

The Warranty and Protection of Private Property in Romania

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Key words: private property, guaranteed and protected, land fund, agricultural grounds, land owners, pre-emption right.

SUMMARY

Romania's Constitution modified and completed by Revision Law of Romania's Constitution No 429/2003, equally guarantees and protects the private property, no matter the owner.

Natural and legal persons, the state and the administrative-territorial units (communes, towns, counties) can own the private property right.

The object of private property right is represented by the mobile and immobile assets that doesn't belong to the public domain. Natural persons can own in property more immobile assets and may freely dispose of these by sale, rent, lease etc. within the limits established by law.

Alienation by sale of agricultural grounds placed outside town can be done respecting the pre-emption right of joint owners, neighbors or tenants.

The proceeding concerning the exerting of pre-emption right is supported by Law no. 54/1998, regarding the juridical circulation of grounds.

Private property is equally protected by law, no matter the owner. Meaning that the judicial protection regime of private property right is equal for natural persons, legal persons and state. The judicial regime of common right stipulated by Civil Code and other normative documents applies itself to private property right.

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1. GENERAL FEATURES

The term of property and the one of right for property are synonymous. The first term “property” is also used to show its juridical expression, being “the right for property”. The Constitution of Romania, modified and completed through the Law no. 429/2003 for revising the Constitution of Romania, uses, in art. 44 and art.136, both the term of property and the one for right for property. Both, property and the right for property, had a different social – economical content, different from one society to another, all throughout time. The content of the right for property is different according to the object and the owner of the right.

The right for property was defined, in doctrine, as being that real right which gives the owner the attributes of possession, usage, disposal, attributes which only the owner can manifest in their fullness, by his own power and in his own interest, according to the juridical norms in force of the Law. (Pop, 2001, Lupulescu, 1997)

2. FORMS OF PROPERTY

The Constitution of Romania devotes the forms of property in art.135 alin.1 thus: “The property is public or private” and in alin.2 in this way: “The public property is guaranteed and protected by the Law and belongs to the State or to the territorial-administrative units.”

The text from the Constitution of Romania, art.136 alin.3, stipulates, in an express way, that the following goods make the object of public property: the riches of the underground for public interest, the air space, the waters with energetically potential that can be turned to good, of national interest, beaches, territorial sea, the natural resources of the economical area and of the continental plattou and other goods ordained by the organical Law.

Private property is the main property, because the goods that compose it are in the civil circuit. In other words, private property is the rule and public property is the exception.

3. THE DEFINITION OF PRIVATE PROPERTY. ADJUSTMENT

The Romanian civil code defines property in art. 480 as being “someone’s right to enjoy and dispose, in an exclusive and absolute way, of an item, but in the limits determined by the Law”.

In the project of modification of the Civil code, property is defined as: “The property is the right to own, to use and to dispose of a good, in an exclusive and perpetuu way, but in the limits stipulated by the Law.”

The right for property can be defined as being a subjective real right which belongs to the natural persons, legal persons, to the State or to the territorial – administrative units over mobile or immobile goods, which allows its owners to manifest the attributes of the right for

property (possession, usage and disposal), in an exclusive and perpetuu way, by personal power and interest, in the limits stipulated by the Law (Lupulescu 1997; Safta – Romano 1993).

It results from the things written above that the attributes of the right for private property are: possession (jus utendi), usage (jus fruendi) and disposal (jus abutendi).

The juridical characters of the private property are: private property is alienable, meaning that the goods are in the civil circuit; private property is prescriptable meaning that the private property is submitted to the acquisitive and extinctive prescription; private property is summonable, meaning that the goods, which form its object can be followed by creditors in order to satisfy their claims.

Private property is reglemented by the Constitution of Romania (art.41 alin.2 and art.135 alin.2); in the Law no.18/1991 regarding the real estate with its afterwards modifications; the Law no.215/2001 regarding the local public administration, in the Civil Code and in other normative acts.

4. THE OBJECT OF PRIVATE PROPERTY

Just as I have shown, the Constitution of Romania, lists in art.136 alin.3 the goods that make the exclusive object of public property and there is no mentioning regarding the private property, which means that the object of private property consists in the mobile and immobile goods that do not belong to the public area.

The Law no. 18/1991, regarding lands, stipulates in art.6 that: “The State’s private area and thus, the villages’, the towns’, countys’ and districts’ is, on one hand, made of the fields bought by these according to the norms of the Law, and on the other, of the fields taken out of usage for a different purpose, according to the Law, from the public area.”

The object of private property is also stipulated by the Law no.213/1998 in art.4 as: “The State’s private area or of the territorial-administrative units is made of goods which are under their property and do not belong to the public area. The State or of the territorial-administrative units have a right for “private property” over these goods, and the Law no. 215/2001 in art.123 alin.1 stipulates: “the private area of the territorial-administrative units is made of mobile and immobile goods, others than those stipulated in art.122 alin.1, entered under their property according to the norms of the Law.

The Law no.18/1991, with its afterwards modification and the Law 1/2000 settles in detail the situation regarding the fields which can from the object of the right for private property. Thus, in art.4 alin.1 the Law no. 18/1991 stipulates that the fields can make the object of the right for private property.

5. THE SUBJECTS OF THE RIGHT FOR PRIVATE PROPERTY

The owners of the right for private property can be natural persons, legal persons, the State or the territorial-administrative units.

We give an example of the juridical owners of the right for private property: trading societies established according to the Law no.31/1990, the self-governmental administrations

established and organized on the ground of the Law no.15/1990; the agricultural societies established according to the Law No.36/1991, which have legal personality but without a trading purpose; handicraft cooperative societies of consumption or of credit and also those without a working purpose and the foundations established according to the Law no.21/1924 regarding the legal persons, abolished through O.G.no.26/2000 and the religious cults.

The natural persons can own under their property many mobile or immobile goods and can dispose them freely by selling, renting, leasing, etc. them in the limits of the Law.

The natural persons who have the aptitude to achieve rights can be subjects of the rights for private property. The Civil Code stipulates in art.949 that: “Any person who is not under the Law guilt can contract” and in art.1306 that: “All those to whom it is not forbidden by the Law can buy and sell.” These texts refer only to the natural persons who are Romanian citizens.

The State is a legal person and it is represented as a subject of rights and obligations through the Minister of Finances, if the Law does not stipulate otherwise (art.25 from the Decree no.31/1954).

The villages, cities and districts are legal persons. The administration of the private area of the village and of the city belongs to the local council (art.38 alin.2 let.f from the Law no.215/2001) and the administration of the private area of the district belongs to the District’s Council (art.104 alin.1 let.f from the Law no.215/2001).

6. THE REGLEMENTATION OF THE WARRANTY AND THE PROTECTION OF THE RIGHT FOR PROPERTY

Art.41 alin.2 from the Constitution of Romania stipulates that the private property is guaranteed and protected in an equal way by the Law, unregardingly of the owner and in the art.136 alin.5 that “private property is unviolable, in agreement with the organical Law.”

In the previous text of the art.41 alin.2 it was stipulated that: “Private property is protected in an equal way by the Law, unregardingly of the owner” and in art.41 alin.1 that the right for property is guaranteed.

In the Explicative Dictionary of the Romanian language, the 2nd edition – Univers encyclopedic, Bucharest, 1998, pag.411, the verb “to guarantee” means “to give someone the assurance that will posses something, to ensure something to someone” and the verb “to protect” means “to take under someone’s watching care, to defend, to protect, to help, to support”, pag.711.

It can be noticed that the term “warranty/guarantee includes (absorbs) the one of “protection”.

It results from this present writing of the art.44 alin.1 and 2 that the private property is guaranteed and protected unregardingly of the good that forms its object and unregardingly of the owner.

To guarantee the right for private property assumes the protection of all the prerogatives of this right and, in a special way, the right for disposal, but the principle of inviolability written in art.136 alin.final from the Romanian Constitution, is defeated in the exceptional situation of the expropriation of the private property for the cause of public usage, according to the

conditions and respecting the demands stipulated by the Law no.33/1994 regarding the expropriation for the cause of public usage.

The Romanian Legislator anticipated the institution of expropriation by the disposition art.481 from the Constitution, according to: “Nobody can be forced to give away his property, excepting only for the cause of public usage and by receiving a rightful and beforehand (legal redress) compensation”, and in alin.6 it stipulates that the compensation is established in a mutual agreement with its owner or, in case of disagreement, through the Justice.

Thus, the Fundamental Law admits that the expropriation for the transition of goods from the private property in the public property, if the following conditions are fulfilled in a concurring way: the public utility to be declared according to the Law, the expropriated owner to receive a rightful compensation; the compensation to be established in agreement with the expropriated owner or in case of disagreement, by the competent Court of justice; the compensation to be beforehand.

Regarding the real estate property the Legislator demanded that the alienation of the agricultural fields situated in the inner city, should be done by obeying the right of preemption. This restraint of the disposal right is reglemented in art.5 from the Law no.54/1998 regarding the juridical circulation of the fields. According to this text: “the alienation, by selling the agricultural fields situated outside the city will be done by obeying the right of preemption of the co-owners, of the neighbors, or of the leaseholders.” The disobedience of these demands brings forth the relative invalidity of the selling – buying contract.

It results from the text quoted above that the right for preemption belongs, firsthand to the cooperators and if these do not exist, or do not manifest their desire to capitalize them, this right can be manifested through the Local Council from the area to which the field belongs.

The procedure in manifesting the right of preemption is reglemented by the Law no. 54/1998 in art.5-11, over which we will not insist.

The right of preemption is recognized by the Law to those persons who benefit of priority in buying some agricultural fields from outside the city, in the order mentioned above.

Regarding the alienation of the fields, the Law institutes some restrictions regarding the form of the legal papers of alienation, the extent of the object of alienation and the quality of the person who acquires it (Zaharia, 2002).

- The private property fields, unregardingly of their owner, are and remain in the civil circuit. The fields situated in the inner city and outside the city can be alienated and acquired through legal papers between living people, made in an authentic form.
- Regarding the acquiring among living people, the real estate of the acquiring person cannot surpass 200 ha of agricultural field, in a ploughing equivalent, per family, under the sanction of the cutting down of the legal paper of alienation until the limit of legal surface (art.2 alin.2 and 3 from the Law no.54/1998).
- The fields attributed through the making up of the right for property: to the active cooperator members, who have not brought field in the Agricultural Cooperative of production or who have brought a field less than 5,000 sm.; to those, who do not have the

quality of cooperators, worked, in any way as employees in the last 3 years in the Cooperative or in cooperative associations if they are established or are going to establish themselves in the city and do not own field under their property in other places; to the families who ask in writing and obligate themselves to work this area; to the families without land or with little land in other places, who ask for it in writing, with the obligation to establish their home in the village, town or city, accordingly, and to cultivate the land, giving up the property they had in their own location, from outside the city; to the young families of countrymen who come from the mountainous agricultural environment, who have the necessary skill and who obligate themselves in writing to create households, to farm and to rationally exploit the land in this purpose, the vineyards cannot be alienated by legal papers for 10 years, counted from the beginning of the following year in which the property was registered under their name, under the absolute invalidity sanction of the alienation paper. The verification of the invalidity can be asked in the Court of Justice by the Mayor, Prefect, Attorney and also by any interested person (art.32 from the Law no.18/1991, republished). The action of the verification of the invalidity is unbarred at the end of years. When the term of 10 years is fulfilled, those fields will enter in the civil circuit and can be alienated, through legal papers between living people.

- The alienation of the fields on which there are litigations at the Courts of justice is forbidden in every form, all throughout the time in which these litigations are solved (art.15 alin.1 from the Law no.54/1998).
- Foreign citizens and stateless persons cannot acquire the right for property of lands (art.3 alin.1 from the Law no.54/1998). It is obvious that these dispositions have to be harmonized with the text art.44 alin.2 from the Constitution which stipulates that: "The foreign citizens and the stateless persons can acquire the right for private property over lands only according to the conditions resulted from Romania's accession to the European Union and from other international treaties to which Romania is a part, on the basis of mutual agreement, in the conditions stipulated by the organical Law, and also by the legal inheritance."

Presently the foreign legal persons cannot acquire fields in Romania through legal papers between living people or due to death causes.

The Law no.18 /1991 regarding the real estate, modified, adjusts the loss of the land's usage right at the end of the year in course, by the agricultural owners who do not fulfill their obligations for cultivating the agricultural fields and for assuring the protection of the soil.

The same Law mentioned above adjusts the restriction of the fields' usage right, by which that it obligates the owners to make available the degraded fields from the improved area, in order to enforce the features and the works stipulated in the project for improving, maintaining the right for property (Popa, 1994).

As it can be observed these restraints are imposed in the purpose of cultivating the fields, of the soils' protection and improving.

It is understood by the owners of the fields, in agreement with the Law of real estate, as the owners of the right for property, of other real rights over these or those, whom according to the Civil Law have the quality of temporary possessors or owners.

The interdiction of alienation of the dwelling places acquired on the terms of the Law

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no.112/1995, for the settlement of the legal situation of buildings with the destination of dwelling places, given under the State's property is enforced for a period of 10 years also.

Thus, regarding to art.9 alin.1 from the Law mentioned above, the renting people titular of a contract which is not giving back to the ex-owners or to their heirs can apply for the buying of these flats, by paying the price fully or by rate/installments and, regarding to art.9 alin.8 "the flats acquired in the conditions of alin.1 cannot be alienated for 10 years after the date of purchase". Afterwards, the Law no.10/2001 regarding the legal regime of some buildings taken in an abusive way, during the period of time March, 6, 1945–December, 22, 1989, in art.44 alin.1 stipulated that in an exceptional way, the dwelling places bought in agreement with the Law no.10/2001 can be alienated in every form before the fulfillment of the 10 years term, but "only to the rightful person, the ex-owner."

To notice that the real estate and, thus, the right for property and the other real rights have to be registered in the existing real estate papers and of the building society advertisement stipulated by the Law.

According to the Law no.18/1991, the real estate of Romania is constituted by any kind of fields, unregardingly of their destination, of the title on which they are owned or of the public or private area from which they belong.

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BIOGRAPHICAL NOTES

I am a Doctor in legal sciences since 2000. I have a 24 years of service as a professional magistrate and I have been teaching in the University for over 10 years
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I am a Judge at the Court of appeal from Galatz and I am a Doctor University lecturer at the Universities "Dunarea de Jos" and "The Danubius University" from Galatz.
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