

THE PROPERTY RIGHT ON THE SHARE-PART

Through this paper we have intended to make a detailed and actual analysis of the property right on the share-part, ordinary and temporary form, but also forced and perpetual, including, from place to place, resemblances and differences between our legislation and others, such as the French legislation, Swiss legislation, Japanese legislation, Polish legislation etc.

We have also sought clarification of controversial legal issues related to ownership both by comparative analysis of the provisions of the old and the new Civil Code and by performing a jurisprudential analysis, which is very common among cases related to this matter.

The Romanian Civil Code succeeds through its provisions to cover many of the gaps caused by the passage of time regarding the institution of co-ownership.

If during the ancient civilisations, the shared ownership property almost didn't exist, it starts to be present in the feudalism period, reaching in the present days, to be regulated as an independent institution with its own legal regime (*Chapter IV "Shared property from the IIIrd Book "About properties"*).

Analysing, however, the new provisions relating to the ownership, we have seen that they are not the absolute latest. By adopting the new Civil Code, the legislature did nothing to create the normative rules stated for a long time in judicial practice or future law proposals.

The paper is structured in seven chapters. It includes a chapter that analyzes the historical profile of the private property right, and also its short analysis, a chapter that presents the the property right on the share-part particularly the ways of obtaining the co-property, a large chapter that examines an ordinary and temporary shared co-ownership property, a chapter concerning the protection of the right of the property right on the share-part a chapter on forced co-ownership, a chapter analyzing the division, a

final chapter which includes regular property the analysis of the periodic property, and conclusions.

The first chapter analyzes the right to private property. This chapter is divided into two subsections, namely: historical profile of the right to private property and the right to private property.

The first chapter therefore includes the historical profile of the right to private property. The research of the property's evolution it has not only a historical importance, purely theoretical, but also practical, as its knowledge contributes to a better understanding of the rules governing the matter in modern law.

First we have considered the terminology of the word property. Another focus is the concept of property or ownership. We have further investigated, in concreto, the property's legal regimes in ancient times to the present: nomadic people's property regime, the ownership in the Age of Dacian statehood Dacian, Romans property regime, ownership in the Middle Ages.

The end subchapter presents Romanian property law, reviewing the major changes of the community, occurred so far.

In the second chapter we have reviewed the defining attributes of the right to private property, the characteristics, the boundaries, the natural easements and the legal right to private property, stopping us and deepening, in particular, the restrictions arising from neighborly relations and the abuse of rights.

The new Civil Code entered into force in October 1, 2011, art. 555, defines the private property: "Private property is the right of the holder to possess, use and dispose of property exclusively, absolutely and perpetually, within the limits established by law." We can thus speak of an addition to the attributes and to the character of the property.

We have shown that the doctrine, interpreted by the art. 480 of the old Civil Code, has considered that the attributes which form the content of the property right are the following: the right to use property (*jus utendi*), the right to the fruit (*jus fruendi*) and

the right to dispose of the goods (*jus abutendi*), but art. 555 of the new Civil Code sets as the attributes of ownership: possession, use and disposal.

Speaking of the characters of the property we can see that they are included in the definition of the property provided by the art. 555 NCC. These characters are: exclusive character, the absolute and perpetual character.

In the old regulation of the Civil Code were provided only the exclusive and the absolute character, but the legal literature added also the perpetual character.

The perpetual character of the ownership right is expressly regulated, in the present moment, by the provisions of the art. 555 alin. (1) NCC.

Handling by the new Civil Code of the neighborly relations in terms of abnormal inconveniences could not go unnoticed, so this section is based on the new Civil Code regulations concerning these institutions.

We have also analyzed the restrictions arising from neighborly relations, legal and natural easements given the changes brought by the new Civil Code.

The second chapter examines shared ownership property and comprises seven chapters, starting with general considerations, legal nature, historical evolution, similarities and differences between shared ownership property and common property in condominium, continuing with several issues related to ownership in Japanese law, with types of shared ownership property and ending with a chapter concerning the modes of acquiring shared ownership property.

In the first section of this chapter we have presented the origin of the word joint property and its definition by the legislature and by several authors in doctrine. We have also presented the two forms of common property, namely: joint property, which means joint ownership and joint ownership in condominium, pointing out some general features about each

Another aspect analyzed in this chapter are the similarities and differences between ownership and tenancy. Two key issues are: the fact that the tenancy provides a

universality of goods and the joint property covers a good or singular goods and the fact that both the tenancy and the joint property involve a plurality of owners, but in the case of the tenancy they are the owners of the heritage, and in the case of the joint property, they are the owners of certain goods.

Subchapter 2 contains five theories regarding the legal nature of the ownership, namely: modern Romanian theory, classical theory, the theory of multiple property rights, the theory of collective ownership and the co-ownership theory - real right - *sui generis*.

Historical development of co-ownership is contained in the *third chapter*, starting with the Latin phrases *condominium*, *pater familias*, *quota pars* (share), *pars pro indiviso* and continuing with the consecration of common property by the code Calimach in the art. 1101-1149 and the Caragea Code Chapter 13, part III .

The next chapter is intended to similarities and to differences between the two forms of joint property: the property right on the share-part and the joint property in condominium.

Subchapter 5 is dedicated to some aspects of Japanese law relating to ownership or co-ownership. We have briefly exposed some of the major influences on this legislation, and regulation of co-ownership by the Japanese Civil Code.

Subchapter 6 deals briefly the two forms of the property right on share-part joint, according to the art. 632 para. (2), common and temporary co-ownership and forced or perpetual ownership.

The last subchapter examines the modes of acquiring the ownership.

The first part of the subchapter captures the general considerations on the acquisition of the property from the provision by the law of nations and until the present provision by the new Civil Code. I have also mentioned some of the classifications made by the doctrine of the modes of acquiring the ownership.

The two ways of acquiring the ownership are briefly analyzed in this chapter, considering them not so important in terms of ownership, are tradition and court decision.

Section 2 is devoted to acquiring the ownership over lands by applying the Law no. 18/1991 and the Law no. 1/2000.

The objective of the Agricultural Real Estate law is to establish or restore private ownership over the land that were in agricultural cooperatives heritage through restoration of the property rights or the constitution of this right. We have also listed the categories of land and buildings relating to the reconstitution.

An important issue that we have analyzed it is that of acquiring the ownership by foreigners.

According to the Romanian Constitution, the art. 44 provides that *"foreign citizens and stateless persons may acquire the right over a private property only under the terms resulting from Romania's accession to the European Union and other international treaties to which Romania is a party, on a reciprocal basis, as provided by the organic law, and legal inheritance. "*

Next we have individually analyzed the common ways of acquiring the co-ownership: legal and testamentary inheritance, or contractual agreement, the jointly creation or production of an asset by two or more people, prescription, accession, occupation, the transformation of the property in condominium into co-property, ways of acquiring the ownership of public property, confiscation, and expropriation for public utility.

Inheritance is the most common way by which the property right on the share-part appears. We have analyzed both the legal succession and testamentary. We talk about legal inheritance when the transmission is done according to the law, to the people, in the order and strict quotas determined by law, and when testamentary inheritance when transmitting estate comes under the will of the testator, the person designated by him through the will.

The situation where the deceased has several heirs, exclusive ownership will become right of property on the share-part, each of his heirs gaining a share of abstract, non-individualized on certain goods forming part of the succession.

The share held by the heir will be expressed by a fraction or percentage, knowing the time when the property right of share-part will appear.

The convention or the contract is treated as a mean of acquiring the ownership. Acquiring the property by convention may be the result of documents transferring the property, such as sale, exchange, donation, life annuity etc. Regarding the conditions for the acquisition, there is the principle of freedom, and in terms of the mechanism of acquisition, the property is transmitted by the effect of the contract.

Another analyzed way to acquire the property right on the share-part is the situation in which two or more persons jointly create or produce an object. Such a situation, that is frequently encountered, is that of construction raised by several people on land belonging to one or more owners.

Section 7 of this chapter is intended for a mean of acquiring ownership, which we consider important, prescription. This is itself defined as a way of acquiring ownership or real right, which is manifested by possession, as an actual state exercised over a period of time required by law and can take effect only if there is an active manifestation of the will of the holder (either by action or by way of exception), and the condition of the registration in the Land Registry, with the exceptions provided in Law no. 71/2011. We believe that prescription can be a way of acquiring the temporary right of property on the share-part. The only requirement is the existence of co-possession of more people on the same good.

The next section is devoted to accession. The accession is a native way of acquiring the ownership, which results in the birth of a new ownership of an asset, directly in the acquirer's heritage.

First we have considered some general considerations concerning the accession in both Roman law and in the old Romanian law.

Next, we have analyzed the evolution of the two kinds of accession, accession estate and accession furniture, from the old rules so far.

This section focuses on the artificial estate accession as a general way of the acquisition of property, emphasizing legislative provisions, and how it operates.

Specific regulation with the estate accession of the legislator in the New Civil Code, could not go unnoticed, so that section is based on the new provisions relating to this institution.

The occupation is analyzed in our paper in the 9th section. Taking possession by a person, of a thing that does not belong to anyone, with the intention of becoming its owner is called occupation. So the main mode of acquiring the ownership is possession. Possession must be a useful, but not necessarily one that will last. The owner must behave as the true owner. The legislator stipulates certain conditions for entry into possession as acquisition through occupation of the venison and the fish.

We have also highlighted in the next section that the property in condominium transformation into co-property represents a way of acquiring the property right on the share-part in the two cases. If the community regime stops through the divorce, former spouses remain joint owners in the condominium on the common goods until the establishment of quota for each of the parts, or where the co owners are persons other than spouses, the setting shares in this situation will be made by good agreement or court decision.

Another way of gaining is treated as the passage of goods from the public to the private domain of the state or territorial administrative units.

We have examined three ways of acquiring the ownership of public property: confiscation, expropriation for public utility and nationalization. The goods' confiscation of an individual is a special case of acquisition of the property right on the share-part that we find in the literature. In the case of the confiscation, the right arises between the state and the individual, the owner of the property.

Regarding the expropriation, this is to acquire forced consideration for the public, under the law and under judicial control, private ownership of property and becomes a way of acquiring public property rights over the property when private property right ceases, that is regulated by art. 7 letter c of Law. 33/1994 on the expropriation for public utility and its regime.

The third chapter is devoted to ordinary or temporary property right on the share-part. In this chapter, during the six subchapters we have analyzed the principles of regular and temporary co-ownership rights of co-owners, co-owners' obligations and the cease of common property on the share part

We exposed the four principles of common co-ownership: the unanimity principle, the principle that each co-owner may freely dispose of its share of the law, the principle according to which none of the co-owners has an exclusive right to a share of common determined material part form the good that is in co- ownership and finally, the last principle each sharer has an exclusive right only to an ideal abstract mathematical share from the ownership of that good.

One aspect treated in this chapter, which we paid special attention to, is the one on one of the attributes of the common property right holder. Exercising the right of co-ownership interest has a limited character, determined by the existence of several co-owners, holders of rights that simultaneously and concurrently exercise them.

None of the owners doesn't exclusively mastered a part of the good, but at the same time, each of them is able to enjoy the powers conferred by its right along with the other communicants. As a result, the co-owners' rights are exercised, usually respecting the principle of unanimity.

A novelty is the elimination of this rule, the unanimity, and the matter action for recovery. The new Civil Code does not only nuances the unanimity rule in formulating the recovery action, but dissolves it by art. 643, according to which each co-owner can stand alone in court, regardless of locus.

We believe that the attenuation of the unanimity rule that was arising from the principle that none of the co-owners has an exclusive right over a good fraction is salutary.

Subchapter 4 concerns the co-owners' rights on the part of their share ownership. A right on which we have insisted in the analysis is the first refusal right, which is a legal or conventional benefit, that is granted to a person called preemptor, to be the first who buys a good over others at the same price. We have also exposed some aspects concerning this right in other countries such as France, Scotland, India etc.

Co-owners, in addition to the common good and the rights relating to the exercise of their property right on the share-part, have a number of obligations on the maintenance, repair, conservation and its management. These obligations are mentioned in the *subchapter 5*.

The concept of co-ownership's tasks has a very general sense. In his field they enter the real tasks such as *propter rem* obligations imposed by the land legislation, obligations *scriptae in rem*, dismemberments of ownership and warranty rights, if the common good is the subject of such a right and the obligation to contribute to the necessary and useful costs for the maintenance, conservation and management of the common good.

At the end of Chapter III, we have analyzed the ceasing of ordinary and temporary property on share-part on ordinary shares or temporary. Extinction of the temporary and ordinary property right on the share-part ceases in the following circumstances: alienation, by all co-owners, the common good by a third party, which in this way becomes the only owner of that property; acquisition, by one of the co-owners of the shares belonging to other owners, by concluding contracts with each of them covering each share of the ownership or by legal or testamentary inheritance; acquisition, by a third party, the ownership of the property by prescription or possession in good faith; total loss of the property that was the subject of the right of joint ownership; expropriation; partition or division.

The fourth chapter is intended to protect the property right on the share-part. The property right on the share-part can be defended both by direct legal defense and indirect legal defense.

We have shown that indirect legal means include actions arising from contracts such as action in nullity or annulment, actions arising from the obligation to repair the harm caused by wrongful delict, unjust enrichment or business management which is not based directly on the property, may remove some effects to the latter, analyzing each medium separately.

We have also treated direct means of defense, about civilian ownership, paying particular attention to action for recovery. Along with this action, we analyzed the action observation, action for the delimitation of property boundaries and owners' action.

The fifth chapter covers the second form of the property right on the share-part in the Romanian civil law, namely the forced and perpetual co-ownership. In this chapter we have analyzed the characteristics of forced co-ownership, rights and obligations of the co-owners, and the cases of forced co-ownership, which we have treated individually in one chapter and forced ceasing of co-ownership. We have also made a comparison between the regular, forced and perpetual co-ownership.

Specific characteristic features of forced co-ownership are: forced character, perpetual character and accessory character, characters that we have analyzed in detail in subchapter 2.

In the subchapter that treats the rights and obligations of co-owners we have insisted on the important issues and the specific forced and perpetual co-ownership.

We have briefly mentioned in the next subchapter the cases of the perpetual and forced co-ownership, they will be dealt with individually in the following subsections. The cases are: co-ownership of partitions between two funds, co-ownership of the common parts of buildings with several apartments, forced co-ownership of the goods that are family memories, co-ownership of the common property necessary or appropriate for the use of two neighboring buildings, co-ownership of the common property affected using two or more funds and forced co-ownership of the goods that belonged to the communities' compossessorates of yeoman freeholders or other assimilated forms.

As an innovation, we have showed in this chapter that the new Civil Code governs all cases of forced ownership. Are presented in detail the most important cases of forced co-ownership, and the legal status of family memories and binding legal regime of periodic property, regulated as a case of forced ownership.

Special attention was paid to the case of co-ownership of the common parts of buildings with multiple apartments or places with another destination. This case is treated in subchapter 6, which contains the following subsections: legal regulation, terminological clarifications, the subject and the co-ownership structure, legal nature of co-ownership, rights and obligations of the co-owners, owners' association and forced ceasing of the co-ownership over the common parts of buildings with several apartments.

As it concerns the owners' association, it appears as a form of autonomous and non-profit association of the majority of the owners of a condominium, with the purpose of the administration and management of common property. We have showed how you live it and that are the organs through which they are expressed, analyzing them individually. The organs of the association are: the general assembly of the owners, the owners' association executive committee, auditors or auditing committee and president of the association.

Ceasing the forced co-ownership, usually can not take place by sharing it due to the forced and accessory character of the common property, that is intended to a proper functioning of the individual property, but we have showed four situations in which the forced co-ownership ceases.

The sixth chapter is dedicated to partition. The shared legal operation through the joint co-ownership is terminated, that means the property or the properties owned on share-parts are divided between co-owners, each of whom became the only owner of a property, when that right has been a common part of the subject property.

This chapter comprises seven subchapters: the concept, the right to require partition, the holders of the right to require partition, the inadmissible partition, the types, the effects and the invalidity partition.

"Nobody can be forced to remain in joint possession", so the output from joint may be made at any time, the right to request the tenancy being inalienable. We have showed that this right holders to demand partition, they can be any of the property owners in the case of interest in common, their successors, legal heirs, universal legatees and universal succession and if the spouse or former spouse who acquired goods as joint owner. Also, in addition to co-owner, locus standi in this regard, can have their personal creditors, assignees inheritance rights, succesoral lenders and prosecutor.

In chapter 4 we have examined three cases in which the division is inadmissible: prescription, the existence of an agreement to suspend the partition and the building permit. The two forms of the partition are treated in the next section. This division may be conventional, with the consent of all co-owners, or judicial, when they do not understand, and in certain cases provided by law. Judicial division has three forms: partition in kind, provisional allocation of a good's sharer and the share by selling goods.

Regarding the effects of the partition, they are analyzed in subchapter 6. In this section, we have shown that in the process of partition are summarized important elements of novelty, which gained through the new Civil Code a constituent character rights.

Art. 680 paragraph 1 NCC replaces the declarative effect with the translative effect of partition. According to this article the sharer who has received the good acquires the other co-owners' shares. However, he acquires the exclusive ownership of the property, and the copartner, who received money, obtains by separation, from the person who pays him, the ownership of the money.

The justification of the translative effect of partition is the regulation of legal acts previously concluded.

The old regulation, the act of sharing was not the subject to the formalities of real estate advertising, but the new regulation through art. 680 para. 2 NCC regarding the buildings, the obligation of registration in the land register of the separation act concluded in original form or final court decision. So now, whether we speak of an act of voluntary separation or judicial one, it is subject to disclosure formalities estate.

We have compared the new rules with the old regulations of the Civil Code and we have found that the latter provides the declarative nature of the partition, as opposed to new regulation of the same Code, which expressly states that the division has constitutive effect, each co-owner becomes the only owner of the property or sums given only from the date fixed in the division, but not before the closing date of the act, in the case of voluntary division împărțelii voluntary or, if applicable, from the date the judgment becomes final.

We have ended this chapter with some aspects regarding the invalidity of both partition the old regulation and the new regulation.

The last chapter briefly presents the periodical ownership right. This is a way of ownership in which each owner in its own name and personal interest the prerogatives of the right or periodical proprietary right, repeating perpetual succession and at regular intervals, assuming at least two owners, individuals or legal persons.

First we consider the periodic emergence of the concept of property both on the European continent in France, Germany, UK, Switzerland, Romania and the USA.

Express regulating of the periodic property of a legislator in NCC could not go unnoticed, so that the work is based on the new provisions relating to this institution.

Regarding the regular property contract, this is treated in a separate chapter in the Directive 94/47 / EC and the Law 282/2004 that describes and outlines its contents.

The situations encountered are increasingly often in practice, the more people have ownership of an asset (usually an apartment or holiday house) exerting once a year within a well defined period of time, makes us believe that the institution of regular property is in continuous evolution, its regulation in NCC is just the beginning

Throughout the paper, we have made a lot of references to comparative law, the new Civil Code and the Civil Procedure, but also to judiciary practice that regulates this matter, thus shaping a wider picture on property right on the share-part.

KEYWORD: *co-property, co-owner, unanimity, partition, periodical property*

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