

# **CONSIDERATIONS ON THE LEGAL RIGHT OF PASSAGE IN REGULATION OF THE NEW ROMANIAN CIVIL CODE**

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## **Abstract**

The New Romanian Civil Code is governing the legal right of passage in art. 617-620 qualifying it as a legal limit of ownership.

The new regulation of the legal right of passage come to solve a series of cases which have generated controversy and difficulties of application in the old legislation due to the lack of express provisions.

So, in according with art. 617, al. 1 of The New Romanian Civil Code - the owner of the fund which is deprived of access to a public way has the right to be allowed for him the passing on his neighbor fund in order to exploit his own fund.

In according with art. 618, al.2, the New Romanian Civil Code - if the lack of access is attributable to the owner of the dominant fund the court can not determine the right of passage in the absence of agreement of the subdued fund owner (which is required passage).

Also, in according with art. 619 the right of passage can be acquired by the owner of the dominant fund by continuous use for 10 years, by agreement or by court decision.

## **Key words**

New Romanian Civil Code, the legal right of passage, legal limit, the dominant fund

Taking into account the opinions expressed into the doctrine, the Civil code in force<sup>1</sup> reiterates in art. 555 the property's definition from art. 480 of the Civil code from 1865<sup>2</sup>, indicating that "Private property is the right of the titular to possess, use and dispose of a good in an exclusive, absolute and continuous manner, in the limits established by law". It results that the area of developing the private property right is not unlimited, and to this extent, Civil Code settles in Chapter III from Book III, the juridical limits of the private property right, classifying them in the legal, conventional and judiciary limits.

The Civil Code in force took over the doctrinaire<sup>3</sup> opinion according to which natural and legal servitudes (settled in the Civil Code from 1865 in chapter I – Title IV, „On servitudes appearing from the situation of the places” and „On servitudes established by law” (art. 576-619), are not, in fact, servitudes, but legal restrictions brought to the property right appearing from the proximity rapports, so that in the conception of this new normative document, these are

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<sup>1</sup> Law no. 287/2009 concerning Civil Code has been published in the Official Gazette of Romania, Part I, no. 511 from 24 July 2009, has been modified by Law no. 71/2011 and rectified in the Official Gazette of Romania, Part I, no. 427 from 17 June 2011 and in the Official Gazette of Romania, Part I, no. 489 from 8 July 2011. Law no. 287/2009 has been republished based on art. 218 from Law no. 71/2011 to apply the Law no. 287/2009 concerning Civil Code, published in the Official Gazette of Romania, Part I, no. 409 from 10 June 2011.

<sup>2</sup> The former Romanian Civil Code has been adopted and issued in the year 1864, entering in force at 1st December 1865 being also called „Civil codes”, being inspired to its greatest extent from the French Civil Code from the year 1804 but also of other civil legislation like the project of Italian code, the French law on the transcription from 23<sup>rd</sup> March 1853, or the mortgager Belgian law from 10 October 1851, as well as some dispositions from the former Romanian law.

<sup>3</sup> To this extent, to be seen O. Ungureanu, C. Munteanu, *Civil law treaty. Goods. Main real laws*, Hamangiu Publishing House, Bucharest, 2008, p. 527; C. Bârsan, *Civil law. Main real laws*, Third edition revised and complemented, Hamangiu Publishing House, Bucharest, 2008, p. 52; For a detailed treaty of this problem, to be seen V. Terzea, *Servitudes in Romanian Civil Law*, C. H. Beck Publishing House, Bucharest, 2006, p. 13- 206

considered as legal limits of the property right, being settled in section I of chapter III from Book III of the new Civil code.

As a consequence, in the category of the legal limits established by the new Civil code is situated: using waters, gutter's drop, view on the neighbor's property, right of way and other legal limitations (like: the right of way for utilities, the right of way for realizing some works and the right of way for re-entering into possession).

The New Romanian Civil Code is governing the right of way in art. 617-620 qualifying it as a legal limit of ownership.

So, in according with art. 617, al. 1 of The New Romanian Civil Code - the owner of the fund which is deprived of access to a public way has the right to be allowed for him the passing on his neighbor fund in order to exploit his own fund.

In the former Civil Code, the right of way had a juridical nature of a servitude of way established by law, real law, dismembered property.

The specialty doctrine<sup>4</sup> stated in a judicious way that there is a distinction between the legal law of way and the legal servitude of way, difference concerning the different juridical; nature of the two institutions but also their juridical means of defense.

So, it shouldn't be confused with the legal passage servitude *stricto sensu*, settled in art. 616-619 Civil code from the former Civil Code (art. 617-620 from the New Civil Code), with servitude of way established though the action of the human being, this latter being, commonly, a veritable dismemberment of the private property right, and only sometimes a simple limitation of exercising this right in proximity rapports.<sup>5</sup>

Also, as mentioned previously, the Civil Code in force settles in a distinctive manner, under the denomination of "Other legal limits" in art. 621—623 the right of way for utilities,<sup>6</sup> the right of way

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<sup>4</sup> To be seen, V. Stoica, *Civil law. Main real laws*, C. H. Beck Publishing House, Bucharest, 2009, p. 119

<sup>5</sup> For a detailed analysis, to be seen V. Stoica, *Legal right of way servitudes*, in Law no. 11/2003, pp. 53-65.

<sup>6</sup> So, according to art. 621 from the New Civil Code, paragraph 1" The owner compels to allow the passage by his grounds of the

to realize some activities<sup>7</sup> and the right of way to re-enter into possession.<sup>8</sup>

Unlike the legal right of way, established in private interest, as part of proximity rapports, the right of way for utilities is established by law in public interest, in the benefit of the competent public authorities or of the ones to whom has been granted the right to realize also some urbanistic nets. Also, it should be mentioned that, to realize activities in the mining or petroleum field or in the one of electricity, there are special provisions,<sup>9</sup> establishing, for instance, the servitude of way on surface or the legal servitude of way.

In the opinion of recent time specialty literature<sup>10</sup> the right of way, as legal limit of the property right, constitutes the possibility of

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urbanistic nets servicing adjacent grounds or from the same area of the type of water, gas or other similar pumps, of the channels and or the electrical cables, underground or aerial, depending on case, as well to any other installations or materials with the same purpose”.

<sup>7</sup> According to art. 622, from the New Civil Code, paragraph 1. „also, the owner is obliged to allow the usage of his grounds to realize some works which are necessary to some activities, as well as the access of the neighbor on this grounds or for cutting branches and collecting fruits, in exchange of some indemnifications, it adequate”.

<sup>8</sup> To this extent art. 623, paragraph from the New Civil Code indicates that the Owner of a ground cannot prevent the access of another to re-obtain the possessions of his property, arrived by change on those grounds, in case it has been announced previously, and paragraph 2 of the same article indicates that, in all cases, the owner of the grounds has the right to a correspondent indemnification for prejudices caused by re-entering in possession, as well as for the ones that the property caused the grounds.”

<sup>9</sup> To this extent, to be seen the following normative documents: Law no. 85 from 18<sup>th</sup> March 2003 of mines, published in the Official Gazette of Romania, Part I, no. 197 from 27<sup>th</sup> March 2003 , Law no. 238 from 7<sup>th</sup> June 2004 of the petroleum and Law no. 13 from 9<sup>th</sup> January 2007 of the electricity, published in the Official Gazette of Romania, Part I, no. 51 from 15<sup>th</sup> January 2007, with the modifications and completions realized ulterior .

<sup>10</sup> To be seen B. Florea, *Civil law. Main real rights*, Juridical Universe Publishing House, Bucharest, 2011, p. 59

the owner of the ground connected to the access at the public road dominant ground) to have access at the public road from the ground of the neighbor (locked ground) for the exploitation of own ground.

It results that, in the vision of the new settlement, the titular of the right of way can be only the owner of a ground which is a field attached on access to the public road (named dominant ground, so the field in favor of which is established the right of way). This formulation leads to the conclusion that the owners of these fields, having a road of access to the public road, would not take advantaged on the right of way, but this supposes grave inconvenient or is dangerous, situation permitted by the former Civil Code and accepted, in equal extent by the judicial doctrine and practice.<sup>11</sup>

The right of way has an indefeasible character and ceases at the moment when the dominant grounds achieve another access to the public road.

Exercising the right of way should be realized by respecting the following conditions:

- not to be brought but a minimal encumbrance for exercising the right of property on the locked ground;
- in case several closed grounds with the dominant one have an access to the public road, the passage would be done on the grounds of that bringing less prejudices.<sup>12</sup>

Also, a special provision is the one that, in case the lack of the access to public road is due to some juridical partition or sale deeds, etc, should be maintained the previous road of access.<sup>13</sup>

Another provision with novelty character, contained in the new Civil Code is the one that, in case the lack of access is imputable to the owner of the dominant grounds, the trial instance is not able to establish the right of way, in the absence of the consent of the locked ground's owner (of which the right of way is requested). Even in case when this consent would exist, the owner of the locked grounds should be reimbursed with the double of the indemnification that

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<sup>11</sup> V. Stoica, op.cit. p. 121; L.M. . Crăciunescu, *Limits private property ownership*, Wolters Kluwer Publisher, 2009, p. 206

<sup>12</sup> B. Florea, op. cit. p. 59

<sup>13</sup> To be seen M. Uliescu (coordinator), *New Civil Code. Commentaries*, second edition, revised and added, Juridical Universe Publishing House, Bucharest, 2011, p. 85

normally would be due to him.<sup>14</sup> Concerning this latter case, in the specialty literature, it has been considered that the provision that indemnification be double can hardly be accomplished meanwhile it cannot be exactly known which is the total of the indemnification for that to be doubled.<sup>15</sup>

To this extent, the legislator offered the solution, establishing, as a general title the fact that losses suffered as a result of exercising the right of way by the owner if the dominant grounds, the owner of the locked grounds should be indemnified, and in case parties do not reach a common agreement concerning the values of the indemnifications, it is called to be pronounced the trial instance<sup>16</sup> (according to the art. 620 from the New Civil Code).

According to the dispositions of art. 619 from the Civil Code concerning the elongation and the modality of exercising the right of way, these are determined by the consent of the parties, by judicial decision or by continuous usage for a period of ten years.

As a conclusion, the new regulation of the right of way come to solve a series of cases which have generated controversy and difficulties of application in the old legislation due to the lack of express provisions.

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<sup>14</sup> . Dănescu, L. Popoviciu, *Law of private property in the new Civil Code*, in Civil Code, annotated by the experts of the Top Lawyer's house in Romania, Collection Lex Dex, Financial Week., p. 140

<sup>15</sup> M. Uliescu, A. Gherghe, *Civil law. Main real rights*, Juridical Universe Publishing House, Bucharest, 2011, p. 119

<sup>16</sup> Civil code 2011 to be understood by everybody, Adevarul Holding Publishing House, Bucharest, 2011, p. 243

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