CONSIDERATIONS ON THE EVOLUTION AND THEORIES OF THE HERITAGE

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ABSTRACT: *THE NOTION OF HERITAGE GAVE BIRTH TO A LOT OF CONTROVERSIES AND KNEW MANY MEANINGS, STARTING FROM THE ORIGINAL MEANING OF THE LATIN WORD PATRIMONIUM THAT DESIGNATED THE ASSETS INHERITED FROM THE FATHER AND TO THE MEANINGS THAT THE CIVIL, ECONOMIC, SOCIOLOGICAL AND ADMINISTRATIVE LEGAL THEORIES HAVE ESTABLISHED THEM. THE PREVIOUS ROMANIAN CIVIL CODE DID NOT DEFINE AND CONTAIN RULES ON THE LEGAL INSTITUTION OF THE HERITAGE, SO DIFFERENT OPINIONS IN THE DOCTRINE ABOUT THE CONCEPT OF HERITAGE WERE ISSUED. THIS ARTICLE ANALYZES THE EVOLUTION OF THE CONCEPT OF HERITAGE FROM ITS ORIGINS TO THE REGULATION OF THE NEW ROMANIAN CIVIL CODE.*

KEY WORDS: *HERITAGE, RIGHTS, OBLIGATIONS, ASSETS.*

1. The evolution of the concept of heritage

The idea of heritage has had an interesting development along the history. The appearance of the concept of heritage cannot be precisely determined, but it has its origins in early Rome, when people worked together to conquer territories and later to defend them. [1]

The conquered territories, and also the tools or weapons were divided between the winners and thus is being sketched, in a primitive form, the idea of individual heritage. But, in that moment, when an advanced legal thinking was not yet developed, the ownership of the assets was of the whole community and we cannot speak of a genuine individual heritage, but rather a precarious detention.

To Romanians, the legal development of property implying the appearance of individual estates consisted, in a first phase, in getting out of the status of individuals, through the division of the assets belonging to the community.

The joint tenancy was initially done by dividing a good to each tribe, of different race, that belonged to the Roman people. A division in ten parts has also taken place within each tribe, one part for each *curie*. [2]

The next progressive step in the creation of individual heritage was the tribal joint tenancy, on curie, and sharing the assets between *pater familias*; the only ones able to hold a heritage composed of weapons, house, land, slaves, etc. This aspect is clear from the writings of Varro in *De jugera* according to which each every Roman citizen could have *jugere* of earth. During this period, women and children could not have individual heritages, because the family organization did not allow the existence of an individual personality of civilian capabilities to the other family members, besides *pater familias*, who was responsible for all the acts of his subjects. The Roman civil law was, however, in a dynamic development and tended towards an expansion of the legal capacities, both of the other members of the family and slaves. In this respect, Ulpian in Dig.77 leg.14 shows how the slave could compel himself under a natural obligation.

Another step in the progress of the Roman law was the possibility of slaves, and *filii familias*, to have a *peculium*. In respect of *filii familias*, it acquires contractual capacity over time, the ability to accumulate debt, could oblige, but not by *dotis dictio* or through a loan, as it was not about a heritage, because the assets that formed the heritage were not determined, they were not separately shown. The concept according to which the heritage is an algebraic sum, in which the rights are the positive element, the debts the negative one, occurs since the Roman period by the maxim "*bona non intelliguntur, nisi deducto aere alieno*" where the good does not have the actual meaning, and the heritage is considered what remains after deducting debts. [3] The Romans were the ones who felt the need to consider the assets, namely the rights and obligations of a person, grouped, as a whole, and not individually. One explanation could be that the Romans had especially into account the death of a person, because when they talked about inheritance they used either the word *bona* or the synonym word *hereditas*. Many expressions were used in the Roman texts to describe the same concept, such as the terms *familia*, *pecunia*, *familia-pecuniaque* or *bona* to designate all assets of a person.

Some authors believe that the concept of heritage was known by the Romans, being mentioned in the Law of the XII Tables, but that by the concept of heritage was only understood all bodily things designated by *familia* or *pecunia*. [4] At their origin, the expressions used by the Romans to designate the heritage of a person expressed: *familia*- slaves *bona*- assets *pecunia*- animals, and later *familia-pecuniaque* - an amount of money. It is noted that the term pecunia which initially designated the animals of a family, extended the coverage area also on the currency once it appeared.

The expression *patrimonium* occurs during the Roman Empire, deriving from *pater familias*. Thus, in the Law 182 Dig. C 50 T.16 " *Pater familias liberi peculium non potest, cum admodum, nec servus bona* " and in the Law 1, C par. V Dig. C 15 T.1 is found peculium: *Peculium dictum est pusilla pecunia, sive patrimonium pusillum*". By *peculium* was meant the assets belonging to a slave or a non-emancipated filius familias, but it is not a heritage in fact, but a fraction of the master's assets, entrusted to the slave for administration or a part of the father's heritage entrusted to his son, but who could not acquire the assets as long as he was under the *patria potestas* of the father, so until his death. And *peculium* had its own evolution, from *peculium castrense*, that individual heritage of the soldier and *peculium quasi castrense* that have the same features and up to another individual heritage - *bona adventicia*.

2. Theories about heritage

To understand the defining legal characters of the heritage and the crystallization of a definition of this, two classical theories were issued: the personalist theory of heritage or heritage-personality and the theory of heritage- purpose or of affectation. [5]

a) The personalist theory of heritage

This theory about heritage also known as "The classical theory of heritage" was the first expressed in a rational and systematic way and was developed in XIX cen. by C. Aubry and C. Rau, professors at the Faculty of Law in Strasbourg. The two illustrious French lawyers presented the heritage characters in a rigorous way, leaving very few opportunities for interpretation as exception. [6]

The theory of personality heritage is based on the idea that heritage is an emanation of the personality and the expression of judicial power invested in one person. [7] The French authors had in mind when defining the heritage that the objects of the civil rights can be considered only by taking into account their usefulness for the person exercising rights on those objects. [8] This concept emphasizes a direct link between the notion of person and the notion of heritage viewed as a whole of the rights and duties appreciable in money. Aubry and Rau believe that the heritage includes all present and future assets, even those acquired at birth and which have an inextricable link with the person.

The approach, in the case of the classical theory on heritage is extremely pronounced, because heritage borrows the essential characteristics of personality, being a part of it, named *legal power of a person* [9] and from this perspective the heritage becomes indivisible and inalienable as the person itself. Four rules were produced from the classic concept on heritage in the legal doctrine:

1. *Only people can have a heritage*, because the existence of the subjective rights is directly related to person and thus the heritage cannot exist without person, because the heritage is considered as the projection of the legal personality on assets. [10] Only human beings (people) can have a heritage, of all beings, because they are the only ones that have personality and hence the ability to acquire and undertake. To highlight these features, the plastic definition given to heritage by the Roman law professor Cornil in „Mélanges Girard" should be mentioned, which is *an alluvium of the personality*. [11]

2. *Any person has a heritage*

This second rule is given by the fact that everyone has the ability to become the subject of law, to acquire rights or contract obligations and, therefore, to have a heritage. This Heritage should not be considered as only a mass of assets but also the ability to have rights and obligations, aptitude springing from the human personality. Therefore, it was considered that the heritage exists even if it is not composed of any kind of good and the person has debts, because the existence of heritage is not conditioned by its content, the subject of law having the possibility to acquire assets in the future. The heritage does not only evoke the idea of *wealth* and *poverty* does not remove its existence. [12] The beggar's situation is exposed regarding this that apparently does not have any heritage. He still has a heritage consisting not only in the clothing that is dressed, but also in the ability to be right holder. [13]

In this sense, the existence of heritage is debated based on the existence of a person who, according to the maxim "*infans conceptus pro nato habetur quoties de ejus commodis agitur*" has its beginning at conception. More precisely, the question of whether a child once born has or does not have a heritage taking into account that he has no good with heritage value. It was considered that a born child although he has no good, he still has a

heritage of basic rights such as the right to life, the right to liberty, nursing, etc., and also the ability to acquire assets in the future, or to assume obligations. Looking from this angle the problem of heritage, the conception of heritage without assets was reached, being considered a more common vision, like an empty tank, devoid of content, but susceptible to be filled anytime. So as tank exists even if it has no drop of liquid inside, a person's heritage exists, even if it does not contain assets because the person has the ability to acquire them. [14] In the doctrine was launched the idea that the theory of empty heritage would have the origin in the Roman law, in matters of inheritance, invoking the Roman jurisconsult Papanian "hereditas etiam sine nullo corpore juris intellectum habet", namely the legacy exists even if the deceased leaves no solid material at his death. The idea is countered by the fact that the Romans did not reach that depth, at that stage of legal thinking in order to issue theories about the heritage, this having a collective and distinct existence, but unexpressed and unexplained at the level of a concept. [15]

3. *A person can have only one heritage*

This rule is called the rule of unit and indivisibility of the heritage; it confirms that the heritage can only be one as long as the person is one. Starting from the connection of the heritage with the personality, it is noted that it is indivisible like the personality.

There are times when the law recognizes, in addition to the heritage itself, certain universalities of law, masses of assets with a special affection, considered exceptions to the rule. In this regard it should be mentioned the situations arising from acceptance of inheritance under the benefit of inventory and by separation of the heritage requested by the creditors of a debtor to avoid the confusion between the deceased's heritage and the one of the heirs. By virtue of this personalist conception of the heritage, the indivisibility is concerned not only with the heritage as universality, but also its component elements. Therefore the general pledge is also indivisible that the creditors have on heritage items; they can be favored only by granting special guarantees by a pledge over a movable good or a mortgage on a property.

4. *The inalienability of the heritage*

Regarded as an attribute of personality, the heritage cannot be separated from the civil code by prohibiting the conclusion of pacts on unopened successions, namely no person with inheritance vocation could dispose of his share of the inheritance before the death of the holder of heritage. The rule is that the heritage cannot be transferred except by death, as it is a universal law. The effect of applying this rule is the confusion of the deceased's heritage with that of the heir. The heir is obliged to pay the debts *ultra vires hereditates* because to succeed in a heritage means to succeed in a person, and this thing is to bear all the debts of the inheritance, even if the debts exceed the value of inherited assets. [16]

But the restriction regarding the transmissions with universal title does not prevent the alienation of assets considered in their individuality by particular title documents. The transmission of the heritage to a natural person will thus be done by succession, when the heirs not only collect certain assets, but all his inheritance rights and all debts. [17]

In legal persons the transmission of heritages occurs when they end, as a consequence of the reorganization through merger or division. [18] The theory of the personality heritage was criticized by the representatives of objective theory, criticism aiming at the following:

– everyone has a heritage not because it would be an emanation of the personality, but because every person has a minimum of assets, and this does not exclude the existence of heritage fractions independent of the holder's person. [19]

– the natural and legal persons have rights and obligations, and the heritage is represented by all the rights and obligations.

– it is inaccurate that a person can only hold one heritage, because there are situations where there exists fractions of wealth or masses of assets with special affection and without a connection with the idea of the personality. These real universalities contradict the conception of unit and indivisibility of the heritage.

– the rule of inalienable of the heritage was removed in the judicial practice when debts were imposed on the task of acquirer of the debtor's wealth by means of particular title transmission, if he has alienated the entire property in bad faith.

b) Theory of the heritage of affectation or objective theory

According to this theory, the rights and obligations considered unitary and constituted universality do not depend on the membership to a certain person, their reporting being done on the purpose or affection which the holder has given them. [20] Thus, the heritage is a mass of assets showing an economic value and affected in common goal. [21]

The notions of heritage and personality should be separated - heritage is independent of personality; it is a mass of assets and it is does not exist in the absence of the actually near assets. [22]

According to this theory a person can have multiple heritages or fractions of heritage and more, patrimonies without subjects of law can exist, the so-called heritages-purposes such as, for example, foundations. The idea of affectation opposes that in the heritage to enter the future assets, the heritage comprising only the existing assets and the debts that are part of the heritage are those that have direct and immediate link with the assets, with the economic and social destination of the heritage. [23]

The criticism brought to this theory is that it minimizes the existence of the person as a subject of law in relation to the heritage, although only individuals can have rights and obligations. [24]

c) The mixed theory of the heritage

The two theories concerning the heritage present both advantages and questionable exposures and therefore, taking the elements of their content, which are not mutually excluding, we can speak of a mixed theory of the heritage.

The personalist theory of the heritage and the heritage of affectation theory became compatible when collective subjects of law have been recognized in a wider variety not only in the public law, but also in the private law. Thus arose, in addition to state, local communities, public institutions and other collective subjects of law: companies, associations and foundations, non-profit. From this theory we can hold that the heritage belongs to a person and that everyone has one heritage; the uniqueness of the heritage does not exclude its divisibility.

Also, we have to retain the idea of purpose or affectation from the heritage of affectation theory to show that the heritage of a natural or legal person, even if it is unique it can be divided.

3. Conclusions regarding the legal nature of the heritage

The previous Civil Code used the term heritage, but did not define it. In this respect, art.781, 784 and 1743 of the previous Civil Code referred to the separation of heritage, caused by the creditors of a deceased person to avoid the confusion between the heritage of *cujus* and the one of the heir. Thus, the creditors of the deceased person could track the assets left by this, without going into competition with the creditors of the heir.

Also art.1718 of the old Civil Code referred to the movable and immovable assets, present and future, which formed the unsecured creditors' right of general pledge, and art.685 of the previous Civil Code regulated the acceptance of the inheritance under the benefit of inventory, which avoided the confusion of the heir's heritage with that of the deceased and limited the liability for the obligations of the deceased up to the value of the left legacy.

To emphasize the notion of heritage in the strictly legal sense, we must stop on the civil legal report, with its components: topics, content and object. [25] The content of the civil legal report consists of the subjective rights and the correlative obligations of the subjects of civil law report. The subjective rights and the correlative obligations may be patrimonial, when they have an economic content and personal-patrimonial, which do not have such a content. Regarding the notion of heritage, it only interests the subjective rights and the correlative obligations that have an economic content.

The rights and obligations of a person can be related to specific assets considered *ut singuli* compared to the other rights and obligations of the same subject by law, but these may also bear on a set of assets, on universality. [26]

In the French legal literature to analyze the concept of heritage it appeals to the concept of field. French Civil Code opposes the goods belonging to natural persons also on those that they may freely dispose of, the assets that are managed by legal persons (moral) of the public law. Traditionally, the latter is subdivided into assets of public field of the state and assets of private field of the state or belonging to other local collectivities (departments, regions, etc.). Certain assets belong to the public legal persons to the same extent that they belong to natural persons, as for example the public forests; these assets form what is called the private domain. Other assets, such as ports, belong to the public community in an own way, in that they are inseparable from their vocation of commons assets forming the public domain. Even if it is about one or the other of the domains, the considerations of public law are likely to alter the classical notion of heritage as expressed by the private law. [27]

The heritage currently means the wealth or richness of a person. The larger acceptance of the notion of heritage includes the public heritage, as shown in the Water Law no. 107/1996, the geo-ground cultural heritage, biological-flora and fauna heritage or the linguistic heritage. [28]

In the public international law, the notion of common heritage of humanity emerged and developed, especially in order to ensure a certain balance between the states in terms of the resources of the sea, submarine land or atmosphere. [29] The notion of common heritage of humanity is very close from the legal point of view to the notion of national heritage.

The assets are not always private individual, they can be considered to be part of an assembly, which in turn is part of universality. The existence of universality entails legal consequences: on the one hand, there is some connection between these rights through

their membership of the same assembly, and on the other hand, the rights group is subject to different rules from those by which act the rights taken in isolation. [30]

The traditional distinction is made between the universality of law - heritage and the universalities in fact. As a matter of fact, the only universality of law permitted by our law is the heritage. [31] There are universalities in fact established for a special legal report by the natural persons' will and consist of a meeting of active elements that could also be considered as isolated, but which, in some respects, have a common purpose and therefore a particular legal regime. The example is the sale of a library, which does not refer to a particular book, but the books that form the whole. [32] The universalities in fact do not include the rights and obligations of a person because these universalities in fact are fractions of heritage and are not constituted of an active and a passive. [33]

The legal (of law) universalities established by law are characterized by the fact that they involve not only the existence of an asset, namely existing assets and rights, necessary for the benefit of a person, but also inextricably linked, a passive, namely the obligations that a person has towards others.

The Romans did not define the heritage, but pointed out its elements, so that Gaius reflected the heritage as consisting of the ownership and the real and personal rights, the latter may figure in active, as claims or in passive as debts. [34]

In the French legal literature the conception about heritage was compared with the close notions of economics and sociology. From the point of view of French economists, starting from their reflections on saving, the heritage appears considered as "the totality of wealth" of an individual-the assembly of the assets designed to meet the needs of an immediate consumption, ready collections, assets that provide an income or an additional value to the capital. Heritage is defined by its function, it serves to satisfy the material needs of the owner, it is not an actual capital to the extent that it is regarded as an object of consumption, but it is not the opposite of capital, as a certain destination may be conferred, neglecting some dogmatic legal provisions. The reporting to this view distinguishes, by two differences, the originality of the legal treatment. First, it can be seen that the right includes the debts in heritage and admits that heritage can be constituted only of a passive. This legal concept on heritage is criticized by economists who are "allergic" to the idea of a null or negative heritage.

From this difference of attitudes, various consequences might be deduced, for example, by means of a legal sociology of indebtedness; a debt, unlike a claim is not, itself, an asset, even in the legal language, thing which does not prevent the influence of the legal situation of the debtor through the heritage. Secondly, it should be stressed that for legal experts, the heritage is distinct of the assets that can compose it, extending even to the assets that are going to get to a person in the future.

The sociological treatment of the notion of heritage is original because it insists on the three basic dimensions of the heritage:

a) the personal dimension, understood in a general way, in the sense that there are things that are related to a person, whose substance is more or less palpable and some of which are related to the law field, while others, such as certain disabilities or certain advantages related to the social environment or education and which sociology takes them into consideration;

b) the family dimension, especially with regard to inheritance, as a main mode of movement of the assets;

c) the diachronic dimension. From this perspective, family, even restricted, individually surrounds through and for heritage, being latent holder of the heritage from the sociological point of view, even if it does not have legal personality.

The family performs several functions, considered rather in time than in the linear space, more vertical than horizontal, including the organization of a transmission circuit of assets; the one function character of exchange opposed to it. A parallel could be established between these and inheritance: synchronicity-diacronism, good-person, will-need, relations between individuals-link between generations. [35]

As it is known, not even the previous Romanian Civil Code and nor the French Civil Code have previously defined the heritage, but those who first outlined the notion of heritage were the famous professors of the Faculty of Law in Strasbourg: Aubry and Rau in the XIX century. Relating to their theory, the heritage can be defined as the whole of the law relations appreciable in money, which have as active or passive subject one and the same person and which are understood as forming a legal universality. [36] In this concept, the heritage is a notion of pecuniary and constitutes a legal universality.

In our legal literature, the heritage has been defined as "all the rights and obligations with economic content, valued in money belonging to a person". [37] Emphasizing the idea that the heritage is a sum of values, and not an assembly of material things, some authors define the heritage as an accounting expression of all the economic powers belonging to a matter of law. [38] Other authors have defined the heritage also referring to the assets that are part of it, thus it was considered "the totality of the rights and obligations having economic value of the assets that these rights refer to, belonging to a person whose needs or duties is intended to satisfy them". [39]

The inclusion in the definition of heritage of the assets has been criticized in the legal literature because in the previous Civil Code the rights were considered assets, and the inclusion of rights together with the assets forming their object would result in a doubling of the economic value and the imbalance between active and passive. [40] The heritage has also been defined as "the universality of the relations in law having the same active and passive subject, to the extent that these relationships are assessable in money by their final effect, being separate of the assets that it refers to". [41] In another definition, the heritage is "the totality or universality of the patrimonial rights and obligations belonging to a person". [42]

Regarding the definition of the heritage, we believe that the definition by which the heritage is *all the rights and obligations that have economic value, belonging to a person* is the most concise and comprehensive, and as such, we adhere to it. [43]

There were also opinions that the heritage includes not only the patrimonial rights, assessable in money, but also the personal-patrimonial rights, the argument being that the infringement of the rights with no material equivalent draws liability for the moral damages. [44]

The current Civil Code expressly regulates the heritage in art. 31 and art. 33. Thus, art. 31 of the new Civil Code - *Heritage. Patrimony masses and heritages of affectation* provides that: "(1) Any natural or legal person holds a heritage that includes all rights and debts that can be assessed in money and belong to it. (2) This may be subject to a division or an affectation only in the cases and conditions provided by law. (3) The heritages of affection are fiduciary patrimonial masses, constituted according to the provisions of the title IV of the book III, those affected to the exercise of an authorized profession, and also other heritages determined by law, and in art. 33 - *Individual professional heritage*, it

provides that: (1) The constitution of the patrimonial mass affected to the individual exercise of an authorized profession is established by the act concluded by the holder, in compliance with the conditions of form and advertising provided by law. (2) The provisions of par. (1) are applied accordingly for the increase or decrease of the individual professional heritage. (3) The liquidation of the individual professional heritage is made in accordance with the provisions of art. 1.941-1.948, unless the law provides otherwise.

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