

PATRIMONIAL RELATIONSHIPS BETWEEN SPOUSES IN THE NEW CIVIL CODE IN THE CONTEXT OF RETURNING TO THE POSSIBILITY OF CONCLUDING MATRIMONIAL CONVENTIONS

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Abstract

Today, while the Family Code is still in force, the patrimonial relationships between spouses are governed by the disposals of Article 30-36 which settle only the matrimonial regime of common goods, a lawful, unique, immutable and compulsory regime.

Key words: *patrimonial relationships, spouses, matrimonial conventions.*

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The ratification of the new Civil Code, Law no. 287/2009¹, gives us reason to believe that in the near future the new settlement regarding the spouses' patrimonial rights and obligations, as stipulated in the new Civil Code, and which will come into effect soon and will take over family relationships, will finally find its proper place in our legislation, becoming applicable².

In the context of ratification, the judicial regime of spouses' goods will not be a lawful, compulsory one, but according to Article 312, paragraph

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¹ Published in M. Of. nr. 511, 24.07.2009; Part I.

² For further discussions before the ratification of this law see: P. M. Popovici, *Regimul matrimonial al separației de bunuri*, în „Pandectele Române”, nr. 2/2006, p. 182-191, *idem*, *Regimul matrimonial al coabitării*, în „Studii juridice”, nr. 1/2006, p. 178-184, *idem*, *Discuții privind modificarea regimului matrimonial*, în „Studii de drept românesc”, nr. 1-2/2003, p. 189-194.

1 of the Civil Code, the spouses may decide for themselves the matrimonial regime they choose. Should they choose the division of goods regime, or that of conventional community, according to Article 329 of the Civil Code, spouses will decide upon the regime in legal conventions, obeying the advertising rules stipulated by the law. No matter what the matrimonial regime is, spouses won't be able to derogate from general and common disposals, by means of absolute nullity penalty, according to Article 322 for the basic or common matrimonial regime stipulated in the new Code in Articles 313-338 that offer the essential rules compulsory for any regime.

That is to say, under the legislative conditions of returning to the possibility of concluding matrimonial conventions, which were also settled in our old Civil Code, 1865, the spouses' patrimonial life will be organized not only by the legislator, but also by the spouses, who know better their patrimonial interests.

The term matrimonial regime in judicial literature is well-determined. The matrimonial regime has been defined by many authors. What seems very important is the classic style, all authors agree upon, namely that the matrimonial regime appoints all the rules which govern the relationships between spouses regarding their goods, as well as those in relationship with a third person¹. This definition is suitable for any matrimonial regime.

We should remember that the matrimonial regime is not the same as the primary, imperative regime, „that is a group of compulsory rules, which should be taken care of by spouses”, no matter what their matrimonial regime might be². The doctrine underlines the fact that the matrimonial regime is a much comprehensive notion than the primary, imperative regime. Thus, „the primary, imperative regime is part of the matrimonial regime, but

¹ See: C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol. III, Edit. All, București 1998; M. Eliescu, *Curs de drept civil. Regimurile matrimoniale*, Universitatea București, 1948; D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român*, tom. VIII, *Convențiile matrimoniale*, Ed. Socec; I. Albu, *Dreptul familiei*, Edit. Didactică și Pedagogică, București, 1975, p. 118; Alex. Bacaci, V. C. Dumitrache, C. Hăgeanu, *Dreptul familiei*, ed. a IV-a, Edit. All Back, București, 2005, p. 46; I. P. Filipescu, *Tratat de dreptul familiei*, ed. a VII-a, Edit. All Back, București, 2002, p. 51; P. Vasilescu, *Regimuri matrimoniale. Partea generală*, Edit. Rosetti; București, 2003, p. 18; C. M. Crăciunescu, *Regimuri matrimoniale*, Edit. All Back, București, 2000, p. 3, P. M. Popovici, *Regimuri matrimoniale. Repere istorico-juridice*, Edit. Canonica, Cluj-Napoca, 2008, p. 15.

² See: P. Vasilescu, *op. cit.*, p. 25.

still only part of it, nor does it give it an essential characteristic, that might allow the division of various matrimonial regimes among themselves”¹.

The primary regime is a general one, that constitutes the basic structure of matrimonial regimes and expresses the effects of marriage upon the patrimonial relationships between spouses, as settled by the inner legislation of each state.

As a set of general rules that govern all matrimonial regimes, the primary regime has also been called, by a couple of authors, „a constitution” of matrimonial regimes², and by some others a „fundamental, imperative statute”³ and is the imperative, common law of matrimonial regimes.

Being the common denominator of applicable regimes, one may talk about the primary regime only if more than one matrimonial regime does exist.

In law systems having only one matrimonial regime and norms are compulsory, the matrimonial regime is, at the same time, basic, imperative regime, but not being called a primary one, just because there is no other. Such an example is the law system in our country, where the regime of lawful, community goods in the Family Code, the only settled one and compulsory, is identified with the imperative, primary regime, an impossible situation where there is more than one matrimonial regime. Consequently, by marriage effect, the spouses should automatically obey the rules of the primary regime.

These rules defend either of the spouses, assuring the protection of financial interests, of common co-habitation, as well as the bearing of the tasks of marriage, thus offering essential solutions to common life. It deals mainly and as a whole with: spouses’ obligations to offer each other material support, division of the spouses’ power regarding common patrimony or the personal one, house-hold expenses, protection of the family residence or the place spouses live in, the regime of some legal documents, their representation and against a third person, their autonomy in practicing a job, the right to compensation, etc.

The matrimonial regime in the new Romanian Civil Code obeys the tendency of modern legislation to create a three-sided equilibrium:

- *between spouses*: through matrimonial conventions, that led to the

¹ *Ibidem*, p. 25. Also see: P. M. Popovici, *op. cit.*, p. 20-23.

² G. Cornu, *Les régimes matrimoniaux*, PUF, Paris, 1997.

³ B. Vareille, *Le régime primaire*, in *Droit patrimoniale de la famille*, Dalloz, 1998, p. 24.

ratification of more flexible judicial norms which allow a certain freedom to the spouses in choosing the patrimonial regime between them.

- *within the family*: for the protection of the major interests of the family imperative norms were used, norms which stipulate limits and interdictions (Article 321-322 regarding the „family residence” – a new notion in Romanian law, Article 316 regarding the disposal acts that seriously endanger family interests.
- *between family and society-third person*: settling some demands as legal acts, including matrimonial conventions concluded by a notarial deed and the obligation of their publicity.

Thus, the new Civil Code, taking into consideration the stipulations of international conventions and to which Romania is also part, as well as the principles and European suggestions, the present settlement in the Civil Code was replaced by a modern one related to the norms of community law. So, Article 312, paragraph 1 stipulates: „The future spouses may choose the regime of the legal community, that of goods division, or that of the conventional community.”

In this way, a lawful regime is set up – that of goods community and two types of conventional regimes – the regime of division of goods and that of conventional community (the latter including in fact conventional derogations from the lawful regime of the community).

But, before settling each of these regimes, Chapter VI – *Spouses' patrimonial rights and obligations*, in Section 1 – *Common Disposals* stipulates, as we already mentioned, a group of fundamental, imperative, basic rules which can be applied to all marriages regardless of the matrimonial regime of the spouses, called primary, imperative regime.

The disposals of the primary regime have a big practical importance, being generally applied. They refer either to the normal periods of cohabitation, or to those of crisis of any kind. The first are concerned with the protection of the family residence and the legal acts about it, marriage expenses, mandate and business management rule between spouses, exercising a job, general frame of matrimonial conventions, the ceasing and dissolution of the matrimonial regime. The second one, concerned with family crises, settles the judicial mandate, the legal documents which

seriously endanger family rights, right to compensation, protection of the third person.

As a conclusion, the primary regime is to be mentioned only if in the legislation of a country there is more than one matrimonial regime, and the law of that country imperatively settles a group of fundamental rules which may be applied to all marriages, regardless of the spouses' matrimonial regime, by their conventional will or lacking convention, by the lawful matrimonial regime.

These fundamental rules are the basic structure of matrimonial regimes, stipulating, in fact, the direct patrimonial effects of marriage, therefore becoming „*a fundamental imperative statute*” as it is called by some authors or „*basic matrimonial statute*” or *primary imperative regime*” or „*basic matrimonial regime*”.

The primary regime cannot be considered as being a type of matrimonial regime organizing patrimonial relationships between spouses or between them and a third person, but it only settles the elementary rules which govern these relationships, generally and compulsory, as an effect of a marriage under the incidence of law in a state that settled these rules.

The primary regime is also called primary imperative regime as its general norms should be obeyed by everybody as an effect of marriage as such.

Spouses should comply with the general compulsory norms of the primary regime, regardless of the chosen matrimonial convention, by means of which they could settle the way the patrimonial relationships are organized, both between themselves and with a third person.

The primary regime differs from one country to the other, depending how the state chose to settle the effects of marriage. However, the goal of the primary regime is that of protecting marriage and establishing an equilibrium in the patrimonial relationships between spouses, ratifying rules both for normal periods of marriage and those of crisis. For instance, (when one of the spouses cannot express his will regarding common goods, the other spouse, according to a rule of principle will be able to demand the instance's approval to represent him (judicial mandate) or, when one of the spouses brings disposal acts which seriously endanger the family interests, the general rule may establish the other spouse's rights in this particular situation).

Related to this concise paper, *the primary matrimonial regime* or *basic imperative statute* or *the spouses' patrimonial constitution* is a group of

essential and compulsory norms applicable to any marriage in a state, regardless of the spouses' concrete matrimonial regime.

To make a long story short, we may say that in each legislation *the general common disposals* which settle patrimonial relationships between spouses constitutes *the primary patrimonial regime* of this legislation, also true for especially settled regimes, be they lawful or conventional ones.