ORIGINAL RESEARCH PAPER

Assoc. Prof. **Emine Zendeli**
e.zendeli@seeu.edu.mk

Asst. Prof. **Arta Selmani- Bakiu**
arta.selmani@seeu.edu.mk

Asst. Prof. **Sami Memeti**
s.memetii@seeu.edu.mk

Faculty of Law, South East European University, Tetovo

PhD **Nagip Zendeli**
Court interpreter in Berlin and Brandenburg
zendeli@web.de

THE INSTITUTE OF PROPERTY IN CIVIL LAW – THEORETICAL AND PRACTICAL ASPECTS

Abstract

The article analyzes the notion, function and characteristics of property as one of the most undefined categories of civil law, namely of the private law in general. In an effort of shedding light on the institute of property, the article follows the path of the historical development of this institute, starting from Roman law until the contemporary law. Since the institute of property and the institute of ownership in theory and in legislation are often used as synonyms, this fact can cause difficulties in applying legal norms that refer to the notion of property, respectively, ownership. Thus the article will clarify the relationship between these two significant institutes. It will also analyze the functions that the institute of property has in the legal relations within various comparative legal systems, always following the transformation of the notion of property depending on the function that it realizes. Furthermore, the article will analyze the importance of property within the

framework of private law, the relationship between property and property law, as well as between the notion of property law in an objective sense and property rights in a subjective sense.

Keywords: property, ownership, responsibility, property law

INTRODUCTION

Property is one of the most important categories, and at the same time one of the most complicated and least understood categories of the civil law, namely, private law in general.[1] The right to peaceful enjoyment of property is a fundamental human right, that is protected under the provisions of the European Convention for Human Rights and guaranteed by the European Court of Human Rights.[2]

The legal theory has not yet achieved to give a unique definition of the notion of property because its meaning has three dimensions: legal, economic, and as a category of land registry (Klarić, Vedriš, 2006). The theoretical definition of the notion of property gains importance because this notion is not defined in normative acts, moreover in the Republic of North Macedonia we do not have yet a codification of civil law which would serve as the main normative text which would define the institute of property. Thus, even though the term property has been used in most of the national legislation in the area of civil law, we do not find its definition in any of them.3 The notion of property is not defined even in the systems that have proper civil codes. The German civil code (Bürgerliches Gesetzbuch-BGB) in several of its provisions refers to property, but it does not give its definition in any of them (BGB, 83). The French Civil code too, like the German civil code, mentions the term property several times, but it doesn't define it. The issue of the notion, functions and characteristics of property is still present today because the term "property" is used in various provisions of private and public law, but the legislator does not appear to be consistent in using this term, therefore, often the term "property" is used to denote the institute of "ownership" and vice versa. The resolution of the dilemmas regarding the notion, functions and characteristics of property is also linked to the immediate need to define the property sphere of the civil law from the non-property sphere, the latter's legal protection for the sake of the truth in recent decades has gained considerable importance.

PROPERTY LAW AND PROPERTY

Property consists of all the subjective civil rights that belong to a subject and which can be expressed in monetary value. The basis of property are the real rights, from which the most important is the right of ownership of movable and immovable things (Kovaĉević-Kuštrimović, Lazić, 2008). Property, namely the property relations that are created about

1 In the everyday life, the term "property" is used to refer to the idea of economic wealth, which entails positive values that can be expressed in money, and in this context it is unacceptable that a person that has no property value possesses property. The idea of property is consumed by the economic condition of the subject in general, which includes debts, and which may be good or bad depending on the level of the assets and liability.

2 Article 1. Protocol 1 to the European Convention on Human Rights protects the fundamental right to the peaceful enjoyment of property. This right is subject to restrictions the admissibility of which is assessed in each individual case by the European Court of Human Rights..

3 Thus, the Law on Ownership and Other Real Rights uses this term nearly 60 times, but does not define it. Similarly, Law on Obligations uses the term property in approximately 70 cases, or the Law on Inheritance in 17 cases.

it make up the basis of property law. The term "property law" is used to refer to civil law as the set of legal norms which regulate property relations and in that case the syntagma property law is used in an objective meaning. This name was used in socialist states precisely because of a lack of tolerance for the notion of private law, but this name is not acceptable because civil relations are not always property-related, but they also include other relationships that have non-property character. The notion 'property law' which included norms governing the property sphere of social relations has long been used in the civil doctrine of the Republic of Northern Macedonia as well (Групче, 1983). The term property law is still used in Swiss theory to this day, but in its substantive sense it includes only real law and the law of obligations (Tour et al., 2002).

HISTORICAL DEVELOPMENT OF PROPERTY

The term property has been established in Roman law long before the notion of ownership. Roman law has dedicated a central role to property, and in the framework of legal capacity it has also acknowledged the capacity to possess property (von Schwind, 1950). In order to define property, the Romans often used the terms *"bona"* and "*familia pecuniaque,"* and less so the term "*patrimonium"*. The term "*bona*" included goods and property, while the term "*familia pecuniaque,"* implied people and goods, the family members of *pater familias*, slaves, movable and immovable things, etc (Stanojević, 2010). The notion of property was linked to the institute of *civis Romanus*, *paterfamilis* and to inheritance (Margetić, 1997). Since under Roman law the head of family was a holder of rights[4], property was inseparably linked with him and transferred only through inheritance (Gavella, Belaj, 2008). With the development of the market economy, property is transformed as basis of transactions, whereas as part of the property were not considered things that have no material value, but only those things that have had a circulating value. In the period of the Roman Republic, under the notion of property, only physical things and assets were included, but not debts. After the collapse of the Republic, the notion of property began to be understood as a whole that included assets and debts (Stojĉević, 1998). In later developments, in addition to the general notion of property (*bona*, *patrimonium*), Roman law also recognized the special property (*peculium*, *merx, dos*), which included special funds within personal property. *Peculium* entails the part of the property that one person gave to another (father to the son), but only to carry out a certain activity, while that part of the property continued to be part of the property of the giver. *Merx,* was a category narrower than *peculium* and related to undertaking certain act. *Dos* represented a special property, which wife brought into marriage, but with which husband administered (Klarić, Vedriš, 2006). One category of things that could not be subject to private law is known as *res extra patrimonium*. In addition to private property, Roman law also recognized public, respectively, state property called *aerarium*, which initially was not owned by anyone. At the time of the Principate, *aerarium* became private property, where one part was administered by the Senate (*aerarium populi Romani*) while the rest by the emperor (*fiscus Caesaris*), but

4 First of all, the paternal property (patrimonium) is presented, and then the maternal one *(matrimonium)*

in the end, all the state-owned property became the private property of the emperor (Eisner, Horvat, 1948).

In medieval law property in its substantial sense has not been recognized for a long time. Medieval law used the term "property" to denote "ability to act" (Köbler, 2010). In 1539 the term "property" was first used in its substantial sense, as an obligation of every citizen each year to pay tax on their property. For Carl von Savigny (1840) "debt is considered as a component of property", so, the author defines "property" as a set of rights that remains to the holder after deduction of debt (Savigny, 1840). Since then, the legal concept of property has taken into account the assets and debts, while the so-called "natural concept of property" includes only assets.

In later history, various theories which dealt with the notion and importance of property were developed. The most pronounced is the classical subjective (personal) theory of the 19th century, created by the French authors Aubry and Rau. According to this theory, the idea of property derives from the idea of personality and is an expression of the legal power that a person has. According to the authors of this theory, a person's property includes all goods indiscriminately, both inborn and the ones that are created later on, the assets (subjective property rights) and liability (debts).[5] It is important to emphasize the fact that even if debts exceed assets, this circumstance does not deprive the person of property; therefore, it will be considered that the person has property even though he does not possess any property goods. According to this theory, a person can have only one property, which is indivisible and cannot be transferred. Property as a entirety is closely related to the personality of the person (the holder), and as such cannot be transferred to a third person because it doesn't have independent existence. On the contrary, the rights and obligations that comprise property are transferable on the legal circulation and can be expressed in money, moreover the rights that can't be transferred are not included in the property. During his life span the subject cannot denounce his property, nor can he be deprived of it against his will, he is separated from property only in case of death (*mortis causa*), whereby his personality ceases to exist and the property is transferred to the heirs (Stanković, Vodinelić, 2007). So, even though property is not transferable, it is still heritable. However, as to the assertion that property as an entirety cannot be an object of civil relationships *inter vivos* in our law of obligations there is an exception where property as an entirety may be an object of *inter vi*vos civil relationships, hence, the Article 1022 of the Law on Obligations states that: "by the contract to cede property during life time, the assignor shall be bound to cede all of his/her property or a part of the property to the descendants ".

The authors of this theory consider that the subjective right of ownership can be created over property. Obviously, such an approach is unacceptable, first and foremost because it contradicts the principle of specification (the right of ownership can be established on things and rights precisely specified), and secondly that the right of ownership can be created only on things and categories equated with the things, but not over claims. However, this approach of the authors may have been encouraged by the fact that property as such can be inherited and passed on to the heirs. But, the transfer of ownership over property through

5 This concept has been abandoned with time, thus in the contemporary civil law debts (liabilities) are eliminated from the notion of property, while only subjective property rights (assets) deemed to constitute property.

inheritance constitutes only one exception, because otherwise property is a broader notion than ownership, which consists also by other property rights, claims related to handing of things and transfer of rights, monetary claims arising from civil obligation relationships, etc.

The most common criticisms addressed to subjective (personal) theory are related to the theoretical claims that property is a personality quality, respectively that property is an expression of the legal capacity of subjects. The remarks are also related to the fact that the theory cannot provide explanations regarding the creation of particular types of juristic persons such as foundations created on the basis of testament. Since a testament produces legal effect only after the death of the person, the subjectivist theory which claims that property cannot exist without a holder, has failed to explain how the testator's property is transferred to the foundation, given that the same one is created after a certain period of time after the death of the testator (Kovaĉević-Kuštrimović, Lazić, 2008). This deficiency of subjectivist theory is explained by Brinz's objective theory, who in 1860 developed the theory of patrimony of affectation (*Zweckvermögenstheorie*), which asserts that property is not inseparably linked to its holder and it can be thought of as a set of property rights that has a specific purpose, in which case it is property without a holder (Becker, 2007).

The approach of the subjectivist theory, according to which, all property rights that have monetary value are transferable can be criticized because not all rights that have monetary value can also be transferred. For example, the right of usufruct is a property right, which is included in the property of the subject but it cannot be transferred due to its strictly personal nature. The subjectivist theory has maintained a degree of flexibility in asserting that all property rights that have monetary value can be part of the property. Thus, several authors assert that within property, indirectly are included the personal non-patrimonial rights, through the institute of compensation for non-patrimonial (personal) damage (Stanković, Vodinelić, 2007).

THE NOTION OF PROPERTY IN THE THEORY, SPECIAL LEGAL PROVISIONS AND THE JUDICIAL PRACTICE OF THE REPUBLIC OF NORTH MACEDONIA

Our legal theory is dominated by the view that every subject of civil law should have property, because civil transactions are realized and expressed through property. According to the principle of pecuniary sanctions, as one of the fundamental principles of civil law, in the case of infringement of the civil law relationship, the sanction will strike the property of the subject infringing the right, thus, the subjects are liable through their property, and this represents its guaranteeing function (Живковска, 2011). But despite the importance of the institute of property as a basic category of private law there is still no unique approach to its notion and content. Property as an institute of property law is expressed in several meanings, such as a set of property goods, namely, objects of property law and other rights (in economic sense); as a set of subjective property rights belonging to a person (in legal sense); and as a relation between assets and debts (according to land registry).

In specific legal provisions depending on the matter that they regulate and the intentions of the legislator, the content of property is determined in different ways. In the Law on Inheritance of the Republic of North Macedonia (1996) the term property includes the entirety of things and rights that belong to the testator. However, in certain cases the law uses the expression property to designate only one category of things, so in Article 37, paragraph. 1 of Law on Inheritance, the legislator states: "Spouse, ancestors, adopters, descendants, the adopted and their descendants and persons referred to in Article 29 of this Law, who have lived in a household with the testator are entitled to household items that serve to satisfy the daily needs, other than items with great value" (Article 37, paragraph 1, Law of Inheritance). In some provisions the term property is used to denote both rights and debts (Article 137, paragraph 1, Law of Inheritance). The Law on Family of the RNM uses the term property in many cases and it seems that the legislator when using the expression property considers a set of economic values belonging to a subject. It is also worth noting an interesting fact that points to the ambiguity and lack of consistency of the legislator in using the term property. Thus, in Article 204, paragraph 2, which defines the special property of the spouses, it is stated that: "as individual property is considered the property and the right to the property that the spouse will obtain by inheritance, legacy and gift…". From this provision we do not understand what type of right to property is being discussed, moreover when it is clear that property as an entirety cannot appear as an object of law *inter vivos*, but only exclusively *mortis causa.*

In judicial practice the notion of property is used to define property goods, especially things. Thus, in the case of the division of common property between the spouses in judicial procedure, the immovables (vineyards, houses, cars,) and other movables and immovables are considered as part of property. In some cases, the common property is required to be proven in a juridical procedure. Even in these decisions courts consider items as property, recognizing the claimant the right over 1/6 of the ideal share of the common property-spousal apartment.

PROPERTY AND OWNERSHIP

Property and ownership in everyday life are often wrongly used interchangeably with each other or used as synonyms, therefore it is necessary to distinguish the notion of property in civil law (*universitas juris*) from the notion of the law of ownership. The notion of property includes everything that subjects possess, such as rights, things, interests, etc. all of which they have the right to use, take fruits and dispose freely. Property represents a broad notion, an integral part of which may also be ownership, but not necessarily, meanwhile some authors with the term property imply a complex set of rights, entitlements, powers and privileges of the holder of rights over other persons.

The term property from civil law perspective implies all subjective civil rights with patrimonial character that belong to a subject of law. Namely, property in addition to ownership includes other subjective civil rights of patrimonial character. In this context it is wrong to identify property with ownership because ownership may be the object of

property, meanwhile the entirety of property only in exceptional cases can be subject of ownership *inter vivos* because not all subjective rights that make up property are of patrimonial character (ex. claims from civil obligations).

The authors of the subjectivist theory Obri and Ro consider that property consists of rights and obligations and not things, and that things are included in property as rights over things, while as things are included in the patrimonial mass. Therefore, it is fairer to understand the notion of property as a set of subjective civil rights rather than of items since items enter into one's property indirectly through the rights that exist over them (Vuković, 1950). The dilemmas regarding the content of property continue to this day. Often in legislation, in theory as well as in practice, we find the terms "property" and "property mass" to be used synonymously (in similar manner acts the Law on Ownership and Other Real Rights). The use as synonyms of the aforementioned expressions can cause many misunderstandings and controversies, therefore, we must make distinction between the notion of "property" as a set of rights and duties and "property mass" as a set of items over which the rights are constituted, respectively, as transaction value or as a pecuniary expression of the economic values to which the rights and duties relate (Gams, 1991).

Ownership represents the fundamental institute of civil law and the main subjective right that is included in the property of a subject (Живковска, 2005). Ownership, as a subjective civil right, acts on everyone and gives its holder direct legal power over things. It represents the full power that can be exercised within a given legal order, while the content of the entitlements of the holder to use, take fruits and dispose of the things belonging to him, is determined by the provisions of a particular legal order (Kovaĉević-Kuštrimović, Lazić, 2008). In fact, in a narrow sense the object of ownership can only be corporal things, and exceptionally rights as non-corporal things (Живковска, 2011).

There are some opinions stating that ownership as a way of economic acquisition differs from other forms of acquisition of things, due to the fact that ownership represents a direct acquisition of a thing, which is not entirely accurate because things in the economic sense can be directly acquired in other forms, ex. through lease. However, the acquisition through lease is not a complete acquisition - ownership acquisition, but rather about partial and limited acquisition. Therefore, only when the subject in its entirety acquires a thing, i.e., when third persons are completely excluded from the acquisition, we talk about ownership, as an absolute real right over his thing.

Ownership is created and exists within the framework of property. Property, whether exclusive or common, is always a wider notion than ownership, whether exclusive or common, meaning that the notion of property entails within itself the notion of property (Групче, 1985), and in this context, every ownership is at the same time property, but not the opposite, namely, every property is not ownership at the same time, as it may be a civil obligation claim. Regarding property it can be said that it represents the acquisition of circulation value whereas ownership represents the acquisition of the value of use (Gams, 1991).

DEFINITIONS OF THE NOTION OF PROPERTY

In legal theory there are different definitions of the notion of property. This is because, as noted above, the modern European codifications use the term property, but do not contain a definition of it in order to have a clear picture of what we mean by the notion of property and what its content is. Property in German law is not protected as a "special right" in the sense of § 823 Abs. 1 BGB (Teichmann, 2004). In the German Civil Code (BGB), namely, in the norms that regulate relations of civil and commercial areas, property is defined as a set of a subject's rights that have pecuniary value, i.e. the liability is not considered as a part of property (Larenz, 1989). In the civil legislation of other countries the notion of property in every legal norm may have different content and can be interpreted in different ways. The German legal theory has adopted a large number of definitions, which have been further incorporated into German-speaking (Austrian and Swiss) legal theory. The German legal theory considers that the notion of property has different meanings because it serves for the realization of different functions, thus it distinguishes the general and the particular notion of property.

LEGAL CONCEPTION OF PROPERTY (GROSS PROPERTY)

Property as a legal category (gross property under German law) represents a set of property rights that belong to a subject. According to a well-known principle of civil law, the subjects of the law in the legal transactions are liable with their own property, therefore given the fact that the debtor is liable to the creditor's claims with all his property, there is no logic to also include debts within the framework of property. Property includes rights over things and not the things themselves, that is, the right ownership over certain things and not the things on which the rights are established.

In the legal meaning of property, i.e. gross property, by which the debtor is liable in the legal transactions, only the property rights, respectively, the rights that have pecuniary value are included.[6] Usually these are rights that can at the same time be transferred, with the exception that within property may be included rights, that are not transferred provided that a material value can be created by their use or exploitation (personal servitudes). Property also includes claims that arise out of an obligation for compensation of non-material damage due to the infringement of personal rights, as well as parts in various forms of joint property. However, property cannot include personal and family rights, as well as personal qualities of a man.

6 Property does not include possession itself unless the right to possession exists.

ECONOMIC CONCEPTION OF PROPERTY (NET PROPERTY)

In economic sense, property represents a set of goods (objects of ownership and other absolute patrimonial rights) of a subject expressed in monetary value. This is actually what we call a property mass. The transfer of goods is realized through the property mass, so that money is earned for a sold item and vice versa, namely, the value of usage is converted to turnover value and vice versa. Property in economic sense, or net property, is created when the debt is deducted from the gross value of property (Larenz, 1989). It consists of the rights and liabilities (debts), more precisely, the value of the rights reduced by the value of the liabilities (debts). Regarding the definition of the notion of property in the economic sense, net property, in there is no uniform position contemporary legal theory. While in the Croatian theory the notion of property in the economic sense - net property coincides with the term property in the meaning of land registry, this is not the case in the German law (Klarić, Vedriš, 2006).

Economic conception of property or net property in certain legal situations continues to respond to the needs for an institute, which would include the rights and obligations that belong to a subject. In our positive law, property in the economic sense to a certain extent is expressed when determining the value of succession property in the provisions of the Law on Inheritance. In fact, the legislator uses the word "inheritance mass" and speaks about goods and not rights over them. In support of the provisions of the Law on Inheritance, first of all property goods that belong to the testator should be recorded and estimated, and then debts, expenses for the estimation of property and the burial of the testator should be deducted from its value (Article 33, Law on Inheritance). From the provisions of the law we can conclude that the inheritance property as well as the property in economic sense is constituted by assets and liabilities (debts).

PROPERTY IN TERMS OF COMPENSATION OF DAMAGE

The notion of property is also important in the area of law of obligations, namely the law on compensation of damages. In the Law on Obligations it is said: the damage represents a reduction of one's property (simple damage) and obstruction of one's growth (lost profit), as well as the violation of personal rights, non-material damage (Article 142, Law on Obligations). In the context of the law of compensation of damage the notion of property in economic sense (net property) is more important because it encompasses both rights and obligations. However, from the legal provision that regulates the compensation of damages it appears that the notion of property in the economic sense is not sufficient to include the position of the legislator, according to which the property of the injured party may be reduced not only because of the decreased subjective property rights (their value), but also due to the creation of new obligations or the increase of existing obligations. With regard to the obstruction of property increase (lost profit), as a type of damage, the notion of property in an economic sense is not sufficient, since the lost profit is not meant to be expressed over the set of subjective property rights of the injured party. Thus, if tortfeasor through his

actions prevents the injured party in concluding a contract with a third party, in this case the injured party has not lost any subjective right, although he has suffered property damage. As noted above, we can conclude that for the purposes of compensation of damage, the notion of property is broader not only from the notion of gross property but also from the notion of net property, because it includes within itself the lost profit.

The notion of property in our law of obligations comes into expression even with regard to unjust enrichment. When a portion of a person's property is in any way transferred to another person's property, and such transfer has no legal basis in any juridical act or law, the acquirer is obliged to return that portion of the property if it is possible, otherwise he should compensate the value of the enrichment (Article 199, paragraph 1, Law on Obligations). From cited legal provision we can conclude that property according to the legislator is constituted by the things and not the subjective property rights. The question that arises is the right of the contracting party, in the event that on the basis of an invalid juridical act or subsequent annulment the item has been transferred to the acquirer. Whether the contracting party will have the right to claim to return unjust enrichment, or the return of the item by means of a *rei vindicatio*.

Concerning the dilemma, if the contracting party which on the basis of an invalid juridical act has transferred an item to another party has the right to request the return of the same, by a legal action *(rei vindicatio*) because he still remains the owner on the ground that the transfer of the property rights of one party into the property of the other party has not occurred (there is no legal basis), or besides the legal action *rei vindicatio* he has the right to seek restitution of what was gained without a legal basis (condiction), different legal systems have different positions. Some of them allow the use of both means in alternative way, while others exclude condictio once conditions for *rei vindicatio* are fulfilled. In German law, in which ownership is transferred to the acquirer on the basis of a real legal act (*traditio* or registration in the land registry) regardless that the juridical act which served as a legal basis is invalid, the owner loses the right of ownership and has no right to use *rei vindicatio* but, can return the item by claiming restitution for unjust enrichment (Article 929, 873, BGB). Austrian and Swiss law have opposite view from the German law. Thus, the invalidity of a juridical act that serves as the legal basis for the transfer of ownership prevents the acquisition of the ownership so the owner does not lose the right of ownership, and therefore he can use the legal action of *rei vindicatio.*

CONCLUSION

Regardless of the different attitudes on the definition of the notion of property, certain characteristics of property remain unchanged. Property is a unique legal notion, a legal category, which always belongs to a subject. It is indivisible, as is the subject to which it belongs. In principle, property as a legal category cannot be transferred during the life of the subject, because it is so closely related to him/her thus cannot be divided. In exceptional cases, property can be transferred (disposed) during the life of a person (*inter vivos*) and in the cases when of the conclusion of a contract for the transfer of property is made during the

life of the subject. The content of property is comprised of various property rights, claims related to items or money, as well as property entitlements of authors or inventors. The most important right contained in the content of property is ownership, which together with other real rights forms the basis of property. Property entails all the opportunities that its holder can realize in the market by being possessor of things and rights. In legal theory, property is defined in several ways, as economic, legal and land register category.

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