

CONSIDERATIONS UPON THE RECONSTITUTION OF THE OWNERSHIP RIGHT CONCERNING REAL ESTATES (LANDS) PRIOR INCLUDED TO COOPERATIVE ASSOCIATIONS IN ROMANIAN LAW

SEVASTIAN CERCEL

Faculty of Law and Administrative Sciences, University of Craiova,
Romania

Abstract

From 1945 to 1989, the private ownership right over land real estates has suffered progressive limitings, in virtue of the aimed systemizing of the territory. The culminating point of these limitations occurred in 1974, when it was forbidden to alienate land real estates through acts between living persons (inter vivos acts). This limiting of the real estates (lands) juridical circulation created a lot of juridical consequences, even after 1989, when the laws on real estate were enforced, in order to try to bring some reparations to the prejudices brought to the right of private ownership on real (land) estates. The new regulations in the matter of real estate do focus on the reconstitution of the ownership right, following some precised criteria. In time, the new legislation in this matter has suffered modifications, in its attempt to complay to the constitutional stipulations and to the ones of the European Convention on Human Rights (E.C.H.R.) concerning the ownership rights.

Key words

Ownership right; Restitution; Real estates; Land estates' juridical circulations.

1. Introductory considerations

From 1945 to 1989, the private ownership right on land estates had suffered progressive limitings due to the political desideratum of systemizing the territory. This trend culminated with the forbidding of the alienation of land estates through acts concluded between living persons from 1974 on. This limiting of the land estates' juridical circulation among private juridical persons brought a lot of consequences after 1989 when the laws issued on the real estate fund have tried to restore the attempts brought to the private ownership right on real estates. The period from 1945 to 1989 may be featured, from this perspective as being dominated by the state's takeover on the land estates owned by private persons, made through various modalities established by the national laws enforced at that moment; among them were: the agriculture's structuring into cooperatives;

- the taking over of the goods considered as without owner;

- the taking over of land estates pertaining to the alienated buildings (Law nr. 58/1974).

2. The legislative frame

Due to the circumstances of this former ownership regime in Romania, after 1989 it became imperatively necessary to adopt a new legislative frame that would contain reparatory measures able to restore the private ownership right on land estates. So, as a basic normative ground for the reconstitution of the private ownership right, the Law nr. 18/1991 was adopted which suffered many modifications after wards, such as: the Law nr. 167/1998, the Law nr. 1/2000, the Law nr. 247/2005, the Law nr. 193/2007.

In the particularly complex question of the reparatory measures taken in Romania into this domain an essential item is concerning the reconstitution of the private ownership right on the land estates formerly placed in the patrimony of the associative forms organized in agriculture at that time, respectively the former Agricultural Production Cooperatives.

3. The concept of reconstitution

The reconstitution of the ownership right concerns the situation of the entitled persons who anciently owned a land estate but lost its ownership towards the state, under the circumstances ruled by the reconstitution laws. The reconstitution of the ownership right is a reparatory juridical operation, through which the entitled persons regain their ancient ownership within the limits stipulated by the law, but not compulsorily on its former site.

4. The reconstitution's object

The reconstitutions of the ownership right is realized upon the land estates that belong to the patrimony of the agricultural production cooperatives, the so called cooperativized land estates, but also upon unoccupied some lands, taken over by the state: the areas annexed by the agricultural production cooperatives in respect to some special laws or the ones taken over by the formers, from individual persons, but with no regular inscription, or taken over in any other way from cooperatives' members or either taken over by the state, with no title.

From reconstitution are expressly excepted the land estates which belong to the state's public domain and which are affected to public utility. The laws issued on real estates establish as belonging to the public domain the fields such as:

- buildings serving to public interest;
- public squares;
- public parks;

- street networks;
- harbours and air;
- ways of communication;
- parts;
- lands vowed to silvicultural purposes;
- stream and river beds;
- vats of public interest lakes;
- bottom of maritime inside waters and of the territorial sea;
- borders of the Black Sea, including beaches;
- the lands containing national parks and natural reservations;
- archaeological and historical sites or complexes;
- natural monuments;
- lands used for military or defence purposes;
- lands used for other public domain purposes or which, by their own nature, are of public use or interest.

The land estates belonging to the public domain are:

- inalienable;
- not to be appropriated;
- indefeasible.

They could be inserted to the civil circuit only if, a lawful statement would disaffect them disaffected from the public domain. The fields where are located street networks, public parks, the lands reserved for national parks and nature's reservation, archaeological and historical aggregates and sites, monuments, might be disaffected from the public domain only in cases of exception, and in respect to works of national interest.

There fore, if the land requested for reconstitution would presently be registered into one of these categories the former owner should no more be entitled to the restitution of the ancient site.

5. The reconstitution's subjects

The people who benefit from this reparatory measure are:

- the cooperative members who have brought land within it;
- the ones from whom the land was taken over by it in whatever way;
- under the conditions of civil law, the cooperative members' heirs;
- the cooperative members who had brought no land to the cooperative;
- other persons established by the law.

The establishment of the ownership law is done on the interested side's demand, through the release of an ownership title.

The quality of being an heir is established on the ground of the heir certificate, or of the definitive juridical decision. If these should lack, the quality should be established through whatever evidence could stand for the heritage's accept.

The heirs who could not prove this quality, because, at that time, the respective lands were not in the civil circuit, are considered as lawfully restored in what concerns the quality which is due to them from the lands which have belonged to their author in the accept term stated by the law. Through the request they would forward to the commission, they would be considered as having accepted the heritage.

The ownership title is emitted for the land area determined on the names of all the potential heirs, the litigations between them being resolved by the Procedures of common law. Both legal heirs and the ones instituted through wills do benefit from the reconstitution.

The term restoration we previously mentioned does not act in regard to the heirs who had expressly renounced to the author's heritage during his lifetime. It only concerns the heirs who had become strangers to the heritage by not accepting it in the due six months' term from the opening of the succession on.

This difference of treatment has raised discussions in specialized literature; the question was elucidated through the Decision of the High Court of Cassation and Justice nr. XI, on February, 5-th, 2007, regarding the unification of practice. So, the supreme instance has stated that: "through the stipulations of the Law nr. 18/1991, art. 13, it is stated that the term restoration concerns only «the heirs» that is to say the persons who own «the quality of a heir». Or, according to the statements of art. 696 Civil Code, the heir who renounces to the succession is considered as never having owned the respective quality, the heir title being cancelled with a retroactive effect, and therefore the respective person is considered as a stranger to the heritage. This is why the person who renounces to the succession does not figure in the category of those who are entitled as heirs, because they could not prove this quality. In this case the certain proof

exists (the declaration at the notary's office) that the respective person is not a heir, due to the fact that she had expressly renounced to the succession. In the circumstances stated by art. 700 Civil Code, the law presumes only this person to be a renounces, thus not to accept the succession, but there is not touchable evidence of this legal presumption. In virtue of his expressed renunciation, the heir is considered as never having been an heir, and there by his hereditary vocation is retroactively cancelled.

By the indivisibility rule concerning the succession's patrimony, the same asset of indivisibility is provided to the successional option, which could never be conditioned by the quantity aspect of the succession's patrimony. The renunciation concerns as well the goods existing effectively into succession at the death's moment, and the ones potentially included to the respective succession. Consequently, in regard to the regulation's date, it is imperatively established that, on the ground of the Law on the real estate fund nr. 18/1991, art. 13, par. (2), in the sense of the restoration in the term of the succession's accept, of the heir right over the succession should benefit only the heirs who previously did not accept it within the term stated by the law, but not those who had previously renounced to the succession".

On the other hand some people are included to the category of "other persons" entitled to reconstitution:

-The persons of whom the owned fields have passed, with or without a title, into the patrimony of the agricultural production cooperative, without yet obtaining, due to this fact, the quality of cooperative's members as well as, following the case theirs heirs;

-The cooperative members, who, following the case, have left the agricultural production cooperative, never have worked in the cooperative or do not reside in the respective locality, as well as theirs heirs, may recover the out-of-city fields brought in or taken over, in whatever way, by the cooperative's patrimony;

-The persons owning some military medals and their heirs, who had to choose and to whom was allotted, at the date of the real estate's attribution, some cultivable field, except for persons who have alienated this land;

-The persons who, totally or partially, have lost their work capacity and the heirs of the persons who have deceased- due to their participation in the struggle for the victory of the Revolution in December 1989-would obtain the ownership of fields f an 10.000 sq.m. area, as cultivable equivalents;

-The private owners, in case when their agricultural fields were added to the perimeter of some agricultural production cooperatives, and they were not consequently compensated with other fields. Their ownership would be restored and an equivalent quality of cultivable area would be given back to them, on some lands established by the commission;

-The Romanian citizens belonging to the German minority or the persons who have been deported or displaced, and their lands were alienated through normative acts emitted after 1944; to them, on their request would be allotted the ownership of the lands areas placed at the commission's disposal; priority would be reserved to these persons or to their heirs;

-The parish commissions or other organs representing the local cult's communities from the rural zones, requesting for agricultural fields. To these, as ownership would be reconstituted a land area of cultivable equivalents reaching to 5 ha in the case of convents, insofar all these institutions have possessed, in the past agricultural fields which have been taken over by the agricultural production cooperatives land presently they do not own such areas or either these areas would be diminished;

Apart from this special conditions required for the being framed in one of the above mentioned special categories, the rule is that only the Romanian citizens could be, as individual persons entitled to the reconstruction, no matter if they should inhabit in Romania or abroad. Foreign citizens and stateless persons could not benefit from restitution because, as we have shown, this is applied only restrictively to the mentioned persons, in the view of the reparatory character of this law. Foreign citizens and stateless persons might, still, obtain the ownership through legal heritage, if their authors were reconstitution beneficiaries.

So, the general rule is that the reconstruction beneficiaries would be Romanian citizens who inhabit in Romania, but also abroad, as well as former Romanian citizens who have required the Romanian citizenship, no matter if they did or not established their domicile in Romania, who could forward a reconstitution request for their ownership right concerning agricultural areas or lands destined to sylvicultural purpose, within the limits stated by the law.

6. The reconstitution's extent. Limits brought to it

The ownership right is established following a request, in respect to the situation of the fields detained by the APC an January 1-th, 1990, as it was inscribed to the general recording system of the real estate survey or to the agricultural account booth, adjusted with the mentions of the legally performed alienations acknowledged by the cooperative until the enforcement of the respective law.

The land area brought into the Agricultural Production Cooperative should be attested by:

-The ownership documents; the real estate office; the cadastral survey; the forwarded requests of inscription into the cooperative; the agricultural account book from the date of joining the cooperative; the cooperative registration books;

if these should lack, any other pieces of evidence, including the statements of witnesses.

These stipulations are to be applied accurately, also regarding the areas taken over by the agricultural production cooperatives in virtue of special law or in whatever other way from the people obliged to become cooperative members.

The real land estates taken over abusively from individual persons by the APC-s, yet without inscribing them as members, or either taken over by the state itself, bearing no legal title over than, would lawfully return to their former owners, who should have requested the reconstruction of their ownership rights, on their ancient sites, unless they were legally attributed to other persons.

The effective attribution of the fields is done, in the hill zones, usually on the ancient sites. In the plain zones, it is not compulsorily done on the ancient sites of the real estates, but on areas established by the Commission, within the actually existing perimeters of the APC's.

The areas occupied by orchards, vineyards, ponds, greenhouses, fishy stock devices, seed beds, agricultural and zoo technical buildings, administrative sieges, the edifices required by the necessities of the fodder supply for the zoo-technical productive capacities of the APC's, might represent, if the restored owners should choose to do so, contributions to the constitution of some private forms of association, owning or not a juridical personality.

The ownership right is established following a forward request, by the release of an ownership title, within the limit of at least 0,5 ha for each person entitled due to the present enforced law. For a family, the limits would be of at least 10 ha per family, in equivalent cultivable areas, but not exceeding the up most limit of 50 ha per family, in cultivable equivalent.

The representative organs of the cult institutions recognized by the law might request, in the rural area, the reconstitution of their ownership right, for the agricultural field area too which represents the difference between, for parishes, the allotted surface of 5 ha and the surface, they formerly owned, but not exceeding 10 ha. For the case of monasteries and hermitages, the allotted surface of 10 ha might be completed with the anciently owned areas, but still not exceeding 50 ha.

In the limits of the formally owned agricultural fields, the representative organs of some other units may also request the reconstitution of their ownership rights, as it follows:

a) The Patriarchate Centre till 200 ha; b) the Eparchy Sieges, till 100 ha; c) the Archpriest's Sieges, till 50 ha, d) the urban parishes till 10 ha, e) the urban and rural subsidiaries, till 10 ha.

About the sylvicultural areas, the individual persons or their heirs, who anciently have owned lands with forest vegetations, forests, everglades coppice, sylvic hayfields and grazing fields, which have been transferred into the state's patrimony, due to the effect of some special normative acts, might request the reconstitution of their ownership rights, for the difference of more than 1 ha, but yet not exceeding 30 ha per family.

If, on the land surfaces which are due to be reconstituted, would be sited sylvicultural buildings or settlements, or either these would be in the designing or execution phases, or if the fields should have been cleared, then other surfaces of land would be allotted, with the respect of the same conditions, immediately nearby:

The parish councils or the representative organs of monasteries and hermitages, as well as the ones of teaching and academic institutions may request the restitution of the lands with forest vegetation, forests, coppice, everglades, sylvic hayfields and grazing fields that their anciently owned in property, within the limits of the ancient estates, but yet without exceeding 30 ha, no matter if they would be sited into the perimeters of many localities.

According to the modifications brought by the Law nr.193/2007, the reconstitution limit of the ownership right for certain categories of lands: pastures and hayfields, was changed from 50 ha to 100 ha. So, for the estates of the deprived owners (individual persons) where are sited pastures and hayfields, the reconstitution would be made for the difference between the area of 50 ha per family and the one brought into the APC or taken over in virtue of special laws or other normative acts or through whatever other way from the cooperative members or whoever individual might have been deprived, but not exceeding 100 ha for each deprived owner.

7. Matters of procedure

The reconstitution procedure of the ownership right is initiated at the person's request-former owners or their heirs. This means that this procedure is governed by the principle of availability. In order to forward the reconstitution request regarding the ownership right, the law has stipulated a period of time, initially it was one of 45 days, but afterwards the ulterior laws, modifying and completing the Law nr 18/1991, have extended it. The sanction for these terms' disrespect is the decay, as these are not prescription terms. The request had to be forwarded at the mayor's office or, following the case, of the localities' mayor's offices in the territorial perimeters of which was sited the blend for which the ownership right was intended to be reconstituted. It had to be forwarded in person or by ordinary mail with confirming of receipt. These local authorities were due to constitute the Local Commissions for Applying the Laws on Real Estates. The mayor or the Local Council's Secretary is obliged to receive the request to record it, no matter if this request should or not contain all the mentions stipulated by the law and if it should be or not supported by all the

documents through which the forwarders do sustain their claims. In such cases the mayor or the local council's secretary are obliged to communicate to the forwarder the necessity of presenting all of the mentioned documents under the sanction of his decay from the reconstitution's term. If the mayor or the secretary should not respect their above mentioned obligations, they would have to face as well administrative and disciplinary liability, according to the law, as the payment of comminatory fees or, following the case, the payment of indemnifications.

After the crossing of the due term for the forwarding of the request, the mayor is obliged, within 30 days, to elaborate the list of the categories of persons who request the agricultural fields requested and the real estate's balance status for the respective locality (commune, city or municipality) in view of the reconstitution of the ownership right, according to the law. Within this term, the mayor will forward these lists to the prefect, under his own signature for conformity. Within 15 days from their receipt, the prefect would elaborate the status concerning the requesting categories of persons and the department's real estate balance, which he is going to transmit, within the same duration, to the Department for Local Public Administration.

After the elaboration of the real estate's balance status at the country's level, the law is due to establish the land surfaces, which will be reconstituted. The terms established for the administrative authorities to perform the reconstitution procedure are only recommendations, because, in case of their disrespect no clear sanctions are stipulated. In practice, this case occurred frequently. The department's commission is competent to resolve contestations and to validate or invalidate the measures taken by the local commissions, through a decision of validation, able to finalize this procedure, which directly involved the administrative authorities. In respect to the real estate laws, the local commission is a public authority with an administrative activity, while the department's commission is a public authority with an administrative and jurisdictional activity.

The person which might not be satisfied by the solution given by the Departmental Commission, has the right to forward a complaint versus this decision in front of the court of justice, respectively at the first degree court, meaning the justice court into the territorial jurisdiction of which the field is situated, in a term of 30 days from its communication. So, the procedure in front of the court of justice is a subsidiary one, in the sense that it only verifies the documents previously emitted by the authorities. The practice has constantly established that, in the matters of real estate fund, the court of law cannot pass straightly to the verification of the essentiality of the right invoked by the forwarder, as it is previously, necessary, that the authorities should resolve the reconstitution request. Through the administrative jurisdictional acts may be contested, the competence to judge upon them belongs to the common law courts, not to the ones profiled on the administrative contentions matters. In respect to the uncontested decision of the Department's Commission or due to its lawfulness' verifying by the

court of law the reconstitution's procedure gets finalized by the issue of the ownership title in favor of the requesting of the requesting person.

8. Considerations upon the jurisprudence of the E.C.H.R.

Two things were said about the art. 1 of the Protocole no. 1: firstly, it does not explicitly impose obligations to the contracting states concerning the return of lands they might own, should those possible lands have been transferred to these respective states before the Convention was ratified by them. Secondly, the contracting states are completely free to establish the extent of the possible restitution and to determine by themselves the conditions where former owners could be restored in their ownerships.

The contracting states' most important prerogative is the possibility of choice about which categories of former owners should or not be excluded from the ownership restoration. If this type of exclusion should occur, the individuals' claims for restitution could no more constitute the appropriate ground of a "legitimate expectation" in the sense stated by Protocole1, art. 1.

But if a contracting state, after its ratifying of the Convention, including the Protocole 1, art. 1, should indeed wish to fully or partially restore the ownership right that was infringed by a former regime and should create to this purpose a new legislation, then the person fulfilling the respective conditions for restoration would benefit, in virtue of the newly created legislation, of the appropriate protection offered by the Protocole no. 1, art. 1. If, before ratifying the Convention, arrangements might have been established about restitution or compensation, and if the respective legislation should still be enforced after the Convention was ratified, including the Protocole no. 1, then the same point of view would prevail. (Maltzan and Others v. Germany, Kopecký v. Slovakia)

Article 1 of Protocole no. 1 does not qualify as a "possession" an ownership right which was not effectively exerted due to an objective impossibility. The same thing goes for a conditional claim of which the essential condition could not be fulfilled. (Malhous v. The Czech Republic, Kopecký v. Slovakia).

It would be not legitimate to expect that art. 1 of the Protocole no. 1 was deliberately issued for the precise purpose to modify, in order to favour an actual applicant, a law formerly enforced.

A simply hope for restitution could be morally agreed, but this hope does not constitute by itself a legitimate expectation. This last concept designates a hope sustained by a concrete matter of fact such as a legal provision or an act acknowledged by the law such as a judicial decision. (Gratzinger and Gratzingerova v. The Czech Republic; Matzan and others).

In the case Viasu vs. Romania, the claimant was the former owner of a land area, which was taken over by the A.P.C. In virtue of the Law nr. 18/1991,

his ownership right was reconstituted, but upon part of his ancient land, as the rest of it was occupied, by a mining exploitation. Though he had formulated numerous requests in order to receive the due indemnifications for non-restituted area, to the administrative authorities, his efforts brought him no success at all.

The claimant had sustained generally, that the Romanian state had twice infringed the right to the respect of their goods owned by the beneficiaries of the reconstitution laws: firstly because the reconstitution procedures were repeatedly modified by the state authorities, and, secondly, these last have omitted to rapidly adopt application regulations for the respective law, so that, for a long period of time, the interested sides were not able to enter into the possession of their goods.

Upon this cause, the E.C.H.R. has stated, essentially that, though the claimant's right is an ancient one, if Romania has understood to choose the restitution of the respective ownership right, Romania should respect the E.C.H.R. principles. The Court has also stated that the claimant's right to reconstitution was constantly confirmed by the Romanian authorities, thus this right was undoubtedly established by the national law, as well as the obligation to indemnify in the case of incomplete reconstitution (not for the whole land), for the authorities.

This because the Department's Commission itself had previously validated the restitution in nature for a part of the land and the indemnifications for the part of the land that had been occupied by the mine's exploitation. Under these circumstances, the Court has considered that the claimant had a patrimonial interest, which was sufficiently grounded within the Romanian law, was also certain eligible and irrevocable, therefore it could fit into the concept of good, as it is established by the E.C.H.R.'s Protocol 1, article 1. So, the non-restitution of the respective land, in the absence of any indemnification at all, does indeed constitute an infringement of the claimant's ownership right.

By stating, next, that, even if the respective infringement should be justified by a public interest, such as the respective mining exploitation, in the present cause the just equilibrium between this public interest and the protection that was due to the claimant's ownership right was broken, the Court has identified an infringement of the Protocole 1, article 1.

9. Conclusions

The reconstitution of the ownership right on the lands that were parts of the former patrimonies of the A.P.C.'s though, even since 1991, it was one of the first ever forms of restoring the private ownership right, had to be submitted to an always changing legislation. In practice, difficulties appeared in the probation matter of this right, especially concerning the existence and preservation of written documents.

On the other hands, since the moment of their accession to the A.P.C. till 1991, the use made of many land areas had been modified, thus the restitution on their ancient sites has become impossible. Or either, there are situations when certain parts of the lands in cause, which had ceased in the meantime, to be used for agriculture, could no more be restituted to their former owners, who received no indemnifications at all for their losses. The effective realisation of the respective real estates' reconstitution and the law's dueful applying were postponed due to the difficulties caused by all these aspects.

Literature:

- Ioan Adam, Civil Law. Real Rights, All Beck Publishing House, Bucharest, 2002.
- Corneliu Bîrsan, Civil Law. Principal Real Rights, Hamangiu Publishing House, Bucharest, 2008.
- Liviu Pop, The ownership right and its dismemberments, Lumina Lex Publishing House, Bucharest, 2001.
- Denisa-Livia Balden, Gabriela Cristina Frentiu, The real estate fund. Jurisprudence. National judicial practice. E. C. H. R.' s Practice. Decisions issued by the Romanian Constitutional Court, Universul Juridic Publishing House, Bucharest, 2009.
- Marian Nicolae, The actual restitution of the ownership right on some categories of lands estates, on the ground of the Law no. 18/1991, modified and republished, in Dreptul no. 5/1998.
- Eugen Chelaru, Civil Law. Principal Real Rights, C. H. Beck Publishing House, Bucharest, 2009.
- Ion Dogaru, Sevastian Cercel, Civil law. General Theory of Real Rights, C. H. Beck Publishing House, Bucharest, 2003.
- Mona Maria Pivniceru, Jurisprudence in the matter of real estate fund, Hamangiu Publishing House, Bucharest, 2008
- site: http://www.echr.coe.int/NR/rdonlyres/81703A27-0054-4DC5-9B42-3C93C990B039/0/COURT_n1908254_v3_Key_caselaw_issues__Concept_of__Possessions__Prot_1_Art3.pdf;

Contact – email

sevastiancercel@yahoo.com