DEMOCRACY AND THE RIGHT TO OWN PROPERTY

Ligia-Roxana ROTARU, Legal counselor
TCM Nord, Baia Mare, Romania
ligia_sunflower@yahoo.com

Abstract: A democratic State is the one that seeks to respect human rights and fundamental freedoms. These rights are divided into several main categories, as follows: fundamental rights, social, economic and cultural right, exclusively political rights, social and political rights and guarantees. The right to own property falls into the category of social, economic and cultural rights. In a democratic society, it is a rights *sine qua non*. Ownership may be acquired or disposed through contracts (sales contracts), unilateral juridical acts (testaments, accepting and offer), and other instruments we have dealt with extensively in this study.

Keywords: democracy, fundamental rights and freedoms, right to own property, sales contract, inheritance

The concept of democracy aims to respect closely human rights and fundamental freedoms of individuals, so that every human being would be able to develop harmoniously within the society, according to their own principles and beliefs. First of all, we want to mention the formulae consecrated by the *Declaration of the Rights of the Man and of the Citizen* set by the National Assembly of France on the 2nd of October 1789 which states that 'men are born and remain free and equal in rights'[1] and that 'liberty, the natural faculty of doing what one likes, is the normal state of man.'[2]

1 Dumitru Mazilu, *Drepturile omului. Concept, exigențe și realități contemporane*, Editura Lumina Lex, București, 2000, pp.62-63.

2 D. Alexandresco, *Principiile dreptului civil român*, vol III, Tipografia Curții Regale, București,1926, p. 5.

Thus, human rights and fundamental freedoms are classified into several categories, which we shall briefly recall, along with some examples of rights that fall within each category, without claiming the exhaustive character of our enumeration.

From Paul Negulescu's perspective, public freedoms are divided into two categories, primary and secondary (or complementary) freedoms.[3] According to Teodor Cârnaț, who uses the criterion of citizens' rights and freedoms, the fundamental rights of the citizens of the Republic of Moldova are divided into several categories. Thus, human rights and fundamental freedoms are classified into several categories, which we shall briefly recall, along with some examples of rights that fall within each category, without claiming the exhaustive character of our enumeration. The first category is that of inviolabilities, or *fundamental rights*, that of the rights closely related to the human being, such as the right to life, the right to marry, the right to the protection of their family, the right to the inviolability of the home. The second category is represented by *economic, social and cultural rights*, those rights that enable the individual to take an active part in the social and cultural life of the society through the right to education, to work, to own propriety, the right to inheritance. These are followed by the category of exclusively political rights, closely followed by that of *social and political rights*, which includes citizens' right to participate in the government of the state, as well as the right to ensure their social, material and political development manifested through freedom of conscience, freedom of speech, freedom of the press, and the right to information. Finally, a last category of rights is represented by the right of the injured party to demand compensation for damage[4] and, wherever possible, reinstatement to the former position.

An international classification of human rights uses a different perspective, dividing human rights into *civil and political rights* and economic, social and cultural rights. The legal instruments used in defending these rights are the Universal Declaration of Human Rights,

3 https://dreptmd.wordpress.com/cursuri-universitare/drept-constitutional/capitolul-17-clasificarea-drepturilor-si-libertatilor-fundamentale-ale-omului/; retrieved on 25.10.2018.

4 https://dreptmd.wordpress.com/cursuri-universitare/drept-constitutional/capitolul-17-clasificarea-drepturilor-si-libertatilor-fundamentale-ale-omului/ retrieved on 02.10.2018.

the International Convenant on Civil and Political Rights and the International Convenant on Economic, Social and Cultural Rights.[5]

Among all these rights and freedoms, we shall focus particularly on the rights to own property in a democratic society. The right to own property was enshrined in the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on the 10th of December 1948. It states in article 17 that 'everyone has the rights to own property alone as well as in association with others. No one shall be arbitrary deprived of his property.'[6]

We shall first analyse the right to own property in its entirety and then we shall deal with how it can be acquired or remised. According to the Romanian Constitution, the right to own property includes two aspects: the right to public property and the right to private property (art. 136, paragraph 1). According to article 136, par. 2 of the Constitution, "public property is guaranteed and protected by the law, and belongs to the Stat or to territorial-administrative units". Because the right to private property applies to every citizen, it will be the focus of our study. Thus, article 555 of the Civil Code defines the right to private property as 'the right of the owner to possess, use and dispose of goods exclusively, absolutely, and perpetually within the limits defined by the law.'[7]

Ownership, that accompanies the right to own a property, also called *ius possidendi*, gives the owners the ability to either 'exercise an effective direct or indirect control over their asset, by their own power and for their benefit, or consent to their ownership to be exercised in their name and in their interest by another person.'[8] The use (*ius utendi* and *ius freundi*) is the owners' ability to use the asset in their own interest and to benefit or profit from it, while *abusus* refers to mood as the most

5 Ana Budeanu, *Totul despre Drepturile Omului - foarte scurtă introducere*, https://adevarul.ro/international/foreign-policy/totul-despre-drepturile-omului-foarte-scurta-introducere-1_5346e9880d133766a8ac6e34/index.html retrieved on 25.10.2018

6 http://legislatie.resurse-pentru-democratie.org/legea/declaratia-universala-a-drepturilor-omului.php accesat in 02.10.2018; Irina Moroianu Zlătescu, Emil Marinache, Rodica Șerbănescu (coord.), *Principalele instrumente internaționale privind drepturile omului la care România este parte*, vol. I. Instrumente universale, ediția a opta revizuită și adăugită, Editura I.R.D.O., București, 2006, p. 5.

7 *Noul Cod Civil*, Editura Universul Juridic, București, 2015.

8 Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil. Drepturile reale principale*, Editura Hamangiu, București, 2013, p.18.

important prerogative of owners, because it gives them the right to do what they want with their asset, be it material (he can consume it or destroy it, as long as he complies with the law) or legal. Legal provisions give owners the right to dispose of it, the right to have real rights over it and even the right to forego or relinquish it.[9]

Generically, the right to own private property is acquired through a sales contract, an inheritance, a donation etc. Most frequently, property is acquired through a sales contract. We shall refer to Romania, a democratic country where the sales contract is defined by article 1650 of the Civil Code as a 'contract by which the seller transfers or, where applicable, undertakes to transfer the ownership of a good to the seller for a price which the buyer undertakes to pay.'[10]

Having defined this type of contract, we shall make a short review of the conditions to be met by those citizens who want to exercise this right. The first condition refers to legal capacity which, according to article 28 of the New Civil Code is "recognized to all persons". This article is in line with the first article of the Universal Declaration of Human Rights that states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[11] Anyone can thus 'buy or sell unless a specific provision in the law forbids them to', according to article 1652 of the Civil Code.[12]

We will take a step forward and we will analyse the conditions to property has to meet in order to its ownership to be legally transferred from one citizen to another. It first has to be possible, as *'ad impossibilium, nulla obligatio'*, that is no one can be forced to make the impossible. Then, the property to be sold has to exist or its existence to be possible, a requirement otherwise easy to understand. We also mention that the object if the contract has to be *in commercio*, i.e. in the civil circuit, to be licit and moral, and the seller to have ownership over it. The property to be sold has also to be determined or determinable, according to article

9 *Ibidem*, p.19.

10 *Noul Cod Civil*, Editura Universul Juridic, București, 2015.

11 http://legislatie.resurse-pentru-democratie.org/legea/declaratia-universala-a-drepturilor-omului.php retrieved on 02.10.2018.

12 *Noul Cod Civil*, Editura Universul Juridic, București, 2015.

1225, paragraph 2 or the New Civil Code which stipulates that the object of a contract must to be 'determined and licit', regardless of the legal operation of the contract.[13]

Having viewed the conditions applicable to property, we will focus on the price, as it is to be sold for a certain price. If there were no remuneration, we would be talking about a donation act or another unilateral contract and not about a synallagmatic contract caractherized by "the reciprocity of the obligations of the parties and the interdependence of mutual obligation."[14] Thus, the price has to be fixed in money, an essential condition of sales contracts. If the price were set in goods, it would be an exchange contract, not a sale. Similarly to the object of the contract, the price also has to be determined and determinable, as well as real and "serious", or proportional to the value of the object. Because it is rather a fact, in order for the price to be "serious", it is often assessed by the court.[15]

Another interesting thing to be mentioned is related to the responsibility of the seller. It is called a warranty for vices or defects, and it refers to the criteria the good has to meet in order to be used normaly, according to "its nature or to the destination given by the parties."[16]

There are different types of sales contract, and we mention only some of them: the *sale after testing* if the good meets the criteria extablished at the conclusion of the contract, after a trial period, the *sale of an inheritance*—the sale of succession rights after the death of *de cujus*—, *repurchase agreement*—allows the seller to repurchase the good in a set period of time by paying the price of the good and the expenses generated by the purchase.[17] After a brief review of the most common way of acquiring property, we shall focus on the donation contract.

Unlike the sales contract, the donation agreement is a unilateral contract, i.e. "that contract that generates obligations only for one of the

13 Liviu Stanciulescu, *Curs de drept civil. Contracte*, Editura Hamangiu, București, 2012, pp.123-127.

14 Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil. Partea generală*, Editura Hamangiu, București, 2012, p.111.

15 Liviu Stanciulescu, *Curs de drept civil. Contracte*, Editura Hamangiu, București, 2012, pp.132-136.

16 *Ibidem*, p.166.

17 *Ibidem*, pp.184-188.

parties."[18] Donation is a legal act to which was payed special attention by the *legislator* as once the contract is signed, the good no longer belongs to the donor, as stipulated by article 984, paragraph 1 of the Civil Code: 'liberality is the legal act whereby a person disposes gratuitously of his/her goods, completely or partially, in favour of another.'[19]

The first aspect worth to be noticed is the special form of the donation contract in order to be valid, namely to be drafted and acknowledged by a civil law notary for it to be *ad validitatem*: "the donation is concluded only through authenticated documents" (article 1011 paragraph (1) of the New Civil Code). Great attention is paid to the authenticated document drafted and acknowledged by a civil law notary because the citizen has to be aware of the fact that s/he will definitely and irrevocably diminish their patrimony without receiving anything in return. The donee has, of course, a duty to be grateful to the donor, but it is often legally unsanctioned, except for cases where the lack of gratitude is impossible to ignore such as attempted homicide, cruelty, serious injuries or refusing to feed a donor in need.

Secondly, we will deal with the capacity of the donor. S/he has to have the legal capacity to dispose of her/his property, which is possible when s/he has full legal capacity. If, in the case of the sales contract it was possible in some cases for one of the parts not to have full legal capacity, this is a *sine qua non* condition regarding the donor. This is why, a "child cannot make donations, except for ordinary gifts, according to her/his material situation" (article 146, paragraph 3 of the Civil Code). According to the Romanian legislation, full legal capacity starts "on the day when the individual attains legal majority. The age to attain legal adulthood is 18" (article 38 of the Civil Code). It is also interesting to notice that "even after attaining full legal capacity, the individual cannot use liberality for the benefit of the one who has been her/his legal representative or legal guardian or before the court frees his of his legal responsibilities. The case where the legal representative or guardian is an ascendant of the donor is an exception" (article 988, paragraph 2 of the Civil Code).

18 Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil. Partea general*, Editura Hamangiu, București, 2012, p.111.

19 *Noul Cod Civil*, Editura Universul Juridic, București, 2015.

Unlike other contracts, a donation is irrevocable, as it is the very essence of the contract, and we can even say that it is an irrevocability in itself, special, derived from its quality of liberality,[20] fact also confirmed by article 985 of the New Civil Code that stipulates that the donor "irrevocably disposes of a good for the benefit of the other party, called donee." A last interesting aspect regarding the irrevocability of a donation is represented by the rule mentioned above.

Thus, the legislator itself only recognizes one veritable exception from this rule in article 1031 of the New Civil Code, which stipulates that "any donation between married couples is revocable only during marriage". It is interesting how the *legislator* decided to give the donor the possibility of revoking the donation at any moment, but within the frame of marriage. Going further, the spouse who makes the donation can revoke it either expressly (by asking for the good to be returned) or tacitly (the spouse names an heir for the good that has been donated). In addition, the donor is not even bound to motivate the decision, so the donation can be revoked by a simple manifestation of the will of the donator spouse. This freedom granted to the donator spouse only applies during marriage, meaning that if one of the spouses dies or if a divorce is finalized, the donated good belongs to the donee spouse, and from this moment on we can talk about the principle of the irrevocability of donations.[21]

Before talking about successions, we will deal with one last contract that can also be a way of acquiring properties, but not in exchange for a price, but for repeated services. It is a continuing contract, meaning the 'act calling for periodic performances, performance being in several units over a period of time.'[22] It is different from *uno ictu* contracts, or executed contracts, which call for a single performance.[23] The maintenance contract is defined by article 2254, paragraph 1 of the New Civil Code as follows: 'under the maintenance contract, a party undertakes to provide for the benefit of the other party or a particular third party the benefits necessary for maintenance and care for a certain period of time. "The debtor must

20 Liviu Stanciulescu, *Curs de drept civil. Contracte*, Editura Hamangiu, București, 2012, pp. 218-219.

21 *Ibidem*, pp. 221-222.

22 Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil. Partea generală,* Editura Hamangiu, București, 2012, p.120.

23 *Ibidem*.

provide for the creditor's food, clothing, footwear, cleaning and adequate housing. Maintenance also includes medical care and medical expenses in case of illness" (article 2257, paragraph 2 of the New Civil Code).

These articles mention some short aspects worth mentioning. First, property is not to be transferred to the debtor for a certain price, but for the performances mentioned above. Given the importance of the maintenance contract in social life, the *legislator* found it appropriate to mention that it should be drafted and acknowledged by a civil law notary, making it a legal contract, along with the donation contract. A legal contract is the 'juridical act without which simple willingness is not enough, but it also needs a legally recognized form. This form (usually the one acknowledged by a civil law notary) represents a condition for the validity of the judicial act. It is said that the act has to be *ad validitatem* or *ad solemintatem*.'[24]

Maintenance also has a random character found only in a few types of contracts. Thus, each party has equal chances to gain or to loose, as their chance depends on the hazard (also called *alea*). In order to better understand how *alea* works, we shall use an example. Let's suppose that party A, 78 year old, concludes a lifelong maintenance contract with party B in exchange for his apartment. Party B, the one who has to take care of party A, wishes to have the apartment for a price that is beneath its real value, that is his performances to have less value than the apartment he were to receive. If party A would die, let's say during the same year or the next one, party B would be left with the property in exchange for his few performances for party A (clothing, medication, looking for the house, etc.) from the conclusion of the contract until his death, an amount a lot lower than the value of the apartment. In this case we could say that B gained from the transaction. But let's also analyse the second possibility. If party A lives 20 more years, when party B has to pay for everything that he needs and let's say that the value of the apartment depreciated, the value of party B's performances could be higher than the price of the apartment. The *alea* element, that depended on a future event, namely the death of party A, and B is at the losing end of the agreement, while party B gains more.

24 *Ibidem*, p. 118.

For this reason, the contract is also *intuit personae*—taking into account the qualities of the debtor[25]—as only a few people would conclude a contract with a stranger while trusting her/him to support hem for the rest of their lives. In consequence, the strong *intuit personae* character is completely justified.

One last aspect that I would like to address is the transfer of ownership through succession. Even the former Romanian law recognized two ways of transferring the property *de cujus*, the one to whom the property belongs. This transfer could be done legally or by will, through the legacy left by *de cujus* to other people or in different quotas that would have been due to them legally.

According to article 557, paragraph 1, of the New Civil Code, 'the right to own property can be acquired, according to the legislation, by means of convention, legal or testamentary inheritance…' Legal inheritance occurs when the property left by the deceased is transferred by applying the succession law, while testamentary inheritance is when the heritage is transferred *mortis causa*—according to the will of the deceased—manifested in a will.[26] The two procedures can coexist when the will does not include all the inheritable estate. Let's use an example and assume that *de cujus* had two houses. Through his will, he leaves one of them to his friend A, without saying anything about the other one. In consequence, by testamentary inheritance, friend A takes one of the houses, while the other one will belong to the successors recognized by law.

Let's make a brief review of the conditions to be met by a citizen to have the right to receive an inheritance or part of it in a democratic society. Firstly, he has to exist. In consequence, any person who exists when to succession procedure commence—at the death of *de cujus*—is considered to have the capacity to receive liberalities.[27] If the first condition is met, the person also needs to be entitled to succession. Thus, the *legislator* limits the number of people who can claim the inheritance in order not to divide the property left by *de cujus* in to many small pieces. This is why there are several classes of heirs, according to a kinship hierarchy and how

25 Liviu Stanciulescu, *Curs de drept civil. Contracte*, Editura Hamangiu, București, 2012, p.443.

26 *Ibidem*, pp.18-19.

27 *Ibidem*, p. 27.

close they were to *de cujus*. We will not go into details, but we will present the example of a *de cujus* who is survived by her mother, her husband and a 4th degree relative. In this case, only the mother and the husband will be entitled to inheritance, because the mother is considered to be closer in the kinship hierarchy than the 4th degree relative. If the inheritance were to be divided between all the relatives, the society would own many small parts of different properties. If, for example, the only relative of the deceased would be the husband and the 4th degree relative, the two of them would inherit the whole property. The husband is not included in any of the classes of heirs as the *legislator* decided that he would have part in the inheritance indifferent of the other entitled heirs. We appreciate the change because in the former Romanian law the surviving spouse had limited rights to inheritance, usually only when there were no other relatives to reclaim it. In the same way, if two people entitled to succession died at the same time, under the same circumstances, it was assumed that the male successors died at a later time, as they were considered to be stronger and resisted longer in case of natural calamity or accidents. This has been corrected by the *legislator* and the law now states that those who die at the same time do not inherit one another: 'If when more people died it cannot be established if one survived the other, they cannot inherit each other' (article 957, paragraph 2 of the New Civil Code). An individual entitled to succession is not unworthy—is not guilty of any serious deeds against *de cujus* or the other heirs.[28]

In conclusion, we have briefly went through some of the most frequents ways of transferring property from one citizen to another, in accordance with the Romanian law. Finally, we would like to highlight that the right to own property can be exercised jointly by more than one citizen, in accordance with article 632 of the Civil Code that recognizes two forms of common ownership as follows: equity sharing (co-ownership) and beneficial joint ownership. Even by modifying this article, the *legislator* desires to foster understanding among its citizens, so it regulated the possibility of owning property in co-ownership. We appreciate the measure and consider it necessary in a democratic society.

28 *Ibidem*, pp. 30-34.

References

- Alexandresco, D., *Principiile dreptului civil român*, vol III, Tipografia Curții Regale, București, 1926.
- Boroi, Gabriel; Anghelescu, Carla Alexandra; Nazat, Bogdan, *Curs de drept civil. Partea generală*, Editura Hamangiu, București, 2012.
- Boroi, Gabriel; Anghelescu, C. Alexandra; Nazat, Bogdan, *Curs de drept civil. Drepturile reale principale*, Editura Hamangiu, București, 2013.
- Mazilu, Dumitru, *Drepturile omului. Concept, exigențe și realități contemporane*, Editura Lumina Lex, București, 2000.
- *Noul Cod Civil*, Editura Universul Juridic, București, 2015.
- Stanciulescu, Liviu, *Curs de drept civil. Succesiuni*, Editura Hamangiu, București, 2012.
- Stanciulescu, Liviu, *Curs de drept civil. Contracte*, Editura Hamangiu, București, 2012.
- Zlătescu, Irina Moroianu; Marinache, Emil; Șerbănescu Rodica (coord.), *Principalele instrumente internaționale privind drepturile omului la care România este parte*, vol. I. Instrumente universale, ediția a opta revizuită și adăugită, Editura I.R.D.O., București, 2006.
- https://dreptmd.wordpress.com/cursuri-universitare/drept-constitutional/capitolul-17-clasificarea-drepturilor-si-libertatilor-fundamentale-ale-omului/; retrieved on 25.10.2018.
- https://dreptmd.wordpress.com/cursuri-universitare/drept-constitutional/capitolul-17-clasificarea-drepturilor-si-libertatilor-fundamentale-ale-omului/ retrieved on 02.10.2018.
- Ana Budeanu, *Totul despre Drepturile Omului foarte scurtă introducere*, https://adevarul.ro/international/foreign-policy/totul-despre-drepturile-omului-foarte-scurta-introducere-1_5346e9880d133766a8ac6e34/index.html, retrieved on 25.10.2018.
- http://legislatie.resurse-pentru-democratie.org/legea/declaratia-universala-a-drepturilor-omului.php accesed in 02.10.2018.
- http://legislatie.resurse-pentru-democratie.org/legea/declaratia-universala-a-drepturilor-omului.php retrieved on 02.10.2018.