particular, according to the definition of the Court of Appeals, the rule set by the paragraph 2 of the article 1160 of CCG, in the process of acquiring the matrimonial property by spouses, protects only the interests of the bona-fide acquirer from the claims of the spouse not-registered as the co-owner of the property.<sup>13</sup> Respectively, in the context of acquiring the property, the content of the article 1160 of the CCG is always interpreted jointly with the articles 185 and 312 of the CCG.<sup>14</sup> In relation to the scale of evaluation of the acquirer’s good faith, in one of its decisions, the Court of Cassation has indicated that administration by the spouse, registered as the owner, of the share of matrimonial property of the other spouse shall be deemed annulled and its authenticity shall depend on the approval of the latter, however, the rule referred to in the second part of this article protects the interest of the acquirer from the claim of the spouse who is not registered as

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Characteristics of Administration of Matrimonial Property, “Scientific Journal Young Lawyers”, № 8, 2018, 88 (in Georgian).

<sup>11</sup> *Shengelia R., Shengelia E.*, Family Law, Tbilisi, 2011, 162 (in Georgian).

<sup>12</sup> *Rusiashvili G.*, Property Relations of Spouses, “Georgian-German Journal of Comparative Law”, № 10, 2020, 12, 18 (in Georgian).

<sup>13</sup> Decision № 2B/211-12 of 29 March 2012 of Chamber for Civil Cases of Tbilisi Court of Appeal.

<sup>14</sup> Decision № 2B/211-12 of 29 March 2012 of the Chamber for Civil Cases of Tbilisi Court of Appeal. Decision № B/1403-12 of 9 October, 2012 of the Chamber for Civil Cases of Tbilisi Court of Appeal. Decision № 2B/3387-16 of 24 November 2016 of the Chamber for Civil Cases of Tbilisi Court of Appeal.

a property owner in the public registry but who had this right under the ground of acquiring property within the registered marriage. Such legislative regulation proves that the right of the spouse not registered as the owner on the property acquired during the marriage is not absolute and when the matrimonial property (including the share of the other spouse) is disposed by the person registered as the property owner, the realization of the authority of the other spouse depends on certain circumstances, namely, the identification of the fact that the acquirer lacks good faith. During the administration (disposal) of the matrimonial property, dispute of the spouse not registered as the owner of the disputed property, may lead to the annulment of the property sale only in case if it is identified the property acquirer not only knew about the existences of the other owner on the subject of sale but he was also aware of the fact that the spouse not registered as a property owner was against selling this property. In any other case, it is presumed that the registered owner, acts in agreement with his spouse and the property acquirer has a good faith with regard to the purchasing transaction.<sup>15</sup> In the context of application of the article 1160 of CCG, the principle of protection of the bona-fide acquirer also applies to the bona-fide mortgagee. In particular, in one of the cases, it is stated that since the fact of concluding a loan and mortgage agreement between the third party and one of the spouses has been established, and the real estate owned by the same spouse registered in the public registry has been encumbered with a mortgage to secure the loan repayment, annulment of the mortgage on the 2/3 share of the second spouse that was registered in the public registry, will cause a violation of the stability of civil circulation, because pursuant to the article 312 of CCG, the Public Registry is the guarantee of bona-fide civil circulation and serves to the provision and protection of the interests of the circulation parties.

This principle protects the right of the creditor too (mortgagee). Therefore, the rights of the mortgagee are protected in the same way as the property acquirer and they receive an authority to satisfy their claim against the main debtor from the property encumbered by the mortgage, respectively, the non-disposing spouse, in compliance with the paragraph 2 of the article 1160 of CCG, has right to demand from the other spouse, the benefit received from the property secured by mortgage.<sup>16</sup> This definition complies with the concept of disposal of the property established in the Georgian doctrine.<sup>17</sup>

In the context of application of the second paragraph of the article 1160 of CCG, the Court of Cassation also defines that with regard to the disposal of the matrimonial property, from the

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<sup>15</sup> Decision № AS-1432-2019 of 22 January 2020 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-397-397-2018 of 19 April 2019 of the Chamber for Civil Cases of Supreme Court of Georgia; There is a strictly defined, homogeneous case law regarding this issue: № AS-756-707-2017; № AS-87-83-2017; № AS-571-879-2009; № AS-506-480-2015; № AS-7-7-2016; № AS-1563-1466-2012; № AS-1015-951-2012; № AS-1367-1289-2012; № AS-794-747-2012; to see case about sham transaction concluded between one of the spouses and the third person and its evaluation, See: Decision № AS-8-2020 of 2 July, 2020 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-789-2019 of 26 July 2019 of the Chamber for Civil Cases of Supreme Court of Georgia.

<sup>16</sup> Decision of № AS-565-536-2014 of 22 July 2015 of the Chamber for Civil Cases of Supreme Court of Georgia.

<sup>17</sup> *Rusiashvili G., Egnatashvili D., Cases of Non-Contractual Obligations, Tbilisi, 2016, 39 (in Georgian).*

transaction concluded by one spouse without the consent of the other spouse, the latter cannot have an independent claim.<sup>18</sup> In case the disposing transaction remains in force, in accordance with the principle of civil procedure law (Article 248 of the Civil Procedure Code of Georgia), for exercising the right to claim the benefit assigned to the non-disposing spouses under the paragraph 3 of the article 1160 of CCG, its formation as a separate claim in the suit shall be considered. Otherwise, the Court may discuss the case within the action of declaration (to recognize the transaction null and void), but, in the event, the claim is rejected, if the party has not claimed reimbursement (pecuniary claim) of the gain acquired from sale of property, the court will not be authorized to initiate the discussion of the lawfulness of the right of this claim.<sup>19</sup> Particularly, even in cases where the plaintiff requests not the gain but the compensation of damage incurred as a result of property sale, in the conditions of its compensation claim, the damage is the reduction of the asset and increase of the liability.

If we mean the money received from the property disposal, then it is not the damage but the gain. If we mean such disposal of the property co-owned by the spouse, where the gain is lower than the actual value of the property, then it can be the damage, but even in this case, the following facts shall be subject to investigation: value of the property at the moment of sale; circumstances leading to the reduced value, etc.<sup>20</sup> Moreover, it is interesting to review the explanation of the Court of Cassation for one of the cases, according to which, in order for giving rise to the matrimonial right of the spouses, the moment of official termination of their marriage cannot be deemed as important, when the case materials prove that before official termination of the marriage, the plaintiff and the defendant had not lived as one family since 1998.<sup>21</sup> According to the explanation of the Court of Cassation, only the marriage registration cannot be the determinant to apply to the property the matrimonial property regime of the spouse being in registered marriage, in the cases when it has been proven that the spouses did not manage the joint household whilst buying the disputable objects and the marriage, regardless of its registration, had factually been terminated. The claim was based on the norms determining the legal regime of the property acquired during the cohabitation of spouses and the plaintiff believed that he had to be recognized as the owner of all immovable property acquired before 2016, before the registration of the divorce and one half of the value of sold immovable property had to be compensated from the side of the other party. However, the Court of Appeals as well as Cassation Courts used the termination of actual cohabitation and not the divorce registration as the ground to separate common and individual property. Hence, the paragraphs 2 and 3 of the article 1160 of CCG were not applied to any of the properties only acquired by one of the spouses or acquired and then disposed in the period following the termination of actual cohabitation of spouses.

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<sup>18</sup> Decision № AS-951-989-2011 of 10 November 2011 of the Chamber for Civil Cases of Supreme Court of Georgia.

<sup>19</sup> Decision № AS-123-118-2012 of 17 April 2012 of the Chamber for Civil Cases of Supreme Court of Georgia.

<sup>20</sup> Decision № AS-1136-1067-2012 of 11 February 2013 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-881-843-2014 of 2 July 2015 of the Chamber for Civil Cases of Supreme Court of Georgia.

<sup>21</sup> Decision № AS-1226-2020 of 25 March 2021 of the Chamber for Civil Cases of Supreme Court of Georgia.

From the point of view of a critical understanding of Georgian case law, it is first of all noteworthy that Georgian case law often misinterprets the notion of matrimonial property, when the complainant spouse is automatically considered to be the co-owner of ½ of unlawfully disposed property. The above-mentioned clearly contradicts the legal nature of the matrimonial property right, because, in this case, the share of none of the spouses is defined in advance (before separating the matrimonial property). Respectively, until the matrimonial property is separated and the shares of spouses and individual ownership of the properties assigned to these shares are identified, the property right of each spouse applies to the whole matrimonial property and not to some part or ½ of it. In this respect, Georgian case law is generally wrong.<sup>22</sup> Respectively, where the preconditions foreseen in the law exist, the transaction shall be fully annulled, because when the property is disposed without informing/approval of the other spouse and at the same time, with mala fide purchaser, the co-ownership of non-disposing spouse shall be fully applied to such property.

Paragraph 2 of the article 1160 of Civil Code of Georgia protects the bona-fide acquirer and the paragraph 2 – the co-owner, a non-disposing spouse. However, it is interesting how the notion “administration” can be interpreted and understood in the context of the article 1160 of the Civil Code of Georgia. Namely, administration is a transaction that aims to satisfy the family needs.<sup>23</sup> Respectively, if the disposing spouse uses the matrimonial property to fulfill his personal obligations, in this case, claim of the other spouse to annul such transaction is admissible on the ground that he was unaware of and/or did not agree to such transaction, however, even in such cases, if the bona-fide acquirer is concerned, he won’t be able to claim the annulment of the transaction, but he can demand the transfer of the gain received from this transaction. Good faith shall be assessed in case of the unlawfulness of the disposing spouse and the latter is unlawful if he violates the rule stipulated in the article 1159 and first part of 1160 of CCG. In such cases, leaving/not leaving the transaction in force shall be decided in consideration of the following circumstance: the main aim of matrimonial property administration in each particular case. Where the aim corresponds to the family interests, then the disposing spouse is lawful in any case and there is no need to evaluate the good faith of the acquirer; however, if the administration of matrimonial property serves to the personal interests of the disposing spouse, he shall inform the other spouse and obtain his approval. And where such does not exist, in order for the transaction to be valid, it is important to identify the good faith of the acquirer, which in case of immovable property co-ownership is defined by paragraphs 3 and 4 of the article 312 of the Civil Code of Georgia. Georgian case law does not use the above-mentioned criterion of “covering family needs” at all and reviews the disposing transaction referred to in the context of the article 1160 only from the perspective of the good faith of the acquirer, which in view of the content of this article is not justified. Therefore, it is necessary for the Georgian

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<sup>22</sup> For instance, Decision № AS-621-588-2015 of 3 June 2016 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-7-7-2016 of 16 March 2016 of the Chamber for Civil Cases of Supreme Court of Georgia; Decision № AS-1426-1346-2017 of 2 March 2018 of the Chamber for Civil Cases of Supreme Court of Georgia.

<sup>23</sup> For details about this issues: *Rusiashvili G.*, Property Relations of Spouses, “Georgian-German Journal of Comparative Law”, № 10, 2020, 12-13 (in Georgian).



case law to adopt the above-referred criterion, limit the area of activity of this norm and require the approval of non-disposing spouse as mandatory only in cases where the disposing spouse uses the matrimonial property solely for personal goals.

#### **4. Rule of Administration of Matrimonial Property in the Laws of Foreign Countries**

##### **4.1. German Family Property Law**

Chapter 6 of the Book 4 of German Civil Code is divided into three sub-sections, regulating the legal and contractual property regimes as well as the issues related to keeping register of the common property. It is interesting that the legislative basis regulating the contractual regime is divided into four chapters, namely: 1. General Provisions. 2. Property Separation Regulatory Norms; 3. Common Property Regime Regulatory Norms; 4. Norms for Regulating the Optional Regime of the Community of Accrued Gains<sup>24</sup>. Pursuant to the section 1363 of the Civil Code of Germany, the spouses live under the property regime of community of accrued gains if they do not by marriage contract agree otherwise.<sup>25</sup> Respectively, in Germany, there is a principle of freedom with respect to choosing the property regime, however, in the absence of the marriage contract, the property separation is a matrimonial property regime defined by the spouses, under the condition to participate in the community of accrued gains by spouses, which is known as the regime of community of accrued gains or “compensation for the community of accrued gains”.<sup>26</sup> Therefore, on the one hand, the property of the husband and the property of the wife do not turn into the common property of the spouses (matrimonial property); the same applies to property that one spouse acquires after marriage, i.e. it is also subject to the property separation rule. On the other hand, the accrued gain that the spouses acquire in the marriage, however, shall be compensated if the community of accrued gains ends. Respectively, according to this legal regime, each spouse manages his own property independently; however, the rule of property management, in accordance with the section 1364 of Civil Code of Germany and the following paragraphs, requires the consent of the other spouse for selling the property or his mandatory approval of already concluded transactions.<sup>27</sup> The section 1414 of the Civil Code of Germany shall also be mentioned. Pursuant to this section, If the spouses exclude the statutory property regime or terminate it, separation of property takes effect, unless the marriage contract leads to a different conclusion.<sup>28</sup>

Sections 1415 and 1518 of the Civil Code of Germany regulate the common property regime. In compliance with the section 1415 of the Civil Code of Germany, the spouses may agree on this

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<sup>24</sup> *Izquierdo A. O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World, Madrid, 2018, 347-348.*

<sup>25</sup> German Civil Code, 1363 Article, <[www.gesetze-im-internet.de](http://www.gesetze-im-internet.de)> [06.09.2021].

<sup>26</sup> *Izquierdo A. O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World, Madrid, 2018, 348.*

<sup>27</sup> German Civil Code, 1364 and following articles, <[www.gesetze-im-internet.de](http://www.gesetze-im-internet.de)> [06.09.2021].

<sup>28</sup> *Izquierdo A. O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World, Madrid, 2018, 348.*

regime, which is characterized by three types of properties that are different from each other: (1) The matrimonial property – the property that the spouses acquire during the period of this regime is subject to joint management and administration rule by both spouses; (2) The individual property – the property owned by each spouse separately; (3) Separated property – the property that is excluded from the matrimonial property of spouses and assigned to one of them, based on the agreement.<sup>29</sup> In the last two cases, the spouse who is or who will become the owner of the relevant property has the authority to manage the property. On the basis of all the above-mentioned, pursuant to the German Law, the rule of the community of accrued gain belongs to the secondary legal property regime and the agreement by the spouses about the matrimonial property regime is allowed by the section 1415 and the following sections of the Civil Code of Germany.

#### **4.2. French Family Property Law**

Article 1387 of the Civil Code of France states that the law regulates property relations between the spouses only in the absence of a specific agreement, which the spouses can conclude on the condition that the latter will not contradict the ethical norms and rules established by the relevant law. Therefore, it can be said that French law recognizes the principle of free choice of the property regime of spouses.<sup>30</sup>

In case the marriage contract does not exist, pursuant to the article 1393 of the Civil Code of France, the primary legal property regime of spouses is the limited common property system, which is characterized by three property types that are different from each other: 1. Individual property – mostly formed by the property acquired before the marriage, also, received as an inheritance during the marriage, property received by subrogation or as a gift. 2. Co-ownership of spouses – all acquisitions of the spouses during the marriage which are not deemed as an individual property in compliance with the article 1401 of the Civil Code of France.<sup>31</sup> It follows from the above dichotomy that the authority to manage and dispose of individual property rests with the respective individual owner spouse, while co-ownership can be managed only jointly, with the consent of the other spouse.

It is noteworthy that the optional system or so called secondary legal regime in this case is a property separation rule, according to which, the spouses have only separated ownership of the property as well as of liabilities during the whole period of marriage.<sup>32</sup> This naturally conditions the possibility to dispose the property independently from each other. Besides, the article 1497 of the Civil Code of France assigns the right to the spouses to limit the use of the common property regime but solely with respect to revenues, change the common property management system or define the

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<sup>29</sup> Ibid, 349.

<sup>30</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 333-334.

<sup>31</sup> The Civil Code of France, 1393, 1401 Articles, <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> [06.09.2021].

<sup>32</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 334.

amount of each spouse's share<sup>33</sup>. Pursuant to the article 1526 of the Civil Code of France, such agreement may also contain the agreement about universal property regime, by which all liabilities and properties, whether current or future, shall be subject to common property regime, excluding the property exclusively agreed by the spouses and the gift specially made to one of the spouses by the grantor.<sup>34</sup> Also, it is interesting to look at the article 1569 of the Civil Code of France, which, by its essence complied with the community of accrued gain defined in the section 1363 of the Civil Code of Germany. In the event, the spouses agree on this regime: 1. Where the community of accrued gains of both spouses exist, the spouse whose gain exceeds the gain of the other spouse, shall give compensation to the latter in the amount of ½ of the difference between the both gains. 2. Where only one of the spouses has a gain, he shall pay compensation to the other spouse in the amount of ½ of the gain value. 3. Where none of the spouses has accrued any gain during the marriage, the compensation rule shall not be applied.<sup>35</sup>

### **4.3. English Family Property Law**

First of all, it must be admitted that UK does not have a specific regulation that would regulate the property rights and obligations of spouses.<sup>36</sup>

As for the English Law itself, from the day Married Women's Property Act 1882 was adopted to date, the latter do not know the property rights regime of spouses.<sup>37</sup> Respectively, in England, the marriage does not have a legal effect on the property of spouses. Nevertheless, this circumstance can be equated with the regime of property separation, although when the marriage ends, the courts may guide with Domicile and Matrimonial Proceedings Act 1973.<sup>38</sup> According to Article 22 of this Act, the court has the right to distribute property acquired in any way during the marriage between the spouses, except for property received as gifts and inheritance.<sup>39</sup> In making such a distribution, the court must take into account the circumstances surrounding the spouses and, if necessary, the agreement between the spouses before and after marriage, so called marriage contract. Such agreements may be supported or rejected by the court fully or partially, however, in any case, the interests of marriage and children shall be taken into account, as it is stipulated in the article 24 of Domicile and Matrimonial Proceedings Act 1973.<sup>40</sup> In consideration of all the above-mentioned, it can be concluded that in England (as well as in Wales), the actual property regime is the property separation rule with potential legal separation. This regime shall be interpreted as a system where the matrimonial property remains

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<sup>33</sup> The Civil Code of France, 1497 Article, <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> [06.09.2021].

<sup>34</sup> Ibid, 1526 Article, <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> [06.09.2021].

<sup>35</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 336-337.

<sup>36</sup> Ibid, 915.

<sup>37</sup> Ibid, 916; Married Woman's Property Act of 1882, <[www.legislation.gov.uk](http://www.legislation.gov.uk)> [06.09.2021].

<sup>38</sup> Ibid, 918.

<sup>39</sup> Matrimonial Causes Act, 22 Article, <[www.legislation.gov.uk](http://www.legislation.gov.uk)> [06.09.2021].

<sup>40</sup> Matrimonial Causes Act of 1973, 24 Article, <[www.legislation.gov.uk](http://www.legislation.gov.uk)> [06.09.2021].

separated during the marriage, in terms of rights as well as obligations of spouses, for which the spouses remain the authority on property ownership, management and free disposal independently from each other.<sup>41</sup> This fact is confirmed by the section 37 of the Law of Property Act 1925, which stipulates that “A husband and wife shall, for all purposes of acquisition of any interest in property, shall be treated as two persons”.<sup>42</sup> Respectively, this rule excludes any legal effect of the marriage against the property of spouses throughout the whole period when the marriage is valid.

#### **4.4. Italian Family Property Law**

Pursuant to the article 159 of the Civil Code of Italy, in the absence of the marriage contract, the property rights and obligations of spouses shall be regulated under the matrimonial property regime stipulated in the law.<sup>43</sup> Thus, the spouses have a possibility to choose the property regime freely, however, if they do not use such possibility, then the primary regime defined in the law is the matrimonial property regime, which is regulated by the article 177 of the Civil Code of Italy.<sup>44</sup> This regime shall be interpreted as the rule of limited common property which foresees different properties: 1. Individual property – each spouse owns individual property separately from each other, which consists of the property of strictly personal nature, e.g. property received as a gift, inherited subrogation and acquired via compensation of personal damage before the marriage or during the marriage. 2. Common property – this consists of all other properties acquired during the marriage (or could be acquired in future) and cannot be deemed as the ownership of only one of the spouses in compliance with the article 177 of the Civil Code of Italy.<sup>45</sup>

With regard to the rule of matrimonial property management and administration – article 180 of the Italian Civil Code stipulates that each spouse can exercise the management and disposal rights independently from each other, however, if this goes beyond the scopes of a daily activities, in this case, the above-referred rights shall be jointly exercised by both spouses or by the court decision in accordance with the article 181 of the Italian Civil Code.<sup>46</sup> Therefore, the authority of individual property management and disposal lies with each spouse independently from each other and the authority of matrimonial property management and disposal may be granted by the court only to one spouse, when the other spouse hinders and frustrates the implementation of these authorities.<sup>47</sup>

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<sup>41</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 916.

<sup>42</sup> Law of Property Act of 1925, 37 Article, <[www.legislation.gov.uk](http://www.legislation.gov.uk)> [06.09.2021].

<sup>43</sup> The Civil Code of Italy, 159 Article, <[www.jus.unitn.it](http://www.jus.unitn.it)> [06.09.2021].

<sup>44</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 432.

<sup>45</sup> *Ibid*, 433.

<sup>46</sup> The Civil Code of Italy, 180-181, Articles, <[www.jus.unitn.it](http://www.jus.unitn.it)> [06.09.2021].

<sup>47</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 432.

Additionally, it is also possible that one of the spouses may claim separation of the common property, if the other spouse treats the property negligently or weakly.<sup>48</sup>

Article 215 of the Italian Civil Code also recognizes the property separation regime as the secondary rule defined by the law for termination of actual cohabitation of spouses. Besides, this rule is one of the optional property regimes.<sup>49</sup> Pursuant to the article 210 of the Italian Civil Code, the spouses have a right to agree about the property regime that will allow them make changes to the rule established in the law, however, in any case, this regime shall be subject to the restrictions stipulated under the article 210 of the Italian Civil Code.<sup>50</sup> This article forbids annulment of the management rules defined in the law and also recognition of the common property strictly as a personal property.<sup>51</sup> Any spouse can create a fund of property which will include immovable and movable properties for covering the family needs. Such fund may be subject to the special regime defined in the law, by which, the disposal of the fund property can be carried out only by mutual agreement/approval of spouses or by the court decision in cases where the interests of underage children are concerned.<sup>52</sup>

## **5. Conclusion**

For the purposes of rightful application of the article 1160 of the Civil Code of Georgia, first of all, the court shall correctly understand the concept of the matrimonial property regime, which means assigning of the indefinitely equal right to both spouses regardless of their share in the properties under the common ownership. However, apart from the above-mentioned, on the basis of German Law, it is necessary to introduce the criterion of “covering the family needs” into the Georgian case law and on its basis, interpretation of the administration transaction referred to in the article 1160 of the Civil Code of Georgia in each particular case, for the purposes of identifying the will of the disposing spouse. Respectively, when the administration of property under the matrimonial property by the disposing spouse complies with the goal of “covering family needs”, the transaction shall remain in force and therefore, this case, with its result, should be equated with the administration of the common property by mutual agreement of the spouses. It is of critical importance for the Georgian family law to identify what type of property regimes are defined by the legal systems of other countries. Interestingly, the property regimes defined in the article 1158 and paragraph 3 of the article 1176 are also familiar to the legal systems of Germany, France, UK and Italy, provided herein. These systems shall be studied in more detail. However, the rule of community of accrued gain defined by the primary legal regime in the German law is completely a new and unknown legal category for the Georgian family law; it shall become the subject of scientific research in academic circles along with the property regimes that Georgian lawyers are already acquainted with.

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<sup>48</sup> Ibid.

<sup>49</sup> The Civil Code of Italy, 215 Article, <[www.jus.unitn.it](http://www.jus.unitn.it)> [06.09.2021].

<sup>50</sup> Ibid, 210 Article.

<sup>51</sup> *Izquierdo A.O., Rodriguez A. M. O., Izquierdo A. M. O., Matrimonial Property Regimes Throughout the World*, Madrid, 2018, 433.

<sup>52</sup> Ibid.

**Bibliography:**

1. Constitution of Georgia, Legislative Herald of Georgia, Departments of the Parliament of Georgia, 31-33, 24/08/1995.
2. Civil Code of Georgia, Legislative Herald of Georgia, Parliamentary Gazette, 31, 24/08/1995.
3. Civil Code of Germany, 01/01/1900.
4. Civil Code of France, 21/03/1804.
5. Matrimonial Causes Act, 23/05/1973.
6. Law of Property Act, 09/04/1925.
7. Married Woman's Property Act, 18/08/1882.
8. The Civil Code of Italy, 16/03/1942.
9. *Burton F.*, Family Law, London, 2003, 4.
10. *Bichia M.*, Peculiarities of Identifying Matrimonial Property Regimes in accordance with Georgian Case Law, "Justice and Law", № 01(61), 2019, 90 (in Georgian).
11. *Frier B. W., McGinn T. A. J.*, A Casebook on Roman Family Law, Oxford, 2004, 3.
12. *Herring J.*, Family Law, Oxford, 2017, 2- 4.
13. *Izquierdo A. O., Rodriguez A. M. O., Izquierdo A. M. O.*, Matrimonial Property Regimes Throughout the World, Madrid, 2018, 333-334, 336-337, 347- 349, 432-433, 915- 916, 918.
14. *Kantaria G., Jgerenaya V.*, Some Problematic Characteristics of Administration of Matrimonial Property, "Scientific Journal Young Lawyers", № 8, 2018, 88 (in Georgian).
15. *Muller-Freienfels W.*, Family Law and the Law of Succession in Germany, International and Comparative Law Quarterly, Vol. 16, 1964, 409.
16. *Maisuradze D.*, Conductio of Infringement by Disposal in Georgian and German Law, "Georgian-German Journal of Comparative Law", № 8, 2020, 12 (in Georgian).
17. *Ninua E.*, Some of the Legal Aspects of the Relations between Spouses, "Justice and Law", № 03(34), 2012, 50 (in Georgian).
18. *Phkhaladze N.*, Legal Regime of Matrimonial Property, "Justice and World", № 14, 2020, 168 (in Georgian).
19. *Rusiashvili G.*, Principle of Separation in Georgian Law of Property, "Georgian-German Journal of Comparative Law", № 1, 2019, 20 (in Georgian).
20. *Rusiashvili G.*, Cases in the General Part of the Civil Law, Tbilisi, 2015, 257 (in Georgian).
21. *Rusiashvili G.*, Property Relations of Spouses, "Georgian-German Journal of Comparative Law", № 10, 2020, 12-13, 18 (in Georgian).
22. *Rusiashvili G., Egnatashvili D.*, Cases of Non-Contractual Obligations, Tbilisi, 2016, 39 (in Georgian).
23. *Shengelia R., Shengelia E.*, Family Law, Tbilisi, 2011, 158-159, 162 (in Georgian).
24. Decision № AS-1226-2020 of 25 March, 2021 of the Supreme Court of Georgia.
25. Decision № AS-8-2020 of 02 July, 2020 of the Supreme Court of Georgia.
26. Decision № AS-1432-2019 of 22 January, 2020 of the Supreme Court of Georgia.
27. Decision № AS-789-2019 of 26 July, 2019 of the Supreme Court of Georgia.
28. Decision № AS-397-397-2018 of 19 April, 2019 of the Supreme Court of Georgia.

29. Decision № AS-1426-1346-2017 of 02 March, 2018 of the Supreme Court of Georgia.
30. Decision № AS-756-707-2017 of 31 July, 2017 of the Supreme Court of Georgia.
31. Decision № AS-87-83-2017 of 13 April, 2017 of the Supreme Court of Georgia.
32. Decision № 2B/3387-16 of 24 November 2016 of Tbilisi Court of Appeal.
33. Decision № AS-506-480-2015 of 29 July, 2016 of the Supreme Court of Georgia.
34. Decision № AS-621-588-2015 of 03 June, 2016 of the Supreme Court of Georgia.
35. Decision № AS-7-7-2016 of 16 March, 2016 of the Supreme Court of Georgia.
36. Decision № AS-565-536-2014 of 22 July, 2015 of the Supreme Court of Georgia.
37. Decision № AS-881-843-2014 of 02 July, 2015 of the Supreme Court of Georgia.
38. Decision № AS-1136-1067-2012 of 11 February, 2013 of the Supreme Court of Georgia.
39. Decision № AS-1563-1466-2012 of 4 February, 2013 of the Supreme Court of Georgia.
40. Decision № AS-1015-951-2012 of 20 November, 2012 of the Supreme Court of Georgia.
41. Decision № AS-1367-1289-2012 of 26 October, 2012 of the Supreme Court of Georgia.
42. Decision № B/1403-12 of 09 October 2012 of Tbilisi Court of Appeal.
43. Decision № AS-794-747-2012 of 05 July, 2012 of the Supreme Court of Georgia.
44. Decision № AS-123-118-2012 of 17 April, 2012 of the Supreme Court of Georgia.
45. Decision № 2B/211-12 of 29 March 2012 of Tbilisi Court of Appeal.
46. Decision № AS-951-989-2011 of 10 November, 2011 of the Supreme Court of Georgia.
47. Decision № AS-571-879-2009 of 30 April, 2010 of the Supreme Court of Georgia.
48. <[www.publications.parliament.uk](http://www.publications.parliament.uk)> [11.09.2021].
49. <[www.legislation.gov.uk](http://www.legislation.gov.uk)> [06.09.2021].
50. <[www.jus.unitn.it](http://www.jus.unitn.it)> [06.09.2021].
51. <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> [06.09.2021].
52. <[www.gesetze-im-internet.de](http://www.gesetze-im-internet.de)> [06.09.2021].