Defending a state of affairs through a lawful action. Possession and possessive action

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Abstract

The present study aims to discover in the doctrine the reason that has generated the basis for which the legislator not only recognized the institution of possession alongside the sacred and complete right of property but also confers defence to a state of affairs through a real action specific to the defence of a states of law. The possessive action is recognized as a real action, which in principle requires an action aimed at capitalizing on a real immovable right, but in this hypothesis the possessive action protects only the state of fact called possession, without questioning the state of law. If property is right, possession is nothing but the fact, but possession has, over time, been imposed as a fundamental institution of civil law. The major importance that the possession has developed in the context of the civil circuit of values has ensured it a constant legislative consecration throughout history. The unanimously recognized possession as state of fact is gaining value through its legal effects, occupying both the theoretical and the practical concerns of the jurists, both from a theoretical and from a practical perspective, joining the full right of property. Without limiting the importance of possession to its main effect - acquiring the right to property by means of an acquisitive prescription, apodictically possession corresponds to the property right itself, being an attribute of it. Under these circumstances, the defence of possession through a real action is merely a situation of normality.

Keywords*: possession; possessive action; civil law; Civil Code.*

JEL Classification**:** K11, K15, K41

1. Introduction

The notion of possession undoubtedly has been put forward well before the emergence of the notion of law. Since ancient times man has developed this relationship that characterizes the connection between the individual and the possessed good.

The institutionalized origin of possession is acknowledged, however, as belonging to Roman law. The first historical recognitions of the possession institution are attributed to the Romans who state the concept of this state of affairs in connection with the use of the public field (*ager publicus*) that was given for use to private individuals (patricians), thus there was a private possession for the benefit of the citizens. In time, the patricians were given the opportunity to subcontract some of the lands owned (*possessiones*) to their clients. Because in time customers refused to return the land at the request of the patrons, and the

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patricians who exercised only a control of fact over the lands, lacking any legal force to force them to regain their possession, forced the creation of *de precario* interdiction, through which the patron could re-gain the subcontracted land with the help of the magistrate. The Roman State remained the owner of these lands, and could at any time revoke the use granted to the patricians[2]. With the creation of the concept of *de precario*, possession acquires for the first time individuality as a legal institution. Thus, we note that although possession as a state of affairs is recognized prior to the property right, its attestation in an organized legal system is accepted after the recognition of the property right.

The legal protection of possession is found in every age of history, its role becoming increasingly important. In the old Romanian law, possession is recognized as a state of fact generating legal effects, the consolidation of its status being found in the edict of the Calimach Code of 1817[3], where by the regulation inserted in the Article 407, which states that "*when the righteous of a thing wishes and has the purpose to hold it as a right thing of his own, he is called the ruler of that thing,*" it is formally admitted that a useful possession is the main condition of obtaining the right of property.

Lord Scarlat Calimachi, proposing to abolish the ancient property rights of both peasants and boyars, shows that at the origin all lands belonged to the Lord, and therefore there can be no private property in the absence of a charity[4]. As such, all the lands possessed without charity had to pass into the property of the lord, as the owner of the *dominium eminens*. However, the public council disagreed with this interpretation, pointing out that, according to the Basilics[5], the possession of immovable property, even belonging to the princely power, leads to the acquisition of the right to property by usucapion if the possession is exercised for a period of 40 years[6].

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[2] Molcuț Emil, *Drept privat roman (Roman Private Law)*, edition revised and supplemented, Ed. Universul Juridic, Bucharest, 2007, p.109.

[3] The Calimach Code or Codica Țivilă a Moldovei was a civil code of Moldova, made up of Christian Flechtenmacher and Anania Cuzanos, with the help of Andronache Donici, Damaschin Bojinca and other lawyers, at the initiative of the prince Scarlat Callimachi (Calimach), who promulgated it in 1817. At the promulgation, the code was written in Greek. Its application became stable only after 1833, when the editing of the code was completed by translation started along with the Greek translation. This code was designed to combine local law, based on custom, with Byzantine law (basilicles or royal laws), while at the same time using as the main model the French civil code from 1804 and the Austrian civil code from 1811 Preserving feudal features, it also contained bourgeois law, which reflected the beginning of the decomposition of the feudal order and of the formation of relations based on private property and capital in Moldova. The Calimach Code was applied until 1865, when the 1865 Civil Code entered into force.

[4] Act by which a donation is strengthened in writing.

[5] The basilicas are a collection of legal texts in 60 books, made in the 9th-10th centuries by order of the Byzantine emperors Vasile I and Leon VI (The Philosopher), constituting a systematization of the parts that were maintained in effect in the codification of Justinian. The basilicas served the feudal subjection of the peasantry of the Byzantine Empire and applied to a varying extent in the countries of South-eastern Europe during feudalism. In the Romanian areas they applied until 1865.

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The 1864 Civil code, inspired by the French Code of Napoleon, adopts the subjective conception of von Savigny[7], according to which the possession, without being an institution, would have the postulate "*animus et corpus, animus domini, animus rem sibi habendi, animus possidentis*"[8], so that the fundamental element of possession is considered to be the will of the possessor to behave as an owner, even if in reality he is not and cannot be the owner. According to the theory advocated by him, the protection of possession as a state of fact would be limited only to the possessor of the material contact with the good, as the possession cannot exist in the absence of the *corpus* element, but still the fundamental element remains to be *animus*. His theory was subsequently challenged by the theory of German jurist Rudolf von Jhering[9], who claims that the material element has preference to the intended one. The will to possess is not indifferent to Jhering, but it is included in the material element and may constitute a separate element only accidentally in the form of various *causae detentionis* in order to transform possession into detention[10].

Under the aegis of these theories, the Romanian legislator regulates the institution of possession in title XX Articles 1846-1862, Civil Code of 1864, regarding the acquisitive prescription, and the possession is defined in Article 1846 paragraph (2) as "*the holding of one thing or the use of a right exerted by ourselves or by other on our own behalf*".

The doctrine has repeatedly challenged this definition, pointing out that, on the one hand, the definition creates confusion between possession and precarious detention, and on the other, the legislator does not refer to the intentional element. These opinions were also criticized because, in the opinion of some authors, the intentional element implicitly derives from the definition given by the old Civil Code, respectively, from the phrase "by ourselves or by others on our behalf"[11].

2. Possession and possessive action in the new Civil Code of Romania

The present Civil Code dedicates to the institution of possession, the last title, Title VIII, of the Third Book - "About Goods", which in turn comprises four chapters: Chapter I - "General Provisions", Chapter II - "Vices of Possession, Chapter III - "Effects of possession" and Chapter IV - "Possessive actions"

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[7] Friedrich Carl von Savigny (born February 21, 1779 in Frankfurt am Main, deceased October 25, 1861 in Berlin), a well-known jurist and German historian of the nineteenth century. In 1803 he published the work Das Recht des Besitzes ("The Right of Ownership"), which is considered a masterpiece in the legal field.

[8] Intent and the material good, Intent to rule, Intent to have for self, intent to possess.

[9] Rudolph Ritter von Jhering was a German jurist, professor at the University of Vienna, known for his book in 1872, Der Kampf ums Recht.

[10] I.P. Filipescu, A.I. Filipescu, *Drept civil. Dreptul de proprietate și alte drepturi reale (Civil Law. Right of Ownership and other Real Rights)*, Ed. Universul Juridic, Bucharest, 2006, p. 63.

[11] Arsene Ilie Viorel, *Posesia (Possession)*, Ed. Hamangiu, Bucharest, 2014, p.9.

regulating possession in Articles 916-952. Contesting the definition contained in the old Civil Code has thus led to the legislative consecration of a new definition of possession, established in Article 916 paragraph (1) of the current Civil Code, according to which the possession is "*the actual exercise of the prerogatives of ownership over a good by the person who rules it and who acts as an owner"*, in order to add that *"The provisions of this Title apply, thoroughly as well as in respect of the possessor who behaves as a holder of another real right, with the exception of the real rights of guarantee*" which strengthens the status of this institution, namely that the possession is found whenever we are in the presence of a factual exercise of the attributes specific to the property right, and of the other major real rights (superficies, usufruct, use, abridgement, servitude).

The present re-codification re-establishes the primordial raison d'être of recognition and legal protection of possession, which stems from the fact that the possessor is the one who takes care of the good, and as such it is fair that the possessor be protected, while the owner is negligent with his good, which will lead to its sanctioning by the acquittal prescription[12].

Without succeeding in eliminating the controversy over the qualification of possession as a right, or as a mere state of affairs, it remains questionable whether possession creates an apparent legal status by the owner's intention to behave as the holder of a real right over a good, which justifies the legal protection it enjoys, [13] or whether the possession is a right and, as a result, its place would be among the real rights together with the property right according to the theory of Rudolf von Jhering.

In the opinion of some reputed specialists in the field, referring to the institution of possession, it was mentioned: "if at the origin there is a fact, possession tends to crystallize into a right by the will of the possessor." [14]

The legal protection of the possession is ensured by the legislator through the possessive action, which is recognized as a real action, although the holder is not the owner. This action seeks to defend possession, as a matter of fact, against any disturbance, ensuring that this state is maintained or that the possession is restored when it is lost.

Undoubtedly, possession as a matter of fact, first of all, will give expression to the right of property or other real right the prerogative of which it represents, so that the justification of the rationale of devoting a real action to the defence of possession is justified.

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[12] *Uzucapion, as a way to acquire ownership of a property, is also indirectly a sanction of the former owner, who, through his passivity, has long made the good to be in the possession of another person, who behaved like a real owner. As such, it is necessary that the action to determine the acquisition of the right to property through the effect of usucapion is settled in conflict with the former owner* - Decision no. 356 of January 13, 2006 of the ICCJ, Civil and Intellectual Property Section - source www.scj.ro (consulted on 1.11.2017).

[13] A. Boar, *Uzucapiunea. Prescripția, posesia și publicitatea drepturilor (Uzucapion. Prescription, Possession and Publicity of Rights)*, Ed. Lumina Lex, Bucharest, 1999, p. 35.

[14] O.Ungureanu, C.Munteanu, *Tratat de drept civil. Bunurile. Drepturile reale principale (Civil law treaty. Goods. The main real rights)*, Hamangiu Publishing House, 2008, p.378.

However, together with possession as an attribute of ownership right, the possession through the complex legal effects that it generates, such as: possession in good faith is worth property in the matter of movable goods under the conditions provided by Article 935 Civil Code, respectively Article 939 Civil Code; acquiring the ownership right through usucapion; the acquisition by the goodwill owner of the fruit of the fruitful asset; the protection of possession through the possessive actions cannot be neglected in a legal system that wants to be clear and predictable and on these grounds the decision of the legislator to create a legal framework for defending it as a state of affairs is based.

Possessive actions under the provisions of Article 949 of the Civil Code are those actions in which the person who has possessed a good for at least one year may request the court to prevent or remove any disturbance of his possession or, as the case may be, the return of the property, the possessor being also entitled to claim damages for the prejudices caused by the disturbance of his possession. Thus, we note that the possessive actions will therefore only tend to restore a situation pre-existing to disturbance or dispossession, without questioning the existence of property right or other real right over the good.

Undoubtedly, the rationale of the actions of the owner is in the interest of repressing any acts of possession or dispossession and maintaining a pre-existing state of affairs, irrespective of its legal source.

Thus, the possessive action will protect only the state of fact called possession, without questioning the state of law (the existence of the right of property or other real right) with regard to the thing in connection with which that state of affairs has been created, so it does not have a petition nature. In this respect, the holders of these actions will not have to prove their right to property or any other real right in order to demonstrate their active procedural capacity. It is only after the situation that has led to the promotion of the action in court that the party considered entitled can bring a petition to the courts to question the right of ownership or other real right over the immovable property under dispute.

Therefore, the judge in possession is obliged to discover and rule the right resulting from possession and never the ownership right. If in a litigation deduced from the court the right to ownership over the good is discussed, then we will be in the presence of the petitioners' actions, not of the owners[15].

The Constitutional Court notes in a decision given in the present case that, for reasons of a pragmatic nature, consisting in ensuring the speedy settlement of disputes with such an object and avoiding prolonged conflict situations, the legislator understood that in this matter, derogatory from the common law, to restrict the object of the probation exclusively to the existence of possession, as a matter of fact, without the question of proving the title, which would presume a genuine "*probatio diabolica*".

If the exercise of possession by a person other than the owner is justified by the existence of a real right in the possession of the possessor, any action by the

[15] Turianu C., Duțu A., *Drept civil. Compendiu (Civil Law. Compendium)*, Ed. Universul Juridic, 2016, p. 339.

holder of the right to ownership likely to prevent the exercise of that possession shall be converted into an abuse as of right, the holder being entitled to defend himself by means of the possessive action, without being able to argue that, in this way, the pre-eminence of a state of fact against the real owner would be enshrined[16].

From the Civil Code Regulations, which states in Article 949 "that the person who has possessed a good for at least one year may request the court to prevent or remove any disturbance of his possession or, as the case may be, the return of the property" we infer that the exercise of the possessive action is conditional to the cumulative meeting of the imperative conditions included in it, namely the existence of a disturbance of possession, the active procedural party having possessed the good, and the possession of the good to have been exercised for at least one year.

By way of exception, when the disorder or dispossession is violent, even the person who exercises a vicious possession can bring the action, irrespective of the duration of his possession. By violence, we refer to any act contrary to the rule of law, which involves resistance from the opponent and tends to defeat the opponent[17]. The possessive claims will be judged urgently and especially (Article 1004 Code of Civil Procedure).

The possessor of the property exercises in fact the prerogatives of his property right over it, thus behaving as an owner which considered to be the possessor, but the exercise of the possessive action is also recognized in case of the temporary holder, according to Article 949, paragraph 2. Therefore, in the event of disturbance or dispossession, peaceful or violent, they may bring the action within the limitation period of one year from the date of the disturbance or dispossession according to the provisions of par. 1, art.951 Civil Code, the introduction of the possessive action after the passing of the term of one year will lead to its rejection as being prescribed.

Possessive actions may also be brought against the owner, who will not have the benefit of a counterclaim. Restriction is imperative under paragraph 2, Article 1004, Code of Civil Procedure which proclaims the rule that the counterclaim is inadmissible, as will be the case of any other claim requesting protection of the right over the good under dispute.

However, the possessive action cannot be brought against the person in relation to whom the obligation to return the property exists, which comes to confirm in the alternative the unwritten rule of the separate judgment on the merits. Thus, when for the rightful owner the right of ownership or any other real right has been acknowledged by means of a petition, the possessive action brought by the rightful possessor will be rejected.

By resolving the possessive action, the court's decision will have the force of res judicata in a possible future possessive action on the same facts and between

[16] Constitutional Court, decision no. 528 of November 25, 2004, regarding the exception of unconstitutionality of the provisions of Article 674 of the old Code of Civil Procedure.

[17] Turianu C., Duțu A., *op. cit*., p. 339.

the same parties, but it does not have such authority in a subsequent request regarding the substance of the law (Article 1005 C. Proc. Only decisions that have resolved a petition on the merits of the law have a res judicata authority in a subsequent possessive claim.

The possessor of fact will be able to turn against the owner as of right when the exercise of the possession has been disturbed, the latter having the option after the removal of the state of the case which led to the bringing of the possessive action to be able to bring to justice his own action by which to prove and ask for the acknowledgment of his real right.

With the obvious intention of providing full codification, the current regulations in the matter provide the possessor solutions for preservation of possession when there are good reasons to believe that the possessed good may be destroyed or damaged by a thing in the possession of another person; or as a result of works such as the construction of a building, the cutting of trees or the carrying out of excavations on in the vicinity, the possessor may request that the necessary measures be taken to avoid the danger or, if necessary, to cease work. These measures are necessary for preserving the substance of the possessed good.

The measures for the preservation of the property are provisional, more precisely until the state of danger disappears. The possessor may require only the court to take the necessary measures to avoid the destruction or damage of the possessed property.

The possessor or, as the case may be, the opposing party, until the settlement of the application, may be required to pay a bail, left to the discretion of the court. The bail is the responsibility of the possessor when the court has provisionally ordered the displacement of work or the termination of the works that caused the disorder so that it can repair the damage that would cause to the defendant by this measure.

However, when the court agrees to maintain the work in its current state or the continuation of the works, the bail is set against the defendant so as to provide the possessor with the necessary sums to restore the previous situation.

3. Conclusions

Situated at the border between legal and non-legal, the possession is represented as the exercise of a factual power enabling the possessor to behave as if he was the holder of the right over work, and the recognition of this fact in the legal system thus illustrates in an eloquent manner that the passage from the territory of the fact to that of law is not achieved by a rupture, but on the contrary, the elements of fact acquire legal legitimacy, being raised to the rank of law[18].

Possession remains unanimously accepted as a state of fact independent of the real right, even if it is a prerogative of it, but by recognizing its specific legal effects, as a consequence it will be defended by law, but only to the extent that the

[18] See Claudiu Dragușin, *Comentariile Codului Civil. Posesia. Uzucapiunea (Comments of Civil Code. Possession. Usucapion)*, Ed. Hamangiu, Bucharest, 2012.

existence of the ownership right or of another real right over the good is not acknowledged. The ownership right as well as the other real rights remain recognized in their legal entirety, their holder having the option of claiming the recognition of his or her right, by way of a petition.

Therefore, as possession creates an apparent legal status and possessive action, while preserving its legal individuality, it will only defend apparently and temporarily, until the judgment on the merits or the intervention of the acquittal prescription, the exercise of possession as a state of fact.

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