

**The Validity Of The Agreement On The Property
Regime of Spouses Under The Vietnamese Marriage And
Family Law - Some Inadequacies And Recommendations
For Improvement**

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Abstract

The right of spouses to agree on the property regime in marriage is a newly recognized issue in the Vietnamese marriage and family law. The recognition of the right of spouses to agree on the property regime in marriage is consistent with the reality of life and in harmony with the laws of other countries. However, due to its recent recognition, the provisions on the agreement on the property regime of spouses in Vietnamese law still have some limitations and shortcomings that need to be further studied for improvement. This article studies the issue of the validity of the agreement on the property regime of spouses in the Vietnamese marriage and family law. On that basis, the article points out the limitations and shortcomings and makes recommendations to improve the provisions of the marriage and family law related to the validity of the agreement on the property regime of spouses.

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1. INTRODUCTION

According to the Vietnamese marriage and family law, spouses have the right to choose to apply the statutory property regime or the agreed property regime (Law on Marriage and Family 2014, Clause 1, Article 28). Thus, in cases where spouses establish an agreement on the property regime, issues arising related to the spouses' property will be determined based on the agreement of the parties. When implementing the agreed property regime, if issues arise that have not been agreed upon by the spouses or the agreement is unclear, the principles of the marital property regime and the corresponding provisions of the statutory property regime will be applied (Law on Marriage and Family 2014, Clause 2, Article 48).

The validity of the agreement on the property regime of spouses is the legally binding value of the agreement on the property regime of spouses that the parties must comply with. In other words, when the agreement on the property regime of spouses comes into legal effect, the property issues of spouses such as: determining common property, separate property; possession, use, disposal of property and other issues related to the property of spouses in marriage will be based on the agreement of spouses on the property regime. To ensure the interests of all parties involved, the law on marriage and family has set out the conditions for the agreement on the property regime of spouses to be legally effective. Only when the agreement on the property regime of spouses complies with all the conditions prescribed by law will this agreement be legally effective. In case the agreement on the property regime of spouses does not satisfy one of the statutory conditions, this agreement will be invalid and the property regime of spouses will be automatically applied according to the statutory property regime. This article studies the provisions related to the validity of the agreement on the property regime of spouses such as: the conditions for the validity of the agreement on the property regime of spouses and the case of the agreement on the property regime of the contract being invalid in form, thereby pointing out the limitations and inadequacies and making recommendations to improve the legal provisions related to this

issue.

2. Conditions for the validity of the agreement on the property regime of spouses

Establishing an agreement on the property regime of spouses not only affects the interests of the spouses but also affects the interests of third parties. Therefore, according to the Vietnamese marriage and family law, for an agreement on the property regime of spouses to be legally effective, the following conditions must be met:

2.1. Conditions on the time of establishing the agreement on the property regime of spouses

Article 47 of the Law on Marriage and Family 2014 stipulates: *“In case the two parties to a marriage choose a property regime by agreement, this agreement must be made before the marriage, in the form of a notarized or certified document. The property regime of the spouses according to the agreement is established from the date of marriage registration”*. From the above provision, it can be seen that if the spouses want to choose a property regime by agreement, the parties need to establish an agreement on the property regime before the time of marriage registration. The provision that the property regime by agreement must be established before marriage is also found in the laws of some countries. For example, according to the provisions of the French Civil Code, the agreement on property in marriage must be made before marriage registration and only takes effect from the date of marriage registration (French Civil Code, Article 1395). Allowing the establishment of an agreement on the property regime of spouses after marriage registration may lead to disruption of property relations in the family as well as potentially affect the rights of third parties. Therefore, the agreement on the property regime of spouses must be established before the time of marriage (Doan Thi Ngoc Hai, 2019). Thus, after the time of marriage, if the spouses do not have an agreement on the property regime, the statutory property regime will automatically apply. Issues related to the property of spouses will be determined based on the provisions of the marriage and family law.

2.2. Conditions on the form of the agreement on the property regime of spouses

The form of the agreement on the property regime of spouses is the method of expression, the form of existence of the agreement on the property regime of spouses. To

ensure the legitimate rights and interests of spouses and avoid affecting the legitimate rights and interests of third parties, the law stipulates that the agreement on the property regime of spouses must comply with a certain form. Accordingly, the agreement on the property regime of spouses must be expressed in writing and must be notarized or certified (Law on Marriage and Family 2014, Article 47). Thus, if the agreement on the property regime of spouses is in writing with the signatures of the parties but is not notarized or certified, it will not have legal value. Research on the French Civil Code also shows that all marriage contracts must be drawn up by a notary in the presence of the spouses (Nguyen Ngoc Dien - Doan Thi Phuong Diep, 2016). However, it should be noted that the agreement on the property regime of spouses is a type of conditional transaction in which the condition for the transaction to take effect is that the parties establish a legal marriage relationship. Therefore, the agreement on the property regime of spouses only takes effect when the parties register their marriage.

2.3. Conditions on the content of the agreement on the property regime of spouses

In addition to complying with formal regulations, the agreement on the property regime of spouses must also satisfy the following content conditions:

Firstly, the agreement on the property regime of spouses must comply with the conditions for the validity of civil transactions as prescribed in Article 117 of the Civil Code 2015 and related documents (Law on Marriage and Family 2014, Clause 1, Article 50). Accordingly, the parties establishing an agreement on the property regime of spouses must have appropriate legal capacity and capacity for action. The parties establishing an agreement on the property regime of spouses do so completely voluntarily. The content and purpose of the agreement on the property regime of spouses do not violate the prohibitions of law and are contrary to social ethics.

Second, the agreement on the property regime of spouses must not violate the general principles of the property regime of spouses. It can be understood that the general principles of the property regime of spouses are fundamental and guiding regulations that the subjects must comply with in the process of building and applying the regulations on

the property regime of spouses. The principles of the property regime of spouses are stipulated in Articles 29, 30, 31 and Article 32 of the Law on Marriage and Family 2014, including: spouses are equal in rights and obligations in property relations; spouses have the obligation to ensure the essential needs of the family; when exercising property rights and obligations, spouses must not infringe upon the rights and legitimate interests of family members and the interests of others. These principles are set out to help strengthen and maintain stronger marital and family relationships while protecting the rights and interests of spouses and third parties. Any agreement between the parties on the property regime of spouses that is contrary to the above principles will have no legal value and if there is a dispute over the property of spouses, the agreement on the property regime of spouses may be declared invalid by the Court.

Third, the content of the agreement on the property regime of spouses must not seriously violate the rights to alimony, the rights to inheritance, and the legitimate interests of fathers, mothers, children, and other family members. Accordingly, cases considered to seriously violate the rights to alimony, the rights to inheritance, and other legitimate rights and interests of fathers, mothers, children, and other family members are cases where the parties establish an agreement with content aimed at evading the obligation to provide alimony or to deprive heirs of the right to inheritance regardless of the content of the will or violate the legitimate rights and interests of fathers, mothers, children, and other family members as prescribed by the Law on Marriage and Family 2014 and other relevant laws (Point b, Clause 2, Article 6, Circular No. 01/2016/TTLT-TANDTC-VKSNDTC-BTP).

Fourth, the establishment of a marital relationship must comply with the conditions for marriage and marriage registration as stipulated in Article 8 of the Law on Marriage and Family 2014. In case the parties to the marriage do not meet the conditions for marriage, the marital relationship is considered illegal. Meanwhile, the agreement on the property regime of the spouses depends on the marriage of the parties and only becomes effective when the parties establish the marital relationship. Therefore, according to the law on marriage and family, the marriage not complying with the conditions for marriage also leads to the agreement on the property regime of the spouses not becoming effective.

3. Limitations and shortcomings in regulations related to the validity of agreements on the property regime of spouses

Research on the regulations on the validity of agreements on the property regime of spouses shows that these regulations still have the following limitations and shortcomings:

Firstly, the regulation on the time to establish the property regime of spouses before marriage registration is not really suitable. Specifically, according to Article 47 of the Law on Marriage and Family 2014, the parties must establish an agreement on the property regime of spouses before the time of marriage registration. After the time of marriage registration, if the parties have not established the property regime according to the agreement, after marriage, the statutory property regime will automatically apply. In other words, after marriage, the parties cannot change the property regime from the statutory property regime to the property regime according to the agreement. The author believes that only allowing the parties to establish an agreement on the property regime of spouses before marriage is not really suitable. Because, in practice, before entering into a marriage relationship, the parties often do not fully envision the property issues arising in married life. However, after the couple officially enters into a marital relationship, the reality of living together gives rise to the need to agree on the property regime of the couple. As owners of the property, it is completely appropriate for the couple to voluntarily agree on the property regime if the agreement on the property regime does not infringe upon the rights and legitimate interests of a third party. In the event that the agreement on the property regime of the couple infringes upon the rights and interests of a third party, those whose rights and interests are infringed still have the right to request the Court to declare the agreement on the property regime of the couple invalid. Furthermore, the regulation requiring the agreement on the property regime of the couple to be established before marriage has eliminated the desire to establish an agreement on the property regime of the couples who registered their marriage before the time when the regulation allows the establishment of an agreement on the property regime of the couple to be recognized by law.

Second, the Vietnamese marriage and family law does not have specific regulations on the issue of public disclosure and transparency of agreements on the property regime of spouses to protect the rights and interests of third parties in civil transactions. In some countries, the law has stipulated the obligation of both men and women to notify the civil registration authority of their application of the property regime according to the agreement. For example, the Thai Civil and Commercial Code stipulates that prenuptial agreements will not be legally valid if the parties do not present a written agreement on the property regime to the marriage registration authority at the time of marriage registration (Thai Civil and Commercial Code, Article 1466). Similarly, the French Civil Code also stipulates that When making a marriage contract, the notary public shall issue a certificate to the parties, and the parties shall not be required to pay a fee; The certificate must clearly state the full name and residence of the notary, the full name, status and residence of the parties to the marriage, and the date of the marriage contract. The certificate must clearly state that it must be submitted to the civil registry officer before the marriage is registered. If the marriage registration certificate states that no marriage contract has been made, the spouses are considered to be married according to the general legal regime in the eyes of third parties, unless in the documents signed with third parties the spouses declare that they have made a marriage contract (French Civil Code, Article 1394).

Third, the provisions on the invalidity of the agreement on the property regime of spouses due to illegal annulment of marriage are not really suitable. The agreement on the property regime of spouses only comes into effect when the marriage complies with the conditions for marriage. In the case where the marriage does not comply with the conditions for marriage, the marriage relationship between the parties will be invalid and therefore the agreement on the property regime of spouses will also be invalid. However, the current provisions of the law on marriage and family do not distinguish between cases where the marriage is annulled illegally but the parties are in good faith when establishing the agreement on the property regime of spouses and cases where the parties are not in good faith when establishing the property regime. The case where the parties are in good faith when establishing the agreement on the property regime of spouses can be understood

as when establishing the agreement on the property regime of spouses, the parties clearly know that the marriage is illegal but still establish the agreement on the property regime of spouses. Meanwhile, the parties are considered to be in bad faith if at the time of establishing the agreement on the property regime, the parties did not know and could not have known that the marriage was illegal. For example, a couple with blood relations is prohibited from marrying but the parties did not know about this. The above provision is not really appropriate and does not ensure fairness for the parties.

French law distinguishes between cases where the parties entered into a marriage in good faith and cases where the marriage is annulled. Accordingly, a marriage declared invalid is still valid for the spouses if the marriage was entered into in good faith. If only one of the parties was in good faith, the marriage is only valid for that person (French Civil Code, Article 201). Thus, according to the French Civil Code, if the parties entered into a marriage in good faith, the agreement on the property of the spouses remains valid until the marriage is annulled and the settlement of property issues is still determined according to the agreement on the property regime of the spouses. In cases where only one party was in good faith, the agreement on the property regime is only valid for the party in good faith. In cases where both parties were not in good faith, the agreement on the property regime will be invalid from the time of marriage. The author believes that the provisions of the French Civil Code are reasonable. Therefore, the author believes that the Law on Marriage and Family 2014 needs to amend and supplement this provision to suit reality.

Fourth, there are many different ways to understand the invalidity of an agreement on the property regime due to a violation of formal conditions. According to Article 47 of the Law on Marriage and Family 2014, an agreement on the property regime of spouses must be notarized or certified. In case a couple establishes an agreement on the property regime but it is not notarized or certified, the agreement on the property regime of spouses will be invalid. According to Clause 2, Article 129 of the Civil Code 2015, *“If the form of a civil transaction, required to be established in writing, violates against regulations on notarizing or authorization, but a party or the parties has/have fulfill at least two third of the obligations in the transaction, a court, at his/her/their request(s), shall issue a decision*

on recognition of the validity of such transaction. In this case, the parties need not perform the notarizing or authorization”. Thus, in the case where the parties establish a written agreement on the property regime but it is not notarized or authenticated and then the parties establish a marriage relationship, there are many different views on whether Article 129 of the Civil Code 2015 should be applied or not. There is a view that the agreement on the property regime of spouses is a type of civil transaction, so in this case, Article 129 of the Civil Code 2015 will also be applied to resolve the matter. According to this view, in the case where the parties violate the mandatory notarization provision but one of the parties has performed at least two-thirds of the obligations of the transaction, the Court will recognize the agreement on the property regime of spouses and the Court's decision to recognize the agreement will replace the notarization. However, another view holds that if the agreement on the property regime is not notarized or authenticated, this agreement should be declared invalid (Ngo Thanh Huong, 2020). Therefore, to ensure consistency in perception and application of the law, the author believes that competent state agencies need to issue specific guidance on this issue.

4. Proposal to improve regulations on agreement on property regime of spouses

From the above limitations and shortcomings, the author makes some recommendations to improve the regulations related to the validity of agreements on the property regime of spouses in the Vietnamese marriage and family law as follows:

Firstly, regarding the time of establishing the agreement on the property regime of spouses. The author recommends amending and supplementing Article 47 of the Law on Marriage and Family 2014 in the direction of allowing spouses to establish an agreement on the property regime after the time of marriage registration. In addition, Article 47 of the Law on Marriage and Family 2014 needs to supplement the obligation of spouses to provide information on the establishment of an agreement on the property regime so that the competent authority can register the marriage in order to note the information on the marriage registration certificate and at the same time stipulate the legal consequences of spouses not fulfilling the obligation to provide information on this matter. Specifically, Article 47 of the Law on Marriage and Family 2014 needs to be amended and supplemented

in the following direction:

“Article 47. Agreement on establishing the property regime of spouses

1. Spouses have the right to choose a property regime by agreement before or after marriage registration and this agreement must be made in writing and notarized or certified.

2. In case the spouses establish an agreement on the property regime before registering their marriage, this agreement shall take effect from the time of marriage registration. When registering their marriage, the spouses are obliged to notify the competent marriage registration authority that the spouses have established the property regime according to the agreement so that the marriage registration authority can note the information about the spouses having established the property regime according to the agreement on the marriage registration certificate.

3. Case if a couple establishes an agreement on the property regime after registering their marriage , the couple is obliged to notify the competent marriage registration authority to record information on the couple's application of the property regime according to the agreement.

In case the spouses establish an agreement on the property regime after the time of marriage registration, the spouses must notify the marriage registration authority to note the information that the spouses have established an agreement on the property regime on the marriage registration certificate. In this case, the agreement on the property regime of the spouses shall be effective from the time the competent authority notes the information on the marriage registration certificate”.

Second, it is necessary to amend and supplement Article 50 of the Law on Marriage and Family 2014 in the direction that in the case of illegal annulment of marriage where the parties are in good faith, the agreement on the property regime remains effective until a decision is made to annul the marriage, which is illegal. In the case where only one party is in good faith at the time of establishing the agreement, the agreement on the property regime is effective for the party in good faith until a decision is made to annul the marriage, which is illegal. At the same time, it is necessary to clearly stipulate the consequences of

the parties not notifying the competent marriage registration authority that the couple has an agreement on the property regime, or in the case where the couple establishes an agreement on the property regime after marriage but does not carry out the procedure to add a note on the Marriage Registration Certificate, the agreement on the property regime of the couple will be considered invalid. The addition of this provision will force the parties when establishing an agreement on the property regime of spouses to strictly fulfill the obligation to provide information about their establishment of an agreement on the property regime of spouses to the marriage registration authority, thereby contributing to protecting the rights and interests of family members and third parties. Therefore, the author believes that Article 50 of the Law on Marriage and Family 2014 needs to be amended and supplemented as follows:

“Article 50. Invalid agreement on property regime of spouses

1. The agreement on the property regime of spouses shall be declared invalid by the Court in one of the following cases:

a) Failure to comply with the conditions for the validity of transactions prescribed in the Civil Code and other relevant laws;

b) Violating one of the provisions in Articles 29, 30, 31 and 32 of this Law;

c) The content of the agreement seriously violates the right to alimony, the right to inheritance and other legitimate rights and interests of fathers, mothers, children and other family members.

d. The couple fails to notify the competent marriage registration authority of the establishment of an agreement on the property regime of the spouses so that the competent marriage registration authority can make a note on the Marriage Registration Certificate as prescribed in Article 47 of this Law.

2. In case of illegal annulment of marriage but the parties are in good faith, the agreement on the property regime remains in effect until the marriage is annulled. If only one party is in good faith, the agreement on the property regime of the spouses remains in effect for the party in good faith until the date the marriage is annulled.

3. The Supreme People's Court shall preside over and coordinate with the Supreme

People's Procuracy and the Ministry of Justice to guide Clause 1 of this Article".

Third, it is necessary to specify cases where the agreement on *the* property regime of spouses violates the provisions on form. According to the author, in cases where the agreement on the property regime of spouses is not notarized or certified, the Court will declare the agreement invalid without applying Article 129 of the Civil Code 2015 to consider the validity of this agreement. Because if Article 129 of the Civil Code 2015 is applied, it is impossible to determine that the spouses have performed two-thirds of the obligations under the agreement. The fact that the law on marriage and family requires that the written agreement on the property regime of spouses must be notarized or certified is aimed at protecting the rights and interests of family members and third parties. Therefore, if the agreement violates the provisions on form but is not declared invalid, it may affect the interests of family members. Furthermore, the consequence of declaring a civil transaction invalid is that the parties must return to each other what they have received (Civil Code 2015, Article 131). Meanwhile, when the Court declares an agreement on the marital property regime invalid, the parties cannot return to each other what they have received, but when the property regime according to the agreement is invalid, the marital property regime will switch to the statutory property regime.

5. Conclusion

The agreement on the property regime of spouses is one of the new provisions recognized in the law on marriage and family of Vietnam. Therefore, these provisions inevitably have limitations and shortcomings that need to be further improved to ensure consistency in the understanding and application of the law. The article has analyzed the conditions for the validity of the agreement on the property regime of spouses according to the provisions of the law on marriage and family of Vietnam. At the same time, the article has also pointed out the limitations and shortcomings and proposed recommendations to improve the legal provisions on the property regime of spouses.

Conflicts of Interest

The author has disclosed no conflicts of interest.

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