

## CONSIDERATIONS REGARDING THE PHILOSOPHICAL CONCEPTS OF OWNERSHIP

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**ABSTRACT:** *THE RIGHT OF OWNERSHIP IS ONE OF THE FUNDAMENTAL HUMAN RIGHTS AND IS CLOSELY RELATED TO THE RIGHT TO LIFE, HUMAN EXISTENCE, EXPRESSION AND THE FOUNDATION OF ITS INDIVIDUAL FREEDOMS. PROTECTION AND GUARANTEE OF PRIVATE PROPERTY IS A CONSTITUTIONAL REQUIREMENT, AND DEFENDING THE RIGHT OF OWNERSHIP FINDS ITS ACKNOWLEDGEMENT IN THE ROMANIAN AND EUROPEAN LAW. THIS ARTICLE DEVELOPS AN ANALYSIS OF PHILOSOPHICAL IDEAS AND THEORIES RELATING TO PROPERTY IN GENERAL, AND THE RIGHT TO PROPERTY, IN PARTICULAR, CONCEPTS THAT HAVE BEEN THE SOURCE OF FUNDAMENTAL PRINCIPLES FOR THE BIRTH AND DEVELOPMENT OF THE INSTITUTIONS OF LAW APPLICABLE TO THE DOMAIN.*

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**KEYWORDS:** *OWNERSHIP, PROPERTY RIGHT, NATURAL LAW, UTILITARIANISM*

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### 1. OUTLINING THE PHILOSOPHICAL IDEAS ABOUT OWNERSHIP

In ancient Greece, as shown by Aristotle, there is a conflict of an economic nature between the rich and the poor, which had a direct link with the property, because either the poor people, many in number, killed, sent into exile and expropriated the rich, or the rich deprived the poor of their rights as citizens and changed the laws concerning in order to make life harder to the latter. Laws of antiquity, both Greek and Roman ones were harsh with regard to debtors who could not pay their debts, so that the body of the debtor would become the property of his creditor. In Athens, these practices have been removed by the Constitution promulgated by Solon, which forbade people to borrow money by offering as pledge their own person.<sup>2</sup>

Plato reflected in his work, the Republic, to the social order based on altruism, where people don't crave for gains and conflicts between classes no longer have meaning. Plato's concept is based, firstly, on the will of the ruling class, which had to relinquish all personal possessions, no more than necessary, and thus need no longer existed temptations based on greed either from the outside, or the inside. At the same time, in Plato's vision, the rulers of the State had to sacrifice family life and ownership of lands and houses in order not to forget

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<sup>2</sup> Aristotel, *Politics*, (Bucharest: National Culture Publishing House, 1924), 234 and seq.

that, although leading the State, they are its servants and not to be preoccupied with their own land or homes, but with guarding the State.<sup>3</sup> The links between the abolition of private property and abolition of the family was not accidental, since, regardless of social class from which they originated, the Greeks regarded property as family-run property and less individual property in the modern sense of the term.<sup>4</sup>

This non-individual way of perception on property would be able to steer us towards the idea of individual altruism, but the conception about property focused on the family generated more than altruism, namely "amoral" familiarism or "curse of backward societies", as it was commonly referred to in sociology. The most eloquent example in support of this opinion is the peasants' obsession to ensure the survival of their own families and disinterest for another form of community loyalty. Plato's writings reveal the fact that family pride was a more common motivation in sacrificing public goods in favor of private ones than greed.

In his view, an ideal Republic implied the existence of a minimum property on the estate and tools required for the trade, for ordinary people, as well as the absence of any personal possessions of the rulers, which would have solved simultaneously two major problems: the conflict between private interests and public goods and the conflict between the rich and the poor. Plato regarded property as a source of trouble and the only way to counteract its negative effects on the policy was that those who have power should not have properties, and those with fortunes should be powerless.

In his writing *Laws*, Plato makes only limited concessions to the idea of taking ownership from public control and doesn't make any kind of concession to the idea of trade and profit. In this respect he presents the community of Magnesia, which is autonomous and does not trade with any other State. The land is divided into quotas, established by majority and no-one can have more than four such units. But the State interfered in the allocation of quota shares in the sense that every male citizen had to have at least one unit and also in the confiscation of any property that exceeded the upper limit. In this community only farming was permitted, not trade because trade implied the use of money, and obtaining cash profits were believed to encourage an uncontrolled urge to have more and more of what was a negative influence for the soul and distracted the citizen from fulfilling his duties.

Unlike Aristotle, Plato does not see anything salutary in the need to establish a balance between what is private and what is public, between family and polis. It tends towards the perfect polis and in this sense he considers that if the property sits at the root of disagreement, then the property should be abolished. Aristotle's view on the property lies at the opposite pole from Plato. Aristotle's debate on economic activities and forms of property is based on the belief that the State is an association of producers. He insists on the fact that keeping the family represents the aim of property. Thus, Aristotle defends private property, in the non-individualistic sense and highlights its positive aspects, considering that, if things are to be used as required by nature, they must be owned by someone who feels that he has a personal interest in his caring for them.<sup>5</sup>

During the Renaissance it was analyzed the relationship between ownership, military organization and constitutional theory, relationship that originated in Roman times, when former soldiers were given farms to pay for their services. One of those who debated the

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<sup>3</sup> Platon, *The Republic*, (Bucharest: Scientific and Encyclopaedic Publishing House, 1986).

<sup>4</sup> For some legal, philosophical, sociological, economic and theological considerations in our doctrine, see O. Ungureanu, C. Munteanu, *Civil law. Rights in Rem*, 3rd Edition, (Bucharest: Rosetti Publishing House, 2005), 88-92, and for the sociological, philosophical, legal, perspective of property right; V. Stoica, *Civil law. Primary rights in rem*, (Bucharest: Humanitas, Publishing House, 2004), 218-223

<sup>5</sup> In his *Politics*, Aristotle stated: "*In a way it is necessary that the properties should be common but generally it's good to have a private character. Those who mind their own business do not quarrel with each other but they will rather be generous if they concern themselves with their business*", Aristotel, *Politics*, 21.

relationship between the ownership of lands, civic virtue and military effectiveness was Machiavelli, who praised the Romans for their materialistic vision, which did not imply lack of respect for deity. Roman religion was closely linked to the household and farm, strengthening the ordinary people's belief in the sanctity of tradition and family life. Independent owners, accustomed to hard work, raised and educated to accept the lack of comfort and luxury, were the essence of uncorrupted Republic and an invincible army. The themes addressed by Machiavelli also appeared in the works of Francis Bacon, which were adapted in English context, because the Roman soldier put in possession of land and the English farmer played the same role in the vision of the two authors. The essence of Bacon's opinion is that "the plough must be kept by the hands of the owners and not by some mere leaseholders".

Along the same line were inscribed the opinions of James Harrington in his work *Oceania*, where, for political harmony in the republic, he proposes a division of the land, so that a part as big as possible of the population should be established as the owners and the confiscation of the estates producing crops worth more than £ 2,000 a year, except for those received as an inheritance. A keen analyst of J.Harrington's philosophy was Hume, who saw a lot of good things in the former's theory such as, for example, the fact that a smaller property in the hands of a single man will give him more power than a large property shared between several people.

Hume speculated on two different pictures of the politics, one being represented by civic tradition, which for Harrington was "ancient prudence" and the other by a vision of politics as the influence of certain legitimate economic interests in a legal framework. The first image appeared for Hume as a 'perfect Republic, but not immortal, "which included a scheme of gradual representation by mixing democratic, aristocratic and monarchical elements of the theory of mixed governance and argued that the representation is based on the property, with direct reference to the idea of Harrington, whereby balance of constitutional law must match the property.

The issue of private property was analyzed in the eighteenth century by J. J. Rousseau. In his work entitled *The Origin of Inequality among People* he made a remark that has remained famous: "the first man who enclosing a plot dared to say that it is mine and he found people quite stupid as to believe it was the true, that was the founder of the civil society. How many crimes, wars, murders, how many miseries and horrors would have spared mankind the man who taking off the pegs or plugging the ditch, would have shouted to his fellows: beware to listen to this impostor, you are lost if you forget that the crops belong to all and that the land is not no man's land".<sup>6</sup>

Later in his *Encyclopedia* he is more reserved, in that he acknowledges that the property is the most sacred of all citizens' rights, the true foundation of civil society and the foundation of the social pact.<sup>7</sup> Marxist philosophers were the ones who attacked property virulently in favor of collectivism. In the Communist Manifesto of 1848, K. Marx and Fr. Engels fr. asserted: "what characterizes Communism is not to abolish a property but bourgeois property".<sup>8</sup>

<sup>6</sup> O. Ungureanu, C. Munteanu, I.C.Rujan, *The historical evolution and philosophical, legal, sociological and theological foundations of property on land*, Romanian Pandects, No. 5/2005, p. 122-123.

<sup>7</sup> Legally J.J.Rousseau's thinking will be resumed later by P.J.Proudhon who, in 1840, publishes 'Qu'est-ce que la propriété?' and responds in a challenging way: "c'est le vol"(It's a theft) (as J.L. Bergel, M. Bruschi, S. Cimamonti, *Traité de droit civil. Les biens*, L.G.D. J, 1999, 77). (as J.L. Bergel, M. Bruschi, S. Cimamonti, *Traité de droit civil. Les biens*, L.G.D. J, 1999, 77).

<sup>8</sup> For details, see, Fr. Terré, Simler Ph., *Droit civil. Les biens*, édition 6, Dalloz, 2002, 85-93, Cimamonti, *Traité de droit civil*. 76.

## 2. PROPERTY IN THE UTILITARIAN CONCEPTION

A philosophical conception on property right is the utilitarian one, which starts from the idea that, if individuals had not been entitled to appropriate, to use, to pass from one to another and to leave as a legacy valuable objects or those of interest, they would have been unable to use the raw materials provided by nature for anything other than the simplest way of immediate consumption. Usefulness is therefore the one that creates such rights.

Utilitarianism is a normative theory, which argues that the moral and legal rules are acceptable as far as accepting and respecting them brings happiness. This theory is hostile to the doctrines of natural law, arguing that legal rights should be a matter of positive law and that moral rights can be explained as the freedoms and powers that individuals must have in order to promote the most important interests. Utilitarians consider that, although the ownership rights are not dictated by nature, the assumption that an individual who has acquired a good without doing any harm to another person, must be able to freely enjoy it, is based on utilitarian considerations.

A.M. Honore best characterised the property in a developed system of laws: "property entails the right to possession, the right of use, right of administration, the right to the income that can be earned from work, entitled to capital, the right to safety, rights, or the possibility of transmissibility or absence of term, prohibition of the use with harmful effects, compulsoriness of execution and the possibility of inheritance; all these are eleven major cases". It was stressed that talking about ownership as a sum of rights is inadequate insofar as it excludes the compulsoriness of execution, i.e. vulnerability of property to be seized and sold as payment for the debts of the owner.

A legal order acknowledges property in a fully modern sense when all these rights and duties are assigned to a single person. As they are scattered and assigned to several people, or some of them do not even exist, we are talking about a pre-or postmodern system. Simple societies often consider community or the extended family as the beneficiary of the right to inheritance-that is, when all the less important rights no longer exist, the object returns to the family rather than to a specific individual.

Utilitarian defense of property, in any form, is thus the defence of the legal recognition of property as an instrument for promoting total happiness. It has been suggested that it makes no sense to ask whether property should be recognized; if the property is defined as the totality of relations between people relating to things, then we have to defend the view that all societies must consider that property is useful in some way and that the only question raised now is what kind of property they have to acknowledge. People may relate one to another by reference to things without property being involved. The hunters who allow the ones who kill the hunted animal to take the first piece of meat from wild game do not claim to be the owners of the hunted animal, nor do they assign ownership of this animal to the hunter who killed it.

It is claimed that, from an analytical point of view, it is best to distinguish between the claims expressed on property or based on the property and any other claim on things. A person can have good reasons to use another person's bike-for example, he hurries to do the right thing; this person's relationship with the owner of the bicycle is not a matter of ownership, but the right of the bike owner to accept or reject the claims of the person to use his bike is a matter of ownership. Property satisfies safety needs and allows the natural incentives of labour to act successfully-we are urged to work of mere desire to remain alive, but no one will sow where someone else will be able to reap the harvest in his stead; by

guaranteeing the situation of not being able to call what is ours as ours, only property rules make our desire of well-being to urge us to work.<sup>9</sup>

What cannot be ascertained is the distinction between the need of property and the need for private property. Here arises the question of the utilitarian conception followers: would it be better developed the idea of utility if it were left, for example the right of capital in the hands of families and only the income in the hands of the individual? The conclusion is that there is no difficulty in doing something like this when a fortune is inherited by will; it's not unusual for a widow or widower to receive an income throughout her life while the capital itself belongs to the deceased's children. Along the same line is the question of whether to accept a property without a time limit for entities such as the land is the best solution possible. Maybe the land in general, or a specific land, in particular, should be owned on the basis of a kind of lease term, after that period returning in possession of the community or of any body representing the community.

The argument in favor of something closer to our own system of indefinite property is that it allows us to buy and sell clearer and more destate titles of property. If the civil law allows a person to accumulate all of the situations of property, then some individuals may have to do with things in the most absolute manner permitted by law. Moreover, in this case the owner will be able to claim all sorts of subsidiary rights in addition to the rights of the owner. The owner who can get a loan for the safety of his land may, if he is reasonable or if he uses the money he gathered efficiently, to increase revenue well above the amount needed to repay the credit. The fact that he can do such a thing promotes general happiness; the law will have to allow mortgages. If the potential creditor will be pleased with the guarantee provided only if the powers available to the owner of the land are total; we have thus an argument for an unrestricted, property unlimited by different conditions from which can be extracted only little interests.

In the utilitarian arguments relative to the property rights hopes are crucial. Their fulfilled hopes constitute an important source of happiness; the property is based on hopes and generate hopes. Thus, it is able to provide much happiness or can be the cause of great despair if hopes are frustrated. Utilitarian arguments provide a good defense, but a not too firm one of public property. Since property rights are justified resorting to the idea of general benefit, without neglecting the importance of the security of the individual and freedom of beliefs and actions, ownership of anything else other than consumer goods and all that resembles them is a matter of convenience. Moreover, given the conception of property as a bundle of rights and duties, utilitarians are happy about the idea that the property will be destroyed, so that control of the capital can be separated from the right to the income, and the rights to inheritance to be removed from the area of influence of the ordinary control.

Utilitarians can not accept Hegel's idea that human will is essentially individual and that, therefore, property is private property nor its Marxist counterweight according to which production is fundamentally social and all pre-Communist societies have been an aberration endorsed by brute force and ideological deceptions. Utilitarian approach of property rights builds upon a concept of ownership based on other rights that are not necessarily related to property. By contrast, certain theorists of natural rights derive all rights from a conception of property as a property on one's own person.

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<sup>9</sup> In economic thinking the idea of property is justified by the notion of work. The economist F. Bastiat, for instance, sees in property "*the principle of progress and of life*" and Demolombe declared that "*God who created man as a sociable human being also gave him the means to fulfill his destiny, i.e. the property*". Planiol rejects the explanation based on the idea of work considering that it contains in germ the denial of ownership right itself (G.N. Luțescu, op. cit., p. 252)

### 3. TRADITIONAL THEORY ON PROPERTY RIGHT

The traditional theory of property rights starts from the idea that individual rights derive from God's laws<sup>10</sup> of Nature or Reason. The Declaration of Independence of America shows that its authors believe these truths to be „ self evident , that all people are endowed by their creator with certain inalienable Rights, among them the right to Life, Liberty, and the desire for Happiness. To obtain these rights, Governments are instituted by and with People receiving their right power from the consent of those who govern them. " Similar claims were made by the Declaration of the rights of man and of the citizen in France.

In many of these „natural rights assumed a natural right to property; Article II of the of the French Declaration from 1791 claims that "the Goal of any political associations is the conservation of natural and imprescriptible rights of man; and these rights are liberty, property, security and resistance to oppression "<sup>11</sup>. Similar claims are listed in the Declaration of the Commonwealth of Virginia which is, in many ways, a model for the Declaration of Independence. The question that the followers of this theory put was :What does ownership right allow a person to have or to do and what are the elements of traditional claims that could survive in a more skeptical and more materialistic period , during which it doesn't seem too reasonable to speak about God's dictate, of Nature and of Reason?

Natural rights were regarded as such by virtue of the fact that they preceded, from a historical point of view, moral and legal rights; Governments were considered legitimate if they transgressed these rights. Moreover, the doctrine was different from utilitarianism because it was clearly individualistic, on the grounds that every person is obliged to submit to the leadership as long as it promotes its natural rights, but only until their violation, because then there is no longer any obligation of submission to the governance. And where the violation could be justified in terms of usefulness, there is no obligation to obedience. The rights established for individuals are constituted within the limits of manifestation for governance, which have the positive task of defending individuals against infringements of the granted rights. Regarding the size of ownership one of the extreme ideas of argues that natural law refers only to the right to continuously use things without harmful consequences and in their natural state, the rest being social convention. The other extreme idea argues that the fact of acquiring something in its natural state entitles the owner property indefinitely, like the one recognized by modern law systems.

The theory of natural rights should consider property rights developed in the framework of a system of laws developed as essentially conventional. If they exist, they should be judged with responsibility and it is necessary to serve the purposes of all legal conventions, namely, the maintenance of our natural rights, and must be created and kept in force by means which do not infringe upon our natural rights. A minimalist perspective moves the approach to the ideas of some contemporary authors such as Rawls or Dworkin. The concern for rights as trumps, or to the idea that a theory of rights reflect the need for the society to guarantee a sphere within which the individual is inviolable and invulnerable even to well-intentioned utilitarian calculations of governance, directing to the opinion that Governments should establish private property in what might be called final consumption goods, because they are essential for the person in order to have individuality.

In this view private or public property on the producing enterprises is a matter of political caution. In this respect it is noted that, if it is easier to run an economy based on private property, then this type economy should be adopted. But, if private property creates the possibility of accumulation of power, making it more difficult to obtain individual freedom and civil rights observance , then it is justified to limit private property. Finally, if it

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<sup>10</sup> For details of theological considerations concerning ownership, see Ungureanu, Munteanu, Rujan, *The historical evolution and philosophical*, 128-130.

<sup>11</sup> A. Ryan, *Property*, translated by I. Busuioc , ed. D.U. Style, (Bucharest Publishing House, 1998), 87

were extremely hard to reconcile private property with access to occupations, then it would be justified to give up private property. Another approach starts from the concept of rights in terms of property considered generically and passes to individualized private property. In the 17th century, Grotius and R. Nozick argued that the "natural right to private property" means that when you get something on which nobody else has ownership we have a full and unrestricted property on that something."<sup>12</sup>

The main idea is that, since a person owns an object so acquired, he may make any agreement with someone else, and third parties whose position is less favored by these conventions may not complain about them, unless he prevents them to use their own resources in the same way in which those people use their own. Our natural right to use freely anything we possess or get it legitimately is not affected by competition with others, regardless of the impact on our welfare. This doctrine clearly favors private property. R. Nozick in his work *Anarchy, State and Utopia* launches the idea that we are born our own owners and talks about people as "properties", and Locke argued that people have a "property founded on their own person. Thus, these authors believe that each of us has in full possession, indefinitely, his own person.

This perspective launches the idea that any property is naturally a total property indefinitely, considering that the world is divided into things that are subject to possessions and things that are still not possessed, but that all people come into their own possession. Along another line, analyzing the aspects of legitimacy of private property, J. Locke, argues that if the appropriation of property is legitimate, then the person becomes, legitimately, the owner of those goods<sup>13</sup>, and P. Manent, continuing the vision of J. Locke, says that "the right of ownership is a fundamental right which underlies other rights, natural too, and this right is not in any way limited because it is based not on nature, but on work".<sup>14</sup>

#### 4. CONCLUSIONS

Regardless of the perspective from which has been addressed property and ownership right through the ages, by the principles and content of the ideas expressed by theorists of philosophy and law, an important issue emerges as a common denominator, that property is closely related to the person, his life and his work, and, therefore, all the rights which derive from property must be protected and guaranteed by the law.

These philosophical conceptions of ownership, classified into several categories as against the targeted patrimony, public or private, have led to the adoption of the 1948 Universal Declaration of Human Rights, a document in which, in article 17, property and property rights are among the fundamental human rights.

The importance of property evoked in these legal-philosophical principles outlined comprehensively, as an outcome of the various theories born and developed within the various philosophical trends, was based on drawing up rules of constitutional law on guaranteeing private property for most countries of the world. In Romania, after the Communist era, in which private property was almost annihilated, being invented a new type of property-Socialist property, protection and guaranteeing of the right of ownership was assigned by the Constitution adopted in 1991 and revised in 2003, and through a series of

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<sup>12</sup> Ryan, *Property*, 94-95

<sup>13</sup> J. Locke appears as the philosopher who best expressed the thesis of jusnaturalist type. For him "*the biggest and the main aim which is proposed to people (...) is to preserve their properties*"; that's why you could say that "*Locke sees property everywhere and uses it to justify his moving from the natural state to social state*" (A. Beriaux, *Le droit naturel*, Coll. Que sais-je?, PUF, 1993, 76).

<sup>14</sup> A. Gorun, *Freedom. Concept and reality*, (Cluj-Napoca: Argonaut Publishing House, 2002), 84-84.

incidental normative acts that have made the legal framework necessary for the establishment, recovery and defence of property.

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