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THE ABSOLUTISM OF THE PROPERTY RIGHT

Summary

When we say that the property right is an absolute right we mean, first and foremost, that it is enforceable against anybody, erga omnes. The erga omnes opposability of the property right presupposes that all the others, except for the owner of the property right, must abstain themselves from encumbering the latter in exercising his/her right, namely to recognize and observe his/her property right. In this case, opposability equals inviolability and characterizes the property right to the same degree as it does any real right or lien. In this first meaning, the absolute character is not something specific only to the property right, but a common trait of any subjective civil right.

Secondly, the absolutism of property rights does not reduce itself to the right's opposability, but presupposes the fact that the owner is the only one who can gather together all the prerogatives of property, that is usus, fructus and abusus. We encounter these prerogatives in the dismemberments rights, where they are being exercised more or less concurrently with the bare proprietor, but under no circumstance shall the usufructuary, the superficiary owner or the holder of an easement, have the right to exercise simultaneously all the property prerogatives. Thus, the property attributes are being exercised by the owner in an absolute manner. It is a feature of absolutism through which property differentiates itself from any other real right.

According to another opinion, the absolute character is represented by the owner's freedom to do whatever s/he chooses with his/her property. There are no inherent limits to the right of property, but only limits that are exterior to the space of absolute action or inaction of the owner. It has been therefore admitted that the property right is absolute only if it is reported to itself, to its holder. This is the significance of the inexistence of the limits inherent to the property right.

Then, property has an absolute character in the sense that it is a general, global notion. Its definition does not vary according to circumstances. It applies to everybody and to everything; it does not vary from person to person or from

owner to owner. Property appears as absolute by means of the state of legal equilibrium which it guarantees in the situation of goods. The property right escapes prescription. Property absorbs dismemberments in order to reunify itself. Therefore, the right's dismemberments can be but temporary and subject to prescription. Easements make an exception, since they are considered to be the only perpetual real rights.

Finally, the absolute character of the property right presupposes that property does not define itself in relation to any other right. It does not need another right as element of reference. The property relation does not have a determined or determinable passive subject that might owe something to the owner.

Key words: absolute right, inexigibility of the right, exclusivity, opposability.

1. The property right is an absolute right. The absolutism of property is expressly stipulated in the provisions of article 480 of the Romanian Civil Code. The meanings of the term "absolute" are multiple.

When we say that the property right is an absolute right, what we understand, first and foremost, is that it is enforceable against anybody, erga omnes. The erga omnes opposability of the property right presupposes that all the others, except for the owner of the property right, must abstain themselves from encumbering the latter in exercising his/her right, namely to recognize and observe his/her property right. Opposability equals, in this case, inviolability and characterizes the property right to the same degree as it does any real right or debt-claim. In this first meaning, the absolute character is not something specific only to the property right, but a common trait of any subjective civil right.

2. Secondly, the property's absolutism does not reduce itself to the right's opposability, but presupposes the fact that the owner is the only one who can gather together all the prerogatives of property, that is usus, fructus and abusus. We encounter these prerogatives in the dismemberments rights, where they are being exercised more or less concurrently with the bare proprietor, but under no circumstance shall the usufructuary, the superficiary owner or the holder of an easement, have the right to exercise simultaneously all the property's prerogatives. Thus, the property's attributes are being exercised by the owner in an absolute manner. It is a feature of absolutism through which property differentiates itself from any other real right.

According to another opinion, the absolute character is represented by the owner's freedom to do with his/her good whatever s/he chooses to. There are no inherent limits to the right of property, but only limits that are exterior to the space of absolute action or inaction of the owner. The property right must be exercised upon the observance of the limits imposed by the law. The limitations brought to the exercise of property are increasingly diverse and numerous, to such an extent that, not without reason, it has been said that "the property is an absolute power that is, by no means, absolute". It has been therefore admitted that the property right is absolute only if it is reported to itself, to its holder. This is the significance of the inexistence of the limits inherent to the property right.[1]

3. Then, property has an absolute character in the sense that it is a general, global notion. Its definition does not vary according to circumstances. It applies to everybody and to everything; it does not vary from person to person or from owner to owner. The nature or the physical features of the goods are irrelevant. It does not matter whether the object of property is a corporeal or an incorporeal good, whether it is movable or immovable. Property thus appears as a procedure that allows the extraction of all uses out of a thing. According to this opinion, absolutism affirms the purely technical role of property.[2]

4.Another meaning of the term consists in the fact that property appears as absolute by means of the state of legal equilibrium which it guarantees in the situation of goods. The property right escapes prescription. Property absorbs dismemberments in order to reunify itself. Therefore, the right's dismemberments can be but temporary and subject to prescription. Easements make an exception, since they are considered to be the only perpetual real rights. The derogation is explained by the fact that easements bring only partially affect the owner's use and always have as an object the utility of a fund[3].

5. Finally, the absolute character of the property right presupposes that property does not define itself in relation to any other right. It does not need

1 V. Stoica, Drept civil. Drepturile reale principale, Editura Humanitas, 2004, pp. 242-243 and note 62. The author points out that the notion of inherent limits must not be mistaken with that of internal limits of the exercise of the right, which is opposed to that of external rights and which are being used in the theory of the abuse of right. The inherent limits presuppose the relations between the owner of the property right and his/her right, and not the relations between the owner of the property right and the others. The internal or external limits of the exercise of property have as point of reference the relation between the owner of the property right with the others.

2 C. Atias, Droit civil. Les biens, quatrième édition, Litec, Paris, 1999, p. 90.

3 F. Zenati, Les biens; Presses Universitaire de France,1988, p. 117.

another right as element of reference.[4] In this approach, the property right has a profoundly original character. The other real rights and debt-claims are relative because their owner exercises his/her prerogatives by reference to another person (the bear proprietor or the debtor). The property relation does not have a determined or determinable passive subject that might owe something to the owner.[5]

In the theoretical debates concerning the existence of the passive subject of the property relation, one has made the necessary distinction between the "direct" and the "indirect" effects of the property right, stating the fact that the internal relation is a direct and immediate legal relation between a person – the owner of the right - and a thing - the object of the right - expressing the authority of the subject over the thing, without the mediation of a third person. On an external plan, one has mentioned the indirect consequence over the surrounding people, namely the external legal relation of absolute opposability of the property right, which can be exercised and which imposes itself, purely and simply, to third persons, even without the prerequisite of being aware of the respective right. There has been said, wisely, that the internal legal relation is a field of relativity, and that the external relation of the property right is a field of opposability. As a conclusion, the external relation of the legal report of property is considered to be taking place between the holder of the right and third persons, and the internal relation refers to the relation between the holder and the thing which belongs to him/her.[6]

This opinion has been criticized in the sense that, when one refers to the right of property, both the internal and the external reports are reports towards a thing, with the ascertainment that the first report is a legal relation of appropriation and control of a thing by a certain person, expressing the authority of the subject towards the thing, without the mediation of a third person, whilst the report between thing and third persons is a mere relation of opposability (inviolability), since all the subjects of civil law have the duty to observe and not to encumber the exercise of the right by its owner. The inviolability has the value of a principle that governs the indirect effects and consequences, namely towards third parties, of the legal situations.[7]

The thing is the common element of the two reports (the internal and the external one), it is the contact point and the geometric locus of the two plans regarding relativity and opposability. If the external report of property is a

4 C. Atias, op.cit., p. 90.
5 F. Zenati, Les biens, p.117.
6 I. Deleanu, Părţile şi terţii. Relativitatea şi opozabilitatea efectelor juridice, Editura Rosetti, Bucureşti, 2002, p. 172.
7 I. Lulă, Observaţii asupra subiectului pasiv al raportului de proprietate, in Dreptul no. 7/2007.

consequence of the internal report, it means that it is a consequence of the direct and immediate legal relation between man and thing. Being a consequence of a legal report, it means that the external report cannot be a legal relation, all the more since it does not generate, modify or extinguishes a legal situation. The external report, of opposability, imposes itself without the condition of the prior awareness concerning the owner of the subjective right, as it results from the provisions of article 136, last paragraph, from the Constitution, according to which private property is inviolable, in accordance with the organic law. Then, the external report of the subjective right of property cannot be considered a legal report also on the basis that it is not assumed by any passive subject, as distinct from the personal report, where the obligation of not to do something is assumed by the debtor.[8]

The opinion according to which the external report of the property right is a report of mere abstention, namely of not encumbering the exercise of this right by its owner, is founded also on a statistical argument since, usually, the third parties do not know what prerogatives the subject of the respective right has upon the thing, and therefore they have to restrain themselves from any sort of disturbance, that is they should never ignore the presumption that upon all things there might exist internal legal relations. This solution imposes itself because the third parties are only indirectly and under the express form of inviolability, as expression of the interdependency of people within social life, affected by the effects of the internal report. Furthermore, as long as the exercise of the internal report of the property right does not imply any disturbance from the part of another person, the external report between the third parties and the thing can have no legal relevance.[9]

When property is concerned, the opposability cannot be in the own interest of the third parties, since it refers to the security of the legal situation of the owner of the subjective right. The third is a person that is alien in relation to a certain legal situation. His/Her obligation of not to affect the goods of others and of not to use them represents the indirect legal effects of the internal report of property, which project themselves erga omnes.[10]

It should be noted that the active subject of the internal relation of property and the general, undetermined passive subject of the external relation of the subjective right have no relation whatsoever between them, the only connection between them being the fact that both reports refer themselves to the same thing, and that the third parties do not need the participation of the active subject or of other persons in order to fulfill their obligation to abstain

8 Idem.
9 Idem.
10 Idem.

themselves and not to hinder the exercise of the right of property by its owner. To consider that the external report of the property right is a report between the owner and third parties means to ignore the fact that this subjective right is report of exclusion, that cannot be overlooked and hindered by other subjects of law, it also means to transform it into claim, although this right rejoices a sovereignty that is limited only by law and although nobody could contest the fact that between the holder and the third parties no civil legal reports are born, modified or extinguished.[11]

6. By analyzing the report between the power over the thing and opposability, the following fact has been underlined: "that which is manifest within the property right is not the fact that its owner can ask everybody not to disturb it but the fact that he/she can exercise a power over the respective thing. To see inside the real right first and foremost the other's obligation not to disturb the owner means to see the negative and secondary part of the right, without seeing its positive and principle one"[12].

The external report of the property right is a simple report of inviolability between third parties and the thing, and not between third parties and the owner of the thing. Furthermore, if the external report of the property right would be, in its turn, a legal report also, one could get to the absurd conclusion that the property relation has in its composition two civil subjective rights. The opposability towards third parties is a consequence of the social character of the property right[13], to the extent that, if there existed only the

11 Idem.

12 I. Filipescu, Drept civil. Dreptul de proprietate şi alte drepturi reale, Bucureşti, 1993, p. 22.

13 The social character of the property right results from the analysis of the provisions of article 136, last paragraph, article 57 and article 44 of the Constitution, as well as of articles 1 and 3 of the Decree no. 31/1954. Thus, according to article 136, last paragraph, of the Constitution, "private property is inviolable, in accordance with the organic law"; according to article 57 of the Constitution, "Romanian citizens, foreign citizens, and stateless persons shall exercise their constitutional rights and freedoms in good faith, without any infringement of the rights and liberties of others", and, according to its article 44: "(1) The right of property, as well as the debts incurring on the State are guaranteed. The content and limitations of these rights shall be established by law. (2) Private property shall be equally guaranteed and protected by the law, irrespective of its owner. Foreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the European Union and other international treaties Romania is a party to, on a mutual basis, under the terms stipulated by an organic law, as well as a result of lawful inheritance. (3) No one shall be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance. (4) The nationalization or any other measures of forcible transfer of assets to public property based on the owners' social, ethnic, religious, political, or other discriminatory features. (5) For projects of general interest, the public authorities are entitled to use the subsoil of any real estate with the obligation to pay compensation to its owner for the damages caused to the soil, plantations or buildings, as well as for other damages imputable to

internal report between the owner of the right and his/her thing, then, in order for the property not to lose its social character, we would be forced to include it within the content of the obligational civil legal report.

The absolutism concords, in this approach, with the inexigibility of the right. The property right is the only right that is intrinsically non-exigible. Its owner, in order to exercise his/her right, does not need the participation of another person. There is no need for an intermediary. There is no need for a passive subject.[14]

7. The undetermined passive subject is a legal fiction whose necessity does not justify itself. It is nothing else than the proclamation of a lack of clarity that has been invented on reasons of stability of the legal system and because of the wish for conceptual perfection of the civil legal relation. The active subject owns the appropriated thing as being his own, and, for everybody else, its object is an alien thing. This means that, from the point of view of all third parties, since it is an object that belongs to someone else, it cannot be argued that there existed some other subject who might have a civil obligation towards the active subject, with the exception of the obligation of inviolability.[15]

these authorities. (6) Compensation provided under paragraphs (3) and (5) shall be agreed upon with the owner, or by the decision of the court when a settlement cannot be reached. (7) The right of property compels to the observance of duties relating to environmental protection and insurance of neighborliness, as well as of other duties incumbent upon the owner, in accordance with the law or custom. (8) Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed. (9) Any goods intended for, used or resulting from a criminal or minor offence may be confiscated only in accordance with the provisions of the law. Then, the normative provision stipulated in article 1 of the Decree no. 31/1954 on the natural and legal person, "The civil rights of natural persons are recognized with a view to satisfying the personal, material and cultural interests, in agreement with the public interests, according to the law and regulations", and article 3, of the same Decree, adds that "the civil rights are protected by the law. They can be exercised only according to their economic and social purpose".

14 F. Zenati, Les biens, p. 117.

15 See I. Lulă, op. cit.; the author points out that the relation of property cannot have a double volitional character since the opposability of exclusivism, which is of the essence of this right, does not allow, apart from the will of the owner and of the society organized in the state, expressed through the provisions of article 480 Civil Code, the existence of any other subject, passive, with which the respective legal relation to link. The double volitional relation presupposes that all the people on earth should find themselves, at the same time, both as undetermined passive subjects and as concrete legal relations, sprung from the manifestation of subjective will of the parties. Also, the changing of the undetermined passive subject with some other passive subject is totally inconceivable, because that would mean that a subject of law would change with itself, since the latter is formed of all the other persons, with the exception of the owner. Moreover, the equality of the parties in the obligational civil relation means that none of them can impose to the other, in a unilateral manner, either the entry into such a relation nor its content. It is out of the question that the relation of property might fulfill such conditions since this subjective right does not require a service from the part of another person, being intrinsically

The direct relation with the thing is sufficient for the owner in order to be able to enjoy all the uses of the good.

Property is an individual and solitary prerogative. Only the owner holds the monopoly over his/her good.[16]

As one can notice, the absolute character is tightly related to the exclusive one, in the sense that the absolute right is exercised in an exclusive manner.

The exclusive character covers both the exclusivism and the exclusivity of the property right. The doctrine underlines the necessity to distinguish between the notions of exclusivism and exclusivity. Exclusivity is a general trait of all subjective rights and signifies the exclusion of people, other than the owner of the right, from its exercise.[17]

In this opinion, the exclusivity must be correlated with the erga omnes opposability of the rights. The removal of any person, other than the owner of the right, from the exercise of that right is a manifestation of the right's opposability. The exclusivity protects the owner against third parties. The fact that the good belongs to a determined person means that it does not belong to anyone else. From this perspective, the analysis of exclusivity presupposes rather the analysis of the relations between persons, namely between the owner and third parties, than that of the relations between persons and the thing[18].

As it has been stated, the theory of opposability can give to the property's absolutism all the strength that it needs in order to develop itself, seeking in it the legal basis that it is lacking. The profound study of the theory of opposability in the field of property has departed from the distinction between the opposability of exclusivity and that of the title.[19]

8. The opposability of exclusivity is understood as an opposability of appurtenance. The fact that we know that a good is not ours is sufficient for us

inexigible. The passive subject of the property right cannot be identified through the legal operation of determination, since, during the course of this attempt, the mere object of research disappears, because, instead of the passive subject of property we obtain a passive subject of some other relation, namely the obligational one. The fact that the passive subject cannot be identified even by the change of the legal nature of the relation under study, demonstrates its inexistence as element of the property relation and the inconsistency of the personalist thesis.

16 In the sense of the opinion that, for the understanding of the exclusive character of the property right the accent must be placed not upon the plenitude of the owner's prerogatives, but on the latter's monopoly in the exercise of his/her prerogatives, see V. Stoica, op.cit., vol. 1, p. 244.

17 M. Levis, L'opposabilité du droit réel, ed. Economica, Paris, 1989, p. 127.

18F. Zenati, Les biens, p. 117.

19 F.Zenati, Pour une rénovation de la théorie de la propriété, Revue trimestrielle de droit civil nr.2/1993, p. 321.

to infer that it belongs to someone else and that we must observe the right of property of that person, without interfering in the exercise of the owner's attributes. Thus, even if the good is corporeal, possession is not necessary in order to underlie the efficacy of property against third parties.[20] It is not from the fact that the good is possessed by someone else that we infer that we have to observe the property right over the good, but rather from the fact that we know that this good does not belong to us. The person of the owner is indifferent to us. What we observe is a relation of appurtenance which has someone else as owner for the simple reason that we infer this because of our non-appurtenance.

The abstract character of incorporeal goods can determine third parties to act in an involuntary manner and to harm the owner's interests. The only modality by which they can become aware of the right is that the title should be opposable to them. In the case of incorporeal goods, the right's opposability gets reduced to the title's opposability. The title's opposability does not have the same power as the opposability of exclusivity. In other words, although it is necessary for us to know that a good does not belong to us, this fact is not sufficient in itself, since, in order for the title to be opposable to us, we must know that it belongs to a certain person.[21]

In the situation in which the owner has disposed of his/her good in favor of several persons, the conflicts between the assignees can be solved by applying the principle of opposability. In matter of corporeal movables, the proof of good faith of the assignees result out of assumptions which are not based, essentially, upon the fact of possession. If the owner has remained in possession, the assignees are considered to be in good faith until contrary proof.

In the case of the constitution of real rights over the thing of another, if the right has a corporeal object, the opposability of the dismembered right is the opposability of the property of the corporeal things.[22]

In the case of the institution of personal rights, the opposability of the claims depends upon the good faith of the third parties. The latter can contest the opposability of the claim as long as they act in good faith, respectively, as long as they ignore the existence of the wronged right.[23]

20 Idem.
21 Idem.
22 Idem.
23 Idem.

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АПСОЛУТИЗАМ ПРАВА СВОЈИНЕ

Апстракт

Када кажемо да је право својине апсолутно право ми на првом месту мислимо да оно делује према сваком, erga omnes. Erga omens дејство права својине претпоставља да се свако други, осим титулара права својине, мора уздржати од узнемиравања поменутог у вршењу његовог/њеног права, тј. признати и поштовати право својине. У овом случају могућност заштите изједначена је са неповредивошћу и карактерише право својине у истом степену као и свако друго стварно право. У овом првом значењу, карактер апсолутности није нешто специфично само за право својине већ заједничка црта сваког субјективног грађанског права.

Друго, апсолутност права својине није ограничена на могућност заштите права, већ претпоставља чињеницу да је власник једини коме могу припадати сви прерогативи својине, тј. usus, fructus и abusus. Са овим прерогативима сусрећемо се када су у питању имаоци изведених права, која они врше више или мање истовремено са власником, али ни под каквим околностима плодоуживалац или ималац службености не може имати овлашћење да истовремено врши све својинске прерогативе. Стога, својинске атрибуте власник врши на апсолутан начин. По особини апсолутности право својине се разликује од сваког другог стварног права.

Према другом мишљењу апсолутни карактер огледа се у слободи власника да са имовином чини шта год хоће. Не постоје никаква урођења ограничења права својине, већ само ограничења која су спољна у односу на простор апсолутне слободе чињења или нечињења власника. Зато се признаје да је право својине апсолутно само у односу на само себе, за свог имаоца. У овоме је значај непостојања ограничења урођених праву својине.

Затим, својина има апсолутни карактер у том смислу што је општи, глобални појам. Његова дефиниција не зависи од околности. Она се примењује на сваког и све; не разликује се од особе до особе или од власника до власника.

Својина се појављује као апсолутна у смислу стања правне равнотеже које гарантује у погледу правне ситуације добара. Право својине измиче прописивању. Својина апсорбује изведена права да би их објединила у себи самој. Зато, изведена права могу бити привремена и прописана. Службености су изузетак, будући да се сматрају јединим изведеним стварним правом.

Коначно, апсолутни карактер права својине подразумева да се право својине не дефинише у вези са било којим другим правом. Њему ниједно друго право као елемент упућивања није потребно. Својински однос нема одређеног или одредивог пасивног субјекта који може нешто731 дуговати власнику.