

# SOME CONSIDERATIONS REGARDING THE JURIDICAL REGIME OF THE ACCESSION

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## Abstract

*The juridical institution of the accession derives its origin from the norms of the Roman private law that consecrated the criteria according to which a property is defined as being principal or accessory. In agreement with these criteria - of a patrician origin - a property was considered to be principal when it did not lose its individuality after the accessory was incorporated to it. This rule was taken over by the Romanian legislator since 1864. But, once the new Civil Code was adopted in 2011 a redefinition of the criteria concerning the two properties was specified: the most valuable property will be considered as principal; this redefinition will become the law for the mentality of a whole social category.*

**Keywords:** *roman private law, accession (lat. accessio), ancient civil code, new civil code, criteria of classifying the principal property and the accessory.*

## Introduction

The main concern of this essay is about the juridical institution of accession (*accessio*) from the moment it was consecrated in the Roman juridical texts up to the moment when the Romanian law-maker adopted a New Civil Code. This juridical institution supposes the absorption of the accession by the principal property or, from this point of view the Romanian New Civil Code brings forth certain new elements concerning the accession, establishing new ways of defining the principal and the accessory property. This new element is very important, as the owner of the principal property will get - by virtue of accession - the ownership over the accessory asset. A deeper analysis of the provisions of the New Civil Code points to a certain alienation from the ancient Romanian juridical tradition - that was taken over by the provisions of the Civil Code adopted in 1864 - although the juridical form of its specificity was maintained in the chapter about the accession. Consequently, the factors determining a certain juridical regulation were changed.

The research envisaged by this essay raises a series of fundamental questions: which were the reasons that imposed the change of the factors determining the content of a juridical norm or, whom does this modification serve to? At the same time, our approach to the problem will prove its utility by underlining the aim of the new legislative policy in the domain of accession.

The analysis of the objectives in view is divided into four sections. The first section of the essay will deal with the Roman private law which had established the accession in agreement with the old Roman conception about ownership. The second section will devote to the analysis of certain norms from Andronache Donici's Juridical Manual, „Amendments to the Law” and from Calimah's Code, as to notice the modifications appeared, in the feudal age, in this domain. The third section will analyze the way in which the accession and the specification were defined in certain codes adopted in

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the modern and contemporary periods. The fourth section deals with the present juridical regulations, that is, with the Romanian New Civil Code. On this occasion, one can notice that the norms of the present regulations go toward another end meant to reflect the mentality of the important owners of capital.

The adoption and enforcement of the New Civil Code, on October 1, 2011, is an important event as the new juridical regulation includes both the latest legislative innovations in the domain of the civil law as well as the results of the theories formulated by the specialized juridical literature. Yet, the researchers of the juridical phenomenon did not insist on the factors that determined the appearance and evolution of the juridical profile of the accession.

### I. The accession in the Roman private law

The millenary evolution of the Roman private law is due to several elements. One of them is the ownership together with all the aspects it involves. The Roman jurists sanctioned, to the lesser details, the juridical institution of ownership and, implicitly, the ways of acquiring it, as they understood the fundamental importance of how to protect ownership. It appeared to be a really necessary measure as the numerically larger the population and the more intricate and complex social relationship, the more the Romans were forced to conclude juridical agreements with the inhabitants of the cities, inclusively; that was the moment which generated the possible appearance of a new chapter in the Roman private law: the law of nations<sup>1</sup> to which the juridical institution of accession is owed.

In the everyday language, accession was given the sense of adjunction or mixture<sup>2</sup>. Nevertheless, the Roman jurists envisaged this modality for obtaining the ownership. In their view, the accession meant the incorporation of the accessory thing into the principal thing, with no possibility for the latter to lose its own identity. In other words, the accessory thing had to have the same fate as the principal thing in agreement with the rule of *accessorium sequitur principale*<sup>3</sup>. This modality was sanctioned by the Roman juridical texts for those situations in which the accession meant the unification of two immovables, of a movable with an immovable or of two movables. If speaking about the first situation, one can easily notice that the alluvion<sup>4</sup> and the strip of land torn off by the waters<sup>5</sup> can be considered accessory thing as reported to the riparian territory of the owner,

<sup>1</sup> Aurel N. Popescu, trans., *Gai Institutiones* (București: Editura Academiei RSR, 1980), 141-142; Vladimir Hanga, trans., *Iustiniani Institutiones* (București: Editura Lumina Lex, 2002), 64-74.

<sup>2</sup> Ioan Nădejde și Amelia Nădejde Gesticone, *Dicționar latin-român complet pentru licee, seminarii și universități* (Iași: Editura „Viața Românească”, 1927), 6; C. Accarias, *Précis de droit romain*, tome premier (Paris: Librairie Cotillon, 1891), 634; Constantin St. Tomulescu, *Drept privat roman* (București: Tipografia Universității, 1973), 185.

<sup>3</sup> I. C. Cătuneanu, *Curs elementar de drept roman* (Cluj-București: Editura „Cartea Românească”, 1927), 246; D 6. 1. 23. 4-6; D 41. 1. 26. 1.

<sup>4</sup> „But, in agreement with the same law, it can also be ours whatever is added by alluvia; alluvion is another natural mode of acquisition. Alluvion is an addition of soil to land by a river, so gradual that at a particular moment the amount of accretion cannot be determined; or, to use the common expression, an addition made by alluvion is so gradual as to elude our sight.” - *Gai Institutiones* II. 70.

„Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another is added by alluvion.” - *Iustiniani Institutiones* 2. 1. 20.

<sup>5</sup> „Accordingly a parcel of your land swept away by a river, and carried down to mine, continues your property.” - *Gai Institutiones* II. 71.

„If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour it clearly remains yours; though of course if in the process of time it becomes firmly attached to your neighbour's land, they are deemed from that time to have become part and parcel thereof.” - *Iustiniani Institutiones* 2. 1. 21.

which is considered to be the principal thing. In the case of the unification of a movable with an immovable the *superficies solo cedit* rule is applied, in the virtue of which the owner of the ground will get the estate for the building, irrespective of the fact that the building was erected with foreign materials<sup>6</sup> or by another person<sup>7</sup>. In case of the unification of two movables, the accessory thing will be incorporated to the principal thing so as to become its integrant part<sup>8</sup> even if the latter is less precious<sup>9</sup>. Later, together with the assertion of the school of Proculus, the Romans admitted that the picture painted on another's canvas can be considered as principal, because the painting made by a notable painter cannot be incorporated as an accessory to a less valuable painting<sup>10</sup> although, with no canvas the painting could not exist. This instant will become crucial in the evolution of the private law, as it is the first step in achieving a profound turn in the physiognomy of the juridical institution of accession.

## II. Accession in the ancient Romanian Law

This juridical institution is often to be traced back to the origins of the ancient Romanian law. Among these, only the „Amendments to the Law”, Andronache Donici's Juridical Manual and Calimach's Code are to be mentioned.

With the exception of the first regulation, the others define both the accession relatively to immovables and movables. To adopt the Juridical Manual of Andronache Donici and the Code of Calimach is considered to be an important step in the history of the Romanian law because, according to the French law, the chapter concerning accession will include dispositions specific to other juridical situations, as specification and mixture.

The „Amendments to the Law” regulates only that clause which refers to the unification of a movable with an immovable, borrowing from the Roman law the *superficies solo cedit* rule, because „any one who builds a house on an another's land on his own account, in as far as the wood and expenses are concerned, that person shall know that he is the one to administer the land and the house, as written in the law which says that the upper ones will be victorious over the lower ones”<sup>11</sup>.

<sup>6</sup> „If a man builds upon his own ground with another's materials, the building is deemed to be his property, for buildings become a part of the ground on which they stand.” - *Iustiniani Institutiones* 2. 1. 29.

<sup>7</sup> „Again, a building erected on my soil, though the builder has made it on his own account, belongs to me by natural law; for the ownership of a superstructure follows the ownership of the soil.” - *Gai Institutiones* II. 73.

„On the other hand, if one man builds a house on another's land with his own materials, the house belongs to the owner of the land.” - *Iustiniani Institutiones* 2. 1. 30.

<sup>8</sup> Paul Frederic Girard, *Manuel élémentaire de droit romain* (Paris: Librairie Arthur Rousseau, 1924), 342.

<sup>9</sup> „On the same principle, the writing inscribed on my paper or parchment, even in letters of gold, becomes mine, for the property in the letters is accessory to the paper or parchment.” - *Gai Institutiones* II. 77.

„Writing again, even though it be in letters of gold, becomes a part of the paper or parchment, exactly as buildings and sown crops become part of the soil, and consequently if Titius writes a poem, or a history, or a speech on your paper and parchment, the whole will be held to belong to you, and not to Titius.” - *Iustiniani Institutiones* 2. 1.33.

„The canvas belonging to me, on which another man has painted, e. g. a portrait, is subject to a different rule, for the ownership of the canvas is held to be accessory to the painting: **a difference which scarcely rests on a sufficient reason.**” - *Gai Institutiones* II. 78.

„Moreover, anything which is written on my paper or painted on my board, immediately becomes mine; although certain authorities have thought differently on account of the value of the painting; but where one thing can not exist without the other, it must necessarily be given with it.” - *Iustiniani Digesta* 6. 1. 23. 3.

<sup>10</sup> „Where, on the other hand, one man paints a picture on another's board, some think that the board belongs, by accession, to the painter, others, that the painting, however great its excellence, becomes part of the board. The former appears to us the better opinion, for it is absurd that a painting by Apelles or Parrhasius should be an accessory of a board which, in itself, is thoroughly worthless” - *Iustiniani Institutiones* 2. 1. 34.

<sup>11</sup> Andrei Rădulescu et al., *Îndreptarea legii* (București: Editura Academiei, 1962), 290.

The same law will be taken over by the provisions of the Juridical Manual of Andronache Donici<sup>12</sup> and that of the Calimach's Code<sup>13</sup> in which there is established the law according to which the owner of the land shall also become the owner of the building. The same ancient Roman rules will be applied in the case of the unification of two immovables<sup>14</sup>.

The accession whose object deals with two movables is regulated in a very strange manner by the Code of Calimach, which will later be included in the content of the Romanian Civil Code that entered into force in 2011. According to this pattern, if any one has been working with another's materials and will mix his own materials with the other one's, he will not acquire the ownership over those things because, then when those things would be brought back to their initial status, each owner will regain his own thing or, the owners of those things will share them as co-owners, on the condition that the one whose things have been joined be retained or left to the other person. By an attentive analysis of these dispositions, one can easily notice that unlike the norms of the Roman private law which established different juridical situations<sup>15</sup>, the same regime is supposed to be applied to more juridical institutions. This error is due to the fact that the Roman juridical texts considered them to be natural modalities for acquiring the ownership<sup>16</sup>, while the members of the commission that drafted the dispositions of the Calimach Code erroneously considered that accession, mixture and specification will be submitted to the same juridical regime. These are the reasons why the fourth chapter of the Section concerning the real rights of the Calimach Code was entitled „Obtaining the ownership over properties through increase or addition” and title XXVI th of

<sup>12</sup> See the provisions of paragraph 2 title XXVI according to which „if someone will build a house on another's land, or build in the underground without any previous convention with the owner of the land, or will build something over another's building, then the owner of the land will become the owner of the built things.”

<sup>13</sup> In agreement with art 562 of the Calimach Code „if someone will willingly build with another's materials on his own land, then the building will remain his as mentioned in the rule: the building is submitted to the land it has been built on.” In agreement with art 563 of the Calimach Code: „on the contrary, if someone with his own materials built something on another's land, then that building will be due to the proprietor of the land, in conformity with the following law: the buildings are subject to the place they have been built on.”

<sup>14</sup> Paragraph 1 of title XXVI-th of the Andronache Donici's "Juridical Manual"; art. 551 and 552 of the Calimach Code - Constantin Hamangiu, *Codul general al României. Volumul I. Codurile* (București: Editura Librăriei Leon Alcalay), 1907.

<sup>15</sup> Valerius M. Ciucă, *Lecții de drept roman*, volumul I (Iași: Editura Polirom, 1999), 270.

<sup>16</sup> „The natural reason is also resorted to in other cases. On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves of corn, belonging to me, are converted by another into wine, or oil, or (threshed out) corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; so too if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into clothing, or my wine and honey are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the ownership of the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner of the material is to be deemed the owner of the product; and this was the doctrine which commended itself to Sabinus and Cassius; according to others the ownership of the product is in the manufacturer, and this was the doctrine favoured by the opposite school.” - *Gai Institutiones* II. 79.

„When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong – to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials out of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material – bronze, silver, or gold – of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey out of which it was compounded.” - *Iustiniani Institutiones* 2. 1. 25.).

the “Juridical Manual” of Andronache Donici was entitled “On whatever is acquired beyond a natural equitableness.”

Another novelty brought by this regulation is that of specification, in the chapter about accession. At a closer analysis one can notice that these dispositions are originated in the Institutions of Justinian which adopt an extra solution to the one suggested by Gaius - a jurisconsult devoted to the old patrician traditions - who promoted the idea that the newly obtained things belongs to the owner of the material. Since the social conflicts appear at the level of the juridical regulations, inclusively, the Justinian theory was taken over by the ancient Romanian law referring to specification<sup>17</sup>, although the solution adopted by the members of the commission drafting the Calimach Code established the fact that the artisan will acquire the ownership over the material used in order to obtain a certain property<sup>18</sup>.

### III. Accession in the Ancient Romanian Civil Code

The three hypotheses of accession are also met with in the provisions of the ancient Romanian Civil Code. If, in the case of the natural accession to immovables, the ancient Roman conception was taken over completely, the substance of the artificial accession to immovables includes, for the first time, provisions regarding the possibility of the landowner to oblige the person who had built on his land to pull the building down<sup>19</sup>; this fact enables the builder to recuperate the ownership of the building materials, because, as long as the union exists, the right over the accessory thing is frozen. This situation is far from being accidental, as the law-maker adopts similar rules with regard to the accession to movable property as well, rules that allow the owner of these things to require the separation and the restitution, in case they are more valuable than the principal property<sup>20</sup>. Under these conditions, a serious violation from the finality in view was noticed, although the Romanian law-maker of 1864 established the criteria meant to make a distinction between the principal thing and the accessory one, according to the French model. Therefore, in conformity with art 567 and 569 of the French Civil Code of 1804 - whose content has been taken over by the Romanian law-maker<sup>21</sup> - it is considered to be principal that thing for whose usage, ornament or completion the unification with the other thing whose value is higher was necessary<sup>22</sup>. Nobody denies the usefulness of these regulations, but can we still speak about accession in case its thing is more valuable than the principal one, and consequently, its owner can claim it?

Analyzing the way the laws were adopted at the beginning of the XIX th century, the ancient Civil Code of 1864 erroneously<sup>23</sup> considered specification close to accession; in this way the concept referring to value plays an important role as, contrary to the Roman juridical texts, the artisan will

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<sup>17</sup> According to paragraph 5 of title XXVI of the Juridical Manual of Andronache Donici „when another’s materials enter the composition of a thing[...] which cannot be separated without spoiling the material, then after paying for the materials, they remain to the owner of the land; yet, if the materials can be restored to their initial state, then the effort vanishes [...]”.

<sup>18</sup> Art. 561.

<sup>19</sup> According to the provisions of art 494 paragraph. 1 of the Ancient Romanian Civil Code, if the buildings and the works have been made by a third person with his own materials, the landowner has the right to keep them or to oblige that person to take them away.”

<sup>20</sup> Art. 506 of the Ancient Romanian Civil Code.

<sup>21</sup> Art. 505, 507.

<sup>22</sup> According to the provisions stipulated by art 507 of the Ancient Romanian Civil Code, if out of the two things united as to form one single thing none of them can be considered an accessory to the other one, it is considered as principal the one having a higher value. In case the value of the things is almost equal, the one whose volume is bigger will be considered the principal.

<sup>23</sup> Contrary to the French and Roman law-makers the Italian law-maker of 1942 mentions the specification alongside with other different modalities of acquiring the ownership.

acquire the ownership over a newly created thing then when the manual labour would greatly exceed the value of the used materials, even if that thing can or cannot resume its initial state<sup>24</sup>. So, beginning with this period we are the witnesses of a new wave of thinking in the domain of the ownership, thinking that will extend greatly in 2011, the year of the implementation of the New Romanian Civil Code.

#### IV. Accession in the New Romanian Civil Code

The entering into force of the New Romanian Civil Code of 2011 stands for the materialization of the practices introduced by the Romanian law-maker in 1864. It is a certain fact that the effects of this policy will be also noticed in the domains of accession to immovable, adjunction and specification as mentioned by the provisions of the section devoted to the accession to movable.<sup>25</sup>

The new provisions concerning the artificial accession to immovable are definitely diverting from the ancient Roman regulations, as - by the provisions of art 581 and 584 of the Civil Code - they offer the possibility to the author of the work - irrespective of his good or bad faith - to buy the construction - at the request of the owner - at the price it could have if the construction had not been built. This situation is mentioned in a around about way by the provisions of art 584 paragraph 3 of the New Civil Code<sup>26</sup> that establishes the juridical regime of the useful adjunct work. It goes without saying that similar provisions will be applied in the case of autonomous works regulated by the provisions of art 581<sup>27</sup> and 582<sup>28</sup> of the New Civil Code; both laws stipulate similar provisions. This time, as usual, the economic reasons are considered more important that the final aim the juridical institution of accession had in view.

Moreover, it is not clear why the bad-faith author can derive profits from buying an immovable property at the market price it might have had if that construction had not been built.

The provisions referring to the accession to movable visibly estrange from the provisions of the Ancient Romanian Civil Code and from the norms of the Roman private law because, in case of the adjunction of two movable things, their owners can ask for their separation if by the separation

<sup>24</sup> Art.508, 509 of the Ancient Romanian Civil Code; art 940 of the Italian Civil Code of 1942.

<sup>25</sup> Book III (On Goods), title II (Private Property), chapter II (Accession), section IV of the New Romanian Civil Code.

<sup>26</sup> Irrespective of the good or bad faith of the author of the work, if its value is high, the ownership of the real property can oblige the author to buy it at the price the immovable would have been estimated at if the construction had not been done.

<sup>27</sup> „When the author of the autonomous work, having a lasting character over the immovable of someone else, is of good faith, the owner of the real property has the right to:

a) ask the court to register him in the land register as the proprietor of the work, if paying, according to his choice, the value of the materials and of the manual labour to the author of the work or the extra value added to the construction by improving it;

b) to ask the court to oblige him to buy the immovable at the price it might have had if the work had not been done.”

<sup>28</sup> „(1) When the author of the autonomous work having a lasting character over the immovable of someone else is of bad faith, the owner of the immovable has the right to:

a) ask the court to register him in the land register as the proprietor of the work if paying, the author of the work according to his choice, half of the value of the materials and of the manual labour or of the extra value added to the construction;

b) to ask to court to oblige the author of the work to pull the construction down;

c) to ask the court to oblige the author of the work to buy the immovable at the price might have had if the work had not been done.

(2) The demolition of the work is done with observing the legal provisions in the domain, on the expense of its author who is at the same time obliged to repair all damages which also include the fact that the construction has not been used.”

the prejudice suffered by the other proprietor could be bigger than a tenth of the value of his own property. On the other side, in case this is not possible, the Romanian law-maker applies the rules from the domain of specification, according to which, depending on the value of the labour work or of the materials, the property will belong to the artisan or to the owner of the materials.

After a deep analysis of these provisions, one can notice that in the virtue of an old Roman mentality, accession will operate in favour of the owner of the more valuable thing (a trader) or of the one who produced it (the artisan).

## V. Conclusions

Society is the place where the interests of different social categories come into conflict, and the results of this conflict are more often than not reflected into the content of the juridical norms which represent the interests of the dominant class. The same conclusion is reached when analyzing the modality of how the juridical institution of accession developed. We do neither reprove the present material conditions that determine certain juridical regulations nor the usefulness of these regulations, because various social categories are interested to impose their own interests as juridical norms. Unfortunately, on this occasion, the representatives of these categories want the standardization of certain juridical aspects as to be able to find new juridical procedures meant to satisfy their own interests, even if they evidently depart from the real functions of accession. Given these realities, for maintaining the equilibrium between the law principles and the juridical institutions it is necessary the redefinition of the criteria according to which the property can be principal or accessory and it is useful to create new juridical institutions able to allow a harmonious inclusion of the new procedures of the juridical system.

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