AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
Vol. 17, No. 2 (2023), pp. 36-40

ASPECTS REGARDING THE GENERAL PATRIMONY – PATRIMONY OF AFFECTATION

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Abstract: *The general identification of the patrimonial mass, its type, and content is a subject that has been subjected to numerous debates. Both the general and the affected patrimonies have undergone several modifications, all in line with the societal development and its corresponding needs.*

Keywords: *patrimony, patrimony of affectation, patrimony division, patrimony establishment, patrimony liquidation*

INTRODUCTION

Relative to the New Civil Code, every person holds a patrimony. This individual's patrimony is not limited to a single mass of goods, rights, or obligations; it can encompass multiple patrimonial masses, established according to the law. These patrimonial masses can be divided into the mass of the affected patrimony – which is the division of the patrimony that includes the assets affected by the exercise of an authorized profession – and the fiduciary patrimonial mass – which is the division of the patrimony that includes real rights, debts, guarantees, or other patrimonial rights transferred by the founder to one or more fiduciaries, who exercise them for a purpose. In correlation with the idea expressed above, maintaining the idea of multiple types of patrimonies, it can be emphasized that there is no person without patrimony, resulting in every person having at least one patrimony.

1. The Notion of Patrimony and Doctrinal Positions

The general definition of the notion of patrimony can first be found within the Explanatory Dictionary of the Romanian Language, where it is defined as the "totality of rights and obligations with economic value, as well as material goods to which these rights refer, owned by a person (natural or legal)." Furthermore, having the same foundation, the current meaning of this term is as an asset inherited by law from parents (or relatives), a parental fortune.

This notion of patrimony holds significant importance for civil legislation. For a long time, this term did not have a clear definition, but upon the drafting of the Civil Code in 1864, minimal attention was given to this term. Subsequently, after the Civil Code of 1864, the New Civil Code was drafted and implemented. An initial version of this Civil Code, prior to the modifications brought by Law no. 71/2011, article 31 paragraph (1), did not contain such a definition; it merely

stated that "every natural person or legal entity is the holder of a patrimony." In the current version, the Civil Code provides a more complex definition of patrimony, according to Article 31 of this code: "every natural person or legal entity is the holder of a patrimony that includes all the rights and obligations that can be assessed in money and belong to that person."

In previous doctrine, patrimony was defined as "the ensemble of rights and obligations of a person that have or represent a pecuniary or economic value" (Hamangiu et al., 1996:522). According to this definition attributed to patrimony, rights that cannot be evaluated in monetary terms, such as personal-nonpatrimonial rights (e.g., right to name, right to honor, right to reputation, etc.), were left aside. Once these rights are infringed, even though they do not have a monetary value, they can give rise to an action for monetary compensation against the perpetrator of the infringement; there is a contradiction in this scenario in that this action has a pecuniary value, being a patrimonial good, but the infringed right remains outside the patrimony, not being one with a pecuniary value.

The doctrine's position regarding the patrimonies of concern and the uniqueness of the patrimony, in 1947 it was admitted that a person can have multiple patrimonies; in other words, the fractionalization of the patrimony was allowed whenever one or more assets were subject to a specific assignment. "To establish a distinct patrimony, each of these fractions must have, alongside its assets, a passive part, meaning it genuinely corresponds to the idea of concern, which is only possible if the following two conditions are met: the goods comprising this fraction, distinct from the general patrimony of the person, must be dedicated to a specific purpose, having a different destination from the other special patrimonies of the same person; this destination must result from a written act that has been invested with the necessary forms of publicity so that interested third parties could become aware of it and therefore oppose it" (Luțescu, 1947:34)

As a difference from the idea expressed above, at the time of adopting the new Civil Code (2009), in doctrine, it was admitted that there was no contradiction between the idea of the unity of the person and the patrimony and the idea of the divisibility of the patrimony. "Indeed, even though divided into several masses of rights and obligations with economic content, the patrimony remains unitary. The patrimonial masses regulated by Article 31 paragraph (3) NCC are the result of this division. Following the division, a person does not have multiple patrimonies but rather multiple patrimonial masses, called patrimonies of affectation just to highlight how elements of the modern theory of patrimony have been incorporated, including elements of both the personalist theory and the theory of the patrimony of affectation." (Stoica, 2009:9-10).

2. Intrapatrimonial Transfer

According to Article 32 of the New Civil Code, in the case of division or affectation, the transfer of rights and obligations from one patrimonial mass to another within the same patrimony is done while respecting the conditions provided by law and without prejudicing the rights of creditors over each patrimonial mass. The transfer of rights and obligations from one patrimonial mass to another does not constitute an alienation.

The transfer of rights and obligations from one patrimonial mass to another, in the event that the law institutes a division case, is carried out under the conditions established by law, ensuring the protection of the rights of third parties.

The second paragraph of Article 32 of the New Civil Code is necessary because "in practice, this transfer is seen as an alienation, as the mechanism of patrimony division is not understood. The consequences are inequitable, even absurd, because the intrapatrimonial transfer act is considered an interpatrimonial transfer act, subject to the requirements of form and taxation for alienation acts. This text puts an end to this unfair and absurd practice" (Project 2004, www.just.ro).

The aforementioned Article 32 does not refer to an alienation in the true sense of the word, but rather to a mobilization of a part of goods, rights, and obligations between the divisions of a patrimony. This mobilization is carried out by the unilateral act of the holder and must be performed without affecting the rights of creditors.

3. Affectation Patrimony

The German doctrine from the early 20th century (Article 419 BGB - Zweckvermogen - currently repealed) inspired the theory of the affectation patrimony and sought to refine the classical theory of patrimony (founded by Aubry and Rau). Solutions were needed to resolve new legal situations that were not identified in the previous model. Examples of newly emerged situations could include the creation of foundations, the establishment of legal entities with or without a patrimonial purpose.

Referring to this theory, any individual can hold a number of distinct patrimonies equal to the number of different activities exercised, and each patrimony is independent of the others.

Distinguished authors of French doctrine are of the opinion that "an individual can have, in addition to their general patrimony, patrimonies affected by particular destinations" (Terré et al., 1999:26). This theory opposes the classical theory of patrimony.

In a study of trust, it is noted that "the trust allows the establishment of an autonomous patrimony - the affectation patrimony - which no longer belongs to the constituent but also does not integrate into that of the fiduciary. It is the great innovation of the law (referring to the French law of 2007) which, by allowing a single person to have two distinct patrimonies, contravenes a major principle of French law, that of the uniqueness of patrimony" (Lefebvre, 2009).

Similarly, Jacques Auger, regarding the trust regulated by the Civil Code of the Province of Quebec (Article 1260 CCQ), states that "this choice of the legislature to consider the trust as an autonomous and distinct affectation patrimony puts an end to a long doctrinal and jurisprudential controversy regarding the right of ownership over goods transferred in trust. This right is not severed (dismembered) and does not constitute a sui generis property right; it remains a traditional property right entirely encompassed in the fiduciary's patrimony, with all its attributes. This conception of trust presupposes the recognition of the idea that a patrimony can exist without a holder, which differs entirely from the classical theory of patrimony" (Auger, 1998:77).

The Romanian doctrine is more conservative, faithful to the classical theory of patrimony. While not rejecting the idea of the existence of multiple patrimonies belonging to the same person, it still considers that the "fiduciary patrimony" is merely a "separate particular mass" of goods that do not overlap with the other masses of goods of the fiduciary, existing within the same, unique patrimony of the fiduciary.

The aspects mentioned above are also found in Article 773; these rights (those transmitted to the fiduciary) constitute an autonomous patrimonial mass, distinct from the other rights and obligations in the fiduciaries' patrimonies. From the viewpoint of Romanian doctrine, one cannot speak of the existence of multiple patrimonies, but one can talk about the existence of multiple masses of goods affected for certain purposes.

3.1 Mode of Establishment (Article 33 of the New Civil Code)

"The legislator's will is not sufficient for the formation of affectation patrimonies; it must be accompanied by the declared purpose of its holder. The affectation declaration is a unilateral manifestation of will by the one who desires the establishment of an affectation patrimony, for example, the patrimony necessary for conducting a liberal activity. This expression of will can take the form of the unilateral act of patrimony division but can also be inserted in the content of bilateral legal acts for acquiring a certain asset intended to be used in exercising the profession (sale, exchange, donation)" (Sferdian, 2011).

Article 33 of the New Civil Code regulates the mode of establishment, the publicity of establishment, and the liquidation of patrimony.

Constitution can be achieved through a professional's intrapatrimonial transfer by a unilateral act. The establishment act of the affectation patrimony is either a private law act with a conventional nature or a private law act with a unilateral nature.

3.2 Liquidation of Affectation Patrimony

Liquidation is the means by which the affectation patrimony can be terminated. The liquidation must be carried out by an authorized liquidator, a member of UNPIR, similar to the liquidation of companies. Under no circumstance are the assets of the professional affectation patrimony subject to the pursuit by the personal creditors of the professional. Similarly, even in the case of professional creditors, they cannot pursue assets from the personal patrimony of the professional.

According to Article 2324, paragraph (3) and (4) of the NCC, those creditors whose claims arise in connection with a specific division of the patrimony, authorized by law, must first pursue the assets that are the subject of that patrimonial mass. Thus, the assets subject to a division of the patrimony related to the exercise of an authorized profession by law can only be pursued by those creditors whose claims are connected with that specific profession, without pursuing the other assets of the debtor.

CONCLUSIONS

We should not view patrimony in a limiting way, as if it only belongs to natural persons, because legal entities can also have a patrimony.

In the situation where a patrimony is fragmented, it should not be understood or confused with the separation of patrimonies, which belongs to the legal entity. Through this separation of patrimonies, the legal entity has the possibility to fractionate its own patrimony (unique, separate from that of the administrative bodies or members). An example would be when a group of companies is the owner of an enterprise, and the most relevant aspect would be if their patrimonies were not separate but in confusion. In the case presented above, the companies are patrimonial entities of the group.

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