THE PRIMARY REGIME – A FAMILY PROTECTION GUARANTEE WAYS TO BALANCE THE POWERS OF THE SPOUSES

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Abstract

Over the last years, the liberalization of matrimonial conventions has been one of the greatest achievements in civil legislation. Although the number of concluded matrimonial conventions is not very large, a major leap forward has been taken.

Irrespective of the matrimonial regime mentioned by the spouses within a convention, or the possibility of the spouses to choose from a wider or smaller variety of regimes, there is a always a set of mandatory rules applicable for all these situations. These rules, referred to as the primary imperative regime, are a real „constitution" (as named by the French doctrine) of the matrimonial regimes, intended to protect the family. The provisions of the primary regime, which produce mandatory and immediate effects upon conclusion of marriage, are applicable for a normal and harmonious cohabitation of the couple but also at times of conjugal crisis. The family home, the spouses` economic and social independence, and the various mechanisms to control the spouses` powers are only a few elements of the primary regime that are approached within the present paper. The conventional and judicial mandates are considered real instruments to manage the patrimonial relations between the spouses. In addition, the paper provides a comparative analysis of similar provisions from the French and Belgian laws.

Keywords: *primary regime, family home, marriage expenses, conventional mandate, judicial authorization, limitation of the spouses` powers.*
JEL Classification [K35, K11]

Regardless of the matrimonial regime selected by the spouses – legal or conventional, the Romanian legislation tends to facilitate and protect the spouses` independence unless it is prejudicial to the interests of the family in general.

The primary regime regulates the relations between the spouses, "not in detail but in their basic functional aspect" (Vasilescu 2009).

Inspired from the French legislation, the institution of the primary regime is not intended to limit the spouses` freedom to make a choice but it is more like an obligation to comply with a set of basic rules, irrespective of the matrimonial regime (Drăgan 2012). Some experts consider that in the legal systems that rely on „separatist" regimes, the primary regime contains „communal" regime rules and vice versa (Vasilescu 2009).

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The primary regime (found particularly in the French doctrine under such names like *primary, main, primordial, primary imperative matrimonial regime, basic imperative status)* is quite extensively regulated by the Art.312-338 of the Civil Code, particularly in terms of the effects of the matrimonial regime, its opposability, the conventional and judicial mandates, the spouses` patrimonial independence, their right to access information, and the marriage and overall expenses. This is applicable both to the patrimonial relations between the spouses and between the spouses and third parties, considering the importance and implications of these relations in the family life.

Some authors divide the provisions of the primary regime into some applicable to a "conjugal harmony" period and others applicable to "conjugal crisis" periods. (Florian 2015, Matrimonial Regimes).

The primary regime can be defined as a set of fundamental imperative norms that are applied to the patrimonial relations between the spouses or between the spouses and third parties, regardless of the matrimonial regime applicable to the marriage – legal or conventional, in order to balance the situation and to provide a relative equality between the spouses.

It is named *primary* because its norms shall be enforced with priority, by matrimonial convention or legal regime, irrespective of its type. It is referred to as *imperative* as most of the norms have a public order character and prevent the spouses to bring limitations or restrictions by convention. It is considered *inflexible* (Muntean 2017) as it aims to maintain a constant trend in the patrimonial relations between the spouses. All in all, it is a set of protective norms.

1. Specific aspects of the national legislation

The present chapter approaches different aspects of the primary imperative regime such as marital home, marriage expenses, spouses` economic and social independence, with a particular emphasis on the conventional and judicial mandates, as well as the judicial authorization issued by the court.

During the "conjugal harmony" period, the rules of the primary regime are specific either to the separation of property regime or to the community of property regime (Crăciunescu 2010). A harmoniuos marriage requires a certain independence of the spouses.

One of the essential duties of the spouses, as outlined by Art.309 of the Civil Code, is to cohabitate[1]. In order to live a normal and good life the spouses need a home. The provisions regarding the **marital home** are meant to protect the spouses and their children, with a view to respect the principle of the marriage and family protection as well as the best interest of the child (Muntean 2017), (Teacă 2017). The French doctrine also emphasizes the importance of the family environment for a balanced and normal family life,

[1] The Code of 1864 did not provide the spouses` obligation to cohabitate, although this is basically the very essence of marriage.

which requires a harmonious combination of the personal and patrimonial aspects of marriage. But the primary regime considers the concept of *marital home* as being more rigid than *matrimonial domicile*. Art.321 of the Civil Code defines *marital home* as the common living place of the spouses or the living place of the spouse who raises the child(ren).

The marital home is protected during the entire marriage, even if the spouses are separated in fact or have different residences. The same norm provides the right of either spouse to request the inscription of the estate in the Land Registry as marital home, even if s/he does not own that property. This measure basically generates a special protection regime. In case the non-owner spouse did not consent to enter the estate as marital home in the Land registry, s/he can bring an action for annulment of the document 1 year from the day s/he was notified about the conclusion of the act, but no later than 1 year from the termination of the matrimonial regime (otherwise, the other spouse may ask for damages) (Moloman 2016)[2]. The inscription in the Land Registry does not alter the ownership of the estate. The above mentioned 1-year limitation period is derogatory to the Common Law.

The action for annulment of any document concerning the marital home or its furniture and other goods can be brought only on condition the estate has been inscribed in the Land Registry or the third party who has acquired it has acted in bad faith. If the marital home is the joint property of the spouses and either of them did not consent to sign the documents, there are several ways to carry out the action for annulment, as expressed by both French and Romanian doctrines (Baias & Chelaru & Constantinovoci & Macovei 2012) (Avram & Nicolescu 2010) (Terré & Simler 1989). One way is to enforce the provisions of Art.322 concerning the marital home, which stipulates that the action for annulment shall be limited to 1 year; another way is to apply the norms that regulate the legal community of property, case in which the action for annulment shall be limited to 3 years. Complying with the French jurisprudence, the spouse will probably choose the provision that is most favourable to him/her.

A marital home can be considered any estate that has been rent or freely leased for this purpose (Florian 2011, Marital home protection).

Both spouses shall exercise their rights on the marital home, be they real or claim rights (Frenţiu 2012). Also, any decision to sell, donate, rent or mortgage the marital home shall rely on the written consent of both spouses, requested *ad probationem* (Avram & Andrei 2010) (Morozan 2014)[3], as stipulated by Art.322 paragraph 1 of the Civil Code. In this case, it shall be enforced what the doctrine defines as the "co-administration rule" ("the requirement of the express written

[2] Civil Decision no. 1538/2013.

[3] As no absolute nullity sanction is enforced this may not be considered a requirement ad validitatem, http://www.grefieri.ro/Docs/20100623InstitutiaFamilieiInNoulCodCivil.pdf, for details regarding the form ad validitatem.

consent" (Florian 2015). The same doctrine states that the requirement is stipulated *ad validitatem*, considering that "without the written consent of the other spouse, neither spouse can decide upon" (Popescu 2010).

The non-owner spouse shall not be party of the agreement concluded this way. In case the joint real estate is going to be alienated, the consent of the owner spouse shall be expressed in authentic form, as an *ad validitatem* requirement.

Moreover, no furniture or decorative objects shall be removed from the marital home[4], even if the spouse is the sole owner of the marital home or of any object in question. Some voices consider that this restriction is too severe as the value and destination of those particular goods must also be taken into account, in such a way that the law should include only the basic goods and those used commonly by all family members (Bacaci & Dumitrache & Hageanu, 2012).

The deeds regarding the lease of the marital home which hamper the use of the real property or of any of its movable assets can also be concluded only with the written consent of the other spouse (Frenţiu 2012). Should the marriage be terminated by divorce, the court shall decide upon the marital residence on demand, as stipulated by Art.918 paragraph 1 letter c of the Civil Procedure Code.

Art.325 of the Civil Code regulates the **marriage expenses**, the obligation of the spouses to financially support each other during marriage. This is distinct from the obligation to spousal financial support (alimony). According to the norms, the spouses shall contribute to the marriage expenses depending on their financial resources. This obligation has a permanent character. By matrimonial agreement either spouse may decide upon his/her financial contribution, but neither spouse shall be extempt from this duty.

The marriage expenses include the overall expenses, utility expenses, expenses involving the child raising and education, health maintenance, clothing and food supplies, professional training[5], leisure (Florian 2015). As a distinct provision, the parenting and household duties are treated as contribution to the marriage expenses. Therefore, if either spouse is unemployed or has no revenues, the household work can be considered contribution to the marriage expenses. The contribution to the marriage expenses must be established based on an evaluation of the spouses` financial status or the economic development of society (Nicolescu 2008). According to the French doctrine, the marriage expenses shall not include the payment of the income tax, the financial

[4] Basically, there must be considered an exception from the rule provided by Art. 346 para. 2 of Civil Code: "Either spouse can have control by onerous title of the joint movables whose alienation must not comply with other publicity formalities, according to law".

[5] Court of Appeal of Timişoara, Civil section, Civil Decision no. 2297/26.09.(2002), in Jurisprudence in Family Law. Divorce and Judicial Separation of Property, Moroşan, Bucureşti, (2006), p.17.

investments or the voluptuary expenses (Vasilescu 2009) (*e.g.* civil, criminal or contraventional fine; damages paid to third parties due to the action of a third party) (Bacaci & Dumitrache & Hageanu 2012). For opposite opinions, which hold that the spouses should contribute to these expenses by virtue of the principle of mutual moral support, *see* Popescu 2018).

A different interpretation of the doctrine treats expenses as joint property within the legal community property regime, and therefore, the income tax must be part of the marriage expenses (Bacaci & Dumitrache & Hageanu 2012). This obligation must be fulfilled as long as the marriage is valid, regardless of the spouses` separation in fact. If either spouse fails to fulfill this obligation, on demand of the aggrieved spouse, the court shall enforce the fulfillment of the obligation, although this sanction is not stipulated by law.

2. Work-related revenues, bank account autonomy, right to access information

The work-related revenues are another aspect of the primary regime stipulated by Art. 327 of the Civil Code which, relying on the principle of the spouses` equality of rights and independence, provides that „either spouse has the freedom to exercise a profession and have control of the income resulting from it".

The freedom to exercise a profession was inspired by the constitutional provisions („choosing a profession, job or occupation and workplace is free - Art.41 paragraph1). Our doctrine concluded that restraining the right of either spouse to choose and exercise a profession would violate the constitutional provisions. Moreover, the Constitution clearly states that the right to exercise a profession can be restricted only by law and under certain circumstances (Art.53 paragraph 1).

The term revenues includes salaries, copyright, dividends, fees, compensatory payments, unemployment benefits, pension. In this context, very important is the possibility of the spouse who actually contributed to the professional activity of the other spouse to receive compensation, proportional to the revenues obtained by the first; this shall apply only if the spouse`s contribution goes beyond the obligation of moral support and marriage expenses (Art.328 of the Civil Code). The patrimonial independence of the spouses also implies their freedom to conclude any kind of act with any third party, unless prohibited by law (Art.317 of the Civil Code). The same body of law emphasizes that the sale between spouses is permitted, considering that spouses can sign any kind of documents with each other. Some authors (Bacaci & Dumitrache & Hageanu, 2012) stated that the provisions of Art.327 regulate only the separation of property regime. Yet, this is an isolated opinion as this norm shall be applied regardless of the matrimonial regime chosen by the spouses but, in case of a legal community of property regime, Art.346 enforces both spouses` consent to any deed concerning the alienation of movable assets.

"Either spouse can make **bank deposit**s independently, without the consent of the other spouse". For all applicable matrimonial regimes, the independence to make bank deposits shall be applied in the relations between spouses and between spouse and the bank. The relations of the spouse with the bank shall remain valid even after the dissolution or termination of marriage.

In spite of the spouses` patrimonial independence, the law comes to create a balance by Art.318 which stipulates the **right to access information**, that is, either spouse`s right to inquire about property, revenues, debts. In case of refusal from the other spouse the court can settle the dispute (if there is an interest of the other spouse and the refusal is ungrounded)[6].

The same norm holds that in case the requested information cannot be provided, there shall be taken for granted the relative assumption that the plaintiff spouse`s statement is true. The doctrine has interpreted the right to access information as a limitation of the spouses` independence and a violation of the principle of the right to private life (Bodoaşcă 2015). However, the obligation to inform the other spouse should not be considered so restrictively, as the relationships between spouses rely mainly on friendship and sincerity which must also be expressed in their patrimonial relations (Popescu 2018).

The "conjugal crisis" period, as defined by the doctrine, brings about "the modification of the game" (Crăciunescu 2010) and other rules. Should the spouses not come to terms in making decisions concerning the marital home or alienation of goods, the law enforces some primary regime rules. The idea behind all these provisions is very simple. The matrimonial regime determines some deeds that either spouse can sign independently and others that need the consent of the other spouse. The potential refusal of either spouse may „paralyse the matrimonial system" (Vareille 2012)[7].

Thus, the decision-making power of either spouse can be limited or, if the case may be, extended. This can be achieved by the **conventional mandate**, the **judicial mandate** or the **court authorisation** issued to conclude deeds that normally need the consent of both spouses.

The **conventional mandate**, regulated by Art.314 of the Civil Code, allows either spouse to conclude any document on behalf of the other spouse. This institution is regulated by most EU countries. The spouse acts as a mandatory under Art.2009-2071 concerning the agreement of mandate. Thus,

[6] No credit institution has the right to reveal any information to the spouse who is not holder or authorized signatory of a bank account. Art.113 of amended GO 99/(2006) on Credit Institutions and Capital Adequacy, provides that the obligation of preserving professional secrecy in the banking field "may not hinder the competent authority in discharging its supervisory tasks", but some information may be disclosed "at the written request of the accountholder's spouse when the submission to the court of an action for the partition of goods is proved, or at the request of the court".

[7] http://197.14.51.10:81/pmb/COURS ET TUTORIAL/DROIT/Droit Prive/Droit patrimonial de la famille.pdf.

„either spouse can mandate the other spouse to represent him in exercising the rights granted by a particular matrimonial regime[8]". This mandate aims basically at helping a spouse to exercise some rights and consequently, it shall not be used to execute his obligations (Popescu 2018)[9]. The consent given for being represented must be a free and personal decision. Under a general mandate, the mandatary spouse can only conclude preservation and administration deeds. In order to conclude alienation acts, encumbrance of substantive rights or other legal actions, the mandate must be special, that is, the mandatary spouse must be expressly mandated.

Art.2013 of the Civil Code comes to complete the provisions of Art.314 holding that the mandate may be concluded verbally, in deed under private signature or in authentic form. Paragraph 2 of the same article stipulates that "the mandate issued with the purpose of concluding a legal act whose form is regulated by the law, must comply with that form, under sanction applicable to the act itself". Should the spouses not establish any validity, the mandate shall be valid 3 years from its conclusion. The revoking of the mandate concluded in authentic form must take the same form. Any document concluded in the absence of a conventional mandate shall be deemed relatively null and void; if the act has been concluded with a third party that acts in good will, the spouse who did not consent to being represented can claim for damages but not the dissolution of that particular act (Art.345 paragraph 4 of the Civil Code).

One can easily notice that the relative presumption of mutual tacit mandate from the old legislation was the predecessor of the mandate (Popescu 2018) (Bodoaşcă 2004)[10]. In its absence, one cannot take action based on the relative mandate presumption.

As the body of law makes no clear distinction, the conventional mandate is applicable to any matrimonial regime, legal or conventional, and covers both the joint and exclusive assets (Baias & Chelaru & Constantinovoci & Macovei 2012).

The judicial mandate offers either spouse the possibility to demand the guardianship authority to approve representation of the other spouse who fails to express his will, in order to exercise the rights deriving from the matrimonial regime. Pursuant to Art.315 paragraph 1, the court shall establish the validity and conditions of the judicial mandate. The causes that may

[8] Art.218 paragraph 1 of French Civil Code contains the same provisions as in the Romanian legislation.

[9] It is necessary to introduce de lege ferenda this aspect in the body of law as there are quite a lot cases in which acts are concluded whose object is the execution of obligations.

[10] Part of the doctrine holds that the tacit mandate was not eliminated once with the introduction of the conventional mandate but maintained in a better form within the matrimonial regime of the legal community of property (Art. 345, 346 of Civil Code). There are also opinions regarding the nullity of the juridical acts that infringe some legal provisions.

determine the incapacity to express will are enumerated by the doctrine as follows: mental alienation and debility, unconsciousness due to medical problems, old age - the senior person has not appointed a representative, or if s/he hasn`t appointed an administrator or mandatary after his/her spouse had passed away, etc. (Frenţiu 2012). The mandate is at the same time used as a substitute for guardianship and curatorship (Avram & Andrei 2010). The incapacity should be serious and with long-term effects. The causes that determine the incapacity can be proved by any means.

The mandate shall become valid only by decision of the guardianship authority (the court in whose territorial jurisdiction lives the claimant spouse), by means of a non-contentious proceeding. The court decision shall also establish the validity and conditions of the mandate.

In terms of validity, the mandate may terminate even if the incapacited person has been appointed a guardian or curator (cases of lawful termination of the judicial mandate) (Art.315 paragraph 2). The appointment of a guardian or curator determines the court`s revoking of the judicial mandate demanded by the other spouse. The potential renunciation of the mandatary must be authorized by the court; also, the death of either spouse leaves the mandate without object.

According to the common law which is also applicable in this matter, the mandate can be general, issued only for preservation and administration acts, or special, intended for particular legal operations. No mandate can grant a spouse absolute representation by the other spouse. The effects of this document will reflect on the person and property of the represented spouse, and if the mandate has been issued for a joint asset, the mandatary spouse will act in his double role.

An important issue has been raised regarding the validity of the documents the need to be signed urgently and are concluded by the claimant spouse in the period between the submission of the mandate claim and the issuance of the court decision. It has been stated that "in case the present and diligent spouse could prove the imminence of a severe prejudice about to be brought in the period before his appointment as a legal representative, the court should normally ratify subsequently the act concluded under the mentioned circumstances (Banciu 2011)."

The doctrine (Crăciunescu 2010) also outlines the Art.315 paragraph 2 which holds that "in case the court finds that the spouses have opposite interests in the assets in question, it should decide, even if not provided by law, upon appointment of a curator for the incapacitated spouse, rejecting at the same time the claim for a judicial mandate". Other opinions (Popescu 2018) assert that this interpretation could be considered only for the acts regarding the personal assets of the incapacitated spouse.

Art. 315 paragraph 3 brings into question the applicability of the provisions of Art.346 and 347 of the Civil Code regarding the acts of

alienation and encumbrance, as well as the applicable sanction which is the relative nullity. Thus, a judicial mandate can also be demanded for the joint assets that need the consent of both spouses and either of them is incapacitated (*e.g.* acts of disposition regarding the real estate) (for opposite opinions, *see* Frenţiu 2012). An exception to the rule are "the joint movables whose alienation must not comply with other publicity formalities, according to law" and the ordinary gifts. The ground of the first exception is said to be the possibility to appeal these acts by revocatory or derivative action (Popescu 2018). As the ordinary gifts do not have a particular patrimonial value, their exclusion is somehow natural.

The spouse mandated by the Court can thus also act with the regard to the personal assets of the other spouse, not only to the joint assets[11]. Should a spouse conclude such acts without mandate, they can be annulled pursuant to the above mentioned provisions.

Named as **disposition acts which severely prejudice the family interests**, the provisions of Art.316 of the Civil Code hold that „by exception, if either spouse concludes legal acts which severely prejudice the family interests, the other spouse can demand the Court that, for a determined period, the right to dispose of certain assets be exercised only with his express consent". This is a **limitation of** either spouse`s **powers**, which is an exceptional and preventive measure. For each particular case, the court will establish the terms of this limitation. The patrimonial interests of the family should prevail, without disconsidering though the moral ones (*e.g.* the wasteful spouse who, relative to the family revenues, spends excessively on valuables, aesthetic needs, getting a loan for gambling (Florian 2015).

The severe prejudice may not have been produced yet because the aim of this measure is to prevent a dangerous situation (Baias & Chelaru & Constantinovoci & Macovei 2012).

In the community property regimes, the co-administration rule shall also apply to the joint assets. A peculiar and unacceptable situation can be found in the separation of property regime, in which the court authorisation is granted for a document whose object is an asset that belongs exclusively to the other spouse. In other words, the spouse who is the exclusive owner of the asset can no longer freely dispose of it. The spouse`s rights to conclude legal acts is not completely limited, as the main purpose is to prevent the prejudicial documents concluded for a particular asset. Part of the doctrine considers that only the acts whose object is the joint assets should be accounted for.

The measure is temporary and it can be established by court for a determined period of 2 years at the most. The sanction applicable to the acts concluded without complying with the court decision is the relative nullity

[11] Although the doctrine of specialty holds that these provisions are incidental only for the acts that need the consent of both spouses.

(only in case of a third party who acts in bad faith, considering the obligation to comply with the principle of opposability against third parties). The right to make an appeal shall be limited to 1 year from the day the aggrieved spouse was notified about the document. To comply with the principle of opposability against third parties, the decision shall be communicated with the view to carry out the required publicity formalities for all movables and immovables (Art.316 paragraph 1).

Another limitation of either spouse`s rights is stipulated by Art.322 paragraph 1 of the Civil Code which holds that „without the written consent of the other spouse, neither spouse can dispose of the marital home or conclude acts that may affect its use, even if s/he is exclusive owner of that estate".

The power limitation of the spouse who is exclusive owner also entails a restriction of his/her proprietorship as provided by law. These rules are applicable to all matrimonial regimes, including the separation of property regime. In case „the consent is refused without a legitimate reason, the other spouse can notify the court and claim for the authorisation of the document" but s/he must prove the illegitimacy of the resons invoked in the refusal. An exception is the case of a resigning spouse who losses his/her right to the marital home acquired by a rental agreement which was signed as an additional act to the individual employment contract. The principle of the freedom to exercise a profession shall not be violated even if „the family will be deprived of the marital home" (Baias & Chelaru & Constantinovoci & Macovei 2012).

3. Primary regime elements from the French [12] and Belgian [13] legislations

French legislation

The matrimonial regime is considered primary and imperative because Art.214-226 of the French Civil Code stipulate just a few basic rules but with a greater influence on the daily life than the other provisions of the legal and conventional matrimonial regime; according to Art.226, these rules shall not be derogated from not even by convention (Vareille 2012). The primary imperative regime focuses on marital cohesion (*cohésion domestique*), spouses` independence (*autonomie individuelle*) and solutions for crisis situations (*solution des situations de crise*).

The spouses` rights over the marital home can be of proprietorship, usufruct and lease. Also, the French law allows the spouses to choose their marital home as and where they like it (Art.215 paragraph 2 of French civil Code)[14].

[12] French Civil Code, full text on http://codes.droit.org/CodV3/civil.pdf, last modified on 03 January (2018).
[13] Belgian Civil Code, full text on http://www.ejustice.just.fgov.be/cgi_loi/loi.
[14] The Romanian legislation uses the term building (Art. 321 of Civil Code).

The written consent of the spouses needed to conclude acts concerning the marital home will cover both the act itself and the terms stipulated herein. For instance, a contract of sale became void because the estate in question had been sold at a lower price than that commonly agreed upon when the other spouse consented to it (Bacaci & Dumitrache & Hageanu, 2012). Part of the French doctrine appreciated that as an excessive obligation, especially that it was not about joint or co-owned movables but exclusive goods (Terré & Simler 1989).

Leasing the marital home is considered an act of disposition by the French jurisprudence[15]. This decision needs the consent of both spouses although they may have separated in fact, because the lease contract belongs to the category of documents mentioned by Art.215 paragraph 3 of the French Civil Code.

Art.215 paragraph 3 of the French Civil Code, which regulates the marital home furniture and other assets, sets forth a co-administration system similar to that established for the highly prejudicial deeds. Neither spouse can benefit from these assets without the consent of the other spouse. Unlike the Romanian Civil Code, the consent stipulated by the French Code must not necessarily be expressed in written form.

In the absence of any consent, the act can be considered null and void. The action for relative nullity shall be initiated by the spouse who did not consent to the conclusion of the act 1 year from the day s/he was notified about the document but no later than 1 year from the dissolution of the matrimonial regime, according to Art.215 paragraph 3 of the French Civil Code.

Art.214 of the French Civil Code provides that the spouses shall contribute to the **marriage expenses** corresponding to their financial means. In a particular case, the decision of the French court was criticized for considering only the revenues of the parties, disregarding the fact that the wife managed an estate which provided her with additional financial resources[16]. If the spouses wish to derogate from the imperative dispositions of the primary regime, they may conclude a matrimonial convention which clearly establishes either spouse`s contribution. Should either spouse fail to fulfill his/her obligation, s/he can be compelled to do that even if the spouses are separated in fact. The French jurisprudence admitted the consent of the spouses as to the contribution share, although the proportion was not established by matrimonial convention[17]. The excessive contribution of either spouse to the marriage expenses can be requested by him/her to the Court based on the rule of unjust

[15] Cour de cassation, chambre civile 1, 16 May (2000), in RTDCiv. no. 2/2001, pp. 416 - 418 - notă de B. Vareille. https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007043754&fastReqId=1120974609&fastPos=4.

[16] Cour de Cassation, Chambre civile 1, 27 octobre (1992), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007029346&fastReqId=218296268&fastPos=1

[17] Cour de cassation, chambre civile 1, 3 février (1987), https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007017925

enrichment. This was also considered as a remunerative liberality, in other words, presents given by a spouse to the other spouse.

In the French jurisprudence, the **freedom to use the work-related revenues** at one`s pleasure prevails over the co-administration rule in the matter of the legal community regime (Baias & Chelaru & Constantinovoci & Macovei 2012).

Art.223 of the French Civil Code stipulates that the spouses may use their own revenues only after they have contributed to the marriage expenses. Thus, in a particular law case[18], it was stated that this primary regime provision must prevail if either spouse has repeatedly spent his/her salary to make donations to his concubine but only after he had fulfilled his obligation to contribute to the marriage expenses. The spouse`s right to freely make use of his revenues has facilitated the approval of these presents.

When it comes to the **freedom to exercise a profession**[19], the French doctrine states that pursuant to Art.220-1 of the French Civil Code, the court could limit either spouse`s right to choose and exercise a profession in case it may prejudice the family`s material and moral interests (Colomer 2000). This measure shall be enforced only temporarily; if the issue fails to be solved in the family it will most likely lead to divorce.

The presumption of independence in making **bank deposits**[20] was borrowed from the Art.221 of the French Civil Code: "either spouse can make independently, without consent of the other spouse, bank deposits and any other operations related to them". This measure shall apply even after the termination of marriage. The bank shall refund the money only to the spouse who has made the deposit and not to the other spouse[21]. Part of the French doctrine (Flour & Champenois 2001) asserted that the spouse of the the person who has made the bank deposit can also make different bank operations by virtue of the legal community property regime governing their marriage (the presumption of the community property provided by Art.1402). Divergent opinions support the idea that both spouses are involved in a competitive administration (except for the highly prejudicial acts) of the funds in question and the primary regime shall be applied as a solution in this matter.

Either spouse can conclude acts concerning his/her own movable assets (sale or lease contracts) without the consent of the other spouse but pursuant to Art.215 paragraph 3. These acts may include any acts of preservation,

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[18] Cour de Cassation, Chambre Civile 1, 29 février (1984), https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007012781&fastReqId=1573180077&fastPos=15

[19] Before (1965), the wife had to get her husband`s consent in order to exercise a profession.

[20] The legislation of (1942-1943) relieved women of the obligation to ask for their spouses` consent in order to open a bank account. This right came to ensure equality of the spouses.

[21] Cour de Cassation, chambre civile 1, 3 juillet (2001). https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007044186&fastReqId=2081059061&fastPos=3

administration or disposition, including donation, that some French authors do not consider a daily administration act but *"ubi lex non distinguit nec nos distinguere debemus"* (Vareille 2012). It is basically about either spouse`s independence to freely make decisons regarding his/her movables under Art.222.

Either spouse can be mandated to conclude on his own acts that he wouldn`t be permitted to sign without the other spouse`s consent, in case the latter is incapacitated or his/her refusal brings prejudice to the family interests (Art.217).

The **extension of either spouse`s powers** is regulated by the provisions of Art.217-219 and the judge shall issue a decison based on whether the spouse has refused to consent or s/he is incapacitated.

The **judicial representation** regulated by Art.219 involves the mandate granted by the court to either spouse with the purpose of concluding legal documents in case the other spouse is incapacitated (due to physical or mental causes, sickness or remoteness from home). The concluded document is enforceable to the person on whose behalf it has been signed, in this case, the represented spouse. The power provided by this mandate is limited to a particular category of acts. The provisions are applicable to any type of matrimonial regime[22]. The court decision will establish the conditions and validity of the mandate. The mandate shall become invalid if the represented spouse is no longer incapacitated or a guardian or curator is appointed.

If either spouse refuses without reason to consent to the conclusion of an act, fact which brings prejudice to the family, it is the court which must intervene. The **judicial authorisation** aims at a well-defined category of acts – administration or disposition acts (Vareille 2012). The judge may forbid a spouse to conclude, without consent of the plaintiff spouse, disposition acts concerning joint or exclusive assets whose sale needs the consent of the other spouse (*e.g.* marital home). The validity of this measure as decided upon by the court shall be of 3 years at the most (Art.220-1 of the French Civil Code). The French jurisprudence also provides ethical interdictions in the application of this legal disposition (*e.g.* the alcoholic spouse`s interdiction to drive the family car for 3 years, due to the financial problems that he has produced to the entire family following a car accident[23]. The applicable sanction for concluding the act without legal authorization is the relative nullity. The limitation period is of 2 years from the day the spouse was notified about the document but no longer than 2 years from the implementation of the publicity measures required by the act.

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[22] Cour de Cassation, chambre civile 1,18 février (1981). https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007007120&fastReqId=1565699327&fastPos=19.

[23] TGI Saint-Brieuc, 1 Juin (1967), La revue "L'intérêt de l'enfant", Ed. Centre Michel de l'Hospital CMH EA 4232, Ecole de droit-Université d'Auvergne, 9 Décembre (2016), p. 51 . http://droit.uclermont1.fr/uploads/sfCmsContent/html/1155/LA%20REVUE%209_INTERET%20ENFANT.pdf.

Belgium legislation

The protection of the marital home, the obligation to contribute to the marriage expenses and overall expenses, the solidarity in providing children`s education, the opening and administration of a bank account, the power to issue a special or general mandate are the main elements of the Belgian primary regime. This regime is applicable in case of a separation in fact or during the divorce proceeding (Raucent & Leleu 1997) but it is not enforceable to the engagement or concubinage.

The acts concluded without compliance with the primary regime norms shall be sanctioned by relative nullity as they affect the interests of the spouses (Art. 224 of the Belgian Civil Code).

Art. 215 paragraph 3 of the Belgian Civil Code provides that neither spouse can dispose of the **marital home and assets** without the written consent of the other spouse. The norm shall also apply to the lease contract involving the marital home, even if it had been concluded by either spouse before marriage. An exception is the family recreational vehicles, mobile homes or caravans. It is basically about a place where all the family members stay together, live and perform their daily activities in an effective and real manner (Hubeau 1994).[24]

Art. 216 of the Belgian Civil Code stipulates either spouse`s right to exercise a profession without consent of the other spouse, but should this profession severely prejudice the moral or material interests of the other spouse or minor children, the aggrieved spouse can appeal to the court (examples provided by the Belgian doctrine (Leleu 2015)[25]: prostitution, practising contact sports, night work, permanent business trips which prevent the spouse from fulfilling his family duties). The prejudice is likely to be iminent and not necessarily already produced. These provisions shall not be applicable if the spouse fills a public position. The court may decide upon a spouse`s right to exercise a profession only on condition the spouses have previously changed their matrimonial regime. Using the spouse`s surname in exercising a job requires the consent of the spouse.

Art.217 of the Belgian Civil Code governs the **obtaining and spending of the spouses` revenues**. Either spouse can use his/her own revenues, except when s/he receives a mandate from the other spouse or is empowered by court order. The spouses` discretionary power on their revenues is limited by the primary regime which enforces the obligation of the

[24] http://www.actualitesdroitbelge.be/droit-de-la-famille/regimes-matrimoniaux/le-regime-primaire/la-protection-du-logement-familial#toc.

[25] https://books.google.ro/books?id=pruIBgAAQBAJ&pg=PT132&lpg=PT132&dq=JT+2000+Bruxelles&source=bl&ots=6gblDDi3n3&sig=KqMfAxgH8LYMlzencRLn4hjCong&hl=ro&sa=X&ved=0ahUKEwi71N3HqcPZAhXPjqQKHVWbC_UQ6AEIUTAH#v=onepage&q=regime%20primaire&f=false.

spouses to support each other financially and to contribute to the marriage expenses and their children`s education.

Either spouse is allowed, without consent of the other spouse, to make **bank deposits**, regardless of the applicable matrimonial regime, because the bank does not request this information. An interesting aspect which distinguishes the Belgian legislation from the Romanian and French ones is the bank`s obligation to inform the non-holder spouse on the opening of the account so that s/he would be able, if the case may be, to make decisions in the interest of his/her family. The non-holder spouse is entitled to demand the bank to transfer amounts of money from that account only based on a court order (Messancy 1989)[26].

Either spouse can conclude basically any acts of administration concerning the joint property. As for the acts of disposition they need the other spouse`s consent too.

A court order empowers a spouse to conclude acts that need the other spouse`s consent in case the latter is incapacitated or absent and there is an urgent need to sell an asset, or his refusal is prejudicial to the interests of the family. The judicial substitution, as it is named by the Belgian law, shall be decided by the first instance court for cases of senility, coma, impairment of the intellectual and physical capacities (Leleu 2015). The mandate can cover both the joint and exclusive assets as well as some or all types of legal acts. The Belgian legislation makes use of the **mandate between the spouses** and the **judicial mandate**.

The mandate between the spouses can be verbal or written, according to Art.219 and 1985 of the Belgian Civil Code and can be revoked at any time (Art.219 paragraph 2 of the Belgian Civil Code).

The spouses shall contribute to the **marriage expenses** depending on their financial resources, if not decided upon otherwise by matrimonial agreement. The Belgian Code also raises the issue of the debts resulting from paying the overall expenses and the children`s education, stipulating that these debts shall be paid commonly by the spouses. In case the non-indebted spouse can prove that a particular debt exceeds the overall expenses, the creditor may act against the other spouse. Solidarity is no longer presumed in case of separation in fact[27].

[26] http://www.actualitesdroitbelge.be/droit-de-la-famille/regimes-matrimoniaux/le-regime-primaire/l-ouverture-des-comptes-bancaires-et-coffre-fort#toc.

[27] https://www.jurisquare.be/fr/journal/jt/index.html#search/eyJxdWVyeSI6IiIsImZhY2V0UXVlcmllcyI6WyJzdGFydFllYXI6XCIyMDAwXCIiLCJwbGFjZV9mYWNldDpcImJydXNzZWxcIiIsImNvdXJ0X2ZhY2V0OlwiYnVyZ2VybGlqa2UgcmVjaHRiYW5rIC0gdHJpYnVuYWwgY2l2aWxcIiJdLCJzdGFydCI6MCwib3JkZXIiOiJkYXRlIiwic2VhcmNoSW5Pd25Bc3NldHMiOmZhbHNlfQ.

Conclusions

One could wonder what is the use of the primary imperative regime if the legislation offers spouses the possibility to choose a matrimonial regime tailored according to their needs and desires? In times of conjugal crisis this is a mechanism meant to restore the equality between the spouses or even to save the marriage. Obviously, the implementation of the primary regime norms cannot guarantee that the marriage will be saved. The judicial mandate or the limitation of either spouse`s powers in crisis situations appeared as a major legislative improvement after long periods when the only solution had been the divorce. The obvious prevention and protection character of the primary regime has become an institution that protects the family in general. Regardless of the applicable matrimonial regime these norms shall constantly regulate the marriage (Muntean 2017).

Just as stated by professors Malaurie and Aynès the purpose of the primary regime is to ensure "cohesion in freedom, interdependence in independence".

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