MARRIAGE CONVENTIONS. AN OVERVIEW IN ROMANIAN AND COMPARATIVE LAW

Lecturer **Carmen Oana MIHĂILĂ**[1]

Abstract

Responding to current needs related to family, marriage, divorce, divorce settlement, the Civil Code provides the spouses with a new legislative technique, with tradition in community law and not only, known in our legal system until the communist regime declared it immoral, as the marriage convention. The choice of the matrimonial regime that best suits the wish of the spouses to live together, the possibility of changing it during the marriage, the imposition of special publicity formalities of the marriage conventions to protect the third parties, are elements of novelty of special importance that exceed the obvious perhaps normal shortcomings (starting with the lack of a legal definition of the marriage convention, with the possible derogations from the chosen matrimonial regime that can create the possibility of the abusive exercise of the rights of the spouses). Presenting specific elements of this institution in the European, American or Islamic system can create an overview of what pre- and post-marital contracts mean today.

Keywords: *spouses, marriage convention, matrimonial regime, patrimonial relations, opposability.*

JEL Classification: K11, K12, K36

1. Brief history

The reform of the matrimonial regime in our country, as it has long been desired, was achieved, at least theoretically, by the appearance of Law 287/2009 of the Civil Code (republished).

In the *Roman law* the matrimonial regime was the legal one, in this case the dowry regime (the "dotal" regime), not being known the notion of the matrimonial convention (in the Geto-Dacian society - if there was the tradition of the endowment of the woman, in order to help bear the tasks of marriage). It seems that the tradition of matrimonial conventions comes from the ancient Egyptians and that prenuptial arrangements existed for centuries in the Anglo-American system[2].

The conclusion of a marriage contract[3] that modified the local customs appears in *France* at the end of the sixteenth and the beginning of the seventeenth centuries when people started to consider legal regimes as not necessarily imperative or prohibitive, feeling that they could derogate from them through agreements.

Later, in the French law, although the spouses had the freedom to choose the matrimonial regime, this could only be done before marriage since the Civil Code of 1804 instituted the principle of immutability of matrimonial conventions.

In France, before the sixteenth century there were only legal regimes, and subsequently they could be derogated from by special conventions. According to the provisions of art. 1387 of the French Code, the *spouses can conclude any conventions regarding their goods, provided they do not violate the good morals or the mandatory provisions of the law*[4].

In our country, the 17th century Romanian Codes of Law gave the institution of marriage a contract character, yet, regarding the patrimonial relations between spouses, only the dowry regime was a regulation, the matrimonial regime considered to be traditional to Romanians[5]. Under the

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[1] Mihăilă Carmen Oana - Department of Juridical and Administrative Sciences, Faculty of Law, University of Oradea, Romania, omihaila@uoradea.ro.

[2] *Those who belonged to the upper social classes concluded prenuptial contracts, usually between the father of the bride and the future husband, specifying the rights and duties of both parties during the marriage and in the case of divorce, even mentioning the amount of food and clothing. which the husband was obliged to provide to his wife for one year,* in M. Revenco, *Matrimonial agreement in the continental legal system and common law*, „Revista Romana de Drept Privat", pp. 75-117.

[3] As regards the notions of matrimonial convention or marriage contract, it should be noted that they do not designate the contract or institution of marriage, in B.D. Moloman, *Discuții privind convenția matrimonială în reglementarea actualului Cod civil*, in „Dreptul" no. 2/2016, p. 58.

[4] J. Carbonnier, *Droit civil. Introduction. Les personnes. La famille, l'enfant, le couple*, Quadrige/Press Universitaries de France, 2004, p. 1262.

[5] C. M. Crăciunescu, *Considerații generale privind convențiile matrimoniale în Noul Cod civil*, Conference on the New Civil Code, Craiova, 2011, p. 3.

empire of the Calimach Code[6] and of the Caragea Code of Laws[7] (which also regulated the endowment regime and the freedom to conclude "the bargains" even after marriage - art. 1614 the Calimach Code, Chapter 31, "For the marriage bargains"), the marriage contract did not have a solemn character. According to art. 1608 and art. 1616 of the Calimach Code, it was sufficient for the validity of an endowment sheet to be made in writing, or even verbally, in the presence of three witnesses, the formality of the transcript being introduced only in 1832, by the Organic Regulation, for opposition to third parties[8]. The matrimonial conventions could be made not only before, but even after the celebration of the marriage (art. 1609 of the Calimach Code), a solution allowed also under the empire of the Caragea Law, even if it was not expressly provided. From the interpretation of the provisions of art. 1614 of the Calimach Code, it can be seen that the principle governing the application of matrimonial regimes was that of their mutability.[9] In Transylvania, the Hungarian customary law was applied and then the Austrian Civil Code[10], applying the principle of freedom of matrimonial conventions, but also the principle of mutability of the matrimonial regime.

Going throughout our history, the Civil Code of 1864, adopting the line of the French Code, regulated in art. 1224 the principle of freedom of the matrimonial convention, establishing as a legal matrimonial regime, *the regime of separation of goods* in art. 1283. This was to be applied when the spouses did not choose before their marriage another matrimonial property regime by a matrimonial convention[11].

The same act regulated the *dowry regime ("dotal" regime)* through art. 1233-1293 as a conventional matrimonial regime, which the spouses could adopt, with or without modifications, by matrimonial agreement[12]. The man was obliged to support his wife, and it was his duty to contribute to the tasks of the marriage with "a third of his income" according to art. 1284. The dowry was the most widespread marriage convention at the time[13]. The dowry contract was concluded in *ad validitatem* form, "*through the court before the marriage celebration, [...], in the form of a penalty of nullity"*. The assets of the dowry were inalienable, which guaranteed the woman to keep her assets[14]. The dowry regime was actually a separatist regime, chosen by the parties, therefore conventional. The dowry regime was immutable, so the dowry constitution convention could not be modified (art. 1236 Civil Code: "*the dowry cannot be constituted nor added during the marriage"*). The dowry document had to be entered in the Registry of Mutations of the place of real estate if it had as object real estate.

The old Code also contained references to a so-called *acquisition regime* of the spouses, consisting of goods that were in their joint ownership.

Regardless of the kind of matrimonial regime that governed marriage, at that time the legal inequality between woman and man and the incapacity of the married woman represented the reality[15].

We can really speak, in light of these regulations, about the principle of freedom of matrimonial conventions, which was later annulled by the regulations adopted. Matrimonial

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[6] Civil Code of Moldova (Codica Țivilă a Moldovei), at the initiative of Scarlat Calimachi.

[7] They remained in force until the adoption of the Code of 1864, being partially amended by the Organic Regulation.

[8] C. Nicolescu, *Incursiune în evoluţia istorică a regimurilor matrimoniale. Privire specială asupra originii şi evoluţiei convenţiei matrimoniale*, in „Analele Universităţii din Bucureşti", no. 1/2009, p. 59.

[9] C. M. Crăciunescu, *op. cit.* p. 3.

[10] The legal matrimonial regime was for the nobles the regime of the separation of goods, and for the lower class, more frequently, that of the joint purchase. The Austrian civil code establishes the legal regime of separation. See details in C. Nicolescu, *Regimurile matrimoniale convenționale în sistemul Noului Cod civil român*, Ed. Universul Juridic, Bucharest, 2012, pp. 60-63.

[11] I. Albu, *Dreptul familiei*, Didactic and Pedagogical Publishing House, Bucharest, 1975, p. 119. The regime of separation was that of common law. One could choose the regime of the community of goods, the regime without community (which was a regime of common law in Germany and Switzerland) and the dowry regime.

[12] C. Roşu, *Necesitatea revenirii la convenţiile matrimoniale*, „Dreptul" no. 7/1999, p. 40. „The dowry represented the wealth that is brought to the man on behalf of or in the name of the woman, to help support the tasks of marriage." - art. 1233 Civil Code.

[13] I. Niculescu, *Despre convențiile matrimoniale*, 29.06.2011, the document is available online at https://www.juridice.ro/153816/despre-conventiile-matrimoniale.html, accessed on 11.02.2020.

[14] D. Alexandresco, *Dreptul civil român*, vol. VIII, Ed. Tipografia Naţională, Bucharest, 1904, p. 118.

[15] See the idea of changes in the traditional family structure in L. Onica-Chipea, *Aspecte juridice privind protecția drepturilor copilului*, Ed. Expert, Bucharest, 2007, pp. 31-33.

conventions were immutable, that is, they could be made only before marriage.

The matrimonial convention was considered the agreement by which the future spouses regulate their matrimonial regime, the condition of their present and future assets, in the pecuniary relations that arise from the marriage[16]. Another definition considers it *a conditional, solemn and irrevocable contract whereby the future spouses organize their civil capacity and determine, as regards the goods, the consequences of the conjugal association*[17]. *The legal act by which the parties regulate their essential patrimonial relations that will be developed between them during the marriage* designated the same notion[18].

The evolution of the Romanian society, the consecration of universal principles such as gender equality, the adoption of the 1948 Constitution determined the change of thinking regarding the matrimonial regime chosen by convention. The dowry regime was thus abrogated tacitly.

The Family Code (Law 4/1954) changes the mentality about family relationships and consequently fundamentally modifies the code's regulation[19]. The matrimonial regime of the community of goods becomes legal and compulsory. The matrimonial convention is taken out of the law, being sanctioned with absolute nullity, it is "repudiated".[20] It has been claimed that this matrimonial regime, although it harms the contractual freedom of the spouses, nevertheless ensures the spirit of social equity as well as the observance of the rules of social coexistence in the relations between spouses[21]. It was intended to protect the common interests of the spouses and the family, the unit of interests that was the basis of the socialist family. Even though the common goods could be divided for good reasons also during the marriage, this was an exception that did not bring into question the principle of mutability of the matrimonial property regime[22].

Until the adoption of the Family Code, regarding the matrimonial convention, there were in fact several types of regime regulated either by the Civil Code or by the laws that were in force in those regions.

The legislation and doctrine of the 90's did not change the view on the obligation and the legal, unique, obligatory character of the regime of the community of goods of the spouses. Thus, some authors argued in favour of the necessity of this regime arguing that the patrimonial relations between spouses are the consequence of the personal relations between them, the patrimonial relations constituting the material basis of the existence of the family[23].

The promoters of the reintroduction of matrimonial conventions have argued after 1989 in the sense of considering the patrimonial relations between spouses as being of particular and not general interest, thus the maintenance of a single matrimonial regime is not justified. The freedom of matrimonial conventions has been upheld on numerous occasions[24], taking into account the social economic realities, but also the evolution of patrimonial relations between spouses (for example, the principle of contractual freedom, the possibility of spouses' participation in the establishment of a company, etc.) is considered.

These considerations, as well as the evolution of the law, the attempt to harmonize our legislation, to adopt a code according to those with tradition, taking into account the fact that in most laws[25] the conclusion of matrimonial conventions, in this case the choice of the desired matrimonial regime has been possible for long, they have made it a legal reality.

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[16] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil*, vol. III, Ed. All Beck, Bucharest, 1998, p. 4.
[17] D. Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român*, Ed. Socec, Bucharest, 1916, p. 5.
[18] P. Vasilescu, *Regimuri matrimoniale*, 2nd ed., Ed. Universul Juridic, Bucharest, 2009, p. 184.
[19] The Great National Assembly of 1945 considers the premarital contract degrading and immoral, contrary to good morals.
[20] E. Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiaţia*, 6th ed., Ed. C.H. Beck, Bucharest, 2018, p. 153.
[21] D. Lupulescu, *Dreptul de proprietate comună a soţilor*, Scientific and Encyclopedic Publishing House, Bucharest, 1987, p. 39.
[22] C. Roşu, *op. cit*., p. 43.
[23] E. Florian, *op. cit*., p. 153.
[24] Al. Bacaci, *Consideraţii în legătură cu regimul matrimonial actual*, in „Dreptul" no. 4/2001, p. 92.
[25] Practically, the foundation of the matrimonial regime is the marriage, and the tradition of concluding marriages will not be found in the Muslim law or in the common-law system. A detailed analysis of the legislation of several states can lead to the conclusion that these matrimonial conventions, in this case matrimonial regimes are tightly linked to the marriage seen not only as a union between a man and a woman, but taking into account, necessarily, the unions between same-sex people. Our civil code has obviously solved this problem by stipulating in art. 271: *"The marriage is concluded between a man and a woman by their personal and free consent",* in M. Avram C. Nicolescu, *Regimuri matrimoniale*, Ed. Hamangiu, Bucharest, 2010, pp. 4-13.

2. The matrimonial convention in the current Romanian law system

Although there are several references to the matrimonial convention, the Civil Code does not give it a clear, legal definition, which can be considered a shortcoming, partly covered by the current doctrine. Also, the legislator chose to give it the name of convention and not of the contract because it has a broader scope than the contract. *Marriage contract*, *marriage agreement*, *matrimonial contract*, *prenuptial contract*, *dowry sheet, family pact*[26], all have in principle designated the same act that we know today as a marriage convention.

According to art. 329 Civil Code, the choice of a matrimonial regime other than that of the legal community is made by the conclusion of a matrimonial agreement. Thus, the spouses can choose, through a matrimonial convention, either for the regime of separation of goods or for that of the conventional community. If the spouses do not choose one of the two regimes until the day of the marriage, the legal community regime is applicable.

The matrimonial convention is, in the vision of Prof. Marieta Avram, *the act by which the future spouses establish the matrimonial regime applicable in principle throughout the marriage*[27].

The characteristics of the matrimonial convention. This act is a *complex*[28] legal act, *bilateral, public*[29], *synallagmatic*[30], *solemn*, *an accessory (to marriage)*[31], *onerous*[32], *special causal* (the purpose is the establishment of a family) [33], *simply*[34], *personal*[35].

Can the marriage convention be confused with the marriage agreement, the* marriage brokerage agreement, *the engagement or the cohabitation agreement? Thus, regarding *marriage*, considering that the object of the matrimonial convention is the matrimonial regime, this being in fact the patrimonial basis of the family created by marriage, we can say that the effects of the matrimonial agreement "*are subordinate to the marriage and cannot be conceived outside it"*[36]. The purpose of the marriage convention should not exceed the purpose of the marriage, which is the foundation of a family, the patrimonial relations between the spouses being an effect of the marriage and not an end

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[26] C. Stanciu, *Convenția matrimonială - o convenție "specială" a Codului civil român*, Revista de Studii Juridice no. 2/2014, p. 79.

[27] M. Avram, *Drept civil. Familia*, 2nd ed., Ed. Hamangiu, Bucharest, 2016, p. 183.

[28] However, there is also the possibility of inserting into the convention provisions that have nothing to do with it. For example, those relating to mutual donations between future spouses or those made by other persons, plus other provisions not related to the matrimonial property regime, such as the recognition of a child. A clause may be introduced ("*praecipuum*" clause), which gives the surviving spouse the right to take over without payment, even before the succession division, one or more of the common assets that are held in joint ownership or group - unfortunately it is not clearly established what assets can make the object of this clause, which would have been recommended. The legal nature of this matrimonial advantage is still debatable. This clause is not subject to donation and reduction reports only when the rights of the heirs of the reservation are infringed. In the situation where the community ended during the life of the spouses, this clause has no effect, for details see C. O. Mihăilă**,** *The preciput clause. Controversial debates. Comparative law*, Proceedings of the International Conference European Union's Hystory, Culture and Citizenship 10th edition, Ed. C.H. Beck, Bucharest, 2017, pp. 292-313. Even if they are part of the convention, these acts retain their own legal nature. The marriage contract was considered even a statutory legal act (similar to the constitutive act or a company act) precisely to highlight the complex character, the fact that it exceeds the limits of a simple contract generating rights and obligations between the spouses, C. Nicolescu, *Regimurile*...2012, p. 83.

[29] Due to the publicity formalities provided by law, in D. Lupașcu, C.M. Crăciunescu, *Dreptul familiei*, 3rd ed., Ed. Universul Juridic, Bucharest, 2017, p. 159.

[30] The spouses have rights and are mutually obliging. Otherwise, the principle of equality of spouses would be violated.

[31] The convention becomes obsolete if the marriage is no longer concluded. This will only take effect as long as the marriage lasts.

[32] The object of the convention is the choice of a matrimonial regime, thus it is related to the patrimony of the spouses. Art. 1030 Civil Code establishes that *"the donations made to future spouses or one of them, under the condition of concluding the marriage, have no effect if the marriage does not take place"*, the sanction being the sunset clause. Thus, in principle, the aforementioned acts retain their own legal nature, not affecting the contractual nature, in M. Avram, L.M. Andrei*, Instituția familiei în noul Cod civil, Manual pentru uzul formatorilor SNG*, Bucharest, 2010, p. 128.

[33] The special cause is the *affectio conjugalis* element.

[34] However, we must take into account the provisions of art. 330 para. 3 Civil code stipulating: *The convention concluded during the marriage produces effects from the date provided by the parties or, failing that, from the date of its conclusion.* The presence of the suspensory term is noted. It was also stated that it is a conditional act, but not in the sense of the ways but to emphasize the dependence on marriage, in C. Nicolescu, *Regimurile*...2012, p. 89.

[35] However, unlike the marriage act, due to the patrimonial character, the matrimonial agreement can also be concluded by representation.

[36] N.C. Aniței, *Considerații privind convenția matrimonială potrivit dispozițiilor din Noul Cod Civil*, in „Jurnalul de Studii Juridice", no. 1/2011, p. 100.

in itself[37]. The bodies before which each act is concluded are different, the matrimonial convention concerns only the goods, not the marital status of the persons, the matrimonial convention may also include the assets held by each of the spouses before the marriage.

Regarding the possible resemblance to a marriage brokerage agreement, which is an essentially commercial act, a species of intermediation, it is appreciated that the only common point is the conclusion of the marriage. The obligation of the broker (which can be a matrimonial agency) is only a duty of diligence and not an outcome (to mediate, to interpose)[38].

The *engagement* is defined by the Civil Code as *the mutual promise to conclude the marriage* (art. 266 paragraph 1 Civil Code). Both the engagement and the marriage convention are prior to the marriage, but it can only be a *coincidence*[39] when the engaged persons conclude a marriage convention in order to conclude the marriage, apart from this the notions involving completely different approaches (the engagement is not subject to any formality, ceases as following the conclusion of the marriage).

The moment of the conclusion of the matrimonial agreement and the conditions for its conclusion. The marriage agreement is concluded before the marriage[40]. It can also be concluded after marriage, by modifying the existing matrimonial property regime. Art. 330 para. 2 stipulates: *the convention concluded before marriage produces effects from the date of the conclusion of the marriage*, and par. 3 regulates the effects of the convention concluded during the marriage from the date stipulated by the parties or from the date of its conclusion.

Conditions of validity. Regarding the *conditions of validity* that must be fulfilled in order for a matrimonial convention to be considered valid, we are talking about the conditions known from the common law plus special conditions of publicity for the opposition to third parties.

If we refer to the *capacity* to conclude the convention, it is necessary to reach the marital age (art. 337 Civil Code shows, however, *that the minor who has reached the marital age can conclude or modify a matrimonial agreement only with the consent of his legal guardian and with the authorization of the guardianship court*). Thus, a minor who is 16 years old is required to have special authorizations for the conclusion of the matrimonial agreement if this is done before the marriage[41].

The emancipated minor (under the conditions of art. 40 Civil Code), acquiring full exercise capacity may conclude the convention without the special authorizations required by law. The incapable adults cannot conclude a marriage agreement, nor can they marry.

The consent of the parties, according to art. 330 Civil Code, must be expressed in front of the notary public, personally or through an agent with a special authentic power of attorney, having predetermined content. Even if, as can be seen, compared to the conclusion of the marriage, it is possible to conclude the marriage convention by proxy, this act must be drafted in advance and should include all the agreed clauses. Regarding the consent errors and the annulment cases in particular, which can be found in the case of the matrimonial convention, some authors argue that they can only be the same as in the case of marriage, others believe that the common law of the contracts must be applied (the errors are those of common law[42]).

The *object* of the matrimonial convention is represented by the matrimonial regime chosen by the spouses. From this point of view one can discuss about limiting the freedom of choice of matrimonial regime. The object must exist, be possible, lawful and moral. *The operation of choosing the matrimonial regime of the conventional community or of the separation of goods, within the limits imposed by the law, is the object of the matrimonial convention[43].*

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[37] Idem, p. 101.
[38] M. Avram, C. Nicolescu, *op. cit.*, p. 80.
[39] P. Vasilescu, *op. cit.,* p. 210.
[40] The Convention may be concluded before and after marriage and in Switzerland or Quebec.
[41] G. C. Frențiu, in *Noul Cod Civil: Comentarii, doctrină și jurisprudență*, *Despre legea civilă. Persoanele. Familia. Bunurile*, vol. I, Art. 1-952, Ed. Hamangiu, Bucharest, 2012, p. 446.
[42] For details on consent errors see F. Morozan, *Drept civil. Introducere în drept civil*, University of Oradea Publishing House, Oradea, 2014, pp. 174-184.
[43] I. Nicolae, *Unele considerații privind noțiunea de convenție matrimonială și obiectul acesteia*, in „Studia Universitatis Babes Bolyai-Iurisprudentia" no. 4/2015, p. 76.

They meet with regard to the object of the *general limits* convention, such as observing public order and good manners (specifying the conclusion of contracts). For example: clauses which do not disregard the principle of equality of rights between a man and a woman cannot be stipulated (establishing a matrimonial regime in which the man manages all the goods of the woman and supports all the tasks of the marriage); no clauses can be established that affect the exercise of parental rights and duties (one of the parents decides exclusively on the education of the child); the rules of inheritance cannot be changed; the assets of the spouses can only be made available only within the limits allowed by law. A second category of limits are the *special* ones that result from the regulation of matrimonial regimes. Regarding the possibility of the spouses to choose the matrimonial regime that they consider appropriate, our legislation limits their choice between the legal community, the separation of goods[44] or the conventional community (art. 312 paragraph 1 Civil Code). In other states, spouses can choose one of the existing matrimonial regimes, but they can even achieve their own regime by combining other matrimonial regimes, even foreign ones.

From the point of view of the immutability of the matrimonial convention, under the empire of the old Civil Code it was possible to choose between the separatist regime and the dowry regime, yet during the marriage the conventions were immutable[45]. The family code provided for the absolute nullity in the case of the conclusion of the conventions derogating from the legal regime provided by law. The Civil Code in force enshrines the principle of mutability of matrimonial conventions, considered a true extension of the freedom of choice of matrimonial regime[46].

Art. 367 Civil Code, called the object of the matrimonial convention, stipulates the elements to which the convention can refer to if the regime of the conventional community is chosen.

Article 332 paragraph 1 Civil Code establishes that the matrimonial agreement cannot derogate, under the sanction of absolute nullity from the legal provisions regarding the chosen matrimonial regime, except in the cases provided by law. After at least one year after the marriage is concluded, the spouses can choose to replace the matrimonial regime chosen by convention or the existing one. Thus, according to art. 369 Civil Code, the replacement of the matrimonial regime can be achieved only with the observance of the conditions provided by law for the conclusion of the matrimonial conventions. However, the modification of the matrimonial conventions entails a limitation concerning the injured creditors by changing the matrimonial regime, according to art. 369 para. 2 and 3 Civil Code.

The *cause* of the matrimonial convention is is represented by the intention of the future spouses to create patrimonial relations for the purpose of conducting the family life. The matrimonial convention is considered a special causal act. Even though the effects of the patrimonial convention are mainly of a pecuniary nature, it remains essentially an accessory and closely linked to the institution of marriage.

However, it is legally accepted the simulation (the choice of a matrimonial regime other than the one for which the publicity formalities have been completed), which according to art. 331 Civil Code produces effects only between spouses and cannot be opposed to third parties of good faith.

The matrimonial convention must wear the authentic notary *form* to be considered valid. The registration of the convention in the National Notary Register of matrimonial property regimes is carried out only after its authentication. Violation of this provision is sanctioned with absolute nullity.

The ***publicity***[47] of the matrimonial agreement (both the one concluded before the marriage and

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[44] For details see C. Popa, *Legal separation between the legal community and liquidation between the spouses according to the Civil code*, in „Annals of the University of Oradea", Economic Sciences Series, 2016, pp. 173-178.

[45] N.C. Aniței, *op. cit.*, pag. 109.

[46] P. Vasilescu, *op. cit.*, p. 50.

[47] In Greece, the convention is registered in a special public register. In Luxembourg the publicity is done by registering in the Register of civil status from the Public Ministry. In Denmark, there is a public register of marriage contracts. In the absence of registration, these will have no effect on either spouses or third parties. In Quebec, it is foreseen that the copy of the matrimonial convention should be registered in the special register of personal and real estate assets at the request of the instrumental notary public. There is no special register in Poland, but information on matrimonial property is registered in the Central Register of Economic Activities. In Hungary the marriage contract must be registered in a special register, which is the National Register for Marriage and Partnership Conventions. In France there is no register of matrimonial property. In Belgium, the conventions are registered in the central register of matrimonial conventions, an electronic register managed by the Royal Federation of Belgian Notaries. There are several civil registers in Spain.

the one that can be concluded during the marriage) is ensured primarily by mentioning the marriage document.

The purpose of these measures is to protect the third parties who must know the spouses' patrimonial status when entering into contractual relations with them.

According to art. 291 Civil Code, the civil status officer makes mention in the marriage document about the chosen matrimonial regime. He has the obligation, ex officio and immediately to communicate to the national notary register of matrimonial regimes (RNNRM) as well as, as the case may be, to the notary public who authenticated the matrimonial convention, a copy of the marriage document. The registration of matrimonial conventions in a special register is an ex officio procedure performed by the notary public who authenticated the convention.

The mention in the marriage document will be made also in the situation where the matrimonial regime chosen is that of the legal community. Thus, the publicity must fulfill these special conditions, both the one made on the marriage document and the one registered in a special register.

Opposition to third parties is mainly ensured by the registration in the RNNRM, the mention in the marriage document being an action with the role of informing.

These publicity conditions do not preclude the application of special rules for publicity the movable and real estate rights, even though they are included in the convention and are made public[48]. Thus, according to art. 334 para. 4 Civil Code, taking into account the nature of the goods, the matrimonial conventions will be recorded in the Land Registry, they will be registered in the Trade Register, as well as in other publicity registers provided by law. In all these cases, the non-fulfillment of the special publicity formalities cannot be covered by the registration made in the mentioned register. However, the text does not provide for the inclusion in the special registers taking into account the quality of the person, for example the quality of the trader, this deserving to be mentioned.

Art. 877 Civil Code stipulates that the real estate rights registered in the land book are tabular rights. They are acquired, modified and extinguished only in compliance with the land book rules. It is the so-called constitutive effect of Land Registry entries. Moreover, art. 902 paragraph 2 stipulates the assets that are subject to the entry in the Land Registry, among which is the matrimonial convention, its amendment or replacement. Therefore, if this is not noted in the Land Registry, it will not be opposed to third parties who will consult the land book entries when entering into contracts with one of the spouses.

Failure to comply with these formalities entails the ***inopposability of the matrimonial convention*** to third parties. According to art. 313 paragraph 2 Civil Code, regarding the third parties the matrimonial regime is opposable from the date of the fulfillment of the publicity formalities provided by the law, unless they knew it by another way. Failure to complete the publicity formalities causes the spouses to be considered in relation to the third parties of good faith, as being married under the matrimonial regime of the legal community. The third parties who have actually known, by any other way, the existence of the conventional matrimonial regime cannot be excused from not fulfilling the publicity formalities in order to invoke its unenforceability[49].

According to art. 335 Civil Code, the matrimonial convention cannot be opposed to the third parties regarding the documents concluded by them with one of the spouses unless the publicity

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The convention must be registered in the civil register of the place where the spouses' habitual residence is. In Sweden, in order to be valid, the marriage convention must be registered with the Swedish Tax Agency. In Italy, registration is made in the Register of civil status. In Portugal the convention is mentioned in the Register of Civil Status. In Slovakia the contracts concluded in the form of an authentic document are registered in the Central Registry of Notaries for Authentic Inscriptions, administered by the Chamber of Notaries of the Slovak Republic.

[48] N. C. Aniței, *op. cit.*, p. 118.

[49] The doctrine shows that, *although mention was made in the marriage document, if the registration in the RNRM was not made and the marriage convention is not opposable to the third parties (unless they knew it by another way). If the registration was made in the special register, but there was no mention of the marriage document due to an omission of the civil status officer, the matrimonial convention is opposable to the third parties. And if neither the mention of the marriage document nor the registration in the special register has been made, the matrimonial agreement can be opposed only to the third parties who have known it in any way*, in Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, Comment on art. 337 Civil Code, Ed. C.H. Beck, Bucharest, 2012, p. 278.

formalities have been fulfilled or if the third parties have known it by another way. Moreover, it cannot be opposed to the third parties regarding the documents concluded by them with any of the spouses before the conclusion of the marriage.

Penalties. The sanction of the *absolute nullity* of the matrimonial convention is imposed for the lack of consent, the non-observance of the conditions regarding the public order, for the lack of the form required by law. The *relative nullity* intervenes in the case of the occurrence of the consent errors or in the situation of the conclusion of the convention by the minor[50] without the approval of the parents and the authorization of the guardianship court. The convention will be abolished with retroactive effect, as a result, between the spouses, the regime of the legal community is applied without affecting the rights acquired by the third parties of good faith (art. 338 Civil Code)[51]. The nullity may be total or partial. The nullity of the convention does not, however, attracts the nullity of the marriage.

The finding of the cause of nullity of the matrimonial convention relates to the moment of its conclusion and not that of the marriage. As an effect of the retroactive character of the nullity of the spouse, the spouses will be considered to be married under the rule of the legal community.

The *caducity* sanction intervenes if the marriage is not concluded or if the marriage is canceled (except for the putative marriage).

The *simulation* stipulated by art. 331 Civil Code causes the secret document to produce effects only between the spouses, not being opposed to third parties of good faith[52]. Only the matrimonial regime for which the publicity formalities have been carried out will have an effect on them.

The effects of the marriage convention. From the point of view of the *effects* of the marriage convention, we can say that it follows the type of matrimonial regime chosen, also having a probative effect of this chosen regime. The additional clauses that are introduced in the convention follow, as we have specified, the common law regime.

Between the spouses the matrimonial convention produces effects from the date of the conclusion of the marriage, and to third parties from the date of the completion of the publicity formalities.

Art. 330 para. 2 Civil Code stipulates: *the matrimonial convention concluded before the marriage produces effects only from the date of the conclusion of the marriage*. Also, *the convention concluded during the marriage produces effects from the date provided by the parties or, failing that, from the date of its conclusion*. Regarding the matrimonial regime chosen, it produces effects from the day of the conclusion of the marriage. With regard to third parties, the matrimonial property regime is opposable from the date of the fulfillment of the publicity formalities provided by the law, unless they have known it by another way. Art. 319 para. 1 establishes the termination of the matrimonial regime by finding nullity, annulment, dissolution or termination of the marriage.

Thus, the effects of the matrimonial convention cease upon the dissolution or termination of the marriage, when the matrimonial regime ceases.

3. Matrimonial convention in the legislation of other states

In *England*, traditionally, prenuptial contracts (*prenups)* of the parties who wish to regulate their property relations during marriage or who wish to determine the consequences of ownership in the case of divorce have been considered null and void for public policy reasons[53]. Since the 19th

[50] According to art. 337 para. 3 Civil Code *the action for annulment cannot be formulated if one year has passed since the conclusion of the marriage.* The term is described as a term of revocation and not of prescription, in Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord), *op. cit.,* p. 280.

[51] In the case where the cause of nullity *is independent, foreign to the matrimonial property regime (for example, a recognition of affiliation, a recognition of debt), the matrimonial convention remains valid, being affected by the nullity only the clause in question*, Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord,), *op. cit.*, p. 281.

[52] In the case of matrimonial conventions, the simulation can appear in the form of disguise and fictionality, being excluded the interposition of persons due to the intuitu-personae character of the convention, in G.C. Frențiu, *op. cit.*, Ed. Hamangiu, Bucharest, 2012, p. 450, the comment of art. 331 Civil Code.

[53] C. Clarkson, J. Hill, M. Thompson, *Study on matrimonial property regimes and the property of unmarried couples in private international law and internal law*, TMC Asser Instituut, 2001, p. 11.

century, it has been considered that such agreements regarding the financial consequences of a possible separation were considered null and void because they threatened the parties' desire to live together. These agreements were later considered reckless because what is right at the beginning of a relationship may no longer be as financially correct during or at the end of a relationship[54].

With the case of Radmacher v. Granatino[55], the way in which the English courts dealt with prenuptial agreements changed. In 2010, a reference decision was given in this file to the Supreme Court. Centuries of legal history were overturned when the court accepted prenuptial agreements regarding English divorce law. Previously, in England and Wales, such agreements were considered to be contrary to public policy because, historically, women could not sit at the negotiating table on equal terms. There were also fears that prenuptial agreements would encourage divorce. It was contrary to public order that a married couple or a couple about to get married conclude an agreement that applies in the event of separation[56]. It has been established the principle that public order should prohibit the implementation of the matrimonial convention stipulated in the event of a divorce. However, while the UK courts recognize prenuptial agreements, they still have the power to disregard them if they are considered unfair to children. In recent years, in England, there has been a judicial tendency to approve matrimonial conventions, and they will be given more attention. However, no clear judicial approval has yet been given on the binding character of the matrimonial convention in current English law.

These agreements are now considered a guarantee of personal autonomy in the UK. The courts do not regard them as hostile, prudent, but with obvious acceptance. They are not mandatory in the UK but are valid if both partners have received legal advice before, the consent was not vitiated and both presented the status of the assets held. The courts are not required to take into account signed agreements if they are made less than 3 weeks before the marriage or contracts in which the division of assets is not fair and realistic. Regarding post-nuptial agreements, the opinions are equally divided. It is considered on the one hand that the pressures are no longer as high as before the marriage ends, on the other hand, the agreement may even be the price of continuing the marriage (given that emotional and financial investments have been made in the marriage and that there is children) [57].

Unlike continental law, the publicity of matrimonial agreements concluded by spouses has no relevance in England. In the English territory the third parties are properly protected throughout the marriage due to the separation of goods of the spouses, so that the marriage will in principle have no consequence regarding the situation of the patrimonial rights of the spouses. After the marriage is dissolved, the third party may, however, face an unpleasant surprise if the debtor makes an adjustment of his capital for the benefit of his former husband.

The Commission's 2014 report[58] on the Law on matrimonial property recommended the creation of a "nuptial agreement of qualification" by the Parliament, that is, a fully mandatory

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[54] *Opinions of the Lords of Appeal for Judgment in the cause Miller v. Miller, McFarlane v. McFarlane*, May 2006 p. 49, the document is available online at https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060524/mill.pdf, accessed on 19.02.2020.

[55] UK Supreme Court, Case *Radmacher vs. Granatino*, 20 October 2010: *Prenuptial agreements are considered a mandatory document in Europe: "For Nicolas and me, in our countries - France and Germany - these agreements are completely normal and routine".* The case concerns a marriage between a German wife, heir to a large fortune in the paper industry and her French husband, a banker. The parties married in London in 1998, signing a prenuptial agreement before a notary in Germany three months before stating that neither party would benefit from the property of the other after the divorce. During the divorce proceedings in June 2008, Mr. Granatino received from the High Court 5,560,000 pounds to cover the annual income for life, a house in London and one in Germany, so that he can see his children and periodical payments for each child. It was stated that the premarital convention cannot be taken into account because Mr. G did not have legal advice when he signed the convention and in the meantime the couple had children, therefore the importance of the contract has decreased. Mrs. R successfully appealed this decision, stating that a decisive weight should have been given to the premarital contract. Mr. G is appealing this decision to the Supreme Court without any luck. Finally, the court held that the prenuptial agreement was legally enforceable.

[56] In 1929 in the case of Hyman vs. Hyman, the House of Lords declared that such agreements would violate public order because *it would diminish the emotional sacredness of marriage if people would end it by having a clear picture of the effects if the marriage failed, and that the parties should not be allowed to exclude the jurisdiction exclusively assigned to the courts for the dissolution or modification of the civil status.*

[57] The Law Commission, Consultation Paper No 198, *Marital Property Agreements*, p. 56.

[58] The Law Commission (LAW COM No 343), *Matrimonial property, needs and agreements*, the document is available online at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc343_matrimonial_property.pdf, accessed on 19.02.2020.

prenuptial agreement as long as certain requirements are met. The Commission's recommendations have not yet been implemented.

In the *USA,* matrimonial conventions, known as prenuptial (*prenupt*) contracts are recognized in all states and have the purpose of dividing the spouses' property in the event of divorce or annulment of marriage, or in case of adultery[59].

Premarital agreements designate the agreement concluded between the spouses who intend to remain married who affirm, modify or renounce a conjugal right or obligation during the marriage or separation regarding the divorce of one spouse or the occurrence of any other event. The term also includes amending the agreement signed after the spouses marry.

The law governing pre- and post-nuptial agreements is The Uniform Premarital Agreement Act (UPAA) [60], updated in 2012 (The updated Uniform Premarital Agreements Act (UPMAA). The law was passed by 28 states and the District of Columbia. Even in states like New York, which have not passed this law, these agreements are recognized if they are concluded in compliance with the legal conditions of the contracts[61]. Such an agreement can be challenged if the legal provisions have not been observed[62]. The agreement must be concluded in writing, without any restrictions whatsoever, in front of a notary or witnesses. Issues related to children or their custody[63] cannot be regulated because these problems should be dealt with only in the light of the best interests of the child. Conditions such as the establishment of the children religion cannot be introduced. The convention that one of the spouses will carry out all the household chores cannot be stipulated. In the last years these agreements even contain rules regarding what is forbidden or not for spouses to post on social networks[64]. It may also be stipulated that the agreement ceases after a certain period of time (for example in Maine it may be stipulated that the agreement ceases upon the birth of a child). However, the states have adopted different versions of UPAA (some states have adopted particular statutes or apply common law). The spouses may renounce to the right of ownership, pension or inheritance by prenuptial agreement.

In Florida, the agreement may contain rights to the property of the parties, the right to sell, buy, transfer, mortgage, encumber or dispose of a property, the division of property after divorce, death or other events, drafting of wills, establishing the way of granting spousal support, life insurance policies, choice of applicable law, any other issue related to personal rights. The rights of the child cannot be adversely affected by such an agreement which will enter into force at the marriage of the parties. If a marriage is declared null and void, the premarital agreement can only take effect if it is necessary to avoid unfair situations.[65]

There are states in which the rule is the common property, others the separation of assets, therefore the prenuptials must be designed in such a way as to cover all possibilities if the spouses marry in one state and live in another. The agreements are usually enforced by courts in all the states. However, in some cases the courts have modified the decision to limit the right to retirement if at the

[59] These conventions refer to the rights and obligations of the parties not only in case of divorce, but also in case of death, the patrimonial relations between spouses but also the personal relations between them. Therefore, the text of the convention must be made only after having good knowledge of all the normative aspects involved in each clause of the contract.

[60] It was adopted at the National Conference of Commissioners on State Uniform Laws, in 1983 (ULC Uniform Law Commission), to promote the uniformity and predictability of state laws regarding premarital agreements in a growing transitional society but also to ensure that a premarital agreement validated in one state will be honored by the courts of another state where a couple could obtain a divorce.

[61] See Bloomfield v. Bloomfield, New York State Court of Appeals, Nov.27.2001. Although New York law already determines how a property should be divided in the event of a marriage ending in divorce or death, courts may recognize a valid prenuptial agreement that may be different from how New York law would divide the property.

[62] It was appreciated that the husband's assertion that he believed that the wedding would not take place unless he signed a prenuptial agreement was insufficient to prove the constraint.

[63] J.E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer,* „Journal of the American Academy of Matrimonial Lawyers", Vol. 21, 2008, pp. 413-438.

[64] L. Effron, *I Love You, You're Perfect, but Watch What You Facebook:* Social Media Prenups. Couples' social media prenups lay out boundaries for what is acceptable online, ABC News, 3 June 2014, the document is available online at https://abcnews.go.com/Lifestyle/love-perfect-watch-facebook-social-media-prenups/story?id=23977608, accessed on 17.02.2020.

[65] In Florida, a form of UPAA is applied, regulated in *The 2019 Florida Statutes,* cap. 61, Dissolution of marriage; Support; Time-sharing - Prematital agreements, the document is available online at http://www.leg.state.fl.us/Statutes/index.cfm?Mode=Search%20Statutes&Submenu=2&Tab=statutes, accessed on 18.02.2020.

time of the divorce the person in need came to need public assistance (North Dakota).

In California[66] by a prenuptial agreement the spouses may waive the right to divide the property, the right of inheritance or survivor's pension[67], may include provisions regarding the management or ownership of the companies owned by the spouses or the assets of a possible future inheritance. In exchange, postnuptial agreements are treated with great care because they are considered under influence or constraint[68]. The prenuptial agreement must be made in writing and in order to be valid it must be at least 7 days from its perfection to the conclusion of the marriage. No court will honor the agreements restricting the rights of the child, the right to custody or the right to visit (the child welfare is an element of public policy). Also, the courts may not implement an agreement if there is a suspicion that the agreement is not fair, giving one party a financial advantage[69]. Sanctions cannot be provided for cases such as infidelity or drug use[70].

In *Germany*, the principle of contractual freedom of spouses or future spouses is enshrined (*the spouses can establish their patrimonial relations by contract even after the marriage is concluded or even if it is about a modification of the initial contract or the regime adopted by it*) - art. 1408 para. 1 BGB[71].

The prenuptial contract is concluded in front of the notary public, in the presence of both parties and is entered in a register of matrimonial property based on a request in authentic form (art. 1410, 1412 BGB). It is held by the competent local court (*Amtsgericht*). The validity of the marriage contract does not depend on the registration in the register, but in order to be able to oppose to third parties a matrimonial regime defined by the contract or a foreign matrimonial regime, it is necessary, according to art. 1412 BGB to register the matrimonial convention in the Register of matrimonial property.

The contract can be modified at any time during the marriage.

The incapable adults can conclude marriage conventions. The spouse with limited legal capacity also needs the consent of the legal representative to make a matrimonial convention and, in certain circumstances, even approval from the court of guardianship (*Vormundschaftsgericht*). In principle, the legal representative does not have the right to conclude the marriage convention on behalf of the one he represents (art. 1411 BGB).

Art. 1363, para. 1 of the BGB stipulates that *during the marriage, the matrimonial regime applicable to the spouses is that of participating in the purchases, unless otherwise provided by the marriage contract.*

The marriage contract can in principle regulate the separation of goods (*Gütertrennung*) or the community (*Gütergemeinschaft*) - art. 1415 BGB, a regime that is not very popular in Germany.

The Federal Court of Justice has ruled that agreements that clearly and seriously disadvantage

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[66] Family Code, Statutes of California, 1992, Premarital Agreements, art. 1610 - 1617.

[67] It was invalidated a prenuptial agreement that establish the renunciation of the financial support of the husband after divorce if the husband is a millionaire and the wife earns after divorce $ 1500 per month, Supreme Court of Colorado, Newman v. Newman (1 November1982), the document is available online at https://law.justia.com/cases/colorado/supreme-court/1982/80sc169-0.html, accessed on 18.02.2020. Despite the validity of these prenuptial agreements, a governmental interest in the health and well-being of its citizens is in fact affirmed, thus, the judicial system can be interposed to protect the persons who at one point in time have concluded a contract that is no longer beneficial to them, in Prenuptial Agreements, the document is available online at https://www.stimmel-law.com/en/articles/prenuptialagreements, accessed on 18.02.2020.

[68] The court invalidated a post-nuptial agreement on the grounds of coercion when the husband signed a post-nuptial agreement that transfers a percentage of his wife's business as a result of continuous verbal and physical abuse by her (including hitting and threatening him to undermine their relationship with children), in Court of Appeal of California, Fourth District, Division Three, In re Marriage of Balcof, 15 August 2006, the document is available online at https://casetext.com/case/in-re-marriage-of-balcof, accessed on 18.02.2020

[69] A convention invalidated by the court (a Kethubah - traditional Jewish convention) referred to the promise that in the case of a divorce, the husband would pay the wife $ 500,000 or half of his property. The court held that the sum was so large that it undermined the very existence of the marriage that could have lasted, in Court of Appeals of California, Sixth Appellate District - In re Marriage of Noghrey (14 June 1985), the document is available online at https://law.justia.com/cases/california/court-of-appeal/3d/169/326.html, accessed on 18.02.2020.

[70] There was no agreement validating the granting of a sum of $ 50,000 in the case of the infidelity of one of the spouses, in Superior Court of Los Angeles, l Diosdado v. Diosdado (2002), the document is available online at https://law.justia.com/cases/california/ court-of-appeal/4th/97/470.html, accessed on 18.02.2020.

[71] Bürgerliches Gesetzbuch, Federal Law Gazette - Bundesgesetzblatt, 2003, the document is available online at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4994, accessed on 19.02.2020.

one of the spouses will be considered void (for example, if the pension entitlement is waived). Moreover, one of the spouses can challenge the marriage contract if during the marriage the income of the other has increased considerably and there is a clear disproportion to the time of the conclusion of the agreement.

Thus, we can say that contractual freedom in this area is limited by the principle of good faith. A marriage convention must comply with the rules of public policy and comply with stricter requirements, which exclude unilateral discrimination by one of the spouses at the time of the conclusion of the contract and for the entire duration of the contract.

In *France,* the freedom of choice of matrimonial regime appears only in the 17th century.[72] In the medieval period the separation regimes could be chosen by matrimonial convention, these being seen as a counterbalance to the community regime. The Napoleonic Code introduced as a common law regime the community regime, but also the possibility to conclude matrimonial conventions that would modify it.

According to art. 1387 French Civil Code, *the regime of the property of the spouses is regulated by law, in the absence of a contrary convention regarding it and its conformity with the legal provisions and morality.*

The spouses can choose by convention the regime of the conventional community (art. 1497 and the following Civil Code), the universal community, in which case all the goods and debts are common (art. 1526 Civil Code), the separation of goods (art. 1536 and the following Civil Code) or the surplus community, in which case there is no community of assets, but each spouse, in the case of divorce or death, has the right to receive financial compensation if he or she has accumulated less wealth than the other spouse during the marriage (1569 and following Civil Code).[73]

At the time of the marriage the officer is obliged to ask them if they have concluded a marriage convention (including the name and address of the notary public) and to make mention in the marriage act (art. 75 French Civil Code).

Regarding the manifestation of consent, the convention is concluded, according to art. 1394 of the Code, in the presence and with the simultaneous consent of all the persons who are parties to the matrimonial convention or of their agents. In France the minor who has obtained the agreement for the conclusion of the marriage can contract a matrimonial convention, but must be assisted by the person who is authorized to give his/her consent for the marriage.

By this convention, the spouses cannot derogate from the duties or rights resulting from their marriage, nor from the rules of parental authority, legal administration or guardianship. Also, the order of legal succession cannot be changed. The conclusion of a matrimonial convention is not excluded even when the legal regime of the legal community is adopted (the spouses can thus pre-constitute the evidence of their own patrimony[74]). The matrimonial convention may also contain provisions related to the transfer of some of the spouses' assets in the property of one of them at the death of the other spouse. The preciput clause may be inserted in the convention before marriage or after marriage by a separate act in authentic notary form (removal from the community before the inheritance of either an amount of money, or some goods in kind or a certain amount of determined goods - art. 1515 French Civil code).

The convention concluded before the marriage takes effect on the date of the conclusion of the marriage. The spouses can agree if it is in the family's interest to modify or change the matrimonial property regime by concluding a notary matrimonial convention[75].

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[72] M. I. Floare, *Originile istorice ale regimurilor matrimoniale regăsite în dreptul modern și contemporan al familiei din România*, „Studia Universitatis Babes Bolyai-Iurisprudentia" no. 1/2015, p. 22.

[73]Starting with 2013, the mixed Franco-German couples and the couples whose patrimonial relations are subject to a German or French matrimonial regime, can opt for the new optional Franco-German matrimonial regime (the regime resembles that of participation in acquisitions - a separation regime of assets during the marriage, and at the dissolution of the marriage each spouse is entitled to half of the goods acquired during the marriage).

[74] J. Revel, *Régimes matrimoniaux*, in Répertoire de droit civil, Paris, Ed. Dalloz, 2014, cited by I. Nicolae, *op. cit.*, p. 74.

[75] The amendment of the regime of matrimonial property produces effects between the parties from the date of the decision or the document that stipulates it and as regards the third parties, three months after the completion of the publicity formalities. However, in the absence of these formalities, the change of the matrimonial regime is opposable to the third parties if, in the documents transmitted with them, the spouses declared that they changed their matrimonial regimes - art. 1397- 6 French Civil Code.

In *Hungary* the purpose of the marriage contract is to allow the parties to define a different matrimonial regime than that of the legal community, as they can establish different regimes for certain goods, they can form their own matrimonial regime, provided they do not contravene the provisions of the Civil Code.

The matrimonial contract is regulated by Section 4:34 of Title VI of the Civil Code, the Law of matrimonial property (*Házassági vagyonjog*) and Chapter VI Contract of matrimonial property (*A házassági vagyonjogi szerződés*).

The matrimonial contract is valid if it is concluded in authentic form in front of the notary public or it can be concluded in the form of a private signature to be validated by a lawyer. The marriage contract must be registered in a special register, which is the National Register of Marriage Contracts. It can be concluded before marriage, but it will only take effect after the marriage is completed. In the case of the person under the age of 18 or of the incapable it is necessary for the conclusion of the marriage contract the approval of the guardianship court.

It can be terminated or modified at any time during the marriage. Marriage contracts may contain provisions regarding the division of the assets of the spouses in case of death, in which case the regulations in the field of succession regarding the common wills will apply.

The clause by which, in the matrimonial contract, is stipulated the fact that only one of the spouses is assigned almost the totality of their own and common goods without adequate compensation, is null and void.

In *Ital*y, through the marriage contract, another regime of matrimonial property can be chosen apart from the legal one which is the community regime of goods. The regulation is provided by the Italian Civil Code, Chapter VI The patrimonial regime of the family (*Del regime patrimoniale della familia*).

Marriage contracts must be authenticated by a notary public. An exception from the exclusivity of the notary powers is provided in the case of adopting the regime of separation of assets. This situation is expressly regulated in para. 2 in art. 162 Italian Civil Code, in which the legislator allows the couples to express their option of choosing this regime through a statement given when the marriage is officiated.

In some cases, it is also necessary to register in the Cadastral Public Register. Conventions may not be opposed to third parties unless elements such as the date of the contract, data about the parties or the attesting notary public are inserted in the marriage document. The minor who has obtained the agreement for the conclusion of the marriage may contract a matrimonial convention, but it must be assisted by the person who is authorized to consent to the marriage (guardian or curator). In the case of the incapable one, for the validity of the stipulations and donations made in the matrimonial convention, the assistance of the curator is required, and in case this does not exist, a special curator is called.

The patrimonial regime of the family is constituted by the regime of the community of goods regulated by the provisions of the code, unless otherwise agreed. The object of the matrimonial convention thus consists in choosing an applicable matrimonial regime. Art. 160 Italian Civil Code provides that the spouses cannot derogate by this convention from the rights and obligations provided by law through the effect of marriage (the imperative character of the primary regime). The spouses cannot agree on the patrimonial relations between them in general terms or by referring to legal provisions or uses that are no longer in force, and they are obliged to delimit the relations between them - art. 161 Italian Civil Code. Thus, all aspects on which the future spouses agree should be delimited in a concrete manner, by using terms that do not allow for multiple interpretations, and a legal obligation in this regard is instituted. It is forbidden to establish a dowry by the matrimonial convention (art. 166-bis Italian Civil Code).

The marriage convention can be modified before or after marriage only with the agreement of all the parties involved in its conclusion (art. 163 Italian Civil Code). In the same sense, art. 210 stipulates that the spouses may, by means of an agreement stipulated in accordance with Article 162,

changes the community regime, provided that the agreements do not contravene the provisions of Article 161.

In *Judaism*, the prenuptial contract (ketubah) is an integral part of the Jewish marriage and is signed and read aloud at the ceremony. The husband agrees to support his wife by providing her with food, clothing and sex, to support his wife in the event of a divorce, and the woman is free to leave unless her husband offers this. In 2004, the High Court of South Africa upheld a *cherem* (excommunication from the Orthodox community) against a Johannesburg businessman as he refused to pay his ex-wife's pension and did not honor the child support agreement[76]. Without such a prenuptial agreement whereby, the spouses can establish that either of them can apply for divorce, it can only be settled at the request of both parties.

In the *Islamic and Arab countries* there is a marriage contract, traditionally known as *aqd qeran, aqd nekah* or *aqd zawaj*, which is signed at the marriage ceremony. In Egypt, Syria, Palestine, Jordan and Lebanon this contract is known as *Katb el-Kitab*. The contract stipulates the rights and responsibilities of future spouses or other parties involved in the marriage process. As with any civil contract, the parties may provide for financial or non-financial aspects (restrictions on moving from a marital home, restrictions on polygamy, permission to visit the family regularly, establishment of common property). The *mahr* or *ṣadāq* dowry represents a specificity of the Muslim marriage[77].

4. Conclusion

Marriage conventions have the great advantage of saving money and time for the spouses. Due to their conclusion, if the spouses reach a divorce, it can even become a formality, the problems that could arise being resolved from the beginning within the convention.

Even if these conventions are born precisely through the conclusion of a marriage that is supposed to be done for reasons other than pecuniary ones, their appearance in the Romanian legislation is not only an expression of the principle of the contractual freedom of the spouses, but demonstrates the capacity of flexibility and openness of the Romanian legislator.

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