



THE GENERAL STRUCTURE OF THE PATRIMONY IN THE NEW CIVIL CODE

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Abstract

This study highlights one of the most important institutions regulated by the Civil Code, i.e. the patrimony. If the Civil Code of 1864 contained regulations incident to the patrimony, as this institution was perceived at that time, the current Civil Code complies with the contemporary realities regarding rights and freedoms and provides a quite different perspective, compared to old school rules. Therefore, we considered particularly useful to present the structure of the patrimony, from a critical and analytical perspective; however, at the same time, we also offered some practical examples for a better understanding of this institution.

Keywords: patrimony, uniqueness, property rights, universality, affectation.

JEL Classification: K22

I. Introduction

The new Civil Code¹ (NCC) modified, to some extent, the boundaries imposed to the patrimony by the old Civil Code. Even though numerous legal texts refer to this notion, we can easily notice that the current rules of substantive law relate, in an

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¹ It was adopted by Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505, from 1 October 2011 and was implemented by Law no. 71/2011, published in the Official Gazette of Romania, Part I, no.409, from 10 June 2011. The last amendment of Law no. 287 / 2009 on the New Civil Code took place by Law no. 138/15 October 2014, published in the Official Gazette no. 753 / 16.10.2014. *Brevitatis causa* it will be called, NCC.



innovative way, to other concepts that interact with the patrimony. In this sense, from the very beginning, we can discuss the concept of "*financial assets and liabilities*" and answer the question: what does the procedure of "*intra-patrimonial transfer*" mean?

Regarding the notion of patrimony, by way of examples, we could mention that the provisions of article 31, par. (1), of the NCC, regulate that "Every natural or legal person holds a patrimony"; article 33 regulates the "individual professional patrimony"; article 214 provides for the separation of patrimonies for legal persons; article 317 provides for the spouses' patrimonial independence; article 500 regulates the patrimonial independence within the institution of parental authority etc.

In the current understanding, the notion of patrimony means a person's wealth or possessions. In a wider sense (*sensu lato*), we can talk about public assets (e.g. Water Law² no.107 of 1996, article 1, paragraph 2), or, in other situations, we can refer to the cultural heritage, including a nation's cultural assets, such as works of art, monuments etc. One can also refer to the notion of geographical heritage (soil), biological heritage (flora and fauna) or linguistic heritage.

However, we are interested in the technical sense of this legal concept. The word patrimony comes from the Latin term *patrimonium*, derived from *pater familias* (the person who owned the entire family fortune). The concept also had a real nature because it designated a family's property, the goods transmitted from father to son. The Roman jurists did not define the notion of patrimony and, strangely, they did not feel the need to group the rights and obligations in a single whole, during a person's life, but at the end of his/her life, upon succession (*hereditas*).

In order to return to the contemporary meaning of the concept of patrimony, it is necessary to anticipate the distinction or classification of patrimonial rights because, as we notice, the patrimony refers only to the sphere of patrimonial rights and obligations. Thus, a person's rights and obligations can refer to some specific assets considered *ut singuli*, compared to other rights and obligations of the same subject by law. As you are going to notice throughout this study, in this respect, we have qualified real rights and obligations

² Law no. 107/1996 - Water Law (published in the Official Gazette no. 244 of 8 October 1996) - was completed and modified by numerous laws. Among the last modifying normative acts, we can mention: Government Emergency Ordinance no. 71/2011, published in the Official Gazette no. 637 of 6 September 2011; Government Emergency Ordinance no. 64/2011, published in the Official Gazette no. 461 of 30 June 2011; Law no. 146/2010 approving the Government Emergency Ordinance no. 3 / 2010, published in the Official Gazette no. 497 of 19 July 2010; etc.



as movable and immovable, tangible and intangible. However, on the other hand, the rights and obligations may also refer to a set of goods, i.e. to a universality.

Traditionally, there is a distinction between *de jure* universalities and various *de facto* universalities. The latter represents a more or less homogeneous group of goods that, by the owner's will, are considered and treated as a single good (e.g. the goodwill which is a set of movable and immovable, tangible or intangible goods, in order to attract customers and earn profit etc.). *De facto* universalities do not encompass all the rights and obligations of a person, being considered as part of a patrimony, or, in another term introduced by the doctrine (Ungureanu, Munteanu), as "*under-patrimony*", because it does not include all assets and liabilities. *De facto* universalities also include the financial assets and liabilities and the dedicated assets, being aware that, under the new provisions, the patrimony may be subject to a division or to an affectation [article 31, paragraph (2), NCC].

As we have already mentioned, the only *de jure* universality admitted in our legislation is the patrimony. Accordingly, our legal literature defined the notion of patrimony through many phrases; here are the most suggestive ones:

a) *the patrimony represents all the patrimonial rights and obligations belonging to a specific natural or legal person, regarded as a sum of interlinked assets and liabilities;*

b) *the patrimony represents all the patrimonial rights and obligations that have an economic value and belong to a person.*

It is very important to note that goods do not fall within the definition of the patrimony, as, in the conception of the New Civil Code, the tangible or intangible items are subject to a patrimonial right (article 535). It was justifiably noted that if the patrimony also included, together with the patrimonial rights, the goods that form their subject, we would reach a doubling of the economic value, which would distort the asset-liability ratio.

II. Elements of the patrimony

As we have already mentioned, the patrimony consists of assets and liabilities; it presents the embodiment of a person's rights and obligations. Professor Ovidiu Ungureanu stated: "the patrimony amalgamates those rights and obligations with an economic



content". However, as an economic expression, it contains an asset and a liability. Considering these aspects, we can distinguish the following elements of the patrimony:

a) **The patrimonial asset**, which consists of patrimonial rights, i.e. those rights that can be expressed in money, i.e. real rights (e.g. ownership of an apartment, the right of usufruct on a third property etc.), rights of claim (e.g. the right to receive the price of the sold property etc.), and some proceedings regarding the rights on an asset (e.g. the action for the recovery of a property).

As shown, the patrimony does not include the rights which are not economically significant and which are not likely to be assessed in money. However, the rights on non-sizeable assets or on those that are exclusively attached to the person, such as the right to revoke a donation for ingratitude, will not be considered outside the patrimony.

b) **The patrimonial liability**, which consists of debts (obligations, tasks) that can be valued in money. They consist of the obligation to give, the obligation to make or the obligation of not doing something that could have been done if the owner had not been required to abstain. The liability is the one that transforms the patrimony into a *de jure* universality, which, hypothetically, can exceed a mere collection of goods.

These two components of the patrimony (assets and liabilities) cannot be dissociated. Acquiring a patrimony does not only mean becoming the owner of the goods within it; it also means becoming the debtor of the debts within it. In this regard, the patrimony is indivisible. Both assets and liabilities are in for a monetary evaluation. If the first exceeds the second, it is acceptable that only the balance is forming the patrimony. Conversely, if the latter exceeds the former, we should not conclude that the patrimony no longer exists; it exists but it is negative.

It is necessary to emphasize that patrimonial asset spans on two distinct levels:

- capital;
- income.

Therefore, in economic terms, the asset can be divided into:

- capital, which is the value of the assets of a patrimony which, in turn, can be productive (e.g. a rented building, a borrowed amount of money which produces interest etc.) or unproductive (an unrented building etc.);

- income, which represents those values directly connected to people's activities.

We believe that an individual's ability to work is not a part of his/her patrimony. Indeed, the labor force, unlike the wages derived from it, is not part of the patrimony because,



although it has an economic significance, it is closely related to the human body and the latter is outside the patrimony.

III. The features of the patrimony

Under the New Civil Code, the institution of the patrimony has largely kept its importance, which was also regulated by the old provisions. As we shall see, an innovative institution is introduced, i.e. the fiduciary. It can be considered a legal modern technique for "patrimony management, based on the idea of transfer", of temporary nature, of a right/ good from the settlor's patrimony to the fiduciary's patrimony, with a purpose determined by contract (the administration of the right/ asset by the fiduciary, for the benefit of one or more beneficiaries).

Generically, article 31 of NCC provides that any natural or legal person have a patrimony. Furthermore, the text states that the patrimony, depending on its size or on the position of the person who owns it, may be split into two or more financial assets and liabilities, which are considered *de jure* universalities. This fractionation can always be made by divisibility or dedicated assets. For example, the fiduciary financial assets and liabilities are considered dedicated assets. The dedicated assets are, for the purpose of article 2.324, par. (2) - (4) of the NCC, a species of patrimonial division, as there are regulated special cases for tracking the existing assets owned by the person responsible for payment.

Also, the *fiducia* represents such a form of fractional patrimony; it is a legal technique whereby a fraction of the patrimony is transferred/ provided to the fiduciary, who will be able to perform acts of disposal on the property/rights that are part of that fraction of the patrimony. The fiduciary is basically a legal owner of the fraction of that patrimony, whether his/her right is not perpetual or exclusive.

Nevertheless, for a better understanding of the patrimony, according to the new civil rules, the legal features or characteristics of the patrimony are:

A) *The patrimony is a legal universality.* This feature means that the patrimony is an entirety or a mass of patrimonial rights and obligations that belong to a person. The patrimony includes, as we have shown, an asset composed of the holder's rights on the goods, as a whole, and a liability, i.e. all the patrimonial debts or obligations of the same person. There is an essential correlation between assets and liabilities, making the rights to meet the obligations. The rights and obligations are distinct from the universality



(*universitas juris*), which leads to the conclusion that the patrimony is independent of the changes that occur with the rights and obligations which make up its content.

B) *The uniqueness of the patrimony.* This means that a natural or legal person can only have one patrimony and that everyone has a patrimony, even if it consists only of debt. In other words, there is no patrimony without a person and no person without a patrimony. The uniqueness of the patrimony derives from the unity of the subject, which is the owner of the patrimony; it be considered, under the existing civil provisions, a general characteristic or trait specific to the patrimony. This characteristic is based on the famous personality theory of the patrimony, promoted by the illustrious French lawyers C. Aubry and C. Rau.

C) *The inalienability of the patrimony.* This means that persons cannot transmit their entire patrimony through acts between living persons. Of course, nothing prevents a person to transmit, by *inter vivos* acts (sale, donation etc.), all the goods he/she has at some point, even those that come from an inheritance. Then, he/she cannot give his/her debts, i.e. he/ she cannot compel his/her creditors to accept another debtor in his/her place. This is because the credit has been given to a certain person and not to another that the debtor would like to replace.

The transmission of a natural person's entire patrimony is done by succession, when the holder dies. In this case, the heirs receive both the deceased person's assets and liabilities. Therefore, in this matter, we have to distinguish between the cession among the living (*cesio inter vivos*) and the cession upon death (*cesio mortis causa*). According article 1.747-1.754 of NCC, a legacy can make the object of a sale and the seller-heir can remain liable for the debts of the inheritance he/she sold. For legal persons, that transmission occurs upon termination, i.e. following the total division or merger with one or more legal persons.

D) *Patrimonial divisibility and affectation.* In general, since the personality is indivisible and the patrimony is an emanation of that personality, a person can have only one patrimony. In this respect, the criticism of the classical theory has been extremely virulent since the law provides frequent situations where the same person is, apparently, the holder of two distinct patrimonies. Moreover, according to this characteristic, it can easily depart from the general rule of patrimony uniqueness and it is very important to note that it may be the object of a division or affectation in the cases and conditions provided by law (article 31, paragraph 2 of NCC). Patrimonial divisibility and affectation



can be considered innovative elements of the New Civil Code; they can also be considered as special features or characteristics of the patrimony, which derogate from the general rule according to which it is unique but it can always be divided in some cases determined by law. Along with its uniqueness, by the implementation of this characteristic, the new Civil Code recognizes to the patrimony a modern theory, a synthesis of the two theories, i.e. the personalistic (subjectivist) and the affectation one.

Thus, we should note that the patrimony is usually unique, but it may be subject to a division or to an affectation in several rights and obligations, i.e. in several financial assets and liabilities, each having a well-defined legal regime (*quasi patrimonia*), only under the law. On this occasion, an intra-patrimonial transfer is made under article 32 of the NCC. Thus, regarding natural persons, the divisibility of the patrimony is required by law, i.e. a legal divisibility.

For example, in the case of spouses, there is a difference between the joint property acquired during the legal community regime (marriage), provided by article 339 of the NCC and each spouse's own property, provided by article 340 of the NCC. Indeed, the spouses may have both their own goods and the joint goods included in their patrimony. The joint goods, according to article 339 of the NCC, are those goods acquired by either spouse, during marriage. These goods can be seized only by the creditors that are common to both spouses; only in case of scantiness, these creditors can also seize the spouses' personal property. On the other hand, the personal creditors of each spouse can seize only the spouses' own goods; only in case of scantiness (regarding this category of goods), according to article 353 of the NCC, they may require for the division of their joint property, in order to satisfy the claim on the property due the debtor-spouse.

According to article 352, par. (2) of the NCC, the spouse who paid the joint debt will have a lien on the other spouse's property, until the covering of all the debts that the latter owes to the former.

Divisibility can also operate in other cases provided by law, for example in accepting a patrimony subject to succession. This acceptance, according to article 1.106 of the NCC is not imposed on any person, whether he/she has or does not have the quality to accept it.

Thus, according to article 1107 of the NCC, the acceptance of an inheritance can be done in an oblique way, by the heir's creditors, within the limits of meeting their claims.



With regard to the legal person, article 187 of the NCC provides that it must have an independent organization and its own patrimony affected to the achievement of a particular moral and licit purpose, in accordance with the general interest. It should also be noted that a company has its own patrimony; however, it is distinct from that of its management members, under article 214 of the NCC.

Regarding the above mentioned examples on the legal divisibility of the natural persons' patrimony, we must note that a voluntary divisibility is also possible, which is incident only for the legal persons when, for example, a trader may divide his/her patrimony into a group of rights and obligations, forming a goodwill affected to a trading activity. Under article 236 of the NCC, this division may be total (by dividing a legal person's entire patrimony between two or more legal persons) or partial (by removing a portion of a legal person's patrimony, which continues to exist, and by transmitting this part to one or more legal persons).

As mentioned before, the patrimony may be subjected to some affectation, but to the extent provided by law. These affectations determined by law may create, for a person, on the one hand, a *de jure* patrimony and dedicated assets. We could include, within the dedicated assets, for example, the rights and obligations on the goods which may be subject to a fiduciary, or an individual professional patrimony (of a lawyer, public notary, officer of the court, doctor etc.).

The institution of the fiduciary represents the innovative affectation form of a patrimony or of a part thereof, subject to the rules of substantive law. Article 773 of the NCC defines the fiduciary as being that legal operation whereby one or more settlors transfer real rights, debt securities, securities or other patrimonial rights or a group of present or future rights, to one or more fiduciaries who manage them for a specific purpose, for the benefit of one or more beneficiaries. This operation is established by concluding a fiduciary contract.

IV. The functions of the patrimony

The patrimony has a significant practical importance. Taking into consideration the specific rules of the Civil Code, this practical importance can highlight the functions of this institution, namely:

- it is the creditors' joint guarantee (general bond);
- it explains and enables the real subrogation by universal title;



• it enables the universal transmission and by universal title of rights and obligations; therefore, it explains the inheritance of rights and obligations by succession.

1. The patrimony and the creditors' joint guarantee.

The patrimony is the general or joint guarantee granted by law to unsecured creditors or, as it is called in the literature, their general bond. In this regard, article 1.518 of the NCC states that if the law does not provide otherwise, the debtor is personally liable for its obligations. This liability is limited to certain situations or cases provided by law, under paragraph (2) of the same text. The debtor's personal liability to fulfill its obligations establishes the so-called joint guarantee of creditors, subject to the provisions of article 2324 of the NCC. The unsecured creditors are those creditors who do not have a real guarantee (mortgage, privilege, bond etc.) in order to ensure their claim; their bond is represented by the debtor's entire patrimony, as a legal universality. Therefore, we cannot discuss about one or another of the debtor's goods, but about all the goods that make up that person's patrimony.

We should note that the phrase *joint guarantee* should not be confused with the lien, which is a special guarantee of the pledgee; it is a real right, accessory to the rights of claim conferring the attributes of pursuance and preference. The joint guarantee means the creditor's right to pursue any of the goods in the debtor's patrimony in order to extinguish the debt, but without being able to stop the debtor to alienate these goods. It follows that any creditor can pursue only the goods existing in the debtor's patrimony at the time of the enforcement procedure and the goods that will enter the debtor's patrimony (so-called future goods) to the full extinguishment of the right of claim.

2. The real subrogation by universal title

The subrogation (i.e. the replacement) is of two types:

A) personal subrogation and

B) real subrogation.

A) Personal subrogation occurs when a person is legally replaced by another person. For example, if two debtors are required to pay a debt to a creditor, if only one of them pays the whole debt, the debtor-payer acquires the paid creditor's rights and will be able to pursue the other debtor for the part incumbent to it.

B) Real subrogation implies replacing something with another thing and it can be:

a) a real subrogation by universal title and



b) a real subrogation by particular title (i.e. when a good is sold from a patrimony, its place is taken by the price charged which, in turn, may be replaced by another good acquired from the price obtained).

a) The real subrogation by universal title involves the automatic replacement of a value with another value within a patrimony. It has a universal title because the replacement of a value with another value is done without taking into account the individuality of the good coming out of, and of the one that enters into, the patrimony. This replacement is automatic but not under a legal provision.

The real subrogation by universal title also has a practical importance; for example, when several heirs acquire together a patrimony and wish to divide the patrimony. Those goods that cannot be conveniently divided in kind are sold and the money obtained replaces the goods. Another example regards the effects of the annulment of the declaratory judgment of a person's death, if the alleged heirs alienated some of the goods for good value and consideration to bona fide third parties; in this case, their actions will remain valid. However, those goods will be replaced by the amounts of money received by the presumptive successor from third parties - purchasers.

b) *The real subrogation by particular title* means the replacement of an individual good by another *ut singuli* good. In this case, a value is not replaced by another value and the subrogation operates only when expressly provided by law. There is such a subrogation provided by article 2.330 of the NCC, which states that when a good encumbered by a security has been destroyed or damaged, the insurance benefits or, if appropriate, the amounts due as compensation, are affected upon the payment of the privileged or mortgaged claims, according to their rank. In addition, the hypothesis provided for in article 72, paragraph (3) of Law 18/1991 on the Agricultural Real Estate, for the exchange of land, provides that, by the exchanges made, each land acquires the legal status of the land it replaced etc.

3. The universal transmission and by universal title

The universal transmission occurs when the entire patrimony is transmitted from one person to another while the transmission by universal title implies the fractional transmission (ordinary fraction, decimal, percent) of the entire patrimony from one person to two or more persons.

When a person dies and his/her entire patrimony is took over, entirely, by a single heir who has a legal universal or testamentary vocation, we are in the presence of a



universal transmission. Conversely, if the successional patrimony is acquired by quotas by two or more heirs, we are in the presence of a transmission by universal title. Therefore, the successors will not receive one or another good or one or another debt within the patrimony, but for example, one third of goods and one third of the debts if there are 3 heirs; $\frac{1}{4}$ if there are four heirs etc. In this case, the goods of the deceased person are impartible between the heirs who, eventually, will ask for their partition.

On the other hand, the transmission of the patrimony to its heirs will expose them to pay the deceased person's debts, even if the value of the assets they receive is lower than the debts brought by inheritance; they are held *ultra vires hereditas*, which basically means paying the deceased person's debts from their personal amounts.

This unexpected result is a consequence of the patrimony's uniqueness that, in this way, highlights an equitable principle. Thus, one cannot conceive why a person's death increases the creditors' chances, the latter taking advantage of the assets of the debtor's heir. The heirs can protect themselves in two ways against such a danger, namely:

- a) giving up to the succession (i.e. to assets and liabilities);
- b) accepting it under benefit of inventory.

In the latter case, they will be held *intra vires successionis*, i.e. only up to the asset succession. This means that all the deceased person's creditors will be able to pursue only its assets. It should be noted, however, that the benefit of inventory contradicts, in part, the classical notion of patrimony.

V. Concluding remarks

As we have noted with great ease, the provisions of article 31, paragraph (2) of the NCC establish a major paradigm. Thus, although each person has a unique patrimony, it may be subject to divisions or special affectations, with the subsequent consequences brought by the fractionation of the person's unique patrimony and by the segregation between different categories of creditors. The latter will not enter into competition upon the judicial execution of the goods from their common debtor's patrimony, at least as long as the division or affectation is established.

Under these conditions, through a broad interpretation of article 31 of the NCC, incident to the patrimony, it appears that the Romanian civil legislator considered it necessary to regulate, in our substantial right, for the cases where the two theories on the



patrimony should operate.

Thus, the personalistic theory of the patrimony, i.e. the classical theory promoted by Aubry and Rau, is reflected in the content of paragraph (1) of article 31 of the NCC. In this respect, the basic ideas of this theory are:

- only persons can have a patrimony;
- every person has a patrimony;
- a person can only have one patrimony which is unitary and indivisible;
- the patrimony cannot be separated from the person who owns it.

In opposition to this personalist characteristic of the patrimony, stated in article 31, paragraph (1) of the NCC, the contents of paragraph (2) of the same article reveal the second theory incident to the patrimony, i.e. the theory of dedicated assets. This theory, taken from the German civil law system, has the following ideas:

- the patrimony is not related to the personality of the subject of law;
- the unity of the patrimonial items is given by the idea of purpose, of affectation;
- a person may hold more patrimonies, depending on the purpose, on the affectation, that he/she gave to certain financial assets and liabilities etc.

In conclusion, the legislator of the New Civil Code wanted to achieve a modern approach to the patrimony - a synthesis of the two theories, i.e. the personalistic and the affectation one. Therefore, the ideas outlining, in a very free and general way, the contemporary understanding of the patrimony illustrate the features of this institution, taken over from these two "classic" theories.

References

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