Possible rights' particularities

Lecturer Roxana MAFETI, PhD.
Student Corina ONESIM
Student Bianca BUCUR – BRÂNZĂ
Transilvania University of Brasov, Romania,
roxana.matefi@gmail.com

Abstract
Possible rights are an extremely disputed subject, regarding which our doctrine has different opinions. While some specialists consider such rights not different from the rights affected by ways or the future rights, others consider them a separate category, showing the specific characteristics which individualize them. In this writing we will expose these different opinions, trying to clarify this type of rights.
Keywords: *possible right, future right, right affected by ways.*

General considerations. Definition. Constituents

It is important to start our presentation by informing the reader about the legal framework of this type of rights, namely the civil subjective rights.

The Romanian legislator apparently did not consider it necessary to specify a clear definition of the subjective rights as he did in the matter of real rights, where the property right, the most illustrative real right is regulated by Article 555, alin. (1) of the Civil Code.

In this context, the doctrine had this delegacy, the specialists giving several definitions of these rights in their writings. We think that the most relevant definition belongs to the twentieth century doctrine because it captures the essence that any novice needs to fully understand the fundamental characteristics of this type of right.

So, the Civil subjective right is defined as "the legal possibility of the right holder to exercise a certain conduct, guaranteed by law by the possibility to claim a certain behavior from the liable person, which may be imposed, if necessary, by the coercive force of the state" [1]. From this definition results, according to the doctrine, some theories about the Civil subjective rights like the natural law theory, denial theories, the theory of will or interest theory [2].

We believe that an appropriate place of this debated category would be around legal documents outright and those affected by the ways, reasons for these considerations is presented below.

In our opinion a possible right is certainly less than one affected by the ways (term or condition) and even less a than a conditional right, but it is without doubt more than a simple desire appeared in the consciousness of the subject.

The differences between possible rights and other rights

In order to understand the characters of this category of rights, in the following pages we present a comparison between the possible rights and other categories of rights, namely rights affected by the ways - possible rights ; future rights - possible rights and the right of property – possible rights, referring to the views of the doctrine in this regard.

Comparison between possible rights - rights affected by the ways

This comparison is ambiguous, because the doctrine views on these categories of rights are divided. We will try to expose them objectively and in a clearer form to any person interested in this subject.

The right affected by the ways is defined by the doctrine as the right whose birth, exercise or extinction depends on future and uncertain events (term, condition) [3] . So, this category of civil subjective rights does not offer full safety to their holders, their existence or exercise depending on future circumstances, certain or uncertain [4].

Correlative rights and obligations contained by a legal act affected by the ways are conditional, in the matter of their existence and even their execution, by the fulfillment or discharge of those elements or circumstances. Legal documents affected by the ways are subject, as regards their birth, existence or termination, to one or more categories of ways, to a standstill or extinctive period, a standstill or extinctive condition [5].

Our legislation calls certain legal acts that cannot exist without being affected by the ways such as loan contract, annuity contract or maintenance contract [6] etc., acts that cannot be affected by any way as adoption or marriage, recognition of parentage, and others that are affected or not by the ways (the largest category of civil legal acts) [7] .

We think that it is very important to present the definitions of the three ways established by the New Civil Code to see the differences between the possible rights and the rights affected by term or condition. The term is defined as "a future and certain event, which is deferred until either the start or termination of the exercise of subjective rights and enforcement of civil obligations " [8].

The condition is "a future and uncertain event, on which depends the existence (birth or termination) of the civil legal act "[9] .

The last way, unfortunately, does not have a legal definition as well as the previous ones determined, so we will expose the regulation under the old Civil Code which states that "the task is an obligation to give, to do or not to do something imposed to the gratified in the case of acts of liberality."[10]

Although the doctrine treats lapidary this category of rights, we will try do give a relevant definition of the possible rights, considering the time they accomplish and their essence. The possible right is an incomplete right in terms of its intrinsic elements, as it will be the legal act whose object will be a possible right, missing one of the parties, one's consent or even the object that will be the basis of a contract.

In order to exercise such rights it will be expected to occur the missing element to turn it into a full right or full legal act. Failure of the possibility does not lead to the annulment of the act validly concluded but, instead, it will entail the contractual liability of the guilty party (the debtor) in compliance with the regulations and whether the necessary conditions required by law for this type liability are fulfilled.

We think that it is necessary to emphasize a necessary fact for fulfilling the ad validitatem conditions which is that the missing element that will eventually lead to the birth of a right shall not constitute an essential element of the legal act in question.

Possible subjective rights are defined as rights under germ, because they lack either the object or the subject, so one of the necessary components of their existence, giving a lower level of safety than the rights affected by ways [11] . For example, the right to compensation for damage that might occur in the future, as opposed to the right to get monthly cash during the studies is an eventually right, while the second right is a right affected by an extinctive term.

As shown in the example above, this right can generate or not all its effects in the future (if an insured person will cause an injury through an accident to another person, the insurer is obliged to cover the equivalent of the injury).

So, this right exists, but its effects will occur in a given situation, there being even the possibility of not consuming its effects (for example – the person does not produce any injury of another person).

Even if this right does produce any effects, the parties shall not be bound to repay the benefits. Unlike possible rights, in the case of a conditional right, if the condition is fulfilled, the parties are released in the previous situation.

As confirmed by the case law, the ways allow the parties to achieve certain interests in relation to the types of documents where they are inserted, such as execution of certain terms of obligations, termination of contracts, elimination of certain contracts , the exercise of certain rights and so on [12], which is not possible in the case of possible rights.

The possible right need to be distinguished from the right under suspensive condition. The birth of the right under suspensive condition depends on a future and uncertain event, but, when fulfilling it operates retroactively, as we have shown above. The possible right will be achieved along with a future and certain event, without having a retroactive effect. The major difference is that in the case of possible rights, accomplishing the event does not automatically lead to the birth of the right. For example, the good that was the subject of the pact was alienated by the deceased, going out of his estate, so that the heirs will not have any rights to that good. The possible right need also to be distinguished from the right affected by a suspensive term, because in the latter situation, the right should be born immediately, postponing just its exercise.

Other specialists classifies rights affected by ways in provisional rights and possible rights. The concept of the provisional rights was first formulated in the doctrine by our late Professor George Beleiu, in an article published in 1989 within the Romanian Journal of Law. He defines these rights as the rights affected by a term (suspensive or extinctive) or a terminate condition, while the eventual rights are defined as rights affected by a suspensive condition.

The suspensive condition is considered by our doctrine, this being an unanimous opinion, also regulated by the Romanian Civil Code and asserted by the French authors, as expressed by the will of the creditor, and when it comes from the debtor this cannot be a valid condition [13]. When the suspensive condition is not a pure potestative condition (as with the right of access) it gives its holders the lowest level of security because there exists the possibility that it could never be exercised.

According to other specialists possible rights tend to become pure and simple: the right to a future succession is actually a possible property right; when the right to succession was exercised, it has been exhausted, being converted into a pure and simple right of property. Other categories of rights tend to become pure and simple rights such as the right of uzucapionem and the right of accession. The first category of rights, namely uzucapionem right, gives the recipient the opportunity to acquire the proper right, namely the right of property, through acquisitive prescription [14] . As regards the right of access, the example of the doctrine is the present case in which a certain X constructs a building on his land Y [15]. While Y does not use his right of access, his ownership of the building is under suspensive condition. When by an act of will Y manifests its intention to acquire the construction, the possible right of accession is exhausted and simply converted into a pure and simple right of property on the building.

Comparison between possible rights – future rights

To understand the opened debate, we will try a brief comparison of possible rights and future rights, referring to the doctrine opinion on these controversial type of rights. We start comparing these rights with their definition of DEX. According to the DEX “the possible right is a personal right which confers to its holder a low power and safety because it lacks either the object or the active subject, so one of the necessary components of its existence” (eg. the right to compensation for damage that might occur in the future).

As regards the future right, we do not find an express definition in the dictionary, but we can start to define this category of rights from the definition of the adjective "future". Thus, according to the dictionary, the word "future" defines something that will come, who will be there, will appear after the moment; designed in a time to come, a

situation, a condition which will exist. Given these definitions, it was expected that in our legal literature to emerge diametrically opposed views regarding these categories of rights. While some authors admit the existence of both categories of rights, other authors include future rights in the category of possible rights. The first category of authors consider that while the possible rights lack either the active subject or the object, the future rights lack either the active or passive subject, and among them is also M.N. Costin.

The second category of authors state that in both cases it lacks both the object and the subject, not knowing whether the object will exist in the future and if the right will belong to any subject. It should be noted that some authors who accept the existence of possible rights confuse them with expectations or hopes [16] . In the conception of professor George Beleiu the so-called possible rights or future rights are not civil subjective rights, meaning legal possibilities to take a certain conduct and to ask for a proper conduct from the passive subject, provided, if necessary, through coercive state's force [17], but simple elements of capacity of use consisting of the abstract ability to become the holder of a genuine civil right which may be, where appropriate, or simply or affected the ways, opinion shared by other authors, too.

Professor George Beleiu also considers that the terms "possible right" or "future right" are only the abstract ability to become the holder of a genuine personal civil right [18]. According to the opinion of other specialists the difference between these two categories of rights is given by the certainty grade that the rights in discussion have. Thus, while the possible right lack the necessary components of its existence, with a low degree of certainty, the future rights lack both the object and the subject, and provide a lower level of safety than any type of right because it is not known if there will ever be the object of the right or even the subject, meaning the person to whom belongs that right. Among the examples mentioned: the right to compensation for a damage that might occur in the future is a possible right, while the right to a future inheritance is a future right.

As seen in the example mentioned above, it is difficult to make a distinction between the possible rights and future rights. This is due to the fact that the same

example is given by some authors as an example of future right and by other authors, for example as possible right.

Illustrative in this case is the opinion of Traian Ionaşcu with regard to succession law, considering it as a future right, while M. Eliescu deems it as an eventually right [19] . Sharing the opinion of other authors, we consider that both the future right and the possible right are closer to the usage capacity than the civil subjective right. These rights arise, rather, like skills to become a holder of an individual right and not as legal possibilities to take a certain conduct and to demand from the passive subject a certain conduct, being able to call on the coercive force state.

In conclusion, regarding these rights, we support the opinion of professor Gh. Beleiu, a comparison between possible and future rights would be impossible and even unnecessary.

Comparasion between possible rights - real rights

Since Roman times, real right (jus in re) represents that patrimonial subjective right under which the holder may directly and immediately exercise his powers on something, without the participation of another person [2]. Real right is an absolute right, opposable erga omnes, which corresponds to the passive subject negative obligation of not to do, so to refrain from introducing any prejudice to that right [21]. It is accompanied by the tracking prerogative and preference prerogative. Tracking prerogative of the real right holder is the possibility to claim reimbursement from any person that would hold it and preference prerogative is the possibility of the real right holder to fulfill his right with priority over other rights holders.

After making a brief presentation of real rights and their defining elements, we can now compare them with any possible rights, namely property right or the right of succession.

Since Roman times, the property appears as the main real right, so opposable erga omnes. The property right shares its full effects, giving its holder the attributes of possession, use and disposal (ius possidendi, ius utendi, ius fruendi, ius abutendi), attributes that can be exercised absolutely, exclusively and perpetual. The property right is an interference between ius abutendi and the absolute character in terms of enforceability of this right. The Quiritar property perpetuity character in Roman times

was expressed by the adage "ad tempus proprietas constituted non potest" ("property cannot be determined by a deadline") while the exclusive nature is that no owner can be required to share the use of the work with another person [22].

These existing attributes in the Roman period endures till these days, property right remaining an absolute right, nobody may prejudice the beneficiary exercising this right without the participation of another person.

In respect of succession, since the Roman period it is classified as follows: testamentary and intestate (legitimate) [23]. In our view, the right to succession could be ranked prior property right, being an intermediate zone between legal vacuum and complet right. The two modes of inheritance are nothing but ways of acquiring property right. In this regard, art. 557 par. (1) of the Civil Code states that "the right of ownership may be acquired under the law by convention, legal or testamentary inheritance, access, adverse possession, as a result of good possession in the case of movable assets and fruits, by occupation, tradition, and by court order, when it is transferring the property by itself . "

Therefore, the right to succession could be, in our opinion, the main generator of the property right, the effect of its perpetual character, but not a guarantee of this absolute right.

In other words, while ownership is a real right, the right of succession is a possible future circumstances, "a transfer of a deceased person patrimony to a plurality of living persons" [24] as stated by the new Civil Code art. 953 para. (1), but it should be considered the definition of Article 954 para. (1) New Civil Code which states that "a person's legacy opens at the time of his death." In Roman law there were forbidden the agreements towards an unopened succession, because pater familias had to be able to the last moment (usque ad supremum vitae exitum) to make disposition of property upon death, after his free will. The succesion of a living person was invalid because it was assumed that, first of all, he had no object, and secondly because it was considered immoral and it seems to wake up the votum mortis captandae. However, Justinian allowed these conventions if the deceased gave his consent to the conclusion of the act, under the condition of not withdrawing his consent before dying.

Art. 1034 of the Civil Code, establishes the principle that future things may be subject to an obligation (the will is a unilateral, personal and revocable act by which a person, called the testator, orders, in one of the forms required by law, for a time when he will not be alive). However, by art. 954 para. (1) "The legacy of a person opens at the time of his death," per a contrario it is prohibited any act towards an unopened succession, therefore we cannot give up the succession of a living person, nor may alienate any rights that might be acquired over the succession.

Because as long as he is alive, the deceased can dispose of his property as he wishes, the successors have only a possible right or a simple hope, not knowing whether the object will exist in the future and if the right will belong to an individual. This succesoral right will not strengthen until the death of the deceased, whether the thing or the right still exist in his heritage and whether the legal conditions regarding the succession conditions are met.

After we made a short presentation of the rights of succession, now we can expose the differences between this kind of right and the right of the property. The property right is a right existing under the Civil Code, the right of a person to enjoy and dispose of a thing exclusively and absolutely within the limits determined by law. The second right was not born yet, "its birth depends on a future event, that will occur with certainty: the death of the deceased ”[25] . Achieving this future event does not provide the right’s birth. We give an example where the heir is unworthy to inherit, provided by art . 958 C. Civ . For a person to come to inherit under the law, besides the succession ability and inheritance vocation it requires that the person in question is unworthy of the heir to the deceased [26]. The property right provides its full effects, giving his holder the attributes of possession, use and disposal (jus possidendi, jus utendi, jus fruendi, jus abutendi), attributes that may be exercised absolutely, exclusively and perpetual, which we cannot find in the matter of possible rights.

While property right is an existing right, giving the holder the opportunity to have this right (eg. to dispose of it) the beneficiary of a possible right can have it as just a hope, not as a right itself.

Conclusion

In conclusion, after the comparison of this category of rights, the possible rights can be classified between a possible legal vacuum, where no one can talk about a real right, and a possibility born in the persons consciousness that anticipates the right in its fullness. So, a possible right is more than a hope and less than a real right, there being the possibility to materialize, or not in the future . A possible right does not ensure that the beneficiary will in the future acquire the full right - being relevant the example of a future succession. Unlike hope, which is something abstract, this type of rights may be a phase in the process of building a real right . We think this because, in our view, a right can be born and then be built in stages by successive assembly of various constituents which are not yet materialized at the moment of expressing the will for agreement between the parties. The possible right is a right that is able to materialize in the future, the beneficiary being unable, at this time, to dispose of it, so we cannot conclude legal acts based on this law.

Bibliography

Adam I., Civil law. Succesions, All Beck Publishing House, Bucharest, 2003.
Beleiu Gh. , Romanian Civil law, VII-th edition, Universul Juridic Publishing House, Bucharest, 2001.
G. Boroi, Civil law. Genral theory, ALL Publishing House, Bucharest, 1997.
Eliescu M., Course of succesions, Humanitas Publishing House, Bucharest,1997.
Eliescu M., Inheritance and its devolution in Socialist Republic of Romania law,, Acad. Buc. Publishing House, 1966.
Ghestin J., La notion de condition potestative au sens du Code Civil, Paris, 1981.
Ionașcu A., Civil law. General Part, Didactică and Pedagogică Publishing House, Bucharest, 1963.
Lupan E., Sabău- Pop I., Treaty of Romanian Civil law. General part, vol. I, C.H. Beck Publishing House, Bucharest, 2006.
Murzea C., Roman law, All Beck Publishing House, Bucharest, 2003.
Planiol M., Traite elementaire de drot civil, Tomul III, ed. Libraire Cottilon, Paris, 1903.
Pop A., Beleiu Ghe., Course of Civil law. General Part, Bucharest, 1973.
Prescure T., Matefi R., Civil law. General Part. Persons, Hamangiu Publishing House, Bucharest, 2012.
Răuschi Ş., Popa Gh., Răuschi Ş., Civil law. General Theory, Junimea Publishing House, Iaşi, 2000.

References:

[1] A. Ionașcu, Civil law. General Part. Didactic and Pedagogic Publishing House, Bucharest, 1963, p. 42.
[2] For a wider view on this subject see E. Lupan, I. Sabău- Pop, Treaty of civil Romanian law. General Part, vol. I, Ed. C.H. Beck Publishing House, Bucharest, 2006, p. 105.
[3] Ş. Răuschi, Gh. Popa, Ş. Răuschi, Civil law. General theory, Junimea Publishing House, Iaşi, 2000, p .55.
[4] G. Boroi, Civil law. Genral theory, ALL Publishing House, Bucharest, 1997, p.62
[5] T. Prescure, R. Matefi, Civil law. General part. Persons, Hamangiu Publishing House, Bucharest, 2012, p.138.
[6] G. Boroi,op.cit., p.124
[7] T. Prescure, R. Matefi, op.cit.,p.175.
[8] A. Pop, Ghe. Beleiu, Course of Civil law. General Part, Bucharest, 1973, p. 165.
[9] Idem.
[10] Examples of liberalities could be the legate or the donation contract. For a wider view on this subject see G. Boroi, C. A. Anghelescu, op. cit., p. 115.

[11] E. Lupan, I. S. Pop, Treaty of Romanian civil law, vol I - General Part, C.H. Beck Publishing House, Bucharest, 2006, p.66.
[12] T. Prescure, R.Matefi, op. cit., p.175.
[13] J. Ghestin, La notion de condition potestative au sens du Code Civil, Paris, 1981, p. 243- 244.
[14] Acquisitive prescription represents acquiring the right through the passed time.
[15] Accession is a way of acquiring property which consists in incorporating the material of a secondary good to a main one, the owner of the latter also acquiring the property of the secondary. Accession can be immovable when it occurs naturally (silt, avulsion, islands etc.) or artificially (plantations, constructions) and movable.
[16] M.Eliescu, Course of succession, Humanitas Publishing House, Bucharest, 1997, p.39-41.
[17] Aurel Pop, Gh. Beleiu, op. cit., p.167.
[18] Gh. Beleiu , Romanian civil law, VII-th edition, Universul Juridic Publishing House, Bucharest, 2001, p.82.
[19] M. Eliescu, Inheritance and its devolution in Socialist Republic of Romania law, Bucharest Academy Publishing House, Bucharest, 1966, p.300.
[20] C. Murzea, Roman law, All Beck Publishing House, Bucharest, 2003, p.89.
[21] T. Prescure, R. Matefi, op. cit., p. 88.
[22] C. Murzea ,op. cit, p. 101.
[23] C. Murzea ,op. cit., p.119.
[24] M. Planiol, Traite elementaire de drot civil, Tomul III, ed. Libraire Cottilon, Paris, 1903, p. 517.
[25] M. Eliescu, op. cit., p. 39-40.
[26] I. Adam, Civil law. Succesions, All Beck Publishing House, Bucharest, 2003, p. 57.