

***Affectus Societatis* - the Essence of Partnership in the Past and Present**

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Abstract

As the title implies, partnership, viewed either as a contract or as a (legal) person distinct from its associates, could not and cannot be conceived in the absence of affectus societatis. Therefore, in the present study we seek to distinguish this concept and establish the relationship between it and the (other) elements of partnership, respectively between it and the effects of partnership. Naturally, the first part of the study will be dedicated to the physiognomy of affectus societatis in Roman law. In the second part we shall examine the affectus societatis in the Phanariot legislations (Pravilniceasca Condiță, Code Calimach and Legiuirea Caragea). The third part concerns affectus societatis in the Civil Code of 1864, in the Commercial Code of 1887, in the Civil Code of 2009 and in Law no. 31/1990, and the last part includes some conclusions.

Keywords: *affectus societatis, society, Roman law, Romanian law.*

JEL Classification: K12, K15

1. Introduction

In the present study, we will examine the concept of *affectus societatis*, which we have already stated in the title that it has represented and continues to represent the essence of society. The attempt to unravel this concept in Roman law and to establish the relationship between it and (the other) elements of society, respectively between it and the effects of society, as well as the way in which they were transposed in Romanian law of yesterday (the fanariote laws - the *Pravilniceasca Condiță*, the *Calimach Code* and the *Caragea Legislation* -, the Civil Code of 1864 and the Commercial Code of 1887) and today (the Civil Code of 2009 and the Companies Law no. 31/1990, republished, with subsequent amendments and additions) will demonstrate the above assertion and the Roman influence on Romanian law also with regard to this constitutive and permanent element of the company, attesting to its continuity.

Of course, this is neither the first nor, we hope, the last research on *affectus societatis*, but in particular, approaching it from the angle of its relationship with the other elements of society and with the effects to which society gives rise brings to the fore aspects perhaps hitherto unnoticed about the true dimension of *affectus societatis*.

The dialectical, logical and historical methods are the methods I use predominantly to investigate this concept of society.

2. Roman law

From the outset, it should be pointed out that not all Romanists include *affectus societatis* or *animus contrahendae societatis* among the elements of society, or at least not under this heading. According to some, the elements of society were, alongside

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affectus societatis, a (mutual) contribution, a common interest and a lawful purpose.²

According to others, the elements of the partnership contract were 1) *consensus perseverans in idem placitum* (persistent consent) of the partners, 2) the practical (and common) aim pursued by them, consisting in obtaining an economic result in favour of all the partners through 3) the effort of each one.³

The aforementioned authors, who include *affectus societatis* among the elements of society, define it as the intention to form a society, while at the same time attributing to it the value of a criterion for distinguishing between society - a consensual contract, a contract of good faith and of the law of the gentiles - and a state of undivided property, such as, in the terms of Aulus Gellius, the *antiquum consortium*, called by Gaius *erctum non citum*⁴, or that arising from the fact that two persons put a sum of money in common to acquire property, but without having (or it being possible to establish with certainty) the intention to form a company.⁵

On the contrary (and with reference to the company in classical Roman law), it has been argued that the juriconsults of this period did not identify in the consent of the associates a particular meeting of wills called *animus contrahendae societatis* or *affectus societatis*, the texts (in particular D.17.2.31) containing these phrases being modified in the post-classical period for various reasons (the author does not indicate which ones) which are not related to this requirement necessary to be fulfilled for the birth of the company.⁶

With regard to *consensus perseverans*, taken as an element of society instead of *affectus societatis*, it has been pointed out that the meaning of this concept derives from

² Among others, Paul-Frédéric Girard, *Manuel élémentaire de droit romain*, huitième édition revue et mise à jour par Félix Senn (Paris: Librairie Arthur Rousseau, 1929), p. 612-613; Grigore Dimitrescu, *Drept roman*, vol. II *Obligațiuni. Succesiuni* (Bucharest: Imprimeriile Independența, 1932-1933, p. 204-205; I. C. Cătuneanu, *Curs elementar de drept roman, ediția III*, (Cluj-Bucharest: Cartea Românească S.A., 1927), p. 362-363, with the author's not including the contribution among the elements of the company; Constantin Stoicescu, *Curs elementar de drept roman*, 3rd edition revised and supplemented, republished under his care and introductory study by Mircea Dan Bob, (Bucharest: Universul Juridic, 2009), p. 280; C. St. Tomulescu, *Drept privat roman*, (Bucharest: University of Bucharest Printing House, 1973), p. 293; Vladimir Hanga, *Drept privat roman*, (Bucharest: Didactic and Pedagogical Publishing House, 1978), p. 384-385; Emil Molcuț, Dan Oancea, *Drept roman*, (Bucharest: Casa de Editură și Presă "Șansa" S.R.L., 1993), p. 288-289; Paul J. du Plessis, *Borkowski's Textbook on Roman Law*, Sixth Edition, (Oxford University Press, 2020), p. 290.

³ For instance, Antonio Guarino, *Diritto privato romano*, settima edizione, (Napoli: Jovene, 1984), p. 817, and, similarly, Reinhard Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (Oxford: Oxford University Press, 1996), pp. 451, 454-455, and Aldo Petrucci, *Manuale di diritto privato romano*, seconda edizione, (Torino, Giappichelli, 2022), pp. 159-160.

⁴ Gaius, 3.154^a: 'there is, however, another kind of society - other than the consensual one, n.n. - which is proper only to Roman citizens. In fact, in ancient times, on the death of a pater familias, a kind of society was established between sui heredes, which was legitimate but also natural, and was called *ercto non cito*, i.e. individual property: *erctum* means, in fact, property, hence the name *erus*, which means owner; and *ciere*, to divide, hence the words *caedere* (to cut), *secare* (to split)" - Aurel N. Popescu, Gaius. *Instituțiunile [Roman private law]*. Translation, introductory study, notes and annotations, (Bucharest: Publishing House of the Academy of the Socialist Republic of Romania, 1982), p. 240-241, including footnote 90.

⁵ Paul-Frédéric Girard, *Manuel élémentaire de droit romain*, huitième édition revue et mise à jour par Félix Senn, p. 613, including footnote 2, and D.17.2.31.

⁶ Antonio Guarino, *Societas consensu contracta*, in *La società in diritto romano*, (Naples: Jovene Editore, 1988), p. 52.

Gaius, 3.151⁷ - *manet societas eo usque, donec in eodem consensu perseverant*.⁸

The existence of the society was linked to the persistence of the associates in their agreement, which was destined to last at least as long as it was necessary for the realisation of a single business, if not, as was usually the case, for a longer period. In other words, the company, understood as a set of relations between the partners, and not as a legal person (with the exception of publicans' societies), existed as long as the partners were committed to the pursuit of the common purpose, for the attainment of which they had decided to join their efforts.⁹

Accordingly, *consensus perseverans* took place between the initial moment of the free-form agreement of wills of the associates and the final moment, when the company was dissolved, marked by the *contrarius consensus*¹⁰, the will of a single associate (*renuntiatio*¹¹, which did not, however, protect from liability the associate who expressed this will in an untimely or fraudulent manner), death of a partner, *capitis deminutio*¹² (equivalent to death under civil law), insolvency of a partner, expiry of the term, fulfilment of the purpose for which it was created or impossibility of achieving it because of the loss of all the assets of the company and the bringing of the action *pro socio*, at the time of *litis contestatio*.¹³

Returning to *affectus societatis* and even admitting that D.17.2.3, attributed to Ulpian, was modified at the time of the elaboration of the Digests, we learn from that fragment that (at least in the post-classical era, if not before) the *actio pro socio* (action as a partner, an action in good faith) was grafted onto the partnership contract and that, for its existence, it was not sufficient for there to be something in common between several persons, since it was possible to conceive of indivision in the absence of an express association, but required the existence of a state of affairs, a will specific to the company, a bond between the partners, created by the partnership contract and specific only to it.¹⁴

Indeed, both *affectio* and *affectus* originally had, in Latin, among other meanings, the meaning of state, way of being, affective state, feeling, and later also designated will, desire¹⁵ (late Latin, in use at the time of the Digests).

In agreement with Sabinus, who considered that both the associates of a *societas omnium bonorum* and those of a *societas unius rei* cannot be condemned, one towards the other, except within the limits of available resources (unless there is wilfulness on

⁷ *Ibid*, p. 53.

⁸ "A society lasts as long as the members of the society persist in their agreement" - Aurel N. Popescu, Gaius. *Institutions [Roman private law]*. Translation, introductory study, notes and annotations, p. 239.

⁹ In the same sense, Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, p. 455.

¹⁰ See Antonio Guarino, *Societas consensu contracta*, in *La società in diritto romano*, pp. 53-55.

¹¹ Irrespective of whether the company was entered into for a specific term or without a term.

¹² Only the maximum and average had this effect in the time of Emperor Justinian.

¹³ See, for the causes of extinction of the company, Gaius, 3.152-153, and D.17.2.63.10., a distinction is made between causes of extinction *ex personis*, *ex rebus*, *ex voluntate* and *ex actione*.

¹⁴ *Ut pro socio actio, societatem intercedere oportet: nec enim sufficit rem esse communem, nisi societas intercedit: communiter autem res agi potest etiam citra societatem, utputa cum non affectione societatis incidimus in communionem, ut evenit in re duobus legata: item si a duobus simul empti res sit: aut si hereditas vel donatio communiter nobis obvenit: aut si a duobus separatim emimus partes eorum, non socii futuri.*

¹⁵ Gheoghe Guțu, *Dicționar latin-român*, 2nd revised and added edition, (Bucharest: Humanitas, 2003), p. 60.

the part of one of them), Ulpian concluded that this solution is natural, since the society formed a somewhat fraternal bond between the associates.¹⁶

The above leads us to the conclusion that *affectus societatis* was more than the manifestation of the intention to create a society and the criterion distinguishing it from a mere state of undividedness. Its role and importance were not reduced to the moment of the formation of the contract, but went beyond that boundary, ensuring the very existence of the society throughout its duration.

From the *affectus societatis* flowed the other elements of society as well as the effects of society. Therefore, society could not be conceived in the absence of *affectus societatis*. Each member made a contribution, which could consist of money, property, the use of a thing or labour, necessary to carry out an activity with the others, from which he could make a profit, while assuming jointly the risk of loss. The reciprocal and identical obligations of the partners - to pay the promised contribution, to take care of the affairs of the company, with due diligence in their own affairs (*culpa levis in concreto*) and to ensure that the others share in the profits made, sanctioned by *actio pro socio*, an infamous action, signal the trust which animates and holds the partners together, and the bringing of this action, consequent on the non-performance of the obligations arising from the partnership contract, its disappearance and the termination of the contract.

This trust makes society a contract concluded *intuitu personae*, and the bond that it creates can only unite those who, in relation to each other, have undertaken to carry out a joint activity. Therefore, in the words of Ulpian, *nam socii mei socius, meus socius non est*.¹⁷

Then, whether we place the origins of the consensual contract of society in the ancient *antiquum consortium*, via *societas omnium bonorum*, or, on the contrary, whether we look for them in the boom of Mediterranean trade in the sec. III-II B.C., when Roman citizens set up extensive commercial ventures with pilgrims, but also among themselves (free from the constraints of the institutions of ancient law), based on the trust (*fides*) they had to have in each other, which the praetor followed by inserting in the edict the action *pro socio*¹⁸, one thing is certain, namely that the associates relied on each other as an expression of a somewhat fraternal bond or a necessary means to fulfil the common interest.

Affectus societatis brought together, therefore, the convergent wills of the partners to set up an enterprise in which they would remain for its entire duration and to which they would share part of their assets, motivated by mutual trust and with the common aim of making a profit, while assuming the risk of loss.

Affectus societatis did not presuppose equal contributions from the associates, assigned to the common purpose, nor equal participation in profits and losses, prevailing, in this respect, the conception of Servius Sulpicius, according to which an associate could not share in the losses, but could receive a share in the gain, considering his contribution in labour, more valuable than, for example, one in money¹⁹. However, a

¹⁶ D.17.2.63.pr.: *verum est, quod Sabino videtur, etiam si non universorum bonorum socii sunt, sed unius rei, attamen in id quod facere possunt, quodve dolo malo fecerint, quo minus possint, condemnari oportere. Hoc enim summam rationem habet: cum societas ius quodammodo fraternitatis in se habeat.*

¹⁷ D.17.2.20. My associate's associate is not my associate.

¹⁸ Antonio Guarino, *Societas consensu contracta*, in *La società in diritto romano*, p. 18.

¹⁹ Gaius, 3.149.

leonine partnership, in which a partner was excluded from sharing in the profits and only the losses, was incompatible with the *affectus societatis*, and as such impossible.

For the same reasons, *consensus perseverans* had the same meaning as *affectus societatis*, not being a distinct element of society.

3. The Calimach Code and the Caragea Law

1. Although the concept of *affectus societatis* was not expressly enshrined in Moldovan law, its existence can be deduced from the body of texts regulating *merchant's fellowship*, of which we will mention a few.

Firstly, Art. 1563²⁰ defined the company as the contract by which two or more persons combine their labour or their labour and their goods, assigning them to a common purpose. It was therefore the same elements that defined the Roman society, and the *affectus societatis* resulted from the allocation of contributions for the benefit of all the associates.

Then, Article 1573²¹ regulated the obligation of each partner to contribute equally to the common endeavour which the attainment of the aim pursued required, irrespective of the amount of each one's contribution. Through the equal efforts of all the partners, the agreed purpose was realised, the *affectus societatis* being reflected in the existence of this obligation.

Article 1574²² prohibited the member from entrusting to a third party the task assigned to him, from co-opting another person into the company without the consent of the other members, or from carrying out a business that would exceed the purpose of the company and would have caused damage. Since the partnership was a contract *intuitu personae*, it was not permissible for one of the partners to substitute a third party to carry out the work assigned to him or to carry out on behalf of the partnership business that was not agreed and was harmful, thereby betraying the trust of the others. By the very nature of the contract, it was inconceivable that a person could enter into a partnership at the will of only one of the partners.

In the Code of Calimach, the leonine society was also null and void, since it lacked *affectus societatis*. In this sense, article 1586 stipulated that *a contract in breach of the law is a contract whereby a person on the one hand insures himself against all the risk of loss which may be incurred by the capital he has invested and the interest thereon, and whereby he takes the work out of the whole, and on the other hand he is prepared to make a profit in excess of the amount.*

The partnership could be terminated by *contrarius consensus*, which we have seen marks the end of that *consensus perseverans*. Other grounds for termination were the realisation of the purpose for which the contract had been concluded or the

²⁰ *The bargain, by which two or more people form themselves to unite only their labors or their belongings, for their common benefit, is called a merchant partnership.* In the elaboration of this study we used the version of the law in Andrei Rădulescu (coord.), *Codul Calimach. Ediție critică*, (Bucharest: R.P.R. Academy Publishing House, 1958).

²¹ *According to the rule, all comrades are bound to act equally for their common benefit, without taking into consideration the analogy of the parties, as if some of them had put more in the bargain, and others less.*

²² *None of the comrades is willing to entrust to a third the work that is his, or to receive anyone into his companionship, or to take upon himself a work that is not the companionship's, to the detriment of the companionship.*

impossibility of realising it, or the expiry of the term (Art. 1598).

On the other hand, the non-performance of the obligations undertaken, the insolvency of the partner, his placing under curatorship or the seizure of his assets did not lead to the termination of the company, but to the exclusion of the partner.

2. The Caragea Law did not expressly regulate *affectus societatis* either, but, similarly to the Calimach Code, it defined the company as a contract by which two or more persons pooled their contributions, in order to share the gain or, on the contrary, to bear the loss that would result from a commercial activity (Part III, chap. 14, art. 1²³). From this definition, as in the Calimach Code, the existence of *affectus societatis* can be deduced.

The same element of society arises from the enshrinement in Article 5 of the rule formulated by Ulpian - *nam socii mei socius, meus socius non est* -, whereby society can only come into being between those who have expressed their will to each other, in consideration of the trust they have in the realisation of the purpose of society.

4. Civil Code of 1864 and Commercial Code of 1887

1. The agreement of the parties to put something in common in order to carry out an activity aimed at achieving a patrimonial end, also involving the sharing of gain or loss (even if Article 1491 did not refer to this), results in the *affectus societatis* of civil society, a concept attached to the consent of the parties and understood as the manifestation of the will to form the society.²⁴

In the light of what has been shown in the section on society in Roman law, from which the civil partnership regulated in the Civil Code of 1864 was inspired, we believe that the *affectus societatis* was not reduced to the moment of the conclusion of the contract, but expressed the endeavour of the partners in their agreement, subsumed under the common purpose they were pursuing.

In the same sense may be considered the provisions of Art. 1523, which included the causes of termination of the company, i.e. the disappearance of the *affectus societatis* or the end of the *consensus perseverans*, namely the expiry of the term for which the company was contracted, the realisation or impossibility of carrying on business as a result of the loss of its object; the death of one of the partners (unless otherwise stipulated); the interdiction or insolvency of a partner and *renuntiatio*.

2. In the absence of a definition of *affectus societatis* in the Commercial Code of 1887, the specialised literature has shown that this notion meant the joint exercise of statutory activities by the associates, which explains the persistence of this element throughout the duration of the company²⁵. This concept is reminiscent of the *consensus perseverans* in classical Roman law, just as some of the grounds for the dissolution of a company provided for in Article 191 were reminiscent of the termination of the Roman company - the absence, dissolution or impossibility of achieving the object of the company, the fulfilment of the purpose for which it was formed or *contrarius consensus*.

²³ Comradeship is a kind of agreement and to say, when two or more are haggling, they will all put as much as they can, with which to negotiate together, having both the gain and the loss in common.

²⁴ Francisc Deak, *Tratat de drept civil. Contracte speciale*, (Bucharest: Ed. Actami, 1999), p. 453.

²⁵ I. L. Georgescu, *Drept comercial român*, vol. II, (Bucharest: Ed. C.H. Beck, 2002), p. 37.

5. Civil Code 2009 and Companies Act 31/1990

1. There are a number of similarities between the civil partnership of today and the partnership under Roman law, although the former is no longer terminated by the death, insolvency or will of a partner. Among the common elements is the essential element of both, the *affectus societatis*, from which, as we have seen, the other elements, namely its effects, flow.

According to one view, *affectus societatis* today designates co-operation between the associates in order to achieve the purpose of the association, and this co-operation must be maintained throughout the duration of the company²⁶. It is no less true that *affectus societatis* means that, throughout the life of the company, the common fund, made up of the contributions of the partners, is subordinated to a profit-making purpose, also involving a risk association.

2. In relation to the commercial company governed by the Companies Act no. 31/1990, it has been pointed out that *affectus societatis* "represents the common will of the partners to co-operate within the company for the purpose of achieving its object of activity and obtaining benefits"²⁷, being "an essential defining element of the company contract" which "must exist both at the signing of the company contract (...) and during the company's existence, through the active participation of the partners in the life of the company"²⁸. However, the *affectus societatis* is diffuse or absent in the case of joint-stock companies.²⁹

Another author presents *affectus societatis* as a particularity of the case in company matters. Following an extensive critical exposition of the considerations expressed in the specialised literature on *affectio societatis*, he concludes that, at present, it is "the affectation of a contribution accompanied by the assumption of the risk that the partners, together (if there are several of them) and possibly under the shelter of limited liability (the rule at present), may gain or lose from the economic operations of the company. In other words, *affectio societatis* means the willingness of the sole shareholder, the founders or any subsequent shareholder to participate, by means of the contribution made, together with the others (if there are several of them), both in the sharing of the profits and in the bearing of the losses (contributions) resulting from the company's statutory activity.

6. Conclusions

The physiognomy of *affectio societatis* in Roman law leads to the conclusion that it was indeed the essence of society, the element without which and beyond which society could not exist, taking shape, as we have shown, around the persistent and persistent will of the associates throughout the duration of the society, the mutual trust that animated them and the idea of risk taken in order to obtain a gain, by using the common fund made up of the contribution of each.

²⁶ Codrin Macovei in Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Codul civil. Comentariu pe articole*, ed. 3, (Bucharest: Ed. C.H. Beck, 2021), p. 2241.

²⁷ Gheorghe Piperea, *Drept comercial*, vol. I., (Bucharest: Ed. C.H. Beck, 2008), p. 140.

²⁸ Ibid, p. 141.

²⁹ Ibid, p. 141.

The brief observations relating to the Romanian law of the Phanariote era, to the modern and current Romanian law, together with some opinions expressed in the doctrine on the *affectus societatis*, formulated on the basis of the provisions governing civil and commercial society, were enough to demonstrate that the *affectus societatis* was and continues to be the essence of society, preserving, in general, the elements crystallised in Roman law.

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