THE DIVISIBILITY OF THE PATRIMONY IN THE ROMAN LAW

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Abstract

Within Roman law, although the head of the family was the sole owner of the patrimony, which had a unitary nature, the division of the patrimony was admitted, under various forms. In the current article, we will analyze the peculia and dowries, highlighting the very complex manner in which Romans knew how to regulate all the aspects tied to the juridical regime of these patrimonial masses.

Keywords: *Patrimony, peculium, dowry, patrimonial masses.*

Made official as a principle in our Civil Code (art. 31, par. 2), the divisibility of the patrimony is a nuance of the principle of unity of patrimony, according to which every rightful subject has one single patrimony. In this context, we operate with the notion of patrimony of affectation, a notion which, even if it was not introduced for the first time through Law no. 287/2009, is relatively new in our legislation.[1]

Did this concept exist within the Roman law? We of course must avoid the mistake of attributing modern notions to the Ancient period, but, as we analyze classic texts, we can tell whether jurisconsults developed similar concepts to those we use today.

1. The Patrimony[2]

The Romans initially considered that the patrimony (*patrimonium*) was exclusively composed of the physical goods that a *pater familias* received as the heir of his father and was to pass them on to his own heirs.[3] It was only in the classical period that the patrimony was considered to include everything a person has in their property[4], all of the rights and obligations of a person which can be measured financially.[5] The theory over patrimony is modern, but the Romans at least empirically knew this notion, which they named *bona*[6]. The notion was especially present in the discourse surrounding succession, under the name of *hereditas.*

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1 See C. Bârsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil,* Hamangiu Publishing House, Bucharest, 2013; V. Stoica, *Patrimoniul de afectaţiune – continuitate şi reformă*, in Revista Română de Drept Privat, no. 2/2013, pp. 13-22.

2 See S. Longinescu, *Elemente de drept roman*, Bucharest, 1926, vol. I, pp. 266; C. Tomulescu, *Drept privat roman,* Bucharest, 1973, p. 162.

3 See E. Cuq, *Manuel des institutions juridiques des romain**s***, Paris, 1928, p. 235.

4 See A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia, 1953, p. 622.

5 See C. Hamangiu, M.G. Nicolau, *Dreptul roman*, Bucharest, 1930, p. 397.

6 See A. Berger, *op. cit.*, p. 374.

The patrimony could have an eclectic composition, in which the passive or active assets may be preeminent, but were considered a whole. The unity of patrimony manifested under two aspects: it belonged to a single person and all of its components were evaluated by their pecuniary value[7]. The difference in value between the active and passive assets mattered, making it so that everything can be practically reduced to a number[8]. The *pater familias,* the head of the Roman family, was the only rightful owner of the patrimony. As we will demonstrate, there were however exceptions from the principle of unity of patrimony, as there could be subdivisions within the fortune of the head of the family, as is the patrimony of affectation, determined by various purposes, first of all of economic nature.

In the following, we will direct our attention towards peculia, *bona adventicia* and dowries.

2. Peculia

The *pater familias* could however sign contracts through those under his authority, such as his sons or slaves. Initially, they could act only in order to gain rights, but, especially after the arrival of synallagmatic contracts, they also had the right to sign contracts through which *pater familias* could become the debtor, not just the creditor. In order to sanction obligational relations thus birthed, the praetors created a series of actions named *adiecticiae qualitatis,* through which the owner could be held responsible to a greater or smaller measure.

In order to offer those appointed to act in his name a greater freedom of action, *pater familias* would constitute a so-called peculium profecticium[9] (*peculium a patre profectum*). It was composed of goods to be administered by a slave or son. The titular owner of the *peculium* had the right to manage those goods and even consume them, sign any onerous contract concerning those goods, grant them to third parties to deposit them or as bailment, but could not transfer them by donation[10] or, in the case of slaves, could not release them.[11] The constitution of a *peculium* was a very comfortable means to use and stimulate the economic activity of the slaves or sons[12]. If initially, through the ancient unilateral contracts, *pater familias* could only be the creditor, which would not pose significant problems, once synallagmatic contracts appeared, through which both parties were obligated to respect certain terms, matters started to become more complicated. The third parties who signed a contract with those with no capacity were in an uncomfortable position as, normally, they could not be directly held accountable, as the signed documents birthed only natural obligations.

In order to give creditor rights efficiency, the praetor created specific actions named *adiecticiae qualitatis* (of added quality or with transposition of persons)

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[7] D. Paul, 50, 16, 5, pr.
[8] See E. Cuq, *op. cit.,* p. 236.
[9] Denomination given by modern authors.
[10] D., 2, 14, 28, 2; D., 39, 5, 7, pr.
[11] D., 37, 14, 13.
[12] See P. Ourliac, J. De Malafosse, *Histoire de droit prive, Tome III Le droit familial*, Presses Universitaires de Frances, Paris, 1968, pp. 47.

through which creditors had the possibility to sue *pater familias* as well, along with the direct contractor. *Actio quod iussu* was an action granted to the person who had to recuperate a debt as a result of the finalization of a juridical document with a son or slave previously commissioned by *pater familias* to close said document through a special order (*iussu*).[13] *Actio institoria* was the action at the disposal of those who contracted the slave or the family's son (*institor*) to whom *pater familias* awarded a terrestrial commercial enterprise (for example, the administration of a store).[14] *Actio exercitoria* was the action set at the disposal of those who had signed a contract with the slave or son (*exercitor*) upon whom *pater familias* had bestowed a marine commercial enterprise (for example, the command of a ship).[15] *Actio tributoria* was the action which could be introduced against *pater familias* whenever there was the issue of proportional distribution among creditors over income made by those under power through the administration of their own *peculium*, without the consent of *pater familias*, but with his knowledge.[16] *Actio de peculio et de in rem verso* was awarded when the administration papers of the *peculium* had been formulated without the consent of *pater familias*, his responsibility being limited by the value of the *peculium* and the benefit drawn from these papers.[17] Through the term *de in rem verso*, what is requested is the return within the peculium of the assets transferred by *pater familias* in his patrimony.

The *peculium* was not a simple *universitas facti* because, as Q. Aelis Tubero claimed, it included the valuables the slave was authorized by his master to possess separately, deducting the debts he may be held accountable for he or other people under his power could have.[18] It was considered that it is a kind of patrimony – *Quasi patrimonium liberi hominis peculium servi intelligitur*[19]*.* The *peculium* was bound to the person of the titular owner, ceasing its existence when they die. Also, a slave or son could only possess a single *peculium*. This was the case for slaves who had two or more masters as well, or for those encumbered by a usufruct or were part of a dowry.

The *peculium* included both active and passive assets. Its existence was independent of the elements composing it, such that even if it contained no asset anymore, the *de peculio* action was still valid. The jurisconsults compared it with a living organism[20].

As opposed to a proper patrimony, the *peculium* was owned by a person without juridical capacity, incapable thus of being the titular owner of a patrimony and only had a practical ownership over those goods. Legally, it was still the *pater familias* who was the titular owner of the patrimony. As it was a patrimony manageable only by the master's will to bestow certain goods upon a slave or a son to use, its existence could cease, without notice, also through the will of the person who constituted it.[21] The third party contractors were however protected against any

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[13] I. Gaius, 4, 70.
[14] I. Gaius, 4, 71.
[15] *Ibidem.*
[16] I. Gaius, 4, 72.
[17] I. Gaius, 4, 72a.
[18] See E. Cuq, *op. cit.*, p. 143.
[19] D. Paul, , 15, 1, 47, 6.
[20] Papirius Fronto, referenced by E. Cuq, *op. cit.*, p. 144.
[21] See B. Frier, T. A. J. McGinn, *A Casebook on Family Law*, Oxford University Press, 2004, p. 268.

withdrawal proven to be fraudulent by the edict of the praetor. When the slave died, the *peculium* was awarded to the master. In case the slave was set free or was emancipated however, with the exception of the situation in which *pater familias*[22] withheld it, the *peculium* became a proper patrimony.

An interesting aspect is that slaves who were titular owners of *peculia* could themselves, constitute *peculia* for so-called vicars[23]. They were a kind of placeholders for the slaves granted a precise mission (named *ordinarius*) by their master. As long as, juridically speaking, all slaves were under the property of *pater familias*, in fact, the *vicarius* was subservient to *servus ordinarius,* whom he had to serve and whom he had to obey. When a *peculium* was created for the vicar, although it was part of the *peculium* of the *ordinarius*, it was however a distinct patrimony.[24]

The family's sons were granted, starting as far back as Octavius Augustus' rule, the right to a *peculium castrense*, which contained the goods earned as soldiers, such as their pay, their cut from the spoils of war or the liberalities received from third parties for their work in the army[25]. As for these goods, they could act as their owners, being able to transfer them freely, with an onerous or gratuitous title. They could also exercise the actions inherent to the rights granted by the peculium. They could even pass the goods on through a will, acting, from this standpoint, as heads of family.[26]

Pater familias could not interfere in the son's use of this *peculium*, either by forbidding their use, transferring them or in any way affect his ownership[27]. The father's creditors could not pursue these goods. If the titular owner had brothers, they could not request a portion of the peculium when their *pater familias* passed on.[28] If the son however died without leaving behind a will, the peculium would not be divided according to intestacy. Instead, it would be awarded to *pater familias* under the special title of *iure peculii*, and not as an inheritance, *iure hereditarii*[29]. Under these conditions, we may consider that the *peculium castrense* was a fraction of the patrimony over which *pater familias* had suspended rights as long as his military son was alive. The Justinianic Code established that, in the case of the son's death and in the absence of a will, his inheritance should go first to his children, then his siblings and only thirdly, the father[30], who is not thus granted the *peculium iure peculii*, but in the same measure as the other heirs.

In 320, Emperor Constantine regulated the *quasi-castrense peculium*, through which the same rights as those of soldiers were awarded to sons who held administrative positions within the imperial palace (*palatini*). Later, this was

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[22] Sometimes, the peculium was withheld by the master as a price to free the slave; see Gardner, pp. 37.
[23] See E. Cuq, *op. cit*., p. 146.
[24] D. Celsus, 15, 1, 6.
[25] See E. Petit, *Traité élémentaire de droit romain*, Librairie Athur Rousseau, Paris, 1925, p. 273.
[26] D. Ulpian, 14, 6, 2 *Filii familias in castrensi peculio vice partum familiarum funguntur*, see E. Petit, *op. cit*., p. 273.
[27] Justinian, Inst., 2, 12, pr., D., 28, 3, 6, 13.
[28] D., 37, 6, 1, 15.
[29] See R. Monier, *Manuel élémentaire de droit romain*, vol. I, sixième édition, Édition Domat Montchréstien, Paris, 1947, p. 256.
[30] Justinian, Inst., 2, 12 pr.

expanded to those who had liberal professions, like lawyers and public servants. Titular owners of *quasi castrense peculia* had the same rights as titular owners of *castrense peculia*, except the right to pass the good on through their will. Finally, emperor Justinian granted them this right as well.[31]

3. Bona adventicia

Emperor Constantine, inspired by the provisions within the Greek Law, also introduced, in 319, a new category of goods with an affectation favoring the son. This included goods inherited from the mother. Practically, this *bona materna* constituted a patrimonial mass which was separate from *pater familias'* patrimony[32]. Honorius extended this provision over the goods received gratuitously from the mother or anyone on her side of the family (*bona materni generis*). All of these goods are known as *bona adventicia*[33].

Progressively, *pater familias* was considered to have only a usufructuary right over these goods, the son only having a nude property, over which he could not impose his will in any way. Thus, as opposed to the *peculium*, the sons could not interfere in the management of the respective patrimonial mass. He was to receive them fully only when *pater familias* died, when he would have exclusive ownership over them. *Pater familias* would also receive those goods in case the child died, as inheritance.

4. The dowry

Dowries were, in classical law, an ensemble of objects the husband received from his wife or from another person on her behalf, in order to support the tasks of marriage[34]. Although the word *dot*, of Greek origin, at first meant gift, donation, the Romans did not consider the dowry as an object obtainable gratuitously.

In classical law, it was considered that, although part of the husband's patrimony, the goods within the dowry were a distinct patrimonial mass.[35] There were several types of dowry: the *profeticia* dowry, provided by the father in law; the *adventicia* dowry, provided by the wife or a third party and the *recepticia* dowry, provided by a third party.

The dowry was seen as a juridical universality, having active and passive assets, with all the consequences that follow[36], being considered a patrimonial mass distinct from the husband's goods[37]. It was claimed that "although the dowry is part of the

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[31] See E. Cuq, *op. cit.*, p. 148.
[32] See R. Monier, *op. cit.*, p. 257.
[33] The denomination is not Roman. See C. Hamangiu, M. Nicolau, *op. cit.*, pp. 70.
[34] See E. Petit, *op. cit.*, pp. 447; R. Monier, *op. cit.*, pp. 290; P. Ourliac, J. de Malafosse, *op. cit.*, p. 223; A. Berger, *op. cit.*, p. 444; J. E. Grubbs, *Women and the Law in the Roman Empire*, Routledge, London and New York, 2002, p. 95.
[35] D., 11, 7, 16; E. Cuq, *op. cit.*, p. 181.
[36] D. Ulpian, 4, 4, 3, 5.
[37] D. Ulpian, 11, 7, 16.

husband's goods, it actually belongs to the wife."[38] With time, it was considered that the dowry actually belongs to the family, the most interested in its preservation being the children. It became autonomous within the husband's or the head of the family's patrimony. The elements of this patrimonial mass could be replaced, maintaining the integrity of the dowry's mass in terms of value. If a good stemming from the dowry was, for example, transferred, the goods bought with the obtained money were goods belonging to the dowry.[39]

This patrimonial mass could come under the ownership of the wife or the person who constituted it, in some cases. In principle, this could happen when the marriage was dissolved, but there were certain situations where it could happen during the marriage as well. If the woman had proof that the dowry was being spent abusively, she could ask that those goods be seized and confiscated. In the situation in which the husband filed for bankruptcy, the wife could ask for her dowry to be returned immediately.[40]

The *Iulia de adulteriis* law was adopted during the reign of Octavius Augustus. This was the starting point for an entire series of norms that define the inalienability of the dowry. The husband was forbidden from transferring the real property originating in Italy or in the territories under *ius italicum*[41]without the consent of the wife. The transfer also meant all disposition acts such as the constitution of a servitude, personal or real, over the property or of a mortgage. In the case the husband was declared prodigal, the wife could request that the dowry be seized and confiscated[42].

Through a constitution created by emperor Justinian from 530, any transfer of the goods from the dowry was strictly forbidden. Through Novel 61, this ban was alleviated, as transfers made with the consent of the wife were declared valid, on the condition that she reiterates this consent two years later.

In the post-classical law, practically, the husband is gradually considered not to be an owner of the dowry, but has a sort of usufructual right over it[43].

5. Conclusion

Thus, both in the situation of *peculia* and dowries, we are dealing with cases of division of patrimony, which was split in distinct patrimonial masses, with a different juridical regime. Having the characteristics of patrimony of affectation, they were bound however to certain people who, under special circumstances, could become the titular owners of these patrimonies.

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[38] D., 23, 3, 75.
[39] D., 23, 3, 54.
[40] See E. Cuq, *op. cit.*, p. 182.
[41] I. Gaius, 2, 63.
[42] See P. Ourliac, J. de Malafosse, *op. cit.*, p. 226.
[43] See V. Arangio Ruiz, *Istituzioni di diritto romano*, Napoli, 1943, p. 455.