PRIMARY REGIME AS REGULATED BY THE NEW ROMANIAN CIVIL CODE

DAN LUPAŞCU[*]
CRISTIANA MIHAELA – CRĂCIUNESCU[**]

Abstract
The regulation of patrimonial relations between spouses shall find a modern approach in the new Civil Code[1], according to the legislation of the European countries, which shall provide any family the possibility to choose its matrimonial regime applicable to the concrete situation and interests.
Moreover, in order to protect the interest of the family and its life environment, the new Civil Code establishes a set of general provisions, applicable to any family, irrespective of the matrimonial regime chosen by the spouses to regulate their patrimonial relations. Even though the legal text summons those norms under the title of „Common provisions"[2], the doctrine assumed the name most used in the law systems having similar provisions, namely the „primary regime".
Among the objectives of this work it is also the analysis of provisions setting up the primary regime applicable to spouses in the new Romanian Civil Code, and also its implications on the protection of the family life from a patrimonial perspective.

Key words: *primary regime, imperative rules, family house, marriage expenses, spouses*

I. Introduction

The regulatory framework on family relationships, which is reflected in the new Civil Code[3], includes many new elements, both concerning personal relations between spouses and their patrimonial relations. The patrimonial effects of marriage become more complex and more suited to the contemporary society.

Since spouses are recognized the possibility to choose the matrimonial regime applicable to their relationship, in most European countries legal systems one may find a minimum set of common mandatory rules for any marriage. We are talking about a mandatory set of rules, most often called the primary regime.

The scope of regulating a primary regime is the establishment of equitable relationships between spouses, as well as a minimum of patrimonial cohesion.

The great interest arising from such a subject, due to the novelty it brings to the Romanian law, the importance of the primary regime for the patrimonial relations specific to any given family and considering the still quite insufficient legal literature in the field we believe that deepening such a subject will be of real support in preparing its practical application.

We will try to meet this goal using an approach that will highlight the specific of the new regulation and will emphasize the reasoning behind the various aspects of the patrimonial effects of marriage contained in the primary regime.

[**] Ph.D., judge and director of the National School of Clerks

[1] Adopted by Law no. 287/2009, published in the Official Journal, Part I, no. 511 of 24 July 2009 *brevitatis causa* we shall use the abbreviation "N. Civ. C.".

[2] The above mentioned norms can be found in Section I – „Common provisions", of Chapter VI – „Spouses` patrimonial rights and obligations" of the new Civil Code.

[3] The provisions concerning family law can be found in Section II "About the family" (articles 258-534) of the new Romanian Civil Code, adopted by Law no. 287/2009.

II. General views considering the primary regime

II.1. Notion

Patrimonial relations of the spouses are an extremely important issue, with major implications for family life. The current rules on the topic are obsolete[4] and do not offer the necessary flexibility for an organization adapted to the realities of the contemporary society. In this context, a new Civil Code, which profoundly reforms this matter, represents a genuine progress, salutary in the framework of the contemporary Romanian law.

The new Romanian Civil Code brings a modern approach to the application of matrimonial regimes, which will also require some measures of protection for the material life of the family.

Irrespective of the matrimonial arrangement applicable to marriage, the new regulation provides a set of general imperative rules, which will apply to all families and which will be the support of spouses' solidarity, which expresses, in fact, the essence of the patrimonial side of family life.

We are talking about a series of special rules that apply to certain specific assets, to all marriages, regardless of the matrimonial arrangement governing[5] them. The scope of such rules is to balance the spouses' life conditions during marriage by creating a stable living environment for all family members and a minimum of material and psychological comfort for both spouses and their children, both during marriage and after divorce (until the dissolution of the matrimonial arrangement). As stated, the role of the primary regime is to daily ensure "cohesion in freedom, independence in interdependence."[6]

Perceived as a genuine "constitution" of matrimonial arrangements[7], this set of imperative rules has received different names in other legal systems. Thus, in French legal literature, it was called, for example, "primary regime"[8], "basic overriding status"[9], "basic matrimonial arrangement"[10]; "basic marital status"[11], "primary matrimonial regime or the effects of marriage."[12]

Given that the law includes the regulations under the generic name of "Common Provisions", the Romanian doctrine took over from other legal systems expressions such as "primary regime"[13] and "mandatory primary regime."[14]

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[4] The patrimonial effects of marriage are regulated in Section II - *Spouses` patrimonial rights and obligations* of Family Code, adopted by Law no. 4/1953 and republished in the Official Journal no. 13/18 April 1956, as consequently amended and completed.

[5] Pierre Voirin, Gilles Goubeaux – „*Droit civil. Droit privé notarial. Régimes matrimoniaux. Successions-libéralités*", Tome 2, 24e édition, Ed. L.G.D.J., Paris, 2006, p. 10; François Terré, Philippe Simler – „*Droit civil. Les régimes matrimoniaux*", 4e éd., Ed. Dalloz, Paris, 2005, p. 41.

[6] Philippe Malaurie, Laurent Aynès – „*Cours de droit civil. Les régimes matrimoniaux"*, 4e éd., Cujas, Paris, 1999, p. 45, apud Cristina Nicolescu – „*Consideraţii generale privind regimul matrimonial primar*", Curierul Judiciar nr. 6/2008, p. 58.

[7] Gérard Cornu – „*Les régimes matrimoniaux*", PUF, Paris, 1997, p. 79; Paul Vasilescu – „*Regimuri matrimoniale. Partea generală*", Ed. Rosetti, Bucureşti, 2003, p. 33.

[8] Philippe Malaurie, Laurent Aynès – „*Cours de droit civil. Les régimes matrimoniaux"*, 4e éd., Cujas, Paris, 1999, p. 45; Frédéric Lucet, Bernard Vareille – „*Droit civil. Régimes matrimoniaux, libéralités, successions",* 2e éd., Dalloz, Paris, 1997, p. 31, apud Cristina Nicolescu – *op. cit*., p. 56.

[9] André Colomer – „*Droit civil. Régimes matrimoniaux*", 10e éd., Litec, Paris, 2000, p. 32.

[10] Jean Carbonnier – „*Droit civil. La famille*", tome 2, 19e éd., PUF, Paris, 1998, p. 125.

[11] Alain Bénabent – „*Droit civil. La famille*", Ed. Litec, Paris, 2000, p. 155.

[12] François Terré, Philippe Simler – „*Droit civil. Les régimes matrimoniaux*", Ed. Dalloz, 4e édition, Paris, 2005, p. 41.

[13] Cristiana-Mihaela Crăciunescu – „*Regimuri matrimoniale*", Ed. All Beck, Bucureşti, 2000, p. 22.

[14] Cristina Nicolescu – *op. cit*., p. 56; Paul Vasilescu – „*Regimuri matrimoniale. Partea generală*", Ed. Rosetti, Bucureşti, 2003, p.; Marieta Avram, Cristina Nicolescu – „Regimuri matrimoniale", Ed. Hamangiu, Bucureşti, 2010, p. 111 and the following.

To summarize, we believe that the primary regime is *a set of fundamental and imperative rules, applicable irrespective of the matrimonial arrangement governing the patrimonial relations between spouses and between spouses and third parties*.

The primary regime can not be confused with the matrimonial arrangement applicable to marriage. While the matrimonial arrangement includes all the rules that govern patrimonial relations of spouses and their relations with third parties, the primary regime includes only some common rules, which are essential for the proper functioning of family life and which apply to all spouses, regardless of the matrimonial arrangement chosen.

The matrimonial regime and the primary regime put together represent the patrimonial charter of marriage.

II.2. The aim of regulating the primary regime

The provisions which compose the primary regime can be found in Section 1 of Chapter VI of Book II of "About Family" of the new Civil Code. The provisions of this section apply necessarily to all spouses; they can't conclude any contrary agreement, under the penalty of nullity, unless the law provides for exemption (paragraph (2) of Art. 312 from the new Civil Code).

The protective role of the provisions under the primary regime is achieved through two types of legal provisions: some apply to the normal course of family life, while others apply to extreme situations, of marital crisis.

The first category mainly comprises rules regarding the protection of the family house and the contribution of spouses to marriage expenses, and also some minimal rules concerning the patrimonial side of family life, concerning the application of matrimonial regime, the conventional mandate, the patrimonial independence of the spouses, their right to information and the matrimonial convention.

These are legal rules which try to ensure, on the one hand, a limitation of the spouses' independence in order to ensure the interdependence premises that family life involve and on the other hand, a certain independence of the spouses in their relations. Given that spouses might become individualistic while adopting a separation matrimonial regime or very interdependent in cases when they choose joint matrimonial regimes, regulating a set of minimal imperative rules is likely to balance the family life and to ensure the equality of spouses.

As regards the spouses' relations with third parties, the purpose of applying the mandatory rules specific to the primary regime is twofold: on the one hand, to prevent that the patrimonial situation of spouses holds back the freedom of their civil circuit and their legal autonomy, and secondly, to prevent damage to marriage due to the spouses' autonomy[15].

Most of the provisions of the primary regime are of great practical importance, considering their daily application, which can not be said about all of the rules specific to each of the matrimonial regimes; its specific rules represent the essence of the patrimonial mechanisms necessary for many households[16].

II.3. The specific features of the primary regime

The specific provisions of the new Civil Code regarding the primary regime include the direct patrimonial effects of marriage. This clearly results from the fact that they apply to every family, by the mere fact of concluding the marriage.

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[15] Marieta Avram, Cristina Nicolescu – *„Regimuri matrimoniale"*, Ed. Hamangiu, Bucureşti 2010, p. 113.

[16] A. Colomer – *„Régimes matrimoniaux",* Litec, Paris, 1990, p. 38; Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziţie al soţilor asupra bunurilor ce le aparţin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p.18. In a more pessimistic note, J. Flour said: „*En ce sens, le prétendu régime primaire est celui sous lequel on vit. Le régime proprement dit est celui sous lequel on meurt*" (apud J. Pineau, D. Burman - „*Effets du mariage et régimes matrimoniaux",* Ed. Themis, Montréal, 1984, p. 16).

Even if spouses will be able to choose, by convention, the matrimonial regime applicable to each marriage, depending on their interests and preferences, the rules provided under the primary regime will be compulsory applicable.

The imperative nature of these legal provisions is expressly provided in paragraph (2) of Art. 312 of the new Civil Code, which states that they can not be eluded unless the law provides such a possibility.

Therefore, the primary regime applies to all families, together with the matrimonial regime which spouses have agreed to follow in their patrimonial relations.

Unlike matrimonial regimes, which according to the new Civil Code will have a changeable nature, meaning that they can be modified during marriage, the specific rules of the primary regime can not change; they shall be common to all marriages concluded in Romania and shall not depend on the will of the spouses. Therefore, the marriage itself implies that spouses agree by default to the application of the rules specific to the primary regime.

III. Provisions of the primary regime applicable to spouses during normal cohabitation

III.1. Overview

During normal times, of marital harmony, the primary regime comprises a combination of rules, some specific to separation regimes and other to joint arrangements, aimed at establishing a balance between spouses in terms of patrimonial relations, as well as a fair relation between the couple's necessary cohesion and the autonomy of each spouse.[17]

They are the essential rules that govern the patrimonial side of family life and the common denominator of patrimonial relations between spouses, as well as between them and third persons. Their daily application is likely to ensure a minimum of patrimonial cohesion for the couple[18], whatever the matrimonial regime applicable, and also the necessary independence of each spouse.

III.2. Family cohesion

The provisions of the primary regime intended to ensure family cohesion are provided in most states laws that enable the spouses to choose between the various matrimonial regimes. These relate primarily to providing special protection to the family house and to pay the marriage expenses. [19]

III.2.1. Family house

According to article 309 paragraph (2) of the new Civil Code, one of the spouses' personal duties is to live together; they may decide to live separately only for serious grounds. The purpose of marriage, to found a family, can only rejoin spouses in a common housing that they manage together. The unjustified abandonment of the common dwelling or the refusal by one spouse to live with the other spouse is considered a violation of the spouses' obligation to live together and may be a serious ground for divorce. [20]

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[17] Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziție al soților asupra bunurilor ce le aparțin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p. 19.

[18] Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 60.

[19] In some legal systems, the primary regime establishes an even stronger interdependence between spouses. One example is offered by the Quebec Civil Code, which governs the establishment of a primary patrimony, consisting of the property used as the family house, the car used by the family's members for transportation, as well as certain rights acquired during marriage. In this regard, please see: Danielle Burman et Jean Pineau – „*Le patrimoine familial*", Les Editions Thèmis, Universite de Montreal, Quebec, p. 1991, p. 7; Marieta Avram, Cristina Nicolescu – *„Regimuri matrimoniale"*, Ed. Hamangiu, Bucureşti 2010, p. 112.

[20] Marieta Avram, Cristina Nicolescu – *„Regimuri matrimoniale"*, Ed. Hamangiu, Bucureşti 2010, p. 115.

A special protection of the house where spouses leave their family life[21] was given in the legislation of many countries, based on the consideration that the living environment is very important for the balance and normality of the family, linking the personal and patrimonial effects of marriage.[22]

The concept of family housing is new in the Romanian Family Law. There is a legal definition of this concept in article 321 of the new Civil Code, according to which "family house is the common dwelling of the spouses or, failing that, the home of the spouse where the children are". One can see that the home is determined by a factual situation -that of either both spouses or one of the spouses and the common children actually living in a building. Difficulties in establishing the family house might arise, for example, when spouses have no children and live in several buildings, alternative, or when the spouses have several children, who live separately, some with their mother and other with their father. For such cases the law does not provide for the possibility of establishing several buildings as family house.

Therefore, it is not imperative that the family house should correspond to the spouses' domicile; one can not exclude cases where spouses have different domiciles, but in fact, live together. In such cases, the family house is different from the domicile of one or both spouses, and is the building where the family actually lives.

As far as the regulation on the primary regime is concerned, the concept of "family house" involves two elements: an objective, material component, represented by a housing estate and a subjective, voluntary component, which is the expression of the spouses' will to use it as the family's residential property. [23] Therefore, not every building that is owned or used by spouses is the family house, but only the one that serves the above mentioned purpose.

In terms of legal nature, the building representing the family house may be a shared asset or the exclusive ownership of one of the spouses, or it can be a leased building or a building used by spouses by virtue of another legal title, without being in their property.

The building representing the family house can be registered in the land registry as having such a destination, at the request of either spouse, even if he/she is not the owner. Thus, if the building used as family house is the exclusive ownership of one's spouse, it can be registered in the land registry with this destination even at the request of the other spouse.

The failure to register the building in the land registry as the family house affects the legal documents concerning that building, in breach of the law, as required by article 322 paragraph (5) of the new Civil Code.

The regulations contained by the primary regime concerning the protection of the family house refer to the spouses' right to dispose of the building having such a destination and the goods that furnish or decorate it.

Thus, in the case of the building determined as the family house that is the exclusive ownership of one of the spouses, the property right itself is concerned, in the sense that the spouse who owns it gives up a part of his/her prerogatives by the mere fact of such a destination. He/she can not dispose of this asset without the written consent of the spouse who does not own the building (article 322 paragraph (1) of the new Civil Code). [24] Thus, the property right lacks one of its fundamental attributes, namely the right to dispose of assets.

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[21] The concept of family housing can be found in several law systems. Thus, the protection of family housing can be found in article 215 of the French Civil Code and articles 401-405 of the Civil Code of Quebec, which were also a source of inspiration for the Romanian legislature (in this regard, Marieta Avram, Cristina Nicolescu – *op. cit.*, p. 124), or article 169 of the Swedish Civil Code.

[22] François Terré, Phillippe Simler – *"Droit civil. Les régimes matrimoniaux",* Ed. Dalloz, 4 édition, Paris, 2005, p. 51.

[23] Marieta Avram, Cristina Nicolescu – *op. cit*., p. 118.

[24] The content of paragraph (1) of art. 322 of the N.Civ.C. will change through article 49, section 3 of the Act implementing the Law no. 287/2009 on the Civil Code (which is currently a draft law that can be found on the website

Also, the law provides for the obligation of gathering written consent from the spouse who did not participate to the settlement anytime he wishes to dispose of "rights on the family house". Which are the rights included? In the absence of a legal provision, we believe that it comprises of all patrimonial rights recognized by law to the owner of the property right (rights *in rem*, principal rights and ancillary rights, as well as debt collection rights) or to the owner of a lease contract.

Moreover, none of the spouses can dispose of the assets that furnish or decorate the family house and cannot be displaced from the home without the written consent of the other spouse, regardless of who owns them (art.322 para (2) new Civil Code)[25].

Consequently, any of the spouse who needs the written consent of the other or, if absent, of the authorization of the guardianship court, in order to settle any act of disposal regarding the building that constitute the family house or the assets that furnish or decorate it. Otherwise, the spouse who did not give his consent to the settlement can request its annulment within a year. The date will be calculated from the time he became aware of the settlement, but no longer than a year calculated from the date of ceasing the matrimonial regime, if the family house was registered in the land registry or if the third party knew, in any other way, that the building was a family house. If the third party was not informed or did not become aware in any other way, the spouse that did not participate to the settlement can request only damages from the other spouse[26].

The authorization of the guardianship court concerning a settlement on the family house made by one of the spouses can only be requested only if the other spouse's refusal is not based on a legitimate reason (art.322 para (3) new Civil Code). The law does not provide for the conditions necessary to appreciate if the reason invoked by one of the spouses to refuse the settlement on the family house is legitimate; thus, we consider that such situation can be encountered when the lack of consent is purely meant to tease the other spouse, the settlement not infringing in any way the family's interests.

In the case of moving out of the family house of assets that furnish or decorate it, by the owner spouse, without the written consent of the other spouse, the law does not clearly provides for the conditions in which the other spouse can act. By the strict application of the same legal provisions, the latter will have the possibility to ask the court to oblige the owner spouse to bring back the moved assets or to pay for damages, if the home was not registered in the land registry. Nevertheless, we consider that, even if the home was not registered in the land registry, the spouse that did not express his consent can request to bring back the assets in the family house, and not for damages, as long as the assets were not sold and, thus, no third party will be prejudiced (such a third party should be protected by registering in the land registry or by any other means of information).

In the case of rented houses, the law provides for ensuring the locative rights of both spouses, the new Civil Code providing an own locative right for each spouse, even if only one is the holder of the contract or even if the respective lease is completed before the marriage[27].

These regulations in the new Civil Code, protecting the family house, find their base in preventing selfish manifestations of one of the husbands, who, by selling on his own the family

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of the Ministry of Justice at http://www.just ro/Sections/PrimaPagina_MeniuDreapta/Proiectulnouluicodcivil/proiectul deLegepentrupunereainaplicareaLeg/tabid/1452/Default.aspx), to include the specification that none of the spouses can conclude legal documents that might affect the use of the family house without the written consent of the other spouse.

[25] It was considered that, by this limitation, the risk of moving and selling the assets from the family house without the consent of both spouses will be eluded, respecting thus the special protection regime (Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 64.

[26] Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziţie al soţilor asupra bunurilor ce le aparţin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p. 168.

[27] Such provision existed in the Romanian law, being stated by Law no. 5/1973 on administering the locative fund and regulating the reports between owners and tenants. The Law no. 114/1996 did not took over the same provision.

house or by selling the assets that furnish or decorate it, can lack the family its home or affect the known environment, thus degrading the quality of the family life.

Such regulations can seem exaggerated, compared to common law, by lacking some of the attributes of the property right, but their impact is diminished by the final purpose of protecting the family and by their intrinsic acceptance on marriage.

The application of the specific provisions of primary regime is completed with thus specific to the matrimonial regime that governs the patrimonial reports between spouses.

For example, when applying a matrimonial regime of community, the building that represents the family house can be owned by either one of the spouses or be a common asset. For the family house that is a common asset, the interdiction to sell is doubled by the law of co-owning in the field of community of goods, according to which the disposal acts on common assets can be only made with the consent of both spouses[28].

If the family house is exclusively owned by one of the spouses, the written consent of the other spouse is necessary in order to conclude disposal acts on the building, according to provisions of art.322 para (1) new Civil Code Such consent only signifies the lack of opposition to concluding a legal act that will infringe on life conditions, because the spouse that has no property right could not become a part to the contract. In the case of alienating the family house by the owner spouse, he will be the sole beneficiary of the obtained price, that will enter his patrimony as personal asset (even within the matrimonial regime of community of goods, the assets or sums of money that substitute for a personal asset are a personal asset, according to art. 340 lit. g new Civil Code), being in the presence of real subrogation.

As it has been shown in the doctrine[29], the principle of the explicit consent of both spouses, for all disposal acts concerning the family house, does not determine that the family house cannot be followed for debts contracted by one of the spouses, without having the consent of the other spouse.

The lack of express consent of both spouses is admitted on concluding some juridical acts that concern the family house, such as disposing by will of the building or requesting for partition if the family house is in joint possession with another person.

Also, when the family house is owned based on a lease, ancillary to a work contract, it is acceptable that, in order to ensure the freedom of exercising the profession, the holder of the lease can resign without the written consent of the other spouse, even if, by doing so, the family loses the house[30].

The spouses' house can also be submitted to acts of forced alienation, like expropriation, without the consent of any of the spouses.

The consent of the spouse that does not participate to the settlement must be written, according to provisions of art.322 para (1) new Civil Code Taking into consideration that the law does not impose the form of the authentic act, we consider that the consent can be expressed in an act under private signature, thus being requested *ad probationem*.

The doctrine concluded[31] that, taking into consideration that it is about a building that must be registered in the land registry, are also applicable provisions of art. 1244 new Civil Code, according to which, the conventions that modify or constitute rights *in rem* to be registered to the land registry must be completed by authentic acts, under the sanction of void. Thus, if the building is common asset or shared property, taking into consideration that each spouse becomes a part of the disposal

[28] Marieta Avram, Cristina Nicolescu –*op.cit*, p.122

[29] Marieta Avram, Cristina Nicolescu –*op.cit*, p.124; see also Gerard Cornu- "Les regimes matrimoniaux", 9e edition mise a jour, PUF, Paris, 1997, p.90.

[30] Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 65.

[31] Marieta Avram, Cristina Nicolescu –*op.cit*, p.126.

act, and that the consent of both spouses must be requested as they are co-owners, the act must have the *ad validitatem* form provided by art. 1244 new Civil Code.

We also believe that, in such a hypothesis, the co-owner spouse who does not participate to the settlement will express his consent on exerting his own right, and this will have the value of a conventional mandate between spouses, and not that of a tacit consent concerning the settlement made by the other spouse. Consequently, the act by which the spouse who was not present to the settlement contest it must have the same form as the initial act of disposal of an common asset subject to registration in the land registry, namely authentic form.

Regarding the content of the act expressing the consent, in the doctrine[32] it was debated if an agreement in principle on behalf of the spouse that does not participate to the settlement is sufficient, or if it is necessary for the consent to be given according to the conditions of the settlement. We believe that the content must differ, according to the specific conditions.

Thus, if the asset is solely owned by the spouse that will conclude the disposal act, the other spouse will only express consent for not opposing. The settlement will not provide for rights or obligations for this spouse, thus his consent will be only one in principle, in no way relevant to the concrete conditions of the settlement.

On the other hand, when there is a common asset, the settlement will be opposed to the spouse who did not participate, creating rights and obligations. In such situations, the spouse will have to express his consent concerning concrete conditions of the settlement[33].

Finalizing the settlement without the written consent of the spouse who does not participate is sanctioned according to provisions of art. 322 para (4)-(6) new Civil Code

Thus, if one of the spouses disposed on a building registered in the land registry as family house, the spouse who did not express his consent might appeal against the act at the guardianship court, which can dispose its annulment. The deadline for contesting is of one year, calculated from the time he became aware of the settlement, but no longer than a year calculated from the date of ceasing the matrimonial regime.

If the building was not registered in the land registry, the damaged spouse by the conclusion of the act without his consent will not be able to request damages but from his spouse, except the situation in which the third party knew about the quality of family house.

Thus, the relative invalidity of the act concluded on the family house by one of the spouses without the express consent of the other one is under a sanctioning regime different from the common one.

III.2.2 The marriage expenses

Another way in which the new law contributes to the strengthening of the family cohesion is including, within the primary regime applicable to spouses, some provisions concerning their obligation to ensure mutual material support and to both contribute to the marriage expenses.

The obligation to ensure mutual material support, part of the patrimonial effects of any marriage, is also present in the current law, namely art. 2 of the Family Code, which states the general framework of family relationships and that family, are indebted to ensure each other material and moral support.

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[32] Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 65.; Marieta Avram, Cristina Nicolescu –*op.cit*, p.128.

[33] In the French doctrine and jurisprudence, it was considered that the limitation of the spouse's consent when admitting in principle the settlement is not sufficient, the consent being expressed also concerning the constitutive elements of the settlement. See also: François Terré, Philippe Simler – „*Droit civil. Les régimes matrimoniaux*", Ed. Dalloz, 4e édition, Paris, 2005, p. 57.

Appreciated as the most comprising form of patrimonial assistance between spouses[34], the obligation to ensure material support is specified in any form of material assistance that spouses give each other.

The Romanian doctrine interpreted the content of this obligation, peculiar to spouses, as including the obligation to support the expenses of the marriage (provided for in art.29 Family Code) and the obligation between spouses to support each other (provided for in art. 86 of the same Code)[35].

The new Civil Code also comprises a series of provisions that regulate participation to marriage expenses, namely "Marriage expenses'[36]. The regulation starts by setting the general obligation of spouses to grant each other material support, thus materializing the feelings that fund a family.

The obligation to contribute to the expenses of the marriage is regulated by art.325 para (2) of new Civil Code, namely that for each spouse the contribution is due according to his incomes. This solution is also present in the new law[37].

The new Civil Code also provides for the possibility to modify this proportion by matrimonial convention, which is an institution not found in the actual Family Code. But not even according to this new provision, it will not be possible for only one husband to support marriage expenses, a convention bearing such provisions being considered unwritten (art.325 para (3) new Civil Code). This is a sanction that, in what concerns its effects, can be assimilated to void, taking into consideration that it cannot be validated in any way.

Obviously, as long as the spouses are in a good relationship, they can derogate from the provisions on the contribution to the marriage expenses, established by law or matrimonial convention. The problem of establishing each spouse's contribution arrises only when the spouses are in a conflict[38]. In such situations, the court will not be able to force the spouse that refuses to comply to his obligation but for his share according with the convention or the legal framework stated by art. 325 para (2) new Civil Code.

The notion of "marriage expenses" was determined by the Romanian doctrine widely, including, as well as the everyday cost of living (groceries, fuel, etc), costs concerning the upgrade and education of children and costs concerning the spouse found in incapacity to work[39].

The new Civil Code provides clearly that the work of any of the spouses in the household and for raising the children represents a contribution to the marriage expenses (art. 326 new Civil Code)[40].

The evaluation *in concreto* of the marriage expenditures shall be made on each case, according to the economic evolution of society and the patrimonial situation of the family, this having a variable[41] content.

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[34] I. Albu – „*Dreptul familiei*", Ed. Didactică şi Pedagogică, Bucureşti, 1975, p.115.

[35] Emese Florian – „*Dreptul familiei*", 3rd Edition, Ed. C. H. Beck, Bucureşti, 2010, p. 97; Dan Lupaşcu – „*Dreptul familiei*", 5th Edition, amended and updated, Ed. Universul Juridic, Bucureşti, 2010, p.105.

[36] See subsection 3 "Marriage expenses", part of Section I "Common provisions" of Chapter IV "Patrimonial rights and obligations of spouses", Title II "Marriage", in the new Civil Code.

[37] Art. 29 of the Family Code states that: "The spouses have to contribue, according to their means, to the marriage expenses".

[38] Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziție al soților asupra bunurilor ce le aparțin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p. 22

[39] I. P. Filipescu, A. I. Filipescu – „*Tratat de dreptul familiei*", 8th Edition revised and completed, Ed. Universul Juridic, Bucureşti, 2006, p. 66; Marieta Avram, Cristina Nicolescu- *op.cit*, p. 142; Emese Florian- *op. cit*., p.98

[40] This a solution also present in the Romanian doctrine and jurisprudence. See also: Emese Florian- *op. cit*., p.106

[41] Dan Lupaşcu – op.cit. p.105; Cristina Nicolescu – „Patrimonial cohesion of the couple – goal of matrimonial primary regime" (II), Curierul Judiciar nr. 07/2008, p.70.

The new regulation sets the condition of fulfilling the obligation to contribute to the marriage expenditures on a privileged position, according to its importance in ensuring the good functioning of the common living. Thus, the liberty of each spouse to exert a profession and to dispose of the incomes, as regulated by the provision of art.327 of the new Civil Code is accompanied by the mention on the necessity to fulfill this obligation.

Also, appraisal of the contribution to the matrimonial expenditures constitutes one of the elements according to which it shall be evaluated the right for compensation of the spouse who effectively participated to the professional activity of the other spouse.

Enforcement of the obligation to contribute to matrimonial expenditures has a successive and permanent nature. As an effect of marriage, it shall enforced during its entire duration, irrespective of the fact that spouses live together or are separated, including during the divorce procedures[42].

Supporting the matrimonial expenditures is an obligation that each of the spouses must fulfill according to the available means, from the common or independent goods in his or her property. This may be fulfilled, according to the situation, in money or in goods.

Generally, this obligation is enforced without counting the contribution of each spouse, according to the actual possibilities and the common living exigencies.

III.3. Mutual independence of spouses

The legal provisions specific for the primary regime provide spouses a normative framework optimal for affirming the independence of each of those, but only if their living within the family is not affected, thus creating a necessary balance for a normal social and personal life[43].

Spouses` patrimonial independence is regulated on several levels, namely: in the exertion of a profession, as regards the possibility to conclude legal acts having a patrimonial character, or in the relations with banks.

Spouses` independence in the professional area is regulated by art.327 of the new Civil Code on two issues: the possibility of each spouse to exert a profession, without the consent of the other spouse, and also the liberty to dispose of the incomes, with the observance of the obligations for contributing to the matrimonial expenditures.

Thus, choosing a profession by a spouse is not subject to a prior consent granted by the other spouse, irrespective of the nature of the profession. But it is also possible that exerting a certain profession might produce to the family some patrimonial or moral damages. For example, a profession exerted by one of the spouse might worry the other spouse as regards the education of their common children, or a profession involving high financial risks, exerted by one of the spouses, may represent a threatening for the patrimonial balance of the family.

A question arises: what is the solution that one spouse may adopt in order to end such situations? We appreciate, together with other authors, that such situation can only be solved by mutual consent of the spouses, eventually by involving mediation procedures, otherwise the only option being the divorce[44].

The liberty of choosing a profession by the spouses also attracts the possibility to change the profession according to the same conditions, thus without the consent of the other spouse.

Also, the right to renounce at the exertion of a profession, by resignation, belongs to each of the spouses, independent of the others will, even if this renunciation would affect the family interests (e.g. if the family dwells in a real estate with a title accessory to the labor contract).

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[42] Marieta Avram, Cristina Nicolescu – *op.cit*., p. 147.

[43] In doctrine it was stated the goal of regulating those norms within the framework of primary regime is, especially in the situation of applying communitarian regimes, that the „autonomy of the married person shall not be entirely sacrificed on the community altar. (Cristina Nicolescu – "*Spouses` economic and social independence as outlined by the provisions of the primary matrimonial regime* (III), Curierul Judiciar no.9/2008, p.91).

[44] Marieta Avram, Cristina Nicolescu – *op.cit*, p.150, on the same opinion, B. Vareille – "*Le regime primaire*", in Michel Grimaldi (coord.) – "*Droit patrimonial de la famille*", Dalloz, Paris, 1998, p.47.

The second aspect on the professional independence of spouses refers to the liberty of each spouse for disposing of the incomes resulted from a profession. Article 327 of the new Civil Code conditions this right only to the observance of the obligations incumbent to its titular for the contribution on marital expenses and for observing the special provisions of law.

It should be reminded the norms set up by the primary regime constitute only basic rules applicable to each marriage and shall be supplemented by those of the matrimonial regime concretely applicable to each family; thus, if the matrimonial regime is of separation, the incomes from a profession shall be the own good of the spouse able to obtain them, and if the applicable regime is one of community, those could become common goods, according to law. In the latter case, the right of disposal belonging to the titular spouse shall be exerted in a different manner, according to certain specific rules.

It is also possible that spouses are willing to collaborate on the grounds of their agreement for developing a professional activity by one of them, in a manner going further to the obligation of mutual material support or that of contributing to the matrimonial expenditures. For those situations, article 328 of the new Civil Code provides for the right of the spouse who exerted this kind of voluntarily activity for which he/she did not claim or receive a remuneration, to obtain compensation, if the other spouse was enriched. This issue regards a special application of the principle of unjust enrichment in the relationship of spouses[45].

We appreciate that such compensation could be obtained by an agreement of spouses or by judicial means, during the marriage or within the divorce proceedings for the allotment of spouses` common goods.

Another situation when the specific dispositions of the primary regime provided for by the new Civil Code regulates the patrimonial independence of spouses refers to the spouses right to conclude any legal acts between them or with other persons, if not provided otherwise by the law (article 317 point (1) new Civil Code).

This right, thus provided for, awards to each spouse a larger or smaller degree of patrimonial independence, according to the matrimonial regime concretely applicable to each family, because the law regulates the spouses` right of disposal in a different manner according to the regime.

The biggest independence of each one of the spouses is manifested in the relationship with the banks. Also, in the framework of new regulation, any spouse shall be able to act alone, without the consent of the other spouse, for constituting bank deposit and for acts related to it.

Thus being provided for within the primary regime and without mentioning any exceptions or possibility to negotiate, this independence shall be applicable to all spouses, irrespective of the matrimonial regime governing the patrimonial effects of marriage and of the legal nature of funds deposited to the bank. It is a liberty that spouses will not be able to limit by a convention, because it is disposed by an imperative provision of the law.

Consequently, in the relations with banks, any spouse shall act as a bachelor, being able to open accounts and make any operations related to those with the consent of the other spouse.

Furthermore, according to the provisions of article 317 point 3 new Civil Code, in the relationship with the bank, the spouse titular of the account shall keep the independence on the right for disposing of the deposited funds even after the end of the marriage or after the divorce, excepting the case when a court decision provides otherwise.

On the grounds of those legal provisions, it was appreciated[46] the bank shall not be liable for an eventual abuse of power made by the depository spouse, excepting the case when the bank acts together with the client spouse, but in this situation the fraudulent intention must be proved by the interested person.

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[45] Cristina Nicolescu – "*Spouses` economic and social independence as outlined by the provisions of the new primary matrimonial regime*" (III), Curierul Judiciar, no. 9/2008, p.96.

[46] Cristina Nicolescu – "*Spouses` economic and social independence as outlined by the provisions of the new primary matrimonial regime*" (III), Curierul Judiciar, no. 9/2008, p.98.

Because in the relationships between the spouse and the bank are applicable special rules, removing the co-management mechanism for the common goods, specific to the matrimonial community regime, the credit institution can not interrupt the normal functioning of an account only at the request of the other spouse, allegedly harmed, but it is necessary a court decision to this end[47].

This independence, quite generously regulated by the new Romanian Civil Code within the framework of the primary regime, it is somehow alleviated by setting a right to informing each spouse and the correlative obligation for making possible to exert this right.

The absolute novelty in the Romanian family law, the spouses` mutual obligation on informing each other on the goods, incomes and debts results from the provision of article 318 N.C.C, described with the marginal name of "right to information".

Observing this right and the correlative obligation will be possible to be imposed even by judicial means, the tutelage court having the competence to oblige the plaintiff's spouse or any other person (if that person is not compelled to preserve the professional secret) and to provide the required information and to deposit the necessary evidence. The law also sets up a relative presumption, according to which the claims of the plaintiff spouse are true until when, according to law, the information required may be obtained only at the request of the defendant spouse who refuses to make the request.

IV. Provisions of the primary regime applicable to spouses during periods of matrimonial crisis

The primary regime regulated by the new Romanian Civil Code is not limited to regulating some imperative legal norms which shall guide the functioning of matrimony during the normal periods, but also sets up certain mechanisms applicable during the periods of matrimonial crisis.

Any family may be confronted, sooner or later, with unfortunate periods, in which the selfishness or the recklessness of one of the spouses, or with some circumstances independent to the will of spouses that may endanger the normal family life, including the patrimonial relationships.

For this kind of situations, the Romanian legislator confers to the tutelage court the competence to interfere for solving the problems, by providing two specific mechanisms, namely the judicial extension or limitation of the power for one of the spouses. Those mechanisms, together with the legal amendment of the matrimonial regime (which shall not be a part of the provisions composing the primary regime), will allow the saving of marriages in which the normal development of spouses` patrimonial relations becomes impossible, at least for a period.

The first mechanism available for the tutelage court in order to interfere in the situations when one of the spouses is not able to express his/hers will is the so-called "legal mandate", regulated by art.315 new Civil Code In such situation, the court may approve that the other spouse shall represent the other spouse who is not able to manifest his/hers will in the exertion of the rights granted according to the matrimonial regime. Thus, we discuss about an extension of the powers for the spouse asking for this approval, in the framework of a mandate for which the court shall determine conditions, limits and period of validity.

The judicial mandate can not be granted without a time limitation, because otherwise it would amend the applicable matrimonial regime, fact not allowed by law in this form. When the conditions requiring the setting of a legal mandate have disappeared, the rationale for its existence will no longer exist, thus being temporarily by its nature.

Also, by setting the limits and conditions within which the judicial mandate may be exerted it is also ensured the concluding of the urgent and necessary acts for the proper functioning of the matrimonial regime, in order to surpass the crisis period of the respective marriage, so that when the

[47] For more details see also Marieta Avram – "*Spouses mutual independence on bank deposits*", Pandectele Romane, Supplement no.2/2006 *in honorem* Corneliu Bîrsan, Liviu Pop, p.25

spouse who was unable to express its will got over this situation, he/she will be able to regain the powers temporarily took over by his/hers spouse.

This is a solution that, even though can not serve for solving the matrimonial conflicts generated by the unjustified answer of a spouse to express its consent in order to conclude certain necessary and useful acts for the family, has the vocation to cover a great diversity of practical cases[48].

The second situation of family crisis that may ask for an intervention from the tutelage court is that regulated by article 316 new Civil Code on the case when a spouse concludes legal acts by which he/she gravely endangers the family interests. In those situations, the tutelage courts shall be able to temporarily limit the power of the spouse who concludes acts damaging the family interest, by conditioning the use of disposal right on certain goods to the express consent of the other spouse.

This measure may be adopted by the tutelage court only for a limited period, which could be prolonged for at most two years.

Being a measure affecting the validity of certain legal acts, it is subject to forms of immovable or movable publicity specific to those goods, in order to be known by the potential contractors. This is because the same article of the new Civil Code provides the sanction of annulling the acts concluded without the observance of court decisions that may be required by the harmed spouse within a term of one year since the acknowledgement of the act.

If the applicable matrimonial regime is one of community, for the common goods those provisions shall be applicable together with those specific for the matrimonial regime, provided by articles 346 and 347 new Civil Code.

Both measures can be adopted only in exceptional situations and have a temporary, provisional and precarious nature, so that may be amended or ceased when the circumstances generating their pronunciation have ended or changed.

V. Conclusions

If the Romanian legal system shall return to a regulation which provides to spouses the possibility of choosing the matrimonial regime governing their patrimonial relationships, it is more then welcome the adoption of a set of fundamental, imperative legal norms ensuring the equality of spouses and a fair percentage between their independence and their interdependence.

The daily functioning of any marriage shall find the balance and security of a quiet home within the application of specific norms on the primary regime, but also a balance in their contribution to the marital expenditures and also the necessary independence for developing the professional activity of each spouse.

For more difficult periods, of marital crisis, the same primary regime will provide solutions for a series of problems, thus being able to save the marriages from the appearance of certain conflicts with consequences that could affect the scope of marriage.

We appreciate that for a correct, efficient and unitary application of the matrimonial regime provisions, a continuation of the exhaustive research of the primary regime, compared to the matrimonial regime provided for by the new Romanian Civil Code, it would be welcome.

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[48] See also Cristina Nicolescu - Adapting the matrimonial regime according to the situation of family crisis” (IV) [in Romanian], in Curierul Judiciar no.10/2008, p.26.

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