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General Considerations about Matrimonial Regime under the Provisions of the New Romanian Civil Code

Nadia Cerasela ANIȚEI ¹

Abstract

The provisions of art. 312 of the Civil Code establish: a legal system, that is the community property regime and two types of conventional regimes: the regime of separation of goods and the regime of conventional community (the latter includes conventional derogation from community property regime).

***Legal matrimonial regime** includes assets acquired by each spouse during marriage, except property required by law, which represents each spouse's own assets.*

*Community legal regime will apply in all situations in which prospective spouses opt for **separation of property regime** or the **regime of conventional community**.*

***Separation of property regime** is characterized by the fact that each of the spouses is the exclusive owner of their current assets and of those acquired alone after the dissolution of marriage, for the adoption of this regime the spouses being forced to draw up an inventory of movable property belonging to each one at the contracting of marriage.*

***Conventional community regime** is applicable when by matrimonial agreement, it derogates from the provisions on legal community regime, and the matrimonial convention concluded in this case can narrow or broaden the community of goods.*

Keywords:

property relations between spouses, matrimonial property regime, legal matrimonial regime; separation of property regime, conventional community regime.

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1. The concept of matrimonial regime

The notion of **property relations between spouses** is related to another concept of great importance for the study. This is the concept of **matrimonial property regime** (Dariescu, 2006).

In the past 50 years Romanian experts have equated the notion of *property relations between spouses* with the notion of *matrimonial regime*. The Romanian contemporary doctrine regarding the notions of *matrimonial regimes* and *property relations between spouses* is more nuanced than in the past, claiming that the two notions are closely linked, but not identical. Thus, the matrimonial regime should designate a system of legal rules that govern the property consequences of marriage, but not of any consequences (there are some pecuniary reports that are not of interest for the matrimonial regimes for example the obligation of maintenance between spouses, as well as those have in relation to other people: children, relatives, etc.). Consequence: *matrimonial regime* is part of the rules that systematize the "patrimonial relations between spouses", relationships which are the subject matter of more disciplines: property right of the family, inheritance law etc.. . As such, the concept of **matrimonial regime** may be perceived in a narrow sense, as it may also have wider significance. In a narrow sense –the sense preferred by the author - the **matrimonial regime** is *a set of legal rules governing the relations between spouses regarding the pecuniary rights and obligations of conjugal life and the relations concerning their management*. In a wider sense, the **matrimonial regimes** (Vasilescu, 2003) also refer to the *pecuniary relations between spouses and third parties, whether they are people completely foreign from marriage or people with specific legal ties to it* (Vasilescu, 2003).

Romanian authors define the **matrimonial regime** as the totality of legal rules governing relations between spouses on their property and those established between spouses, on the one hand, and the third person on the other hand, also regarding the spouses' goods (Bacaci, Dumitrache, Hageanu, 2005; Filipescu, 2006).

Based on legal provisions in effect, other authors consider that the **matrimonial legal regime** *consists of all legal rules governing property rights and obligations of spouses* (Bodoaşcă, 2005; Filipescu, 2006; Bacaci, Dumitrache, Hageanu, 2005).

It follows that the concept of matrimonial regimes, has a wide range of meanings, from the largest one containing all the rules governing economic relations arising from marriage, until the narrowest, referring only to the rules on spouses' property, excluding other economic relations existing between spouses (such as those resulting from maintenance, donations, bequests, etc..) or patrimonial relations between spouses and their children (Dariescu, 2008).

Based on the above, we will try to give a definition of the **matrimonial regime**, we consider that **the matrimonial regime** means all legal rules governing the relations established between spouses, or between one or both spouses, on the one hand, and third party, on the other hand, relations which have as object existing assets at the contracting of marriage or acquired during it and the obligations contracted in connection with such goods for carrying out the duties of marriage (Dariescu, 2006).

Generally, the matrimonial regime will be subject to the following rules:

- After the contracting of marriage, the spouses will declare the chosen matrimonial regime, which is mentioned in the marriage document;
- Regardless of the matrimonial regime chosen, the spouses will not be allowed to derogate from the laws laid down for that regime;
- Between spouses, the chosen matrimonial regime will become effective only after the contracting of marriage and in relation to third parties only after the accomplishment of advertising formalities prescribed by law;
- matrimonial regime chosen will be changed whenever they want wives, but only after at least one year after marriage and only authentic notary;
- the chosen matrimonial regime will be changed whenever the spouses want so, but only after at least one year after the contracting of marriage and only by an authentic notary document;
- A spouse can give a mandate to the other spouse to represent him/her in the exercise of rights he/she has under matrimonial regime;

- If one spouse is unable to express their will, the other spouse will be able to obtain court permission to represent him/her to exercise his/her rights it has under matrimonial regime. This court decision will determine the conditions, scope and duration of the judicial mandate. This mandate will end when the spouse represented will be in a position to express his/her will or when a guardian or a curator will be appointed;
- At the request of a spouse the court may condition the provision acts of the other spouse to his/her express consent. The measure will be imposed only if a spouse contracts legal acts which seriously endanger the interests of family and only for a fixed period. Documents concluded in breach will become void. The right to action will be barred within one year, starting from the date the injured husband became aware of the act;
- The matrimonial regime will cease with the cancellation, termination or cessation of marriage. The matrimonial regime will end according to law in the event of termination or change.

The New Civil Code establishes the property relations between spouses on the basis of the principle of autonomy of will, predicting a real legislative reform of matrimonial property regime existing at present in Romania (Apetrei, 2005).

By means of the matrimonial regime it establishes, the new Civil Code is subject to the modern laws tendency to create a triple balance:

1. between spouses: the emergence of marital agreements, which led to the adoption of more flexible legal rules that allow spouses a certain freedom to choose the property relations regime between them;
2. within the family: to protect the interests of the family, they resorted to mandatory rules that provide for limitations and prohibitions (Art. 321-322 on the family home - new concept in the Romanian law, art. 316 on documents seriously threatening family interests);
3. between family and society-third parties: by the establishment of formal requirements of legal documents, including marriage agreements concluded by notarial act, and with the obligation of making it public.

2. Classification of matrimonial regimes

Taking into account the international conventions to which Romania is party and the principles contained in the European recommendations in the field the new Civil Code replaced the regulation of the Family Code with modern regulation harmonized with European law rules. Thus, according to art. 312 of the new Civil Code "The future spouses can choose as matrimonial regime: legal community, separation of goods or conventional community (paragraph 1). Regardless of the matrimonial regime chosen, one cannot derogate from the provisions of this section, if otherwise provided by law (paragraph 2)."

Paragraph 2 of art. 312 of the new Civil Code provides that regardless of the chosen matrimonial regime one cannot derogate from the provisions of this section. Section I of Chapter VI called *Patrimonial rights and obligations of the spouses* is entitled *Common provisions*. Articles 312-338 of the new Civil Code are dedicated to this section. We note that this section brings under regulation the **primary regime** that we define as *the set of legal norms governing the relations established between spouses, or between one or both spouses, on the one hand, and third parties on the other hand, relationships which refer to property existing at the contracting of marriage, acquired during it and the obligations and in connection with such goods or for the accomplishment of the duties of marriage and that apply to all marriages, regardless of the marital regime to which the spouses are subjected.*

From the provisions of art. 312 par. 1 of the new Civil Code we notice that future spouses can choose as matrimonial regime: **legal community legal, separation of goods or conventional community.**

We note that by means of the provisions of art. 312 of the new Civil Code it is established: a legal system that is the community property regime and two types of conventional types of regimes: the regime of separation of goods and the regime of conventional community (the latter includes conventional derogation from community property regime).

Legal matrimonial regime includes assets acquired by each spouse during marriage, except property required by law, that represents each spouse's own assets.

Community legal regime shall be applies in all situations in which prospective spouses do not opt for **separation of property regime** or the **conventional community regime**.

Separation of property regime is characterized by the fact that each of the spouses is the exclusive owner of his/her current assets and of those they acquire on their own after the contracting of marriage, for the adoption of this regime the spouses being forced to draw up an inventory of movable property belonging to each one at the contracting of marriage.

Conventional community regime is applicable when by matrimonial agreement, derogates from the provisions on the legal community regime, and the matrimonial convention concluded in this case can narrow or broaden the community of goods.

In conclusion, the legislative novelty of the new Romanian Civil Code which reformed the Regulation of the Family Code of patrimonial relations between spouses in Romania, lies *in the possibility of future spouses to choose between several matrimonial regimes, responding thus to the continuous need for adaptation of existing legislation to socio-economic needs and to the trend manifested in this field at European level.*

3. Legal nature of the matrimonial regime

Given the controversies in the research literature on the legal nature of the main types of matrimonial regimes we can identify some aspects common to all material regimes likely to imprint a unitary legal nature. (Avram, Nicolescu, 2010)

First, the matrimonial regime is a legal abstraction, a concept whose application is not dependent on spouses' wealth. As everyone has a heritage, no matter how poor they would be, so does the spouses are subject to a matrimonial regime, regardless of their wealth.

Secondly, the matrimonial regime must be examined in the complexity of the problems it raises. The premise from which to start is that the marital status of married person necessarily induces some changes in the property status of that person. First, a network of specific property relations is created between spouses, and, secondly, the way in which the married person, within the civil and commercial circuit, gets

into legal relationships with third parties differs, in some respects –from the way a single person establishes such legal relationships.

If we consider the patrimonial nature of matrimonial regime, and the fact that they involve, in principle, an adaptation of the individual's assets to the status of married person, we believe that the matrimonial regime is, legally, a way of property of each spouses.

Determining the legal nature of the matrimonial regime is important because the eligibility of the matrimonial regime as a way of property of each spouse allows the identification of general problems of any matrimonial regime, which is practically the legal subject matter of the matrimonial regime.

The first general problem is to determine **the structure or composition of each spouse's property**. Just as in any property, we distinguish the assets and the liabilities, so, in case of the matrimonial regime we distinguish between:

- matrimonial assets, the main problem of the matrimonial regime being to determine the legal nature of the property of each spouse. In case of the community regimens we are interested how the mass of common goods and the mass of own goods of each spouses becomes part of assets, how a possible transfer or circuit between them is made, how real subrogation which maintains the property divided into these two distinct masses of goods operates. It should be noted that we consider each spouse's property structure. This is true in case of the community property, which is characterized by the existence of two heritages and three masses of assets: the mass of common goods, which is found in the property of each spouse and the two masses of own goods corresponding to the property of each of them. Therefore, we cannot talk about three patrimonies, as common goods do not form a third patrimony, distinct from the assets of both spouses, but there are two patrimonies and three masses of goods;
- liability, the main problem of the matrimonial regime being that to determine the legal nature of each spouse's debts. In case of community regimes we are interested in the way in which the nature of debt is determined as common or own

and in the opportunities of the creditors to pursue the common or own property of the spouses.

A second problem is that of determining **the way in which the matrimonial regime works**. Given *the structure of the assets*, we are interested in the way in which the spouses manage the assets available, depending on their nature. In other words, we are interested in the "power" they have upon the goods, in the conditions in which they can validly sign acts of administration, use and disposal of the property. Given the *structure of patrimonial liability*, we are interested in the way the spouses assume their debts and the way in which they respond to creditors (divisible or jointly) for debts assumed, and the way mutual claims between spouses are set to rights.

The third general problem is related to **the termination and liquidation of the matrimonial regime**. Depending on the regime's nature there can be identified other specific issues such as property division in case of community regimes.

4. The object of matrimonial regimes

Matrimonial regime is the bridge between family law, reduced to that of marriage, and classic civil law designed as property law. It borrows features from both systems, trying to develop its own legal aspect. Thus, the matrimonial regime is a pecuniary regulation of marital status. From this point of view, one can distinguish a specific object to every matrimonial regime, an object divided in a material one and a legal one (Vasilescu, 2003; Crăciunescu, 2000).

In the material sense (Crăciunescu, 2000), the matrimonial regime sets to rights the property of spouses, so, all property of husband and wife, regardless of the date of the acquisition. Its object is, therefore the property the spouses had at the contracting of marriage and those acquired during their marriage together or separately, onerously or free of charge. This refers generally, as shown by Stettler and Waelti, to all the pecuniary rights belonging to a person, these being especially real rights on movable and immovable property, the rights of intellectual property, pecuniary rights related to the activity of shareholder in an anonymous company or member in a partnership, and the rights arising from claims of any kind. In case of collective property, the rights will be

either parts of co-ownership, or parts due from the common property, the property can be generated by family entirety, a hereditary community, resulting from a succession or relations that unite the members of a simple company, collectively or in limited partnerships.

In the legal sense (Crăciunescu, 2000), matrimonial regime subjects the spouses' property to certain rules having their own object, but forming together a coherent whole. Some of these rules relate to ownership of property, governing the separation of goods or the composition of heritages. With their help, one can determine whether certain goods that the spouses had at the time of marriage or they have acquired it afterwards, during marriage, remain own property or become part, in whole or in part, of the common mass.

At the same time, these rules govern the distribution of patrimonial liability.

5. Principles of matrimonial regimes

Depending on real matrimonial regimes diversity, on the similarities and differences that may arise between different national regulations, the research literature (Vasilescu, 2003; Crăciunescu, 2000; Avram, Nicolescu, 2010) has shown that it is permitted to distinguish some general rules that can be found in any structure of a matrimonial regime. The variation of principles depends not only on the concrete systems of law, but also of the social evolution, on the way the society attached importance, more or less nuanced, to the role and place of men and women in the institution of marriage, on the importance that the society granted to the institution itself.

The principles governing matrimonial regimes (Vasilescu, 2003; Crăciunescu, 2000; Avram, Nicolescu, 2010) are:

1. *The principle of equality between spouses.* This principle is enshrined in art.48 of the Constitution revised and republished and by various international acts to which Romania is party as for example: art.16 of the Universal Declaration of Human Rights, art. 24 paragraph 4 of the International Covenant on Civil and Political Rights. Thus, equality of rights is nothing but the guarantee that citizens will be able to exercise all rights provided by the Constitution, by laws and other normative acts, without distinction of nationality, race, religion, culture or profession.

Equality between the spouses has a full scope of applicability for non-property and property legal relations governed by family law. In case of the matrimonial regimes the equality between spouses is reflected in several ways:

- spouses have the same patrimonial rights and obligations arising, by law effect, from marriage;
- the legal nature of property acquired by either spouse, or of the debt assumed by a spouse under the rule of matrimonial regime is no different as they belong to men or women;
- the power of each spouse on property he/she owns exclusively or together with the other spouse does not differ due to sex. Mainly, regardless of "their economic power " each spouse has the same "legal power", namely the same rights and the same ways to exercise the rights on their property.

2. *The principle of freedom of choice of matrimonial regime.* In terms of private law, the freedom of matrimonial regime is related to conventional freedom and autonomy of will. Thus, spouses are able to choose the matrimonial regime which shall be applied *in concreto* in the relations between them.

3. *The principle of mutability (change) of matrimonial regime.* The freedom of choosing one's matrimonial regime, implies, in principle, the possibility of spouses to modify during marriage the matrimonial regime they chose when they got married.

4. *The principle of subordination of the matrimonial regime to the purpose of marriage.* The matrimonial regime is subordinated to the purpose of marriage (and *nuptiae sequantur*) and to family interests. Patrimonial relations between spouses are additional to non-property relations and are designed to support the family economically. Hence the two essential consequences:

- there is no matrimonial regime outside marriage. The effects of any matrimonial regime, whether conventional or legal only occur only after marriage and extend in time until the date of termination or dissolution of marriage, becoming void;

- the purpose of matrimonial convention is subordinate to the purpose of marriage, so to family; its diversion from that purpose is not allowed.

6. Beginning and end of the application in time of matrimonial regime (Vasilescu, 2003: 58-61)

As a consequence of its characteristics, matrimonial regime can only be applied once marriage has been contracted because this is the date from which one can speak of legal effects, both extra-patrimonial, and patrimonial between spouses.

For legal matrimonial regimes the rule is that is automatically applied once the marriage ceremony took place without any special manifestation of the will of the spouses. From the moment the effects of marriage end, regardless of the specific causes: divorce, annulment, death of a spouse, etc., the legal matrimonial regime will cease after the marriage is considered dissolved, disbanded or terminated.

For alternative matrimonial regimes, the act of choosing the matrimonial regime is out of the question or analysis, because the effects of interest here are those of the elected regime, and not those of the act itself.

In case of conventional matrimonial regimes, because the marriage contract is usually signed before the celebration of marriage, the rule no longer refers to the registration, but to the application of the principle of matrimonial regime in addition to the institution of marriage (and *nuptiae sequantur*).

The differences between the matrimonial legal regime and the conventional matrimonial regime may be defined in terms of its enforceability. Thus, if the legal matrimonial regime is opposable *erga omnes* by law, matrimonial conventions achieve their enforceability by fulfilling certain legal formalities.

In case of the matrimonial regime change, because it occurs during the marriage, the starting point of the effects of regime change is the completion of the formalities prescribed by law, usually coinciding with the date of judicial approval of the amendment of the original matrimonial regime.

The application in time of the matrimonial regime is determined by the duration of marriage.

Where a change of the matrimonial regime interferes during marriage to third parties changes will occur after the date on which the formalities of publicity required for such situations are met. These forms of publicity are usually performed after the time when the change of the matrimonial regime became effective between spouses. For this reason, in this case, the matrimonial regime will take effect starting at two different times, as it refers either to the relations between them or the relations between them and third parties.

In conclusion, matrimonial regimes depend temporally on the institution of marriage. So, the beginning of application of a marriage may depend on the fate of marriage, and the causes of termination or dissolution are common, also determining the termination of the matrimonial regime applicable.

7. Choice and change (mutability) of the matrimonial regime

The new Civil Code provisions on matrimonial regime choice

Article 312. **Matrimonial regimes.** "The future spouses can choose as matrimonial regime: legal community, separation of goods or conventional community."

Article 329. **Matrimonial convention.** "The choice of another matrimonial regime than that of legal community is achieved by contracting a marriage agreement."

The choice of matrimonial regime

The freedom of choice of the matrimonial regime ensures the establishment of a matrimonial regime specifically tailored to the needs of spouses, to their mentalities and opportunities, and therefore the matrimonial regimes based on this principle are preferable to legal matrimonial regimes, unique and compelling. And the choice is always conventional being achieved by the contracting of a marriage agreement.

The freedom to choose the concrete matrimonial regime may be very broad, in that it allows one to choose one of the matrimonial regimes alternatively regulated by law or combine them and create an

"unnamed" matrimonial regime, or may be narrower in that it allows one to choose only a matrimonial regime provided by law. On the other hand, this freedom is not absolute, but limited by the imposition of a set of mandatory rules (the core of matrimonial property) from which no derogation by matrimonial agreement is possible and which forms the primary system. For situations where, by matrimonial convention, a concrete matrimonial regime has not been chosen, the law indicates the matrimonial regime applicable to spouses, thus constituting the legal matrimonial regime (Vasilescu, 2003; Crăciunescu, 2000; Avram, Nicolescu, 2010).

Provisions of paragraph 1 of art. 312 of the new Civil Code show that prospective spouses have the possibility to choose as matrimonial regime: the legal community, the separation of goods or the conventional community.

As is apparent from the provisions of art. 329 of the new Civil Code, the spouses have the possibility to choose by matrimonial convention as matrimonial regime either the regime of separation of goods or the conventional community regime. Exception to this rule is the legal community regime. So, if spouses have not chosen until the contracting of marriage by matrimonial convention one of the two matrimonial regimes, the legal community regime is applied.

Regarding the matrimonial convention we mention that in this section we will define it for we will dedicate an entire chapter in this monograph.

The notion of matrimonial convention (Dariescu, 2007) has been defined by authors differently. Thus, the matrimonial convention is defined as "the convention which regulates the matrimonial regime of future spouses, the condition of their present and future property, in pecuniary relationships arising from marriage" (Hamangiu, Rosetti – Bălănescu, Băicoianu, 1998:4) or as a "conditional, solemn and irrevocable contract by which future spouses organize their civil capacity and shall determine, in relation to their property, the consequences of marital association "or "as the legal document that regulates the essential patrimonial relations, which will take place between them during marriage (Vasilescu, 2003).

One last opinion (Crăciunescu, 2000:11), to which we agree (Art. 21, Legea nr.105/1992), is that matrimonial convention refers to the

conventional act by means of which future spouses, making use of the freedom conferred by the legislature, establish or change their own matrimonial regime during marriage, the matrimonial regime under which they were married. In comparative law, matrimonial convention is defined as that contract by means of which the spouses adopt a particular matrimonial regime, different from the legal regime, but which is still provided by national law applicable to pecuniary relations (Georges, Droz, 1974).

8. Change (mutability) of matrimonial regime

The provisions of the new Civil Code relating to the change (mutability) of matrimonial regime

Chapter VI Patrimonial rights and obligations of spouses, Section 1 Common provisions, § 4. The choice of matrimonial regime, dedicates to art. 336 to marriage convention modification.

Article 336. **The change of marriage convention.** "Matrimonial convention may be modified before the contracting of marriage, under the conditions specified in art. 330 and 332. The provisions of art. 334 and 335 are applicable. "

Article 330. **Conclusion of matrimonial convention.** "Under penalty of nullity, matrimonial convention is concluded by a document certified by notary public, with the consent of all parties, expressed in person or by procurator by means of an authentic, special mandate and having predetermined content (paragraph 1). Matrimonial convention concluded before the marriage becomes effective only after the contracting of marriage (paragraph 2). Matrimonial convention concluded during the marriage becomes effective from the date specified by the parties or, in its absence, from its closing date "(paragraph 3).

Article 332. **The object of matrimonial convention.** "By matrimonial convention one cannot derogate, under penalty of nullity, from the laws on the matrimonial regime chosen, except as expressly provided by law (paragraph 1). Also, matrimonial convention cannot affect the equality between spouses, parental authority or legal hereditary devolution "(paragraph 2).

Article 334. **Publicity of the matrimonial convention.** "To be binding on third parties, matrimonial conventions shall be registered at

the National Register of matrimonial regimes, organized under the law (paragraph 1). After the authentication of matrimonial convention during marriage or after receiving the copy of the marriage document, according to art. 291, the notary public sends, *ex officio*, a copy of the convention to the Civil Service where the celebration of marriage took place, to make reference to the act of marriage, at the register referred to in paragraph (1), as well as at the other registers of publicity, according to paragraph (4) (paragraph 2). The provisions of paragraph (2) do not exclude the right of any of the spouses to require the fulfillment of publicity formalities (paragraph 3). Given the nature of property, matrimonial conventions will be noted in the cadastral register, will be included in the trade register and other records of publicity provided by law. In all these cases, the failure to complete the special publicity formalities cannot be covered by the entry in the register referred to in paragraph (1) (paragraph 4). Any person, without being held to justify an interest, is allowed to investigate the register referred to in paragraph. (1) and may require, as provided by law, the issuing of certified extracts" (paragraph 5).

Article 335. Unenforceability of matrimonial convention. "Matrimonial convention cannot be opposed to third parties as regards the acts signed by them with a spouse, unless the publicity formalities provided by Art. 334 have been met or if third parties have found it otherwise (paragraph 1). Also, the matrimonial convention may not be opposed to third parties as regards the acts concluded by them with any of the spouses before marriage "(paragraph 2).

Chapter VI *Patrimonial rights and obligations of spouses*, Section 5 The change of matrimonial regime change, § 1. Conventional change dedicates art. 369 to matrimonial regime change.

Article 369 **Conditions.** "After at least one year from the contracting of marriage, the spouses may, whenever they wish, to replace the existing matrimonial regime with another matrimonial regime or to modify it, under the conditions provided by law for concluding matrimonial conventions (paragraph 1). The provisions of article 291, 334, 335 and 361 shall apply accordingly (paragraph 2). Creditors harmed by change or liquidation of matrimonial regime may repeal within one year after the publicity formalities were met or, where appropriate, when

they became aware of the circumstances in the other way (paragraph 3). Creditors provided in paragraph (3) can invoke at any time, by way of exception, the unenforceability of matrimonial regime change or liquidation which harmed their interests"(paragraph 4).

Art 291. **Formalities of matrimonial regime.** "The officer of civil status makes mention on the marriage certificate of the matrimonial regime chosen. He must, ex officio and without delay, notify the register provided for in art. 334 par. (1) and, where appropriate, and send the notary public who certified the matrimonial convention a copy of the marriage certificate. "

Article 361. **Movable assets inventory.** "After adopting this regime, the public notary draws up an inventory of their movable property, whatever their mode of acquisition (paragraph 1). One can also draw an inventory for movable assets acquired during the separation (paragraph 2). In all cases, for enforceability against third parties, the inventory is attached to matrimonial convention, subject to the same formalities of publicity as matrimonial convention (paragraph 3). In the absence of an inventory, until proven otherwise, it is presumed that exclusive ownership belongs to the owner spouse (paragraph 4). If the property has been acquired by a legal act, subject, according to the law, to a formal requirement for validity or to publicity requirements, exclusive ownership can be proved only by the document required by law" (paragraph 5) .

The change of the matrimonial regime

The freedom of choice of the matrimonial regime implies, in principle, the possibility of the spouses to modify during marriage the matrimonial regime under which they got married. Thus, spouses are able to modify the matrimonial regime applicable to them, specifically when family relationships require this. Usually, this change is supervised by the court, which must approve or ratify the legal act of changing the matrimonial regime. The change of the matrimonial regime is performed by a matrimonial convention with the observance of the substantive, form and publicity conditions required by law when adopting the original matrimonial regime (Vasilescu, 2003; Crăciunescu, 2000; Avram, Nicolescu, 2010).

Regarding the change of the matrimonial convention we shall distinguish between the changes of convention concluded prior marriage and the modification of the convention signed during marriage.

According to art. 336 of the new Civil Code matrimonial convention may be modified before the end of marriage, under the conditions of art. 330 of the new Civil Code (document authenticated by the notary public, with the consent of the parties, expressed in person or by a procurator by means of an authentic, special mandate and having predetermined content and art. 332 of the new Civil Code (by means of the matrimonial convention one cannot derogate, under penalty of nullity, from the laws on the matrimonial regime chosen, except as expressly provided by law. The marital convention cannot affect the equality of spouses, parental authority or legal hereditary devolution).

However, for opposability to third parties, the publicity conditions stipulated in art. 345 and 335 of the new Civil Code should be observed.

The change of matrimonial convention before marriage may have as object even the replacement of the original matrimonial regime chosen by spouses, as it may refer to certain changes within the same matrimonial regime (eg within the conventional community regime future spouses add or as appropriate eliminate the preciput clause). Also, the change of the matrimonial convention before marriage is done with the consent of all persons who participated in its conclusion.

Instead the matrimonial regime change is achieved during marriage, after the matrimonial regime chosen at the contracting of marriage was effective. And this implies the conclusion of a convention, which must meet all conditions of the marriage convention.

It is noted that the difference between the two hypotheses is the following:

- Before marriage we refer to change (because there isn't a matrimonial regime applicable), while during marriage the matrimonial regime itself changes;
- changing the matrimonial agreement before marriage requires the presence of all those who participated in its conclusion (the intending spouses, as well as appropriate third parties who have made donations, according to the principle of legal

- symmetry), while the change of the matrimonial regime during marriage is carried out only with consent of spouses;
- the new Civil Code distinguishes between conventional modification (art. 369) and legal modification of the matrimonial regime (art. 370-372).

Conventional modification of the matrimonial regime may take place after at least one year of marriage, under the conditions provided by law for marital conventions.

Legal modification of the matrimonial regime may be performed judicially by passing from the community of property regime to the separation of goods regime, at the request of either spouse, whether by acts concluded, the other spouse jeopardizes the interests of the family.

9. The effects of matrimonial regime

The new Civil Code provisions on matrimonial regime effects

Article 313. **The effects of matrimonial regime.** "Between spouses, the matrimonial regime becomes effective only from the marriage day (paragraph 1). In relation to third parties, the matrimonial regime is opposable after the publication formalities provided by law are met, unless they have met it otherwise (paragraph 2). The failure to meet the publicity formalities make the spouses to be considered in relation to third parties in good faith, married under the matrimonial legal community regime"(paragraph 3).

The effects of matrimonial regime

The analysis of paragraph 1 of art. 313 of the new Civil Code shows that the effects of any matrimonial regime - whether it comes to: the matrimonial legal regime, matrimonial regime of conventional community and the separation of goods matrimonial regime - are produced only from the date of marriage and extend over time until date of termination, dissolution of marriage.

Looking at paragraph 2 of art. 313 of the new Civil Code we note that where a change of the matrimonial regime during marriage to third parties takes place, changes will occur after the date on which the legal publicity forms required for such situations are met. These forms of publicity are usually achieved after the time when the matrimonial regime

change became effective between spouses. For this reason, in this case, the matrimonial regime will take effect starting at two different times, as it refers to the relations between spouses or to the relations between them and third parties.

As an exception to paragraphs 1 and 2 of art. 313 of the new Civil Code if the publicity formalities on matrimonial regime change are not met, the spouses will be considered in relation to third parties in good faith, as married under the matrimonial legal community regime. So, we will apply the rules of the legal community.

10. Termination of matrimonial regime

The new Civil Code provisions on matrimonial regime termination

Article 319. **Termination of matrimonial regime.** "Matrimonial regime ceases by nullity acknowledgment, cancellation, termination or dissolution of marriage (paragraph 1). During marriage, the matrimonial regime may be modified under the law (paragraph 2).

Termination of matrimonial regime

Since the end of the effects of marriage regardless of the specific causes: divorce, annulment, death of a spouse, etc., the matrimonial regime will stop its effects after the marriage is considered dissolved, disbanded or terminated.

Analyzing the provisions of art. 319 of the new Civil Code relating to the termination of the matrimonial regime we notice that, whether it comes to: legal matrimonial regime, matrimonial regime of legal community, or the matrimonial regime of separation of goods, any of them cease by:

- death of one or both spouses;
- divorce;
- delivery of nullity or annulment of marriage;
- modification of the matrimonial regime, according to the law during marriage.

As a result of death of a spouse the community ceases because marriage ceases as well.

As a result of divorce art. 385 of the new Civil Code provides for termination of matrimonial regime. As a result, the court decision for divorce, becomes effective from the date the request for divorce was presented, but to third parties, according to art. 387 of the new Civil Code, the divorce decision shall become effective from the date the publicity formalities provided by law by Art. 291, 334 and 335 of the new Civil Code are met.

However, according to art. 385 paragraph 2 of the new Civil Code either or both spouses, may ask the divorce court to find that the matrimonial regime ended from the date of separation in fact. Also, these provisions shall apply in cases of divorce by agreement between the spouses, if they so agreed.

If the matrimonial regime is terminated by divorce former spouses remain joint owners of the common property until the establishment of the shares of each.

In case of marriage annulment, the cancellation operating retroactively, marriage is considered nonexistent and therefore the matrimonial regime is nonexistent.

11. Liquidation of matrimonial regime

The new Civil Code provisions on matrimonial regime liquidation

Article 320. **Liquidation of matrimonial regime.** "In the event of termination or change, the matrimonial regime is liquidated according to law, by agreement or, in case of disagreement, by the court. Final court decision or, where appropriate, the document drawn up in original is an act of liquidation. "

Article 355. **Liquidation of community regime.** "At the end of the community, it is liquidated by court decision or original notarial document (paragraph 1)."

Liquidation of matrimonial regime

The matrimonial regime, in the event of termination or change, is liquidated in the following ways:

- by agreement, by original notarial document;
- by judicial decision, the final court decision representing the liquidation act.

When community ceases by the death of a spouse, the liquidation is made between the surviving spouse and the heirs of the deceased spouse. As such, according to paragraph 3 of art. 355 of the new Civil Code the deceased spouse's obligations are divided between the heirs in proportion to their respective shares from the inheritance.

When community ceases by the death of a spouse, the liquidation is made between the surviving spouse and the heirs of the deceased spouse. Thus, according to art. 355 paragraph 3 of the new Civil Code the obligations of the deceased spouse are divided between the heirs in proportion to their respective shares.

The liquidation and sharing of goods are governed by the provisions of art. 320 of the new Civil Code, supplemented with common law provisions regarding the partition.

If matrimonial regime is terminated by divorce the former spouses remain joint property owners of the common property until the establishment of the shares of each. So, in accordance with art. 357 paragraph 1 of the new Civil Code in the liquidation of the community both spouses will take their own goods, then the court will proceed to the division of joint property, judging by the contribution of each spouse to the acquisition of common goods and to the accomplishment of common obligations. So liquidation of community begins with the establishment of the mass to share, then the goods to be assigned will be evaluated and as a last step the assets and liabilities will be shared proportionally.

In case of dissolution of marriage the matrimonial regime being non-existent will be a settlement between spouses *de facto* not *de jure*, by the rules of joint tenancy or society of facts, among third parties.

In case of putative marriage where both spouses were in good faith to liquidation, the rules of divorce are applied. Between them, the date of termination of the community is the date the action for annulment is introduced. When only one spouse is considered in good faith, only he/she will be able to stand on the effects of the matrimonial regime and to the liquidation of the community by the rules of divorce (Banciu, 2011).

Conclusions

The new Civil Code places at the basis of patrimonial relations between spouses, the principle of autonomy of will, predicting a real legislative reform of the matrimonial regime existing, at present, in Romania.

By means of the matrimonial regime that is established, the new Civil Code is subject to the modern tendency of law to create a triple balance:

1. between spouses: by the emergence of matrimonial conventions, which led to the adoption of more flexible legal rules that allow spouses a certain freedom to choose the regime of patrimonial relations between them;

2. within the family: to protect the interests of the family, they resorted to mandatory rules that provide limitations and prohibitions (Art. 321-322 on the family home - new concept in the Romanian law, art. 316 on the acts of disposition seriously threatening the family interests);

3. between family and societies- third parties: by the establishment of substantive requirements of legal documents, including of the marriage conventions concluded by notarial act, with a publication duty.

In conclusion, the novelty of the new Romanian Civil Code which reformed the regulation of the Family Code of patrimonial relations between spouses in Romania, *rests in the possibility of future spouses to choose between several matrimonial regimes, responding thus to the continuous need for adaptation of existing legislation to socio-economic needs and to the trends manifested in this field at European level.*

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