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LEGAL LIMITS ON THE RIGHT OF PRIVATE PROPERTY CONCERNING JUS ABUTENDI

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Abstract

This article proposes an analysis of the limits of private property rights. They do not limit the property right, but they temporarily limit one of its essential attributes - ius abutendi - which can have as its source either the will of the party or the will of the legislator expressed in the content of the normative act.

Key words: *property, right of disposition, legal norm, convention, limits.*

INTRODUCTION

Starting from the axiom value provisions formulated in Art. 44 paragraph 1 from the Constitution of Romania which provides that "the right to property is guaranteed, its content and limits being established by law", Art. 555 of the Civil Code referring to the attributes of the right to private property shows that they are exercised within the limits established by law.

Therefore, the right to private property as the main real right is not unlimited in terms of its content and attributes, it is exercised within its limits which can be - either material limits related to the corporeality of the object of the property right or they are of a legal nature having as source either the law, the object, the convention or the court decision.

In the present analysis, we approach the legal limits of public interest, taking into account those causes of temporary inalienability of some goods subject to the right of private property.

In contrast to these, the legal limits of private interest which in the economy of the Civil Code from 1864 were classified in the category of "natural servitudes" or of "legal servitudes", they "in reality did not represent true servitudes - dismemberment of real rights - but they reflected a normal situation generated by the neighborhood,, *(G.Boroi, A.Anghelescu, B.Nazat, 2013, p.20.)* which imposed a series of duties on the part of the property right holders.

LEGAL LIMITS ON THE RIGHT OF PRIVATE PROPERTY CONCERNING JUS ABUTENDI

The legal limits mentioned in the fundamental law, the constitution, have their legal basis in the fact that the private interest must correlate with the public interest, in general, thus ensuring an optimal balance within society.

The exercise of the attributes of the property right, and in particular we refer to "jus abutendi", can be limited in accordance with the normative acts issued by the competent authorities.

For example, we mention in the category of constitutional limits the causes of expropriation of privately owned goods (see Art. 44 paragraph 3 of the Constitution to which it refers Art. 562 paragraph 3 of the Civil Code) according to which "no one can be expropriated except for cause of public utility, and then, only according to legal conditions and with fair and prior compensation,,. Starting from this constitutional regulation, the legislator in the content of Law no. 33/1994 clearly establishes the conditions, assumptions and principles that define the general framework of expropriation for reasons of public utility.

In cases of violation of the imperative provisions stipulated by the mentioned legal text, the act of expropriation is abusive, being null and void, a fact that reinforces the absolute nature of the right to private property.

Another legal limit established by the Constitution that comes to harmonize the general interest with the private one refers to the use of the basement of a building. Thus, in Art. 44 paragraph 5 it is specified that "for works of general interest the public authority can use the basement of any real estate with the obligation to compensate the owner for the damage caused to the soil, plantations or constructions as well as for other damages imputable to the authority".

It should be mentioned in this regard that the one whose right is violated by an action or inaction likely to cause him damage is entitled to compensation equivalent to the damage caused, which is regulated by civil legislation in terms of civil liability delictual or unjust enrichment (see Art. 1345 and 1348 Civil Code). Thus, art. 1357 Civil Code, paragraph 1 mentions "He who causes damage to another through an illegal act, committed with guilt, is obliged to repair it,,. In our opinion, in order to reach a legal limit regarding the right to private property in this case, the exploitation of the basement must be justified by satisfying a general interest that responds to an economic need, and the unavailability of the basement of the respective property must be covered by the the person that uses it otherwise it would seriously violate the principles of social equity.

In the doctrine, it was emphasized that art.44 par. 2, the second thesis of the 2003 Romanian Constitution through its provisions would bring a limitation of the exercise of property right. Thus, "foreign citizens and stateless persons can acquire the right of property of land only under the conditions resulting from Romania's accession to the European Union and from other international treaties to which Romania is a party on the basis of reciprocity under the conditions provided by the organic law as well as through legal inheritance ,,.

This situation results naturally from the constitutive acts of the European Union as well as from the treaties and international agreements to which Romania is a party, making direct reference to the principle of reciprocity, because in these circumstances the respect for the sovereign character of the Romanian state is taken into account.

The current civil legislation regulates numerous situations that create limits to property right that have as their object immovables intended for land or constructions.

These assets are basically temporarily removed from the civil circuit if the law expressly provides for this.

It is the derogating effect from the principle established by Art. 12 paragraph 1 of the Civil Code which establishes the rule of free circulation of goods that are subject to the right of private property.

Through express provisions of a prohibitive nature, the legislator temporarily removes certain assets from the civil circuit, sanctioning with absolute nullity the acts that violate this limit regarding the right of disposition. In this context, Art. 32 of Law no. 18/1991, now repealed, "stipulated the prohibition of the alienation of land acquired by the beneficiaries of the right of private property established under the conditions of Art. 19 paragraph 1 and Art. 43 of the mentioned normative act,, *(I.Adam, 2013, p.70)*.

The sanction of nullity could be requested either by the prefecture, the town hall, the prosecutor or any person who had an interest.

The interest of the legislator who introduced this limitation was to encourage small owners of agricultural lands and to prevent speculative actions on these lands.

A case of limitation of the right to dispose of lands was the one provided by art. 15 of the currently abrogated Law no. 54/1998, which removed from the civil circuit the lands on which there were disputes brought to court.

Likewise, the existence of a dispute regarding the reconstitution of private property rights over lands that fell under the land fund laws were also removed from the civil circuit (see Art. 4 of Law no. 247/2005).

Such a case of permanent inalienability is the one stipulated by Law no. 247/2005 which prohibits the sale of lands owned by constitutive associative forms according to Art. 26 of Law no. 1/2000.

The prohibition obviously concerns only acts concluded "inter vivos", because the prohibitive norm is of public order; per a contrario – those for the cause of death do not fall under this prohibition.

A situation that limited the "jus abutendi", concerned the lands with forest vegetation that had been returned to the property of the composesorates, these lands not being able to be the subject of acts of alienation except for their owners, only to people in the same association. By way of exception, they could only be

transmitted by legal inheritance to persons who did not have the capacity of associated members (see Art. 28 par. 8 of Law no. 1/2000).

In case of reorganization through total division, the respective lands would become the property of the state, to be used by the respective territorial administrative unit (see Art. 28 par. 6 of Law no. 1/2000).

The legislator's intention was not to divert the purpose for which he had reconstituted the property right of these associative forms, as well as to protect the interests of their members.

In symmetry with the previous provisions, the legislator created a similar legal regime through a series of special laws, namely Decree Law no. 61/1990 on the sale of housing from the state housing fund to the population, amended by Law no. 85/1992 which would be amended in turn by Law no. 76/1994 on the sale of houses and premises with other purposes built from the state fund and from the funds of the economic or state budgetary units *(The Official Monitor no. 196 from 29 July 1994.).*

Through the package of laws mentioned above, it was imperatively regulated that the alienation of the goods intended for housing and the spaces with other purposes that were the subject of these regulations should be done exclusively only to the persons who had the status of tenants at the time of the sale. The arguments that the legislator had in mind by introducing these prohibitions were mainly constituted in the general policy of the state aimed at the social protection of certain categories of people who, in this way, "could acquire real estate at modest prices, much below the market price,, *(I.Adam, 2013, p.73).*

The respective provisions were incidental to the houses built from the state funds and the funds of the state budgetary units, with the exception of those that before March 6, 1945 belonged to state institutions, autonomous regencies and companies with mixed state or private capital that ceased their activity after that date or they became state economic or budgetary units through reorganization, as well as the houses under construction that were not completed by the state until the date of entry into force of Law no. 85/1992, respectively July 29, 1992.

A similar regulation was also enjoyed by the people who had the status of tenants, thus being able to acquire ownership of the buildings in which they lived as tenants, the state therefore having the obligation to alienate the homes to these people based on Art. 9 paragraph 1 of Law no. 112/1995, and the same article paragraph 5 removed temporarily, respectively for 10 years from the civil circuit, the homes acquired by tenants now in the new capacity, namely that of owners.

As it was correctly shown in the specialized doctrine, the state was "imposed the obligation to sell real estate intended for housing to tenants, therefore a limitation of the right of disposal, but the beneficiaries of this provision, in turn, were required the obligation not to sell for the period provided

by law the home purchased under the penalty of absolute nullity,, *(I.Adam, 2013, p.74)*.

By Art. 44 par. 3 of law no. 10/2001, however, former tenants who have now become owners were given the possibility to sell the building to the former owners if the latter expressed the desire to buy the building within 90 days from the entry into force of the respective normative act, which was done through an express notification.

An alienation ban is also the one provided by Art. 14 of Law no. 114/1996, which conditions the act of alienation on the up-to-date payment of the amounts received as a grant from the state budget.

A case of perpetual inalienability is the one in which a good object of private ownership has passed through one of the forms regulated by law in the public domain. Thus, the provisions of art. 136 paragraph 4 of the Constitution are imperative so that the public domain is inalienable, so it is removed from the civil circuit. By way of consequence according to Art. 861 paragraph 3,, under the conditions of the law, public property assets can be given into administration or use and can be concessioned or rented,,.

From the interpretation of the legal provisions in force, it follows that any act of alienation of an asset from the public domain is null and void.

The right of disposition is limited in the case of co-ownership, so when the exercise of the attributes of the right of private ownership with respect to the same asset is exercised by several holders who have the capacity of co-owners, whether we are talking about the joint ownership in shares or the joint ownership in devolution.

In the case of this type of property right, the rule of unanimity applies in terms of "jus abutendi", because an act of disposition concluded by one or some of the co-owners without the consent of the others is null and void. In the situation where one of the co-owners becomes the sole owner, for example, he inherits the other co-owner, the acts of disposition will come out of the scope of the limitation, because the attributes of the exercise of the real ownership right are exercised by a single owner.

All the more, the rule of unanimity regarding the right of disposal is imposed in the hypothesis of forced and perpetual co-ownership when, depending on the nature of the asset or its destination, it usually serves a main asset, and the right of disposal over these assets is limited.

The perpetual character of the forced co-ownership comes to show that regardless of the will of the parties (the co-owners), if the property were to be divided, it would lose its usefulness and destination as such, becoming practically unsuitable for use.

A controversial issue in the specialized doctrine was whether or not the limitation of the right of disposition born by conventional means has its source in

the law. The natural question arising is whether "the inclusion of an inalienability clause in the documents concluded by the owners is based on a normative provision"*(C.Hamangiu, Rosetti Bălănescu, AI Băicoianu, Bucharest, p.94-100).*

It is unanimously accepted in the doctrine that in the economy of our Civil Code, the unanimous rule of inalienability was imposed, because through the transmission of the right of ownership it is consolidated.

Starting from this axiom of inalienability argued in Cuza's Code in numerous articles (see 475, 480, 803, 804, 1236, 1306, 1310, 1594 s.a.) it was opined in the specialized doctrine that as long as an inalienability clause is not expressly stipulated by the legislator, it is allowed, practically remaining at the discretion of the court to rule on its legality.

Starting from the plenary affirmation of the full freedom of will that animates the conduct of the subjects of civil law, the doctrine required that when the party or parties insert an inalienability clause in the act that is going to be drafted, this clause must be determined by a ,,serious and legitimate interest and be of temporary duration,, *(G.Marty, P.Raynoud, 1980, p.69).*

Thus, a fundamental principle is set in motion in the conclusion of civil legal acts, namely the unrestricted affirmation of the freedom of will of civil law subjects will be taken into account.

Starting from these circumstances, three articles can be found in the economy of the New Civil Code, namely 627, 628, 629 – the regulation of the inalienability clause.

Such clauses can be stipulated through property transfer deeds, whether concluded inter vivos or for cause of death, but under the condition that they violate public order or harm the good manners in society, because otherwise the sanction will be absolute nullity.

A special mention is required in this regard concerning the hypothesis of inserting an inalienability clause in the content of a will where "the validity of the inalienability clause will be governed by the law in force on the date of its drafting and the effects that the clause will produce will be governed by the law in force at the opening of the succession,, (*(I.Adam, 2013, p.61*).

For the temporary period in which the inalienability clause is active, the term is 49 years maximum, a term that runs from the date of acquisition of the asset. The serious and legitimate interest is appreciated either in the person of the disposer or in that of the acquirer, or even of a third party *(J.Carbonier, 1980, p.128-129).*

In the situation where the serious and legitimate interest is no longer justified, the acquirer can ask the court to freely dispose of the asset. Nothing, however, prevents the beneficiary of such a clause from renouncing it, but here it will have to be determined if there cannot be taken in discussion cases regarding the vitiation of his consent.

The inalienability clause in the situation in which it no longer proves to be of interest and legitimate, in the opinion recently formulated in the doctrine, it "can be requested in court also by the acquirer's creditors" *(M.Nicolae, 2011, p.558-559).*

As a novelty, the legislator of the New Civil Code has regulated in the content of Art. 627 paragraph 4 an implicit inalienability clause considering the given assumption by which the property is to be transferred in the future to a person determined or determinable through a convention concluded.

It was correctly shown that in the situation where the acquirer does not respect the inalienability clause, "the applicable sanction will not be that of the nullity of the concluded legal act, but the resolution or, as the case may be, its revocation." *(O.Ungureanu, C.Munteanu, Bucharest, p.174).*

According to Art. 2351 paragraph 2, inalienable goods can be mortgaged, this being qualified as a future good as in accordance with Art. 627 paragraph 5 Civil Code the existence of an inalienability clause does not lead to the impossibility of inheriting the asset as such. In this sense, the French Civil Code in art. 900-1 introduced by Law no. 71-526 of July 3, 1971 provides - Inalienability clauses affecting a donated or bequeathed property are not valid unless they are temporary and justify an interest seriously.

CONCLUSIONS

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