

SOME ARGUMENTS FOR JUSTIFYNG THE EFFECTS OF ACQUISITIVE PRESCRIPTION

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ABSTRACT. BEYOND THE ARGUMENTS FOR OR AGAINST UZUCAPION WE CONSIDER THAT THE BASIS OF UZUCAPION CAN BE COMPLETELY POINTED OUT THROUGH A SYSTEMATICAL ANALYSIS OF THE FUNCTIONS IT HAS FULFILLED ALONG THE TIME THE ECONOMIC FUNCTION IN THE ROMAN PERIOD (A MANCIPII GOOD WHICH STOPPED BEING EXPLOITED BY THE OWNER WAS STILE AN OBJECT OF QUIRITARIAN PROPERTY, BEING INHERITED BY THE PERSON WHO USED IT), THE SANCTIONARY FUNCTION, THE PROBATORY FUNCTION AND THE ACQUISITIVE FUNCTION.

KEY WORDS. ACQUISITIVE PRESCRIPTION – BASIS, FUNCTION.

The acquisitive prescription, although regulated today with specific notes in most law systems, has been controversial for centuries among those who argued the justice of the juridical institution for its affiliation to the natural law (the property which was acquired is naturally preserves as a will to keep the gained good) or through the necessity of obtaining for the owners the stability and the necessary guarantees, as well as making them manage their business wisely and those who disputed the legitimacy of acquisitive prescription, considering it a sin, an infringement of the divine laws, an *impium praesidium* (the representatives of the canon law) and later on, those call it a contestable institution of law, unfair and which can became a source of litigation, for from extinguishing juridical conflicts, or an institution legitimating a state of the things which doesn't correspond to reality.

The acquisitive effect of usucapio has been justified both based on the principle of dynamic security of civil legal relations[1], and based on an equity reason.

The principle of dynamic security of civil legal relations, provided by alienating the incertitude caused by the contradiction between the factual power and lawful power, claims at the same time the probative function of usucapio (the right existent in a person's patrimony is consolidated through the violent legal presumption of ownership) and the *acquisitive function* (the holder, even if of bad will acquires ownership right upon an individual – determined tangible asset). The argument of equity explains the acknowledgment of the ownership right upon the asset in favour of the one holding it for a long period of time, to the disadvantage of the careless holder, punished with the loss of

its ownership right. But this punishment of *verus dominus* (which could be criticised for the inconsequence of its enforcement to any owner that has neglected its asset for a period long enough to prescribe) is more a consequence of the acquisitive effect than a function.

The acquisitive function of usucapio reflected in the acquisitive effect does not contradict with the provisions of *art. 44* from the *Romanian Constitution*, as revised, or with the provisions of *art. 1* from *Protocol no. 1 additional to the European Convention for defending human rights and fundamental liberties*[2].

As far as the notions of *guaranteeing* and *protecting* the right of private property referred to by *art. 44, par. 2 phrase 1* of the *Constitution*[3], as revised are concerned, the *guarantee* “operates in the vertical relations and is, from the point of view of substantial law, public or private, a protective shield against possible abuses from public authorities”, and *protection* of the private property law assigns the procedural legal means that the lawmaker has to create in order to guarantee this right.

Art. 1 of *Protocol no. 1 additional to the European Convention*[4], says in its first paragraph, in the meaning that “*nobody may be deprived of its property*”, still, the imperativeness of the text is decreased by the exception, “*except for a cause of public utility and under the conditions provided by the law and by the general principles of international law.*” This article, as resulted from *par. 2*, does not prevent member states to adopt the regulations “*that it considers necessary*”, regarding “*the use of assets*” if they comply with the general interest like the ones admitting the in legal acts the existence of extinctive or acquisitive property effects in the horizontal relations, even without the owner’s approval.

The double face of acquisitive prescription – liberty depriving, from the real owner’s point of view and the consolidation of a right it has known as its for a long time, from the good-will usucapio owner’s point of view, availing itself of the acquisitive effect, as a benefit of the law, from the point of view of the bad-will usucapio owner’s point of view - allows various interpretations of *art. 1* of *Protocol no. 1 to the European Convention*, both in the meaning of a conflict between this legislative text and the effects of the acquisitive prescription and reversely, in the meaning that this effects are not a violation in the private property right, as long as it is exercised in compliance with the law.

Such an interpretation, from various points of view, is also provided by ECHR in two decisions sentenced in the same case, at a distance of two years.

Towards the end of 2005 (15th of November 2005), through ECHR Resolution, given in the case of *J. A. Pye (Oxford) versus the Great Britain*, as, in a plastic formula, it was suggestively said regarding its controversial ground, the institution of usucapio “the bullet zinged by its ear”: one of ECHR Chambers decided that the British legislation regarding acquisitive prescription breaches *art. 1* of *Protocol no. 1 to the European Convention*.

In short, within the decision reasons, it was appreciated that, in the case of fields not recorded in land registries, the institution of acquisitive prescription serves in preventing legal insecurity and guaranteeing the reality of a non-contested ownership of a field, the importance of such objectives becomes debatable in the case of fields included in land registries, that facilitates the identification of the legal status of the field. It next showed that states may really determine public interest regarding the loss of the ownership right upon the asset in favour of third parties, as an effect of fulfilling the term of acquisitive prescription[5], but the fact that the owner is deprived of its asset without receiving a compensation in return is an excessive individual task that may break “the right

balance” between the exigencies of public interest and the right for assets respect, therefore a breach of man’s patrimonial rights. ECHR Chamber decided with a very small majority (four votes against three, the divergent separate opinion being common for all the three judges voting against the solution) that there is a breach of *art. 1 from Protocol no. 1*.

Following a request of the British government, re-examined by the Great Chamber of ECHR, (ECHR Resolution, the Great Chamber from 30th of August 2007 in the case of *J. A. Pye (Oxford) Ltd versus the United Kingdom of Great Britain*) that reached a different conclusion, considering that the penalty of owner’s omission to protect its asset is not excessive in case of its usucapio.

Unlike the Chamber that analyzed the circumstance as ownership depriving, the Great Chamber analyzed it as a regulation of assets use, in which case there was no problem for giving compensations, and as far as the procedural protection is concerned for the owner recording in land registries, it was decided that complaining companies had the possibility to submit the action for the recovery of possession, thus interrupting the prescription term.

REFERENCES

- [1]. For the difference between the principle of dynamic security of civil legal relations, also called the principle of legal circuit security, and the principle of static security of civil legal relations, being in conflict, the first one on the owner’s side and the latter affirmed in the continuity of the rights within the patrimony of a person, , as long as no consent has been given for alienation by the one claiming to be the real owner of the right, V. Stoica., *Civil Law. The Main Realy rights*, Vol. II, Humanitas Publishing House, 2006, p. 622. The author shows next that only when “*there are solid grounds for accepting a breakage in this continuity [...] the dynamic aspect of the principle of civil legal relations security is revealed.*”
- [2]. *The European Convention for defending human rights and fundamental liberties* shall be referred to as “*The European Convention*”. *The European Convention and Protocols no. 1, 2,4, 6, 7, 9 and 10* to this convention were ratified by Romania through the *Law no. 30 from 18th of May 1994 regarding the ratification of The European Convention for defending human rights and fundamental liberties and additional protocols to this convention*, published in the Official Gazette, Part I, no. 135/31 May 1994, completed through the *Law no. 79/ 6 July 1995 regarding the ratification of the Protocol no. 11 to The European Convention for defending human rights and fundamental liberties regarding the restructuration of the control mechanism established in the convention, concluded at Strasbourg on 11 May 1994* (O.G., Part I, no. 147/13 July 1995), *Law no. 33 from 25th of February 1999 for the ratification of the European Agreement regarding the persons taking part in procedures in front of the European Court of Human Rights, adopted at Strasbourg on 5th of March 1996* (O.G., Para I, no. 88/02 March 1999), *Law no. 7 from 9th of January 2003 for the ratification of the Protocol no. 13 to The European Convention for defending human rights and fundamental liberties regarding the abolishment of the death penalty concluded at Vilnius on 3 May 2002*, (O.G, Part I, no. 27 /20 January 2003), *Law no. 345 from 12 July 2004 for approving the withdrawal of the reserve submitted by Romania for art. 5 of The European Convention for defending human rights and fundamental liberties, adopted at Rome on 4th of December 1950*, (O.G., Part I, no. 668/26 July 2004), *Law no. 39 from 17th of March 2005 regarding the ratification of the Protocol no. 14 to The European Convention for defending human rights and fundamental liberties, adopted at Rome on 4th of November 1950, regarding the amendment of the control system of the Convention, adopted at Strasbourg on 13th of May 2004*, (O.G., Part I, no. 238/22 March 2005) and through the *Law no. 103/25 April 2006 for the ratification of the Protocol no. 12 to The European Convention for defending human rights and fundamental liberties, adopted at Rome on 4th of November 2000*, (O.G., Part I, no. 375/2 May

2006).

- [3]. According to art. 44, par. 2 phrase 1 of the Constitution, “Private property is equally guaranteed and protected by the law irrespective of its owner.”
- [4]. According to art. 1 of the Protocol no. 1 of the European Convention, “Any natural or legal entity is entitled to the respect of its assets. Nobody may be deprived of its property except for a cause of public utility and under the conditions provided by the law and by the general principles of international law.

The previous provisions shall not breach states rights to adopt the laws they consider necessary for regulating the use of assets according to the general interest or in order to provide the payment of taxes or other contributions, fines”.

- [5]. „... Only ignoring this distinction between legal protection of the private property right in vertical relations and this right legal protection in horizontal relations explains the solution adopted by the European Court of Human Rights in the case of *J.A. Pye (Oxford) Ltd. versus the United Kingdom of Great Britain and Northern Ireland*. [...] this decision of the European Court of Human Rights expresses the conflict between the public and the private perspective on this issue. The failure to understand the specificity of acquisitive prescription, a private law institution, that operates in horizontal relations and not in vertical ones explains why, in majority’s opinion, it has been appreciated that the acknowledgement of the acquisitive effect of prescription is a violation of the ownership right, a breach of the provisions of art. 1 from Protocol no. 1 additional to the European Convention, respectively.” (V. Stoica, *op. cit.*, Vol. II, p. 362).