

THE PRINCIPLES CONCERNING THE RECOGNITION, THE EXERCISING AND THE DEFENCE OF THE SUBJECTIVE CIVIL RIGHTS IN ACCORDANCE WITH NEW CIVIL CODE

Luiza Cristina GAVRILESCU¹

e-mail: luiza.gavrilescu@uaic.ro

Abstract

Recognition of subjective civil rights is achieved through legal norms, being established both at a general level, when it addresses to all rights, as well at a special level, when it covers only certain categories of rights. Exercising of the subjective civil rights involves the concretization of their holder's abilitation to dispose of them, respecting certain principles and limits prescribed by law and by the rules of social cohabitation. The infringement of the external limits in exercising of the subjective civil rights can be sanctioned by filing a legal action in a civil court. Overcoming internal limits in the exercise of civil rights is considered abuse of rights, so the holder can be deprived of the right to obtain legal protection. In both cases, the individual whose rights have been violated can request the support of the coercive force of the state to restore its rights and to obtain damages. The issues of substantive law related to the civil action concerns the admissibility of evidence and the extinctive prescription.

Key words: recognition, exercising, defence, civil rights, abuse of law

The Civil law recognizes wide powers of action for its subjects, in the form of individual rights, called subjective rights. By „subjective civil law” we understand the right of the holder - the active subject of the civil legal relationship - to pursue a certain conduct in accordance to law and to claim a specific obligation the passive subject, corresponding to his right, which if necessary, can be enforced by the coercive force of the state (Dogaru, I., Dănișor D.C., 2011). The converse of the subjective right is the Obligation, namely the bond in law by which the debtor is due to give, to do, or not to do something in favour of the creditor, under the the state's coercion; the obligation is the negative aspect of the obligational report (Gavrilescu, L.C., 2015).

The interdependence of rights and obligations characterizes the content of all civil law relationships, whether it is a real report or an obligation report, yet the size of each content varies depending on the nature of the relationship of civil law (Ungureanu, O., 2005). Thus, the real legal relationship is always a simple report, since the active subject in principle only has rights, and the passive subject, which is not determined, has only a negative obligation not to hamper the exercise of these rights (as, for instance, in a property legal relationship, the active subject, which is the owner of the good, has the right to possess it, to use it and to dispose of it, while all

the other passive subjects, which are undetermined, have a negative obligation, not to do anything liable to harm the owner's right).

An obligational legal relationship could be however, a complex one, when all of its subjects have both rights and obligations (for example, in the sales contract, the right of the seller to get the price for the goods sold entails the obligation of the buyer to pay the price, as the seller's obligations to convey property, to deliver the goods and to ensure its use, correspond to the buyer's right to pretend the transfer of the property and the guarantee for the goods purchased).

MATERIAL AND METHOD

Recognition of subjective civil rights

Recognition of subjective civil rights is achieved through rules enacted by the legislature. Recognition may be:

- a general one: that is set out in the Constitution and reiterated by the content of art. 26 Civil Code. To ensure equality before the law it is stated that natural and legal persons shall enjoy protection and safeguard of their rights;

- a particular one: that it is found in the texts fixed by the Constitution, the Civil Code and other special laws, with respect to certain categories of rights (Irinescu, L., 2015).

¹ "Al.I.Cuza" University of Iași Faculty of Law

From art. 1 of Civil code it follows that the general legal principles were given a normative function, which will directly govern civil legal relationships, when the legal norm or customs do not cover a certain factual situation. The fundamental principles of civil law created the legal basis for the recognition of civil rights and liberties:

- The principle of property is enshrined in Constitution, in Civil Code and in other civil laws. According to the Constitution and to art. 552 Civil code, the property can be public or private. The public property, according to art. 554, belongs to the state or to administrative-territorial units. The holder of the the private property right could be an individual or a legal entity. The Constitution provides in art. 44 para. (2) that "private property is equally protected by law, irrespective of its owner." According to art. 136 of the Constitution, public property is guaranteed and protected by law (Muraru, I., Tănăsescu, E.S. 2008). Regarding the content of the right to private property, taking into consideration the solution enshrined by doctrine, art. 555 of the Civil Code states that : "Private property is the holder's right to possess, to use and to dispose of his property, exclusively, absolute and perpetual, within the limits established by law". Public property is defined by art. 858 of Civil code, as: "the ownership belonging to the state or to an administrative-territorial units on goods which by their nature or by law are of public use or interest, provided that they are acquired in one of the ways provided law". Public property is defined by art. 858 of Civil code, as "the ownership belonging to the state or to an administrative-territorial units on goods which by their nature or by law are of public use or interest, provided that they are acquired in one of the ways provided law".

- The principle of equality before the civil law (principle of non- discrimination) is the application of the fundamental principle of law enshrined in art. 16 para. (1) of the Constitution: "Citizens are equal before the law and public authorities, without privileges and discriminations"(Toader, T., 2015). That principle, which requires the protection of subjective rights civil, without any distinction based on race, nationality, ethnicity, language, religion, social status, belief, sex or sexual orientation or belonging to a disadvantaged category, is enshrined in detail by order Government no. 137/2000 on preventing and sanctioning all forms of discrimination. Art. 30 of the Civil Code reproduces and reinforces this listing criteria as mentioned, adding that in addition, neither colour,

nor age, political affiliation, union, social status, wealth, social origin, culture degree or any analogous situation have no influence on the civil capacity. The texts mentioned are in line with Art. 26 of the International Covenant on Civil and Political Rights of man: "All persons are equal before the law and are entitled, without discrimination, to equal protection from the law. In this respect, the law should guarantee to all persons equal and effective protection against any form of discrimination, such as based on race, sex, language, religion, political affiliation, national or social origin, property, birth or other status ". As regards legal persons, the principle resulting from art. 192 of Civil code, as "legal persons regularly founded are subject to the rules applicable to the legal category to which they belong, as well as to those contained in this Code, unless the law otherwise requires."

- The principle of combining individual and general interests emerges from the interpretation of art. 11, art. 14 and art. 15 of Civil code , concerning the duty to observe public order and morality, good faith in exercising of subjective civil rights. The abuse of law means the exercise of a subjective right by breaching the principles drawn for its proper use (Dojană, I., 2010). Thus, it states that "any natural or legal person shall exercise their rights and perform its civilian obligations in good faith, according to public order and morals" (art. 14 of the Civil Code.), according to art. 11 of Civil code: "it can not be derogated from by agreement or unilateral legal acts of the laws that concerns public order and morals" and that "no law can be exercised in order to injure or defraud another person, or into an excessive and unreasonable manner, contrary to good faith "(Art. 15 of the Civil Code. and art. 57 of the Constitution). Also art. 60 of Civil code indicates that the individual has the right to dispose of himself, if not infringe the rights and freedoms of others, public order or morals.

- Principles of protecting and guaranteeing civil rights are enshrined both in constitutional law (art. 1, art. 18, art. 21, art. 25, art. 26 to 30, art. 44, art. 46) and in art. 26 of Civil code , as well as by international legal norms. Thus, art. 26 of Civil Code ensures that "both civil rights and freedoms of natural persons as rights and civil liberties of legal persons are recognized and guaranteed by law." The beneficiaries of the recognition and of the guarantee of their rights are both foreigners and stateless persons, which are being assimilated with nationals, in respect of civil rights and liberties. This solution is imposed by art. 27 of Civil code and reflects the national treatment system for natural and legal persons who have not romanian nationality. A similar solution is constituted by art. 26 of the International Covenant on Civil and Political Rights. In case the subjective right

recognized by law is disregarded, the injured holder can sue the one who is guilty of this violation, to obtain reparation due. Ensuring the ownership by the state assumes the duty of the public authorities to ensure fair compensation for the owners who have been aggrieved in their rights, even by state institutions, through various administrative measures (Prescure, T., Matefi, R., 2012).

RESULTS AND DISCUSSION

Exercising subjective civil rights

Exercising subjective civil rights involves the concretization of the holder's ability to dispose of them (Beleiu, Gh., 2007). Exercising of specific prerogatives is optional, however it is governed by certain principles:

- compliance with laws, rules and morals of social cohabitation - art. 14 para. (1) of Civil Code;
- compliance with external limits involves framing within material boundaries, by exploiting the right within the area bounded by the nature of the property on which it is carried-for example, respecting the boundary between properties and the legal limits, by harnessing the right to the extent allowed by the prerogatives recognized by law, such as the usufructuary's obligation to preserve the substance of the good given in usufruct;

- compliance with internal and legal limits involves harnessing the right according to the economic and social goal recognized by law and not in order to damage or harm another one, or in an excessive and unreasonable manner - art. 15 of Civil Code;

- compliance with of good faith - art. 14 para. (1) of Civil Code and art. 57 of the Constitution. Good faith was defined as conformity between what a man thinks and says and his actions (Uliescu, M., 2011).

Defending subjective civil rights

Exercising a civil action

Failure to comply with the former two tenets is tantamount to infringement the holder's subjective right, being punished by way of specific actions that can be exercised in court.

The main legal means for defending subjective civil rights is the possibility enabled by the law to the holders of the rights to request, by the way of a legal action, the intervention of the coercive force of the state, in order to achieve compliance or to restore his rights against any person who would ignore or violate it, and by legal constraint imposed through the enforcement of the judgment pronounced. According to art. 29 of Civil Procedure Code, the civil action means all procedural means provided by law to protect the subjective right claimed by one party or of any

other legal circumstances and for defence of parties in litigation.

Thus, where a conflict occurs between parties to a civil legal relationship regarding the existence or its performance, which can not be settled amicably, they will address the court to decide the case. In order to rule the case, the judge must consider the legal relationship deferred for trial. The judicial investigation is achieved through the operation of probation, based on the principle *da mihi factum, dabo tibi ius* and *non idem est non probari et non esse* - which has not been proven it is considered that does not exist. For the substantive law, the admission of evidence presents a particular relevance (*decisoria litis*), since it concerns the merits of the cause, while managing and assessing evidence (*ordinator litis*) are operations specific to procedural law. The rules on admissibility of evidence are no longer laid in the Civil Code, as in the old regulation, but in the new Code of Civil Procedure, which brought together all the issues concerning the evidence- art. 249-382 of Civil Procedure Code civil. In relations with the EU Member States, Council Regulation (EC) no. 1206/2001 establishes cooperation between the courts of Member States in the taking of evidence in civil and commercial matters. The action must be filed within the period of limitation prescribed by law, otherwise the issue of probation is no longer in question. A certain distinction must be drawn between the meanings of the term „right to file a action”:

- The right to court action, in procedural sense is the possibility to bring an action before the courts and to exercise the procedural means governed by regulations which define the civil action, in other words, the possibility to submit applications, to propose evidence,

- to supports the findings, to exercise the remedies provided by law, etc. This right is imprescriptible, meaning that the holder can always address an action in court under art. 51 of the Constitution ;

- The right to court action, in substantial sense, is the possibility granted of the proprietor of a subjective civil right, which has been troubled in exercising it, to obtain the support of the coercive force of the state to ensure protection against any violations and to obtain restoration. According to art. 2500 par. (2) of Civil Code, the "right to legal action" means the right to compel a person using public force to enforce a specific performance, observe some legal situation or incur any civil sanction, if appropriate . This right is prescriptive, in the sense that if the action is brought after the expiry of the extinctive prescription term and the defendant asks, in legal terms, be stated that the

extinctive prescription has operated, the application will be rejected by the court without further proceeding on its judgment on the merits.

Currently, the New Civil Code has created an overall regulation of the extinctive prescription, the rules being submitted in the content of the Book VI, Title I of the Civil Code, entitled "About extinctive prescription, the revocation and the calculation of time limits".

From the provisions of art. 2516 para. (1) of Civil Code appears that this represents the common law, which means that its provisions shall apply in all cases where an action which is not declared imprescriptible and there isn't a distinct regulatory regarding extinctive prescription or the existing one is insufficient. It must be emphasized that in accordance with Art. 2516 par. (2) C. civ., the extinctive prescription of the right to obtain enforcement of a judgment or arbitration or the enforcement order is subject to the rules of Civil Procedure Code, unless the latter would be insufficient. It follows therefore that the rules of the Civil Code are designed mainly to regulate the extinctive prescription of the right of action, which is a matter of substantive law. On the other hand, the provisions regarding the extinctive prescription complement the legal provisions on acquisitive prescription, where these are insufficient - art. 934 of the Civil Code.

The extinctive prescription is no longer regarded as an institution of public policy, since the Civil Code regulations in this matter reveals its private policy nature.

Sanctioning the abuse of rights

Since disregard latter two principles represent an indirect violation of a subjective right, this would be considered an abuse of law. By interpreting *per a contrario* the text of art. 15 C. Civ., the abuse of law consist in the exercising of a subjective civil right contrary to its economic and social goal, as it has been recognized by the law and to the rules of social coexistence and good faith (Ungureanu, C.T., 2013). In order to be consider as an abuse of law, the exercising of the right must fulfil two constituent elements, namely:

- a subjective element, consisting of the exercise of subjective civil law with bad faith ;
- an objective element, that lies in the hijacking the subjective civil right from the purpose for which it was recognized, from its legal goal, fact that could not be explained by a legitimate reason (Boroi, G., Stănciulescu, L., 2010).

So, to characterize the exercise of a subjective right civilian as abusive, it is necessary that that subjective right civil belongs to the author of abuse, since the infringement of the

external boundaries of the right is excluded from the scope of this concept (being delict, an action committed without right). However, it requires that the holder exploit his right contrary to its normal purpose, aiming to commit injury, in bad faith, to the rights of another person (Neculaescu, S., 2011). In the case law it was qualified as an abuse of right the conduct consisting of: the defendant's unjustified refusal to grant consent to his neighbor for obtaining the construction permit, especially if that consent was conditional on payment of a sum of money; the abuse of majority or minority in a corporation, the exclusive use of the probationary period for obtaining free labor etc.

The sanction for the abuse of right lies in the refusal of the judicial authority to protect the right abusively exercised and when it materializes into an unlawful act causing injury, it will attract the civil responsibility (art. 1.349 of the Civil Code). In the latter case, the author of the abuse will be forced to cease his harmful action and to pay for the damages caused. These drawbacks must to be distinguished from those that the neighborhood relations generates normally (Duțu, M., 2015). An application of this case is the solution established by art. 630 of the Civil code, on overcoming the normal drawbacks related to neighborhood relationship (Stoica, V., 2003).

CONCLUSIONS

Subjective civil rights are recognized to all holders if they have acquired under the law, any discrimination that might differentiate their treatment being forbidden. The regulation of the new Civil Code strengthens and develops the constitutional provisions that guarantee and protect the fundamental rights of the subjects of a legal relationship. In order to benefit from the protection the civil law, the holder must exercise their rights in good faith, according to its economic and social purpose. In case of violation of his right, the holder can file a court action to obtain its rehabilitation and damages. The civil action must be promoted within the period of extinctive prescription prescribed by law. The holder which claims support from the coercive force of the state to capitalize his right must first prove his right under the rules of probation.

REFERENCES

- Baias, F., Zamșa, C., 2008 - In: Muraru, I., Tănăsescu, E.S. (coord.), *Constituția României, comentarii pe articole*, All Beck Publishing House, București, 1295.
- Beleiu, Gh., 2007 - *Drept civil român. Introducere în dreptul civil. Subiectele de drept civil*, XI-th edit.,

- revised by M. Nicolae, P. Trușcă, Universul Juridic, Publishing House, București, 92.
- Boroi, G., Stănciulescu, L., 2010** - *Drept civil. Curs selectiv. Teste grilă*, V-th edit., revised, Hamangiu Publishing House, București, 11.
- Dogaru, I., Dănișor, D. C., 2011**- *Dreptul subiectiv și libertățile publice*, In: Dogaru, I., *Texte Juridice*, București, 334.
- Dojană, I., 2010** - *Dreptul subiectiv*, Universul Juridic Publishing House, București, 91.
- Duțu, M., 2015** - *Repararea prejudiciului produs prin depășirea inconvenientelor normale ale vecinătății*, in *Pandectele Române*, 3: 19-30.
- Gavrilescu, L.C., 2015** - *Drept civil. Partea generală*, Universl Juridic Publishing House, București, 52.
- Irinescu, L., 2015** - *Curs de dreptul familiei*, Hamangiu Publishing House, București, 7-9.
- Neculaescu, S., 2011** - *Ambiguități ale teoriei abuzului de drept*, *Dreptul*, 3: 81-103.
- Prescure, T., Matefi, R., 2012** - *Drept civil. Partea generală. Persoanele*, Hamangiu Publishing House, București, 17.
- Stoica, V., 2003** - *Limitele judiciare stabilite în interes privat, în materie imobiliară, în cadrul raporturilor de vecinătate*, in *Dreptul*, 12: 76.
- Toader, T., 2011** - *Constituția României reflectată în jurisprudența constituțională*, Hamangiu Publishing House, București, 16-38.
- Toader, T., Safta, M., 2015** - *Constituția României: decizii ale Curții Constituționale, hotărâri CEDO, hotărâri CJUE, legislație conexă*, Hamangiu Publishing House, București, 26-44.
- Uliescu, M., 2011** - *Buna credință în noul Cod civil, în Justiție, stat de drept și cultură juridică*, Universul Juridic Publishing House, București, 359.
- Ungureanu, O., 2005** - *Drept civil. Introducere*, VII-th. edit., Rosetti Publishing House, București, 84.
- Ungureanu, C.T., 2013** - *Drept civil. Partea generală. Persoanele*, 2-nd edit., Hamangiu Publishing House, București, 93.