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JUDICIAL MECHANISMS AND CONTINOUS LANDS CONFLICTS

Theoretical article

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Abstract

What defines the idea of state, social order and appurtenance of an individual to a social class? Citizenship rights and liberties correlative to the obligations incumbent on us! And yet the property right and the idea of appropriation of a movable or immovable good through all the modalities provided by law remain the ones which best define the modern human being. The idea of property was the one that marked the emergence of social classes and differences between them.The coexistence of public and private property was and is an element that characterizes every form of government of any age organization.

In a socialist state as Romania was after World War II and until the revolution from 1989, the state area and implicitly the public property occupies an overwhelming percentage, also motivated by the fact that the law from that time prohibited a citizen to own more than one dwelling house, and if a second property was acquired by inheritance he was obliged to alienate it, under the sanction that, in case of a contrary conduct it becomes state property.

The idea of revolution and the phenomenon itself marks the dissatisfaction of the people besides a state system management that considers it no longer represents him, so that as a vox populis manifestation there is a reversal of the theocracy and system values back to what?

The revolution did not mark a return to the government form previous to the communist regime establishment, respectively the constitutional monarchy, but has opted for a democratic republic with semi-parliamentary regime, as in the first instance was outlined by the regulation manner and the function of the main levers of democratic control established between the Parliament, President and Government as the main leading institutions of the Romanian state.

The main issues pursued by this article refer to private property, modalities for its reconstitution, perceived as remedy measures for former owners or their heirs, the manners of protecting and respecting it related to public property, which constitutes the main social value protected by the legislature previous to 1990 (we take into consideration the period of the communist regime) we try to emphasize in a synthetic manner inconsistent both of the legislature in which regards the private property restitution as well as the legal regime difference related to the measures of protection between private and public property.

An inequitable differentiated regime of protection for the private property reported to the private one in an early legislative was found in the Romanian penal code, for breach in different modalities specific to criminal acts that affect the patrimony, the injuries brought to public property constituting an aggravating circumstance.

Currently in our legal system there are constitutional guarantees regarding the respect of the right of private property, being protected regardless of the holder in relation to Article 44 from the Constitution of Romania and Article 1 from the Romanian penal code.

From the point of view of the author, these guarantees exist at the declarative mode, the judicial practice both in the criminal and the civil guarantees when private property right is infringed, not reflecting always the spirit of the Romanian legislator who situates the property among the fundamental values protected by the Romanian state of law.

Thus, regarding the judicial practice at the level of prosecution regarding the application manner of Article 220 Romanian penal code, which regulates the offense of trespass, does not reflect in any way the respect for private property that should exist by the solution to prosecute those who intentionally disrupt two of the main attributes of the property right regulated by Article 448 in the old Romanian civil code, now Article 556 Romanian civil code, respectively the possession and use, attributes that reflect the content of the property right.

As main way of committing Article 220 paragraph 1 Romanian penal code takes into consideration the occupation, in whole or in part, of an immobile which is in the possession of other person, without its consent and without prior approval received under the law, or refusal to liberate the building.

As it results from the constitutive content of the crime, the perpetrator of the possession disorder, named in the phase of criminal prosecution as accused, and in the one of judicial inquiry as defendant, occupies a building, without the permission given by the owner of the property right of an immobile, built or not built, or by his mandatory. On other words between the victim, the owner and the accused there is no bailment, rental or lease agreement.

From the point of view of the author the contractual agreement only must exist and be proven, not to speak of trespass, even though the manner of verbal or written agreement doesn't gather the conditions of validity of such a contract in relation to the provisions of the civil code. In the absence of such agreement we appreciate that there are gathered elements of the offense of trespass, especially if the perpetrator knew that the land is not part of a building or property of himself or another person's that would have given the permission.

The more common solution in this matter, is to acquit the perpetrator reported to Article 10 letter d Code of Criminal Procedure reprinted in 1997, above the new Criminal Procedure Code, entered into force on February 15, 2014 (it is not gathered one of the elements of the offense), motivated by the fact that the landlord does not have a protocol of possession for that land, and thus he can not proof that at one time he had the effective possession of the land. With such type of litigious situations and solutions I've shown above, are faced the heirs of the people holding a property proved by a property title, due to the fact that their author deceased and the injured party received the inherits reconstitution right on the grounds of the Law no. 18/1991 regarding the land fund, modified and republished. The solutions are absurd in the context that reported to the provisions of the laws regarding the land fund it is impossible the issue of

the property title without the sheet of possession of the owner of the property right.

Owner's death does not mean that heirs should benefit from the land fund local committee of a new possession. It is a wrong solution from our point of view equivalent to not recognizing the owner of the inherited property right, by express or tacit acceptance, the attributes of ownership, possession and use and implicitly the disposal, in the context that the real owner can not dispose as desired respecting the relations of good neighborhood of his good. The fact situations to which I refer are accompanied by a position of recognition from the perpetrator's part of the committed offense of trespass. Such solutions lead to the establishment of any lack of respect for the property right of any legal holder.

If the perpetrator pleads not guilty, the evidence that makes the prove of the owner of the property right remains the surveying expertise that usually has as objectives the measurement of the occupied surface, the establishment of the cadastral indicators, the comparison of the property titles where both the victim and perpetrator have property titles from which results or not that they have surrounding areas.

In such a situation if it results that the injured party is entitled to the abusively occupied property and the perpetrator didn't know that the property belongs to the injured party, having the intimate conviction that it was his, the proper solution is the removal from criminal prosecution under Article 10 letter d from the Romanian penal procedure code.

However, in the hypothesis that the perpetrator continues to master the land without the consent of the injured party after this moment, he can not claim he did not know that this is not his land, even if in the property title of the injured party, the cadastral indicators are incorrectly operated, this cadastral error signifying just a mistake that does not result in the change of physical emplacement of the land.

At this point, in Iasi county, such situations are considered by the Decision no. 202 from May 17th, 2012 which proposes in this respect an administrative procedure for amending the property titles of any kind of error that does not mean changing the physical emplacement of the land, which would equalize to an overlay of titles and implicitly with a litigious situation not criminal, but civil.

This type of administrative procedure should be conducted at the solicitants request at the Office of Cadastre and Real Estate Advertising of Iaşi County, which refuses to comply with such a procedure, citing the lack of enforceability of the County Commission of Land Fund Iasi.

In terms of judicial practice, a constant problem encountered is related to other possible errors concerning the name, is that of errors related to cadastral indicators, whether they are incorrect, whether the title must be completed with a plot that misses. These situations by changing the cadastral indicators do not bring, as explained above, overlay of property title. The holder of the property right or his heirs did not suffer any trespass, but has always had the possession of the land whose boundaries have remained unchanged from the physical point of view. These errors were discovered during the procedures for making the land book for the immobile, without which reported to the Law no. 287 from 2009 regarding the civil code, published in the Official Monitor 511/24.07.2009 and amended by the Law no. 71/2011, it is no longer possible only the transmittance of the property right on the immobile through sale-purchase contracts or donations, nor the issuance of permits to build a new immobile or even repair it.

In rural areas it is ascertained the creation of a legal awareness for older people to leave their heirs without legal problems, reason for which the number of people who want to register their property right of the buildings they own at the Office of Cadastre and Real Estate Advertising of Iaşi County, increased.

The judicial practice regarding the amendment of the property titles on the material errors that do not signify a physical change in the cadastral emplacement, equivalent to the overlay of another property title, it is not unitary. From the judicial point of view, these material errors have the character of some relative nullities, which injures the legitimate interest of the holder of the property right found in the impossibility of making the land book for the immobile, and does not enter into the category of absolute nullities contemplated in Article III from the Law 169 from 1997. The variety of absolute nullities contemplated by the Article III from the Law no. 169 from 1997 envisaged the partial or total absolute nullity targeted for people who were not entitled to reconstitution of property right, no matter that it was on the old emplacement or on another accepted emplacement, the old emplacement being affected by works of systematization and public utilities. On other words, in these cases it was about people who did not make the proof of a confiscated property right and proved through the agriculture role or by statements of two witness neighbors with the claimed property.

The large number of lawsuits regarding the nullity of property titles issued as reparatory effect under the Law 18 from 1991, which suffered the last modification by the Law no. 247 regarding the property and justice reform from 2005, there were generated as a great number of people, except the old cooperators members who benefited from a lot of 5000 square meters, even if they didn’t have land delivered to the old C.A.P. or I.A.S., that

didn't prove the existence of any property right in their names or family members whom they inherited.

Another problem was generated by the solutions of the Law courts which canceled the Decision of the county or local Commission of land fund, giving favor to the petitioner, in the context in which its old emplacement was returned this time to a justified person, but who accepted the reconstitution of his property right on another emplacement, its old emplacement being affected by works of systematization and public utilities interest.

Currently another legal source of the litigations for amending the property titles or absolute or partial nullity, in the context that there are ascertained overlaying of property titles are either material errors of the local committee of land fund that reported to the Government Decision 850 from 2005 has as main attribution in putting in effective possession the holder of the property titles, changes of the plot plan of the village realized by the County Office of Cadastre and Real Estate Advertising, or even by the representatives of the territorial administrative unit on whose jurisdiction the land is, sometimes generated by the emergence of some new entities, or the disappearance of the old ones. It is very difficult to prove, in the absence of a coherent archive of the village, which was the plan plot in 1994, and which was the plan plot in 1996, given that in the two property titles results that they are bordering them, and not physically overlay.

A non-unitary judicial practice was generated by the Law no. 10 from 2001 on the return of nationalized properties and Law no. 112 from 1995 as amended and republished.

If the Law 10 from 2001 has legalized measures in favor of the former owners of the nationalized buildings, Law 112 from 1995 has initiated measures favorable to the tenants of the nationalized buildings.

Thus in the first phase it was intended by the legislature that the former owners of nationalized buildings be entitled to receive damages, the tenants of such buildings not being forced to evacuate these buildings. Moreover, the latter were given the right to purchase such houses for a price that does not reflect the market price provided their obligation or not to alienate a house acquired in this manner for 10 years.

Noting the lack of funds, however, the legislature allowed the former owners of nationalized buildings to be able to choose to receive them in kind or otherwise to be compensated. There were many situations where the property has been purchased by tenants as good faith purchaser, the former owners of the nationalized property (usually its heirs) gave up the compensation and asked for restitution in kind. In such situations, some courts have opted to begin the principle of good faith purchaser and therefore the principle of civil legal documents security and in other situations there was allowed to the property right of the former owner of the nationalized property.

Other litigious situations were generated by the Law no. 10 from 2001 concerning the abusively taken buildings, in the event that the holder of the property right of the nationalized building has obtained from the Court in whose jurisdiction the property is, the cancellation of the mayor's disposal of rejection of its petition in the kind of the building, and during such a dispute the property was alienated many times. Also in this kind of situations there were different solutions.

From the point of view of the author it has priority the principle of civil legal documents security and good faith purchaser that should also be applied in case the entitled owner of the property right obtains the cancellation of the property title issued in the name of the person who did not have the quality of a person entitled, and this land made the object of several alienations. The person who didn't have the right to be the recipient of the good's restitution that was never owned by his family and was not donated or confiscated shall be liable to pay the land concerned at the market price value, from the moment the judgment becomes final and irrevocable.

Tenants and owners of nationalized houses didn't come into conflict only when the nationalized property no longer existed, it was not possible the restitution in kind, a restitutio in integrum, the holder of the nationalized immobile good being entitled by the mayors disposal only to a compensation. The procedure of the Law 10 from 2001also in the latter situation is very difficult, the owner of property being put in front of the National Authority of Nationalized Properties Restitution and Payment of Compensations, being faced to restoring the file from the beginning, although it has a favorable disposal, which it was acted on the grounds of gathering the legal conditions required.

In the application of Law no. 112 from 1995, the manner in which it is acted by the territorial administrative unit in which jurisdiction the immobile is situated, in order to conclude a transaction of sale is arbitrary, the refusal of the authority is usually justified as that the legislator used the phrase can and maybe he shouldn't. On the other hand this obligation is interpreted as being optional and not mandatory (civil decision no. 1089 of 13 June 2012 the Court of Appeal Iasi, as judiciary practice).

From the point of view of the author of the study the refusal of the authority in such circumstance as specified above must be justified in practice (he didn't sell such immobile in the last

5 years, the refusal is justified in maintaining the locative fund for social houses, in that area the building will be demolished and there will be made works of public interest, etc.)

We argue that the main mean at reach for property protection, regardless of the holder to be the criminal one, due to the lower costs than the civil specific ones that usually involve the payment of legal fees, stamp duty, which is increased annually, the payment of some specialty expertise etc.

We appreciate that complainant in a criminal complaint for trespass can be the owner of a usage right ceded under a contract of use, loan, lease, with its obligation associated to indicate the owner of the property right.

We ascertain that in practice jurisprudence as judicial means to protect the property are the actions of the owners, motivated by the fact that such action is limited to a period of one year from the date on which the owner of the right had to know the infringement of the property right. In the case of the heirs who expressly accept the sequence by a statement before a notary public, most often they do not check in this year a possible violation of the property.

The most frequently met remain the actions in claim formulated either under Article 480 from the old civil code or under Article 566 from the new civil code depending on the moment when it took place the abusive occupation of the property, prior to October, 1st, 2011, the date of entry into force of the new civil code, or after this date. Another advantage of this action is that it is inalienable, the owner being able to claim his property at any time and from the hands of anyone who would be found. Usually, such action is associated with one in rectification of land book, if the abusive occupier has tabulated his property right over the cadastral emplacement of right of the applicant, the person who claims in court using a range of evidence as witnesses (which show the movement of the boundary signs, for example), writings (usually authentic documents which prove a fair title and implicitly a property right) and surveyor expertise.

Also, if the abusive occupant, who, in such a civil process figures as defendant has erected a building can be obliged to demolish it on his expenses, or the applicant may ask the court to authorize him to the demolish the buildings erected on the land, property of the applicant.

It is observed a large payment of the judicial means, but which through the large number of litigation may lead to an instability of the civil circuit of immobile goods, reason for which we propose a ferend law as administrative amendment of the plan lots, that lead to the amendment of the cadastral data with the agreement of the holder of the property right, who will receive a document that the amendment of the cadastral data does not equate to a physical change of the emplacement, his consent being expressed before a notary public.

The parcel plan approved by the Office of Cadastre and Real Estate Advertising must be regarded as a chessboard where you exist or not.

In the region of Moldavia, these problems of tabular existence of property right which ultimately equals to the identity card for an immobile good has been generated by the coexistence alongside the Transcriptions Register, in the land book of a locality being also written a series of litigation that were not always operated in the land book of the building, in the context in which the owner of the property right was drawing it.

In the new civil code, at this time, it is legalized a tabular usurpation, which equates to the obligation of drafting by the Office of Cadastre and Real Estate Advertising of a register of holders without documents for the land who built or not buildings, buildings that are not claimed, by attributing cadastral numbers. We refer to the provisions of Article 931 from the new civil code in this sense. It is required in this sense the elaboration of some methodological rules that create an administrative procedure for the registration of possession with beginning or not of written evidence, which are not subject of litigation.

In conclusion, the application method of the law, even in the context of the clear text of law is fragmented, and the refusal of some authorities to enforce new legal disposals and to apply the law in the spirit of helping citizen, of finding solutions within the limits of the legal texts will perpetuate the myth of judicial mechanisms and land hatred.

BIBLIOGRAPHY

[1] JUDICIARY PRACTICE - civil decision no. 1089 of 13 June 2012 the Court of Appeal Iasi
[2] CONSTITUTION OF ROMANIA revised in 2003
[3] LAW NO.18/1991 – concerning the Property Land Restitution, republished on 5th of January 1998.
[4] THE GOVERNMENT DECISION NO. 850 /2005 concerning THE RULE FROM 4THOF AUGUST 2005 – for re-establishing the Property Right.
[5] LAW NO. 169/1997 amending and supplementing the Land Law no. 18/199
[6] *LAW NO.10/2001 – concerning the abusively taken buildings*
[7] LAW NO 112 of 25 November 1995 regulating the legal status of property for housing, owned by state
[8] LAW NO.247/2005 – concerning the Justice and Property Reform
[9] LAW NO. 287/2009 concerning NEW civil code

[10] ROMANIAN PENAL CODE from 1968 reprinted in 1997, above the new Criminal Procedure Code, entered into force on February 15, 2014
[11] DECISION NO. 202 from May 17th, 2012 of Iasi County Commission of Land