PATRIMONIES BY APPROPRIATION
AND THE PERSONALIST THEORY OF PATRIMONY*

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Abstract
This study aims to determine the legal nature and characteristics of patrimonies by appropriation and the impact of such important matters regarding the legal regime of patrimonies by appropriation on the subjectivist (or personalist), classical theory of patrimony.

We start from the idea that the patrimony by appropriation should be perceived as a new creation, with different characteristics than the ones of the “parent patrimony”. To accept this idea means to open new ways in the approach of the patrimony by appropriation and the issues debated hereby.

We will reach our goal through the answers to the following questions: Is patrimony an asset? What about the patrimony by appropriation? Does the patrimony by appropriation reproduce the genetic code of the general patrimony or is it a new creation with a special legal regime? What are the special characteristics of the patrimonies by appropriation?

Keywords: patrimony by appropriation, general patrimony, alienation of patrimonies by appropriation, patrimony ownership, JEL Classification: K10, K11, K12, K20, K22.

Preliminary notes
To determine the legal nature and characteristics of patrimonies by appropriation will allow us to understand and use this legal institution better and how they determine a rethinking of the theory of patrimonies in the Romanian law.

To obtain proper answers to our questions and reach the objectives of this study, it is firstly necessary to clarify several major issues in the matters of goods relevant for the classification of general patrimonies and patrimonies by appropriation. Subsequently, based our findings, we will analyze if general patrimonies and patrimonies by appropriation qualify as assets and, thus, we will be able to determine their legal nature. We will further analyze and define the

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characteristics of patrimonies by appropriation and their impact on the subjective theory of patrimony by reference to the dual legal nature of the patrimony by appropriation and the features of general patrimonies.

1. About assets in general

People and assets are traditionally essential components of the legal universe, the super-classes of the civil law. This summa division, people and assets, originates in the Roman law and it was the Code of Justinian that took over the concept from the famous legal advisor Gaius1. In the Romanian legal field, the concept was first found in the Code of Calimach, according to which: “Everything that is not a person and serves people is an asset according to the law” [art. 378 of the Code of Calimach].

Since the 2nd century A.D., the evolution of society and, thus of laws, has triggered significant transformations in the law of assets.

In Romania, the current Civil Code still distinguishes between things (tangible and intangible) and assets [art 535 Civil Code²], but rights seem to originate from the class of assets to form a separate class of rights [art 542 Civil Code³].

If the Civil Code of 1864 did not provide a definition of assets, it has been stipulated in the current Civil Code according to which: “Assets are the tangible and intangible things that are object of a patrimony right” [art 535 Civil Code].

Based on this definition of assets, the Romanian Civil Code takes after the Italian Civil Code, according to which: “Assets are the things that might be object of rights” [art. 810 of the Italian Civil Code⁴], and separates itself from the French Civil Code that provides that assets are the tangible and intangible things – object of appropriation and property and personal rights [art 520 of the French Civil Code⁵].

The jurisprudence of the European Court of Human Rights has a more modern and comprehensive approach as regards the definition of assets from art 1 under the Additional Protocol of 1952 to the Convention for the protection of human...
rights and fundamental freedoms. The article stipulates the enjoyment of assets: "any natural or legal person is entitled to the peaceful enjoyment of assets". According to the jurisprudence of the European Court of Human Rights, the concept of assets includes all rights of patrimony, property and debt; moreover, it was decided that the "substantial economic interest" and even a "legitimate hope" can be classified as assets under art 1 of the Additional protocol no. 1.

The German Civil Code (BGB) has an adverse approach: "everything that arises from intangibility (rights) and things that cannot be controlled (air, clientele) are not considered assets according to the BGB. What we consider intellectual or intangible property is considered, by the German law, a non-property right that offers no power over an asset because the asset does not exist".

An interesting thesis comes from the remarkable French doctrinaires Zenati and Revet, who claim that an asset is any identifiable, isolable and useful entity that is object of an exclusive relation. For Zenati, property rights are not assets as they are mechanisms allowing things to become assets.

It is axiomatic that not things, but assets are of interest from a legal perspective and, implicitly, for the analysis on patrimony because assets are those things that can make object of a right of patrimony, right that is a component of the patrimony.

In terms of the assets’ transformation, all things, i.e. physical realities (others than people), become assets only when they are likely to be appropriated according to the legal meaning, i.e. are object of a right of patrimony.

Beyond doubt, only patrimony rights are considered and not money claims, although both classes of rights are patrimony rights based on the arguments presented below.

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6 According to the CEDO jurisprudence, a money claim is a patrimony value and classifies as asset under art 1 of Protocol no. 1 to the Convention because "there is at least a legitimate hope to recover the money", ECHR decision of April 16, 2002, S.A. Dangevillec/France, Recueil 2002-III, §48; in all cases, a money claim is an asset according to the Convention only when it is determined under an injunction enjoying a status of res judicata (EDH Commission, rap October 1, 1975, no. 5849/1972, Muller C/Autriche, DR no. 3, p. 25 and the following: October 5, 1977, no.7459/1976, X c/italie, DR nr. 11, p. 114 and the following), Apud. C. Bîrsan, Convenţia europeană a drepturilor omului. Comentariu pe articole, I, Drepturi şi libertăţi (denumită în continuare Convenţia), Ed. All Beck, Bucharest, 2005, n. 526, p. 973-974.


8 Regarding the exclusivity of the property right, see V. Stoica, Drept civil 2013, op. cit., p. 125 - 126; O. Ungureanu, C. Munteanu, Conţinutul şi definiţia dreptului de proprietate în lumina noului Cod civil, in RRDP no. 3/2013.


The exclusive comparison to property rights is required by the essential difference between the nature of property rights, as rights of a person exercised over a thing directly and unmediated, such thing being in the possession of the person, and money claims as rights of a person against another person, exercised to compel the latter to give, do or not do something. Therefore, a thing is subjected wholly or partially, to the power of a person only based on a property right by means of which the fully unmediated power is exercised over a thing.

If we compare the two classes of rights, property rights are absolute rights, opposable to *erga omnes*, while money claims are relative rights as a person can have money claims only against a person or more people who are limited in number and identifiable.

Therefore, considering that art 535 of the Civil Code does not distinguish between patrimony rights by means of which things become assets, we can say that a thing, an economic value, will be an asset if it is object of one of the following property rights of patrimony: property rights, rights of superficies, rights of usufruct, rights to use, rights of inhabitance, rights of easement, rights of administration, rights of concession, security rights, other rights stipulated by the law as such [art. 551 of the Civil Code].

As tangible things are concerned, if the asset is not appropriated under a property right, the other patrimony rights do not operate over tangible things, respectively over tangible assets. We advocate, therefore, the opinion according to which a tangible thing will become an asset if it is object of a property right.

2. Rights vs. assets?

Under the influence of the foreign doctrine and the provisions of the New Romanian Civil Code, our literature has reshaped the idea according to which rights are not original assets, but can become assets through assimilation (art 542 of the Civil Code).

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17 Art. 542 of the Civil Code: (1) If not provided otherwise, property rights attached to real estate are subjected to the rules on such real estate (2) The other patrimony rights are subjected, within the legal limits, to the rules on movable assets.
Independently, it is generally accepted that patrimony rights can be, on their turn, object of patrimony rights; classical examples concern money claims and stocks-in-trade which could be called derived assets.

Going back to the theory of the “dichotomy” between rights and assets, its authors claim that rights are assets only when they are likely to be appropriated in legal terms, respectively they can be object of other rights of patrimony\(^\text{18}\), as per art 535 of the Civil Code on the “transformation” of things into assets.

This theory is contradicted by the texts of the Civil Code that assert the quality of tangible assets of several rights; we consider here art. 1897 of the Civil Code, which expressly indicates as intangible assets \(\text{(ab initio)}\) in terms of the contributions (in intangible assets) to a company’s share capital: receivables, shares issued by a company, promissory notes and other debt securities used by merchants – all of them being deeds that contain money claims.

Secondly, the definition of assets is not included in the legal regime of assets or the requirements to be met for the “transformation” of rights into assets. Logically, the provisions of art 542 of the Civil Code cannot be construed as conditioning the status of rights as assets to the former following the path at the end of which things become assets\(^\text{19}\).

Similarly, art 542 of the Civil Code provides that rights are subjected to the legal regime on assets, not on things. Art 543 indirectly admits, thus, that rights are included in the class of assets without additional requirements. Conversely, given that patrimony rights are the only intangible ones, we should include patrimony rights in the class of “intangible things”, which is not possible.

In our opinion, therefore, art 542 of the Civil Code should not be construed as regulating the distinction between rights and assets as per the meaning put forward by the new theory on the transformation of patrimony rights into assets.

It is more natural to construe this law as a classification of patrimony rights as tangible assets or assets of specific nature\(^\text{20}\), irrespective if they are or not object of another patrimony right. We have to add, however, that according to a coherent concept, intangible assets should be understood as including the property rights over tangible things\(^\text{21}\). Therefore, in a broad meaning, assets are both things and related rights\(^\text{22}\).

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\(^{19}\) The criticism on the legal definition of assets under art 535 of the Civil Code and the need to amend it in I. Reghini, Ş. Diaconescu, P. Vasilescu, *Introducere în dreptul civil*, op. cit., p. 386-387


In fact, the appropriation of things or (economic) values is made under the form of patrimony rights.

In the operation of the “elevation” of things, the patrimony right plays an essential, but not singular part. The patrimony right exists only if the thing likely to be object of such right exists and through the exercise of such right or power over the thing, it becomes an asset. It is natural, thus, that at the end of this process of the transformation of things in juridical terms, the asset is “imbued” by the right and the right becomes asset.

On the other hand, rights are those that represent the patrimony assets and not the assets as objects or creations and, therefore, in juridical terms we are not interested in the assets, but in the rights over such assets. Thus, property rights are the representation of assets in terms of patrimony. In other words, things and creations become things when they are subjected to a power through which they are appropriated and such appropriation is represented in juridical and patrimony terms under the form of rights. Moreover, assets can be dismembered and shared between different people when they are part of a patrimony. That’s why patrimony rights are deemed assets, independently to their appropriation through other patrimony rights.

3. The juridical nature of the general patrimony

Patrimony is not generally seen as an asset (res), but rather as a collection of assets. However, the idea to classify a general patrimony as asset, when seen from outside, exists in the juridical literature and there are significant arguments in this respect.

It has been considered that, “as form of universality, as well as universality itself, the patrimony (typical universality) is only an asset of the holder when third parties are concerned”.

According to the Romanian Civil Code, the legal criteria stipulated under art 535 of the Civil Code should be taken into account when analyzing if an asset belongs to the general patrimony. Thus, is the (general) patrimony object of a patrimony right?

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23 Gh. Beleiu, Drept civil român, op. cit., p. 94.
24 In the common law system, assets are not held in the sense of physical appropriation, but rights in such assets are held, in the sense of metaphysical appropriation, P. Matthews, op. cit., p. 315.
25 M. Raczynska, Parallels between the civilian separate patrimony, real subrogation and idea of property in a trust fund, în L. Smith, The World of the Trust, Cambridge University Press, 2013, p. 475
Following the analysis of the power exercised upon a patrimony by its holder, it has been considered that using the criterion on the object of such patrimony right offers a suitable answer. We note thus that the holder cannot hold a property right upon their patrimony because the patrimony is not an asset. This is the reason why a patrimony is inalienable

This assumes the patrimony is not an asset and reverses the legal operation, under which a power is classified according to its object and not according to the contents and effects of such power exercised upon a thing/creation.

The principle on assets’ identification is highly precise, thus the appropriation of a thing is made through the power exercised upon it in juridical terms and it is transformed into an asset.

From this perspective, the general patrimony belongs to its holder – natural or legal person – who exercises their power upon their patrimony and this power cannot be anything else but a right.

Given that the (general) patrimony is an abstract theoretical construction, a creation of the juridical thinking – part of the intangible realm – the holder would have a special property right upon it; it would be a wider notion of property, understood as “ownership of a right” or a right of intangible property.

The criterion regarding the (in)alienability of the general patrimony seems to significantly threaten the asset quality of the patrimony and any other asset, as it is considered that only values that are not subjected to legal restrictions on alienation can be assets.

In our opinion, when a thing is object of a patrimony right, it becomes an asset and the (im)possibility of its alienation under a ownership deed or its encumbrance is not a requirement regarding its acquirement or preservation of such status, irrespective of the nature of such asset.

Even so, an inalienable asset might be object of a legal deed that doesn’t presume a property transfer, and the asset preserves its status as long as there is at least one patrimony right that can be transacted.

Obviously, the alienation of a person’s general patrimony is not allowed, but it does not trigger incongruence with its asset status since it can be object of another patrimony right. For instance, the right to manage a patrimony can be object of a juridical deed since a patrimony can be managed by its holder or a third party.

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31 In this respect see: I. Reghini, Ş. Diaconescu, L. Pop, Introducere în dreptul civil, op. cit., p. 386-387; R. Rizoiu, Ipoteca asupra bunurilor incorporate: Cum urmărești ceea ce nu vezi?, op. cit., p.13.
32 Also see G. Boroi, C.A. Anghelescu, Curs 2011, op. cit., p. 78.
Patrimonies by appropriation and the personalist theory of patrimony

[art 792, paragraph (1) of the Civil Code]33; provided that a person is empowered under an agreement to manage the general patrimony of another person, such patrimony is object of the right to administer as patrimony right.

Similarly, assets that are public property [art 134(4) of the Constitution of Romania] are alienable and cannot be pursued, they have an economic value and can be object of property rights (other than ownership). They can also be given for administration or concession [art 866 of the Civil Code, Law no. 213/199834 and E.G.O no. 54/200635]. This example excludes the right to use public property since this property right is free of charge and does not focus on the economic value of the assets making object of the patrimony right [art. 866 of the Civil Code, art. 124 of Law no. 215/200136].

From a different perspective, a person’s general patrimony is deemed without value since it is inalienable and, thus, it cannot be deemed an asset.

But the patrimony theory does not reject the existence of a positive or negative patrimony value; on the contrary, the rule states that the general patrimony has an intrinsic value37, independently of its inalienability.

Although all these agreements could make us classify the general patrimony as asset (intangible and movable)38, we do not deem it to be the most correct option.

The inalienability of the general patrimony is absolute and it will survive as long as the holder exists.

Therefore, according to the Romanian law, the general patrimony can be deemed only as an attribute of personality (each person has a patrimony), characteristic that explains the idea of appurtenance and excludes its classification as asset39.

4. The juridical nature and characteristics of the patrimony by appropriation

The Civil Code defines patrimony from a personalistic approach: “Any legal or natural person holds a patrimony that includes all the rights and debts that can be monetized and belong to such person” [art 31(1) of the Civil Code].

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33 Art. 792 (1) of the Civil Code: the person empowered under an agreement or legate to manage one or several assets, patrimonies or patrimony that do not belong to them is a trustee of other person’s assets.
35 E.G.O no. 54/2006 on contracts for the concession of public property, published in the Official Gazette Part I no. 569/30.06.2006, as further amended and supplemented.
36 Law no. 215/2001 on local public administration, republished in the Official Gazette Part I no. 123/20.02.2007, as further amended and supplemented.
37 C. Hamangiu și colab., Tratat, I, op. cit., n. 1589, p. 523.
38 “Any intangible creation of the legal thinking must be classified as intangible asset”, P. Catala, apud. R. Rizoiu, Ipoteca bunurilor incorporale: Cum urmărești ceea ce nu vezi?, op. cit., available online at: www.idrept.ro.
39 See V. Stoica, Drept civil 2013, op. cit., p. 10.
The model is from the Civil Code of Québec that defines patrimony in art 2 and states that: “Each person has a patrimony”.

As regards the classical theories on patrimony, the definition in art 31(1) of the Civil Code is not a surprise, but a reconfirmation of our legal system’s adherence to the subjective idea on patrimony, seen as attribute of personality.

The option has been criticized for having kept the dogma stipulated by the subjective theory on patrimony that hinders this legal institution’s modernization.

It is essential that the new Civil Code allows the division of the general patrimony into smaller patrimonies to serve a destination or purpose; therefore, the patrimony can be object of a division or purpose according to the law [art. 31(2) of the Civil Code].

Therefore, the general patrimony (concept of genus) is divided into smaller patrimonies which are or not patrimonies by appropriation and the personal patrimony, all these smaller patrimonies being included in the holder’s general patrimony.

The patrimonies regulated by the Civil Code are: patrimony of succession (heritage), joint assets of spouses and patrimonies by appropriation allocated for a certain purpose.

Limiting ourselves to the goals of this study, given the current law framework, the types of the patrimonies by appropriation, as stipulated or determined by the law, are: patrimonies assigned by professionals to practice a certified profession, such as professional patrimonies (by appropriation) (i); patrimonies assigned by economic operators to a certain economic activity as per the provisions under E.G.O. no. 44/2008, respectively commercial patrimonies (by appropriation) (ii); fiduciary patrimonies, respectively fiduciary patrimonies (by appropriation) (iii) and the patrimonies of simple companies, respectively company patrimonies (by appropriation) (iv).

The proper approach of the issues regarding the juridical nature and characteristics of patrimonies by appropriation involves accepting the distinction between the two juridical concepts: general patrimony and patrimony by appropriation; the latter is not a patrimony in the classical meaning of the concept that applies to the general patrimony. There is not, in essence, identity between the general patrimony and the patrimonies by appropriation.


41 In the same respect see V. Stoica, Drept Civil, op. cit., p. 11; A.A. Chiș, Obiectul cărții funciare în lumina Noului Cod civil - dispoziții speciale privind înscrierea drepturilor tabulare, in Revista Română de Drept Privat nr. 3/2012, n. 2.1.3., available online at: www.idrept.ro.

42 According to art 31(3) C. civ: Patrimonies by appropriation are fiducia patrimonies, created according to the provisions under title IV of book III, those assigned to practice a certified profession and other patrimonies determined according to the law.
The patrimony by appropriation is not original, but derived from the general one, through the will of its holder according to the law [art 31 of the Civil Code].

The general patrimony is, therefore, the creation of the law while the patrimony by appropriation is the creation of the general patrimony’s holder.

That means that the existence of the patrimonies by appropriation is not indissolubly connected to a person as the person can freely decide if they create or not a patrimony by appropriation. This is called potestative right.

Thus, the patrimony by appropriation derives from the dogma on the general patrimony and is not an attribute of personality.

Given that it is not an attribute of personality, the patrimony by appropriation does not take entirely over the genetic matrix, the DNA of the parent patrimony, respectively the legal nature and characteristics of the general patrimony.

The classification of an asset from the patrimony by appropriation must not be fully subordinated to the legal regime of the general patrimony because, although it is a “patrimony in miniature”, it enjoys its own legal regime, highly different from those of the general patrimony in which it is included or, in other words, from which it is created by the holder.

The main characteristic of the patrimony by appropriation, taken over from the general patrimony, is that the patrimony by appropriation is a juridical universality.

The patrimony by appropriation appears as a “fraction of universality”, a legal universality with rights and obligations connected by their purpose, created by the exclusive will of the general patrimony’s holder and acknowledged by the law.

But the patrimony by appropriation is not only a legal university, but an asset, as well. And we say this based on the legal criterion stipulated under art 535 of the Civil Code, according to which a thing, creation, economic value becomes an asset when it is object of a patrimony right.

Created under the law, through the will of the general patrimony’s holder, as stipulated by the law, the patrimony by appropriation is a juridical creation with economic value and which is object of a patrimony right.

It is acceptable, thus, to say that the patrimony by appropriation is an asset when it is object of a patrimony right. For instance, the patrimony by appropriation can be object of a property right, administration right etc.

Therefore, the patrimony by appropriation is a movable asset; art 539(1) of the Civil Code and art 542(2) of the Civil Code stipulate various criteria in this respect:

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43 Art 31 of the Civil Code, paragraph (1): any legal or natural person holds a patrimony that includes all rights and debts that can be monetized and belong to such person; paragraph (2): it can be object of a division or appropriation only according to the law.

the assets that are not immovable according to the law are movable assets. Moreover, since it is a legal creation, the patrimony by appropriation is an intangible movable asset\(^{45}\).

But the asset quality of the patrimony by appropriation is highly related to its in(alienability) and we will maintain this requirement without denying the ideas highlighted in the section on the general patrimony.

We showed in a previous study\(^{46}\) that the patrimony by appropriation can be alienated, as legal universality, by means of deeds among living people and we advocate this idea based on those arguments.

Moreover, the Romanian law does not allow for the general patrimony to be alienated during the life of its holder given the inseparable connection between person and patrimony and this is what triggers the universal inalienability of the patrimony by means of deeds between living people\(^{47}\).

But such indestructible connection does not exist between holder and their patrimony by appropriation, as the latter is not an attribute of personality and, thus, it can be alienated by means of deeds among living people.

Therefore, patrimonies by appropriation are not (a priori) inalienable assets and, as per the provisions of art 2329(2) of the Civil Code related to art 629(3) of the Civil Code, they can be pursued.

But the inalienability and the restriction to pursue an asset can be stipulated under the law, an agreement or will, save for the unilateral legal deeds [art 2329 of the Civil Code related to art 627(1) of the Civil Code]; even for such exceptions, the restriction to pursue an asset operates only for the benefit of the asset’s acquirer.

That means that if the professional and commercial patrimonies are created based on a unilateral expression of will, respectively unilateral legal deeds, the holder cannot protect their patrimony by appropriation under a unilateral statement of inalienability and cannot create a restriction on the pursuit of the assets because the Romanian law does not acknowledge the validity of such expression of will.

However, as effect of the creation of a patrimony by appropriation, the personal creditors of its debtors and/or the creditors whose claims do not arise from such patrimony by appropriation, cannot pursue the assets from such patrimony by appropriation for a shorter or longer period; conversely, the

\(^{45}\) In the same respect see St. D. Cărpenaru, *Tratat de drept comercial român*, 4\(^{th}\) edition, updated, Ed. Universul Juridic, 2014, p. 96-97. The distinguished expert assimilates the stock-in-trade to the patrimony by appropriation and decides that the latter is an intangible movable asset in legal terms.


\(^{47}\) A patrimony is a reality that accompanies someone during their existence, but upon the death of the holder, the connection between person and patrimony disappears and it will be passed along to the deceased’s heirs.
creditors of the patrimony by appropriation are under a temporary restriction (for commercial patrimonies) or definite restriction (for professional and fiduciary patrimonies) to pursue the assets from the personal patrimony of the holder of the patrimony by appropriation.

The case of the fiduciary patrimony is totally different. It is usually created under a fiducia contract, which allows, de plano, an inalienability clause and a restriction to pursue assets.

As a general rule, the inalienability clause is implicit in such contract because the trustee must pass along to the beneficiary, in the future, the ownership over the fiduciary patrimony [art 627. (4) of the Civil Code].

Therefore, the fiduciary patrimony is inalienable and cannot be pursued as long as it is part of the trustee’s patrimony.

The principle on the patrimony’s inalienability refers, without doubt, only to the general patrimony in its entirety [art 31(1) of the Civil Code], excluding patrimonies by appropriation\(^48\).

In conclusion, the patrimony by appropriation has a dualistic legal nature, being a legal universality and an intangible movable asset.

5. The impact on the subjectivist patrimony theory triggered by the regulation of patrimonies by appropriation

Given the nature and characteristics of the patrimonies by appropriation, in general, and of those considered atypical, in particular, the axiomatic principles from the subjectivist theory on patrimony, enacted in the Romanian law, seem to lose their original power.

Thus, patrimony divisibility and the reality of the patrimonies by appropriation have determined the doctrine to say that the new Romanian Civil Code has enacted exceptions from the principle of the patrimony uniqueness\(^49\).

Without rejecting this opinion, we deem that the answer to the issue of the general patrimony’s uniqueness is given from our perspective on patrimonies.

If we consider the patrimonies by appropriation as being separate and independent from the source of their existence, i.e. the general patrimony, and will consider them as patrimonies reproducing the “parent patrimony”, the only

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\(^48\) Adverse opinion in Irina Sferdian, Patrimoniul profesional individual afectat desfăşurării unei profesii libere în reglementarea Codului Civil (Legea nr. 287/2009), in Revista Dreptului no. 7/2012, p. 50; E. Chelaru, in Baias et all., Noul Cod civil, op. cit., p. 35.

conclusion is to admit the existence of such exceptions from the principle of the patrimony uniqueness.

But we cannot assimilate patrimonies by appropriation to a general patrimony as the differences between them are significant and lead to separate legal regimes and, thus, in a restrictive construal, we will analyze the unique nature of patrimony solely from the perspective of the general patrimony. In a wider sense, we can consider that someone can have several patrimonies – a general patrimony and one or several patrimonies by appropriation.

We will have, however, a totally different answer if we analyze the patrimony by appropriation as a legal creation, which does not reproduce the pattern of the general patrimony, as part of it – more or less independent (according to the type of patrimony by appropriation and the will of its holder), with own characteristics, different from those of the “parent patrimony”.

From this perspective, the patrimonies by appropriation, whatever their type, are not exceptions from the unique nature of the general patrimony.

The legal enactment of the patrimony’s divisibility is relevant for the unitary nature of patrimony\textsuperscript{50}, the two characteristics being incongruent and the unitary nature being removed from the characteristics of the general patrimony. The consequences of giving up the principle of the general patrimony’s unity mainly impact its function of joint security for creditors. Here appears a specialization of the general pledge of the creditors of the debtor as holder of patrimonies.\textsuperscript{51}

Another dogma of our law is that only legal or natural persons have a patrimony. In consequence, there cannot be a patrimony without a holder.

In this respect, the Romanian law provides examples of patrimonies by appropriation that can be deemed atypical in terms of their ownership.

We refer here to the patrimony of a small company and the patrimony of family businesses whose regulation launched the discussion on how the objective, modern theory on the patrimony without holder is perceived since its creation by the German theorists Brinz and Bekker at the end of the 19th century. According to its authors, the existence of patrimonies, legal universalities, is accepted without a person or legal personification.\textsuperscript{52}

\textsuperscript{50} E. Chelaru in Flavius Baias et all, Noul Cod Civil, op. cit., p. 35; I. Sferidan, Patrimoniul profesional individual afectat desfășurării unei profesii liberale în reglementarea Codului civil (Legea nr. 287/2009), Revista Dreptul no. 7/2012, p. 44; In order to preserve the unitary nature of patrimony see: V. Stoica, Patrimoniul de afectațiune – continuitate și reforma, Revista Română de Drept Privat no. 2/2013, p. 22;

\textsuperscript{51} See, L. Tuleașcă, Executarea patrimoniilor de afectațiune, Revista Română de Executare Silită no. 2/2015; L. Tuleașcă, Patrimoniul de afectațiune – instrument în derularea afacerilor, op. cit.

We do not believe that the new Civil Code creates breaches in the subjectivist theory of patrimony with regard to the ownership of the general patrimony because, as indicated, there is no identity between the patrimony by appropriation and the general patrimony. Moreover, the type of power exercised upon such patrimonies is different.

Secondly, in our opinion, the patrimony of a simple company and family businesses are joint patrimonies by appropriation and the shareholders, respectively the members of the family business are the co-holders of such patrimonies by appropriation.

The discussion regarding the ownership of the company patrimony by appropriation assigned for the activity of a simple company starts from a brief presentation of the legal regime of such collective entity.

A simple company is established under a company contract by means of which: “two or more people undertake to collaborate to carry out an activity and to have a contribution to it in money, goods, knowledge or services, in order to share benefits and to use the profit that might result” [art 1881(1) of the Civil Code].

A simple company does not have its own patrimony or legal personality, but it has many of the elements of a law subject: name, share capital, social patrimony, own bodies: shareholder assembly and administrators, tax attribute and it is registered with the tax authorities.

Given its structure and operation, a simple company is more than a company contract; it is an “operational entity” with “remnants of a legal personality”.

As regards the (in)existence of a company patrimony by appropriation – a patrimony assigned for the operation of a simple company – the alternative use of the phrases – “joint assets of the shareholders’, “company assets” and “social patrimony” – might create confusion.

The patrimony of a simple company is, however, but a joint patrimony by appropriation created to be used by the simple company, independent patrimony under the common property of shareholders for the reasons to be detailed below.

Firstly, the legal regime of contributions in-kind to the share capital [art 1896 of the Civil Code – art 1897 of the Civil Code] show the transfer of the ownership right or other property right over the assets brought by shareholders as contribution, respectively a transfer of some assets from the shareholders’ patrimony into another (company) patrimony assigned for the company’s operation.

It is important to say that art 1883(1), 2nd thesis of the Civil Code, stipulates that the contributions to a simple company’s patrimony become the joint property

55 In the same respect, see Gh. Piperea în Fl. A. Baias şi colab., Noul Cod civil, op. cit., p. 1911.
of the shareholders, save for when they have expressly agreed that they will be used jointly and the rules say that the share of each shareholder regarding the loss and benefits is proportional to their contribution to the share capital [art 1902(2) of the Civil Code].

Secondly, the assets brought as contribution are “share assets” or “company assets”, namely they are used for the company’s benefit [art 1904 of the Civil Code]. These phrases also suggest the existence of a distinct patrimony that is used for the company’s operations.

Moreover, the debts of third parties to the company cannot be compensated with the debts of a shareholder to such third party [art 1907(3) of the Civil Code]; this also suggests the existence of the company patrimony, distinctly from the patrimonies of the company’s shareholders.

Moreover, the company creditors^56 will first pursue “the joint assets of the shareholders”, respectively the assets from the share patrimony and, secondly, the personal assets of the shareholders; the shareholders can protect themselves from the direct pursuit of the company creditors.

Therefore, the shareholders are liable with their personal patrimony for the company’s liabilities, secondarily and proportionally to their contribution to the share capital only if the company creditors have not recovered their money from the company’s assets (art 1920-art 1947).

Following the segregation of patrimonies, the shareholders’ personal creditors cannot pursue the assets of the company patrimony [art 1920(2) of the Civil Code]. They can only pursue the share of the shareholder-debtor up to the liquidation of the company patrimony or the loss of the shareholder position.

When the company is liquidated, the company assets will be transformed into money to pay company debts. The net asset will be used to reimburse the shareholders’ contributions to the share capital. The difference is profit and will be distributed to shareholders proportionally to each shareholder’s share of benefits, respectively the contribution to the share capital, save for adverse provisions under the company agreement or shareholder decision. The company assets that are not sold will be distributed in-kind according to the rules on the distribution of joint assets.

And not lastly, art 1946(3) of the Civil Code^57 stipulates that when a simple company is liquidated, the asset used as contribution (by means of ownership transfer) can be returned if the asset is still part of the patrimony (appropriated for the activity of the simple company). Thus, the distinct patrimony used for the company’s activity is expressly acknowledged.

^56 The Civil Code also uses an improper phrase: “joint creditors of the shareholders” referring to the simple company’s creditors.

^57 Art. 1946 (3) C. civ.: If the asset brought as contribution is still in the patrimony, it will be returned in-kind, upon the request of the shareholder, provided that a certain sum is paid if necessary.
Therefore, the company patrimony of a simple company has all the characteristics of an independent patrimony appropriated for the activity of the simple company and we face a patrimony by appropriation – joint property of the company’s shareholders, each shareholder owning a share proportionally to their contribution to the share capital, respectively to the company patrimony.

In conclusion, the company patrimony is a joint patrimony by appropriation of the simple company’s shareholders.

As regards the patrimony by appropriation of a family-owned enterprise the issues of its ownership are similar to that of the company patrimony.

As per E.G.O no. 44/2008, entrepreneurs working as self-employed professionals, owners of individual companies or members of a family-owned enterprise, can set up patrimonies by appropriation for their activities, distinctly from the general pledges of their personal creditors.

All patrimonies by appropriation stipulated by E.G.O. no. 44/2008 are patrimonies by appropriation (commercial patrimonies) and, among them, only the patrimony by appropriation of a family-owned enterprise poses an ownership issue since a family-owned enterprise, composed of 2 or more members of the same family, is not a legal person [art 30(1) of E.G.O. no. 44/2008].

Thus, a family-owned enterprise is a functional entity, without own patrimony, but, under the articles of incorporation or addendum, its members can stipulate the formation of a patrimony by appropriation [art 30(2) of E.G.O. no. 44/2008] and the shares of each member to the formation of such patrimony.

For the obligations undertaken while operating the family-owned enterprise, its members are jointly and indismissibly liable with the patrimony by appropriation if it exists and, secondarily, with their entire patrimony, as per the shares to the company’s net income [art 31 of E.G.O. no. 44/2008].

Moreover, the definition of the family-owned enterprise’s patrimony by appropriation (commercial patrimony) clearly stipulates that it belongs to the members of the family-owned business: the patrimony by appropriation is “all the assets, rights and obligations (…) of the family-owned enterprise’s members, allotted for an economic operation, formed as distinct portions of the patrimony (…) of the family-owned enterprise’s members, separated from the general pledge of their personal creditors” [art 2(j) of E.G.O. no. 44/2008]. Obviously, the law stipulates both the segregation of the shareholder’s patrimonies and of their creditors.

Consequently, the patrimony by appropriation of a family-owned enterprise is not owned by such company and it is not its property. It is formed by the enterprise’s members and is allotted for the activity of the family-owned enterprise.

58 E.G.O. no.44/2008 on the economic activities carried out by self-employed natural persons, individual companies and family-owned enterprise, published in the Official Gazette Part I no. 1 328 of April 25, 2008, as further amended and supplemented.
Therefore, the patrimony by appropriation of a family-owned enterprise is a joint patrimony (by appropriation) that includes both the initial contributions of its members and the assets acquired for the enterprise’s activity. The members of the family-owned enterprise have a joint ownership right over the common patrimony, based on the shares mutually agreed upon under the articles of association or addendum.

In conclusion, the patrimony of the family-owned enterprise and of the simple company are joint patrimonies by appropriation, “jointly owned by the holders of two or more distinct patrimonies,” in which the shareholders have joint ownership on shares and each shareholder is the owner of a share from the patrimony by appropriation [art 623(1) of the Civil Code].

None of the cases analyzed above corresponds to the formation of a patrimony (by appropriation) without holder as gap in the subjective theory of the patrimony.

Moreover, the fiduciary patrimony – patrimony by appropriation with a highly special configuration – has a holder. The provisions of art 773, final thesis of the Civil Code, are explicit in this respect, respectively the fiduciary patrimony is an independent patrimony in the general patrimony of the trustee. Thus, the holder of the fiduciary patrimony is the trustee, independently of type of fiduciary property: “attenuated and imperfect properties” or conditioned property.

And not lastly, the right to alienate patrimonies by appropriation under deeds between living people does not affect and does not create a breach in the subjective theory of the general patrimony seen as attribute of personality that justifies its inalienability, given that patrimonies by appropriation do not take over this characteristic of the general patrimony.

Conclusions

The patrimony by appropriation is not a general patrimony, but a new creation whose existence is decided by the holder of the general patrimony in the cases stipulated by the law.

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59 Art 32(3) of E.G.O. no. 44/2008: “The deeds, under which assets are acquired for the activity of the family-owned enterprise, are concluded by a representative (…). The acquired assets are the joint property of the members as per the shares stipulated under art 29(1) or art 30(3), as the case may be”.

60 Entities without legal personality, as per the provisions of art 1892(1) of the Civil Code and art 30(1) of E.G.O. no. 44/2008.

61 The joint professional patrimony is a legal type of the patrimony. As regards the distinction between the types of ownership and types of patrimony, see V. Stoica, Drept civil 2013, op. cit., p. 278.

62 See V. Stoica, Drept civil 2013, op. cit., p. 20-21 and p. 278.

63 For a different opinion, see A. Oprea, op. cit., n. 20, p. 203.

It means that the existence of the patrimonies by appropriation is not indissolubly related to a person, provided that a person is free to decide if they form or not a patrimony by appropriation. This is a potestative right.

As it is not an attribute of personality, the patrimony by appropriation does not take over the genetic matrix – the DNA – of the “parent patrimony”, respectively the legal nature and characteristics of the general patrimony and, it separates itself from the main dogma of the subjective theory of patrimony.

Based on such argument, we can determine and accept both the dual legal nature of the patrimony by appropriation: legal universality and intangible movable asset and its special characteristics, among which its alienability.

The changes occurred with the regulation of the patrimonies by appropriation on the theory of patrimony are substantial, but they are not breaches in the subjectivist theory of the patrimony as regards its ownership and uniqueness, but only in terms of its unitary nature.

The special nature of the patrimony by appropriation justifies its separation from the theories of the general patrimony, its independency and specialization.

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