POSSESSION AS A PREROGATIVE OF PROPERTY: A REAPPRAISAL

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Abstract

My lecture is concerned with possession as an element of right, a legal institution that is apart from the Romanian context less common in the European legal framework. It is nevertheless universally recognized that possession is primarily a state of fact, being, according to a prevalent expression, "the shadow of property". I will show in the following pages that, in fact, this is also its only genuine stance, since possession as an element of right does not represent a theoretical position that can be successfully defended. I will also prove that all the powers of the owner are in fact exercised by means of the classical prerogatives, and hence possession as an element of right is not necessary for this reason either.

Keywords: *possession, element of right, usus, fructus, abusus.*

1. Introduction[1]

For a long time, private property had a stable theoretical foundation. From the adoption of the first Romanian Civil Code, going through the interwar period, property was understood as the crowning of three powers. Of course, by power in the civil sense we mean to say prerogatives, that are exercised directly on the object of the property, or possibilities to interact with it. The first of these consisted in the possibility of the owner to make good use of his asset, *i.e*., to utilize it for the needs that the object was called to satisfy. This is called, after the Roman moniker, *usus* or *ius utendi*. The second ability gave the owner the power to obtain the fruits of the good, either by exploiting or cultivating it directly, and even by ceding its use to a third party, which is still referred to today as *fructus* or *ius fruendi*. Finally, the prerogative to dispose of the asset, which could mean alienating the good or changing the substance of the asset, is known as *abusus* or *ius abutendi*.

We can clearly see that possession was not listed initially among the attributes of private property. Even immediately after the war, the situation was the same in this regard. The doctrine of that period holds that "from Roman law until today, the right of ownership, in its exercise, has been broken down into three attributes or prerogatives"[2], again listing *usus*, *fructus* and *abusus*. But things would soon change, as towards the end of the 60s we will find that real rights "entitle their holders to exercise certain faculties in relation to a thing - for example, in the case of ownership, *possession*, use and disposal"[3]. So, it seems that possession now appears, probably for the first time, incorporated in the right of property, as its faculty.

And from „faculty" it will eventually graduate to „element", a step which was taken in the mid-80s. Now, in a legal scholarship work[4], that soon became reference, outlining possession in native law, we find that possession, „an important element", is found in the structure of all real rights. This element is seen to have special characteristics, that differ according to the proper nature of each of these rights and without it the „appropriation" of natural goods cannot be conceived. We will see that this optic, with small nuances, still stands today. In fact, the contemporary doctrine[5] still holds on the distinction between possession as a state of fact and possession as a prerogative that enters into the legal content of each main real right. And in this last situation, possession is an element of right.

Therefore, possession seen as an element of right constitutes, together with *use* (*ius utendi and ius fruendi*) and disposition (*ius abutendi*), the legal content of the right of ownership. The fact that use now also means picking the fruits is, up to a point, a far-fetched idea. The reason for this agglutination cannot be other than that

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[1] The present article is the presentation in English of a small part of my PhD thesis entitled „The Theoretical Foundations of Possession", which is in its final stages and will be publicly defended soon.

[2] G.N. Luțescu, *Teoria generală a drepturilor reale. Teoria patrimoniului. Clasificarea bunurilor. Drepturile reale principale*, Bucharest [s.n.], 1947, p. 254.

[3] T. Ionașcu *et al., Tratat de drept civil*, vol. I, Bucharest, Academiei Publishing House, 1967, p. 196.

[4] D. Gherasim, *Teoria generală a posesiei în dreptul civil român*, Bucharest, Academiei Publishing House, 1986, p. 19.

[5] V. Stoica, *Drept civil: drepturile reale principale*, 4th ed., Bucharest, C.H. Beck Publishing House, 2021, p. 54.

by introducing possession into property a bundle of 4 prerogatives would have been created, which in turn stand to shatter the illusion of continuity of the Roman law triad. Therefore, it was necessary to keep the shell but change the core.

2. Element of right

The national legal system does not allow the agglutination of several rights into one. We are far from understanding property as a *bundle of rights,* the beautiful metaphor used in the Anglo-Saxon sphere. On the contrary, a Romanian subjective civil right is an inalienable and irreducible intellectual entity. It cannot be fragmented into other rights that may be within it. What it is permitted, however, is to include in its content powers or prerogatives which the holder has. That is why the *stricto sensu* right of ownership does not contain *the right* to harvest the fruits of the property, but only the *prerogative* to harvest these fruits. This aspect is very important, as we will soon see, since the national doctrine[6] has built a vision of subjective civil right, understood as a *bundle of prerogatives*, both substantive and procedural. By means of the latter being, in reality, the former defended. Subjective rights are, thus, complete and self-sufficient.

Indeed, the position is not only elegant, but also accurate. For our part, we appreciate that any subjective right has two sides: a *substantial* one that potentiates the options that its owner has over other people (obligational rights) or carried over certain assets (real rights), and a *procedural* one in which the plenitude of the first one is defended and will activate itself when the former is touched. Of course, there are two ailments they suffer from. While *prescription* extinguishes the procedural side, *decay* (in Romanian *decădere*) closes both.

Seen through this lens, a subjective right will never allow another right inside it, because the consequence would assume that the right inside would have its own procedural side. However, this does not happen. The loss of the use of the good can sometimes be regained through an action to revendicate, the procedural coordinate of the ownership right, and not through an action specific to its use. For this reason, lacking a procedural aspect, use is reduced to an element of right.

We will therefore say that *an element of right represents that power or faculty, legally recognized, but without direct protection, nevertheless still indirectly protected alongside other prerogatives which, together and only in this way, outline a right*.

3. Why is possession (as an element of right) different from other prerogatives?

Possession, as a civil faculty, has a legal nature. In this sense art. 555 para. (1) CC lists it among other faculties of the owner. Therefore, it will be distinguished from the faculties inherent in the human personality, which are seen as natural, or from those which are conventionally constituted, thus being obtained from the other contracting party. Above all, however, the prerogative of possession is not at all like the others. In order to understand this, it is necessary to start from the definition of possession as an element of right and then observe the differences it implies in relation to the prerogatives of use, of harvesting the fruits and of disposition.

The legal doctrine[7] is unanimous in fixing possession as *ius possidendi* in the form of the right to appropriate and possess the good that is the object of the right of ownership. It was therefore found that „because a person is the holder of the right of ownership over an asset, the law gives him the ability to possess it, respectively to appropriate and own it as a recognized owner”[8], possession being thus „the legal expression of appropriation and possession of good”[9]. We will note that the two sides that circumscribe the idea of possession as an element of right are appropriation and possession, which we will subject to a careful examination.

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[6] V. Stoica, *op. cit.,* p. 469.

[7] G. Boroi, L. Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil*, Bucharest, Hamangiu Publishing House, 2012, p. 19; E. Chelaru, *Drept civil: drepturile reale principale*, 4th ed., Bucharest, Hamangiu Publishing House, 2013*,* p. 39; C. Bîrsan, *Drept civil: drepturile reale principale*, 4th ed., Bucharest, Hamangiu Publishing House, 2020*,* pp. 48-9; V. Stoica, *op. cit.,* pp. 101-2; I. Sferdian, *Drept civil, Drepturile reale principale: studiu aprofundat*, Bucharest, Hamangiu Publishing House, 2021*,* pp. 155-156; Fl.-A. Baias *et al.* (coord.), *Codul civil. Comentariu pe articole*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, p. 740.

[8] E. Chelaru*, op. cit.,* p. 39.

[9] V. Stoica, *op. cit.,* p. 101.

4. Appropriation

The notion of appropriation only makes sense in relation to corporeal things. As stated, „as a result of appropriation, anything, without losing its material meaning, becomes good in legal terms" [10]. The French doctrine also considers that the appropriation of the thing marks the moment when the thing enters into patrimony, in the form of the right to which it serves as an object[11].

Therefore, the first consequence of appropriation becomes the economic value that the thing, after appropriation, acquires. It was noted in this sense that "things acquire economic value and become goods only through appropriation"[12], so appropriation "presupposes the existence of the use value of things and adds their exchange value, so that the goods (appropriated things) have economic value"[13]. In an opinion that is in the same vein, albeit with a little twist, it is found that through appropriation it is not the thing that acquires value, but the right it carries over it, so "the exchange value that is obtained through appropriation is an assigned value, which it is observed at the level of law"[14].

The second conclusion concerns the notion of *civil circuit*. We have defined the civil circuit elsewhere[15] as *the multitude of assets that are capable of changing their ownership rights, by any legal means*. It is not necessary to repeat now the arguments used there, but it makes sense in this context to remember that in another opinion it was justly noted that in order to be possessed, "the goods must be appropriated, that is, they must be in the civil circuit or be able to enter the circuit civil"[16]. In a nutshell, appropriation implies the introduction of the good into the logic of the dynamics of transfers, which is the essence and foundation of the civil circuit.

Of course, the history of the concept of appropriation has a venerable tradition. If we go back in time, we notice that for Hugo Grotius appropriation meant the introduction of the thing into the *dominium*, and for Locke it is justified by the absolute and exclusive possession of one's own body which, touching the thing through its labor, makes it become an object of property.

The concept of law, a creation of the millennial collective imagination, remains an intellectual reality. This being so, he cannot receive sense-objects into him, these naturally pre-existing to it and having a reality independent of law. That is why the legal sphere is forced to create an intellectual entity to house these sensory objects (things), giving them the name of *goods*. Our national doctrine notices this aspect when it states that "as a rule, the thing pre-exists the appropriation, but the patrimonial right, as a concrete subjective right, through which the thing is appropriated, does not pre-exist this process, but is born during it"[17].

To fully understand appropriation, we need to imagine a physical space in which the legal concept lives. Naturally, it cannot be separated from humans, seen as storytellers and, in turn, listeners of those stories. In the end, the whole web of rights and obligations can be understood simply as narratives that have power as long as we believe in them and thus bringing them to life. Robinson Crusoe couldn't be part of a legal universe because there was no one to listen to him and believe his story.

Now let's imagine the limits of this legal space, its membrane. It separates the legal from the non-legal, the world of things that cannot be the object of our narrative. On July 21, 1969, when Neil Armstrong landed on the Moon, the quantitative disparity between the two worlds was overwhelming. But the moment he picked up a piece of moon rock with the intention of keeping it, the membrane that encompassed him, a human being with rights and obligations, would surround this lunar rock, turning it into good. *The passage of the thing through the legal membrane to become good is the essence of appropriation*.

Appropriation takes place here through occupation, but the two are not to be confused. While *occupation* is an original mode of acquisition through the effect of the instant acquisitive prescription of possession, *appropriation* is the exclusive mode of entry into the legal order. Appropriation therefore uses the whole palette

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[10] V. Stoica, *op. cit.,* p. 322.

[11] W. Dross, *Droit des biens*, 5th ed., LGDJ, Paris, 2021, p. 20.

[12] V. Stoica, *Noțiunea de bun incorporal în dreptul civil roman*, in Revista Română de Drept Privat no. 3/2017, p. 34. For the similar idea, see also C. Stătescu, *Drept civil. Persoana fizică. Persoana juridică. Drepturile reale*, Bucharest, Didactică și Pedagogică Publishing House, 1970, p. 530.

[13] V. Stoica, *op. cit*., p. 59.

[14] I. Sferdian, *op. cit.,* p. 57.

[15] For a broader treatment of the concept of civil circuit see S. Boţic, Comentariul art. 6^1, in S. Boţic (coord.), *Legea nr. 50/1991 privind autorizarea executării lucrărilor de construcții. Comentarii și jurisprudență pe articole*, Bucharest, Hamangiu Publishing House, 2021, pp. 293-6.

[16] I. Sferdian, *op. cit.,* p. 249.

[17] V. Stoica, *op. cit.,* p. 23, n. 21.

of ways in which the membrane between things and goods can be penetrated, regardless of whether we are talking about occupation, constitution, manufacture or confection.

However, what is of the essence of appropriation – and here we are probably parting ways with a good part of the national doctrine, is the fact that appropriation necessarily involves the transition from things to goods. More precisely, wrapping it in a legal garment that makes it intelligible to the legal order[18]. *The good is therefore a thing dressed in the garment of legality*.

Several conclusions emerge immediately from this. The first is that at the time of the transfer of ownership, appropriation does not operate, because we have an asset that changes hands, the ownership of which is passed from one person to another. But the good is the same, the thing within being already draped in the legal toga. There is no transition from things to goods, so we have no appropriation in the basic sense. The same is the situation of usufruct or acquisition by possession in good faith, because despite the original character of the acquisition, what is born is *a new right, not a new asset*. The good is already in the legal order, being irrelevant that the right to it is extinguished so that another right is born in favor of the prescriptive acquirer or the acquirer.

The second conclusion implies that, in the proper sense of the word, *we can never speak of an individual appropriation*. Our moon rock is not appropriated *by* Armstrong, but *thru* him. A finer explanation is needed here, since apparently it is the famous astronaut who makes the appropriation for himself and on his behalf. But in reality, the real profit belongs to the concept of law, not to the one who made the occupation. This is because he acquires a right, while the legal world is enriched with a good. Once back on Earth, Neil will be able to sell or donate his asset[19], which means that the right to it will come out of his patrimony, but the asset remains won for the civil circuit.

The legal order is therefore the real beneficiary, for Neil Armstrong temporarily acquires a right, but the concept of law permanently gains an asset. Or, the appropriation concerns exclusively the assets, not the rights they carry over them, from which it follows that the appropriation is the way of acquiring the asset, while the transfer, the usufruct, the accession and all the others that the legislator instituted or will institute[20] are nothing more than ways of acquiring the right to property.

That is why the appropriation can only be of two kinds, *private* and *public*, because what interests us is the place the good will have in the legal world, namely if it can be characterized by dynamism, being in the general civil circuit, or if, on the contrary, it will be fixed only for the scope of a type of property. In the situation of private appropriation, but also in the context of public appropriation, we will be able to find a man in the proximity of the thing. In the strict sense, however, it will never appropriate the thing, but it will be *the agent* of appropriation.

Once we understand the mechanism of appropriation in this way, it becomes obvious that possession as an element of right cannot be the expression of an appropriation. Indeed, appropriation is the foundation of any property right, as we have seen, because it alone delivers its object (the good). But after the appropriation, after the thing has become good, its role fades. The real right no longer needs it, since the asset exists and thus has its object.

Equally important, accepting the contrary thesis would lead to a split in private property, which is inadmissible. This is because if *ius possidendi* is a prerogative of property, and it is the expression of appropriation, then the right of ownership acquired through the material realization of the thing or through occupation would indeed respect the mechanism of appropriation. But the right acquired through transfer would not, because now we would have the same *asset* that carry from one person to another (not a thing that metamorphoses into a good). So, we would have two types of property, one that would contain possession as an element of right, and another that would not, with the consequence of different degrees of rights. However, in addition to the complete lack of practical utility of such an arrangement, national law does not even allow it. The conclusion being absurd, the thesis must be abandoned.

For all these reasons, we will consider that *ius possidendi* is mistakenly seen as an expression of appropriation. If the role of appropriation is to make something external to the person come into his sphere of

[18] It has been noted somewhat in the same sense that „right is the mental, psychological mechanism by which a thing becomes good through the relation of appropriation", in I. Popa, *Sunt bunurile incorporale susceptibile de posesie?*, in Revista Română de Drept Privat no. 5/2010, p. 89.

[19] Subject to certain regulations specific to celestial objects which for the architecture of our argument have no relevance.

[20] Art. 557 para. (3) CC, in the case of private property and art. 863 letter f) CC, in the case of public property, provides for the possibility of establishing other ways of acquisition than the already existing ones.

power, to belong to him or serve his interests[21], then appropriation would be just another word for acquiring the right to the property, totally identifying itself with the different types of acquisition. However, as we think we have managed to show, *appropriation represents the acquisition of an asset for the benefit of the legal order, not the acquisition of a right over the asset thus embodied*.

5. Mastery of the good

It is rather indisputable the fact that in itself the phrase „mastery of an asset" refers to possession and ownership, for only the possessors and owners can be said to have omnipotence over their goods. But in the context of an *ius possidendi* this mastery, and here the legal doctrine is again in full agreement[22], is a purely intellectual one. Accordingly, we are not talking about *corpus*, but about *animus*, more precisely about its intellectual coordinate. In this sense, it has been rightly stated[23] that possession as a state of law is the intellectual expression of the right to rule.

It is true that it is unimaginable for an owner not to have the representation of the idea of ownership. Samuel Pufendorf made once a persuasive argument that the possessor must understand the legal notion he emulates (property). But this condition imposed on the owner is not a true prerogative or power, but a condition of legal capacity which, moreover, is absolutely presumed. There is no possibility in Romanian law that a person who has full capacity to exercise, but who does not have, for any reason, the representation of the idea of ownership, can be deprived of his real right.

Therefore, what kind of prerogative is this intellectual mastery of the good in reality?! Well, we can begin to answer this by first noticing that there is a deep gulf between this power and the others which the law confers on the owner. First of all, all other powers can be exercised materially over the good: *usus* through its use, *fructus* through the perception of natural and industrial fruits through separation[24], and *abusus* through the separation of products or any other manifestations of the material disposition over the good. Possession as intellectual possession is incapable of any objectification! Rigorously speaking, there isn't any kind of material manifestation for possession that is not already an attribute of the other powers (*usus*, *fructus* and *abuses*).

Secondly, some of the owner's powers can be exercised by legal acts. It is the case of *fructus* in the case of civil fruits and of *abusus* as a legal disposition. Possession as intellectual dominion is incapable of this form of objectification, any imaginable legal act under it being in fact absorbed into the power of reaping civil fruits and into the power of disposition.

Thirdly, all powers over good are possible in their negative aspect, by which we usually understand the restraint from their exercise does them no harm. This, again, is commonplace in the doctrine[25]. The owner may not make use of his work, may not reap its fruits, may not alter its substance, or alienate it, and all this does not cause his powers to suffer anything.

On the contrary, the „prerogative" of possession cannot fail to be exercised. The doctrine very correctly held it „has a meaning of continuity until the moment of the loss of possession of the good or the right of ownership by its owner"[26]. It becomes more and more obvious that possession, in this sense of *ius possidendi*, cannot be understood as a prerogative of property, its content making it untenable with classic prerogatives of real law.

Of course, it could be argued that the idea of ownership expresses the relationship between the owner and his property, a relationship established legally by mentioning possession among the elements of the right of ownership in the legal definition encapsulated in art. 555 CC. In principle we agree with the idea that possession can be understood as a legal relationship, but with an important nuance: we do not consider that we can speak of a relationship between the owner and his property. The good is an intellectual reality that is molded on a

[21] P. Berlioz, *Droit des biens*, Paris, Ellipses, 2014, p. 38.

[22] G. Boroi, L. Stănciulescu, *op. cit.*, 2012, p. 19; E. Chelaru*, op. cit.,* p. 39; C. Bîrsan*, op. cit.,* pp. 48-9; V. Stoica, *Drept civil...,* pp. 101-102; I. Sferdian, *op. cit.,* pp. 155-6; Fl.-A. Baias*, op. cit.,* p. 740.

[23] V. Stoica, *op. cit.,* p. 102.

[24] *Idem,* p. 103.

[25] O. Ungureanu, C. Munteanu, *Tratat de Drept civil. Bunurile. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008, p. 573; E. Chelaru*, op. cit.,* p. 40; C. Bîrsan*, op. cit.,* pp. 49-50; V. Stoica, *op. cit.,* pp. 103 *et seq.* ; I. Sferdian, *op. cit.,* p. 156; Fl.-A. Baias*, op. cit.,* p. 740.

[25] V. Stoica, *op. cit.,* p. 102.

[26] *Ibidem*.

thing[27]; therefore, the thing cannot be the other necessary side of any relationship. Relationships can only be established between people, because only they can adjust their conduct as a result of entering into that legal relationship. In this sense, the legal doctrine[28] agrees with us, property being a relationship between an owner „and those who, as a consequence, are deprived of that property"[29].

6. Conclusions

For all the reasons mentioned, we consider that possession as an element of right is not theoretically supported. Therefore, it must be abandoned. In fact, as we have seen, it is not even necessary as a power, the other prerogatives being more than sufficient to make up for it. On the other hand, possession (as a state of fact) is one of the most powerful legal institutions, and its effects are far-reaching. That is why it must remain well defined in its essential elements, and the permanent confusion with an institution that bears its name, but cannot actually support itself, only saps its power of persuasion. It is high time to take a closer look and remove all the theoretical jumble that has settled, here and there, upon our national legal framework.

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[27] We will leave aside here the situation of animals, seen as movable corporeal goods, as well as of artificial intelligence programs, as incorporeal goods, since for the logic of our argument, even if it could be said that they can somehow change their behavior, this makes no difference other than to find that we again have property rights of different degrees, an unacceptable situation of course. See for an argument tending to the same conclusion M. Nicolae, *Drept civil: teoria generală. vol. II: Teoria drepturilor subiective civile,* Solomon Publishing House, Bucharest, 2018, p. 3.

[28] M. Nicolae, *op. cit.*, p. 3 *et pass.*

[29] V. Stoica, *op. cit.,* p. 96.