CERTAIN THEORETICAL AND PRACTICAL ISSUES, REGARDING THE ADMITTANCE INTO GUARANTEE OF THE ESTATES GAINED ON BASIS OF LAW NO. 112/1995 FOR THE REGULATION OF THE LEGAL SITUATIONS OF CERTAIN ESTATES WITH THE DESTINATION OF DWELLINGS, TRANSFERRED INTO THE PROPERTY OF THE STATE

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Abstract
The property right is a subjective civil right, so that its admittance, protection and exertion should be approached within the general frame of the aggregate subjective civil law. In accordance with the provisions of art. 480 Civil Code: „the property is the right of someone to enjoy and dispose of a thing in an exclusive and absolute manner, but within the limits determined by law". The property right is the fullest real right, as it is the only subjective right that renders to its holder three attributes: possession, usage and disposal. In regard to the protection of the subjective civil rights, it represents one of the fundamental principles of the Romanian civil law and it is presented as such both in the internal normative documents and in the international normative documents whereof Romania is a party. The property right should be exerted only according to its economic and social scope; it should be exerted by observing the law and morals (art. 5 Civil Code); it should be exerted bona fides (art. 970 Civil Code and art. 57 from the Constitution); it should be exerted within its limits. The judiciary and notary practice have faced within the last period the urgent necessity to find the most suitable solutions to the problems raised by the interdictions to alienate the estates stipulated by certain organic laws, such as: art. 9 para (8) from Law no. 112/1995 on the regulation of the juridical situation of certain estates with the destination of dwellings, transferred into the property of the State, with subsequent amendments and supplements.

Keywords: *the property right, subjective civil right, Romanian civil law.*

In accordance with art. 9 para (1) from the Law: ..tenants, who are holders of contracts for the apartments that are not returned in kind to the former owners or their heirs may choose after the expiry of the term stipulated in art. 14 to buy such apartments against paying the prices as a lump sum or in installments", and in accordance with art. 9 para (8): „apartments gained in the terms of para 1 may not be alienated for 10 years as of the date of purchase". By the amendments brought by art. 9 para (1)-(4) from the Law, by art. 43 para (1) from Law no. 10/2001 on the legal regime of certain estates taken over abusively within the period 6 March 1945 - 22 December 1989, republished: „tenants, who were sold the apartments they lived in on basis of the provisions from art. 9 para 1-4 from Law no. 112/1995, by observing such laws, shall be entitled to alienate them under any form before the anniversary of the 10-year term as of the date of purchase, only to the entitled person, former owner of such dwelling".

From the analysis of the legal text it results that the interdiction to alienate (re-alienate) the apartments gained by the tenants for 10 years as of purchase (See art. 37 from the Methodoligical Norms for the application of Law no. 112/1995 adopted by Government Decision no. 20/1995 republished in the Official Gazette of Romania, Part I, no. 27 from 18 february 1997), is a case of temporary and absolute inalienability that regards all apartments purchased in the terms of art. 9 para (1) from the Law. The formation of a real estate market depends inter alia also upon the

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manner in which the legal provisions on the circulation of estates are applied. In regard to the dwelling real estate market, although it is more dynamic than the land market, the deficit of dwelling space is felt unfavorably, as the offer is more limited than the demand. Under such terms, the interpretation of certain notions whereby certain interdictions in regard to the circulation of estates are implemented generates dysfunctions of the real estate market, contrary to the scope aimed at by the lawmaker; but the right cannot remain alien to the economic realities it regulates.

Under such conditions, we estimate that for our study subject it is important to distinguish whether the interdiction (prohibition) is:

a) either only a special sales incapacity or on purchase in considering the person (in personam);

b) or a inalienability (only on sales) established by law according to the nature or destination of the goods, stipulated propter rem that have as a main consequence the removal from the civil circuit.

The opinions expressed in the legal literature, related to the nature of such interdictions are divergent, as the notary and juridical practice reveal contradictory solutions, a context in which the critical approach of such issue seems necessary to us. In an opinion it was claimed that the interdiction to alienate the estates gained in terms of art. 9 para (8) from the Law represent a intuitu personae unavailability, preventing the persons that gained the properties to speculate the received estates. In another opinion it is claimed that the interdiction to alienate such estates is not a simple special alienation incapacity established between persons, but a inalienability stipulated propter rem, considered for the good (intuitu rei) and not for the person holding the right. This opinion is shared also by other authors, the alienation interdiction characterized as a propter rem obligation, being also extended in regard to the estates gained in terms of art. 9 para (1) from the Law. In another opinion that is quite ambiguous and imprecise, it is claimed that the prohibitive provision stipulated in art. 9 last paragraph from the Law „should not be rigidly interpreted when a clause occurs that is beyond the will of the gainer, such as his settlement in another locality", a situation that in the opinion of the author would justify the alienation of the estate also during the 10-year period as of purchase. The opinions expressed by the practitioners in the notary activity, also in natural agreement with their practical activity, oscillate between the in rem nature of the inalienability of such goods and the intuitu personae nature of the alienation incapacity. Thus, in another opinion, the alienation interdictions stipulated in art. 9 final paragraph from the Law and art. 32 from Law no. 18/1991 of the Land Fund, with subsequent amendments and supplements, are propter rem inalienable, but the conclusion in regard thereto of sales precontracts, synalagmatic sales promises is legal, provided the parties do not establish the term to conclude the sales contract earlier than 10 years and such deed is not an alienation of the said estates. The inalienability of goods shall be substantiated on the provisions of art. 963 Civil Code, according to which: „only the goods that are in trade may be the object of a contract".

Stating their opinions for the purpose of the intuitu personae nature of the interdiction to alienate the estates gained in terms of art. 9 final paragraph from the Law, certain authors show that only deeds transferring property are interdicted, not the legal deeds on the setting up and transfer of dismemberments of the property right, as such may also come in the form of deeds under private signature, whereas other authors are of the opinion that the interdiction to alienate estates also implies the interdiction to set up and transfer the dismemberments of the property right, the interdiction to mortgage such, as well as the conclusion of bilateral sales promises (pre-contracts), motivating that by their conclusion the provisions of the Law would be eluded (See O. Radulescu, *Interdictia de instrainare a apartamentelor cumparate de chiriasi in baza Legii nr. 112/1995,* in magazine Dreptul no. 10/1999, p.35).

In the legal practice it was deemed that sales pre-contracts are legal and their registration in the land ledger was ordered, as well as the sales contracts concluded by the heirs of the owners of the estates gained in terms of the Law.

Explicitly or implicitly, all quoted authors agree however that the aim of the lawmaker by alienating the said interdictions is that of limiting speculation with such estates upon which was set up, re-set up, a property right or the vocation to gain such a right as a legislative measure of evident social protection.

The interpretation and application of the law may not omit such a scope, because as a reputed theoretician of the Romanian law from the period between the two world wars noted, he who „on behalf of the positive law limits himself to a narrow logics, excerpted only from texts and omits their supreme reasoning of being, i.e. justice, commits a mistake that means a crime against the law itself".

The scope of the law may not be contrary to the idea of justice, but subordinates itself to it.

Between the propter rem inalienability and the intuitu personae inalienability we have to see which better serves the scope of the law. Passing over the fact that such interdictions are at the edge of the constitutionality of the law, as they also bring de facto limitations to fundamental rights and freedoms other than the property right, influencing the right of free circulation and the right to settle the domicile in any locality in the country or even abroad (art. 25 from the Constitution), we have to choose that interpretative solution that brings the fewest limitations to the exertion of the fundamental rights and freedoms of the citizen. The fact may not be ignored that in accordance with art. 135 from the Constitution, the economy of Romania is a market economy and the State should ensure the freedom of the trade. This constitutional provision is not and should be not declarative. The freedom of trade also means the freedom of the circulation of goods.

The propter rem inalienability reflects an excessive intervention of the State in economy, impairing the freedom of trade in an unjustified manner, as it would restrict the civil circuit of such goods, in accordance with art. *963* Civil Code and it may not sell the traded things. The intention of the lawmaker was not that of removing such goods from the civil circuit and a proof is that they may be transmitted by mortis causa deeds or by civil deeds, such as usucapio, in case of which the effects are caused ex tune, and it is possible that the beginning of the possession should be within the Law and art. 32 from Law no. 18/1991, republished, and it has no suspensive effect upon the prescription term.

The propter rem inalienability has a constitutional support only for the goods of public property, declared according to art. 136 para (4) from the Constitution as inalienable, and such inalienability is absolute, as they cannot be barred and perceived, but they can enter the civil circuit by non-transferable deeds of property, such as: the assignment and giving into administration or lease (art. 136 para (4) from the Constitution; art. 1844 Civil Code).

The Law may also set up a relative propter rem inalienability regarding certain goods that due to reasons related to public order and health or the national security have a restrictive circulation regime and they may be manufactured and traded only by certain authorized legal persons or individuals and upon certain economic activities is set up the State monopoly in terms of Law no. 31/1996[12], and the regime of gaining and holding such goods, such as: weapons and ammunition, explosive materials, intoxicant products and substances etc. and they are regulated by special laws.

If the inalienability would be intuitu rei or propter rem, it should theoretically concern all goods of the same kind, irrespective of their owner, not only the goods of certain persons. If it concerns only the goods of certain persons it means that not the nature of the goods is the one that determines the inalienability, but the quality of the person and thus the inalienability is intuitu personae.

The propter rem obligations theoretically do not impair the civil circuit, as they do not hinder the circulation of the goods and the new gainers remain to further fulfill them and they are debitum cum rejunctum.

There is no reason of the above nature to set up such a propter rem inalienability in regard to the estates we refer to; on the contrary, there are suffice reasons to note that the alienation interdiction has an intuitu personae nature, being in reality a restriction of the property right, justified by the scope >n which the lawmaker setup a right to the bene/tio/the hMe/.

In case of tenants from the estates transferred into the property of the State, the gaining of the property right by their purchase is also conditioned by the fact of not selling such estates for 10 years as of the purchase date, under the sanction of absolute nullity of the alienation deed.

The restriction of exerting certain rights is governed by the proportionality principle itself, consecrated by art. 53 para (2) from the Constitution, any restriction should be pro rata to the situation that determined it, without impairing the existence of the right or of the freedom.

The restriction of exerting the property right by limiting the legal provision upon the good could concern only those who, benefiting of the social protection granted by the lawmaker would distort its scope, infringing the obligations under the condition of which was regulated such social protection.

As a consequence, we deem that a real tehnological interpretation of the said legal norms can lead only to the conclusion that by such norms was regulated an intuitu personae incapacity to dispose of such estate for 10 years. Some authors deem that such incapacity does however not concern the heirs of the initial owners, as thei gain the concerned good not as an effect of the law under which the good was gained are not binding to them (to settle their domicile in the locality where thei hold the land, to work such land etc.) and neither is the interdiction to alienate the estates.

Starting from the premises of the intuitu personae character of the inalienability of such estates, we further examine the legal deeds that may be concluded in such regard.

The sales pre-contracts are not alienation deeds of the estates, as they have as a legal object not the obligation to give, but the obligation to make, respectively to conclude in the future the promised contract, being practically a bilateral sales promise. Due to this reason was expressed the opinion that such are legal insofar the conclusion of the contract transferring the property is to be performed after the expiry of the 10-year term, as long as the alienation interdiction of the said estates lasts.

The argumentation brought in favor of this opinion is theoretically accurate and such deeds may be validly concluded, however provided that the law should not be eluded through them. When the bilateral sales promise is followed by the transfer of the real estate possession and the payment of the due price, we deem that the intention of the parties to elude the provision of the law is clear and the owner of the real estate demonstrates that he does not need any dwelling and so the reason whwrefore the social protection was granted to him by the lawmarker is not real.

A decision of the High Court of Cassation and Justice (See the High Court of Cassation and Justice, S.civ. and of intellectual property, dec. no. 5499/2004, published in the magazine “Dreptul” no. 2/2006, p. 263), brings again into discussion certain controversial issues regarding the interdiction stipulated by art. 9 para. (8) from the Law that, as we know, stipulates that the “apartments gained in terms of paragraph 1 may not be alienated for 10 years as of the date of purchase”.

The provision of art. 9 para (8) from the Law were amended by Law no. 10/2001 that by art. 43 para (1) stipulated the right of tenants who purchased the dwelling on basis of the Law to alienate it, even before 10-year term as of purchase, but only if the alienation is performed to the entitled person, former owner of such dwelling.

By the above-mentioned decision, the High Court essentially provided that:

- the legal or testamentary inheritors of the deceased that purchased an apartment on basis of the Law are entitled to sell it, under the suspensive condition that the transfer of the property should operate on the date of the 10-year anniversary as of gaining;

- the inheritors shall be entitled to set up and transfer dismemberments of the property right before the expiry of the mentioned term.

We shall further examine both provisions of the High Court. In regard to the inheritors right to sell under the indicated suspensive condition, it is to be noted that on basis of art. 1296 Civil Code: „the sale can be performed either purely or conditioned" that may be evidently also suspensive, as it is also expressly stipulated by art. 1584 para (1) French Civil Code. Only that in accordance with art. 1004 Civil Code, the obligation is conditioned when its fulfillment depends on a future and uncertain event". When the parties stipulate that the transfer of the property right shall operate on the anniversary of the 10-year term, this is certainly a future event, but also an „uncertain" one. The concerned date can be rather deemed a suspensive term, in the meaning of art. 1022 Civil Code, given the fact that the term, in comparison to the condition, does not suspend, but postpones only its execution. Irrespective of the qualification we refer to, we deem that we should make the distinction between the transfer of the property right that usually operates on concluding the contract and the delivery of the good that is the object of the sale and that usually operates or may operate later.

In accordance with art. 1583 French Civil Code, the sale is concluded between the parties and the property is de jure gained by the buyer as soon as the thing and the price are agreed upon, although the thing has not been delivered and the price has not been paid. The parties may of course agree that the transfer of the property should operate after the conclusion of the contract. Therefore, art. 1476 from the Italian Civil Code stipulates among the main obligations of the Seller also that of transferring the property upon the good or the right „if the transfer is not the immediate effect of the contract". In the French doctrine it was rightfully underlined that the transfer of the property that is the object of the sales contract is of the sales nature, not its essence.In the same way it was indicated in our doctrine in a justified manner that the parties may agree to postpone the transfer of the property right to a certain date that differs from that of concluding the contract, e.g. on the date when a buyer fully pays the price. Admitting thus that the inheritors may conclude sales deeds, if stipulated in the deed that the transfer of the property shall be performed on the anniversary of the 10-year term, motivating that for such purpose is not disregarded the interdiction we refer to, we naturally draw the conclusion that not only the heirs, but also their authors have such right.

Finally, considering the above stated, certain authors do not share the reason comprised in the above-quoted decision of the High Court, according to which to the inheritors of the holder of the property right upon the apartment purchased from the State, on basis of the Law (the former tenant) „were not incident the provisions of art. 9 final paragraph in regard to the interdiction of the alienation" (a solution justified on the idea of not admitting the extensive interpretation of certain exception norms). The motivation of the opinion of such authors is justified on the application of the principle clasic nemo plus juris adalium transferre potest quam ipse habet; in other words, as long as he could not de cujus alienate the dwelling purchased on basis of the Law, for 10 years as of gaining, his inheritors cannot have larger rights than their author, without such legal axiom representing an „extensive interpretation" and an infringement of the provisions from art. 53 from the Constitution of Romania (republished) in regard to the extraordinary nature of restricting the exertion of certain rights or of certain freedoms. In regard to the possibility of the inheritors to transfer the usufruct of the purchased estate or other dismemberments of the property right, with the motivation that such are not alienations and that the lawmaker interdicted only

alienations, the same authors deemed that if we admitted the existence of such a possibility, the Law would be eluded.

In the opinion of such authors, the thesis that if the lawmaker interdicts the alienation of certain goods, neither parts (dismemberments) of the property right concerning such good can be alienated, remains valid, as the alienation interdiction would be eluded and the scope aimed at by the lawmaker would be disregarded.

By the interdiction stipulated in art. 9 from the Law was aimed at avoiding speculation and not creating difficulties to the persons entitled to request the retrocessesion of the apartments, inclusively by declaring the nullity or canceling the sales contracts concluded by the State with the tenants, sanctions that become more difficult to accomplish, if the estates are alienated to third parties that may invoke bona fides. Or, if the setting up of a usufruct and its assignment for a long time is allowed, none of the scopes aimed at by the lawmaker would be observed.

On the other side, as the usufruct is an element of property, so that if the sale is interdicted, then the setting up and the assignment of the usufruct would be the principle accessorium sequitur principale.

The same authors deem that before the expiry of the 10-year term, neither the inheritors, nor their authors may set up or transfer dismemberments of the property right upon the estates purchased on basis of the Law.

In the specialty literature were expressed divergent opinions in regard to the mortgaging of such estates that were gained in accordance with the Law.

Some authors deem that the mortgaging of such estates is not legal, starting from the provision comprised in art. 1750 para (1) Civil Code, according to which only estates in the civil circuit may be mortgaged. Such authors claim that the concerned estates are in the civil circuit, but their circulation is limited to mortis causa deeds. The same authors claim that the capacity to mortgage an estate belongs only to the person that also has the capacity to alienate such (art. 1769 Civil Code); or, as we subsequently showed, the new owners of such estates have a restricted capacity to exert the property right upon them and they cannot alienate them for 10 years as of the date of setting up the property right; as a consequence as these estates cannot be alienated, they can be neither mortgaged.

In another opinion it is claimed that such estates may be mortgaged and it is deemed that the cancellation of the mortgage security contract could be ordered only if ab initio proven that the owner aimed by mortgaging the good to reach its alienation by executory way of the good.

However the infringement of the law has to be proven, as the good faith of the owner is presumed. If the fraudulent intention of the owner is not proven, the mortgage security contract would be valid.

In the light of the above are incident the provisions of art. 45 para (2) from Law no. 10/2001, according to which: „legal alienation deeds, inclusively those made within the privatization process, having as an object the estates taken over without a valid title are stricken by absolute nullity, except the case when the deed is concluded bona fides". Bona fides is presumed and the overturning of the presumption is possible by establishing the mala fides resulting from the evidence administered before the law court.

Under this last issue, the law courts concretely provided that those who gained as tenants the estates on basis of the provisions of the Law should perform the minimum diligences in order to find out whether they made the object of in kind return applications, so that those abusively dispossessed should regain the property right (See Decision no. 1/2003 of the Supreme Court of Justice, Civil Section; decision no. 1005/2003 of the Supreme Court of Justice, Civil Section; decision no. 4612/2004 – High Court of Cassation and Justice, Civil Section and intellectual property; decision no. 4702/2004 - High Court of Cassation and Justice, Civil Section and

intellectual property; decision no. 2141/2004 - High Court of Cassation and Justice, Civil Section and intellectual property; decision no. 5758/2004 - High Court of Cassation and Justice, Civil Section and intellectual property; decision no. 10045/2004 - High Court of Cassation and Justice, Civil Section and intellectual property).

„What regards us, we share the opinion of those authors according to which estates gained on basis of the Law may be mortgaged, considering the provisions of art. 1750 para (1) Civil Code, meaning that they are in the civil circuit, however provided the 10-year term stipulated by the lawmaker is fulfilled. As indicated, starting from the premises of the intuitu personae nature of the inalienability nature of such estates, the restriction of exerting the property right by limiting the legal disposal of the good, we do think that it could concern only those which benefiting of the social protection granted by the lawmaker would distort its scope by infringing the obligation under the condition of which was regulated this social protection".

Thus, the restriction of exerting certain rights, such as that of mortgaging the good gained in terms of the Law is governed by the very principle of proportionality stipulated in 53 para (2) from the Constitution of Romania.

According to this principle, any restriction of the exertion of the property right should be pro rata with the situation that determined it, without being able to impair the existence of the right or of the freedom. However it is understandable that the lawmaker has not aimed at such effects.
We deem that this opinion is accurate, considering the fact that such estates gained by virtue of the Law are in the civil circuit, so that they may be the object of a real estate security contract. To support a contrary opinion according to which the concerned goods would be removed from the civil circuit is not justified as long as certain legal deeds can be concluded in their regard, inclusively such transferring property of mortis causa nature.

The interdiction of alienation set up by the text is not equivalent with the temporary removal of the purchased estates from the civil circuit (a proof that they may be transmitted by inheritance), but with a limitation of the property right in the attribute of the provision understood for the purpose of alienation of transferring the property right by deeds among living persons. The temporary inalienability set up by Law aims only at the alienation by deeds among living persons, for valuable consideration or free of charge, not at the transmission by legal or testamentary inheritance and the intention of the lawmaker is not to remove such goods from the civil circuit.

Without substituting the law courts and so much the less the Constitutional Court at the question whether the limitation by legal deeds of the exertion of certain rights is constitutional (in this case, the stipulation of alienation interdictions), the answer can be only affirmative. Considering art. 44 para (1) from the Constitution of Romania, as well as such of art. 480 Civil Code in our opinion, the limitation by organic law of exerting certain rights is possible (as the alienation interdiction is the form of limiting the exertion of the property right).

Art. 44 para (1) from the Constitution of Romania stipulates that: „The property right, as well as the receivables against the State are guaranteed. The content and the limitation of such rights are established by law"; art. 480 Civil Code stipulates that: „The property is the right someone has to enjoy and dispose of a thing in an exclusive and absolute manner, but within the limits determined by law".

From the interdiction established by art. 9 final paragraph from the Law, art. 43 para (1) from Law no. 10/2001 set up, as we mentioned, an exception, meaning that the concerned apartments may be alienated „under any form before the anniversary of the 10-year term as of the purchase date only to the entitled person, former owner of that dwelling".

In considering such provisions and having regard to the intuitu personae nature of the interdiction to alienate such estates, we deem that they may be the object of real estate security contracts, as they are goods that are found in the civil circuit.

Thus, in order to admit in guarantee such estates, we deem that additional formalities are necessary to be performed, respectively:

a. it shall be checked whether the price of the estate was fully paid and for such purpose shall be produced either the proving receipt, or the address from the purchasing company wherefrom this should expressly result;

b. supporting documents shall be produced wherefrom should result that the10-year term stipulated by the lawmaker expired, a term computed as of the date of the sale operation (forsuch purpose shall be submitted either the address from the selling company, or the photocopy of the land ledger of the estate);

c. it shall be checked whether the tenant becoming an owner was summoned,notified or announced in any way about the existence of an action formulated by any entitled person, concerning the estate he wants to alienate. In this case, we deem that it is not suffice to produce only an authentic declaration of the owner of the estate proposed to be brought into guarantee in regard to the above-mentioned operations, but also from the State or the selling legal entity, as well as of the mayoralty of the locality where the estate is situated;

d. information shall be requested about the existence/non-existence of litigations, having as an object the cancellation or the assessment of absolute nullity of a legal alienation deed concerning the estate gained in terms of the Law from the law court competent to solve the concerned cause.

Concerning the above and having regard to the necessity of concluding the transaction in terms of maximum security, without the occurrence of a risk on setting up the guarantee to the benefit of the bank and concurrently having regard to the provisions of art. 43 para (2) from Law 10/2001, as amended and supplemented by Law 247/2005, wherein it is mentioned: „under the sanction of absolute nullity, the alienation in any way of the estates gained by virtue of Law no. 112/1995, with subsequent amendments and supplements, shall be interdicted until the final and irrevocable solving of the actions formulated by the entitled persons, former owners or, as the case may be, their heirs, according to art. 45", we deem that the subject remains open to any comments, so much the more the court practice and the notary one, as well as the opinions of the theoreticians are divergent in regard to the legal nature of the estates gained in terms of this special law.