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CONCEPTUAL PREMISES FOR SKETCHING A RATIONALE FOR THE INSTITUTION OF PRESCRIPTION

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Abstract: *The author observes that the concerns of substantiating the institution of prescription belong to the theory of civil law and that the presentations of the civil model are made separately for the two forms of prescription (extinctive and acquisitive). This, in a context where criminal jurisprudence faces one of the most intense debates on how to apply the criminal rules regarding the prescription of criminal liability, a debate which, however, omits the idea of substantiating the institution. The thesis is updated according to which time - movement in sequence of events, external and unavoidable natural element of subjective rights - is presented as a modality of obligations, a concept that can be used both in the scope of civil and criminal norms. Time with the stated legal meaning can be accepted as the basis of prescription. The model offers a consistent methodological potential for the hypotheses in which the legal norm - whatever its origin - finds its meaning with difficulty. Hence the consequence: the subjective rights - interests with high legal protection of the subjects in the relationship - placed in time, can be understood in a unitary way and applied to all branches of law.*

Keywords: *extinguishing prescription, acquisitive prescription, modality of obligations, substantive subjective right, procedural right, right to action in material sense, legal interest.*

INTRODUCTION

The concept of prescription includes the elements of an extremely complex legal institution that can be traced in all branches of law (Căpățână, 1989:304). Its substantiation, of the concept, involves the research of the very reasons "that justify it" (Pop et al., 1975:490) and then explains the mechanisms providing the effects; this even if the substantiation and legitimization presentations are particularly concerned with the theory of civil law.

Civil doctrine, explaining the prescription, insists on the purpose and functions pursued by the legislator by regulating the prescription (Căpățână, 1989:305) or, in another expression, in "establishing the reasons, the reasons on which it is based" (Nicolae, 2010:48). Mainly, "reasons of public order: consolidation of factual situations and guarantee of security, stability of the civil circuit..." are observed from comparative and Romanian law; or, depending on the case and circumstances, the prescription would also be justified on other grounds: the presumption of payment, the sanctioning of negligence, the prevention of the debtor's ruin, the confirmation of a voidable act (Nicolae, 2010:49-51); but "the consolidation of factual situations through the adequacy of the right to the facts remains the basic and essential rationale of any extinguishing prescription" (Nicolae, 2010:51).

In other words, the need to ensure the stability of relationships between individuals and entities would justify the regulation, functions, mechanisms and effects of the prescription; the prescription would reveal, an indisputable fact otherwise, an opportune solution for a specific, precisely determined problem in social functioning, explicitly regulated. We would be dealing,

therefore, as in any other field of interest, with a particularizing form of necessary intervention of the legislator in human relations, on a social reality.

1. The civil foundations of the prescription

Controversies related to the nature of regulations or prescription mechanisms, problems arising in jurisprudence related to the operation and application of these mechanisms (Rădulescu, 2006; Pivniceru et al., 2007; Vlăduca, 2022), as well as the need for pragmatic clarifications forces us to deepen the research; this without disputing in any way the expressions presented. From the consistent set of problems highlighted by the civil jurisprudence regarding the statute of limitations, I highlight issues of constitutionality or compliance with the fundamental rights related to this institution: a) if the forfeitures of the right to action and implicitly the statute of limitations are compatible with the right of access to justice – (EctHR, 1996), b) or if the lapses related to the flow of time, deadlines are sufficiently protective of the right to property – (Constitutional Court, 2006).

I only observe methodologically and by way of example possible questions: on the one hand, the inevitability of the need for public order is emphasized when substantiating the standards and the operation of the prescription, on the other hand, observing and invoking it remains - at least in the civil space - within reach to the interested party, after the terms have expired (art. 2507 of the new Civil Code); separately, the imprescriptibility of claims is stated and, next to it, the acquisitive prescription - usucapion - is regulated as an effect of possession - art. 928 – 937 of the new civil code; that is, even the prescription of the claim action of the holder of the subjective right is regulated in practical terms.

The examples indicate, in reality, apparent contradictions and may even suggest a certain superficiality in the approach. The formulations are convincingly explained by the civil doctrine: conditional possession produces acquisitive effects following the prescriptions of the law; or, as the case may be, giving up the benefit of prescription – which naturally links subjective rights to the passage of time (Pop et al., 1975:487) – it is, in its essence, a waiver of an explicitly recognized personal right (Stoica, 2017:361-397; Avram, 2006:222; Terzea, 2012:2522).

Practically, the civil foundations of the prescription place the abstract and the concrete of the existence of subjective rights - birth, effects and extinction - in the reality of time.

2. Amendments related to the statute of limitations

The possible doubts - related to the purpose of the statute of limitations - were not produced by civil practice, which was always based on a nuanced and highly adapted theoretical discourse, but by the understanding of criminal statutes in the matter of statute of limitations. Contextually, the prosecutor - representative of the most general interests of society, the protector of its values and, therefore, the sole holder of the criminal action – invoked a procedural need and the judge - through a preliminary question addressed to the European court - requested clarifications regarding the applied procedural meaning of a solution issued by the constitutional court and which, subsequently, outlined - recognized or not - a genuine problem substantiation of the prescription in criminal matters.

More precisely, the Constitutional Court decided - of course, casuistically and as a guide - that a certain wording in the criminal code regarding the interruption of the statute of limitations for the criminal liability action would violate the requirements of the constitutional order (Constitutional Court, 2018) (predictability of criminal law - which stated that the interruption of the prescription of criminal liability - that is, the right to initiate criminal action in the material sense - is interrupted by any procedural act in question, it is not necessary that the interrupting procedural act is necessary - according to the old regulation - to be communicated to the interested party; casuistically, since it is a matter of criminal rules of material law that appeared successively over time, it would logically follow to apply the more favorable criminal law, if one or more criminal laws intervened between the commission of the crime and the final judgment of the case, the more favorable law is applied); and the lack of predictability of the law - in a field such as the criminal one governed by the legality of crimes - could essentially affect other personal rights recorded also constitutionally.

The answer received (CJEU, 2023) however, it was atypical for the general way of interpretation and, above all, of the reasoning of the courts: judges cannot, "within the jurisdictional proceedings that aim to penalize serious fraud crimes that harm the financial interests of the Union, to apply the national standard of protection regarding the principle of retroactive application of the more favorable criminal law (lex mitior - the application of the national standard would "increase the systemic risk of impunity for such crimes" (point 99 of the same reasoning), to bring back into question the interruption of the limitation period of criminal liability by procedural documents intervened before June 25, 2018.

That is, do we understand the same rule - related to the prescription of a subjective right - and therefore apply it differently when debating the financial interests of the Union in relation to the possible damage to other interests?

4. Such overly simplistic and inconvenient question points us to at least a methodological problem in explaining the institution of prescription and, why not, procedural lapses (Nicolae, 2010:137-149).

The general theory of the civil legal act - the most concerned with the field - insists only on the extinguishing prescription; the courses of real rights observe the manifestations of the possessors - bearers of good or bad faith - which could constitute conditions for an acquisitive prescription; administrative law joins with references adapted to the developments of civil theory and criminal law - based on the positivist principle of the legality of its institutions - is not at all concerned with the deep potential of the foundations (Nedelcu, 2020). But, here, ironically, it is precisely the criminal law that is hampered by the insufficiency of the law and the conjunctural relativity of the meaning of the rules.

The legislator - as usual - is completely devoid of such concern and disperses the rules of prescription in the most diverse forms, on domains, in different chapters of the codes or of the particularizations of special laws.

2.1. Acquisitive and extinguishing forms of civil prescription

Juxtaposing the two forms of regulation of civil prescription - acquisitive and extinguishing - suggest only apparent similarities. The similarities would not be essential, fundamental (Nicolae, 2010:48).

Extinctive prescription operates against the holder of a right of claim who does not request that the debtor perform his performance (or does not start enforcement). The acquisitive one sanctions a negligent owner who does not "stop for a while the disturbing acts initiated by a third party possessor, although the prerogatives of this real right impose on everyone the task of not committing such acts" (Luha, 2017:49).

In the first hypothesis, the prescription is liberating but in a particular sense: only the action in the realization of the subjective right is extinguished, action understood in a material sense. The prescription in the acquisitive sense shows us that - effect of the positive norm - even the extinction of the subjective right, of the real right, of ownership is accepted; "a long possession - of a certain kind - carelessness, neglect of the holder - justifies the possessor (sometimes even being in bad faith) to become the owner himself to the detriment of his predecessor: the possessor usucapated, acquired by acquisitive prescription" (Luha, 2017:49). Basically, the statements indicate differences, not similarities.

However, in each case a general interest is invoked: combating the neglect of the holder in the exercise of prerogatives, clarifying factual situations on which legal situations overlap; this even if the omission produces different ineffectiveness: in the case of the extinguishing one the right subsists, "the correlative obligation preserving its being as a natural obligation"(Pop et al., 2012:38); through the effect of usufruct, the real right of the inactive owner is extinguished.

In other words, the two institutions are similar only through the substantiation understood as the purpose, as the mission of the regulation and its application (Nicolae, 2010:48) or by its legal nature presented as a sanction for the defaulter (Pop et al., 1975:576) or, as the case may be, through the mobilizing prevention function in favor of the interested party (Căpățână, 1989:306).

But the civil doctrine insists - which is a fragmentary and separate law - on an essential difference between the two forms of prescription, a difference that suggests the methodological need to search for new elements in the foundation of this essential institution in law.
The statute of limitations is always analyzed from the perspective of the negligent creditor; the acquisitive one, on the contrary, only from the position of the third party concerned and active up to behavioral vice, debtor of a general duty to refrain from disturbing acts directed against the holders.

Not by chance the protective action of the holder of the real right it is not extinguished by the main fact of the passage of time as in the case of the prescription of a debt right; first the real right is extinguished - as an effect of someone's purchase - and only subsequently the right to action is lost; the action is, therefore, undeniably imprescriptible; it is lost as a result of the disappearance of the main right and not as a result of the idea of prescription.

2.2. The double condition

In another debate setting (Malaurie et al., 2010:732) it was observed that time, its flow, presents itself to us juridically - alone or associated with other events - as a modality of obligations: external elements on which the exercise or existence of subjective rights depends, as well as their correlative obligations. This, precisely in order to be able to overcome the

possible limits of substantiating civil prescriptions on the need to protect the general interest of securing and predictability of the effects of factual or legal situations.

So we locate ourselves in an area of the modalities of combined obligations; "we have either an obligation with a term subject to a condition, in the case of the statute of limitations, or a term subject to the expiration of the obligation (resolutive condition), in the case of the acquisitive prescription.

That is, in the case of the extinguishing prescription, the obligation that must be executed within a certain term - and which exists because it is affected by a term - is subject to a probable event, uncertain that it will occur, outside the legal relationship (a condition): negligent behavior of the creditor. In the space of the acquisitive prescription, the real real estate right - whatever it may be - is doubly conditioned - in its existence - by the active behavior of the usufructuary possessor: if the possession will be compliant for a while (while it outlines an extinction term), the owner's right will disappear from his heritage; if the usufructuary claimant's possession will be inadequate within the time indicated by law, its effect (of possession) will be specific to a lapsed situation.

The double condition - each subject to the same resolutive term - indicates the angle from which we see the legal relationship: the condition will be extinguishing for the usufructuary and suspensive for the acquirer" (Luha, 2017:52).

3. The theory of subjective rights

Treating the prescription from the perspective of the modalities of the obligations sends us to another area of concepts: the modalities of the obligations are seen as external elements of a subjective right; such elements could be designated - only methodologically and in a generalizing formula - in the form of external conditionality of the effects of this right.
Equally, any subjective right originates in the fulfillment - concurrently or successively - of some internal conditionality (capacity, consent, object of cause) (Titulescu, 2002). All these conditionalities - internal or external - are placed, objectively, equally and inevitably, in time - seen as a movement in sequence of events - and only in a space of complex social relations.

The theory of subjective rights is very developed (Dogaru et al., 2008:372-830) and generally known. It was observed and, then, it was demonstrated, also by way of substantiation, that subjective rights are in their essence interests of the subjects, interests with the highest level of legal protection (alongside, among others, indifferent interests, legitimate interests, etc.) (Thierry, 2004). Moreover, even art. 1349 of (1) and (2) of the Civil Code approach - recognized or not - also a model of conceptualization as long as the common law imposes on everyone the general duty to respect, along with the rights, the legitimate interests of others; and disregarding this obligation attracts civil liability (Art 1349 C. civil: al. (1).

Separately, the rules distinguish and the doctrine develops the distinction and details its implications between the substantive subjective right, the right to action in the material sense (Stoica, 2023:248-281), the right to enforcement, as well as the procedural right (Nicolae, 2010:155-216). The connection between these autonomous rights is complex but can also be presented starting from the idea that the subjective rights subsequent to the substantive right - such as the right to action - include the latter - the substantive right - as an intrinsic condition of its existence (of the right to action, for enforcement, etc.).

CONCLUSIONS

The theory of subjective law and, implicitly, of legal interest is common - of course with specific particularities - to any branch of law. Time - its flow - presented as a modality of correlative rights obligations inevitably becomes valid and applicable - even if there would be difficulties in delimitation and tracking - to every legal field.

In conclusion, it can be stated that nothing would justify a separation of the treatment of the criminal prescription from the civil one both in terms of the foundation and the understanding of the principles that govern its mechanisms.

The subjective rights - substantial, action in a material sense, procedural or enforcement - the interests of the subjects however diverse their origin and foundation - criminal or civil rights and/or interests - appear and exist over time and very often in competition.

These sketched concepts - explained, then, in detail and following their practical implications - indicate a huge methodological potential for the hypotheses in which the legal norm - whatever its origin - finds its meaning with difficulty. I note that the reference to the jurisprudence of the European court - the financial interests of the European Union has its particularity and foundation; these interests may - case by case and in a very different manner - come into competition with the procedural rights of those against whom the criminal action has been initiated; following the effects of the concepts that I presented schematically, the landmarks of an answer can be outlined in the debate that concerns the criminal law community: the application of the norm of interruption of the prescription is not done in an abstract way - the community norm or, as the case may be, the constitutional norm has priority - national - but only on a case-by-case basis, analyzing the inter-conditions of rights and competing interests (Leș, 2023).

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