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ПОНЯТТЯ «ВЛАСНІСТЬ» В ЗАРУБІЖНІЙ ПРАВОВІЙ НАУЦІ В КОНТЕКСТІ ЗЛОЧИНІВ ПРОТИ ВЛАСНОСТІ

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THE CONCEPT OF «PROPERTY» IN FOREIGN LEGAL SCIENCE IN THE CONTEXT OF CRIMES AGAINST PROPERTY

What is “property?” The term is extraordinarily difficult to define. One of America’s foremost property law scholars even asserts that “[t]he question is unanswerable.” The problem arises because the legal meaning of “property” is quite different from the common meaning of the term. The ordinary person defines property as things, while the attorney views property as rights. Most people share an understanding that property means: “things that are owned by persons.” For example, consider the book you are now reading. The book is a “thing.” And if you acquired the book by purchase or gift, you presumably consider it to be “owned” by you. If not, it is probably “owned” by someone else. Under this common usage, the book is “property.” In general, the law defines property as rights among people that concern things. In other words, property consists of a package of legally recognized rights held by one person in relationship to others with respect to something or other object [1].

As said, the – originally factual – notion of possession (factual means possession seen as factual power over a thing), developed into a more complex notion by accepting the idea that you can possess for another and that you can possess through others. In the classical Roman law and Germanic tradition (revived by R. von JHERING) (including the Anglo-Saxon tradition), the concept of possession starts from the factual (corpus or factum possidendi) element (a person who possesses for another is also called possessor).

In the modern roman tradition, rather the element of animus possidendi (for whom one possesses) is stressed. But all this is rather a question of terminology than of basic differences as to the legal consequences and protection of possession. The modern terminology rather leans again towards the romanistic, but the more far-reaching effects of possession in the germanistic tradition have been adopted, esp.

in French and Belgian law. The French (and Belgian) civil code does not follow Savigny's terminology systematically, but it has been interpreted in this way later on (under the influence of Savigny) [2].

In Civil law systems, the principle of numerous clausus and the specificity principle make it necessary for all new forms of property rights to be specifically introduced and regulated by the legislator, in harmony with the originally recognised rights in Civil Codes. Parties are not allowed to create new forms of property rights. This is, indeed, a basic difference between real rights and mere obligations that can be determined by the parties in the exercise of their freedom of contract. No such freedom is allowed in the case of defining real rights in property and property relations. It is, therefore, not surprising that in Continental Europe only the Dutch have been able to introduce a limited version of the Anglo-American trust in the new Civil Code of the Netherlands.

In Italy scholars like Professor Mauro LUPOI have successfully argued that the country does not need to enact Trusts in Italian law, since it can recognise foreign Trusts under the Hague Convention and apply the law of the place of settlement (in most cases English law). Luxembourg has adopted a similar approach[16], and in Switzerland there are calls for a more open treatment of trusts. But in France, an attempt to change the Code Napoleon in 1991 to include a fiduciary institution (la fiducie) failed [3].

The Ius Commune Casebook for the Common Law of Europe on Property Law states that '[i]n the most general terms, the law of property is the law dealing with things.These things may either be tangible (corporeal) or intangible (incorporeal).' This general description is then further elaborated and an explanation is provided as to why property rights are different from other rights: '[T]hese [...] rights to objects [i.e. property rights] are different from other rights as they are created in respect to an object and not vis- -vis specific other persons. Property rights, to put it differently, have effect against third parties by their nature. Personal rights, which are rights arising from a contract, and even though they also concern an object (the 'performance' of that contract), are generally only binding between two or more specific parties. This is something that is shared universally between systems of property law.'

The Restatement (First) of Property (1936), produced by the American Law Institute, provides the following description in its introductory note: 'The word "property" is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations. The former of these two usages [...] does not occur in this Restatement.

When it is desired to indicate the thing with regard to which legal relations exist, it will be referred to either specifically as "the land," "the automobile," "the share of stock," or, generically, as "the subject matter of property" or "the thing." The word "property" is used in this Restatement to denote legal relations between persons with respect to a thing. The thing may be an object having physical existence or it may be any kind of an intangible such as a patent right or a chose in action. The broader meanings of the word "property," which include any relationship having an exchange value, are not used [4].'

Steven Shavell, scientist from Harvard uses the term "property rights" to refer broadly to two subsidiary types of rights, possessory rights and rights of transfer. What are often called possessory rights allow individuals to use things and to prevent others from using them. A particular possessory right is a right to commit a particular act or a right to prevent others from committing a particular act. The other type of right associated with the notion of property rights is a right to transfer a possessory right, that is, the option of a person who holds a possessory right to give it to another person (usually, in exchange for something) [5].

One of the aims of criminal law is the protection of property. The protection comes in different ways and one of this is through the offence of stealing. The law therefore makes it an offence for you to take a property belonging to another person without the person's consent given freely. The offence of stealing is one that is frowned at in all parts of the world, including Nigeria and constitutes an offence in all jurisdictions. Apart from being a crime, stealing is an act that is viewed as morally wrong. Thus, both the Criminal Code (CC) and the Penal Code (PC) criminalizes the act of stealing [6].

Scientists Monica Pocora and Mihail-Silviu Pocora concluded that in criminal law the concept of patrimony in relation to crimes committed against it, may have a narrower meaning and refers to assets not as universal, but individual, likely to be acquired by the offender through any fraudulent means or to be destroyed, damaged, concealed or fraudulently managed, etc.

An offense would never be committed against property as a universality of assets because will always exist regardless of assets number or value and even if the subject does not have any debts; no one can be deprived of heritage but up of one or few assets that form its patrimony. Therefore, is more adequate to name these crimes, as offences assets belong to a property (patrimonial) than crimes against property as whole.

Legal generic object of offenses against patrimony is patrimony as social value and ensemble of social relationships which are born, develops and grows in relation to namely social value, especially in terms of real rights concerning to property, including the obligation of maintain the initial legal status of assets as part of that patrimony .

Some crimes such as robbery had a complex legal subject because as primarily is affected the social value, named patrimony, and secondary the social value represented by life, health, physical integrity or individual freedom. Material object of crime in general is thing on which moves the material element of offense. Regarding the crimes against patrimony, the material object is represented by mobile or immobile assets against was directed the criminal activity. Some offenses can only had a mobile asset (the crime of theft, robbery, breach of trust, embezzlement or appropriation of found asset), while in others it may be an immobile asset (destruction in any variants or possession disturbance).

The perpetrator of most crimes against patrimony can be any person who carried out general conditions of criminal responsibility, if law not provides a special quality for it. Some of Title offenses are proper in sense of requires a special skill to

perpetrator – for example, embezzlement for which law establishes a special quality of perpetrator – the official administrator [7, p. 142].

German law separates property law from the law of obligations by focusing more on the nature of objects (or things) rather than on the nature of various rights, in contrast to the descriptions in the Casebook and the Restatement. It employs the so-called *Trennungsprinzip* (principle of separation) to indicate a strict separation between the law of obligations and property law and is therefore one of the legal systems that most clearly and explicitly draws the line between these two areas of law.

Spanish law provides a stark contrast to German law and its *Trennungsprinzip*, and not just because it includes a far wider range of 'things' within property law than German law does. Primarily, the contrast flows from the fact that Spanish law operates a *numerus apertus* instead of a *numerus clausus* of property rights. This means that private individuals may create new property rights themselves, provided they 'satisfy an actual and socially valid need and that they respect the characteristics of these kinds of rights'. For immovable property it is the Land Registry, in which property rights on immovables must be registered in order to have third party effect that applies this test to new types of property rights that parties wish to create [4].

In Anglo-American law, where possession is used in an narrower sense, the *constitutum possessorium* is usually not understood as a form of delivery, but still as another type of conveyance (transfer of property, *in casu* without transfer of possession). This understanding can be found in French-Belgian doctrine, too, but is incorrect in our tradition / concept of possession. As to the effects, Anglo-American and continental law reach similar results, whether or not they consider this a form of delivery: in continental systems, too, this form of delivery *s.l.* is not in all respects equivalent to a "direct" delivery [2].

Taking into account the existence in the theory of criminal law, the different approaches to the understanding of the object of a criminal assault, in the legal literature as an object of property crimes tend to understand property (public property relations) or ownership.

The object of attacks of this category of crime calls the property right as the right of ownership, use and disposal. These proprietary rights, in our view, reveal the legal nature of the object of such attacks [8].

Thus, the concept of «property" is the subject of discussion in foreign science. Foreign scientists mainly adhere to position that property has a very wider meaning in its real sense. It not only includes money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth. It is the right to enjoy and to dispose of certain things in the most absolute manner as he pleases, provided he makes no use of them prohibited by law.

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Soloviova A. The concept of "property" in foreign legal science in the context of crimes against property

The article analyzes the different approaches of foreign scholars to understand the concept of «property». The author identifies the common signs of the term for a variety of legal sciences.

Keywords: *property, law, crime, theft, property damage.*

Соловйова А.М. Поняття «власність» в зарубіжній правовій науці в контексті злочинів проти власності

У статті проаналізовано різні підходи зарубіжних вчених до розуміння поняття «власність». Автор виділяє загальні ознаки цього терміна для різних правових наук.

Ключові слова: *власність, закон, злочин, крадіжка, майнова шкода.*

Соловьева А.Н. Понятие «собственность» в зарубежной правовой науке в контексте преступлений против собственности

В статье анализируются различные подходы зарубежных ученых к пониманию понятия «собственность». Автор выделяет общие признаки этого термина для различных правовых наук.

Ключевые слова: *собственность, закон, преступление, кража, имущественный вред.*

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