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THE LEGAL PROTECTION OF THE PROPERTY RIGHT

Theoretical article

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Abstract

The property right has been acknowledged as one of the personal fundamental rights since a very long time. It enjoys complete legal protection provided on the top of the national legislation hierarchy by constitutional norms as well as by juridical norms specific to the various legal branches where the property is present.

The property right is protected consistently and by means of the criminal law, mainly by those juridical norms that incriminate the illicit behaviours which bring prejudice, as well as by the norms that regulate other criminal right institutions such as those ones which are specific to the safety measures with a patrimonial character.

After examining the juridical norms that protect the property, the conclusion is that the juridical protection is awarded only if the property right has a licit character.

I. THE CONSTITUTIONAL PROTECTION OF THE PROPERTY RIGHT. BRIEF CONSIDERATIONS

Acknowledged as one of the fundamental rights of the citizens since a very long time (The property right can be found consecrated even since 1789, in the French Declaration of the Man's and Citizen's Rights dated 27th August 1789, in Article 17 which states that the property being a sacred and inviolable right, nobody can be deprived of it, only in the case when the public necessity is legally found and requires it obviously and under the condition of a just and prior indemnity), the property right enjoys a complete juridical protection provided at the highest level by constitutional norms as well as by juridical norms characteristic to the various legal branches where the property can be seen.

The constitutional protection of the private property is essential because, as an effect of the Constitution's supremacy, it dominates and subordinates its entire legislation related to the regime of this property (Constantinescu et al., 1992).

The Romanian Constitution places it in Title 2, Chapter2 called "Fundamental Rights and Liberties", thus confirming the fundamental attribute character of the private property right.

Article 44 of the Constitution, marginally called "Private Property Right", first paragraph, stipulates that "*The property right as well as the debts over the state are guaranteed. The content and the limits of these rights are set by law"*.

As for the significance of the "*guarantee*" notion used by the constitutional text previously quoted, the specialty literature shows that guaranteeing by law the property right suppose "regulating those measures that should protect the property right's holders against the infringements that they might suffer on behalf of the state or of the administrative–territorial units when the latter would act against them from authority positions. Moreover, guaranteeing the property right also involves the obligation of the state or, if it is the case, of the administrative–territorial units in order to compensate the holder for any prejudice caused to his/her right" (Baias, 2008).

The constitutional norm written in Article 44, paragraph (1) gives the property right's holder the certainty that his/her right cannot be touched by any danger that might *arise* on behalf of "the law"; in case such a prejudice takes place, the state has the obligation to compensate the prejudiced holder. The legal or natural person has the right to purchase a property, to use it and to dispose of it, to give this right to somebody else without being afraid that an external agent who has a powerful position might intervene abusively and unwillingly in order to damage the property.

Article 44, paragraph (2) of Constitution, is a reflection in the matter of the private property right of the constitutional principle of the citizens' equality before the law. It stipulates that *"The private property is guaranteed and protected equally by the law, regardless of the holder."*

In a free translation, the quoted text supposes that the fundamental law provides the same level of juridical protection to the private property right, regardless of the holder and of the elements that characterise the property holder. It is well-known that the private property may belong to the state, to administrative-territorial units, to public institutions, to juridical persons of private right, to natural persons etc. It is imposed to show that the state property during the Communist regime was regulated in such a way that it was placed on a hierarchically superior position in comparison to the group property or to the individual one. Therefore, when the Constitution was adopted in 1991, this legislative approach was fresh in the memory of the constituent legislator and determined it to set up an equal regime of protection for the holders of the private property right. The debates within the Constituent Assembly showed that the state's private property and the group's property could not constitute a privilege because "there can be a healthy market economy only if all the forms of private property are equal and are equally guaranteed" (Geneza Constituției României 1991).

One can notice the fact that the second paragraph of Article 44 includes the word "protection", implicitly consecrating the idea that the law makes available to the property right holder the necessary measures and instruments to protect his/her right against the infringements that might come from other lawful subjects who are on equal positions with the holder.

In other words, the constitutional protection of the private property has two components: the protection against rashness that might come from the state being on an authority position in comparison to the holder of the right and the protection against damages brought by other lawful subjects being on equal positions with the holder.

A separate guarantee of the property right can be found in paragraph (8), first thesis of Article 44 of the state's fundamental law which stipulates that "*The legally purchased fortune cannot be confiscated"*.

We believe that the basis of this written guarantee was made up by the regulations during the Communist period which were adopted in the matter of the private property right and by the numerous property trespasses which occurred during that period.

The constituent legislator went on and offered an additional protection to the private property right by raising to the rank of constitutional

guarantee a presumption which in essence constitutes the means of evidence. Thus, pursuant to the provisions of Article 44, paragraph (8), second thesis of the Constitution: *The licit character of the purchase is presumed"*.

The reasoning (retained expressly by the constituent legislator while discussing about the amendment that aimed at eliminating the liceity presumption of the fortune purchase) that lay at the foundation of instituting such a guarantee of the property right was to provide the juridical security of the property right. The concept of juridical security of the property right must be understood in the meaning of protecting the citizens and their rights against the danger which comes from "the right itself", namely a protection provided by legislative stability.

In our opinion, what guarantees the constitutional text quoted above is "the property right", but not "the right to the purchased fortune". We tend to believe that the authors of the Constitution inserted that presumption as they wanted to offer an additional guarantee to the property right, without the possibility that the guarantee could be converted into an instrument to protect the illegally purchased fortune.

The liceity presumption of the fortune purchase, if it is a relative presumption, may be overturned by the contrary test. The difference is related to the task of the test where there is an inversion which means that it is not incumbent to the fortune's holder, but it shall get to the one who invokes the illicit character of the fortune's source of origin.

The Constitutional Court of Romania expressed itself in the same way by a constant jurisprudence, showing that the constitutional norms related to the liceity presumption of the fortune purchase do not hinder the search and the confiscation of the illicitly acquired fortunes. The presumption written in Article 44, paragraph (8), second thesis of the fundamental law is not an absolute one. (The opinion of the Constitutional Court related to the presumption of the licit character of the fortune purchase can be found in Decisions no. 85/1996, no. 799/2011 and no. 356/2014).

In the juridical literature one has claimed that the provisions of Article 4, paragraph (8), second thesis of the Constitution represent an application in the field of confiscation, of the innocence principle written in Article 23, paragraph (11) of the fundamental law related to the juridical individual freedom (Iancu 2003).

The juridical protection granted to the property right does not have an absolute character whereas the Constitution admits the possibility of imposing, by means of law, limits related to the scope of the property. These limits are clearly and expressly mentioned; they might consist in the possibility of depriving the holder from his/her property right for a public utility cause or in the regulation of exercising this right in accordance with the general interest.

The fundamental law of the state authorises the legislative power to set the content and the limits of the property right but this empowerment must be exercised substantially so that it should provide a fair balance between the general interest of the society and the individual interest. Achieving the property right supposes the state's obligation to guarantee and to protect the legally obtained property (Constantinescu et al, 2004).

Beyond the protection offered by the constitutional norms, we can also find a civil protection of the property right regarded subjectively by defining this real right, by establishing its juridical characters, its way of purchasing and of settling. Also, we can find a criminal protection granted mainly by juridical norms which incriminate the illicit behaviours that affect the person's patrimony as well as norms included in the general part of the Criminal Code. We shall analyse the protection granted by the criminal law norms to the property right, then we shall examine a series of relevant provisions included in the special part of the general criminal law.

II. THE CRIMINAL PROTECTION OF THE PROPERTY RIGHT

1. The analysis of the criminal protection granted by norms from the special part of the Criminal Code

Just like any other fundamental personal right, apart from the protection granted by the extra-criminal juridical norms, the property right is defended by a consistent way and by means of the criminal law. Similar to other fundamental personal rights, the protection of the property right is mainly carried out by incriminating the facts that bring prejudice to it. This kind of facts constitutes offences against the patrimony and is stipulated in the Second Title of the special part of the Romanian Criminal Code called "Offences against the patrimony". As it can be seen from the marginal name (Second title of the Special part of the Criminal Code), the incriminating norms of the offences included in this title are not limited to protect only the property right, but it offers protection to other rights with an economic value, but the property right is on the first place among all these rights. This allegation relies on the fact that the "patrimony" notion has a larger scope in comparison to the "property" notion and it includes the property right and the other rights and obligations with an economic value.

"The weight" and the importance of the property right are the arguments that determined the criminal legislator to allot for the offences against the patrimony an entire title from the special part of the Criminal Code and at the same

time to place this title in the upper part of the social value hierarchy which enjoyed protection from the criminal right.

However, apart from the offences against the patrimony, we can also find in the Special part of the Criminal Code other incriminating norms that protect the patrimony as a social value. In this way, as an example, we are indicating the blackmail offence which has the aggravated form stipulated at Article 207, paragraph (3), Criminal Code, whose existence is conditioned by the perpetrator's unfair attainment of a material use. But according to the material result specific to the aggravated form of blackmail, we can see that, apart from the protection granted to the fundamental right of the person's moral freedom which constitutes the main juridical object of the blackmail offence in the aggravated variant, there is also protection for the patrimony of the person that makes up the secondary juridical object of the offence. The same situation may be encountered for the offence called concealment of truth (Article 270, Criminal Code) which is included in Title 4 in the Special part of the Criminal Code allotted to offences against the justice achievement by whose incrimination there is protection mainly for justice achievement and secondly for the patrimony. In the case of the truth concealment offence, the damage of the relations with a patrimonial character is produced after the hindrance of the goods' return into the patrimony where they were taken out from and as a consequence of committing a deed forbidden by the criminal law (Toader et al., 2014).

In accordance with the constitutional principle of the equal protection for the private property regardless of the holder, the criminal law norms provide equal protection regardless of the juridical nature of the property affected by the offence, private property or public property.

While looking to the past, we must notice the fact that in the system of the old Criminal Code (the Criminal Code adopted by Law no. 15/21.06.1968, published in the Official Bulletin no. 79-79 bis/1968 and it was in force from 1st January 1969 to 31st January 2014). In that period the property right benefitted from juridical protection differentiated according to the property's juridical nature which depended on the juridical nature of the property right's holder. Thus, the old general criminal law made the distinction, under the aspect of the criminal juridical treatment, between the protection of the personal or private wealth and the protection of the public wealth. This is the reason why the offences against the patrimony made up the object of two distinct titles in the Special part of the Criminal Code, namely a title consecrated to "offences against the personal or private wealth" and a second title consecrated to "offences against the public wealth". The only distinction between the two offence categories was given by the holder of the property right: the private person in the case of the private wealth and respectively the socialist organisations in the case of the public wealth. Taking into consideration that, in the vision of the criminal legislator of 1968, the public wealth was much superior to the personal or private wealth, the deeds incriminated by the criminal law as offences against the public wealth were more severely sanctioned in comparison to the offences which caused prejudice to the private property, having in view that the two categories of patrimonial offences had an identical content.

The approach of the old general criminal law aimed at granting a different juridical protection according to the juridical nature of the property was rejected by the jurisprudence of the Romanian Constitutional Court (in this case, the Plenary Decision of the Constitutional Court no. 1/1993, published in the Official Monitor, Part 1, no. 232/27.09.1993) which established that the new fundamental law – the Romanian Constitution of 1991 – partially abrogated the provisions in the Criminal Code of 1968 related to the offences against the public wealth.

Keeping the same ideas, the solicitor constitutional instance, by Decisions no. 177/15.12.1998, no. 5/04.02.1999 and no. 150/07.10.1999, found as unconstitutional those provisions stipulated in the case of the following offences: trust abuse, fraudulent administration/management and destruction. The latter stipulated that the criminal action was triggered after the preliminary complaint of the prejudiced person "except for the case when it belongs entirely or partially to the state". The instance stated that the criminal action was to be done after the preliminary complaint of the prejudiced person and when the goods belong entirely or partially to the private property of the state and not only when the holder of the property right is the natural person or the juridical person of private right.

2. The licit character of purchasing the property right, an essential condition for granting criminal protection

After examining the entire juridical content of the offences incorporated in the category of the offences against the patrimony, the deriving conclusion is that *the criminal protection is granted according to the licit character of purchasing the property right*. In other words, for the holder of the property right to benefit from protection from the criminal right norms, the right claimed to be infringed as well as its origin must have a licit character.

The juridical criminal norm does not have to protect any factual situation, but only the situation which is compliant with the law whereas the person who acquired a good illegally may not claim the

protection of this situation with the help of the right (Loghin&Filipas, 1992).

The necessity that the purchase of the property right must have a licit character appears as an application of the principle *nemo auditor propriam turpitudine mallegans* (nobody may invoke their ***own*** guilt in order to support their interests) in the matter of property. It means that the person who had an illegal conduct while purchasing the property right may not benefit from juridical protection.

Taking into account that the requirement of the licit character of the property right is not stipulated *expressis verbis*, we propose the presentation of several provisions included in the Special part of the Criminal Code which clearly shows that the purchase of the property right must have a licit character in order to be granted criminal protection.

The criminal legislator emphasizes the licit character of the right that the person who owns a movable good has upon the mentioned good. This emphasis is obviously seen in the content of Article 228, paragraph (2), Criminal Code, which stipulates: *„The deed constitutes theft even if the good belongs entirely or partially to the perpetrator, but at the committing moment, that good was in the* ***legitimate*** *possession or detention of another person"*.

The above quoted legal text allows the owner of a movable good to protect his/her right and to follow his/her good no matter who has it, with only one exception, namely the situation when the asset is in the possession of a legitimate owner. The protection offered by the provisions of Article 228, paragraph (2), Criminal Code, is conditioned by the legitimate character of the property right in its plenitude on one hand and of the right to own a patrimonial entity on the other hand. Thus, when the owners do not legally lose any attribute of their right, they are entitled to recover their assets whereas their deed cannot trigger the criminal responsibility; the juridical protection received by the owners in such a situation is granted while considering the licit character of their property right. In the hypothesis when the precarious possession or detention over the personal asset has been transmitted by legal means in the favour of another person, the respective holder benefits from criminal protection even in relation to the owner of that asset who shall be criminally responsible for committing the theft offence if he/she does not comply with the legitimate possession or detention and takes action to recover his/her asset.

While trying to interpret *per a contrario* the text written in Article 228, paragraph (2), Criminal Code, we can notice that, in the case of personal assets, the illegal possession is not protected in relation to the legitimate owner of the property right; in order to claim and receive juridical protection, it is necessary for the exerted possession and detention, including the purchasing way to have a legal character.

The criminal doctrine expressed the opinion that the illegitimate possession may be disregarded – without triggering criminal responsibility – not only by the owner, but also by the custodians who had, in relation to the owner, the obligation to preserve the asset and to return it to the owner. It has been claimed that these precarious custodians must be considered as acting on behalf and in the name of the owner (Loghin&Toader, 1996).

The criminal law norms that incriminate the theft offence provide protection to the illegitimate possession but this protection must not be understood in this way: the law tolerates those illicit behaviours that result in taking possession of an asset (for example a theft offence). The reasoning that is the foundation of such a defence is constituted by the need of achieving the general interest of the democratic society: to protect the lawful order by the lack of disturbance and by the stability of the patrimonial relations. In fact, there have been claims in the juridical literature that serious trouble would occur in the normal development of the social relations with a patrimonial character if the illegitimate possession were not protected by the criminal law. Namely, it would encourage the embezzlement of goods from the patrimony of somebody else who is considered as the illegitimate holder of those goods (Dongoraz et al., 2003).

The condition of the licit character of the acquisition of the property right in order to receive protection from the criminal law may be extracted from the definition given by le criminal legislator to the offence called "trust abuse" (Article 238, paragraph 1, Criminal Code: "The unjust appropriation, disposal or use of somebody else's asset by the person who received it on the basis of a title and with a certain purpose, or the refuse to give it back is punished with imprisonment from 3 months to 2 years or with a fine" where the phrase "*unjust*" is used. It signifies the lack of a title that should legitimate the perpetrator's conduct which consists in transforming the simple detention of an asset into a complete ownership. The specific of the trust abuse offence is the perpetrator's abusive intervention of his/her quality as a simple holder of *somebody else's* asset into the quality of alleged owner of the mentioned asset (Dongoraz et al., 2003).

The existence of the trust abuse offence is determined by the following circumstance: at the time of the appropriation, disposal, use or refusal to return, the perpetrator should not have acquired the property right over the personal asset that forms the material object of the offence. In the hypothesis when the perpetrator has become the owner of the asset, his/her conduct does not fall within the criminal illicit sphere. In other words, the owner of

the asset or the person to whom the owner transmitted the ownership shall receive juridical protection when the perpetrator's action consisting in the appropriation, disposal or use of somebody else's asset or the refusal to give it back does not rely on the property right acquired legally by the perpetrator.

The need to legally acquire the property right over the assets can be seen in the provisions of Article 239, paragraph (2), Criminal Code that define the assimilated form of the trust abuse by embezzling the creditors as the deed of the person who knows that he/she will not be able to pay for the price but who purchases goods or services by producing damage to the creditor. The failure to pay for the purchased good or service makes the purchaser not able to enjoy the property right over the purchased asset. Moreover, the way in which he/she understood to obtain the property (by embezzling the creditor) falls within the criminal illicit scope by triggering its criminal responsibility.

Another relevant provision from the perspective of the condition of the licit character of acquiring the property right is represented by the incriminating norm of the fraud offence (Article 244, paragraph 1, Criminal Code). It stipulates the perpetrator's requirement to obtain an unjust patrimonial use, namely a use that is not adequate and to whose acquisition he/she is not entitled. *Per a contrario*, there is a hypothesis where the perpetrator's deed to mislead another person – achieved by one of the two alternative methods stipulated in the incriminating text – is aimed at obtaining a patrimonial advantage to which he/she is entitled (for instance, to recover the vehicle which is his/her ownership but which actually is illegitimately owned by the damaged person). Thus, his/her action may not trigger the criminal responsibility because the subjective aspect of the fraud offence is not achieved. In such a situation the person who has been misled may not claim and receive protection from the criminal law because he/she has not suffered any damage of a legitimate right. By the criminal law norms presented previously as explanations, we tried to present the requirement imposed by the criminal legislator in the matter of the offences against the patrimony, precisely the offences by which the property right is protected, so that the acquisition of this right by the holder who claims the protection of the criminal law should have a legal character. Only in such a situation, the holder of the property right shall be able to oppose his/her right against any lawful subject which, in one way or another, disregarded it and as an effect of the juridical protection from which he/she benefits, he/shall obtain the removal of the suffered infringement.

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