SHORT CONSIDERATIONS ABOUT THE PRECIPUT CLAUSE IN RELATION TO MATRIMONIAL CONVENTIONS

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Abstract

The preciput clause is a subject of dispute since the new Civil Code entered into force.Several question arise in this field: is this clause a liberality or a donation, which matrimonial regime is compatible with the preciput clause, for what reason the legislature choose to regulate preciput as a clause and not as an agreement and the expressed doubts can be continued as regard to the new civil law.The authors of this article are not having in mind to put an end to all those debates they are just proposing an investigation of the preciput clause under two aspects:legal nature and aplicability as related to the matrimonial regimes – legal community, separation of assets and conventional community with accents on the normative evolution as a result of social and economic changes.

Keywords: *preciput clauses, matrimonial conventions, liberality, donation, agreement*.

Introduction

The patrimony benefits that are not a current creation in the different legislative systems will always be a debate theme of the doctrine makers, if we consider their effects on the patrimonies of persons who are alive, but especially the consequences of their establishment over the patrimonies sent to the heirs. The reasons that lead to their genesis and the change step by step of the optics concerning the implementation means in the variable positive norms depending on each community are especially of our concern. As species, the matrimony benefits at the crossroad between the family law and the inheritance law integrate the idea of "freely interested" which is set at the crossroad between the bounds and donations without being yet able to be embedded with arguments in any of both categories.

It is imposible to talk about the preciput without analyzing the matrimonial conventions, organizing the patrimonial relationships between spouses or future spouses.As will be pointed during this study the evolution of those notions is indestructibile attached to the evolution of society, of the position of the separation of the wife"s fortune from the husband"s fortune and at last but not least of the intention of the spouses by reference to their relationship and in the same time to the heirs.This connection makes it so difficult to define, beyond the aplicable legal provision, the true intention and also the moral one when a preciput clause is intervening.

Evolution

The preciput clause is not a novelty, being known as a mechanism since the II B.Ch. millennium, proofs of the practices regarding the preferential partition being identified in the Ur or Nipur[1] cities. The first new born right as patrimony benefit of him is even mentioned in the Old Testament, as in the case of father's death, he received two parts of the inheritance, and the others, one part[2] . Although "the paradigm of legal relation between the giver and receiver", loaded with a certain "moral consistence", having its origins in the principles applicable to an old testamentary heir right, was taken over by either forms in the encodings along the times. [3] However, we think that the delimitation of civil authority areas from the ecclesial area in the matrimony field or in its related one is one of the most acute, by the sociologic change of approach of the family institution and implicit of the subsequent inheritance rights (by the Decision of French Cassation Court, this was decided as not being contrary to the good habits, the liberality whereby its author follows the maintenance of an adultery

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[1] for the details about the inheritance vocation, based upon the heirs' masculinity principle and the benefits granted by inheritance to husbands, who did not have a dovery see Bianca Albu, Daniel Chelariu, "The husbands' preciput – a protective "Legal arachnea"?, scoaladreptuluiorganic.ro/aplicațiimetodologice/preciputul_sotilor.pdf, Nadia Cerasela Aniței, Preciput clause in the matrimonial agreements, http://edituralumen.ro/wp-content/uploads/2012/07/jurnalul-de-studii-juridice-supliment-3-2012.pdf

[2] Eugeniu Safta - Romano, Legal archetypes in the Bible, Polirom Publishing House, Iasi 1997, p 99

[3] Ion Chirilă, Marriage and inheritance law elements in church legislation, p.8 and further, http://www.studia.ubbcluj.ro/download/pdf/713.pdf

relationship he had with the beneficiary of liberality[4] ; the distinction of French doctrine makers between the effects of adultery and non-adultery liberalities, the progress of moral and interpretation of deciders' will or of an agreement parties, either we talk about a matrimony agreement, or we are in front of a civil solidarity pact, there are issues converging to the need of a careful reading of intention, irrespectively of its anchoring in the micro-reality of relationship or in the social macro-reality; on the other hand, we must not forget that affectio maritalis and concubinatio had been present institutions since the Romans' time).

Whereof the inspiration source of the Romanian law giver with respect to the preciput clause, namely the French civil code, we shall focus on certain progress marks of it, specific to French law. In this system, the matrimonial regime (generally the family law) knew a demarcation between the North side of the French territories, where a customary law is applied, which allows the bound of both husbands' fortunes and the South side, where the condominium of the husbands' assets was unthinkable, the rule being given by the dovery system. From the analysis of royal documents, Edit des meres(1567), Ordonnance de Blois(1579), it results the intention to protect the children by the first marriage, against consequences (considered as suspect sometimes) which a new marriage could have. In the case of widows, on the other side, their protection was expressed by the taking over of their own assets, of a half of movable assets shared and a dovery computed sometimes at the value of a half of the deceased husband's own assets, on the north of the country and by retaking the dovery brought on the time of marriage and procurement of an amount of the deceased husband's own assets, computed rated to the value of dovery originally brought into marriage, in the south. The establishment of a community of common assets has been materialized along time by the marital agreements that included, besides the dovery, the wife's own assets, provided that the value brought by each of both husbands to be equal. By the same deed, yet, after the establishment of common assets, the assets that wife was to take over after her husband's death (douaire) were specified before the notary.

The above mentioned system does not represent itself a novelty if we return in time to the age of Justinian emperor and to *dos profecticia* or *dos adventicia* (the doveries brought on the marriage, by the bride's father or even by wife) or to *donatio propter nuptias* (donation on the account of marriage, made by the husband), intended to serve the wife's and children interests, in case of dissolution of marriage or husband's decease[5].Besides *douaire*, in the most of the marriage of 17th century, in Paris, we find the preciput clause, having a similar profile at least at the intentional level, to the one mentioned by this paragraph, namely the establishment by the husband, for his wife, of the right of taking over a certain part of his fortune, before its division between the heirs. Whereof, as shown by the written law of 16th century (inheritance of the Roman Empire) specific to the French South, the wife's assets were under the husband's management, only the dovery and iota of assets received by her by inheritance or donation (paraphernalia) being for the benefit of wife, the right of poor widow to a quarter of assets (quarte du conjoint pauvre), which she acquired under ownership provided that there were no children resulted by marriage or with usufruct title, provided that there were up to 3 children alive that time, will be warranted by the initiated reforms.

It is still required the clarification of the fact that the preciput could overlap on the right of the first new born, but, as resulted by the mix of French condominium law, with the French law, it results that preciput could be found, too, in the donation or as testamentary clause, so that between the droit d'ainesse (the equivalent of primogeniture)[6], which means the right of the new born and cannot be altered by the will of decuius and preciput, at least at the historical level, a full similarity of meanings does not exist.

Legal notion

The clause of preciput is found in our civil law, as inspired from the French regulation, the correspondent of French civil code being identified by articles 1515-1519. The term included by Art. 333 par. 1 of the Civil code is not clear, but rather a report to the content of matrimonial agreement, irremediably binding the existence of preciput to the existence of the agreement. We don't understand why the law maker builds a definition of the clause with no respect to terms like: "decision", "provision", "stipulation" if we only consider the meanings existing in the explicative dictionaries[7], being only limited to the description of the object and effects of such a clause. Additionally, the text of Art. 1516 of French Civil code refers to preciput as a matrimonial agreement between partners, too[8], so it would have been more appropriate, by the opinion of the authors of this study, the definition of preciput (not of the clause) resulted by other arguments shown below, as an agreement between the man and wife or the future man and wife. In the same meaning,

[4] Cass., 1-ere civ., 3 februarie 1999, H. Capitant, F. Terré, Y. Lequette, *Les grands arrets de la jurisprudence civile*, Dalloz, ed. a 11-a, 2000, Tome 1, p. 143

[5] George Mousourakis, Fundamentals of Roman Private Law, Springer, 2012, p 104 and further

[6] Ralph E.Giesy, Succession before and after the Civil Code, http://www.regiesey.com/Fox/ProjetFoxFiles/03_07_Succession_and_Civil_Code.pdf

[7] http://dexonline.ro/definition/clause

[8] art 1516 - Le préciput n'est point regardé comme une donation, soit quant au fond, soit quant à la forme, mais comme une convention de mariage et entre associés

we underline, too, the provisions of Art. 367 of Civil code, which provide that in the case of adoption of conventional community, the matrimonial agreement may refer to one or several issues listed at letters a-d, letter d referring to the clause of preciput. Provided that, according to the text of Art. 367, the matrimonial agreement may only refer to one issue, namely "inclusion of the clause of preciput", the law maker's option to bind the conclusion of a matrimonial agreement with a single issue of it, namely the preciput, which simultaneously represents the object of the matrimonial agreement and a clause of it, seams again not understandable.

The Romanian doctrinaires tried too the definition of the clause of preciput as an agreement of husbands, an agreement of will of husbands or, as the case may be, of the future husbands[9], a donation[10], a partial liberality[11], under certain circumstances, a matrimonial benefit established for the surviving husband, if its object[12] is taken into account.

Before analyzing the legal kind of the clause of preciput, it must be specified that neither the French doctrine was unanimous on the issuance of a definition of preciput, because, although Art. 1516 French Civil code refers to preciput as an agreement and excludes it from the category of donations, the Latin etymology of the term *proc* - before and *capio* - to take) does not automatically place on either of categories, so that, it was considered, in turn, as a preferential characteristics of an asset[13], a matrimonial benefit granted by marriage[14], and not the latest a contractual establishment of heirs (if we consider the donations allowed by matrimonial agreements) [15].

It is also required a terminological specification, namely that by Law no. 2006-728 of June 23rd, 2006, regarding the reform in the field of assets and liberalities, french legislator replaced of the text of Articles 843 and 844, the term of preciput by the phrase "hors part succesorale" (outside the assets part). This way, provided the exit from timeshare, the phrase *hors part* is intended to explain the benefit duly or conventionally granted, that an amount of money, a certain asset or a group of assets of being able to be sampled, before the partition, the preferential assignment being of property title, private property or usufruct. Such a clause also exists in the French assets law, so that the donations made outside the assets part cannot be claimed by the heir came to partition, unless they surpass the available quotity (the surplus being subject to reduction).

Legal nature

By the analysis of text of Art. 333 Civil code, it undoubtedly results that by the insertion of a clause of preciput in the content of matrimonial agreement, a benefit of surviving husband will be procured, but not anytime, just before the partition of inheritance, so that we are in front of a possibly affected right by a suspensive condition (survival). It is easy to notice that a heir of succesoral law and of the family law is born(to keep the tone of Art. 333) that seams to be adopted yet with full effects by the great family of civil law, but without identifying itself a clear position within it and losing the connections to his predecessors strangely, because he had all the premises of inheriting the most important qualities from them. But the law maker sets the clause of preciput within Book II About family, Title II. Marriage. Chapter VI. Patrimonial rights and obligations of husbands, Section 1. Common provisions, §4 Selection of matrimonial regime. The selection of the matrimonial regime, although the regulation included in par. 1 and 2 of Art. 333 is full of provisions specific to succesoral law, an issues that is explicable considering the fact that the legal effects are produced on the date of the opening of the inheritance, therefore it is logical that they are subject to the provisions of BookIV About inheritance and liberality.We recognize that the romanian legislator position is not the the happiest one because the structure of the Civil code is not similar to French Civil code which brings together in the Book III: Des différentes manières dont on acquiert la propriété both the provisions that are incident in the matter of inheritance and liberalities and those applicable to the matrimonial regimes, but beyond the empathy, we consider that the separation of the legal notion from the effects of clause would be more appropriate. We support this because, by joining the provisions included in Art. 333, it legitimately incurs the question: the clause of preciput is a liberality?

Starting from the classification of legal acts , it is defined as a liberality the legal document with free title, whereby the decider decreases his patrimony by the procured patrimonial use, opposed to the disinterested acts , whereby no decrease of patrimony is produced, although the decider procures a

[9] Dan Lupaşcu, Cristiana-Mihaela Crăciunescu, Regulation of the clause of preciput in the new Romanian Civil Code, as amended by Law no.71/2011, Pandectele române no.8/2011, p 39

[10] Iolanda Elena Cadariu-Lungu, The right of inheritance in the new Civil code, Publishing House Hamangiu, 2012, p.74

[11] M.Avram, C.Nicolescu, Matrimonial regimes , Publishing House Hamangiu, 2010, p.315

[12] Oana Ghiță, Matrimonial conventions in new Civil Code, Dolj Bar Association, Juridical Research Institute "Acad.Andrei Rădulescu" of the Romanian Academy, Conference"New Civil code", Craiova, 22 oct 2011, http://www.barouldolj.ro/files/2620_Material%20prezentat%20de%20Conf%20Univ%20Dr%20OANA%20GHITA%20-%20Baroul%20Dolj%20Craiova%2022%20oct %202011.pdf

[13] Pothier, Traite de la communaute nr.440, apud Ph.Malaurie, L.Aynes, Les regimes matrimoniaux, 3 eme ed, Defrenois, 2010, p 327

[14] G.Cornu, Vocabulaire juridique.Association Henri Capitant, Quadrige, 4 eme ed, 2003, p 676

[15] Ioana Popa, Preciput clause, RRDP no.4/2011, p 172 apud Ph.Malaurie, L anyes, Les succesions.Les liberalites, 4 eme ed, Defrenois, 2010, p.367 and Code civil francais, Livre III - Des différentes manières dont on acquiert la propriété, Titre II - Des liberalites, Chapitre VIII - Des donations faites par contrat de mariage aux époux, et aux enfants à naître du mariage, http://www.legifrance.gouv.fr

patrimonial benefit [16]. In the same meaning, the definition of contract with free title also surprises the intention of procuring the other parties a benefit without the procurement in exchange of a benefit (Art. 1172 par. 2 Civil code). Maintaining the intention of grouping the study instruments, it must not be forgotten the hypothesis of par. 2 of Art. 984, whreby the law maker undoubtedly established the fact that no liberalities may be made, but by donation or adjuncted to the contents of testament.

With respect to donation, certain similarities of the clause of preciput may be noticed to this contract and a certain authentic form (specific to direct donations and matrimonial agreements), the fact that both of them may be considered bilateral legal deeds (if we consider the provisions of Art. 367 letter d), both of them are legal deeds with free title, translative of property, the donation affected by the suspensive condition of the donor's decease, having a similar effect to the clause of preciput, mentioned for the surviving husband, both of them are subject to reduction, and under the aspect of advertisement, they make object of registration at the Notary National Registers, provided by Law 36/1995, republished, of the notaries public and notary activity. The clause of preciput cannot be considered yet as a donation, as mentioned by Art. 1516 of French civil code, neither as form, nor as fund conditions. The Romanian doctrinaires follow the line of French code, "not regarding" the clause of preciput as a donation.

The arguments for this position are represented by the different regulation method of both agreements (the donation is regulated in the Book IV "About inheritance and liberality", Title III "Liberalities", the clause of preciput is regulated within Book II, intended to Family), on the differences regarding their object (the object of donation may be only the donor's own assets, while we talk about the common assets in the clause of preciput), about the time when caducity occurs (on the one hand, the donor's heir constitutes a caducity reason of donation, while in the clause of preciput case[17], the production of effects depends on the decease of one of the husbands, and on the other hand, the divorce and ceasing of the community state represent a caducity cause of the clause of preciput, but not the caducity clause of donation).

Approaching the legacy as issuance method of liberalities, we consider that the basic difference between the two institutions is given by the fact that the legacy is an unilateral legal document, an expression of the exclusive will of testator (Art. 1036 Civil code, undoubtedly establishing that, under the penalty of absolute nullity of testament, two or more persons cannot decide, by the same testament, cannot decide one for the other's benefit), while the right of surviving husband incurs by the agreement of both husbands.

Returning yet to history, it must not be omitted the analysis of surviving husband's position, initially intruder among the other heirs of the deceased, the ideas of the French Civil code 1804 being taken over. These provided priority to the maintenance and preservation idea of assets by the blood relatives. Rough. The Civil code 1864 admitted to the surviving husband the vocation of only inheriting in default of legitimate or natural heirs of twelfth degree, the only concessions being the food receivables, granted to the widow (Art. 1279 Civil code 1864) and the right of poor widow to inherit even if she competes against the heirs (Art. 684 Civil code, 1864). A major optics change occurs on the appearance of Law 319/1944, which changes the surviving husband into rezervee heir, acquirer of special assets rights and especially provides him a competition to any of the four categories of heirs, independently of his material statement. The social dynamics clarifies therefore the status of surviving husband, in the matter of assets law. An adaptation to realities specific to modern states is established, on the other hand, by the possibility of choosing by husbands of the matrimonial regime that will characterize optimum the way that the patrimonial relationships between them will develop, so that, according to Art. 312 par. 1 Civil code, the husbands may opt to classic legal community, conventional community or to the regime of assets separation. It is obvious that since conventionally, the husbands establish the matrimonial regime, unless we start from the idea of fictive marriage (whereof nullity may be covered, however, after 2 years from its conclusion), the partners undoubtedly look to the first rank relative, but especially to the heirs. In this circumstance, it must be understood and it is desirable the clarification of intersection between the provisions concerning family and the matrimonial agreements and those regarding the assets and rules applicable to them. Returning to the clause of preciput, we consider that the provisions that regulate it strictly represents the intersection of these two categories of norms, just with the notice that it would have been probably avoidable the insertion of par. 2 in Art. 333, considering the possibility of its insertion as distinct provision of Book IV, About inheritance and liberalities.

Therefore, we consider that the clause of preciput may be defined as an agreement, whereby the husbands stipulate for the benefit of one of them or either of them that before the partition of inheritance, the surviving husband takes over without payment one or several common assets. Also, it would have been more indicated to define preciput as an agreement, because even in the hypothesis of art .367 letter d), the marriage covenant concluded, in fact will concern the parties and the object, specifying the legal grounds and it is somehow unnatural that, if only this clause exists in the contents of the covenant, its normal form should

[16] Gheorghe Beleiu, Romanian Civil Law, Publishing House 'Şansa', Bucharest, 1993, p 121

[17] for details about caducity of preciput clause and about the legal nature of it see Liviu Stanciulescu, Inheritance Law, Publishing House Hamangiu, Bucharest, 2015, p 94-95

not be given priority, being necessary to acquire the form specific to another covenant (the matrimony one).

However, referring to the legal provisions establishing the preciput, we will eventually try to identify how we may find oursleves in the presence of such a clause by reference to a certain matrimonial regime.

Preciput clause and matrimonial regimes

In essence, the preciput clause is a covenant between the spouses, although it is regarded as being accessory to the marriage covenant.

Two questions arise from here, related to the issue of matrimony systems, that we intend to answer:

§1. May preciput apply only in case of conventional community or also in case the spouses or future spouses adopt either the matrimony system of community of property, or the system off separation of property?

§2. May the preciput clause have a main character, and if yes, if this clause represents the sole object of the concluded marriage covenant, and the spouses are married, under the legal community system, by signing the marriage covenant, does the matrimony system change, from a legal community one, into a conventional one?

§1. Introducing the preciput clause in a sub-section containing only general provisions is not the only argument justifying the opinion that the spouses may give each other this benefit even if they are subject, for instance, to the legal community system[18].

In addition, art. 333 para. (1) of the new Civil Code foresees that, by marriage covenant, it may be stipulated that the surviving spouse may take over without any payment, before the partition of the inheritance, one or several of the joint goods, *owned **in condominium** or in **joint tenancy***. Or, the alternative feature of the norm in art. 333 of the new Civil Code is strengthened by the well-known fact that condominium is specific to community systems (legal or conventional), and joint tenancy is specific to the system of separation of property.

Therefore, *de lege lata*, the preciput clause is compatible both with the system of conventional community, and with the matrimony system of separation of property, and, *de lege ferenda*, it should become compatible with the system of legal community.[19]

Contrary to the French law (art. 1515-1519 in the French civil law), admitting the possibility to stipulate the clause only in a covenant concerning the condominium of the spouses[20], the majority Romanian doctrine[21] rejected this hypothesis, and the conclusion was that the preciput was compatible both with the conventional community system, and with the system of separation of goods.

Part of the doctrine, which states an opinion that we agree with,[22] has suggested that such a clause should be compatible with the legal community system in order to avoid the discrimination between the spouses or the future spouses that are getting married choosing the system of legal community, compared to those that are getting married choosing the system of conventional community or of separation of goods. The surviving spouse must be equally protected, regardless of the chosen matrimony system. Reasoning otherwise, the choice of the matrimony system could be therefore determined by the advantages „created by the law-maker" for certain matrimony systems (and we are not convinced that this was the law-maker's intention when adopting the new Civil Code), which we believe it would seriously affect the spouses' or the future spouses' freedom of choice.

An additional argument, concerning the solution to admit the conclusion of a preciput clause in the system of separation of properties is also the fact that the latter system is created by signing a marriage covenant and, as highlighted, it may generate the spouses' joint tenancy (art. 362 of the new Civil Code), and the goods that are held in joint tenancy may constitute the object of the clause of preciput.[23]

§2. Although the text of the law expressly stipulates that such a clause may make the object of a marriage covenant, a covenant in itself representing the result of an agreement of will, the doctrine[24] asked whether, however, the legal provision has an imperative character, which one cannot waive, or will the preciput clause be able to have a main character. The provided answer was negative, departing from the provisions of art. 333, corroborated with those of art.

[18] A. Bacaci, V.-C. Dumitrache, C.C. Hageanu, Family Law, ed. a 7-a, Publishing House C.H. Beck, Bucharest, 2012, p. 84. (Family Law)

[19] I. Popa, quoted works, p. 173.

[20] Also see the relevant French Doctrine: Fr. Terré, Le couple et son patrimoine, Ed. Jurisclasseur, Paris, 2002, p. 227; G. Cornu, Les regimes matrimoniaux, Presses Universitarires de France, Paris, 1997, p. 583; J. Champion, Contrats de mariage et régimes matrimoniaux. Stratégies patrimoniales et familiales, ed. a 12-a, Dalloz, Paris, 2007, p. 175.

[21] C.M. Crăciunescu, "Spouses' right to use the goods belonging to them, in different matrimony systems", Publishing House Universul Juridic, 2010, p. 118; T. Bodoaşcă, A. Drăghici, "Discussions related to the clause of preciput in the regulation of the new Romanian Civil Code", Dreptul no. 10/2013, p. 33; N.C. Aniței, Matrimonial convention in the new Civil code, Publishing House Hamangiu, Bucharest, 2012, p. 70; I. Popa quoted works, p. 173; D. Lupaşcu, C.M. Crăciunescu, quoted works.; Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori),New Civil Code.Coments by articles, 1st edition, Publishing House C.H. Beck, Bucharest, 2011, p. 354.

[22] See D.Lupaşcu, C.-M. Crăciunescu, „Regulation of the clause of preciput in the new Romanian Civil Code, http://www.juridice.ro/100156/reglementarea-clauzei-de-preciput-in-noul-cod-civil-roman.html; I. Popa, quoted works, p. 182.

[23] For this purpose, see also T. Bodoaşcă „System of separation of property in the regulation of the new Civil Code", in Dreptul nr. 11/2010, p. 65 and the next; T. Bodoaşcă „Some opinions related to the joint goods of the spouses acquired during the matrimony, in the context of the new Civil Code", in Dreptul nr. 10/2011, p. 90.

[24] I. Popa, quoted works, p. 173.

329 of the new Civil Code, according to which marriage covenants may be signed only in case of choice of matrimony system.

In our opinion, this point of view cannot be accepted. The interpretation of the provisions of art. 329 of the new Civil Code must be made in the sense that only the choice of another matrimony system may be made by matrimony covenant, and not in the sense that a marriage covenant may exclusively include clauses concerning the choice of the matrimony system. Moreover, art. 367 letter d) of the new Civil Code expressly states that the object of a marriage covenant may consist in the clause of preciput, without conditioning this provision to the insertion of other clauses by the spouses or by the future spouses in the contents of the same covenant. This happens because, on the one hand, the law does not forbid such a solution, and, if the law does not make a distinction, neither should the person interpreting it (*ubi lex non distinguit nec nos distinguere debemus*), and, on the other hand, a contrary solution would create a discriminatory treatment according to the applicable matrimony system.

Obviously, we do not abjure that, according to art. 329 of the new Civil Code, if the spouses wish to apply another matrimony system, they will sign a marriage covenant. However, if the spouses sign a marriage covenant (the discussion being relevant only as regards the legal community system) and it contains exclusively the stipulation of a preciput clause and no other additional clause, it does not mean that they choose another matrimony system than the legal one, and they are not under the incidence of a conventional matrimony system.

This is why we do not exclude the possibility to sign a marriage covenant when the parties wish to obey to the rules of legal community system, but at the same time they wish to introduce a clause of preciput providing comfort to the surviving spouse. By this covenant we are however appraising, contrary to the opinions expressed in the doctrine[25], that the matrimony system does not automatically change from a legal one into a conventional one, governed, in terms of composition of patrimony, of its management, of the rules related to the issue of legal community, the matrimony system remaining the one chosen by the spouses, namely that of legal community. It would mean to admit, *mutatis mutandis*, that the conclusion of such a will whose object would consist only in the recognition of a child or indications concerning the ritual of funeral, would determine us to automatically speak of a testamentary inheritance.

Therefore, the fact that the preciput may be instituted only by marriage covenant is not capable of turning in itself the legal system into a conventional system, and this does not determine an incompatibility of the clause of preciput with the matrimony system of legal community.

Conclusions

Although the liberty in choosing the most appropriate matrimonial regime is consacrated by the Civil Code, not allways, transposition of a provision in the romanian legislation from a foreign system, as the French Civil Code, is proven to be the most efficient mechanism to pertinently give to that provision its real meaning.As we tried to illustrate in this study, there are situations when a clause is in fact a real convention with defined characteristics so there is no need to hide it behind the clothes of another convent just for the sake of respecting the setup in a law structure. This could be often also the reason for not using such an interesting option for the spouses and when a legal norm finds itself into such a position its initial scope is not achieved.Being optimistic we believe that until some needed legislative interventions, the arguments presented in this paper will help in practice in finding flexible and effective solutions to assign to the preciput clause the real sense.

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[25] C.-M. Nicolescu, "The clause of preciput – matrimony advantage or instrument of successional planning?" – in AUB, series Law, in volume Conference on fundamental regulations in the New Civil Code and in the New Code of Civil Procedure, supplement , Publishing House C.H. Beck, 2012, p. 93, C.-M. Nicolescu "The clause of preciput in the regulation of the New Civil Code. Comparative approach" in R.R.D.P. no. 6/2011, p. 141.

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