

# THE EXERCISE AND LIMITATIONS FOR THE EXERCISE OF NON-PATRIMONIAL RIGHTS AND OBLIGATIONS OF THE SPOUSES

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## Abstract

*The evolution of contemporary private law is due to the recognition of the importance of human rights, knowing a real progress in the last period of time, which has led to the promotion and protection of the person's subjective civil rights. It is very important that, in addition to legal coercive values, society should accept the importance of civil subjective rights and respect them. Correspondences to civil subjective rights are the obligations, and in terms of family law, the personal obligations of spouses are of particular importance.*

*In order not to be ineffective, these rights must be applied rationally and it is necessary that they come to defend the injured person both physically and mentally. It is very important that, in addition to legal coercive values, society should accept the importance of civil subjective rights and respect them. Although at European level we can observe an exponential increase of the values protected by the adoption of the European Convention on Human Rights and its implementation from the adoption until now in Romania the respect of the civil subjective rights remains at the discretion of each individual, force can not cover all the cases that may arise.*

*Correspondences to civil subjective rights are the obligations, and in terms of family law, the personal obligations of spouses are of particular importance.*

*The husband's personal rights and obligations are inseparable from spouses and can not be alienated. They can not be the subject of the matrimonial agreement or of any other contracts. This provides an essential principle of family law - the equality of spouses in family - and excludes any attempt to violate it by concluding legal acts. Equality of spouses in rights derives from all social relations based on the Universal Declaration of Human Rights, the Convention on the Political Rights of Women, adopted by the United Nations on 20 December 1952, the Convention on the Elimination of All Forms of Discrimination against Women adopted on 18 December 1979, Civil Code.*

**Keywords:** non-marital rights and obligations of spouses, cohabitation, fidelity, name.

## Introduction

The current civil law brings important changes in the sphere of private law institutions. By introducing several special laws into the Civil Code, romanian legislator sought the harmonization of civil law and the uniformity of non-unitary judicial practice. Family relationships enjoy a new, modern approach that seeks to meet the needs of contemporary family life.

The new civil regulation brings significant changes to marriage although innovative in relation to previous regulation, the solution offered by the legislator is limiting and, therefore, criticism may occur from this point of view. Legislation should be more flexible in the sense of introducing the possibility of concluding customized matrimonial conventions to enable spouses to determine non-patrimonial issues.

## 1. The obligation of cohabitation

Under article 309 (2) civil code, spouses have the obligation to live together.<sup>1</sup> In some situations they can live separately, for example: to pursue a profession, health care, training, etc.<sup>2</sup> The refusal of one of the spouses to live together may constitute grounds for divorce thoroughly.<sup>3</sup> Traditionally the wives have a duty to live together, because the purpose of marriage is to live a life in common. This obligation does not imply, however, that either spouse may be compelled to cohabitation, through coercive measures.<sup>4</sup>

### 1.1. The choice of domicile

The Romanian legislator gave the possibility for spouses to choose their domicile or residence. As a legal principle common to the spouses, housing is where they live constantly dwelling on, i.e. they choose by mutual agreement. Domicile is, in principle, the result of a voluntary act. The choice of the place of residence of the spouses disagree about is can

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<sup>1</sup> Prof. Dr. Teodor Bodoașcă, family law, 3rd Edition, Rev., Bucharest, Editura Universul Juridic, 2015, p. 94

<sup>2</sup> Tribe., dec. civ. No. 546 of March 6, 1973, in 1974, CD p. 169; Tribe., dec. civ. No. 1334 from 1970, in 1970, pp. CD 114-117; Tribe. jud., Dec. civ. No. 849 of 18 September 1986, CD nr. 2 of 1987, p. 65.

<sup>3</sup> Ion P. Filipescu, Andrei i. Filipescu, treatise on family law, 6th Ed. All Beck, București, 2001, p. 41

<sup>4</sup> Aurelian Ionascu, Mircea Mureșan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975, p. 109

materialize through expressing one of the spouses to change his place of residence or the desire to establish separate residences.<sup>5</sup>

### 1.2. The residence of spouses and family housing

The actual location where the family is probably more important for the majority of the couples than the notion of residence or domicile<sup>6</sup>. In proclaiming the equality of spouses in family housing choice, the legislator had to ensure equality and same spouses in respect of ownership rights to dwellings. So the wife cannot, one without the other, to avail itself of the right of ownership of the dwelling or to goods falling within its membership.

This co-insurance-management of family housing thus protects each spouse against the other acts on them may end alone and that would endanger the common dwelling property. Therefore, this community of life for the spouses (and their children) is ensured through common housing.

Through art. 321 of the Civil Code shall be suburban home defines the term family as custom-built municipality or, failing the spouses, the spouse dwelling upon which lies the children. These legal provisions relating to housing family double perspective: that of the residential building and that of family life. As a consequence of the Declaration of the building housing the family is that the spouse who is not the owner may oppose acts of disposition over the property, even though it is the exclusive property of the other spouse. In this situation the husband owner cannot dispose of his rights over the property without the consent of the other spouse, in the event of a sale, mortgage: usufruct, waiver of a right, lease, etc. There are stipulated provisions regarding family housing assets. In order to avoid any abuses, you can straighten the owner spouse against spouse who opposes such action being within the competence of the Court of guardianship.

Another issue concerns the situation of spouses who live in a property held under a lease. So, in this case, each spouse will have a housing law. In the event of a divorce each of the spouses will have their own right to live in housing rented, will be determined by the Court which of the two spouses to retain the right, depending on the needs of each.

### 1.3. Evacuation and protection order

In practice, several difficult situations have been shaped and the question is whether one of the spouses

has the opportunity to obtain, through the court, the evacuation of the other spouse from the joint house, but the opinions were contradictory. However, we believe that an evacuation action is admissible because most situations are critical and require the protection of the spouse who formulated the action. The evacuation<sup>7</sup> of the other spouse may be requested for reasons leading to the impossibility of continuing coexistence, such as domestic violence, which could seriously endanger life, body integrity, health of the other spouse or members family.<sup>8</sup> The evacuation solution is temporal and has no consequence of the loss of ownership of the house.

According to article 23 of Law No. 217/2003 for the prevention and combating of family violence, republished<sup>9</sup>, the person whose physical or mental integrity is endangered, may ask the Court for a protection order.<sup>10</sup> This measure is provisional and requires certain obligations and prohibitions imposed to protect the injured spouse

### 1.4. The property consequences of the absence of cohabitation

As regards the heritage consequences of the absence of cohabitation we will refer to the contribution of the spouses to household expenditure. Thus, the refusal of one of the spouses to Cohabita does not prevent the other spouse from getting a contribution from his husband to household expenditure, even more so as they have children together.

But if the link between the contribution and the common residence is not or is no longer compulsory, the courts will tend to link the obligation to contribute and the legitimacy of this refusal of life in common. Therefore, in the light of the circumstances of the case, the courts may oblige the spouse who refuses to coexist to contribute to the expense of the other spouse.<sup>11</sup>

### 1.5. The separation in fact of the spouses

A husband may refuse the cohabitation, both in his marital aspect and in his material aspect, that of living in the same house. Separation can also be the result of the common will of the spouses. However, in order for the factual separation to be a good reason for divorce, it is necessary to pass a period of two years.<sup>12</sup>

As a sociological phenomenon that the law cannot ignore, de facto separation may be amicable or solicited by one of the spouses. This is manifested by the choice of a separate residence by one of the spouses. Its duration will depend only on the will of the spouses.

<sup>5</sup> M. Avram, N. Nagaraju, matrimonial regimes, Ed. Hamangiu, Bucharest, 2010, p. 116

<sup>6</sup> Ioan Albu, family Law, Ed. Didactic and Pedagogical, Bucharest, 1975, p. 111

<sup>7</sup> Prof. Univ. Dr. Teodor Bodoașcă, Family Law, 3rd edition, Rev., Bucharest, publishing House of the Legal universe, 2015, p. 95

<sup>8</sup> Ion P. Filipescu, Andrei I. Filipescu, treated by family Law, ed. VI, ed. All Beck, Bucharest, 2001, p. 42

<sup>9</sup> Law No. 217/2003 for the prevention and combating of family violence, republished, M. Of. No. 205 of 24 March 2014

<sup>10</sup> Emese Florian, Family Law. Marriage. Matrimonial regimes. Parentage. Edition 5, Ed. C. H. Beck, Bucharest, 2016, p. 93

<sup>11</sup> Judicial practice Fractional Instances: Civic 1, May 8, 1979, Civil Bull I, No. 135, D. 1979. IR 495, Obs. D. Martin; Civ. 1, 16 Feb. 1983, D. 1984. 30, note J. Revel, and the case-law cited; Adde: Bordeaux, January 8, 1985, Cah. Around. Aquitaine 1985, 66; Civ. 1 7 November 1995, Nr. 92-21.276, Bull. Civ. I, No. 394, Dr. and Shabeena., 1996, p. 72, Obs. A. Bénabent, RTD Civ. 1996. 227, Obs. B. Vareille

<sup>12</sup> Emese Florian, Family Law. Marriage. Matrimonial regimes. Parentage. Edition 5, Ed. C. H. Beck, Bucharest, 2016, p. 94

## 2. The obligation of fidelity

### 2.1. The notion of fidelity

The duty of loyalty constitutes a part of marriage. This promise of spouses to comply with and be loyal to each other is of the essence of marriage<sup>13</sup>. Considering that the wives have freedom in expressing the will of the conclusion of the marriage, consider it their duty to respect each other and thus comply with the obligation of fidelity later celebration of marriage<sup>14</sup>.

If we look at in terms of the word etymologically, fidelity, we can see that it comes from the Latin word 'fides' meaning faith<sup>15</sup>. The ideology of the obligation of loyalty is based on the fact that spouses must be faithful to each other. Mutual trust and awareness of the importance of love worn each other are fundamental to a marriage.

The duty of fidelity presents two important aspects:

- a) a positive aspect, which implies a positive obligation to have intimate relationships within the marriage,
- b) a negative aspect, not to maintain intimate relationships outside of marriage.

Failure to comply with this obligation may even lead to the divorce of the marriage, for reasons attributable to the unfaithful husband. However, it is important to note that this obligation can not restrict the individual freedom of each spouse, so the refusal of one of the husbands to have intimate relationships can not be a valid reason for defamation of marriage.

### 2.2. The principle of monogamy

Because marriage is monogamous<sup>16</sup> in Romanian civil law, the obligation of fidelity in its negative aspect is a necessary corollary. The principle of monogamy is based on the fact that the conclusion of marriage takes effect between the two spouses, who owe each other love and fidelity. Due to the principle of monogamy, in Romanian civil law, the paternity presumption of the mother's husband contracted, without the need to prove the filiation of the child born within the marriage<sup>17</sup>.

The sanction of the breach of the duty of fidelity, namely the principle of monogamy, was sanctioned in the old Romanian criminal legislation. Although adultery has been disinclined, the law allows the deceased husband to promote divorce on grounds of husband's infidelity, which is a cause of marriage dissolution.

### 2.3. Extending the notion of infidelity

Closely related to the legal definition of marriage, the duty of fidelity seemed to be protected directly by

law, but as a very personal area, the legislator did not want to interfere in a limited way in spouses' relations. We believe, however, that infidelity is a topic of topicality and a good reason for divorce, and the development of this subject is imperative from a practical point of view. Although the obligation of loyalty requires that spouses have marital relationships only with the other spouse, being forbidden to sex with third parties, we consider that this obligation does not refer only to physical but moral obligations<sup>18</sup>. For example, there have been some cases of correspondence exchanges which, by their nature, have morally violated the obligation of loyalty to the other spouse. Given that we find ourselves in an era of digitization, the question is whether virtual messages can be the basis for divorce. We consider that, to the extent that they are made public and their obtaining does not violate the secrecy of correspondence, they may be a valid reason for breaking marriage.

### 2.4. Finding infidelity

The abstracto's assessment of infidelity is hard to prove, but infidelity based on an extramarital relationship can be proven.

Infidelity is appreciated in concrete by the judge and will therefore be done in a subjective, personalized manner. In order to establish a blame in a divorce case, the judge must assess the existence of a serious violation or continued violation of the obligations arising out of marriage. In addition, violation of the loyalty obligation made it unacceptable to maintain a common life. This allowed the judge to appreciably extend his discretion to both the gravity of the infringement and the responsibility for such an infringement.

### 2.5. Responsibility for Infidelity

In order for infidelity to be invoked in the defense of a spouse, it must be imputable. In practice, there may be different cases that may disguise the unfaithful husband, such as: factual error, personam error, violence exerted on him by a third party to compel him to engage in intimate extramarital relationships, believed to be free from marriage, and so on. In these cases, the husband must be in good faith.

### 2.6. Agreements on loyalty

We must bear in mind that, although marriage involves certain aspects of a civil contract, the obligation of loyalty can not be determined by the two spouses only. The loyalty obligation can not be regarded as a mere contractual obligation from which the spouses could discard.

<sup>13</sup> Aurelian Ionascu, Mircea Mureșan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975, p. 106

<sup>14</sup> Prof. Univ. Dr. Teodor Bodoașcă, Family Law, 3rd edition, Rev., Bucharest, publishing House of the Legal universe, 2015, p. 94

<sup>15</sup> [www.limbalatina.ro/dictionar.php](http://www.limbalatina.ro/dictionar.php)

<sup>16</sup> Aurelian Ionascu, Mircea Mureșan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975, p. 106

<sup>17</sup> Idem., p. 106

<sup>18</sup> Idem., p. 106

We have in this regard the model of the United States of America, where husbands can set prenuptial contracts clauses for the situation where one of them is unfaithful. These clauses may contain moral and material damage. In France, for example, there have been requests to draw up twinning arrangements. In this regard, both the judicial practice and the French doctrine have concluded that a marriage can not be concluded in the form of a brokerage contract, and fidelity can not be negotiated<sup>19</sup>.

### **2.7. Obligation of fidelity and divorce proceedings**

The fate of fidelity during divorce proceedings can be taken into account by judging the judge's husband's culpable divorce, in which sense the judge is a true guardian of public order, especially in the function of protecting the divorce.

However, we consider that from the date of filing the divorce request, none of the spouses can no longer oppose the other duty of loyalty. With the request for divorce and the divorce of the spouses, the effects of the marriage are suspended until the final settlement of the divorce request is terminated.

### **2.8. Sanction**

The sanction will, of course, be divorce or separation for violating the loyalty obligation resulting from marriage. The severity and consequences of unfaithful behavior during marriage can be determined in the divorce proceedings, and may lead to the divorce of the unfaithful husband.

## **3. The marital obligation**

### **3.1. Notion**

The new Civil Code does not expressly provide for this obligation, but in the literature<sup>20</sup> the importance of marital duties is attached.

The marital obligation is separate from that of the common dwelling and there is no matter whether the spouses have a common dwelling or do not live separately.

### **3.2. The marital obligation is strictly related to marriage**

It is important to note that although the Civil Code does not refer to the marriage obligations of married couples, there were some canonical laws that imposed the "carnalis copula"<sup>21</sup> as a condition for the validity of marriage. This ideology lasted until the 12th century and claimed that it is imperative that the relationship be consumed in marriage to make it indissoluble. This can also be justified by the fact that marriage was perceived as a remedy for concupiscence.

### **3.3. Failure to comply with the marriage obligation**

There is no explicit sanction in our Civil Code for non-observance of the obligation of loyalty or marital debt, however non-compliance may lead to divorce, so that in this case the judge will have to set the limits.

First of all, from the point of view of divorce, in order for this obligation to be a valid reason for the dissolution of marriage, one of the spouses must be at fault and the refusal to represent the wrongful husband's behavior. We can discuss a thorough ground of divorce in the context of breaching the common obligation by denying physical relationships or by applying a behavior of rejecting the other husband in these relationships. In his defense, the deceived husband can invoke medical reasons (for example, impotence, etc.) or moral (desire for chastity, for religious or other reasons).

### **3.4. Lack of consent and legal recognition of the offense of rape between spouses**

Even though these aspects of the loyalty obligation have been introduced to establish a normality of marital behavior, the issue of rape appears between spouses. Traditionally, in the past, it is possible for the husband to force his wife to maintain intimate relationships. There were no legal provisions to protect the wife from such abuses, and society did not consider the obligation to maintain intimate relationships between spouses as rape.

Although the illicit nature of coercion in sexual relations between spouses is not expressly established, however, the application of the provisions of Art. 218 The Criminal Code also applies to rape with the wife injured as a person.

Therefore, the courts recognize the notion of rape between spouses, and there is European jurisprudence: ECHR March 22, 1995, S.W. and C.R. v. United Kingdom, Civ. 1996, 512, obs. J.-P. Marguénaud: The Court makes an explicit reference to "a civilized notion of marriage." In practice, there have been cases of rape with violence. The presumption of consent of spouses or complicity in the privacy of marital life can only be valid until the proof of the opposite<sup>22</sup>.

We believe that the current criminal legislation could be improved, following the model of the French Criminal Code, which provides in Art. 222-22 par. The following provisions: "Rape and other sexual assaults are constituted when they have been imposed on the victim in the circumstances provided for in this section, regardless of the nature of the relationship between the aggressor and his / her victim, united by the marriage ties. In this case, the presumption of the consent of the spouses to the act Sexuality is valid only until the evidence goes wrong. "

<sup>19</sup> M.-T.-CALAIS AULOY, for a wedding in conventionally limited effects, RTD civ . 1988. p. 255

<sup>20</sup> Prof. univ. Teodor Bodoașca, Family Law, Third Edition, Rev., Bucharest, Publishing House Universul Juridic, 2015, p. 95

<sup>21</sup> V. C. SAINT-ALARY-HOUIN, Sexuality in Contemporary Civil Law, Ann. Do. Toulouse, Vol. 33, 1985, p. 7

<sup>22</sup> CEDO 22 march 1995, S.W. și C.R. v. United Kingdom Civ. 1996, 512, obs. J.-P. Marguénaud

It should be noted that it is not a system of protection only for husbands, but for all couples, even unmarried.

It is found that there is a contradiction, on the one hand, a marital duty is imposed on married couples and, on the other hand, any constraint in the sexual relations between spouses is repressed.

Since sexual intercourse must be voluntary, one should state the constraint that one of the spouses can use for the other to fulfill the marital legal obligation.

The issue must also be studied under the consent given at the time of marriage. In order not to be in a situation of a constraint that enters the sphere of the penalty, the question arises whether this consent should always be repeated for every constituent act of the spouses' sexual relations. Thus, each spouse's responsibilities with regard to the marriage obligation should be clarified. Such clarification, however, can not be made objectively, but the particularities of each couple relationship must be taken into account.

If such a case is invoked in a divorce process, it should be determined primarily whether failure to comply with this obligation has led to the impossibility of continuing marriage. In this case, we can assume that the consent expressed at the end of the marriage is valid throughout the marriage, and the marriage relationship is a constituent part of the marriage.

However, then we are discussing a criminal case, it is obvious that we must consider whether at the time of the rape deed, respectively, the husband had the consent of the wife. When we talk about marital relationships through violence, we will rightly consider that the consent expressed at the end of the marriage was given for consensual relations and under no circumstances can it be used by the husband to discredit abusive behavior.

## 4. Obligation of moral support

### 4.1. The concept of moral support

In fact, it has always been very difficult to establish the concrete legal content of this obligation. As a result of marriage, the moral support obligation refers to the assistance given by spouses to each other in matters of daily life during marriage<sup>23</sup>.

Wives are morally obliged to consult each other about marriage issues. Certain authors<sup>24</sup> consider that marriage should be governed by the principle of co-decision. It requires that the spouses decide together to complete an act or make a decision, choosing the most appropriate solution<sup>25</sup>.

### 4.2. Obligation to assist in case of illness

In practice, certain situations may arise which extend the effects of mutual moral support from a purely moral point of view to an obligation to do, which occurs essentially when one of the spouses is unable to produce income for non-imputable reasons or is ill or infirm.

The obligation of mutual moral support may also have a pecuniary nature, where for improper reasons one of the spouses can not produce an income and thus can not secure his existence. In this situation, we may consider it the duty of the income-producing spouse to provide the necessary living. Family maintenance is an obligation for the spouse who produces income. In practice, there are countless cases where the wife has to deal with one or more juvenile children, providing them with raising and educating, in which case the husband, income producer, owes to support both minors and children his wife.

### 4.3. Obligation of the guilty husband to grant the other husband moral support in the case of divorce

Violation of the moral support obligation may occur in several ways, such as: lack of sincerity, patience, solidarity, honor, courtesy, mutual respect, etc. These moral values are fundamental to any relationship and, moreover, to a marriage. It is almost impossible to force a husband, guilty of violating this obligation during marriage, to respect the divorce. As a coercive measure, the husband may be forced into at least civilized behavior that does not even affect the other husband. If it is found that failure to comply with this obligation causes serious harm, the spouse affected by inappropriate behavior may request possible moral damages.

### 4.4. Sanction

Breach of the obligation of mutual moral support may entail civil, contravention or criminal liability of the guilty party<sup>26</sup>.

Art. 378 paragraph 1 lit. of the Criminal Code provides that the commission by a person of an act likely to endanger the life of a family member constitutes the offense of family abandonment. These legal provisions also apply if the offense is committed by one of the spouses by leaving the other husband in need, exposing him to certain physical or moral suffering.

It is punishable from the criminal point of view, the fact of leaving a member of the family, or the husband without help, and the fact of failing to pay the legal obligation of maintenance. Although both facts are committed by inaction, they can have particularly serious consequences.

<sup>23</sup> Aurelian Ionașcu, Mircea Mureșan, Mircea N. Costin, Victor Ursa, *The Family and Its Role in the Socialist Society*, Ed. Dacia, Cluj Napoca, 1975, p. 108

<sup>24</sup> Emese Florian, *Family Law. The marriage. Matrimonial regimes. Filiation*, Edition 5, Ed. C. H. Beck, Bucharest, 2016, p. 95

<sup>25</sup> Prof. univ. Teodor Bodoașca, *Family Law*, 3rd Edition, Rev., Bucharest, Publishing House Universul Juridic, 2015, p. 93

<sup>26</sup> Prof. univ. dr. Teodor Bodoașca, *Dreptul familiei, Ediția a III-a*, rev., București, Editura Universul Juridic, 2015, p. 93

## 5. Obligation of mutual respect

### 5.1. Exercising the duty of mutual respect

The legal duty of respect may embody several types of obligations. In addition to the above-mentioned obligations, we can say that husbands are obliged to behave properly for each other during the marriage.

Spouses must respect the profession of the other and support each other in all its aspects. In the same sense, it is necessary for spouses to respect their passions, habits, social relationships, to offer affection to each other.

### 5.2. Sanction

Failure to comply with this obligation may result in the impossibility of continuing marriage. These deficiencies may lead to the divorce of the marriage depending on the seriousness of the offense committed by the spouse, and may even result in criminal offenses. These may include physical or mental injuries or aggressions to the other spouse. The most common are: lack of loyalty to the other, violation of honor, lack of affection, neglect, refusal to participate in activities of interest to the other spouse, prohibition of certain inter-human relationships, development of certain vices, etc.

Some situations may arise in court practice, for example: alcoholism or refusal to undergo medical treatment to suppress addiction<sup>27</sup> may be a reason for divorce for breach of the duty of mutual respect, refusal to seek nursing care or the procreation of a child without taking into account the opposition of the other husband<sup>28</sup>, the fact of having surgery to change sex without the consent of the husband<sup>29</sup>.

## 6. The effects of marriage on spouses' names

### 6.1. Effects on the spouse's name during marriage

The spouses have, according to art. 282 Civil Code, several variants: the preservation of names before marriage, the bearing of the common name of any of the spouses, the bringing together of both names or the bearing by one of the spouses of the names together.

According to art. 311 The Civil Code is obliged to bear the declared name at the end of the marriage. Changing the name of one of the spouses, when they have a common name, is allowed by administrative means, but only with the consent of the other spouse. We believe that this solution could be changed in the

sense that the law could allow the name change without the consent of the other husband for good reasons (for example, the profession of the spouse who wants to change his name, the commencement of divorce proceedings when the preservation of the common name affects the image, dignity or honor, etc.).

In the doctrine<sup>30</sup> some special situations regarding the spouses' names were analyzed. One of the cases is that of the surviving spouse bearing the predecessor's family name. If he wants to remarry, he can keep the name of his predecessor and, moreover, he can agree to be the common name in the new marriage. The considerations underlying this view refer to the fact that the right to name can not be restricted, but also to the fact that the legislator does not make the difference between the ways of acquiring the name when referring to the name of the future spouses.

### 6.2. The existence of a right of use over the name worn during marriage

The marriage declaration entitles the spouses to use the name after the marriage. In the event of a divorce, the spouses may decide to return to the previously worn-in name or, with the consent of the other spouse, to keep the name worn for the duration of the marriage.

Divorce does not distinguish between husband and wife, which is why both spouses lose their husband's name in case of divorce. Use of the name can only be done with the consent of the other spouse. From a practical point of view, the question arises if the husband is entitled to request the return of his wife to the name before marriage. Judicial practice has held that it is contrary to Art. 8 and 14 of the European Convention on Human Rights, that national law should establish the name of the spouse.

A practical problem occurs when the husband, who has received the other husband's consent to the common name, remarries because art. 282 The Civil Code also applies in this case. Otherwise, the spouse of the second marriage may decide to bear the name obtained by her husband after her first marriage. From a legal point of view this situation is not foreseen and the question arises whether the spouse whose name is in question can intervene in this situation. We believe that once the divorce has been completed, the husband who has given his consent to the other spouse's name can no longer return to this matter. There is, however, the possibility of requesting in this case possible damages<sup>31</sup>, where the use of the name may affect the image<sup>32</sup>, for example in the case of a public figure, or simply causes discomfort to the former spouse whose name is in question.

<sup>27</sup> Aix-en-Provence, February 27, 2008, Dr. fam 2008. Comm. 142, obs. V. Larribau-Temeyre, D. 2009. Pan. 832, obs. L. Williatte-Pellitteri Bordeaux, March 19, 2008, Family Dr. 2008. Com. 142, D. 2009. Pan., 832, L. Williatte-Pellitteri obs.

<sup>28</sup> Nîmes, March 21, 2007, JCP 2007. II, 10149, note J. Vassaux, Dr. fam., 2008. 91, Obs., J. Hauser

<sup>29</sup> Nîmes, June 7, 2000, Dr. fam 2001. Comm 4 Obs H. Lécuyer, RTD civ 2001 335 Obs J. Hauser

<sup>30</sup> Alexandru Bacaci, Viorica Claudia Dumitrache, Cristina Codruța Hageanu, Family Law, 6th Edition, C.H. Beck, Bucharest, 2009, p. 40

<sup>31</sup> TGI Briey, June 30, 1966, JCP 1967. II. 15130, note by J. Carbonnier

<sup>32</sup> Anne Claire Aune, The phenomenon of multiplication of droit subjectifs en droit de personnes et famille, Ed. Presses Universitaires d'aix Marseille, 2007, p. 247

### 6.3. The effects of marriage termination on the name worn during marriage

If the marriage ends by the death of one of the spouses, the choice to maintain the use of the name worn during the marriage is done automatically. This is mainly a consequence of the social character of the spouse's name during marriage. In Romanian civil law, bearing the name of a deceased husband after marriage has an absolute character.

In practice, there were certain situations in which the deceased's family opposed the use of the common name by the surviving spouse, because they considered it abusing the name of the worn by various means. This aspect can be noticed in concrete terms if the surviving spouse chooses to remarry<sup>33</sup>.

Unlike the situation of ending marriage by death, in the case of divorce the spouse who has taken the common name can not keep this name except with the consent of the spouse whose name it bears.

The ability to use the spouse's name may result from his / her consent or from the court's solution, but

only if the applicant warrants a special interest for him / her or for the children.

### Conclusion

Non-matrimonial rights of spouses are part of the category of personal rights, being found in the subcategory called the doctrine of rights relating to the existence and integrity of the person.

The provisions governing the spouses' personal relations are declaratory and do not contain sanctions for violation of the provisions stipulated in them. However, they are of particular importance in ensuring the equality of the spouses in the family, protecting the interests of each of them and ensuring the effective education of children in the family.

It is preferable for the legislator not to be involved in the personal matters of spouses, but if they so wish, they should be able to lay down certain clauses on non-pecuniary rights and obligations (loyalty, cohabitation, etc.) and possible sanctions for non-compliance.

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