UNIVERSITY OF CRAIOVA
THE FACULTY OF LAW AND SOCIAL SCIENCES
THE DOCTORAL SCHOOL

SUMMARY OF THE PhD THESIS

CONTINUITY AND INNOVATION IN THE MATTER OF ARTIFICIAL IMMOVABLE ACCESSION IN THEROMANIAN CIVIL LAW

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Craiova
2013

The property has always been a topic that will keep on concerning the individual, the practicians and the theoreticians for a very long time in the economic, social, legal and even cultural field.

The issues arisen by property, the ownership right respectively, differ according to the way in which the individual relates to it. History shows that the individual's attitude towards property changed along time, the evolution of property being a process that has closely followed the evolution of the individual himself.

The trovering of assets which was initially achieved to meet primary and elementary needs is one of the prerequisites of the occurrence of some higher, secondary or even tertiary needs. Obviously, in order to meet those needs, they needed an additional trovering of assets.

In this regard, accession appears as a novel way of acquisition the ownership right as it cannot be produced to meet the individual's needs. We could rather say that accession is a way to defend the ownership right. But at the same accession is one of the most severe limitations brought to the ownership right.

Although it is one of the classic ways of acquisition the ownership right, its has been brought under regulation since the period of glory of the Roman Empire, accession still brings "surprises" both to theoreticians and practicians due to its resulting effects.

This study does not want to reveal all the "surprises" that the matter of accession can reveal, only to point out many of the forms in which they developed in time. At the same time, this work wants to forecast some of the potential "surprises" that the matter of accession, especially the artificial

immovable one, shall prepare for legal counsellors juristi as a result of the entry in force of the new Civil Code.

For many legal counsellors, accession is an extinct institution. We dare to contradict them. Even if some of the classic ways of accession cease to be used, new forms of accession will appear. As a way of acquisition the ownership right, accession is the legal expression of the union of some assets belonging to different owners. As the physical interaction between assets cannot be stopped, we appreciate that neither accession as a lawful institution can disappear. As long as the possibility of the physical and material union of two assets belonging to different owners is recognised, there will also be the possibility of acquisition the ownership right over another person's asset, by accession.

Artificial immovable accession is but one of the forms under which the asset accession is manifested. Although we cannot say it is the most frequent form of accession, we can say that artificial immovable accession is the most disputed one, placing two important ownership rights in conflict.

This study is structured in three parts, each of them proposing a different approach of the artificial immovable accession.

The first part proposes to point out the historical prerequisites of artificial immovable accession as a way of acquisition the ownership right. Only going through history we can notice its evolution by the forms it had in time.

Relating to the importance that the individual has given to the different types of assets, we appreciate that primarily the most invoked form of accession is the immovable one. As the movable assets are the first ones trovered by an individual, the first form of accession was as a consequence the natural or artificial movable accession.

In time, immovable assets were more and more appreciated which led to the establishment and regulation of immovable accession. Like movable

accession, the immovable one was produced then and it is produced at present by human intervention both naturally and artificially.

At present, we appreciate that immovable accession, especially the artificial one, still outperforms the movable accession, from the point of view of incidence in the judicial practice. It is very likely that, due to the recognition of some new ownership rights, bearing over some movable tangible or intangible assets, we witness a change in this classification and even some new forms of accession.

In our opinion, artificial immovable accession is worth studying although they have written many pages of legal literature about it. First, artificial immovable accession still has a practical interest because it is still being produced. Secondly, artificial immovable accession rises a live interest for those concerned with the protection of human rights, because it places two such rights in conflict: the ownership right over the primary asset and the ownership right over the accessory asset.

The second part of the study proposes an analysis of the contemporary regulations in matters of artificial immovable accession.

This part shows accession under its different legal meanings. Only by understanding all the valences of accession, we can to know entirely its way of operation, or how artificial immovable accession should operate as a way of acquisition the ownership right.

The research continues focusing on accession as a way of acquisition the ownership right.

As we find ourselves in a period of transition, legally speaking, a passage from the "old" Civil Code to the "new" one, the analysis of artificial immovable accession can only be achieved by a comparative outlook of both incident regulations in the matter. As already outlined, "the new Civil Code is

the old Civil Code"[1], the research pursues in parallel the two regulations, pointing out the "turning" points of the new regulation. The research of both regulations is more important as they are both keep on being applied in parallel. In this regard, the issue of intertemporal right could not be neglected.

Starting from the analysis of the different aspects of legislative techniques, I noticed an enhanced concern of the lawmaker to achieve a detailed but coherent and well-organised regulation of accession.

Artificial immovable accession, by its effects, is a complex institution. In order to achieve a complete and coherent approach of artificial immovable accession, we proposed a systematic approach of all its aspects, starting from object ands subjects and arriving to the way of protection the rights arisen from accession.

The theoretical analysis combines with the practical one, the work proposing to point out the difficulties in the interpretation of the regulations in the matter and in their application. Theoretically, artificial immovable accession challenges the researchers, by using the logical and the systematic methods, to identify the lacunae, ambiguities and loopholes and to propose efficient solutions. Practically, artificial immovable accession challenges the courts of law to identify its levers in order to issue some fair solutions in the matter.

Following a long period in which the legal circulation of the immovable assets was strongly affected by the regulations issued by the communist regime during 19456-1949, the courts of law had to enforce cautiously the rules of law in the great number of disputes whose aim was to acquire the ownership right over the immovable assets. The inter-war doctrine and case law offered clues to the courts of law regarding the correct interpretation and enforcement of the provisions in the matter of artificial immovable accession. We appreciated as

[1] V.Stoica, Civil Law. Real Principal Rights, Editura C.H.beck, Bucureşti, 2009, the author's note on the back cover of the volume

useful to bring to attention such studies and judgments which can continue to be sources of inspiration for practicians. Therefore, the historical method was also used in this part of the work.

The contemporary law is also being studied, the new elements introduced by the new Civil Code being presented both from the doctrine perspective and ours.

Another new aspect of this part of work is the inclusion in the study of the artificial immovable accession of some rules from other matters, such as family law or administrative law in city planning matter.

Also as a novelty, we proposed to identify all the legal means that can be used to protect the rights arising from the artificial immovable accession. In this part of the work, issues of material law combine with issues of procedural law.

In the third part of the work, the comparative method was used to better outline the institution of accession. We analysed the main aspects in matter of artificial immovable accession from the French and Swiss law.

Finally, as the image of the artificial immovable accession was already outlined, we presented some solutions to improve the regulation in this matter. The solutions proposed by doctrine, along with those proposed by the author of this work, are brought to our attention.

We could say that the research made on artificial immovable accession changed our perspective on law. We appreciate that law can be regarded as a science which requires the knowledge of some principles of logic for the best study and of some mathematical principles. Just like mathematics, when solving some problems they offer some working formulae, in law it is the same, the lawmaker gives practicians the necessary formulae to settle legal issues. The issues occurred in the matter of artificial immovable accession cannot be

correctly settled without exact knowledge and correct application of the legislative “formulae”. The unknown issues occurred in the different causes brought to judgment only increase their complexity. Also, we appreciate that the knowledge of the order of operations in the matter of artificial immovable accession is of utmost importance. Without a coherent and accurate evolutional image on the cases brought to judgment, the courts can easily be cedeived by appearances.

This study proposes to be a useful tool for a correct identification of the problems in matter of accession. One these details are known, by correctly applying the formulae established by the lawmaker, the solutions in matter of immovable accession could acquire a homogenous character. On the contrary, when, starting from such details of the issues, they reach unfair solutions, either they can identify the errors occurred in formula application (reasoning), or they can detect such formulae (lergal rules) that no longer correspond to the new social requirements.

History shows that the law has not succeeded yet to “hold up” the anti-rule behaviour of the individual. This is due to the lower quality of the law sometimes and to the refusal of the individual to let himself restrained in his actions, even if such restraint is necessary, many times to reach and maintain a balance between the great number of individual interests and the general interest.

The normative consecration of the artificial immovable accession goes in these general trends. Although for ages the individual has known that he had to protect his ownership right by immediate resort to competent authorities when his right was violated, and that he was not allowed to perform any works unless the materials belongs to him on his own immovable asset or on another

person's immovable asset, subject to the latter's approval, the cases of artificial immovable accession are still present.

As we mentioned before, immovable accession can be regarded in our opinion as a means of protection of the ownership right. We maintain this point of view starting from the analysis of the material issue of the matter. The owner of the primary asset establishes that his asset suffered unintentionally, from his point of view, quality and/or quantity changes, by incorporation of one or more assets belonging to another person. As accession is produced in case the assets associated cannot be recovered and reused as such without losing and severely damaging the primary asset, it is a means to protect the integrity of suc assets, especially the primary asset.

In order not to face the situation of losing or damaging the asset, the owner of the immovable asset may often need to keep the assets associated, offering some compensations in exchange. On the other had, to protect his right on the immovable asset, the owner could remove the assets incorporated artificially. This operation supposes some expenses though that the owner can claim only from the bad faith individual that achieved the incorporation. Or, when the incorporation was achieved without guilt on behalf of the author, resting on some semblances of lawfulness, the owner of the primary asset can no longer claim the building of the accessory assets on the expense of the individual achieving the incorporation. Thus, the regulation offered to artificial immovable accession also assures the protection of the owner of accessory assets which can be replaced pecuniarily, even though they cannot be returned in kind.

Regarding artificial immovable accession as a means of protection of the ownership right, we can understand why it acts as a limitation of the ownership right, too. It is well-known that the ownership right is inviolable. It is less

known or accepted that the exercise of the ownership right can sometimes be limited. In this regard, they said that “if in the vertical relationships, i.e. in the relationships with the authorities, the lawmaker can make no exception from the principle of granting the private ownership right without violating the fundamental law, and in the horizontal relationships, i.e. in the private law relationships, the lawmaker is allowed such exceptions by an organic law”[2], such in the case of artificial immovable accession regulated by the Civil Code.

Facing a chain of ownership rights, the owner’s of the primary asset and the owner of the accessory asset, the lawmaker had to protect the former to the detriment of the latter. Regarding the consequences produced by artificial immovable accession, we appreciate as very important the criterium that the lawmaker decides to use in the classification of assets, as primary and accessory. In this regard, I noticed that the lawmaker is somehow constant in his way of bringing rules. We appreciate that the new regulation, using the term of “immovable” extended the range of primary assets, including here both lands and constructions. Nevertheless, in the relationship born based on accession between a plot of land and a construction erected on it, the lawmaker gives priority to the land owner, as the land is considered as the primary asset. As an exception, the land can be considered as accessory asset in the particular case of artificial immovable accession regulated by art. 587 of NCC (new civil code) regarding partially achieved works on the author’s immovable asset.

We could say that one of the causes of incidence still in practice of artificial immovable accession is the historical context. We are still under the influence of a rule that confused the judicial circulation of lands, by removing them from the general civil circuit and by their abusive passage into the State’s

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[2] Court of Appeal. Constanţa, civil section for minors and family issues, labour conflicts and social security conflicts, Decision no. 312/C/06.06.2007, in *Relevant decisions, 2nd semester, 2007*, http://portal.just.ro/SitePages/cautare.aspx?k=Decizia%20civil%C4%83%20nr.%20312%2FC%2F06.06.2007, accessed on 03.11.2013, time 17.51.

ownership. Although there were some reparatory laws, the "wounds" produced in this regard by the communist regime have not yet been cured. That explains the frequent incidence of the cases in which good faith authors achieved and may still be achieving works on some immovable assets that they think belong to them, although they belong to other persons in fact.

Another cause of producing this phenomenon is the carelessness of owners of immovable assets. Showing a passive attitude, even careless in many cases, regarding the assets belonging to them, these owners allow some persons to achieve works on them even if they did not entered an agreement with these persons in this regard or even if an agreement was entered, it was violated.

In this regard, we noticed that the new Civil Code puts an end to this controversial problem both to the level of doctrine and case law. The new regulation exonerates the owner of the immovable asset of any liability concerning passiveness, for the works achieved by a bad faith author. Such an author cannot oppose "to the owner of the land the passiveness that he woud have showed during the performance of the works". Although art. 593 of NCC regulating the passiveness of the owner during the performance of works refers only to the land owner, we appreciate that the owner of the construction, as a primary asset, has the same legal protection, too.

Nevertheless, in the new regulation, the passiveness of the owner of the immovable asset does not lack legal effects from our perspective. If the good faith author of the works could be assimilated to a possessor not long ago, and the bad faith author to a precarious-detentor, there are clues in the new regulation suggesting the quality of owner on the work of his author. A fiorst clue in this regard is that the lawmaker expressly mentions that the ownership over the materials used in achieving a work is no longer acquired instantaneously by incorporation. Another clue would be the possibility that the

lawmaker admits to the author of the work when the owner of the immovable asset chooses to acquire the immovable asset corresponding to the work. In our opinion, another argument is the possibility of the author of the work to become co-owner together with the neighbouring owner over the entire resulted immovable asset, land and work. This hypothesis refers to the situation when the work exceeds the limits of the land itself of the author of the work, affecting the land of the neighbouring owner.

The last hypothesis, regulated for the first time by the new Civil Code, made us analyse a situation for which the lawmaker did not foresee any solution. It is the conflict of interests arisen between the owner of the immovable asset – remained as bare owner, by establishing a right of usage, life interest or homestead, and the neighbouring owner, in the case the holder of the real property title achieves a work affecting both lands. In such situation, both the bare owner and the neighbouring owner are recognised by law a right of option regarding the destiny of the work. Obviously, the right of option cannot be exerted at the same time by both holders, one of them has to have priority. Following the analysis of the different situations that might arise according to the way in which the two rights of options are exerted, we reached the conclusion that the right of option should be granted prevalently to the bare owner, considering the chronological order in which the legal relationships between the parties occurred. Primarily, there is a legal relationship between the bare owner and the holder of one of the above-mentioned parcelling to the ownership right. Only subsequently to such relationship and as a consequence of it, the legal relationship between the bare owner and the neighbouring owner is born.

Returning to the new trend of judicial qualification of the author of the work, as an element of comparative law, we noticed the same tendency to

qualify the author of the work as a temporary owner of the work in the French civil law, too, where the notion of "delayed" or "postponed accession" has appeared relatively recently.

A special attention was paid, with respect to the acquisition time of the ownership right over the works effected, to the various types of works, as they are classified in the new Civil Code, namely to the sustainable works and provisional works, autonomous works and added works (be they necessary, useful and for pleasure), for which the lawmaker established different legal treatments.

According to the new regulation, to be found in Art. 885 para.(1) of NCC, the ownership right over an immovable asset can only be acquired by recording such right in the land book. Applying this text of law was, however, postponed by Law No.71/2011 for the application of Law No.287/2009 regarding the Civil Code. Art. 56 para.(1) of the law established that the provisions of Art. 885 para. (1) of NCC applied only after the completion of cadastre works for each administrative-territorial unit and the opening, upon request or *ex* officio, of the land books for the respective immovable assets, in accordance with the provisions of Law No.7/1996, as republished, subsequently amended and supplemented. This new regulation will generate numerous issues of intertemporal law.

Art. 58 of the same law acknowledges another issue of artificial immovable accession, subject to transitory law, establishing that "in all the cases in which the artificial immovable accession implies the exercise of a right of option by the owner of the immovable asset, the effects of accession are governed by the law in force at the time when the work was commenced".

Whichever would be the applicable legal rule, the former one or the new one, the main effects of artificial immovable accession are the same: the

acquisition by the owner of the immovable asset of the works effected and, in relation to it, the birth of a receivable right in the patrimony of the author of the work. Although the author's receivable right was initially acknowledged by the lawmaker to prevent the occurrence of enrichment without just cause of the owner of the immovable asset, we noted that such reason seems to be lost here and there in the new regulation. The damages, to which the landlord of the immovable asset is obligated, can no longer serve such purpose, when they cover only half of the value of the works appropriated on the strength of artificial immovable accession, as indicated by the provisions of Art. 582 para.(1) letter a) of NCC, which establishes the calculation method of the damages to which the bad faith author of sustainable autonomous works is entitled, and of Art.584 para.(2) letter a) of NCC, which establishes the same calculation method of the damages owed to the bad-faith author of the useful added works.

The effects specific to accession, as an acquisition method of the ownership right, do not occur, however, whenever an accession occurs, as a material fact. Therefore, accession needs to be well understood, in virtue of all the shapes it takes.

When researching this matter, we found that there are circumstances which affect the occurrence of accession, as an acquisition method of the ownership right.

Firstly, we found it interesting to study which is the impact of the rules regarding discipline in constructions on artificial immovable accession and to what extent the author of a work can be held accountable for the flaws of the respective work.

Secondly, we deemed it useful to identify those circumstances in which, although a person makes a work on a plot of land which does not belong to

them, artificial immovable accession does not occur. We analyzed, in this context, both classical assumptions, such as the conclusion by the parties of a convention allowing the acquisition of the ownership right over the work or the occurrence of *usucapio*, and more interesting assumptions, such as the erection of works. Although this does not prevent the occurrence of artificial immovable accession, to highlight any eventual confusion that might be generated, we appreciated that it would be interesting to mention the effects that can be caused, from this perspective, by the expropriation procedure.

Once artificial immovable accession occurred, as we mentioned above, it triggers certain juridical effects. The main effect of artificial immovable accession is the birth of the option right of the landlord of the immovable asset, right which allows him to become or not the landlord of the works effected. In the assumption that the landlord opts for appropriating the works, the receivable right of the author of the work is born, a right which allows the author to recover the investments made by him, in full or in part (according to his good or bad faith), and which has the role to also prevent the occurrence of enrichment without a just cause of the landlord of the immovable asset.

The lawmaker does not provide which are the means by which the concerned party can protect its rights resulting from the occurrence of artificial immovable accession. We considered it useful to identify the means which can be used by the parties to protect their rights. The actions that are most frequently used by the parties under such circumstances are the action for the recovery of possession and the declaratory action. The parties can successfully use, however, the action for eviction, the injunction or the challenge to enforcement.

From this perspective, we found that the regulation introduced by the new Code with regard to the enforcement of guarantees the object of which

was modified further to the occurrence of accession is interesting. Failing a judiciary practice generated by this new regulation, we analyzed, in terms of theory, any eventual consequences of the extension of mortgage according to the object to which it relates: the immovable asset (primary asset) or the construction materials (accessory assets).

In terms of lawsuit, the lawmaker did not include any special provisions for the settlement of cases of artificial immovable accession. Nonetheless, we draw attention to the issue of the necessity or opportune nature of the request, be it *ex officio* by the court of law, of a technical appraisal for the cases having artificial immovable accession as their object.

Following our research, as a certain image of artificial immovable accession was outlined, we considered that its analysis was opportune also in light of the way in which it is manifest and regulated in other legal systems, such as the French system. Compared analysis is the most adequate for highlighting the pluses and minuses of artificial immovable accession or of the solutions proposed in the field of artificial immovable accession within the legal systems under analysis.

The research work, in order to achieve the desired purpose, namely to directly or indirectly become a useful instrument for researchers and practitioners in law, ends with a presentation of a series of suggestions to perfect the applicable regulation. The main solutions proposed by the doctrine, as well as our own suggestions are set out.

The fact that we are going through a recession period is well-known. In our opinion, the recession starts from the multiple challenges undertaken by a person without meeting the requirements necessary to complete such challenges. Even in legislative terms we encounter this trend, the lawmaker being preoccupied, sometimes excessively, with harmonizing national

legislation with the European legislation, in its multiple aspects, neglecting the particular features of its own system. This is only one of the causes that led to the crisis of the legal system.

We appreciate that we can go out of recession only by concentrating our efforts on fundamental issues. The Romanian legal system cannot evolve by simply taking over European norms. An adequate environment should be previously created for such norms, in which they can operate to achieve the purposes for which they were created.

In our opinion, the study of artificial immovable accession, allows, starting from a specific situation, the identification of some of the problems of the Romanian legal system. Moreover, this study allows the identification of the social issues specific to the space and time in which we are living.

Artificial immovable accession is the result of an accrual of problems. A first problem is represented by the inexistence of a functional real estate publicity system allowing an accurate knowledge of the legal status of immovable assets. This problem is joined by the problem of the administrative system which has frequently encouraged, in one way or another, for various reasons, the performance of works, in breach of legal norms. The inefficiency of the jurisdictional system is also one of the causes generating the premises for the occurrence of immovable accession. The fact that the courts of law are operating in an extremely slow manner and are easily misled by appearances, encourages the anti-normative conduct of those persons performing various types of works.

Obviously, artificial immovable accession is also favored by factors which are not only extrinsic, but also intrinsic to a person. The lack of education, including civic and legal education, is the primary factor which

determines a person to overrule the others' rights in the course of obtaining and protecting his own rights.

All these factors need to be considered both as a whole, in terms of their causality and of the connections between them, as well as in detail, in light of their specific features manifested in each and every case. Only by carefully analising these factors, the legislator can start off a legislative process which, in time, should alow and lead to the social evolution, that will reflect over each system: justice, administration and others.