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LIMITATIONS OF THE WILL OF THE TESTATOR IN THE CASE OF RIGHTS HELD IN HISTORIC COMMUNITIES OF PROPERTY OWNERS IN ROMANIA

A. C. TUDOR-TODORAN, B. I. TUDOR-TODORAN

Alexandra Cristina Tudor-Todoran[1], Bogdan Ioan Tudor-Todoran[2]
[1] Faculty of Law and Social Sciences,"1 Decembrie 1918" University of Alba Iulia, Romania
E-mail: alexandra.tudor@uab.ro
[2] Bucharest Bar, E-mail: bogdan@nostrasilva.ro

Abstract: *Since 2008, Romania's historical treasury also includes historical property owner communities, which regained legal status under art. 26-28 of Law no. 1/2000. These communities, such as freeholder communities, compossessorates and frontier forests each had different specific organizational and functional rules prior to the abusive takeover of their lands by the communist regime. Through the 1910 Forestry Code, a normative act that regulated until 1948 the functioning of these associative forms, "local practices" were validated, and rules that diverged from the civil code and procedure were established. Even today, general rules governing the freedom of will of the owner of property are not entirely applicable to jointly managed properties by these communities. Thus, with the exception of some transactions between people who are already members of the associative form, legal inheritance is the only way by which co-ownership rights can be acquired within these special legal entities. The possible testamentary transmission of these rights is also limited to the circle of legal heirs.*

Keywords*: Romania's historical treasury, historical property owner communities, freeholder communities, compossessorates, frontier forests.*

Introduction

Law no. 1 of January 11, 2000, by art. 26-28, regulated for the first time, explicitly, the possibility of the reconstitution of the property right in favor of the historical communities of owners, compossessorates, communities of collectively owners, communities of indivisible owners, frontier forests and other associative forms assimilated to them. Prior to this moment, throught point no.31 of Law no. 169 of October 27, 1997 a new article was introduced in Law no. 18 of February 20, 1991, art. 41^1, which established that the owner that used to have property in compossessorates can request the reconstitution of the ownership right for the lands they belonged to compossessorates or communities of collectively owners. This regulation seemed to order an individual reconstitution and not within the associative forms, situation corrected by Law no. 1/2000, which established retrocessions only within the old communities of owners (althought, through a regrettable technical legislative error, the provisions of art. 41^1 became art. 46 upon the republication of Law no. 18/1991, can still be found today, October 2024, in the first land fund law).

Analysis of legal provisions

By Emergency Order no. 102 of June 27, 2001, amended Law no. 1/2000, and in art. 26 two new paragraphs were introduced. Paragraph 7 had the following wording: "*In the event that there will be no legal heirs of the members of the associative forms established in the accordance with the provisions of this law, their respective quotas become the property of the state and for the use of the respective local council*". Paragraph 8 provided: "*The members of the associative forms cannot alienate their shares among themselves or to persons outside them and cannot transfer the rights by will or donation, but only by legal inheritance*".

By Law no. 400 og June 17, 2002, paragraph 8 of art. 26 is modified and receives the following wording: "*The members of the associative forms cannot alienate their shares to persons outside them*".

Through the amendments made to Law no. 1/2000, respectively by Law no. 247 of July 19, 2005 paragraph 8 became paragraph (6), with the following wording: "*The members of the associative forms in common or indivision forms cannot alienate their shares to persons outside them*", this regulation being in force at the date of this study.

A first analysis of these provisions was made by Decision no. 173 of June 12, 2002 pronounced by the Constitutional Court. The authors of the exception of unconstitutionality showed that the art. 28 paragraph (7) of Law no. 1/2000 "*violates both the provisions of art. 42 of the Constitution, which guarantees the right to inheritance, as well as those of art. 41, as it restricts the right of disposal*". Paragraph (8) of the same article would have represented "*a violation of art. 41 paragraph (1) of the Constitution, by the abusive restriction of the owner´s right of disposal, this time in the case documents between living persons*".

The Constitutional Court, responding to the critics of the authors of the exception, emphasized "*the atypical nature of the ownership right over forest lands reconstituted in favor of some associative forms that have not existed for a very long time in the legal system of our country*".

Historical communities of owners were recognized as such "*unusual forms of regulation*", the legislator bringing back "*ancient forms of organization*" to social life. The constitutional judges established that we are in the presence of "*a form of property that is reborn, through its pre-existing reconstitution*", and if it were not a "*traditional organization (which has proven its viability throughout history), singular and exceptional*", doubts would arise of constitutionality.

It was recognized that "*this archaic form is a sui generis modality of ownership*", and if indivisibility and its perpetual character were eliminated, a legal regime would be established that did not exist in the past. The Constitutional Court also held that "*admitting the replacement of a member of the association, as an effect of the will of the owner of a share, the will expressed by deed between the living or by will, would have the same effect: the abolition of undivided, forced and perpetual property*". It has been shown that common property can correspond either to the nature of the good or to a statement of the law.

The constitutional litigation court established that "*the reconstitution of the right of ownership in the case of forest areas located, on the date of their acquisition by the state, in the common ownership of the listed associative forms can only be conceived within those forms; the property right is to have the configuration, prerogatives and, in general, the legal*

regime of that era". The legal regime of these properties takes into account "*the economic and social particulatiries of the forms of exploitation prior to the transfer of the lands to the ownership of the state*".

It was concluded that "*the property right is reborn in favor of the former owners or their heirs, under the imperative conditions established by the legislator, without the regime thus regulated representing a deviation from the constitutional principles regarding the protection of private property*".

The limitation of some prerogatives of the property right stems from the fact that this right carries over a property in a perpetual forced indivision; the respective goods are administered and exploited exclusively in the associative forms provided by law. A particularity of this mandatory legal regime is that "*the mortis causa transmission of this share can only be done by legal inheritance*". It was found that the criticism regarding the violation of art. 42 of the Constitution, regarding the guarantee of the right to inheritance "*because the law is the one that establishes the forms of inheritance, and in this case the regulation of the right to inheritance is made in consideration of the special legal regime of this associative form*".

Although subsequent to this decision of the Constitutional Court, the analyzed provisions were modified, the prohibition of the alienation of shares between members of the associative form being eliminated, as well as the phrase "*I cannot transfer the rights by wil or donation, but only by legal inheritance*", the prohibition of alienation of rights to persons outside the community of owners was maintained.

However, the courts including in recent decisions, build their considerations starting from the ruling of the Constitutional Court recorded in Decision no. 173 of June 12, 2002. An argument in favor of such an interpretation is that in the subsequent decisions of the Constitutional Court, reference was made every time to its jurisprudence and to the concrete indication of the decisions by which the same exception was previoulsy analyzed with regard to the same text of law, decisions and arguments that the Constitutional Court kept.

For example, Decision no. 579 of May 4, 2010, of the Constitutional Court refers to the Decision no. 521 of May 31, 2007 of the Constitutional Court, noting that "no new elements have intervened to determine the reconsideration of the jurisprudence of the Constitutional Court, both the considerations and the solution of the mentioned decision are also valid in the present case". Decision no. 521 of May 31, 2007 of the Constitutional Court refers, in turn, to Decisions no. 584 of November 8, 2005 and no. 210 of March 7, 2006 of the Constitutional Court. It was noted again that "both the considerations and the solutions of the mentioned decisions are also valid in the present case, since no new elements have intervened to determine the reconsideration of the jurisprudence of the Constitutional Court". Finally, Decision no. 584 of November 8, 2005, but also no. 210 of March 7, 2006 of the Constitutional Court refers to Decision no. 173 of June 12, 2002 of the Constitutional Court, noting that "both the considerations and the solutions of these decisions are also valid in the present case, as no new elements have intervened to determine a reconsideration of the Court´s jurisprudence in the matter". Related to these successive references, the considerations of the Decision no. 173 of June 12, 2002 are still valid today.

Case studies

We referred, in another study (Tudor-Todoran, 2023:357-371), to the situations in which the courts were confronted with various legal strategies for circumventing the legal provisions analyzed above, situations that were sanctioned because "*in an evasive manner and by defrauding the legal provisions on the basis of which it was established and the community is functioning, undivided parts of its land were alienated to a person outside the community*". It was shown that "*the purpose of the regulations, contained in art. 26-28 of Law no. 1/2000, was to reconstitute the former forms of joint exploitation of communan forest and pasture areas of the former owners or their heirs*", and "*third parties do not have any rights over the reconstituted lands in favor of the composer*" since "*the purpose of the association is to maintain the continuity of the old community*" (Civil Sentence no. 216/2018). The same court also showed that the modification of the statute in the sense of introducing the possibility of receiving members who do not have the status of elders represents a "*modification contrary to the law and cannot be considered as a simple change in the perspective of the members of the community, because it does not represent changes in form, but of substance that flagrantly contravene the provisions of art. 28 paragraph 6 and 7 of Law no. 1/2000* ".

Other courts (Decision no. 879/2023) have shown that the statutes of associative forms, even if they allow alienations outside the community, "*can only be interpreted through the prism of the provisions of art. 28 paragraph 6 and 7 of Law no. 1/2000, respectively in the sense that the register of composers can be modified only with the consent of the general assembly on the basis of sale-purchase deeds concluded by the composing members as well as on the basis of legal inheritance documents, since only in these conditions are the provisions of art. 28 paragraph 6 and 7 of Law no. 1/2000 which prohibit any form of alienation, total or partial, of shares to persons outside the community*".

In the same decision, starting from Decisioin no. 173/2002 of the Constitutional Court, it was held that "*compositional rights can be transmitted, inter vivos, only between persons who already hold membership in the association, and mortis causa, only by legal inheritance, and not by bequest, regardless of whether universal, with universal title or with private title*". In this case, based on the provisions of art. 1247 paragraph (1) Civil Code, it was held that the sanction that intervenes must be the absolute nullity of the will by which the establishment of the lagacy with a special title on the compositional rights was ordered in favor of the person who was not a member of the associative form at the time of the manifestation of the will of the deceased. Another consequence, the application of the principle resoluto iure dantis, resolvitur ius accipientis, is that the reason for the nullity of the will also extends to the cortificate of legal and testamentary heir.

In another case (Decision no. 405/2024) in which the legality of a contract of donation of compositional rights to a person who did not have the capacity of a member was analyzed, it was held that in the situation where through a constract "*the compositional rights were alienated in a manner prohibited by law, its object it is an illegal one, a circumstance that attracts the absolute nullity of the contrcat*".

Another court (Decision no. 44/2024) established that the prohibition of the alienation of one´s own shares to persons outside the constituent members is a consition that "*refers to the fact that such alienation of individual shares is permitted by any legal act when the*

beneficiary is another constituent member, and when the beneficiary does not have this quality, he cannot be third party, except in the case of legal inheritance, because the legal heirs of the community members are hos successional vocation by the power of the law and therefore the transfer of such rights by way of testamentary inheritance is not recognized, acceptable".

Therefore, the rights within historical communities of owners can only be transmitted to the legal heirs, which are: the surviving spouse, the descendants (the children of the deceased, the children of their children and so on, without limitation regarding the degree of kinship), the ascendants (parents, grandperents and so on), and collateral up to the fourth degree inclusive, according to the art. 963 paragraph (1) san (2) Civil Code.

On the other hand, the testamentary inheritance "*wears the form of an alienation*", not being collected under the power of law as in the case of legal inheritance, being an act of disposition of the testator regarding his assets.

In another case (Decision no. 15/2024), in which, on appeal, the Court concluded that "*the statute of the composer could derogate from the legal regime and that the members of the composer are obliged to resoect this statute established by voluntaru agreement of the parties*", nothing that the statute provided for the possibility of alienating the rights and to persons who were not members of the associative form, the Court of Appeal, rejudging, changed the decision of the court of appeal, establishing that "*the provision of the statute invoked in the appeal had to respect the legal norms that regukated the regime of lands with forest vegetation owned by the community, including those that limited the right to alienate there lands*".

In another situation, in which the plaintiff invoked a donation contract concluded in authentic form, by which he has given a right within a community of property owners, the appeal court held that it was not proven that the donor "*had any dram in the community or membership in order to be able to transmit, in turn, the rights that he woul have held within the associative form to the appellant*", establishing that only annexes 54 and 51 (regulated by Regulation of land fund laws approved by Government Decision no. 180 of March 14, 2000) or annex no. 39 ((regulated by Regulation of land fund laws approved by Government Decision no. 890/2005) can prove membership of the associative form (Civil Decision no. 546/2023).

Finally, an unprecedented case, through the arguments retained by the court, stablishes, in the task of public notaries, a much more rigorous verification of the documents presented by the parties in order to proceed to the conclusion of a notarial deed regarding rights in the historical communities of owners. It was noted, in the sentence of the first instance (Civil Decision no. 529/20222) that "*simple certificates, issud by the 4 municipalities, were submitted in the succession files, which would attest to the quality of the deceased´s inheritance, as well as the rights he benefits from*". However, the court considered that in the notarial file "*annexe 54 should also be submitted, as well as the decision on the validation of the County Land Fund Comission, from which it can be seen that the deceased was validated with rights (lei) in those communes, at the time of the reconstitution of the right to property*", in the absence of these documents, the judge appreciating that the quality of heir of the deceased whose succession was debated was not proven before the notary. In this

context, the court ordered the absolute nullity of the heir´s certificates, since in them they were retained as part of the deceased´s estate, goods that did not exist in his patrimony at the time of the opening of the succession. In the same case, the Court held that "*only by submitting certificates issued by the respective community – under the conditions in which no other additional documents are invoked and submitted to base those certified by the certificates, and the deceased held rights in commons derived from successions that have not been debated*" the rights held cannot be proven with certainty[1]. It was also held that only by submitting certificates issued by the respective community – under the conditions in which no other additional documents are invoked and submitted to base those certified by the certificated, and the deceased held rights in the community derived from successions that did not were debated, "*it would end up being accepted that the rights of co-individuals can be established by the community, and not by the parties (by agreement), or, in otherwise, by the public notary or the court*". And the appeals court held[2], in agreement with the first two courts, that "*the governing bodies of the community do not have powers related to the debate of the successions of the members of the community in terms of the rights held within them*" and that the certificates issued by the community must always be accompanied by the decision to validate the right of ownership of the associative form and of the annex with fellow members and their rights.

Conclusions

In conclusion, the doctrine must focus more on these historical communities of owners and deepen all aspects of the regime this historical treasure of Romania, since, at the national level, there are hundreds of thousands of people who are members of these communities, and the legal life is meets more and more often with aspects related to the existance, functioning and activity of associative forms of property.

REFERENCES

1. Tudor-Todoran Bogdan Ioan, „Comunităţile istorice de proprietari, un tezaur istoric al României", în Studii de drept al patrimoniului cultural și natural. Patrimonium. In Honorem Augustin Lazăr, Editura Universul Juridic, Bucureşti, 2023.

Legislation

2. The Civil Code of Romania [online] COD CIVIL 17/07/2009 - Portal Legislativ
3. Law no. 1 of January 11, 2000 for the reconstitution of ownership rights over agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and Law no. 169/1997.
4. Law no. 169 of October 27, 1997 regarding the amendment and completion of the Land Fund Law no. 18/1991.
5. Law no. 18 of February 20, 1991.
6. The government´s emergency ordinance no. 102 of June 27, 2001 regarding modification and completion of Law nr. 1 of January 11, 2000 for the reconstitution of

[1] Decision no. 819/A of November, 15, 2023, pronounced by the Vâlcea Court in file 789/198/2018.

[2] Decision no. 479/2024 of December 17, 2024, pronounced by the Piteşti Court of Appeal in file 789/198/2018.

ownership rights over agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and Law no. 169/1997.

7. Law no. 400 of June 17, 2002 for approval The government´s emergency ordinance no. 102 of June 27, 2001 regarding modification and completion of Law nr. 1 of January 11, 2000 for the reconstitution of ownership rights over agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and Law no. 169/1997.
8. Law no. 247 of July 19, 2005, regarding the reform in the fields of property and justice, as well as some adjacent measures.
9. Decision no. 173 of June 12, 2002, regarding the constitutionality of the Law for approval The government´s emergency ordinance no. 102 of June 27, 2001 regarding modification and completion of Law nr. 1 of January 11, 2000 for the reconstitution of ownership rights over agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and Law no. 169/1997.

Webography

10. LEGE 1 11/01/2000 - Portal Legislativ, website accesed on 24.10.2024.
11. LEGE 169 27/10/1997 - Portal Legislativ, website accesed on 24.10.2024.
12. LEGE nr. 18 din 19 februarie 1991 fondului funciar, website accesed on 24.10.2024.
13. OUG 102 27/06/2001 - Portal Legislativ, website accesed on 24.10.2024.
14. LEGE 400 17/06/2002 - Portal Legislativ, website accesed on de 24.10.2024.
15. LEGE 247 19/07/2005 - Portal Legislativ, website accesed on 24.10.2024.
16. DECIZIE 173 12/06/2002 - Portal Legislativ, website accesed on 24.10.2024.
17. Dosar-2091-205-2017-sentinta-civila-216-din-23.01.2018-Judecatoria-Campulung.pdf, website accesed on 24.10.2024.
18. Tribunalul BUCUREŞTI - Informaţii dosar, website accesed on 24.10.2024.
19. Decision no. 879/2023 of 4.07.2023, cod RJ deg566e63 [online] https://rejust.ro/juris/deg566e63, website accesed on 24.10.2024.
20. Decision no. 405/2024 of 24.07.2024, cod RJ 729883gge [online] https://rejust.ro/juris/729883gge, website accesed on 24.10.2024.
21. Decision no. 44/2024 of 6.02.2024, cod RJ 4e865e283 [online] https://rejust.ro/juris/4e865e283, website accesed on 24.10.2024.
22. Decision no. 15/2024 of 25.01.2024, cod RJ g87g8e388 [online] https://rejust.ro/juris/g87g8e388, website accesed on 24.10.2024.
23. Civil Decision no. 546 of June 21, 2023 pronounced by the Vâlcea Court in file 455/198/2023.
24. Civil Decision no. 529/2022 of September 28, 2022 pronounced by the Brezoi Court in file 789/198/2018.