Matrimonial property regime in Turkey

Abstract

As the number of marriages between spouses from different nations is increasing, the issue of the matrimonial property regime has become significant. The aim of this article is to examine the possible problems when claims regarding the matrimonial property regime with a foreign element are brought before a Turkish court. In this regard, both the private international law and the substantive law aspects of the matrimonial property regime in Turkey will be explained: namely the jurisdiction issue in matrimonial property cases, the conflict of law rules regarding the applicable law in the matrimonial property regime before the competent Turkish courts and, finally, the matrimonial property regime under the Turkish Civil Code. Accordingly, both the legal matrimonial property regime and three contractual matrimonial property regimes that the spouses may choose under Turkish law will be described.

1. Introduction

Due to globalisation and mobilisation, the number of marriages between spouses from different nations is increasing. Along with their cultural aspects, such marriages also have legal impacts, especially in a legal environment where family matters are not harmonized. Probably one of the significant legal impacts of such marriages arises during the dissolution of the marriage, particularly with regard to problems regarding the matrimonial property regime.

This article examines the possible problems when claims regarding the matrimonial property regime with a foreign element are brought before a Turkish court. In this regard, firstly, it will analyse the jurisdiction issue in matrimonial property cases according to Turkish Private International Law and the International Civil Procedure Code ('PIL Code') as well as the Turkish Code of Civil Procedure ('CCP') (section 2). If Turkish courts will have jurisdiction, the second problem that may arise is the applicable law. Secondly, this paper will examine the provisions of the PIL Code on the conflict of law rules regarding the applicable law in the matrimonial property regime. Depending on the connecting factors, Turkish conflict of law rules may either refer to a foreign law or to Turkish law (section 3). Accordingly, in the last part of this article (section 4), the matrimonial property regime under the Turkish Civil Code ('TCC') will be explained.

2. Jurisdiction

2.1 International jurisdiction of the Turkish courts

The PIL Code constitutes the principal source of Turkish international civil procedure law. According to Article 40 of the PIL Code, the international jurisdiction of the Turkish courts shall be determined by the rules of domestic law on internal jurisdiction. In other words, apart from several specific articles according to which Turkish courts may exercise international jurisdiction (Arts. 40-47 PIL Code), a separate system of Turkish international civil procedure law does not exist. For this reason, when designating the competent court under Turkish law, the applied provisions are mainly the rules of the CCP.

Disputes that do not fall under the scope of the specific jurisdiction rules are subject to the domestic jurisdiction rules due to the specific reference in Article 40 PIL Code. In addition, international conventions that contain provisions pertaining to international civil procedure to which Turkey is a party will prevail.

The absence of the international jurisdiction of the Turkish courts may be asserted only as a preliminary objection according to the internal jurisdiction rules (Art. 116 CCP). In cases where the court considers that it does not have international jurisdiction after an objection, it dismisses the case based on a lack of jurisdiction. If the respondent does not assert his/her objection regarding the absence of international jurisdiction or is absent from the proceedings although he/she is duly notified, it is considered that the respondent has consented to the international jurisdiction of the court and the case is heard before that Turkish court. This provision also applies to respondents living abroad or possessing foreign nationality. It

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2 Law No. 6100 concerning the Turkish Code of Civil Procedure, O.G. No. 27836, 4 February 2011.

3 For instance, in the decision of the 8th Chamber of the Court of Cassation (Yargıtay) dated 26 May 2011 and numbered 5330/3103, the court decided on the application of German law since both spouses had German nationality.

4 Law No. 4721 Turkish Civil Code, O.G. No. 24607, 8 December 2001.

5 The Turkish PIL Code was prepared taking into account the recent developments in European private international law and the rules of other jurisdictions in order to draft the most effective legislation in accordance with the needs of the Turkish legal system. In particular Swiss law was the main source of inspiration due to the fact that the Turkish Civil Code and the Code of Obligations are modelled after the Swiss legal system. See G. Tekinalp and A. Çaşuşoğlu, Milletlerarası Özel Hukuk Bağlama Kuralları (Private international law conflict of law rules), Istanbul: Vedat 2011, p. 14-15 (hereinafter: Tekinalp/Çaşuşoğlu); Z.D. Tarman, ‘The Applicable Law to Contractual and Non-contractual Obligations under Turkish Private International Law’, NIPR 2009, p. 15-24.


9 Nomer, p. 464-465; Şanlı, p. 368.
is essential to comply with the two-week period for an objection starting from the receipt of the claimant’s petition. Otherwise, a non-competent Turkish court will be given jurisdiction.

2.2 General competent courts

The general competent court is the family court at the place of the legal domicile of the respondent (Art. 6 CCP). Due to the reference to domestic law in Article 40 PIL Code, the court of the respondent’s domicile is a court which also has international jurisdiction. Under Turkish law, the domicile of a person is the place where she/he resides with the intention to remain there permanently (Art. 19/1 TCC). For individuals who do not have a domicile in Turkey, the court at the place of the habitual residence of the respondent has jurisdiction (Art. 9 CCP). As for actions arising from the law of property, if the disputed property is in Turkey, the court at the place where the assets are located, such as bank accounts and real estate, shall have jurisdiction over such movable or immovable property is located also has jurisdiction (Art. 9 CCP). Regarding the matrimonial property regime, the court at the place where the assets are located, such as bank accounts and real estate, shall have jurisdiction over the case. However, claims under the matrimonial property regime are usually accompanied by an application for divorce. In divorce cases, besides the court at the place of the domicile of one of the spouses, the court at the spouses’ common habitual residence for the last 6 months before the case also has jurisdiction (Art. 168 TCC). The court of the legal domicile of one of the spouses has jurisdiction concerning the matrimonial property regime (Art. 207 TCC). In case of a dissolution of the matrimonial property, a specific article on jurisdiction is available (Art. 214 TCC). Accordingly, in case of the dissolution of the marriage upon death, the competent court shall be the court at the last legal domicile of the deceased, while in cases of the dissolution of the marriage upon divorce, annullment or a decision of the court, the competent court shall be the same court that has jurisdiction over these issues. In other cases, the court at the legal domicile of the respondent shall be competent.

2.3 Agreement on jurisdiction (in favour of the Turkish courts)

In cases where the Turkish courts do not have internal jurisdiction and, as a result of which, they do not have international jurisdiction either, the spouses may agree that a particular Turkish court will have jurisdiction by agreement. The conditions for the validity of such an agreement on jurisdiction are determined pursuant to the Turkish CCP. According to the relevant provisions, only merchants and public entities are entitled to enter into contractual agreements on jurisdiction. Due to this restriction, spouses are not permitted to conclude a jurisdictional agreement regarding the matrimonial property regime.

2.4 Competent courts according to the PIL Code

Since Article 40 of the PIL Code refers to rules on internal jurisdiction, the above explanations are related to the CCP. In this section, the jurisdiction rules relating to matrimonial property in the PIL Code will be explored. Accordingly, firstly claims relating to the personal status of Turkish nationals stipulated in Article 41 of the PIL Code (section 2.4.1) and, secondly, the agreements on jurisdiction in favour of foreign courts stipulated in Article 47 of the PIL Code (section 2.4.2) shall be explained.

2.4.1 Claims relating to the personal status of Turkish nationals

In principle, the nationality of the spouse filing a lawsuit (being a Turkish national or a foreign national) does not have any effect on the establishment of the jurisdiction of a court in Turkey. However, the legislature aims to grant jurisdiction to the Turkish courts regarding actions pertaining to the personal status of Turkish nationals. It is not required for both spouses to have Turkish nationality in order for the international jurisdiction of the designated court to arise. For the application of Article 41, it is satisfactory if one of the spouses – either the plaintiff or the respondent – possesses Turkish nationality. Provided that the lawsuits relating to the personal status of Turkish nationals have not been or may not be brought before the courts of a foreign country, these lawsuits shall be heard before the following Turkish courts: (i) the court having internal jurisdiction in Turkey, (ii) if there is no court which has internal jurisdiction in Turkey, before the court where the person concerned is resident, (iii) if he/she is not resident in Turkey, before the court of his/her last domicile in Turkey, and (iv) if there is no court of last domicile, before one of the courts in Ankara, Istanbul or Izmir (Art. 41 PIL Code).

This provision does not establish exclusive jurisdiction regarding claims concerning the personal status of Turkish nationals. In that respect, it does not prevent the recognition and enforcement of judgments delivered by foreign courts. Lawsuits relating to the capacity, matrimonial matters and guardianship of Turkish nationals shall be subject to Article 41. It is argued in the legal literature that lawsuits relating to the matrimonial property regime and maintenance claims, that do not determine the legal status of the individual, fall outside the scope of Article 41, even if disputes giving rise to such suits are related to personal status. However, it is the author’s view that a claim relating to matrimonial property is subject to Article 41 when this claim is made as part of a divorce lawsuit. Independent of the application for divorce, the Turkish court at the place where the property is located shall gain jurisdiction according to Article 9 of the CCP regarding claims under the matrimonial property regime due to the reference in Article 40 of the PIL Code.

2.4.2 Agreement on jurisdiction (in favour of foreign courts)

While agreements on the choice of court in favour of Turkish courts are regulated in the CCP as explained above, agreements on the choice of court in favour of foreign courts are regulated under the PIL Code. Accordingly, in cases where the internal jurisdiction of Turkish courts is not determined pursuant to the principles of exclusive jurisdiction, the spouses may agree that a dispute among themselves involving a foreign element and resulting from obligational relations is to be heard by a court of a foreign state (Art. 47 PIL Code). In case of a valid agreement granting jurisdiction to foreign courts, the lawsuit can only be heard by Turkish courts under two cir-

10 If there is more than one asset in different locations, this may create multiple competent courts. In such a case, these different proceedings shall be joined upon the request of one of the parties (Art. 166(2) CCP).
11 Akıncı/Gökaylyla, p. 77.
12 Şanlı, p. 382; Nomer, p. 466; Çelikel/Erdem, p. 576.
13 Nomer, p. 455; Şanlı, p. 370.
14 Çelikel/Erdem, p. 543.
15 Nomer, p. 455; Çelikel/Erdem, p. 543.
16 Nomer, p. 455.
cumstances. Turkish courts will gain jurisdiction when the foreign court considers itself not to have jurisdiction or when an objection to jurisdiction is not raised before the Turkish courts. In accordance with the previous jurisprudence of the Turkish courts, it was possible to bring the lawsuit before a Turkish court despite a valid jurisdiction agreement. However, the General Assembly of the Turkish Court of Cassation has overruled these decisions. Accordingly, today, agreements granting jurisdiction to a foreign court are acknowledged as exclusive jurisdiction.

Spouses cannot enter into an agreement that grants jurisdiction to a foreign court regarding matrimonial property since these disputes do not have the characteristic of an obligatory relationship. However, the PIL Code does provide spouses with, for instance, the opportunity to obtain a decree on matrimonial property by applying to a court in a foreign country provided that the spouses have mutually agreed to do so. In case the recognition and enforcement of such a judgement is requested from a Turkish court, the fact that the spouses have applied to the foreign court in mutual agreement does not provide a ground for dismissing the recognition and enforcement of this judgement.  

2.5 Security to be paid to the court

Article 48 PIL Code states that if a foreign individual files a lawsuit or joins a lawsuit, he/she should deposit security in order to cover the damages that the other party might suffer and to cover the litigation costs. Such security is a prerequisite for a legal lawsuit and therefore the judge should ex officio consider the fulfillment of this prerequisite at any stage of the proceedings (Art. 114 CCP). On the other hand, one may be exempted from depositing a security due to the principle of reciprocity. Also Turkey is a party to the Hague Convention concerning the Law of Civil Procedure, which exempts its parties from depositing a security (Art. 17).

3. Applicable law

3.1 Introduction: conflict of law rule in matrimonial property

The conflict of law rule pertaining to matrimonial property is stipulated in Article 15 of the PIL Code. According to its scope, the definition of the matrimonial property, the designation of the assets considered as matrimonial property and the management of the matrimonial property are governed by this rule.

In the case of the dissolution of the matrimonial property due to death, the conflict of law rule on matrimonial property is applied prior to the application of the conflict of law rule on inheritance. In other words, first the assets of the deceased shall be determined according to the law which is applicable to the matrimonial property, and then the distribution of the inheritance shall be determined according to the conflict of law rule on inheritance (Art. 20 of the PIL Code). Accordingly, the national law of the deceased is established as the applicable law.

3.2 Choice of law

In principle, the choice of law rules in the field of family law do not recognise the principle of party autonomy. However, in matrimonial property matters, a limited choice of law is granted. The spouses may choose the law of either one of their habitual residences at the time of the marriage. Another option provided by the law is the national law of the spouses at the time of the marriage. Since the spouses may have different nationalities and habitual residences, they may enjoy the right to choose among a maximum of four different legal systems.

For example, when a Turkish woman residing in the Netherlands marries a Frenchman residing in Belgium, the spouses may choose between Turkish, Dutch, French and Belgian laws. The spouses may determine the law which is applicable to matrimonial property either within the marital agreement or in a separate agreement on the choice of law. In both cases, the choice of law has to be made explicitly. If the spouses have determined the law which is applicable to the matrimonial property, but have not specified whether the chosen law pertains to the substantive law or the choice of law rules, then it is assumed that the law which applies to the substantive law has been chosen. It is explicitly laid down in Article 2(4) PIL Code that where the choice of the applicable law is allowed, the substantive law provisions of the chosen law shall apply, unless otherwise determined by the spouses. Article 15(3) provides an opportunity for the spouses to acquire a new common law upon the marriage. Accordingly, the matrimonial property could be made subject to that new common law without prejudice to the prior rights of third parties.

The rationale behind this provision is to achieve the application of a common law regarding family law matters. However, it is not clear from this provision at which moment this new common law shall be applicable. In order to achieve unity regarding the applicable law, the new common law shall apply retroactively, i.e., starting from the time of the marriage. The capacity and form requirements of such a contract is subject to the general provisions of the PIL Code. Article 9(1) applies to capacity and Article 7 applies to the form requirement. Thus, the capacity of the spouses to conclude a marital agree-


19 The conditions that Turkish law requires to be met for recognition and enforcement (PIL Code Art. 54) are not sufficient to dismiss the recognition and enforcement of such a judgement. The jurisdiction of foreign courts falls outside the matters to be reviewed by the Turkish judge, unless this concerns the exclusive jurisdiction of the Turkish courts.


21 Şanlı, p. 129; Tekinalp/Çavuşoğlu, p. 194.

22 Tekinalp/Çavuşoğlu, p. 195.

23 E. Şensöz, ‘27.11.2007 Tarih ve 5718 Sayılı MÖHUK Uyarınca Yabancılık Ünsuru Taşıyan Evlilik Mallarına Uygulanacak Hukuk’ (The law which is applicable to the property regime with a foreign element in accordance with Turkish Private International Law and the International Civil Procedure Code dated 27 November 2007 and numbered 5718), İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi (Istanbul Commerce University of Social Sciences Journal) (8) 2009, p. 181 (hereinafter: Şensöz); Çelikel/Erden, p. 247; Akıncı/Gökşayla, p. 73. If a person has more than one nationality, Art. 4 of the PIL Code applies. Regarding persons who have both Turkish nationality and one or more foreign nationalities, only his/her Turkish nationality is taken into account from the point of view of Turkish private international law (Art. 4(1)b)). If a person has more than one nationality when he/she is not a Turkish citizen, the law of the state with which he/she is most closely connected shall be taken into account (Art. 4(1)c)).

24 Tekinalp/Çavuşoğlu, p. 201; Şensöz, p. 184.

25 Akıncı/Gökşayla, p. 73.

26 Şensöz, p. 183; Çelikel/Erden, p. 134; Tekinalp/Çavuşoğlu, p. 45; Akıncı/Gökşayla, p. 77.

27 Tekinalp/Çavuşoğlu, p. 201; Şanlı, p. 129.

28 Şensöz, p. 200; Tekinalp/Çavuşoğlu, p. 201.
ment shall be governed by their national laws. As for the form requirement, either the law of the location of the execution (lex loci actus) or the law governing the legal transaction itself (lex causae) is applicable in order for the agreement to be valid. In other words, the alternative application of one of these two laws is accepted.36

3.3 Objective connecting factor

Article 15 PIL Code provides that if no choice of law has been made by the spouses, the common national law of the spouses at the time of the marriage, and in the absence thereof, the law of their common habitual residence at the time of the marriage, and where none of these exist, Turkish law shall apply. It should be specifically mentioned that the third possibility in determining the applicable law is not the law of the country where the matrimonial property is located, but Turkish law. This provision is envisaged in order to prevent difficulties that would arise in cases where the matrimonial property is spread over different countries. The connecting factors are not variable, since they are determined pursuant to the time of the marriage. A fixed status accepted in Article 15 ensures legal certainty.30

The liquidation of assets falls within the scope of application of the law governing the matrimonial property as well. However, the liquidation of immovable property shall be subject to the lex rei sitae due to Article 15(2) PIL Code. This rule was introduced in order to achieve easier implementation in practice.31

When a dispute arises regarding the nationality of one of the spouses, the law of the state whose nationality is at issue shall be applied.32 The law that is solely applicable to the determination of Turkish nationality is Turkish law. The same applies to the question of the nationality of a foreign state where the law of that state is applicable. If a person has more than one nationality, Article 4 of PIL Code applies. Regarding persons who have both Turkish nationality and one or more foreign state nationalities, only his/her Turkish nationality is taken into account from the point of view of Turkish private international law (Art. 4(1)(b)).33 Where one of the spouses has Turkish and a foreign nationality but the other spouse only has the same foreign nationality, a common nationality of the spouses does not exist according to Turkish jurisprudence.34 In other words, the aforementioned provision dealing with multiple nationalities is also applied in these cases and the courts apply the second connecting factor, i.e., the common habitual residence stipulated in Article 15. This approach can be strongly criticized since the Turkish courts ignore the common nationality of the spouses.

In the absence of a common national law, the law of the common habitual residence shall apply. However, there is no legal definition of a habitual residence in Turkish private international law. It is accepted in the legal doctrine that habitual residence is the centre of an individual’s life.35 Habitual residence does not require any conditions, such as the intention to reside there permanently.36

4. The matrimonial property regime under the Turkish Civil Code

4.1 Agreements regarding the matrimonial property regime

The legal matrimonial property regime under the TCC has been the regime of participation in acquisitions since 2002.37 Although the property regime of participation in acquisitions is the default matrimonial property regime under Turkish law, it is not the only possible matrimonial regime.38 Considering the different needs of the spouses, three contractual matrimonial property regimes are stipulated under the TCC along with the legal matrimonial property regime; namely the regime of separation of property, the regime of separation of property with distribution and the regime of community of property.39

According to Article 202(2) TCC, the spouses may determine the applicable matrimonial property regime by entering into an agreement at any time before or during their marriage. The spouses may also modify the chosen matrimonial property regime by means of an agreement, although within the boundaries of the law as regulated by Articles 203-205, 221, 237, 240, 258-260 and 276-277 TCC.

Agreements regarding the matrimonial property regime may be concluded at any time before or during the marriage, meaning that both pre-nuptial and marital agreements are equally binding and subject to the same provisions.40 A pre-nuptial agreement enters into force upon the marriage. The spouses may also, at any time during their marriage, enter into a marital agreement, even after they have requested a divorce. The spouses may decide on the retroactive application of such agreement beginning from the time of the marriage or at any time during the marriage.41 However, such an agreement is different from a divorce agreement since a divorce agreement is subject to judicial control according to Article 166 TCC.

The main purpose of the marital agreement is to determine the matrimonial property regime which is applicable between the spouses.42 Freedom of contract is considered as one of the basic principles under Turkish Law. However, this principle is exceptional and is limited under Turkish Family Law. Accordingly, the spouses may determine, terminate and

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36 Tekinalp/Çavuşoğlu, p. 68; Şanlı, p. 38.
37 Separation of property was the legal matrimonial regime in the previous Turkish Civil Code of 1926. However, due to the unfair consequences of the regime of separation of property, the legal matrimonial regime was replaced by the regime of participation in acquisitions upon the enactment of the Turkish Civil Code of 2002. The regime of separation of property was retained as one of the contractual matrimonial regimes.
39 Dural/Öğüz/Gümüş, p. 299; Ş. Şepka, Türk Hukukunda Edilmiş Malara Katılma Rejimi ve Uygulama İlişkini Sorular (The property regime of participation in acquisitions and issues related to its application), Istanbul: Dumlupınar Üniversitesi Türkiye Aile Hukuk ve Aile İlişkileri Dergisi 2011, p. 15 (hereinafter: ‘Şepka’).
40 M. Dural/Öğüz/Gümüş, p. 301; Şepka, p. 19.
42 Acar, p. 96; Dural/Öğüz/Gümüş, p. 302; Sari, p. 7.
change the matrimonial property regime by entering into an agreement within the boundaries of the law (Art. 203 TCC). This means that the spouses may only choose between the *numerus clausus* statutory property regimes, namely the regime of participation in acquisitions, the regime of community of property, the regime of separation of property and the regime of separation of property with distribution. The spouses either confirm that the legal property regime of participation in acquisitions shall be applicable to the matrimonial property or opt out from the legal property regime by choosing one of the statutory property regimes. Otherwise, the spouses may not determine or create a new property regime or decide on the application of more than one of the statutory property regimes. Only one of the statutory property regimes stipulated under the TCC may be applied to the whole of the matrimonial property.

The chosen property regime itself may only be modified where the law explicitly provides for this. Thus, the spouses cannot create new conditions which are applicable to one of the statutory regimes. The legal boundaries to the modification of the statutory property regimes are specified under Articles 221, 237, 240, 258-256 and 276-277 TCC. Like all other agreements, pre-nuptial or marital agreements regarding the matrimonial property regime are subject to general validity conditions. In addition, there are special validity conditions for these agreements as stipulated under Articles 204 and 205 TCC.

The first special condition is that the spouses must have legal capacity and that the consent of the legal representatives of minors or persons under guardianship is also required under Article 204 TCC. If this was not explicitly stated, one might claim that entering into an agreement on the matrimonial property regime is a strictly personal right and, as a rule, the consent of the legal representatives is not required. However, in this provision, it is emphasized that even though the matrimonial property regime is a strictly personal right, the consent of the legal representatives of minors or persons under guardianship is indeed required.

The second special condition is a form requirement. According to Article 205 TCC, pre-nuptial or marital agreements must be signed by the spouses and entered into or approved by a notarial deed. The spouses must sign the agreement in person; voluntary representations is not possible. However, the legal representatives of minors or persons under guardianship must also sign these agreements. This requirement shall also be applicable to agreements regarding the determination, termination and amendment of the matrimonial property regime. Moreover, another possibility provided for spouses in Article 205 is to present a written declaration within the application process for the marriage.

4.2 Legal regime: participation in acquisitions

As stated above, the legal matrimonial property regime under the TCC is the regime of participation in acquisitions. By contracting an agreement at any time before or during their marriage, the spouses may opt out of the legal regime and choose one of the contractual property regimes. Thus, the legal matrimonial regime shall not be applicable when spouses choose another statutory matrimonial regime by entering into an agreement. However, if the spouses have not entered into such an agreement, it will be presumed that they choose the legal matrimonial property regime and, therefore, the property regime of participation in acquisitions shall be applied as of the time of the marriage.

Under the property regime of participation in acquisitions, the assets of each spouse are allocated as acquired property (Art. 219 TCC) or personal property (Art. 220-221 TCC). There is no single mass of common marital property. Also, it is not possible to allocate a specific asset to more than one property mass. Accordingly, there are four types of property masses: the personal property of the wife, the acquired property of the wife, the personal property of the husband, and the acquired property of the husband. This allocation, however, has no effect on ownership rights which are governed by the general provisions on property in the TCC.

The scope of personal property is stipulated under the Articles 220 and 221 TCC. Article 220 provides an exhaustive list of assets. Accordingly, personal property is comprised (i) of the assets for the sole personal use of either spouse; (ii) of the assets belonging to either spouse before the commencement of the property regime or later acquired by inheritance, gift or otherwise without any remuneration; (iii) of the compensation paid for pain and suffering; and (iv) of the substitute values for pre-existing personal property. Additionally, lump-sum payments for the benefits received from occupational pension funds, social insurance and social security institutions received by each spouse shall also be added to their personal property as an amount equivalent to the present value, which he or she would be entitled to during the dissolution of the matrimonial property regime (Art. 228(2) TCC).

Further, the spouses may agree on certain modifications to the legal property regime. Accordingly, the spouses may designate in an agreement regarding the matrimonial property regime that assets used for professional purposes or to conduct a business shall be regarded as personal property that would otherwise belong to the acquired property. Likewise, the spouses may also determine that the revenue generated from personal property shall not be included in the acquired property (Art. 221 TCC).

All other assets are allocated to the acquired property. According to Article 219 TCC, an acquired property comprises those assets which are acquired by a spouse in return for valuable consideration during the marital property regime. The second paragraph of this article provides a non-exhaustive list stating that the acquired property are earnings of the spouses, benefits received from occupational pension funds, social insurance and social security institutions; compensation for the loss of earning capacity; income derived from the personal properties of the spouses and the properties acquired to replace the acquired properties.

Like the assets, debts are also allocated under their most related property mass. Pre-existing debts of the spouses before marriage are allocated to the separate property respectively. Upon dissolution, first each asset is assigned to one of the four categories and then the contributions of one property mass and the financial claims of each spouse against the value of

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43 Dural/Öğüz/Gümüş, p. 302; Şıpka, p. 20.
44 Dural/Öğüz/Gümüş, p. 302; Sarı, p. 10; Şıpka, p. 20.
45 Sarı, p. 8.
46 Dural/Öğüz/Gümüş, p. 302; Sarı, p. 19.
47 Sarı, p. 20.
49 Dural/Öğüz/Gümüş, p. 304; Sarı, p. 27.
50 Sarı, p. 32.
51 Dural/Öğüz/Gümüş, p. 321.
52 Sarı, p. 132.
53 Dural/Öğüz/Gümüş, p. 321; Sarı, p. 132; Şıpka, p. 91.
54 Dural/Öğüz/Gümüş, p. 321.
55 Acar, p. 186; Dural/Öğüz/Gümüş, p. 331; Sarı, p. 168; Şıpka, p. 104.
56 Sarı, p. 12.
57 Acar, p. 155; Dural/Öğüz/Gümüş, p. 322; Sarı, 134; Şıpka, p. 92.
the acquired property of the other are calculated. In the end, each spouse essentially retains his or her personal property and is entitled to one-half of the surplus of the acquired property of the other spouse. The respective compensatory claims of the spouses are set off. In legal practice, it is observed that usually court-appointed experts make this rather complex calculation once the parties prove the allocation of each asset to one of the property masses. Accordingly, each spouse who claims a specific allocation for a specific asset bears the burden of proof. If the allocation of an asset or a debt to one of the property masses cannot be proven, such asset or debt is considered to be an acquired asset under the co-ownership of both spouses and is allocated accordingly.

The spouses may agree on a different proportion for the distribution of the marital property surplus. On the other hand, such agreements do not diminish the reserved part of the inheritance of non-common children or their descendants (Art. 236 TCC). Further, the spouses may determine the rights of the inheritance of non-common children or their descendants (Art. 240 TCC). The application of this regime is possible either by an agreement between the spouses or under certain extraordinary circumstances stipulated under Articles 206, 209 and 210 TCC. Due to the latter, the regime of separation of property is named as an extraordinary regime. Accordingly the regime of separation of property may be imposed by the court at the request of one of the spouses where the other spouse incurs serious debts or his/her share of the common property has been seized; or when the other spouse jeopardizes the interests of his/her partner or of the marital union; or when the other spouse unreasonably withholds consent which is required for the disposal of common property; or when the other spouse refuses to provide information regarding his/her income, assets and debts or common property; or when the other spouse permanently lacks legal capacity (Art. 206 TCC). Also, in cases where one of the spouses living under the community of property regime is declared bankrupt or is being pursued for a personal debt, then the matrimonial regime shall be converted into the regime of separation of property ex officio or upon a court order respectively.

The regime of separation of property means basically that both spouses shall have separate assets. In other words, under the regime of separation of property, there are two categories of assets, namely the assets of the wife and the assets of the husband. Since there is no common marital property, there shall not be any claims for financial adjustment upon dissolution. If the spouses own joint or collective property, the general rules of property law and contract law will apply.

The legal consequences of this regime is stipulated under Articles 242-243 TCC. The fundamental principle of the regime of separation of property is stipulated under Article 242 while Article 243 only refers to the related provisions of the regime of separation of property with distribution. According to Article 242 TCC, both spouses retain their rights to manage, benefit from and to dispose of their assets. However, the spouses may determine a different proportion for the distribution of the community of property in case of the dissolution of the marriage upon death (Art. 240 TCC).

4.4 Contractual regime: separation of property with distribution

The regime of separation of property with distribution is the second contractual matrimonial regime and it is a unique regime of Turkish law developed by Turkish lawyers deriving from the matrimonial regime of separation of property with the influence of the matrimonial regime of participation in acquisitions. As a matter of fact, this regime was first planned to be the legal regime during the preparatory works of the TCC. However, it was replaced by the current legal regime of participation in acquisitions.

The regime of separation of property with distribution is stipulated under Articles 244-255 TCC. Under this regime, basically there is no separation of acquired/separate property masses, and the dissolution is made in kind while the spouses may claim the difference between their shares from each other.

4.5 Contractual regime: community of property

The regime of community of property is the last statutory contractual marital regime which the spouses may agree upon contractually and it is stipulated under Articles 256-281 TCC. Under the regime of community of property, the assets are divided into three categories: the personal property of the wife, the personal property of the husband and the common property, which is owned by both spouses together in the form of joint property. This is the most significant difference between this regime and the legal regime where the spouses do not have joint property rights over the acquired property unless otherwise agreed.

Under the regime of community of property, the default model of general common property consists of assets and income other than the personal properties of each spouse (Art. 257 TCC). However, the TCC has provided the spouses with the possibility of certain modifications upon agreement, especially regarding the determination of the assets belonging to the community of property.

Accordingly, the spouses may vary the scope of the common property by choosing between two optional restrictive models: the model of ‘common property of acquisitions’ and the model of ‘other common property.’

Common property of acquisitions consists only of acquisitions where the common property corresponds to the marital property under the property regime of participation in acquisitions (Art. 258 TCC). Other models of common property may be

58 Dural/Öğüz/Gümüş, p. 338; San, p. 229; Şıpka, p. 264.
59 Şıpka, p. 267.
60 Dural/Öğüz/Gümüş, p. 340.
62 Dural/Öğüz/Gümüş, p. 305; Şıpka, p. 35.
63 Dural/Öğüz/Gümüş, p. 414.
64 Since 1926, it has been the legislator’s political choice to adopt both the Swiss Civil Code and is inseparably linked to the Code of Obligations. For further information on the reception and development of the Swiss legislation in Turkey, please see Y.M. Atamer, ‘Rezeption und Weiterentwicklung des Schweizerischen Zivilgesetzbuches in der Türkei’, RabelsZ 2008, p. 722-774. Accordingly, the matrimonial property regime in Turkey has basically adopted the Swiss system with the exception of the regime of separation of property with distribution.
65 Acar, 309; Dural/Öğüz/Gümüş, p. 418.
66 Dural/Öğüz/Gümüş, p. 418.
67 Acar, p. 309; Dural/Öğüz/Gümüş, p. 418.
68 Acar, p. 333; Dural/Öğüz/Gümüş, p. 426.
69 Acar, p. 333; Dural/Öğüz/Gümüş, p. 426.
70 Acar, p. 333; Dural/Öğüz/Gümüş, p. 426.

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formed either by specifically excluding certain assets from the common property (Art. 259 TCC) or by designating the personal property which is not to be included in the community of property (Art. 260 TCC).

Unlike the legal regime, the distribution is made in kind. 71 Accordingly, upon the dissolution of the regime of community of property upon the death of either spouse or agreement between the spouses on a different marital property regime, each spouse is entitled to half of the common property (Art. 276 TCC). In the case of death, the dissolution of the inheritance shall be made after the dissolution of the marital property regime. In cases of the dissolution of the regime due to divorce, separation, an annulment of the marriage or the separation of property by law or by court order, each spouse shall take back from the common property those assets which would have been his/her personal property under the property regime of participation in acquisitions, whereas the remaining portion of the common property will be split in half (Art. 277 TCC). It is possible for the spouses to determine a different proportion for the distribution of the community of property in case of dissolution. 72

5. Conclusion

Having examined the rules pertaining to the matrimonial regime under Turkish law, this article concludes that the Turkish legislature has succeeded in adopting rules which are in line with the legal trends in Europe. In Turkey, family law, both in terms of substantive law and private international law matters, is regulated by mandatory rules, and therefore party autonomy is not promoted. However, in the field of matrimonial property, limited party autonomy is granted to spouses both as to the ability to choose the regime applicable to their property and the ability to choose the law applicable to their relationships.

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71 Acar, p. 249; Dural/Öğüz/Gümüş, p. 433.
72 Dural/Öğüz/Gümüş, p. 434; Sarı, p. 13.