General Aspects on Matrimonial Regime of Legal Community. Common Assets in Condominium*

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Abstract:

The current Romanian Civil legislation grants to the Matrimonial Regime of the Legal Community the prerogative of common law, applicable to patrimonial relations between spouses, when they do not derogate by concluding a matrimonial convention or opt to choose another matrimonial regime.

Although, the common law character of this matrimonial regime is not explicitly expressed by the Civil Code, it is understood not only by its marginal term, but also by the interpretation of the various provisions of law: for example, article 313 (3) states that *the failure of publicity formalities means that spouses are considered married under the matrimonial regime of the legal community in relation to third parties in good faith* and article 329 provides that *the choice of a different matrimonial regime than that of the Legal Community is made by concluding a matrimonial convention* .

Even though the choice of spouses is optional, the Legal Regime itself is comprised of imperative rules. As long as it was chosen by spouses or prospective spouses, the Matrimonial Regime of the Legal Community has, throughout its survival, imperative character - a fact expressly provided by the Civil Code. The rules governing the asset and the patrimonial liabilities have led some doctrines to qualify it as partial or asymmetric regime.

Keywords: matrimonial regime, Matrimonial Regime of the Legal Community, matrimonial convention, spouse, future spouse.

The current Romanian civil legislation gives spouses and future spouses the possibility to choose between several matrimonial regimes, according to art. 312 paragraph (1) of the Civil Code, their choice lays between the matrimonial regime of the legal community, the separation of goods and the conventional community. Also, according to the provisions of article 369 paragraph (1) of the Civil Code, after one year

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from the date of the marriage, so during marriage period, the spouses are free to, whenever they intend, to replace the existing matrimonial regime with another matrimonial regime.

Thus, unlike the matrimonial regime of the legal community, regulated by the Family Code, which was compulsory, the new one provided by the current Civil Code, is in principle "a permissive matrimonial regime".

However, by way of exception to the optional nature, spouses can come under the regime of the legal community in a forced manner. Thus, according to art. 313 par. (3) C. civ the non-fulfilment of publicity formalities makes it possible for spouses to be considered married under the matrimonial regime of the legal community, by third-party good faith.

In fact, according toart. 313 alin (3) C.civ. it is possible that under the matrimonial convention concluded between spouses, which has not been subject to legal formalities of publicity, in the relations between them,spousesare subjectsof the matrimonial regime of goods' separation or the regime of the conventional community, while in their relations, on the one hand, and third parties in good faith, on the other hand, they are considered married under the legal community regime.

Obviously, in the case regulated by art. 313 paragraph (3) Civil Code, it is not compulsory for third parties to consider spouses married under the regime of the legal community. On the contrary, depending on their interests, they may or may not use the rules of the matrimonial regime of the legal community. Thus, for example, if a third party has an interest in an obligation assumed by one of the spouses to preserve a common good along with the other spouse, third party may consider it as a common obligation and will rely on the provisions of art. 313 paragraph (3) Civil Code, even if in the relations between the spouses, they are married under the regime of the separation of goods, within which, according to art. 362 Civil Code the goods acquired together belong to them, in common ownership on shares and on the basis of art. 364 par. (1) Civil Code none of the spouses can be held responsible for the obligations arising from acts committed by the other spouse.

Under art. 329 Civil Code provisions, the choice of another matrimonial regime than that of the legal community is made by concluding a matrimonial convention. *Per a contrario*, if future spouses understand to comply with the matrimonial regime of the legal community, they are not obliged to conclude a matrimonial convention. However, even if they have decided to submit to this matrimonial regime, the future spouses have the obligation, under the sanction of the civil status officer's refusal to marry them, to declare the choice of this

matrimonial regime in the declaration of marriage, according to art. 281 paragraph (1) Civil Code.

Also, nothing prevents future spouses from concluding a matrimonial convention even if they have opted for the matrimonial regime of the legal community. Obviously, in this case, the matrimonial convention will only be confined to the option of spouses to be subject to this matrimonial regime. Indeed, under the provisions of art. 359 Civil Code, any convention contrary to the provisions of this section (Section 2, The Regime of the Legal Community) is sanctioned by absolute nullity, insofar as it is incompatible with the conventional community regime. Also, under the same sanction of absolute nullity, according to art. 332 paragraph (1) Civil Code, by matrimonial convention, spouses may not derogate from the legal provisions regarding the chosen matrimonial regime, except in the cases specified by the law.

In our opinion, however, during matrimony, the replacement of the existing matrimonial regime with the regime of the legal community, under the conditions of art. 369 Civil Code, can only be made by means of a matrimonial convention. This conclusion strongly supports the fact that the evoked text refers to "replacing the existing matrimonial regime with another matrimonial regime" without making a distinction related to the form of the existing regime and the one it replaces the current regime.

In this respect, the provisions of art. 369 paragraph (1) disagrees with those of art. 329 Civil Code. Indeed, the latter text refers to the "choice of another matrimonial regime", by way of the matrimonial convention, rather than that of the legal community, but without distinguishing, however, in relation to the moment of the election.

In order to avoid various interpretations related to this subject, we suggest to the legislator that, by *lawferenda provisions*, set concordance between the provisions of art. 360 par. (1) and those of art. 329 Civil Code.

In the doctrine, it has been appreciated that the matrimonial regime of the legal community has other characteristics, such as those outlined below (Bodoaşcă; Drăghici; Puie; Maftei, 2013: 154).

First of all, this matrimonial regime, even if it is optional, it is a legal regime comprised of imperative rules. Indeed, as has been pointed out, according to art. 359 Civil Code provisions, when future spouses or spouses understand to be subject to the matrimonial regime of the legal community, any convention contrary to the provisions of the law, if it is incompatible with the matrimonial regime of the conventional community, is invalid.

However, we note that most of Civil Code provisions, which embody the "legal community regime" (article 339–359), do not have an imperative wording, but rather an permissive one. We evoke, for example, art. 342, art. 343 par. (2), art. 344, art. 345, art. 346 paragraph (2), art. 348, art. 350, art. 352 paragraph (2), art. 353 paragraph (2), art. 358. Probably, the permissive wording of the texts in question was intended to leave the spouses the freedom to decide, under various aspects of their patrimonial relations, within the meaning of the conventional community, as the exception to the end of art. 359 and the provisions of art. 367 Civil Code. In fact, under this last aspect, the doctrine has been expressed, in sense that the matrimonial regime of the legal community is compatible with the clauses provided by art. 367 Civil Code, which turns it into a conventional regime (*Ibidem*).

Under the matrimonial regime of the legal community, the rule is common goods in condominium, and the exception is the personal assets. Instead, community debts are the exception and personal debts, the rule. This situation has led some authors to characterize the matrimonial regime of the legal community as *partial* (Avram; Nicolescu, 2010: 173) and others to classify it as *asymmetric* (Bodoşcă; Drăghici; Puie; Maftei, 2013: 154).

Under the name of common assets, art. 339 Civil code provides that the property acquired by any spouse within the legal community regime is, at the time of their acquisition, common property in condominium belonging to both spouses.

The provisions of art. 339 Civil code are the equivalent of those previously provided by art. 30 par. (1) of the Family Code. Thus, according to the latter, the assets acquired during matrimony by any of the spouses were, at the time of their acquisition, common goods of the spouses.

In the doctrine, by comparing and assaying the two texts, two significant differences (*Ibidem*: 155) were highlighted. Thus, unlike the art. 30 paragraph (1) of the Family Code, the text of art. 339 Civil Code refers to "property acquired during the legal community". This clarification was imposed since, unlike the Family Code, which regulated the exclusive regime of the legal community of spouses' assets (art. 30–36), the current Civil Code allows the spouses to opt for the matrimonial regime of the legal community (art. 339–359), that of the conventional community (art. 366–368), or that of the separation of goods (art. 360–365). Also, in the content of art. 339 Civil Code it is made clear that the property acquired by any of the spouses during the regime of the legal community are "common goods in condominium".

Instead, art. 30 (1) of the Family Code refers generically to "common goods".

It has rightfully been appreciated in legal literature that the clarification in the new regulation is such as to eliminate the ambiguity that it has set on the fairness of the interpretation which the jurisprudence and the doctrine have given to the provisions of art. 30 paragraph (1) and following of the Family Code.

In consensus to those expressed in law literature (*Ibidem*), we appreciate that, given to some transitional rules for the implementation of the current Civil Code[*], unless otherwise agreed between spouses and established by the provisions of matrimonial convention[†], property acquired by them under the provisions of Family Code retains their legal nature after the 1st of October 2011, when the current Civil Code entered into force. That is why in the doctrine (Bodoşcă; Drăghici; Puie; Maftei, 2013: 157) it is considered useful, the effort to interpret the provisions of art. 30 paragraph (1) and following of the Family Code.

Thus, under the empire of the Family Code, in doctrine[‡] and jurisprudence[§] in the field it was decided that the expression "common goods" from the content of art. 30 (1) and following[**] are the "spouse-owned property". Moreover, it was argued that, under the rule of the Family Code, the common property right in dealt with was only the property of the spouses[††].

In legal literature (Bodoşcă; Drăghici; Puie; Maftei, 2013: 157), it was appreciated that in order to reach this solution which presents no legal alternative, the jurisprudence and doctrine in the field ignored an

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[*]Tobe seen the provisions ofart. 3, art. 5 and art. 27 of the Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code (published in the Official Gazette of Romania, Part I, No. 409 of June, 10th 2011)

[†] Concerning the limits with in which spouses may decide by matrimonial convention, tobeseen Bodoşcă T., *Aspects regardingthe general regulation of the matrimonial legal regime in thenew Civil Code*, in "Law" no. 5/2010, p. 69–70.

[‡] Albu, I., *Family Law*, Didactic and Pedagogical Publishing House, Bucharest, 1975: 123; Adam, I., *The Real Real Rights*, All Beck Publishing House, Bucharest 2005: 402; Stoica, V., *Civil law. The Real Real Rights*, C.H. Beck, Bucureşti 2009: 300; Ungureanu, O., Munteanu, C., *Civil Law Treaty. The goods. The Real Rights*, Hamangiu Publishing House, Bucharest, 2008: 353; Urs, I.R., *Real Rights*, University Publishing House, Bucharest, 2006: 212.

[§] Supreme Court, Civil, Dec. 630/1974, in C.D. 1974: 167; December, no. 77/1983, in the "Romanian Law Review", no. 8/1984: 59; December, no. 326/1984, in the "Romanian Journal of Law", no. 1/1985: 62; C.S.J. s.c.v., December, no. 907/1993, in "Dreptul", nr. 7/1994: 89.

[**] for example, art. 30 paragraph (2), art. 31, art. 32, art. 33 paragraph (1) andparagraph (2), art. (34) and art. 35 of the Family Code.

[††] See Albu, I. *Quoted op*.: 123; Adam, I. *Quoted op*.: 402; Ungureanu, O., *Quoted op*.: 353; Urs, I.R., *Quoted op*.: 212.

essential aspect, which could be inferred with the power of the evidence from the content of art. 30 (1) and following of the Family Code. Thus, it was reported that the texts in question referred to the spouses' "common goods in condominium".

As a result, in a correct interpretation, imposed in particular by the requirements of the *ubilex non distinguit, necnosdistingueredebemus* principle, and the absence of a legal text prohibiting the spouses from acquiring a certain category of common goods, the doctrine and the jurisprudence required the fact that, under the regime of the common property governed by the Family Code, spouses could have both common goods in condominium and common goods on quotes.

It has rightly been appreciated in specialized (*Ibidem*) literature that classical interpretation was the consequence of an egalitarianism imposed to spouses by jurisprudence and accepted by doctrine. It was considered that this interpretation was not only in clear disagreement with the generic reference of the Family Code texts to "common property of spouses", but was also contrary to their legal equality. Indeed, in general, the legal equality of the parties in the private law relationships confers on them the possibility of agreeing on their subjective rights and obligations, or, in other words, none of the parties is in the legal position to imposes his/her will on the other[7]. In particular, the legal equality of spouses was regulated by art. 26 of the Family Code and is reaffirmed by art. 308 Civil Code. Thus, on the basis of the two texts, the spouses decides by common accord in all matters concerning marriage.

As the specialized literature (Bodoşcă; Drăghici; Puie; Maftei, 2013: 157) has suggestively expressed, the legal equality of the spouses has not, and will not, confer on them a discretionary right to decide by mutual consent on legal relationships and, consequently, on their subjective rights and obligations, including patrimonial ones. In general, their will-to-consent must be in accordance with public order and morals, as general limits to freedom of will. In particular, when the legislature found it appropriate to restrict the legal capacity of the spouses, to decide jointly or unilaterally on their patrimonial legal relations, it did so expressly. In this respect, for example, the provisions of art. 30 paragraph (2), art. 31–33, art. 36 paragraph (1), second sentence and paragraph (2), sentence I of the Family Code. Instead, as

[7] Bobos, Gh., *The General Theory of Law,* Argonaut Publishing House, Cluj-Napoca, 1999: 223 et seq.; Lupan, E., Sabau-Pop, I., *Civil Law Treaty*, Vol. I, General, C.H. Beck, Bucharest, 2007: 37 et seq.; Pop, L., *On themethod of regulation in civil law,* in Studia Universitatis Babeş-Bolyai "Jurisprudentia", no. 1/1977: 49 et seq.

already stated in the paper, the current Civil Code limits the spouses' freedom of will, for example through art. 312 alin (2), art. 316 paragraph (2), art. 332 and art. 367.

According to the doctrine (*Ibidem*) in the field, in the analyzed case, with the exceptions stipulated by law, without disregarding the provisions of art. 30 par. (1) et seq. of the Family code, the legal equality of the spouses implied their possibility of deciding by mutual agreement whether the goods acquired by them during the marriage were common goods in condominium or common goods on quotes and, in the latter case, the extent of the quota to each of them.

Regarding the aspect discussed above, it was appreciated that, by default, even Romanian doctrine and jurisprudence acknowledged the existence of this legal reality. Thus, it was unanimously admitted that the provisions of art. 30 paragraph (1) of the Family Code established two relative presumptions (*iuristantum*), one of a common contribution of spouses to the acquisition of common goods and another of equal contribution to their acquisition. So, to the contrary, in principle, each spouse was presumed to have a patrimonial right equal to that of his/her spouse on each of their common assets, that is to say a share equal to it. Due to the relative nature of the presumption (*iuristantum*), it could be overthrown by contrary proof and as a consequence, it could be established that the spouses had an unequal contribution to the acquisition of common goods. Synthetically, under art. 30 paragraph (1) of the Family Code, it could be seen that the goods acquired by any of the spouses during marriage were common commodity shares, and those quotas were, as a rule, equal and unequal exceptions. In special literature (*Ibidem*), it was considered that the principle of legal equality of spouses and the presumption of their equal contribution to the acquisition of common goods legitimately justifies their use, intendancy and disposal of common assets, as well as the presumption of tacit reciprocal mandate, stipulated by art. 35 paragraph (1), paragraph (2), first sentence of the Family Code.

It was appreciated that it pleads for this novel interpretation even the fact that in the Romanian legal system, under the old Romanian Civil Code, devolution has not been enshrined a unitary regulation, with a general character, there are only some applications of it, through some special laws, from different domains[8].

[8] For example, in the field of intellectual creation, according to art. 6 paragraph (1) of the Law no. 8/1996 on copyright and connected rights (published in the Official Gazette of Romania, Part I, No. 60 of March 26, 1996), represents a collective work in which the personal contributions of the co-authors form a whole, with out being possible, according to the nature of the work, to beat tributed distinctly to one of the co-authors on

In the doctrine (Bodoşcă; Drăghici; Puie; Maftei, 2013: 158), it was concluded that, from this point of view, within the legal community of goods governed by the Family Code, condominium goods on quotes assets had equal legal chances of being acquired by spouses.

On the other hand, in the literature (*Ibidem*), it was appreciated that, despite some exclusive doctrinal claims, condominium may, in principle, regard all patrimonial (real or receivable) rights and not just the right to property[9]. Indeed, in a natural, legal logic, any patrimonial right may, at the same time belong to one person or some people and, in the latter case, the right may or may not be split between the holders. Indeed, in the current regulation, the generic view on asset term is no longer seen only from the perspective of "ownership" over one asset.

Thus, under art. 535 Civil code provisions, goods are corporal or non-corporal things, object of a patrimonial right.

Unlike the 1864 Civil Code, the current Civil Code regulates, in general terms, *expressesverbis*, the common property in condominium. Thus, art. 632 paragraph (1) Civil code determines that forms of common property are the ownership of shares or co-ownership (letter a) and property in condominium (letter b). Moreover, according to art. 633 Civil code provisions, if the asset is jointly owned, co-ownership is presumed, until the opposite is proven. So, in the current regulation, shared ownership on quotes represents the rule, and the condominium, the exception.

It was also appreciated that, by reference to the meaning of term *asset*, provided in art. 535 Civil code, condominium can apply to any corporal or incorporalasset, that is, goods and patrimonial rights over them. Moreover, condominium includes both rights and obligations, resembling the indivisibility, but of another type, without shares, the assetsunframed belonging to both spouses until the marriage is dissolved or the matrimonial regime of the legal community is liquidated, during the marriage (Bacaci, Al.; Dumitrache, V.C.; Hageanu, C.C., 2013: 91).

It should be noted that the current Civil Code regulates only the common property right in condominium, without including rules

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the whole of the created work. This legal text call sin to question the tantalizing position of the doctrine, in the sen set hat the debauchery existed only in the case of the common goods of the spouses (for some details, see Bodoşcă T. *Contributions to the study of the legal regime of the common and collective work*, in "Magazine of Intellectual Property Law", no. 1/2008: 13 et seq.; *Intellectual property law*, Universul Juridic Publishing House, Bucharest, 2010: 27 et seq.

[9] In the sense that condominium may also be exercised over other patrimonial rights (real or receivable), rather than owner ship: Florian, E., *Family Law*, 3rd Edition, C.H. Beck, Bucharest, 2012: 81.

regarding other patrimonial rights in condominium. In particular, according to art. 667 Civil code, there is common property in condominium when, by virtue of law or by virtue of a legal act, the ownership of property belongs simultaneously to several persons, without any of them being the owner of a determined share of ownership.

In legal literature, it was appreciated that, with reference to the exclusive assignation of art. 339 Civil code, to "common goods in condominium", *per a contrario*, within the legal community, spouses cannot have common goods on quotes. In fact, the imperative character of the norm provided by art. 339 Civil code is amplified by the fact that, under art. 359 provisions, as has already been stated, any convention contrary to the provisions of the legal community regime is being sanctioned by absolute nullity, insofar as it is incompatible with the regime of the conventional community. So, if by means of a convention compatible with the conventional community regime, the spouses have waivered from the rules of the matrimonial regime of the legal community, it will be presumed that they have resigned legal regime and have been subjected to the regime of the conventional community (Bodoşcă; Drăghici; Puie; Maftei, 2013: 160).

In relation to this normative situation, in doctrine, it was even considered that, under the analyzed aspect, the regime of the legal community of goods regulated by the current Civil Code is more restrictive than that established by art. 30 and following of the Family Code (*Ibidem*).

Instead, in the context of the separation of goods, according to the current Civil Code, each spouse is the exclusive owner of the goods acquired before the marriage, as well as those acquired in his/her own name after marriage conclusion (article 360). Assets jointly acquired by spouses belong to them in common property on quotes, under thelaw provisions (article 362, paragraph 1). *Per a contrario,* in the case of the matrimonial regime of the goods'separation, spouses can not have commons in condominium.

Finally, within the conventional community, under art. 367 Civil code provisions, the spouses have the possibility to include in the community, in whole or in part, acquired goods or debts born before or after the marriage, except for those stipulated by art. 340 lit. b) and c) (letter a) or to restrict the community to the particular goods or liabilities determined in the matrimonial convention, regardless of whether they are acquired or, as the case may be, born before or during marriage, except for the obligations stipulated in art. 351 lit. c) (letter b).

For the following reasons, in the doctrine, it was appreciated that within the conventional community, as well as within the legal community, spouses may have only common goods in their condominium and own goods (*Ibidem*).

Thus, as stated above, common assets on quota are specific to the regime of goods separation, and not to that of the legal community of assets.

Also, as argued in the legal literature (Bacaci, Al.; Dumitrache, V.C.; Hageanu, C.C., 2013: 90), the regime of the legal community is the common law in relation to the conventional community regime. Indeed, according to art. 366 Civil code, the Conventional Community regime applies when a matrimonial convention derogates from the provisions of the conventional community regime.

In fact, by adopting the regime of the conventional community, spouses can waiver from the legal community regime, only under the aspects specified limitingly by art. 367 Civil code, among which there is no possibility of considering that their common goods, including those included in the community, would be common goods on quotes. Finally, under the examined aspect, spouses only have the possibility to include or exclude from the community various goods acquired before or during marriage, except those for personal use and those for the exercise of the profession.

Eventually, with regard to the express and exclusive reference to art. 367 letter a) to own assets and debts, *per a contrario*, any common goods on the shares that the spouses would have acquired before the marriage cannot be included in the community.

In consensus with those expressed in legal literature (*Ibidem*: 161), the fact that, within the legal and the conventional community, common goods in condominium are the rule, it is contrary to the general principle of community, in which, according to art. 633 Civl code, the community on quotas prevails. Moreover, it was appreciated that the situation debated contravenes the tendency of liberalization of the patrimonial legal relations between spouses and especially their legal equality, equality that remained of constitutional order, after the coming into force of the new regulations in the field and anyway, reaffirmed by art . 308 Civil code.

In fact, in the older (Fechete, 1995: 612) legal literature, it was rightly argued that condominium draws a limitation on the spouse's capacity of possession, since they can acquire, during marriage, only such property and only then, as an exception, own goods. In our opinion, in the new normative context, the evoked thesis is topical, with the

amendment that, therefore, there is no restriction of the spouses' capacity of possession, but their capacity of exercise.

Finally, under art. 369 Civil Code provisions, the matrimonial regime of the legal community can be changed at any time during matrimony with another matrimonial legal regime. Also, before the marriage concluding, nothing prevents future spouses from returning whenever they want, on the decision to be subjected, during marriage, to the matrimonial regime of the legal community.

Concluding, the legislator limited the types of matrimonial regimes. Although in other countries there are other types of matrimonial regimes, some of them so agreed that they are even legal regimes in several European countries (eg the regime of participation in acquisitions), the Romanian legislator was limited to three: the legal community regime, the separation regime goods and conventional community regime.

The regime of the conventional community can restrict or extend the legal regime within certain limits. The Civil Code enumerate, imitatively, in art. 367 aspects that can be derogated from the legal community regime, by concluding the matrimonial convention.

Beyond these limits, it should be noted that, in addition to the rules applicable to each matrimonial regime, there is another set of rules applicable to all matrimonial regimes (the so-called primary regime), which can not be derogated from by any convention.

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