The Right to Private Property and Limitations for the Purpose of Public Interest

Senior Lecturer Adriana Pascan, PhD
Danubius University of Galati, Romania
adriana.pascan@univ-danubius.ro

Abstract: The right to property is a guaranteed right. Property is the right of an individual to own, dispose and enjoy an asset, absolutely and exclusively, within the limits determined by law, therefore its scope is not unlimited. The content and limitations of this right are established by law and the doctrine makes a distinction between the material limitations and judicial ones, stating that the distinction between the right to property and the object of this right and the judicial will. When the right to property brings a prejudice to the general interest of a society and endangers the social harmony, the legislator intervenes and limits the rights to private property as this right cannot be an absolute right under these conditions.

Key words: right to property; limitation; public interest; private interest; legislation

1 Introduction

We are currently discussing (Birsan, 2001) more and more the limitations of the right to property in a society that is characterized by continuous changes and transformations in the economic, social, political etc. sectors but especially in a society in which the citizens' rights and liberties are guaranteed by the Constitution and international treaties, an aspect which is underlined by the doctrine as being a paradox.

While some authors (Boroi, 2003) consider that "when talking about the exertion of the right to property, we consider the ways in which the holder of this right – the owner- explores its attributes, therefore the content of the right, while other authors (Birsan, 2001) assert that in what concerns the content of the right and its scope, the right to property is not unlimited but the law itself establishes that the exertion of the right to property is susceptible to certain limitations which are nothing more than the expression of the individual interest of the individual combined with the collective or general interests.

The balance that has to be reached between the general interests and the individual ones represent the finality of the law as protector of both the social and individual interests.

Article 44 in the Constitution stipulates that the right to property as well as the claims to the state is guaranteed. The content and limitations of these rights are established by law. The legislation also defines the right to property as the right of an individual to enjoy and value goods that are imposed, regarding the object of the right or other attributes of the right, for the defense of the collective interests or for the defense of the private interests of others.

The doctrine (Stoica, 2004) separates the limits in material and judicial ones, stating that the differences between these two categories is based firstly on the difference between the right to property and the object of this right and secondly on the role of the judicial will. The right to property is not and cannot be an absolute right and the legislator has to be able to limit the rights of the owners when they have the tendency to dangerously touch the genera interests of the society and harm the social order.

The material limitations concern only the corporal goods and separate the exertion of the right to property depending on the corporal character of the object of the right to property. The judicial limitations focus on the judicial content of the right to property. They restrain, in one way or another, the exertion of the attributes of property without being equivalent to a suspension of the latter in relation to a part of the object of the right.

Irrespective of their nature, the limitations to the right to property has to be imposed within the limits determined by the law or else the right to property will not be valid and the exertion of this right will no longer be protected and the liability of the owner will be involved in case the owner will cause damages to the other owners.

2 The Limitations to the Right to Private Property

The private property is not and cannot be an absolute right but if the exaggeration of the absolute right to property can be dangerous for the general interest then the exaggerate restraint and especially the partial or total suppression of the private property is a greater danger for the social order and general prosperity. Never in history the abuse deriving from the exclusive and absolute character of the property, can be compared with the abuses and disorganization during the suppression of the individual property during the communist period (Stoica, 2004).

The limitations of the right to property, irrespective of their nature, are not mistaken with the suppression of the right to property, expropriation and confiscation being the only hypothesis in which the Constitution allows the annulment of the right to property over certain goods.

Although it has been asserted that the restrictions are inspired by the public interest, we concur with others (Lutescu, 1946) that the proximity relations can

lead to incidents. The proximity relations are the judicial relations between the holders of rights to property or other rights on the neighboring lands. The Constitution, in article 44 statutes the obligation that the holders of right to property have, namely the respect of the duties for ensuring a good proximity as well as the respect of the other duties that, according to the law, belong to the owner. The legislator covers the entire scope of the proximity relations in this phrasing.

The proximity relations can lead to the emergence of incidents which are not recognized by the legislation in the matter but are found in the judicial practice. The limitations of the rights to property deriving from the relations of proximity are solved through the concourse of the judicial instances that are called to solved those cases although, from a material point of view of the right, there is no breach of the right but from the point of view of the spirit of the right, we are witnessing a deviation from the purpose for which that right was recognized and granted to the owner (Hamangiu & Rosetti- Balanescu & Baicoianu, 1997).

Beyond the individual function which protects the space of liberty of the person, the right to property has also a social dimension and the concept of social interest has a certain evolution, the restrictions to the right to property are in a continuous growth as well, either if we are talking about the limitation of the right to property to the advantage of the public space or if the limitations are applied in the name and benefit of urbanism, nature and environment protection, aesthetics, safety and public health, economic requirements etc. (Birsan, 2007).

The incidents related to the disturbance in the proximity relations by the abusive exertion of the attributes related to the property impose the examination and recognition of the circumstances that caused them namely if the holder exerts his prerogatives within the limitations of the right recognized by law or, on the contrary, abuses his right or disturbs the normal exploitation of the neighboring funds by other individuals.

The dispositions in article 1 in the Additional Protocol to the European Convention of human rights confers the states the right to adopt laws that they consider as being necessary in order to regulate the use of the goods according to the general interest, considering also the dispositions in article 57 in the Romanian Constitution which stipulates the obligation to exert in good faith the constitutional rights and liberties, so that the rights and liberties of the others are not violated (Craciunean, 2006).

Article 35 in the Constitution provisions that "The state recognizes the right of any individual to a healthy and ecologically balanced environment" and Decree 31/ 1954 on the legal and private entities stipulates in article 1 that "The civil rights of the private persons are recognized with the purpose of satisfying the personal, material and cultural interests according to the collective interest, in virtue of the

laws and regulations for social life" and in article 3 we find that "they can be exerted only according to their economic and social purpose".

3 Limitations Imposed by the Public Interest

The servitudes established by law have in view either the public utility or the utility of the owners. For this reason, they can be divided in servitudes of public interest and servitudes of private interest.

The servitudes of public interest have as object the road near the navigable or floatable rivers, the construction or reparation of road or other public or communal works. These servitudes are also limitations of the exertion of the right to property. In the interest of navigation, the law imposes the owners of the riverain terrains to leave the road near the navigable or floatable rivers free. The owners cannot block the access or use the road in order to build or perform other works (Schiller, 2005).

According to article 44 in the Constitution, the right to property as well as the claims over the state are guaranteed, the content and the limitations to these rights being established by law. To the same end, it is also mentioned that the attributions of the right to property are recognized within the limitations imposed by the law (Stoica, 2006).

The same article in the Constitution stipulates that the right to property implies the obligation to respect the duties regarding the environment protection and guarantee of a good proximity as well as to comply with the other duties which, according to the law or customs, belong to the owner. The servitudes established for the public or communal utility are actually limitations to the right to property or duties for the benefit of the state or the benefit of the territorial administration units. Such a limitation is made by Law 213/ 1998 on public property and its judicial statute which, in article 13, stipulates that the servitudes on the goods belonging to the public sector are valid only to the extent in which these servitudes are compatible to the use or public interest for which the related goods are destined. The limitations to the property in public interest are numerous. Among these we would present the most common ones.

The limitations for urban interest or for the urban aesthetics represent a category in which the restrictions are varied and have different motivations. They are based mostly on the purpose of makeover, sanitation, order, safety and internal police, national defense and military necessities etc. They are urban servitudes namely the measures taken by different laws and regulations for the purpose of impeding those who want to build an industrial establishment or an insalubrious installation with the purpose of affecting the public safety and sanitation as well as the interests of the neighbors. The measures are also taken for the safety of public decency and the

authorities have to ability to eliminate the insanitation, prevent the owner from renting or even impose the deconstruction (Ungureanu & Munteanu, 2005).

To this end, Law no. 50/1991 establishes rules for civil constructions, industrial constructions or any other type of works regarding the alignment, height and respect of the systematization plan. The constructions will be performed only in conformation to the authorization of construction and regulations regarding the design and execution of the construction and the permits for constructions will be issued in compliance with the urban dispositions based on the urban certificate and landscaping plans, legal notifications and permits as well as the other documents that are annexed to the request for issue of construction permit (Munteanu, 2005).

In the case of the limitations for the purpose of sanitation and public health we mention the obligations deriving from the plans of territorial development, general urban plan of the area, detailed urban plan and the urban regulations, including here the obligations regarding the hygiene of the constructions, sewage system and environment protection. These obligations are stipulated in article 44 in the Constitution. The sustainable development is ensured by complying with this principle that entails the integration of the environment policies in the policies of the important sectors of the economy in any state, namely industry, agriculture, transportation, health etc. The harmonization of the legislation in environment protection with the legislation of economic and social development based on the national plan and empowerment of every citizen in complying with the right to a healthy environment for every citizen leads to the accomplishment of the concept of sustainable development (Nicolae, 2000).

Limitations for cultural, historic and architectural interests are established in article 7 in Law 50/1991 which stipulates that for the authorization of the constructions in the areas over which a certain protection regime has been set and stipulated in the approved urban documentations the following will be respected: in the historic and architectural reservations, established according to the law or in case of the works that modify the monuments of any nature, the solicitor will obtain the permit from the National Commission for the protection of monuments, national sites and developments or the Department for urbanism and territorial development; for the national parks and reservations, the solicitor will require the permit from the Ministry of Environment; in the areas where another type of restrictions has been imposed, the solicitor will require the permit from the competent authorities.

According to article 119 in Law no. 18/199, republished, the historic monuments, vestiges and archeological objects that will be discovered on site or in the subsoil are under the protection of the law. The owners and holders of the terrains are obliged to ensure their integrity, refer to the state authorities and allow the performance of research and preservation works. For the damages caused, reparations will be granted.

The limitations in economic and general or fiscal interest refer to certain exploitations or cultures that cannot be performed freely by owners in order not to prejudice the fiscal interests and incomes of the state. There are generally goods over which the state has an exploitation or sale monopole such as tobacco, playing cards trade, cigarettes paper, matches production, alcohol, salt exploitation etc. (Craciunean, 2006).

The law of the land fund no. 18/1991, republished, establishes in article 74 some obligations with the purpose of ensuring the cultivation of the terrains and the protection of the soil. Also, articles 77 and 89 in the same law stipulate that the use of the terrains for the agricultural and forestry production, including the change in the category of use of the arable terrains and the obligations for the improvement of terrains are subject to certain limitations. The same law stipulates some obligations on the temporary or definitive use of the terrains for other purposes that agriculture or forestry. The Constitution stipulates in article 44 that the public authority can use the subsoil of any property for works of general interest with the obligation to compensate the owner for the damages brought to the soil, plantations or constructions as well as for any other damages imputable to the authority. Limitations of the right to property result also from the judicial status of transportation and use of electricity or the judicial statute of water and use of water.

Article 102 in Law 18/1991, republished, mentions that the telecommunication lines and transportation and electric networks, water transportation pipes, sewage, oil pipes, gas pipes as well as other similar installations will be distributed so that they will not impede the execution of agricultural works. Article 103 stipulates that the occupation of the terrains necessary for emergency remediation of damages and maintenance works for the objectives mentioned in the previous article will be made based on the preliminary agreement of the owner or, in case of rejection, with the approval of the county or Bucharest City hall, in all cases the land owners having the right to compensations for the damages caused. Also, there are limitations resulting from the judicial regime of the telecommunication activities. According to the telecommunication law no. 74/ 1996 the license holders that intent to enter on a property for the installation or maintenance of the lines will convene in writing with the owner all the necessary details, including the place and methods used as well as the timeline in which the owner cannot perform works that would impede the access and good maintenance of the installations or that would require their displacement. In the lack of the agreement of the owner, the holder of the license will make a written notification to the owner in which the activities and their placement will be indicated, which can be disputed at the Ministry of telecommunications. Law no. 29/1990 mentions that against the decision taken following the dispute, the unsatisfied party can refer to the instance of administrative contentious. Also, in the lack of an agreement from the owner or the habitants, the works for telecommunications can be performed based on a definitive and irrevocable court order and, in case of emergency, based on

presidential ordinance. There are also limitations deriving from the judicial regime of the national system of oil transportation provisioned by the Law of oil no. 238/2004, amended, which is applied to the terrains, other than the ones declared as being of public utility, that are necessary for the access in the perimeters of exploitations or perimeters exploited as well as over the terrains necessary for all the activities involved, others than those declared public utility. Limitations are imposed also by the judicial regime of the perimeters of exploitation- exploration of the oil resources and those of the safety areas of these perimeters provisioned by the same law. The exertion of the right to property can be limited also by the monopole judicial status for some activities for example the production, preparation and sale of tobacco.

The limitations of the exertion of the right to property can also be imposed by the ***defense interests***, for example the creation of military areas or for the protection of the airports, harbors or other economic or general interest objectives. Aeronautic servitudes, stipulated in Decree 95/ 1979 according which the works, constructions or installations are forbidden near the landing and take-off areas, which can endanger the safety of flights can also impose limitations to the right to property.

The property located near the borderlines of the state is also limited according to Law 56/ 1992 which stipulates that the plantation of trees is allowed only within 500 m from the protection line towards the inside and high crops, from 250 m to the interior. The constructions in unincorporated areas can be made only at 500 m from the protection area but only with legal approval, including the approval of the competent border authorities. Among the other types of limitations of public interests we have to mention also the *limitations regarding the area near the navigable waters*, *the placement of constructions near the railways*. Regarding the latter, the Emergency ordinance no. 12/ 1998, stipulates that in the protection area is forbidden the placement of any construction, material storage or plantations. Limitations are imposed also from the *judicial regime of the woods*, the *judicial regime of the waters or road constructions*. In what concerns the judicial regime of some mobile assets, for example, these assets cannot be sold by private persons and can be used only in certain conditions, among which we mention: medicines and toxic substances, drugs, arms and munitions, goods from the archives, goods in the national and cultural patrimony.

4. Conclusions

Currently, the institution of the right to property is undergoing essential changes in its structure: it enhances the role of associated property, the process in individualization of the judicial regimes of the right to property are deepened, deriving from the object of the right to property. In the system of the object of the right to property revolutionary changes have occurred. The process of merging of

the real and obligation rights, new types of property are appearing that have the features of merchandises. Many of these new types are reported to the un-material objects, especially information, right to claim, new means of individualization, know-how, which in time, are occupying their place in the structure of the economic values within the states characterized by market economy. We can observe that currently new theoretical constructions are actively being searched for the right to property. The representatives of the new judicial vision of the right to property consider that this institution of law has to comprise any subjective right that have a patrimonial character, including the real rights and the member rights. The limitations of the right to property restrain in a way or another, the exertion of the attributes of property without being equivalent to a suspension of them in relation to the object of the right. The limitations derive from the judicial will, either the legislator's will or the judges' or even the will of the owner, named also the will of men.

5. References

Bîrsan, C. (2007). *Drept civil. Drepturi reale principale/ Civil Law. Real principal rights*, 2nd Ed. Bucharest: Hamangiu.

Boroi,G. & Stănciulescu, L. (2003). *Drept civil/ Civil Law.*Bucharest: All Beck.

Stoica,V. (2004). *Drept civil. Drepturi reale principale/ Civil Law. Real principal rights*, Vol. I, Bucharest: Humanitas.

Luţescu, G. (1946). *Teoria generală a drepturilor reale/General theory of real rights*. Bucharest: Romania.

Hamangiu, C. & Rosetti-Bălăcescu, I. & Băicoianu, Al. (1997). *Tratat de drept civil român/ Treay of Romanian civil law*. Vol. II, Reedited, Bucharest: All Beck.

Crăciunean, L.M. (2006). Câteva consideraţii cu privire la istoricul, noţiunea şi natura juridică a exproprierii pentru cauză de utilitate publica/ Considerations on the history, notion and judicial nature of expropriation for public utility. *A.U.L.B.* no. 1-2.

Munteanu, C. (2005). Consideraţii privind servituţile de utilitate publica/Considerations on the public utility servitudes. *A.U.L.B.* nr. 1-2.

Stoica, V. (2006). Noţiunea juridică a dreptului de proprietate privată/Judicial notion of the right to private property. *P.R. In honorem Corneliu Bîrsan, Liviu Pop*. Bucharest: Wolters Kluwer.

Ungureanu, O. & Munteanu, C. (2005). Despre servituţile administrative/On administrative servitudes. *P.R.* no. 3.

Schiller, S. (2005). *Droit des biens*/ *Property law*. Paris: Dalloz.