

THE PRIMARY IMPERATIVE REGIME AS REGULATED BY THE NEW ROMANIAN CIVIL CODE

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Abstract

Perhaps the most significant novelty brought by the current Romanian Civil Code (Law no. 287/2009) regarding family relations, now covered by the new code, consists of the consecration of the principle of freedom of choice of matrimonial regime.

Regardless of the matrimonial property regime chosen by the spouses (the statutory community of property, the conventional community of property or the separation of property), there are several provisions relevant to the patrimonial relations established between spouses or between spouses and third parties, provisions that apply to any marriage, in order to ensure its functioning and that are known as the primary imperative regime.

Noting that family law doctrine mainly analyses the three matrimonial property regimes that are currently possible in Romania and that it does not thoroughly cover the primary imperative regime, and also considering the importance of the latter regarding the patrimonial viability of any marriage, the author has chosen to analyze the primary imperative regime in its entirety.

Keywords: the Romanian Civil code, primary imperative regime, the principle of freedom of choice of matrimonial regime.

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1. Introduction

The current Romanian Civil Code (Law no. 287/2009) completely reforms the patrimonial relations between spouses, establishing the principle of freedom of choice of matrimonial regime. Therefore, besides the community of property (the only matrimonial regime possible according to the previous regulations of the 1864 Civil Code), the current Civil Code allows spouses to choose, by concluding a matrimonial convention, between the conventional community of property and the separation of property. Currently, the community of property is a suppletive matrimonial regime, applicable in the eventuality that the spouses have not concluded a matrimonial convention in order to opt for another matrimonial regime.

Regardless of the chosen matrimonial property regime, whether statutory or conventional, there is a sum of rules that ensure the functioning of the marriage, including the case the spouses get along, but especially designed to ensure the organization of the marriage in case any disagreement arises between spouses. These rules constitute the primary imperative regime (basic matrimonial statute, fundamental statute or primary matrimonial regime – as it is known in French Law).

The concept of primary regime, within the meaning of “body of rules referring to the matrimonial regime in general”¹, does not identify with the concept of matrimonial regime, since, between the two, exist the following differences² :

- the primary regime is unique and includes only mandatory legal provisions, while the matrimonial regime may be chosen or concluded by the spouses, under the law;
- the primary regime applies to any marriage, along with the matrimonial regime chosen by the spouses;
- the primary regime only covers provisions designed to ensure a minimal operation of the marriage, while the matrimonial regime includes rules that refer to the spouses' property, to their debts and also to their management.

The primary and the matrimonial regime together form “the patrimonial charter of marriage”³.

2. The concept of primary imperative regime

Considered to be “the key of any discussion ... on the matrimonial conventions liberalization”⁴, a “constitution” of matrimonial regimes⁵, the primary imperative regime has been defined as “the totality of legal rules governing the relations established between spouses or between one or both spouses, on the one hand and third parties, relations regarding the existing goods on the conclusion of marriage, and acquired during marriage, as well as the obligations incurred in relation to such goods or the responsibilities of marriage”⁶.

¹Al. Bacaci, V.C. Dumitrache, C.C. Hageanu, *Dreptul familiei (Family Law)*, 7th edition, according to the regulations of the new Civil Code, C.H. Beck Publishing House, Bucuresti, 2012, p.48.

² D. Lupascu, C.M. Crăciunescu, *Dreptul familiei (Family Law)*, 2nd edition, Universul Juridic Publishing House, Bucuresti, 2012, p.127.

³ Ibidem.

⁴E. Florian, *Dreptul familiei (Family Law)*, Ed. C.H. Beck Publishing House, Bucuresti, 2010, p.105.

⁵ G. Cornu, *Les régimes matrimoniaux*, PUF, Paris, 1997, p.79.

⁶ N. C. Anitei, *Dreptul familiei (Family Law)*, Hamangiu Publishing House, Bucuresti, 2012, p.75.

3. The legislative setting of the primary imperative regime according to the current Civil Code

The primary imperative regime is regulated in Title II – *Marriage*, Chapter VI – *Marriage Rights and Responsibilities*, Section 1 – *Common Provisions*, Paragraph 1. – *About the matrimonial regime in general* (art. 312-320), Paragraph 2. – *The matrimonial home* (art.321-324), Paragraph 3. – *Marriage expenses* (art.325-328).

Given that the primary imperative regime is intended to insure the "minimum" organization and functioning of marriage, the legislator regulated this regime, with several exceptions, through rules of public order, stating within art. 312, paragraph (2) of the Civil Code: "Regardless of the matrimonial regime chosen, one cannot derogate from the provisions of this section, unless the law provides otherwise."

In terms of civil law enforcement regarding this matter, since October 1, 2011, the imperative provisions of the primary regime apply to all married persons, regardless of the date the marriage has been concluded and of the chosen matrimonial regime.

4. The content of the primary imperative regime in the current regulation

In the primary imperative regime, the Civil Code includes aspects concerning the extension of powers of one spouse through exercising the rights of the other spouse and the ones regarding the acts of disposition that severely threaten the interests of the family, the legal status of the matrimonial home, the aspects regarding the economic and social independence of each spouse, the bearing of marriage expenses.

Unlike the previous regulation of the Family Code, which established the tacit mutual mandate of the spouses, the current Civil Code establishes the conventional mandate (art. 314), through which one of the spouses may represent the other by exercising his/her rights which the latter has according to the matrimonial regime⁷.

To determine the kind of conventional mandate between spouses, we have to start from the provisions of the Civil Code regarding the contract of mandate of the common law. Thus, according to art. 2011 of the Civil Code, "the mandate is with or without representation." Furthermore, as stipulated by art. 314 of the Civil Code regarding the conventional mandate, "one of the spouses may mandate the other spouse to represent him/her ..." Corroborating the two legal texts, we can conclude that the conventional mandate between spouses is a mandate with representation, precisely, as stated in the doctrine⁸, it is a particular representation mandate, since its object consists in exercising the rights deriving from the matrimonial regime, that cannot be applied to other persons concluding a contract of mandate.

Regarding the form of the conventional mandate, since the primary regime regulations do not stipulate anything to this effect, we shall apply the provisions of art. 2013 of the Civil Code, which regulates the form of mandate with representation of common law. Therefore, we understand that the conventional mandate can be concluded in writing (authentic or under private signature) or verbally. Acceptance of the mandate may result, as required by the Civil Code, as well as from its execution by the procedural representative.

Another innovation on this matter, in addition to the conventional mandate, is established in the new Civil Code within art. 315 – the judicial mandate, approved by the court for guardianship at the request of one spouse, in the event that the other is unable to manifest his/her will, the court determining the conditions, the limitations and the period of this mandate. The court for guardianship cannot establish a general mandate that would be valid for an indefinite period, since this would eliminate the very application of the

⁷ The mandate concerns either common property or the property of the mandant spouse.

⁸ M. Banciu, A. Banciu, *Dreptul familiei conform noului Cod civil (Family Law According to the New Civil Code)*, Hamangiu Publishing, Bucuresti, 2012, p.48.

matrimonial regime. The judicial mandate terminates when the represented spouse is no longer in the situation leading to the imposition of the mandate, even if its validity period has not yet expired, or when a guardian or a curator is appointed.

As the powers of a spouse can be extended, the court may exceptionally limit the powers of one spouse who concludes legal acts that severely threaten the interests of the family and, at the request of the other spouse, the court can establish that, for a determined period of time (maximum 2 years), the right to dispose of certain goods can be exercised only with the consent of that spouse⁹. The written decision on this matter is communicated to the public, in order to arrange the formalities concerning real and personal estate publicity, so that this aspect become available to third parties as well.

If a husband whose powers have been limited concludes legal documents in violation of the court decision, the penalties imposed to the legal documents thus signed is relative nullity. The action for invalidation is prescribed within one year, calculated from the date on which the injured party acknowledged the existence of the act.

For the first time, the current Civil Code establishes the concept of the matrimonial home, as an important component of the primary imperative regime that is defined on art. 321, paragraph (1) as "common home of both spouses, or, in absence, of the spouse responsible for the welfare of the children".

The matrimonial home can be noted in the Land Registry for such purpose at the request of either spouse, whether he/she has or has not the status of holder of ownership of the property in question.

Given its importance, art. 322 paragraph (2) of the Civil Code provides special protection of the matrimonial home, stipulating that none of the spouses, not even the exclusive owner, can exercise certain rights over the matrimonial home and can conclude legal documents that would affect its usage, except the case he/she has the written consent of the other spouse. Furthermore, none of the spouses can remove from the matrimonial home the goods that furnish or decorate it, and neither can dispose of them without the written consent of the other spouse, an excessive provision of the current regulations, in our opinion.

As stated in the specialized literature¹⁰, in the eventuality the property is exclusively owned by one of the spouses, the written consent of the other spouse signifies only the lack of opposition of the spouse on the conclusion of a legal document that would influence the conditions of family life, the non-proprietary spouse becoming part of the contract.

If this written consent concerning the rights over the matrimonial home is denied by the other spouse without having a legitimate reason (namely for purpose of heckling, as stated in specialized literature¹¹), the concerned spouse may notify the guardianship court, in order for the court to authorize the conclusion of the act.

In case one spouse concludes legal documents disregarding the above requirements (both on the rights over the matrimonial home, as well as those relating to goods furnishing or decorating the matrimonial home), the spouse that has not consented the conclusion of the document may require its cancellation within one year from the date on which he had been informed on it, but no later than one year from the date of termination of the matrimonial regime.

In the event that the matrimonial home has not been registered in the Land Register, the spouse that has not consented the conclusion of the document may not require its

⁹ The legal limitation of powers of one of the spouses may be ordered only for certain goods and only for acts of disposition which, according to the matrimonial regime applicable to spouses, would not require the consent of the other spouse.

¹⁰ D. Lupaşcu, C. M. Crăciunescu, op.cit., p.131.

¹¹ D. Lupaşcu, C. M. Crăciunescu, op.cit., p.130.

cancellation, but only interest on compensation, unless the third party acquirer otherwise acknowledged the quality of matrimonial home.

In the current economic climate, the matrimonial home is often held under a rental agreement, thus the current Civil Code regulates this situation, stipulating that each spouse has the right of leasehold interest, even if only one of the spouses is the holder of the rental agreement or if the agreement has been signed prior to marriage. The legal regime of the matrimonial home, already discussed, also applies in the case the matrimonial home is being used under a rental agreement.

If the family home is held under a rental agreement ancillary to a contract of employment, the doctrine¹² states that, in order to ensure free exercise of the profession, the spouse concerned may resign without requiring the consent of the other, even if the family would be thus deprived of the home.

In case of death of one spouse, the surviving spouse continues to exercise his/her leasehold interest right, unless he/she expressly disclaims it, within 30 days from the date of registration of the death the other spouse.

On the dissolution of marriage, if the matrimonial home cannot be used by both spouses and they do not have a proper relation, the benefit of the rental contract can be assigned to one of the spouses, taking into consideration, as follows, the best interests of minor children, the fault in the dissolution of marriage and housing opportunities of the former spouse.

As a new aspect regarding this matter, the spouse awarded with the benefit of the rental agreement has the obligation to pay an allowance to the other spouse in order to cover the expenses for finding a new home, except in the event that the marriage was severed because of the exclusive fault of the latter. If the spouses have joint property, compensation can be imputed, on separation, over the share awarded to the spouse benefiting from the rental contract.

In a similar manner, the problem of attributing the matrimonial home will be solved in case it is jointly owned by both spouses, the effects of the matrimonial home assignment producing up to the date of the definitive sentence regarding the partition.

The patrimonial independence of the spouses is another component of the primary regime, the Civil Code stating that each of the spouses can conclude legal documents with the other spouse or with third parties, of the law does not state otherwise. Thus, the spouses may conclude contracts of sale, donations¹³, contracts of exchange, loan agreements, etc. Also, each spouse can, without the consent of the other, make bank deposits, as well as other operations in connection therewith. In the relations established with the banking institution, the account holder has, even after the marriage is dissolute or terminated, the right to dispose of the deposited funds, if the court has not decided otherwise. As a protective measure that would alleviate this provision belonging to the separation regimes, either spouse may request the other to inform him/her about his/her assets, income and debts, and in the event of unjustified refusal may appeal to guardianship court that can require the refusing spouse or any third party to provide the requested information and to submit the necessary evidence in this regard.

Third parties may refuse to provide the requested information when they have the professional secrecy obligation.

¹² C. Nicolescu, *Coeziunea patrimoniala a cuplului – finalitate a regimului matrimonial primar (II) (Patrimonial Cohesion of the Couple – purpose of the primary matrimonial regime)*, Curierul Judiciar no. 7/2008, p.65.

¹³ Under current regulations, donation between spouses may be revoked only during marriage, while in the previous regulation donation could be revoked even after the dissolution of marriage or death of donee spouse.

In the event that, according to the law, the information required by a spouse can be obtained only at the request of the other spouse, the latter's refusal to require that information creates a rebuttable presumption (which means it can be countered by contrary evidence) that plaintiff's claims are true.

In terms of spousal contribution to marriage expenses¹⁴, regulated more completely and flexibly than previously, the Civil Code establishing the obligation of the spouse to provide reciprocal material support, states that the spouses are obligated to contribute to these expenses according to each other's possibilities, if it has not been otherwise decided through matrimonial convention. Any convention that stipulates that only one of the spouses bears the marriage expenses is considered unwritten.

It is also stated for the first time that the housework of any of the spouses and the duty of raising children represent a contribution to family expenses, aspect which has been previously discussed in legal practice.

Given that each spouse complies with the obligations regarding family expenses, he/she has the right to pursue a profession and to dispose, under the law, of the acquired revenue.

Professional independence of spouses implies the right of each spouse to pursue a profession, the possibility of changing this profession and the right of renouncing this profession through resignation, regardless of the will of the other spouse, even if that would prejudice the interests of the family¹⁵. Regarding the right of each of the spouses to exercise a profession, the doctrine¹⁶ discusses the matter of the solutions that the morally or pecuniary prejudiced spouse might have because of the unsuitable profession pursued by the other spouse, stating that such a situation could be solved through spouses' agreement, mediation or, ultimately, through divorce.

As another novelty regarding marriage expenses, the Civil Code establishes, within art. 328, the right of the spouse that has effectively participated in the professional activity of the other spouse, to obtain compensation, according to the extent of enrichment of the latter (this being the case of an unjust enrichment), if his/her participation has exceeded the limits of material support obligation and of the obligation to contribute to the expenses of marriage.

We consider, along with other authors¹⁷ that this compensation can be obtained through mutual agreement of spouses or can be legally obtained (during marriage), or, through division of property (in case of divorce).

5. Conclusions

We consider that, besides identifying this regime as primary, the current Civil Code provides the general legal framework designed to ensure the protection of patrimonial interests of spouses, regardless of the chosen matrimonial regime.

We cannot but wonder how will these regulations be applied in the Romanian judicial practice? Will the spouses married under the community of property regime (regime that is still preferred by most married couples) accept that their life partners can simply conclude bank deposits concerning sums of money representing common goods without their consent, as well as other operations connected to these? Will people married under the same regime agree with their spouses concluding any kind of legal documents with third parties (except those for which the law requires the consent of both spouses) without even being consulted on this matter? Will the spouse accept that their partners can freely dispose of collected

¹⁴ The spouses' contribution to the marriage expenses may be cash or in kind.

¹⁵ For example, the case in which the family lives in a home ancillary to a contract of employment.

¹⁶ D. Lupașcu, C. M. Crăciunescu, op.cit., p.135; M. Avram, C. Nicolescu, *Regimuri matrimoniale (Matrimonial Regimes)*, Hamangiu Publishing House, București, 2010, p.150.

¹⁷ D. Lupașcu, C. M. Crăciunescu, op.cit., p.135.

revenues, after fulfilling the obligations regarding marriage expenses, considering that, at least under the legal community of property regime, these revenues are currently considered and specifically regulated as common goods?

These are but a few questions arising from this intercession, the doctrine and especially the future judicial practice will certainly provide us the answers to these, so far, rhetorical questions.

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