

MATERIAL LIMITS OF THE EXERCISE OF PRIVATE PROPERTY RIGHT OVER LAND

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Abstract in original language

Pornind, pe de o parte, de la distincția dintre dreptul de proprietate și obiectul acestuia, iar pe de altă parte având în vedere rolul voinței juridice, trebuie deosebit între limitele materiale și limitele juridice ale exercitării dreptului de proprietate. În ce privește limitele materiale, acestea privesc numai bunurile corporale și derivă cel mai adesea din dimensiunile corporale ale obiectului proprietății. Dacă limitarea materială a bunurilor mobile nu presupune dificultăți, acestea apar în cazul bunurilor imobile, în special în ceea ce privește terenurile. Astfel, așa cum reiese din textul art. 489 Cod civil, dreptul de proprietate asupra terenurilor se întinde nu numai asupra suprafeței acestora dar și asupra spațiului aflat asupra terenului și asupra subsolului, o situație specială având și terenurile cu ape (fie că este vorba de lacuri, ape curgătoare navigabile sau izvoare).

Key words in original language

Proprietate; teren; drept de proprietate privată.

Abstract

Starting, on the one hand, from the distinction between ownership and its object, and on the other hand, regarding the role of legal will, must distinguish between material limits and legal limits of the exercise of ownership. Regarding the material limits, they concern only tangible goods and often derived from corporal size of the object property. If the material limitation of the movable goods does not involve difficulties, they appear for immovable goods, particularly as regards the land. Thus, as shown in the text of art. 489 Civil Code, ownership of land lies not only on their surface but also on the space on the land and the subsoil, a special situation regarding the land with the water (be it lakes, navigable rivers or springs).

Key words

Ownership; the land; private property right.

The world today is facing a paradoxical situation: on the one side stands more than ever the right of property, both through the Constitution and by international treaties and conventions, and on the other hand is becoming more urgent the need of limitation by law to exercise that right, justified by the insurance of the balance between public and individual interest.

According to art. 480 of the Romanian Civil Code the ownership is exercised within the limits specified by law, and according to the Romanian Constitution, Art. 44, paragraph 1, the 2nd thesis, the content and the limits of property rights are established by law.

Starting on the one hand, from the distinction between ownership and its subject, and secondly in the light of legal will, there must be a distinction between material and legal limits of the exercise of ownership. In this respect the new Civil Code¹ in art. 556., alin1. provides that “the property right may be exercised within the material limits of its subject. These are tangible limits to property forming the subject property, subject to limitations established by law. Under paragraph 2 of the same article, it may be restricted by law exercise the attributes of ownership. „and under paragraph 3, ” this limitation can be made by agreement, with the exceptions provided by law. “

Legal limits of the exercise of legal ownership on the juridical content of this right, and have the effect of restricting the powers of ownership, without attracting their suspension, and, depending on their basis, most specialized authors² classify them in: legal limits, judicial limits and conventional limits (under expressed will of the owner through conventions or related to)³.

Concerning material limits, they relate only to tangible goods and often derived from body size of the object property. They do not apply to the exercise of ownership on intangible assets, in their case is about the legal limits.

Material limitation concerns both movable and the immovable assets, but if the mass of the asset determines material limits of exercising ownership on movable goods, making the demarcation between them to be clear and precise, difficulties arise in case of real estate, especially in terms of land.

¹ Law no. 287/2009 on the Civil Code was published in the Official Gazette of Romania, Part I, no. 511 of July 24, 2009.

² See, V. Stoica, *Civil Law, Civil Law, The Main Real Rights*, vol I, Humanitas, Bucharest, 2004, p. 249; O. Ungureanu, C. Munteanu, *Civil Law. Real rights*, Third edition revised and added, Editura Rosetti, 2005, p. 111-114; I.P.Filipescu, AI, Filipescu - *Civil law. Ownership and other real rights*. Revised and supplemented edition. Legal Universe Publishing, Bucharest, 2006, p. 258 -284;

³ Furthermore this is also a planned solution of the legislature by the New Civil Code, which in Book III “About assets”, the 2nd title “Private Property”, Chapter III, entitled “Legal limits of private property rights” governing on separate sections, legal limits, conventional limits and judicial limits of this right.

Thus, as shown in the text of art. 489 Civil Code, ownership of land lies not only on their surface but also on the space of the land and the subsoil,⁴ a special situation have water lands (be it lakes, navigable rivers or springs).

Note that most doctrinaires⁵ qualify the area of a land, the area above it, the subsoil and lands with waters as material limits of ownership and in a recent opinion⁶, it is considered that although the physical demarcation of the property involves such limits, however, the material delimitation must always precede the ownership restrictions.

Irrespective of their destination, lands that form the subject of private property must be defined, first, in terms of their surface⁷. These material limits are usually contained in the property titles and they are practically marked by milestone, fences, terminals, dividing lines etc.

Starting from the provisions of art. 584 and 585 of the Civil Code, the doctrine held that physical marking appears as a right or even as an obligation for the owner, as can be seen as an act of management of the owner⁸. As observed the provisions of these two articles refer to two distinct legal institutions, namely land partition and, respectively, containment of property⁹.

Typically, the delimitation of the land is made through a settlement, but in the event of disagreement, it can be made through the court's decision, following the passing of the parts of an action of bordering.

⁴ The new Civil Code art .. 559, paragraph 1 provides: "Ownership of land extends also on the subsoil and on the space above the land, respecting legal limits."

⁵ See, V. Stoica, op. cit. p. 248; L.M. Crăciunean, *Limits private property ownership*, Wolters Kluwer Publisher, 2009, p. 144 -158

⁶ See O. Ungureanu, C. Munteanu, *Treaty of Civil Law. Assets. Main real rights*, Publisher Hamangiu, Bucharest, 2008, p. 179.

⁷ Disputes between owners of neighboring lands are generated, most often, by the confusions existing in property titles (they do not contain enough elements on the surface and the neighborhood) or on the differences between the area and neighborhoods mentioned in securities and real situation land question, which requires that property titles including all the necessary entries on the surface and the neighborhood and to have enclosed cadastral plans, showing the correlation between the elements contained in securities and real situation of lands.

⁸ O. Ungureanu, C. Munteanu, op. cit., 2008, p. 180.

⁹ L. M. Crăciunean, op. cit. p. 146

Since the legislature does not define this operation, the doctrine and the juridical practice have the role of filling this gap, clarifying the content of the concept.¹⁰

Thus, according to some authors it is an operation with a rich content, with double nature, legal operation of separation of neighboring properties followed by a physical operation of establishing some external signs.¹¹ According to other views, land partition means the operation by which it is delimited from a legal and material point of view by placing concrete exterior signs, limits of two neighboring properties, belonging to different owners.¹²

But it is important to distinguish between bordering, as a physical operation of division by external signs of two neighboring properties belonging to different owners, and the action of bordering that comes due to a dispute between neighboring property owners, the objective being to determine the limits between the two properties to be achieved by the intervention of the court¹³.

Restriction is also a way of delimiting land ownership, also being a right and sometimes even a requirement for the owner, as evidenced by the provisions of Article 585 of the Civil Code¹⁴

The new Civil Code governs the obligation of bordering as well as the right of bordering¹⁵

It should also be noted that exercising the right of ownership on a land is legally limited by establishing a statutory right to use or a right of servitude in favor of the competent authority for the establishment and exploitation of some public works, if these do not impose expropriation. Applicable restrictions governed by art. 7 of the Oil Law no. 238 of June 7- 2004, art. 7

¹⁰ According to art. 584 of the Civil Code: “Any owner may oblige its neighbor to border the land which is next to his; bordering costs will be split”.

¹¹ O. Ungureanu, C. Munteanu, op. cit., 2008, p. 180

¹² L. M. Crăciunean, op. cit. p. 146

¹³ Regarding the legal nature of the action of bordering see P. Perju *Issues concerning the action of bordering*, in The magazine Law no. 6 / 1991, p. 35., C. Bîrsan, *Civil Law. Main Real Rights*. Third Edition revised and added, Publisher Hamangiu, Bucharest, 2008, p. 50

¹⁴ According to art. 585 of the Civil Code “Every owner can restrict the property, except what is made out of the art. 616 “(it is legal encumbrances the existence of a crossing.)

¹⁵ According to Art. 560 of the new Civil Code: “The owners of adjacent land are required to contribute to the reconstruction of the border and setting the appropriate signs, carrying equally, the costs of it; and according to art. 561, any owner can to restrict his ownership, carrying, according to the law, the costs”

of the Mining Law no. 85 of March 18 - 2003 and by art. 16 and 18, paragraph. 1-5 of the Electric Energy Law – no. 318 of July 8, 2003.

Typically, the landowner is the owner of the space located above it, up to airspace limitation, because this, according to art. 136, par. 3 of the Constitution of Romania, form the exclusive object of private property. The Air Code ¹⁶ defines in art. 6, the concept of airspace as “a column of air situated over the Romanian sovereignty land, until a lower limit of the extra-atmospheric space”. But the ownership of the space belonging to the land (the supra soil) may suffer some concrete limitations , where appropriate, in usage or encumbrances rights, (some of them established even by law), that want the achievement and exploitation by the authorities of some public works, or in establishing a right of superficies or easement for the benefit of a third party .

Thus, the air space may be limited by aviation encumbrances consisting, according to art. 3.32 of the Air Code in “imposed or prescribed conditions, restrictions, obligations, by national and/or international aviation regulatory requirements for the interest in the safeness of the aviation flight”. Because the air space is part of the public domain, the state gives the surveillance right to the airlines, as enforceable against any owner of land, but this right, on the one hand should not prevent the exercise of ownership rights and, on the other hand it must repair any damage caused because the of airing servitude does not eliminate the liability of the airline that caused such damage.

Also, there are plenty of limitations governed by the laws of urban planning and constructions, of telephone transmissions, telegraph, transportation and distribution of electricity. ¹⁷

Moreover the right of space overlapping land can be limited even through the owner’s will, for example, by establishing a right of superficies for a third or a right of servitude in favor of another person. ¹⁸

Although, according to art. 489 of the Civil Code, the owner of the land can exercise his right on the subsoil indefinitely, until the very center of the

¹⁶ Government Ordinance no. 29 of August 22, 1997 regarding the Air Code was republished in the Official Gazette of Romania, Part I, no. 45 of January 26, 2001, pursuant to Art. III of Law no. 130 of July 21, 2000, published in the Official Gazette of Romania, Part I, no. 355 of July 31, 2000.

¹⁷ According to art. 102, par. 1. of the Land Law and “the telecommunications lines of electricity transmission and distribution, pipelines to transport water , sewerage, oil, gas and other similar facilities will position and assemble along and right near the communication networks.”

¹⁸ See O. Ungureanu, C. Munteanu, op. cit., 2008, p. 179-180.

Earth, practically this right has many material limitations, set by the legislature in the public interest.

In this regard, Article 491 of the Civil Code provides that “the land owner can do all construction and excavation that finds it necessary, and draws from them all the advantages they could produce, apart from the changes prescribed by laws and regulations relating to mines, as well as laws and police regulations”.

Other limitations are set by the Basic Law.

Thus, the Romanian Constitution in Art. 136, par. 6 states that “resources of public interest of the subsoilare exclusively public property”.¹⁹ Therefore the right for private property over a land can also be extended on its subsoil, but except resources of public interest of the subsoil, and per a contrario other resources of the subsoil can form the object of the private property²⁰. On the other hand, through art. 44, para. 5 of the Constitution, it is consecrated what the doctrine²¹ calls a constitutional servitude, establishing that “For projects of general interest, the public authority can use the subsoil of any real estate with the obligation to compensate the owner for damages of the soil, plantations or buildings, and for other damages imputable to these authorities”²². In the latter case, through the term public authority shall be designated by the state and the territorial-administrative units having the capacity of owners of the right to use subsoil property²³.

But undoubtedly, the most numerous limitations concerning the subsoil of a property are required by special laws.

Thus, art. 1 of the Mining Law no. 85 of March 18, 2003,²⁴ provides that mineral resources located within and in the country’s subsoil and of the continental shelf, in the economic zone of Romanian Black Sea, bounded according to the principles of international law and regulations of international conventions to which Romania is party, shall be exclusively

¹⁹ We mention that before the amendments of the Constitution, according to art. 135, paragraph 4 exclusive object of public property was formed of riches of every kind of soil.

²⁰ See V. Stoica, op. cit. p. 225

²¹ See L. M. Craciunean, op. cit. p. 151

²² According to art. 44, par. 6 of the Constitution, the compensation shall be determined by agreement between the authority and the owner or, in case of divergence, by the court.

²³ See C. Bîrsan, op. cit., p. 56; C.L Popescu, *Romania's constitutional regime of the subsoil*, The magazine Law. no. 3 / 1995, p. 6

²⁴ Published in the Official Gazette of Romania, Part I, no. 85 of of March 18, 2003

public property and belong to the Romanian state. These resources are valued by mining activities which are given in concession to Romanian or foreign legal persons or they are given into the administration of public institutions by the competent authority, but ownership of land does not confer the right of first refusal on concession or of giving into administration the mining activities.

In its turn, the Law of Oil no. 238 of June 7, 2004²⁵ contains a similar regulatory ruling that the oil resources of petroleum resources located in the subsoil of the country and the Romanian Black Sea continental shelf, defined under the rules of international law and international conventions to which Romania is part of, are exclusively part of the public property belonging to the Romanian state.

Moreover, according to art. 16, par. 2, lit. C and para. 18 of the Electricity Law,²⁶ passing through the underground includes “the right of access and execution of works at the sites of the energy capacity during surgery for refurbishments, repairs, revisions and damages”

Similar provisions has the Law no. 351 of July 14, 2004 of gas²⁷ which establishes through art.89 a legal servitude of underground, surface or air crossing which includes the right to install the network of pipes, lines, poles and other equipment related to capacity, as well as access to their location for assistance, maintenance, repair, revision, changes and operating under the present legal provisions .

In the same context there must be mentioned the provisions of Law no. 182/2000 on the protection of national cultural mobile treasures²⁸ according to which, in order to ensure the protection of property belonging to the national cultural heritage, to ensure the material base and financial resources in order to detect, record, expertise, rank, research, storage, preservation , restoration, protection and enhancement of the exercise of ownership and other real rights over them, and the right of management are subject to special rules contained in the law²⁹. Also mining activities are

²⁵ Published in the Official Gazette of Romania, Part I, no. 353 of June 15, 2004.

²⁶ Published in the Official Gazette of Romania, Part I, no. 511 of July 16, 2003

²⁷ Published in the Official Gazette of Romania, Part I, no. 679 of July 28, 2004. The law has been successively amended by Ordinance no. 116/14 July 2005, of the Law no. 288 of 11 October 2005, and O.U.G. no. 33 of May 4, 2007 and O.U.G. no. 122 of October 31, 2007.

²⁸ Originally published in the Official Gazette of Romania, Part I , no. 530 of October 27, 2000, as amended.

²⁹ According to art. 3, section 1 in the national cultural heritage are included terrestrial and underwater archaeological discoveries, tools, pottery, inscriptions, coins, seals, jewels, clothing and harness parts, weapons and funeral signs.

strictly prohibited on lands which are located on historical, cultural, religious monuments, archaeological sites of a real interest, nature reserves, areas of sanitary protection and perimeters of hydro-geological protection of water sources, as well as creating the right of servitude for mining activities.

It should also be stressed that even if ownership of this subsoil may be detached from the ground and may belong to another person under an agreement.³⁰

To what concerns the lands with water, they have a special legal regime enshrined in the Constitution but also by special laws, regulating the physical limits of the exercise of private property rights on these lands as well as the way of getting close and use of water.

In this regard, according to art. 136 para. 3, of the Constitution, waters with hydropower potential, of national interest and territorial sea are the exclusive object of public property.

The constitutional text is supplemented by provisions of the special law, Law no. 107/1996³¹, the Water Law in Art. 3, paragraph 1 states that water surfaces with their minor beds with lengths greater than 5 km and the catchments area exceeding 10 square kilometers and with hydrographic tanks bigger than 10 square km, the banks and the vats of lakes as well as groundwater, inland sea, the cliffs and the sea beach with their natural wealth and potential hydropower, territorial sea and the Sea bottom, all belong to the public domain. As provided by law they are given in the administration of the Independent Institution – “Romanian Waters” by the Ministry of Waters, Forests and Environmental Protection.

According to article 3, paragraphs 2 and 3 of the Waters Law, minor beds that are smaller than 5 km and with river basins that do not exceed 10 square kilometers, where waters do not flow permanently, belong to the holders, with any title, of the lands which form or flow³² and the islands which are not related to the lands with shore at a medium level of water belong to the owner of water riverbed. It should be noted that the water is not similar to

³⁰ O. Ungureanu, C. Munteanu, op.cit., 2008, p. 184

³¹ Published in the Official Gazette of Romania, Part I no. 244 of October 8, 1996, amended by Law no. 404/2003 and Law no. 310/2004.

³² In the doctrine, the idea was accredited that they have a preferential right on the water (riparian rights), having the right to prohibit fishing and access to foreign persons, except where the servitude is a right under art. 28 of the Waters Law, also, they can use preferentially water for household, agricultural or industrial needs and can extract sand or gravel riverbed - see O. Ungureanu, C. Munteanu, op. cit., 2008, p. 185

flowing water; it is considered an enhancement of land that it covers³³. The ground sank in waters, as waters themselves belong to the riparian owners, and the owner of lakes and ponds always keeps the land that the water covers, even when the water will disappear, but he does not acquire ownership of the riparian lands that water, when it flows, it will cover them³⁴.

As lakes and lakes which communicate with the sea, belong to the maritime public domain, they can not form the object of the private property, the same regime have the navigable or floatable lakes.

Also note that the property of a riverbed is distinct from the use of water. In this regard, because the waters are and shall remain common goods, the public has a general right to use the waters, but he can not exercise it only so far as riparian allow access to these³⁵.

The Waters Law, in article 9 paragraph 2 establishes the rule that underground waters may be used freely by the owner of that land respecting the norms of protection of the water quality for drinking, watering, wet, washing, bathing and other household needs, but for these they do not use installations or they use low-capacity installations up to 0.2 l / sec., designed exclusively to meet their household needs.

However, as exception, in accordance with article 1 and article 2, paragraph 1 of the Law. 85/2003 geothermal waters, the accompanying gas, natural mineral waters (carbonated and flat) and therapeutic mineral waters belong to the state public domain.

As observed by the doctrine of specialty, the Waters Law establishes some servitudes, enforceable against all such as: natural water³⁶ drainage servitude: and servitudes, without charge, agreed with the Autonomic Institution “Romanian Waters”³⁷

³³ For example, rainwater that falls on land belongs to the owner, also they are the accessory funds which are water from wells, water ponds, from unsalted lakes that do not communicate with the sea and are formed by damming a stream.

³⁴ See O. Ungureanu, C. Munteanu, op. cit., 2008, p. 185

³⁵ Idem

³⁶ According to article 26 paragraph 1 of the law holders of downstream waters, they are required to receive the waters that are drained, naturally, of the land upstream.

³⁷ They consist of a) passage or movement of personnel with work duties in water management, to pursue - them b) the location of the riverbed and banks, of milestones, benchmarks, measuring and control devices or other equipments or facilities necessary for the execution of studies on water regime as well as the access for maintenance of the installation destined for these activities, c) transport and temporary storage of materials and equipment for operative intervention on flood defense d) transport and temporary storage of

In conclusion, under the imperative of general interest we can observe the trend of legislator to limit, including material, land ownership, the analysis of material limits over the ownership of land proves its usefulness.

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materials, equipment, as well as their movement and of the personnel in case of the execution of maintenance and repair works. - Article 28, paragraph 1 of the Waters Law.