

The comparative study on the defense of patrimonial rights

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Abstract: The topicality of the article convinces us that heritage is a complex phenomenon, which implies an undeniable state of progress and social stability. The notion of stability, if it does not give rise to the very existence of patrimonial property, ensures in any case the respect given to this right. The defense of patrimonial relationships is today the foundation of any social order, at the same time representing the essential task of all legal systems. Thus, the patrimonial right, the most important of the real rights, as well as its dismemberments, is defended by a diversity of legal means, regulated by different branches of the legal system.

The purpose of this article consists in carrying out a broad theoretical analysis combined with some practical situations of the institution of the defense of patrimonial rights through the comparative study of the national civil legislation with that of other states in this field, simultaneously making rigorous generalizations and conclusions. In order to achieve this goal, we proposed to appreciate the contribution of the predecessors in the matter of property contained in the doctrinal monuments of the civil law classics and to adjust these investigations to the current regulations in order to be able to offer some solutions to improve the national legal framework in the field.

Currently, the comparative analysis of the situation in the field of property rights protection, according to international law, differs a lot compared to a few decades ago. And here the situation can be viewed from two aspects: in terms of national research and in terms of research in other countries.

In the research plan in the field of other states than the Republic of Moldova, we can say with certainty that the defense of patrimonial rights is a subject of fierce disputes among specialists in the field, thanks to its specificity. Among them, we will mention with priority the studies of Romanian, French, etc. researchers.

As for the national researches, the local specialized literature initially based its achievements on the Soviet juridical science, which, unfortunately, did not draw special attention to the conflicting issues in the matter of the defense of patrimonial rights.

However, with the adoption of the Civil Code of the Republic of Moldova in force since 12.06.2003, and with its modernization on 01.03.2019, some attempts were made to research the given field according to private international law. The narrow angle of research in this field served as an impetus for the achievement of the objectives regarding conflicting issues regarding the specific legal means of defense of patrimonial rights, as well as the non-specific legal means of patrimonial defense.

Keywords: property, defense of property rights, law, legal means.

INTRODUCTION

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In the research plan in the field of other states than the Republic of Moldova, we can say with certainty that the defense of property rights is a subject of fierce disputes among specialists in the field, thanks to its specificity. Among them, we will mention with priority the studies of Russian, Romanian, French researchers, etc.

DISCUSSIONS

As for the national researches, the local specialized literature initially based its achievements on the Soviet juridical science, which, unfortunately, did not draw special attention to the conflicting issues in the matter of the alienation of assets with the condition of lifetime maintenance. However, with the adoption of the Civil Code of the Republic of Moldova in force since 12.06.2003, and with its modernization on 01.03.2020, some attempts were made to research the given field according to private international law. The narrow angle of research in this field served as an impetus for the achievement of the objectives regarding conflicting issues regarding the specific legal means of defending the right of ownership, as well as the non-specific legal means of defending the right of defense.

In the local specialized literature, the necessary attention is not paid to the theoretical and practical aspects of the defense of property rights. Publications are with reference to property in general, and from these considerations we can conclude that the topic of the proposed master's thesis is a current and important one.

A pioneering work on the defense of property rights regulated by the legislation of the Republic of Moldova is the one developed by M. Rusanovschi (2001) "The main ways of defending property rights in the Republic of Moldova". Here, a general characteristic of the right of ownership is made, referring to the legal means of defending the right of ownership. The author mentions (Rusanovschi, M. 2001), that "the claim action is used only by the owner of the asset against the one who has it or who holds it without right. In other words, the non-possessing owner requests the non-possessing possessor to return to him the asset that he possesses without right". Proof of ownership over time has presented practical and theoretical difficulties.

The practical difficulties were generated by the fact that the owners did not have written titles, the difficulties from a theoretical point of view due to the insufficient evidence of the property owners. In conclusion, he mentions that proof of ownership cannot be absolute on the basis of all translational titles, ownership should be established "from author to author to infinity" and with written titles ((Rusanovschi, M. 2001).

We continue our analysis with the paper elaborated by Baieş S., Roşca N. "Civil law. The main real rights", dated 2005. From the examination of the content of the work, it can be seen that, unlike the old legislation, the CC of the Republic of Moldova from 2002 also provides for the claim action as a means of defending the right of ownership.

According to the authors' opinion, starting from the essence, legal nature and destination of the defense of property rights, *act he claim is, for the first time in our legislation, legally enshrined by general rules and qualified as a means of defending property rights. Under the rule of the previous regulation, the doctrine distinguished between the specific means of defending the right of ownership (claim action, limitation action and negative action) and non-specific means tending to the same result: actions based on contracts; the action to repair damages caused by illegal acts; the action resulting from unjust enrichment, etc.* (Baieş S., Roşca N. 2005).

Extensive and successful analysis of the defense of property rights in the Judge's Manual for examining civil cases Băieşu S. (2006) "*Peculiarities of the examination of disputes related to property rights*". In this detailed article, the author analyzes in comparative terms the legislation of the Republic of Moldova that regulates the defense of property rights, referring to characters, notions, particularities, exposing the point of view on its legal nature vis-à-vis the regulations of other states. He mentions that the current Civil Code of the Russian Federation dedicates a separate chapter to property relations, also regulating the defense of property rights. From the content of the respective chapter, it would seem, the independence of the legal means of defense can be deduced, which can be direct and indirect (Băieşu S., 2006).

Another work, which deserves attention, by the same author, Băieşu S. "The second book. Real rights" (2006). In this work, the author has thoroughly analyzed each article, interpreting in detail all the means of defense of property rights. He mentions that the defense of property rights is achieved through a series of legal means. By means of defense of the right of ownership are understood those actions, through which the owner tends to remove the infringements brought to his right and ensures its exercise under normal conditions. Depending on the nature of the property right violations, the civil means of defending the property right are of two types: non-specific (or indirect) legal means and specific (or direct) legal means (Băieşu, S. 2006).

The specific or direct legal means of defending the right of ownership consist of those actions that have their foundation directly on the right of ownership. In case of direct violation of the right of ownership (for example, the theft of the owner's goods), the absolute defense against any attack comes into force, which, like the right of ownership, has an absolute character. Having as the basis the right of ownership itself, as a real right, the shares in this category are real shares. Among these actions, the claim action occupies the central place. Apart from the claim action (art. 581 - 584 Civil Code of the Republic of Moldova), our legislation also recognizes the negative action (art. 585 Civil Code of the Republic of Moldova), as a real action with the help of which the right to property is defended (Băieşu, S. 2006).

The claim action is one of the most common means of defending the right of ownership, by which the owner, who has lost possession of his property, demands the restitution of this property from the non-owner possessor.

So, the claim action is the action, by which a person asks in court to recognize the right of ownership over something that he was dispossessed of. The action of the non-possessing owner against the non-possessing possessor (claim action) is aimed at restoring the right of possession that belongs to the owner and of which he was deprived. The owner always has the right of possession over his property, but he cannot exercise his powers, because the property is in the possession of other persons. Precisely by virtue of this power of attorney (the right to possess), the owner has the right to file a claim. If the action is satisfied, the property is returned to the owner (plaintiff), thus removing the violations of the right of possession. Along with the defense of the right of possession, the claim also defends the right of use and disposal, since the owner, not having possession of the asset, does not have the possibility to use it and dispose of it (Băieșu S., 2006).

The works of Ms. Cojocari E. "Civil law. Real rights. Course Notes" (2003), Cojocari E. and Dandara L. "Civil Law: Dismemberment of Property Rights" (2005), as well as Cojocari, E. and Perederco, V. "Dismemberment of Property Rights" (2014). In all of these works, the author analyzes property rights, examining in detail the defense of property rights and other real rights. The conducted study convinces us that the social relations regarding the violation of property rights have a well-established foundation by law, as well as that legally acquired wealth cannot be confiscated, no one can be expropriated except for a cause of public utility, established according to the law, with right and prior compensation, and the right to private property obliges to comply with the tasks regarding the protection of the environment and ensuring good neighborliness, as well as to comply with the other tasks that, according to the law, belong to the owner (Cojocari, E., Dandara, L. 2005).

Next, we will give a separate space to the examination of scientific materials on the topic of the work published in Romania. Following the research of the scientific materials, published on the subject analyzed in Romania, we identify a set of studies, varied, which reflect the alienation of goods with the condition of lifetime maintenance in the content of civil law manuals and monographs but with direct reference only to the maintenance contract, sharing several opinions.

In particular, we mention the work "*Property rights and other real rights*", of Ungureanu O. and Turianuc (2002). This work includes complex structure (judicial doctrine and practice), which presents - both to beginners in the career of legal sciences, as well as to theoreticians and practitioners in the branch of civil law - as a solid proposal for reflection on the treated matter.

The theorizations in the three volumes are supported by a judicial practice section, focused on the most important judicial decisions of the supreme court in the field of property rights, but also of other real rights, going through, for their exemplary power, also solutions pronounced by other courts (courts of appeal, tribunals, judges). The selection made on the casuistry with the incident is completed by clarifications on the opinions from the specialized literature, the most significant of them being strengthened by notes that make references to the bibliography of the case or to the opinions of the authors.

One of the publications of Romanian doctrinaires Dumitrache, B., Marian, N., Popescu, R. "*Civil law institutions. Selective undergraduate course 2001-2002*" (2001), which also comments on the regulations regarding the defense of property rights. Mention the authors, that the owner may bring an action to claim the property subject to restitution under the terms Art. 563 The Civil Code of Romania, respectively an action for the purpose of abolishing "subsequent acts concluded by the debtor of the restitution obligation with third parties, regarding the property subject to restitution, according to the principle of *resoluto iure dantis resolvitur ius accipientis*, in which the request for restitution of the property against the third party has an accessory character (Dumitrache, B., Marian, N., Popescu, R. 2001).

In another context, we also mention the work of the authors Dogaru I., Cercel S. "*Civil law. The General Theory of Real Rights*"(2013). The work represents a first tool for approaching the matter of real rights, both from a theoretical and practical perspective. Also here we find several cases related to the defense of property rights through legal means of defense.

Another scientific publication on the subject of the present work is his Pekete Gh. entitled "*Civil law. Real rights*" (2015). Of particular interest is that part of that study that concerns property. Property is of the greatest interest because it is the basis of the social edifice, because since ancient times property has played an essential role in economic life, becoming a driving factor in the production and circulation of goods. The book Property Law begins by making a history of the evolution of property law in Romania and internationally, continuing by analyzing the place of this branch of law in the general legal system. Analyzing the metamorphoses of property rights, the author finds that property represents the most eloquent example of

man's connection with reality, with his material and spiritual existence, that man is more than Aristotle's political animal or Hobbs' wolf and that he is and has always been a social being (Pekete, Gh. 2015).

In particular, we mention the work "Civil law. Real rights", by Joba C. and Ciochina-Barbu I. dated 2019. The current real rights course, in its 3rd edition, wants to provide useful information regarding institutions specific to this part of civil law, the authors aiming to bring new elements from the doctrine and judicial practice and to update the content of the course in relation of the legislative changes that have occurred.

The authors considered the regulations of the current Civil Code of Romania and, when it was considered necessary, a comparative analysis was carried out between the current regulation and that contained in the Civil Code of Romania from 1864. Also, some elements of comparative law were presented, at some of the studied institutions.

The authors have carried out a thorough study of legal institutions in the matter of real rights, the course being an important study tool.

We emphasize that the authors sought to highlight those aspects considered to be of great importance in the matter of real rights for the correct application of legal regulations, but also for the purpose of improving the current legal framework. It should be remembered that the authors' opinions and points of view can be subject to scientific discussions and debates, can constitute elements of analysis in order to improve the legislation (Joba, C., Ciochina-Barbu, I. 2019).

The authors sought to provide information on heritage and its functions, heritage rights, possession, private and public property rights, the legal regime of the circulation of goods, the legal modalities of property rights, the dismemberment of private property rights, the ways of acquiring the right of ownership, the limits and restrictions of the right of private ownership, the defense of the right of ownership, the cadaster and real estate advertising (Joba, C., Ciochina-Barbu, I. 2019).

A more recent publication is also by Mr. Bîrsan C. "*Civil law. Main real rights*", dated 2020. Under the well-known signature of Professor Corneliu Bîrsan, this course analyzes in detail the legal regime of goods, regulated by Book III of the Romanian Civil Code in force.

In the sequence indicated by the Civil Code of Romania, all the important aspects regarding real rights are treated: concept and classification, delimitation from claim rights, acquisition of real rights, the legal regime of private property and that of public property, legal modalities and the defense of the right to property, surface, usufruct, use and habitation, servitudes, possession and publicity of real estate rights (Bîrsan, C. 2020).

This 4th edition of the work was revised and updated at the level of the beginning of 2020, taking into account the latest changes to the special legislation mentioned in the course, but also the doctrine and recent solutions from judicial practice (Bîrsan, C. 2020).

Researching the evolution of the defense of property rights has not only a historical, purely theoretical importance, but also a practical one, as its knowledge contributes to a better understanding of the rules that govern this matter in modern law. From these perspectives, we consider references to the existing regulations in the field of property rights protection both domestically and internationally to be inherent.

At the moment, the legal rules governing the defense of property rights are found in the Civil Code of the Republic of Moldova and other normative acts, the fundamental one being of course represented by the Constitution of the Republic of Moldova.

Internally, the Constitution of the Republic of Moldova, adopted on July 29, 1994 (1), (hereinafter the Constitution of the Republic of Moldova) includes private property in the fundamental human rights, which proclaims the fundamental principles regarding the right to private property and its protection - according to art. 46 of the Constitution of the Republic of Moldova:

- the right to private property, as well as claims on the state are guaranteed;
- no one can be expropriated except for a cause of public utility, established according to the law, with fair and prior compensation;
- lawfully acquired wealth cannot be confiscated. The lawful character of the acquisition is presumed;
- goods intended for, used or resulting from crimes or misdemeanors can be confiscated only under the law.

- the right to private property obliges to comply with the duties regarding the protection of the environment and ensuring good neighborliness, as well as the compliance with the other duties that, according to the law, belong to the owner;
- the right to inherit private property is guaranteed.

In any system where the right to property is guaranteed by the Constitution, the crucial moment faced by constitutional adjudication is the selection from a variety of regulatory decisions of a redistributive nature, as they directly or indirectly affect the right to property.

In the Republic of Moldova, social relations regarding the defense of property right were initially regulated by the Civil Code of the Moldavian Soviet Socialist Republic adopted on December 26, 1964 (hereinafter the Civil Code of the SSR).

On June 6, 2002, the Parliament of the Republic of Moldova approved a new Civil Code of the Republic of Moldova, in force since June 12, 2003, and modernized on March 1, 2019, which regulates the defense of property rights in book II - Real rights, section 2, Chapter V - Defense of property rights, through the prism of art. 581-585 of the Civil Code of the Republic of Moldova.

The new wording of the chapter simplifies the claim action regime (the action of the non-possessing owner against the non-possessing possessor), establishing in art. 581 that the owner of a good has the right to have his right of ownership recognized and to obtain or recover his possession from any person who actually owns it, in the following cases:

- 1) that person has a right to possess the good, opposed to the owner.
- 2) if, under the conditions established by the law, through the effect of acquisition in good faith, usufruct, accession, the application of the provisions regarding the regime of found property or any other basis provided by law, the owner has lost the right to ownership, and the possessor or his predecessor at acquired (art. 582 CCRM).

Norm art. 583 Civil Code of the Republic of Moldova provides disclosure of the asset after acquisition under the legal act hit by absolute or relative nullity or ineffectiveness. Thus, if the asset was acquired on the basis of a legal act hit by absolute or relative nullity or an ineffective legal act on the part of the acquirer's right, the owner can exercise the claim action subject to the provisions of art. 581 and 582 of the Civil Code of the Republic of Moldova. And if, according to the law, the owner who claimed has an obligation to return the price or rent received or another correlative obligation towards the acquirer, and this correlative obligation must be executed simultaneously, the acquirer, pursuant to art. 914 of the Civil Code of the Republic of Moldova, may suspend the execution of the obligation to return the asset until the owner offers to execute or executes the correlative obligation that falls to him.

In the context of our study, the negative action included in art. 585 Civil Code of the Republic of Moldova, where did the owner's right is disturbed otherwise than by usurpation or deprivation of possession, the owner is entitled to ask the court to be defended. He can also claim compensation for the damage caused. Compensation may also be requested in the event that the termination of the infringement is not requested or the execution of this requirement is impossible. The court may order the defense of the owner, depending on the circumstances, by prohibiting the imminent disturbance, prohibiting the current disturbance, as well as removing the consequences of the past disturbance.

The modern legislation of many foreign countries contains provisions on the defense of property rights.

The protection of property in the continental system received the deepest and most serious scientific development in the German Civil Code of 1896 and the French Civil Code of 1804. The modern civil codes of a large number of foreign countries have their own special sections and chapters devoted to property institutions and the protection of property rights, where the acquisition and termination of property rights are regulated in detail, and special property claims are indicated together with claims for the protection of property rights and other property rights.

In Romanian legislation, the defense of property rights is regulated by the current Civil Code of Romania from 2011, by means of the legal norms that separately regulate the claim and negation action. In the Civil Code of Romania, the defense of the right to property has its own regulation in TITLE II - Private Property, Chapter I, Section 2 - Defense of the right to private property.

Resulting from the content of art. 563 Civil Code of Romania, the co-owner of an asset has the right to claim it from the possessor or from another person who holds it without right. He is also entitled to damages, if applicable. The right to claim action is imprescriptible, except in cases where the law provides otherwise. The property right acquired in good faith under the law is fully recognized. The court decision admitting the claim brought against the possessor is also enforceable against the person who holds the asset for the possessor, and can be executed directly against him (Urs, I., Carmen, I. 2003). The court decision by which the claim action was admitted against the person who holds the thing for the possessor is not opposable to the possessor, if he was not brought into the case.

In the same way, the owner can file a negative action against any person who claims to be the owner of any real right, other than ownership, over his property (art. 564 Civil Code of Romania). In the case of real estate registered in the land register, proof of ownership is made with the land register extract. The defendant will be obliged to return the asset or to compensation if the asset was lost through his fault or was alienated. Under the same conditions, the defendant will be obliged to return the products or their equivalent. In all cases, compensation will be assessed in relation to the time of restitution (art. 566 Civil Code of Romania).

The German legislation is the forerunner of the respective type of introduction of the defense of property rights. Such a defense method, as a claim for the restoration of possession against a person whose possession is vitiated in relation to the plaintiff, allows the owner to request the restitution of the property (§ 861 CCG). If the possession consists in creating obstacles to the possession caused arbitrarily, but at the same time does not end the possession, the owner, of course, can demand the elimination of such violations of his legitimate rights and interests (art. 862 CCG).

Following the German tradition, Swiss civil law establishes two types of property claims - claims for the return of things and claims for the removal of possession violations, which are provided for in Articles 927 and 928 of the Swiss Civil Code.

In the Italian Civil Code, two types of property claims are fixed - for defense (maintenance) and for restoration (reintegration).

At the same time, the French Civil Code distinguishes three main property claims: a claim for the legal or real termination of actions not related to the deprivation of possession (la plainte), a claim for the restoration of forced possession (la reintegrande) and a claim for the suspension activities of the defendant that endanger possession (la denonciation de nouvelle oeuvre) (Baies, S., Ugo, M., Roşca, N. 2000).

It should be noted that the Anglo-American legal system does not contain claims identical to the possessory claims of the continental legal system. The defense of property there is carried out within the framework of tort law with the mandatory use of the main categories of violation of common law (crime expressed in the invasion of another's property) (Turianu, C., Turianu, C. 1998).

CONCLUSION

The main purpose of the present study consists in carrying out a broad theoretical analysis combined with some practical situations of the institution of property rights defense through the comparative study of the national civil legislation with that of other states in this field, simultaneously making rigorous generalizations and conclusions.

Analyzing the historical evolution of the defense of property rights, we came to the conclusion that property is one of the consistent access codes used in deciphering historically constituted human societies. The institution of the defense of the property right appeared as an imperative of the time, because only it was and is able to fight, with this magistracy that kept silent about it, turned it into a political tool of current use, with the chameleon power of to explain everything, both good and bad, in a reductionist perspective in which it becomes the beginning and the end of any social given. In this study, we have tried to look at the institution of the defense of property rights stripped of these ornaments, narrowing down strictly to its legal physiology. Following the research carried out on this issue, studying the legislation and specialized literature, at the same time being practically confronted with some situations that required the application of the legal provisions that guarantee the protection of property rights, I have identified some aspects that I think we need to pay more attention to .

At the same time, it is making a comparative analysis regarding the protection of property rights with the legislation of other states, we can conclude that the legislator has armed the owner with a wide range of means and procedures so that he can defend his property from any violation would be out of the question.

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