THE CONCEPT OF PROPERTY AND ITS LEGAL DELIMITATIONS

Gabriela BOANGIU[*]

Abstract: The present study establishes the content on addressing the concept of property, along with its legal delimitations. The feudal context is to be taken into account, for the occurrence of the concept of property, and the ways it had to be respected. There are to be underlined the relations between rulers, boyars and freeholders. Furthermore, there are to be presented some particular cases, in the exact way they were found in the documents of that time, in which property is acknowledged, or even it is granted the right to appropriation with lands or even entire villages. From the joint property, to deforestation – as a modality to gain the right to property on new lands, unfallowed yet, they represent as many cases of land ownership.

Keywords: concept of property, joint property, severalty, freeholders, pre-emptio.

The term of "property" has encountered numerous debates, thus, a clear distinction has to be made between the property understood as object that supports a right or the right itself. Another distinction, efficient for an analysis, is represented by the differentiation between the material and immaterial aspect of property, meaning the relations of property. It also ought to be mentioned the fact that the distinction individual property – common property can be correlated with the binominal imaginary – rationality, the role of the socio-cultural component becoming a central one. These aspects of the structure regarding the relations of property are to be analysed within our investigation, in different contexts associated with mentalities.

In the feudal period of time, the age in which there were written the princely documents that mention the status of property, there were certain particularities referring to the forms and ways of gaining the right to property.

The different "modalities of ownership, possession or tenure of land, with restrictions on addressing the use and the transmitting, with the interdependence of the different categories of owners, possessors of landlords, form a fundamental

[*] 3rd Degree Scientific Researcher, PhD., "C.S. Nicolăescu-Plopşor" Institute for Research in Social Studies and Humanities from Craiova, of the Romanian Academy; Email: boangiu_g@yahoo.com.

„C.S. Nicolăescu-Plopşor" – YEARBOOK/ANUARUL, vol. XVIII, 2017, pp. 229-235

aspect, characteristic for the feudal property"[1]. The diverse situation of the multiple categories of possessors of landed property, known under one title or another, the overlapping of certain right, the complicated scale of positioning the people in relation to the assets, led to the differentiation of some legal notions, confronted by the acceptation of the classic one, from the Roman law system.

At the beginning of the feudal era, both in Moldova and Wallachia, the rule of ownership within the allodial property (*hereditary-baştină, through legacy-ocină*) was the one in *joint possession*, including the kindred from common ancestor; each simple family had their share from the entire estate. This family element that persisted in the feudal property is explained through the fact that the old community was transformed into a territorial community, within it occurring a class differentiation. Thus, it is imposed the "family private property that would be transformed into the real feudal property, on which there would work a great number of dependent peasants. This family property remained in the joint possession of the family members, descendants from a common parent, for a period of time" The documents mention numerous such cases, in which the owners form blood related groups, of the same ancestor. The due part of each of them was an arithmetic share, related to the degree of kinship, from the joint possessed plot. The direct descendants had equal joint shares from the land, and their successors were representing the same number of lines (*groups-cete*) of estate brotherhood (H.H.Stahl)"[2]. These portions were calculated from the entire property, and could be bartered (sold, pledged, donated). From this situation, there emerged the formulations from the documents: "half of the field", "the seventh part of the domain", "half of the mill", "the entire third part of the entire plots, from the field, forest, waters, the whole village pasture" etc. In this manner, there emerged the situation of fifty, sixty, or even one hundred families who held parts of land jointly, where "the princes ruled over those domains"[3].

Alongside the feudal development, the common indivisible property narrowed its basis more and more. Those joint owners who managed to create themselves a strong position within the feudal state, were leaving the severalty, were defining their frontiers, and the, with the use of money, violence, law suits and other such actions, would extend their possession, to the detriment of their neighbours. It is the period when there was formed the great domain, which would become wider, on the account of the small joint propriety. The joint co-owners that would still remain in the possession of their old plot were similar to the free peasants, struggling, along with them, with the great property that would expect to include their possessions.

---

[1] Vladimir Hanga (coord.), *Istoria dreptului românesc*, Vol I, Bucharest, Romanian Academy Publishing House, 1980.

[2] H. H. Stahl, *Contribuţii la studiul satelor devălmaşe*, Bucharest, Romanian Academy Publishing House, 1958, p. 57.

[3] Vladimir Hanga, *op. cit.*, p. 345.

After the development and the strengthening of the economic feudal basis, within the Romanian feudal states, there appeared a new type of property, the personal donation property (inalienable possession, called *ohaba* or *uric*), representing the property received as a donation, from the ruler of the country, by those who would offer their services for the internal and external needs of the country. "The granting of the appropriations were more numerous in Moldova, rather than in Wallachia, owing to the fact that the lands at the disposal of the Moldavian ruler were wider. The new property was of interest because it was granted to a person, although in the document issued on this opportunity there was mentioned the entire family and the successors of the beneficiary, and it corresponded to the western *fief*, Balkan *pronia*, or Russian *pomestia.* The granting of such properties was usually accompanied by an immunity act, which would confer economic, fiscal, legal and administrative full powers to the beneficiary. These immunities could be granted to the owners of alloidal properties, producing changes in the nature of the right to property too"[4].

Thus, the legal titles for the granting of feudal property in the Romanian states was the legal inheritance, the princely donation that could be compressive of not only an agriculture real estate, but also a privilege on a property already owned by the holder, different legal documents concluded between private owners (selling and purchasing, trading etc.), the testaments and the deforestation or the fallowing of the unfarmed lands.

The property inherited from the ancestors has its origin in an era prior to that of the independent feudal states. Thus, Alexander the Good reconfirms, on the 28th of January 1409, to the Giurgiu Ungurean boyar, the possession over "his villages, domains, which is the estate of Ungureni, where it is his house", and, besides it "the plot of Suhodol neighbouring the well, to found a village on Țurluiu too... with all its old boundaries, which he has owned for a century now"[5]. Stephen the Great reconfirms on the 10th of January 1495, to Miclea and his sisters "his rightful possession of the domain, a village on Cneajna, where it was settled his Grandfather's household"[6]; Michael the Brave reconfirms to Dragomir, High Stewart, and to Pârvu, Court Marshal, on the 10th of June 1696, the possession over two villages "because it is their rightful and old proprietorship of the domain and hereditary plot, transmitted from their grandfather and parents"[7].

The donations were granted firstly to the boyars, for different services brought to the ruler, but other social categories enjoyed this right too: the free peasants for military merits, the monasteries etc. Based on these reasons, Stephen, ruler of Moldova, gives to Tofan, on the 15th of May 1437, five villages because, "seeing his right and trustworthy help brought to us, we conferred him with great

[4] *Ibidem*, p. 546.
[5] DRH, A, I, p. 34-36, *apud* Vladimir Hanga, *op. cit.*, p. 546.
[6] DIR, A; XV/2, p. 213, *apud* Vladimir Hanga, *op. cit.*, p. 547.
[7] DIR, B, XVI/6, p. 221, *apud* Idem.

mercy and awarded him for faithful services"[8]; Mircea the Old gives to Micul and Stoica half of the village "to guard over this estate peacefully and for ever, for his faithful service, because I decided free-willingly"[9]. Nicolae Alexandru donated to the church of Câmpulung (1st of September 1351 – 31st of August 1352) a village "for the confirmation and use of this church, and for providing of food for the priests and fathers from the clergy, and altogether for himself and his parents"[10].

The third manner of gaining property in a secondary way, were the different *legal documents* concluded between the private people, either living (*inter uiuos*), or *mortis causa*. From the first category, there can be mentioned the sale-purchase, the donation or the barter acts, and in the second category, there are subscribed the oral or written testaments. Thus, on the 4th of August 1597, Ieremia Movilă reconfirms a bartering of a domain, when the treasurer Damian "bartered his rightful domain that he had bought", and Grigore Băcea "gave him in return, his rightful domain and inherited possession"[11]. Michael the Brave reconfirms on the 20th of February 1594 a bartering of properties, in which few boyars "gave and exchanged with the formerly mentioned servant of my princely person, boyar Pârvu the Chancellor, their share from Sălătruc, to be all of Pârvu the Chancellor. And my servant Pârvu the Chancellor gave them his all share from the village of Perieni"[12].

The fallowing can also be regarded as an original title of ownership over the unfarmed lands, which were nobody's possession. Thus, Ilie and Ştefan confirm to Ivan Stângaciul the possession of a village "that he looked after, taking it from the deserted condition and from forest and establishing its both side frontiers, including the share of Lungogiu...that he alone worked on and deforested it and established its frontiers"[13].

From some documents, there can be seen that the ruler confirms the possession over the deforested plots, which might create the impression that the princely donation is the source of the entitled property in this case too. Nonetheless, the unfallowing forms an autonomous title of obtaining the ownership.

The inherited property was that legally obtained from the parents, or other relatives; it could be possessed individually of jointly, if the owners did not share the estates after the death of the person from which they inherited it.

The inherited feudal property "enjoyed wide protection from the feudal law, because it used to keep the family patrimony as intact as possible, within the great families of feudal nobles constituting, along with one of the basic principles of the feudal organisation, one of the ways to accomplish the general purpose of this type of organisation"[14].

[8] DRH, A, I, pp. 239-240, *apud* Idem.
[9] DRH, B, I, pp. 55-56, *apud* Idem.
[10] DRH, B, XIII, XIV, XV, p. 12, *apud* Idem.
[11] DRH, A, XVI/4, pp. 177-178, *apud* Idem.
[12] DRH, B, XVI/6, p. 104, *apud* Vladimir Hanga, *op. cit.*, p. 547.
[13] *Ibidem*, *apud* Idem.
[14] Vladimir Hanga, *op. cit.,* p. 548.

The donated property was the consequence of a granting to the nobles, for the worthy military service and for their faithfulness shown to the feudal ruling, the feudal king. Before making a donation, the king used to make research – with the help of a canonical council, who used to play the role of a research and authentication court (*locus autenticus*), for being established if the land to be donated was the king's rightful possession, and then it was to be given into the possession of the grantee.

The fourth way of obtaining the property was constituted by the different legal documents concluded *inter uiuos*, such as sale-purchase, bartering, private property or *mortis causa* documents, as *the testament*.

The last means of gaining ownership was the *deforestation* or *unfallowing*, which – both in Moldova and Wallachia – was an original way of obtaining the right to property.

The pre-buy or the preferential buying back were also rights acknowledged to some groups of people, on addressing their assets, related to which, both the goods and the owners, privileged when buying before and back, they showed solidarity: relatives, deforestation, neighbouring, old possession over the same plot etc.

This privilege is a background proof, a reactivated survival of a former equal or inferior participation to the ownership that starts to fade. This vision of solidarity between people and goods, or the actual and second-handed, unequal, owners of a specific asset, "is expressed through a true *conditioning* of the actual owners, for the benefit of the privileged possessors and for the responsibility of the actual and active possessors. These, through the free and voluntary alienation of the asset, start the mechanism of privileged conditioning. Owing to the fact that, even free and voluntary, the alienation is an accident and, provided that it is to take place, its troubling effects are reduced, through the maintaining of the asset within one of the solidarity groups, which are gathered for *pre-emption*, in a hierarchized order: joint relatives, simple relatives, simple joint holders, total neighbours, corner neighbours, the former lord, the village, the neighbouring villages"[15].

The *pre-emption* conditioning makes the specific society remain relatively closed, more structured in the traditional organisation, more hierarchized. "Historically, it takes place on two levels, or two different modalities: the pre-buy, or the proper pre-emption, and the buying-back, or the retract provisions. In the first case, the person who alienates the property has the duty to announce the privileged (*denuntiatio*) of his selling, inviting them to pre-buy it. Their refusal would grant the freedom to sell it to anyone. On this level, the inobservance of the pre-buy would trigger as sanction the right of the preeminent to buy back from the non-party the illegally sold asset, often in secrecy. The retractor "would return" the price paid by the buyer, if it was real. This technique would raise the problem of the *denuntiatio* interval (the time for the response to this action), and of the buying-

[15] *Ibidem*, p. 550.

back, with the due annulments. In the second modality, the alienator had the duty to sell to the preeminent, but he was free to sell to a non-party too, risking that on short term (generally one year and a day), the unconsidered privileged person to exercise their right to buy back, paying the real price for the asset. The first level is the original one, and can be entirely found in the Byzantine pre-emption; the second level, of the western retraction, is later, derived, and mirrors a slight beginning of the breaking-up, or weakening of the intensity, on addressing the pre-emption structures"[16].

In the feudal right, as much as in the modern one, the owner of the right of pre-emption was the main criterion for classifying the right to pre-emption, along with the criterion represented by the document and the good subjected to pre-emption and buying-back. But this important criterion, which has a historical role too, cannot lead to a just analysis of the institution, unless it combines the socio-economic criterion of class belonging, because this category of the preeminent, joint rights relatives, neighbours etc., belong to the dominating class of the feudal lords, either free townsmen, free or dependent peasants.

The classes of the preeminent people "can be divided, not without a certain relativity, in three main forms of pre-emption, such are: the pre-emption of the relatives, the joint pre-emption and the neighbour pre-emption. To this, there can be added the pre-emption of the first owner and his relatives, which, in documents, is not different at all from that of the relatives"[17], but which, in reality, represents from the beginning a retract procedure of a buying-back. The legal persons, in their turn, were carrying out a patrimonial activity that could not remain outside the control of pre-emption, but it could not also be subjected to this control, with all the well-known aspects. Finally, from the medieval Romanian documents, there is not missing the pre-emption of the feudal lord on addressing the selling of an asset to a servant or the dependant peasants, along with the pre-emption for bargaining[18]. The fiscal function of the pre-emption is illustrated by a decision of Matei Basarab from the 29th of February 1648, when the villagers that had to pay the taxes are recorded as a special category of preeminent persons. The regime of emphyteusis of the vineyards, on different types of estates, combined in Wallachia especially with the regime of the wine tax for the prince, the boyar or the monastery, would lead to the application of a reciprocal pre-emption between the landlord and the owner of the vineyard, in case one of them would consider to sell the good. The alienation documents that instituted the pre-emption were firstly the selling, then the donation, the bartering, the endowment, the payment, the forced execution, the pledge, the leasing.

[16] Idem.

[17] *Surete*, III, p. 219, no. 131 and p. 297, no.7; *Surete*, V, p. 12, no. 4, *apud* Vl. Hanga, *op. cit.*, p. 550.

[18] Doc. June 9 1650, ABS, Bradul Monastery, I bis/5, *apud* Idem.

The pre-emption was not only a surviving reminiscence of some collective land ownership forms; nonetheless, as long as the collective property exists and it is inalienable, the pre-emption has no purpose, and it does not exist. When it occurs, it does not express an old form of collective, residual form of ownership, but something new, related to the elements of the incipient privatization of the landlords, which is producing and accentuating gradually. Only who privatised their property sufficiently can sell and can be involved in the selling to an owner from certain solidary groups. And only he who, furthermore, privatised their possession, has the possibility and the interests to increase it through the pre-buy procedure.