THE "NEW LOOK" OF ACCESSION IN THE ROMANIAN LAW, A SOURCE OF INSPIRATION FOR ITS REGULATION IN THE COMMUNITY SPACE

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Abstract

Although the trend is to interpret legal texts directly, regarding each legal regulation as a freestanding text, many times legal norms have to be correlated and interpreted ones by means of the others. Thus the legislative technique plays a very important part in drawing up an efficient legislative act whose enforcement should not generate any difficulties caused by the misinterpretation and misunderstanding of the norms.

It is obvious why the lawmaker has given such attention to accession, bearing important changes which have taken shape into a regulation much higher than the previous one.

If the lawmaker's attention to details is generally appreciated, i.e. it is useful to cover legislative lacunae by new regulations, sometimes excessive regulation is regarded critically by legal councillors, generating a poisonous inflexibility in enforcing the law. Also, the lawmaker's attempt to define some terms within the code is regarded critically, too, by legal councillors, considering that it is not pertinent to define some terms within a civil code.

We consider that by the regulating way the lawmaker succeeded in surpassing its old pattern, the French civil code adjusting better to the situations arising from practice. Also, the Romanian lawmaker evolved from the point of view of systematization of norms, compared to the French lawmaker which keeps on treating immovable accession, including the movable one, as conglomerates of norms.

The new accession regulation is a progress from the point of view of enforcing the norms of legislative techniques. It can certainly represent a pattern for the regulation of the accession in the law of other EU Member States, and not only them.

Key words: *accession, legislative technique, interpretation, ownership right, good faith.*

Introduction

Although there is a frequent tendency to interpret legal texts in a direct manner, regarding each legal norm as an autonomous text, regulatory texts should be often correlated and interpreted by means of each other. Thus, the legislative technique plays a particularly important role in the preparation of an efficient regulatory act, the application of which should not generate any difficulties, caused by the erroneous interpretation and understanding of the norms.

"Law was and will always be intimately connected with its language of expression, being rightfully named the necessary extension of legal concepts". The terms used within each system of law by means of the language, "the vocabulary specific to legal professions" truthfully expresses both the political options of the national lawmaker, his historical, cultural, religious traditions, and the influences of other regulations".[1]

Unfortunately, the legislative technique aspects have never been too much in the attention of the law researchers. Their criticism could be a very useful instrument for the legislator. The aim of this study is to bring to the attention of the law researchers that a regulation could be improved by simply using efficiently the legislative technique.

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[1] S. Neculaescu, Noul Cod Civil, intre traditie, si modernitate in privinta terminologiei juridice normative, http://sacheneculaescudotcom.wordpress.com/2011/01/11/noul-cod-civil-intre-traditie-si-modernitate-in-privinta-terminologiei-juridice-normative/, accessed on 7.12.2012, 15.30 hours.

Any regulatory act should comply with the requirements of legislative technique, as the role of these requirements is to "ensure the systematization, unification and coordination of legislation, as well as the legal contents and form adequate to each regulatory act".[2]

The lawmaker from 1864 regulated accession by using the model of the French Civil Code.

Taking over this model, the Romanian lawmaker treats accession in Book II, more precisely in Chapters I and II of Title II, which dealt with the regulation of property,

The regulation of accession has a leading role within the norms regarding ownership, as the lawmaker probably considers that such order is natural, since the article preceding the chapters on accession (that article which concludes the general presentation of ownership) deals with the right to accession. We consider, however, that the regulation of accession should have been included in that part of the Code which deals with the different ways of obtaining the ownership right, our criticism aiming also at the new Civil Code, which maintained the same positioning of the texts regarding accession.[3]

In this way, after the lawmaker tries to define property in Art. 480, attempting to underline its importance under Art. 481, which provides it with a special protection, Art. 482 provided that "ownership over a movable or immovable asset gives a right to everything that merges, as an accessory, with the asset, in a natural or artificial manner." Probably this is the reason why the lawmaker, instead of developing the notion of ownership, its contents and effects under various regulations, intended to further treat the matter of accession.

Accession was regulated in two chapters: the first chapter regarded the right to accession over those working products, and the second chapter regarded the right to accession over those merged with and incorporated with the asset.

In this way, in full compliance with the French model, the first chapter which regulated accession also dealt with the matter of fruits. Art. 483 provided the fact that "Natural or industrial fruits of the land, civil fruits, animals' offspring (progeny), shall be due to the owner on the strength of the right to accession". With good reason, this provision was criticized in the specialty literature, being considered that "fruits are due to the owner, as prerogatives of its ownership right, and not on the strength of its right to accession, as Art. 483 erroneously provides".[4]

In the French legal literature[5], the following idea was developed: the right over the fruits of an asset derives from the accession right of the owner of the main asset over such asset. It is considered that accession should be viewed in terms of two stances: natural accession by incorporation (where the natural immovable accession would be classified and, depending on the stance, the movable accession cases) and natural accession by production, the latter referring to the fruits and products of the asset. In the Romanian legal literature, there are authors who supported this point of view; however, their opinion remained marginal, and it was not appropriated by the majority of authors.

In a general formulation, the Swiss Civil Code establishes that the owner of an asset is considered the owner of all that is an integral part of such asset, according to the custom of the place.[6]

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[2] Art.2 para.1 of Law No. 24/2000 regarding the legislative technique norms for legislation elaboration, as republished in The Official Gazette, Part I, No. 260, of April 21, 2010.

[3] "It was said, with good reason, that the place of accession was in Book III, where the lawmaker regulates the ways in which ownership can be obtained." (D. Alecsandresco, Explicatiunea teoretica si practica a dreptului civil roman, vol.III, Atelierele Grafice SOCEC, Bucharest, 1909, p.284), O.Ungureanu, C.Munteanu, Tratat de drept civil, Bunurile. Drepturile reale principale, Ed. Hamangiu , p.609.

[4] E.Chelaru, Drept civil. Drepturile reale principale, Ed. C.H.Beck, Bucharest, 2009, p.30.

[5] Ch Larroumet, Droit civil. Les Bienes, Ed. Economica, p.369, quoted by O. Ungureanu, C. Munteanu, op.cit., p. 608 "the fruits and products of an asset are only accessories to this asset, and the economic function of property is precisely to allow the owner to fructify its asset and, therefore, to become the owner of such fruits and products. (…) this is, therefore, an obtainment of property by natural accession; production is a natural function of the asset, even if it implies the intervention of the human being, for instance, for industrial fruits and products."

[6] O.Ungureanu, C.Munteanu, op.cit., p.608.

The criticism made to this opinion seems to have been taken into account by the lawmaker of the new Civil Code, since the new regulation no longer refers to the obtainment of fruits as an effect of accession, but as a natural effect of the ownership right over the fruit-bearing asset. This new insight of the lawmaker is reflected into the inclusion of the obtainment of fruits as an effect of possession exerted in good faith among the methods of obtaining the ownership right. The good faith holder, the one who acts like a true owner, owning both animus, and corpus, shall retain the fruits produced by the asset exactly due to the assimilation by the lawmaker of this possessor, from the point of view of certain legal consequences, to the rightful owner of the asset.

By doing so, the lawmaker distanced itself from the model of the French Civil Code, which continued treating the obtainment of the ownership right over the fruits as an effect of the accession right.

However, we can say that the change in the lawmaker's insight occurred in the last minute, since Art. 435 of the draft new Civil Code defined accession as follows: "All that is produced by the asset, as well as all that merges with or is incorporated in the asset, as a result of the deed of the owner, another person or a fortuitous case shall be due to the owner unless otherwise provided by law."[7] We deem as opportune the lawmaker's brave attitude to take a distance from the traditional French doctrine and to adhere to the vision of the Romanian doctrine.

The second chapter on accession dealt with "the accession right over those merged with and incorporated into the asset". The chapter opened with a general provision, which preceded its two sections. Art. 488 had a general vision, according to which "all that merges with and is incorporated in the asset is due to the owner of the asset, according to the rules established below." This provision created the opening for a distinct treatment of the conditions and effects of accession, which had as its main asset either an immovable asset (Section I "On the Accession Right Related to Immovable Assets"), or a movable asset (Section II "On the Accession Right Related to Moving Assets").

In these sections, the lawmaker did not make any separation in subsections regarding the accession that occurred naturally and the accession that occurred artificially. For more legal rigor, the lawmaker of the new Civil Code dealt real with natural immovable accession and artificial immovable accession in separate sections. It is possible that such aspect is the result of the fact that the Romanian lawmaker drew his inspiration from the model of the Civil Code from Quebec. Moreover, due to the numerous controversies generated by the legal provisions regarding artificial immovable accession, the lawmaker of the new Code created several subsections regarding immovable accession to capture in a manner as exact as possible the aspects generating legal effects which occurred in practice. Using the regulation of the lawmaker from 1864, but particularly the experience generated by the judicial practice, the lawmaker of the new Code refined the regulation to simplify its application. In this way, they highlight again the advantages of observing the legislative technique norms, requiring, as a necessity in the elaboration of a new regulatory act, the documentation stage for substantiation purposes. The lawmaker of the new Civil Code has obviously gone through this stage, in which it examined the "practice of the Constitutional Court in the field, the practice of the courts of law as far as the application of the regulations in force is concerned, as well as the relevant judiciary doctrine."[8]

The new regulation includes in the situation of artificial immovable accession the same two primary situations: the situation in which a work is performed by the owner of the main asset, using the materials belonging to another owner and the situation in which works are performed by a third party, with its own materials, on the main asset. This latter situation is, however, distinctly regulated, based on new categories, introduced by the lawmaker, namely **autonomous** works with a durable nature and **added** works with a durable nature.

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[7] http://www.just.ro/Sectiuni/PrimaPagina_MeniuDreapta/Proiectulnouluicodcivil/tabid/985/Default.aspx, accessed on 10.12.2012, 17.00 hours.

[8] Art. 21 of Law No. 24/2000.

As a novelty by comparison to the former regulation, the Civil Code in its new form contains not only general provisions, but also special provisions. In addition, the new code contains also an article entitled "the meaning of certain terms" (Art. 586). If, in general, the lawmaker's attention to details is appreciated, in the sense that it is useful to cover legislative gaps by new regulations, sometimes excessive regulation is critically regarded by jurists, as it generates a bad inflexibility in the application of the law. Also critically is regarded by jurists the lawmaker's attempt to define certain terms in the code, considering that defining certain terms is not opportune in a civil code.

Nonetheless, we consider that the specification of the meaning of the notion of "good faith" in the law of accession is opportune, as this notion is liable to have several interpretations, depending on the different fields in which it is applied.

Specifying the "meaning" of this notion, the lawmaker does nothing else but complying with the corresponding norms of legislative technique. In this respect, the article provides that "if a notion or term is not consecrated or can have different meanings, its significance in the context is established by the regulatory act instituting such meanings, within the general provisions or in an annex designed for the respective vocabulary, and it becomes mandatory for the regulatory acts from the same field". [9]

The scope of the regulation contemplated by the lawmaker of the New Code, in its attempt to update and correct all the flaws in the former regulation, caused the final result to differ from the expected result. Thus, the new regulation generated certain "legislative events", as such are conceived by Art. 58 of Law 24/2000 regarding the legislative technique norms for legislation elaboration. According to this article, in well-grounded situations, the regulatory acts having a particular importance and complexity can be amended, supplemented or, as applicable, repealed by the issuing authority also in the period comprised between their date of publication in The Official Gazette of Romania, Part I, and the date provided for their coming into force, on condition that the proposed interventions should come into force on the same date as the regulatory act subject to the legislative event". In this way we can explain the issue of Law No. 71/2011 for the application of Law No. 287/2009 on the Civil Code, having as "its primary object the reconciliation of the existing civil legislation with the provisions of such code (the Civil Code – our note), as well as the settlement of the conflict of laws resulting from the coming into force of the Civil Code"[10].

Although for accession is reserved an entire chapter in the new Civil Code, the vision of the contemporary lawmaker is not very different from the vision of the lawmaker from 1864, the regulation being realized by suppletive norms. However, as the lawmaker may have wished to ensure a higher safety for the civil judicial circuit, it expressly applies the principle of the non-retroactivity of the civil law, by Law No. 71/2011 for the application of Law 287/2009 on the Civil Code. In this way, Art. 58 of this law establishes that "in all the cases in which the artificial immovable accession implies the exercise of an option right by the owner of the immovable asset, the effects of accession are governed by the law in force on the date when the work began". An application of the same principle can be found also in case of Art. 576 regulating natural accession over animals, law 71/2011 specifying that such principle shall apply only to "the situations occurring after the coming into force of the Civil Code". (Art. 57).

An important objective that the new lawmaker had mostly to achieve in terms of the legislative technique was to update the used terminology. It is generally acknowledged the fact that the terminology used by the Civil Code from 1864 no longer matched with reality in many situations, the terms used being obsolete and, sometimes, even hilarious. When drafting the new Code, the lawmaker tried to use the words in their current meaning from the modern Romanian language,

[9] Art. 37 para.2 of Law No. 24/2000.

[10] Art.1 of Law No. 71/2011 for the application of Law No. 287/2009 on the Civil Code, published in The Official Gazette No. 409 of June 10, 2011.

avoiding regional phrases, taking into account the fact that "drafting is subordinated to the desideratum represented by the easy understanding of the text by its recipients"[11].

We consider that, by its regulation manner, the lawmaker managed to exceed the former model, the French Civil Code, being better adapted to the situations occurring in practice. Also, the Romanian lawmaker, unlike the French lawmaker, evolved in terms of the normative systematization, as compared to the French lawmaker, which continues treating the immovable accession, movable accession in the form of normative conglomerates. Systematization was necessary for "the insurance of a logical succession of legislative solutions (…) and the achievement of an inner harmony of the regulatory act (…), this being realized by grouping the ideas (our note) in accordance with their connections and natural relationship, within the general conception of the regulation"[12].

Taking these aspects into consideration, we could say that the new regulation of accession, in the Romanian Law, could become a source of inspiration for it's regulation in the Community Space.

The preparation of an efficient regulatory act requires the knowledge and appropriate application of regulation technique, although it does not seem so spectacular. In order to obtain a certain social or individual behavior we must first learn how to ask for it.

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[11] Art. 36 para.4 of Law No. 24/2000.
[12] Art. 35 of Law No. 24/2000.