

AUTHENTIC INSTRUMENT – MEANS LEGAL PROTECTION OF PROPERTY RIGHTS ATTRIBUTES GRANTED BY THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE

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Abstract

Legal protection of human rights represents a major challenge in modern society, both in national and European perspective.

The subject of this study is to analyze the advantages of the authenticated documents concerning the protection of property rights of individuals, in terms of Romanian citizens, as well as foreigners, with individualization of particular aspects concerning the ownership of citizens of Member States of the European Union, compare to third-country nationals. An analysis of the land acquisition rights is required when foreigners are involved, as of January 1, 2014 new provisions of Law no. 312/2005 will come into effect, affecting the EU citizens. The legal provisions and the practical aspects are likely to prompt extensive debate not only in the legal national and European circles, but also in the mass-media across Romania and also in the European governing bodies.

Keywords: Authentic instrument, human rights, protection of property rights, new legislation

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Legal protection of human rights represents a major challenge in modern society, both in national and European perspective.

The subject of this study is to analyze the advantages of the authenticated documents concerning the protection of property rights of individuals, in terms of Romanian citizens, as well as foreigners, with individualization of particular aspects concerning the ownership of citizens of Member States of the European Union, compare to third-country nationals. An analysis of the land acquisition rights is required when foreigners are

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involved, as of January 1, 2014 new provisions of Law no. 312/2005 will come into effect, affecting the EU citizens. The legal provisions and the practical aspects are likely to prompt extensive debate not only in the legal national and European circles, but also in the mass-media across Romania and also in the European governing bodies.

According to the Universal Declaration of Human Rights adopted by the UN General Assembly on 09/10/1948, all Member States have an obligation to ensure the legal protection of persons, both for its own citizens and citizens of other countries and stateless persons.

In this regard were included in the Constitution, but also in special laws, details regarding the protection of human rights, including property rights provided for in Art. 17 of the Declaration and secured by art.44 of the Constitution. But not only ownership is protected and guaranteed by the Constitution, but also the other rights laid down in the Declaration can be found in the fundamental law, Chapter 2 – Rights and Freedoms, art. 22-53.

Expression or exercise of these rights in material form, most often takes the form of an authenticated document because on one hand the authentic document is recognized by all institutions and state authorities, on the other hand notary public is a person vested with the necessary authority power under law to give this category of acts.

Thus, from a simple authentic statement necessary to obtain social assistance or unemployment benefits, the conversion of driving license or passport issuance or certain forms of state support in various areas, or to declare loss of title property until the deed of sale, the certificate of inheritance, or the act of voluntarily sharing or the will, all these categories of acts and more, are just examples of how individual rights are protected through the document.

Practical exercise of the right to social assistance, the right to travel freely, the right to social security, right to education, the right to association, the right to marry and to dissolve the marriage, etc. often takes the form of an authentic document and the notary public is entitled to mediate the free expression of these rights and establish procedures laid down in law for this purpose.

Since the protection of individual rights is extremely vast subject, the purpose of this paper is the analysis of the authentic document as a specific means of protection of property rights – one of the most important and tangible individual rights.

The main regulations by which the state guarantees and ensures the right of property, mainly the new Civil Code and the new Civil Procedure Code, republished, with subsequent amendments make numerous references to authentic documents. Thus, while the current Civil Code sets/ establishes mandatory requisite for the validity of legal documents, the Code of Civil Procedure outlines the probative value of the authentic document. Furthermore, according to art.638 and art. 639 of the Code of Civil Procedure republished and amended, it is established the principle that authentic documents are enforceable and can be put into enforcement, and the document authenticated by notary public that finds an outstanding, liquid and payable debt is also enforceable, no longer requiring enforceable investment by the court, which is particularly relevant in enforceable investment of pre-contracts of sale. Following the enactment and entry into force of the new codes – Civil and Civil Procedure, the regulations changes were authentic, the probative value and enforceability thereof.

Should be noted that the old code contained regulations concerning the authentic document, its value and importance as evidence of ownership, but also as evidence, as well as its effects.

The provisions of the new Civil Code state in many cases the authenticity of the document in terms of legal validity. In this regard reference can be found regarding the field of family law (marital status, adoption, parentage, curator, marriage settlements, divorce involving minor children or not etc.) in the matter of legal regulation of the land rights book, in the field of real estate and dismemberment, but also of securities rights, inheritance matters, in commercial law and in other branches of law. Basically we can say that the authentic document is one of the most important tools to protect individual rights.

The importance of the document as a means of protecting individual rights, especially property rights is demonstrated by compulsoriness of authentic acts, under penalty of nullity when it comes to legal documents related to the ownership of people. Thus, art. 589 conditions the registration of ownership rights in the land ownership book under the convention of parties if is in 'authenticated form or judicial decision', measurements repeated in art. 888. Art. 889 paragr. 1 provide that 'the owner may waive his right to property by notarial authentic statement'. Also reference to the authentic form of the act is done, under penalty of nullity, to the donation (article 1011 section 1), form also required for the authentic testament (article 1043 section 1), the declaration of non-acceptance (art. 1111) or waiver of succession (art. 1120 p. 2), Art. 1144 – in inheritance proceedings, separation can be achieved by agreement and if the property is in real estate, the separation agreement must be concluded in authentic form, under penalty of nullity. Likewise, the legislature imposed a mandatory requisite documents relating to immovable property or their dismemberments, the penalty being absolute or relative nullity, as applicable, as provided in art.885, art. 888 and following, art.242 paragr. 3 – for legal persons (transmission of ownership right on real estate), Art. 774 – fiduciary contract; also, under penalty of nullity, there must be concluded in authentic form the sale of an inheritance (art. 1747 paragr. 2), conventions by which we shift or establish real immovable property (Art. 1244), maintenance contract (art. 2255) and the mortgage contract (art. 2378).

The reason for which the legislature has established absolute nullity of acts that are not authenticated when it is a requirement of the law is that the authentic form is required due to the high degree of safety of act and due to the greater protection offered by the solemn character of this form. To be authentic, an act must take a certain form, you must have certain terms and targeted content to be drafted and signed in certain circumstances, public notary is the person responsible for checking formal conditions during authentication.

The term "authentic document" is defined in art. 269 of the Civil Code, first paragraph stating that "the authentic act is the document issued or, where appropriate, received and authenticated by a public authority, a notary public or other person entrusted by a state public authority, in the form and conditions established by law". Same law regulates the content of art. 270 proving its strength, namely that "the authentic

act makes full proof against any person, until it is declared as false, regarding the observations made by the person who authenticated the document, under the law".

The authentic act, prepared with solemnity and conditions provided by law, proof of ownership, or other legal relations are in direct correlation with proof of ownership by up to false.

Should be noted that the evidential value of the authentic act imposes distinction between those claims regarding the observations made by the notary public through his senses (presence of the parties, their identity, consent, signature and date of the document), which can be combated only by the false registration procedure, benefitting from total presumption of veracity towards the assessment of exercise capacity (altered partially or totally) – which exceeds the level of specialized training of the notary (if the notary has suspicions in this respect he can require a medical certificate or deny authentication of document requested) or from assessing the validity of the consent expressed by the parties before it, the notary public cannot be accused of any defects of consent (fraud, error, violence), where the constraint was not explicitly stated¹.

It is necessary to emphasize that if the notary public becomes aware of the existence of constraints affecting the control of the parties or either party finds lack of judgment, or if the parties insist on inserting an unlawful clause in the act, he is obliged to refuse authentication of document and where applicable, to notify or inform the authorities or competent institutions when appropriate.

These obligations of the notary are part of the global legal regulation of the authentic act, being another guaranty, a further proof of how the legislature intended to protect the property rights of the person through the instrument notarized. The fact that either party has the option to notify any defects in their will, or even the notary, in case he has suspicions about any aspect of legality and/ or free agreement of the parties shall refuse the authentication or even inform, if circumstances require it, other state institutions.

As such, there is no doubt regarding the absolute importance that the legislature has given to the authentic document, and the weight assigned to entries in it, which is likely to further empower notary public in the performance of his duties.

Early discovering of illegal acts, improvement of security and safety elements of notarial acts, but also increase in the level of training and the degree of legal responsibility of notaries public, and why not – even the intense media coverage of cases identified and resolved by the prosecution will lead to a decrease in crime and prevent more effectively the offenses of forgery in the notarial activity.

All these actions are aimed at securing the authentic document, and thus more efficient protection of human rights, especially the right of ownership, requirement imposed by European legislation and practice.

Ownership generally has a deep heritage character and the property enjoys a special legal regulation, arising from the need to protect this right efficiently.

Thus, based on the general rules of the Civil Code and Civil Procedure Code, the legislature inserted in all the legislative acts which affect the field of real estate, provisions for mandatory requisite for acts that constitute, transfer, alter or extinguish legal relations related to real estate. Thus, any transfer of ownership, regardless of the

¹ Mircea Ionescu, *Înscris autentic în reglementarea noului cod civil și a viitorului cod de procedura civilă*.

manner of performance, must be made only by an act concluded in authentic form, under penalty of nullity. Whether it is a sale, a donation, a maintenance contract, an act of real estate exchange, a will, an estate or an act that refers to a dismemberment of ownership, the applicable law imposes the authentic form. In these circumstances it is clear that the legislature intended that the most effective means of protecting property rights should be the authentic instrument, which is why nullity was imposed in cases where the act doesn't take the form required by law.

The high degree of safety of the instrument lies in the legal requirements for its validity. Thus, in addition to the specifications of the art.269 of Civil Code which defines the authentic act, as 'the document authenticated by a notary public or other person vested with public authority in the form and conditions established by law', the legislature has set out in detail the authentication procedure by means of Law No.36/1995 – of notaries public, which is the basic legal act that establishes the main rules and authentication procedure (Chapter V – Procedure of notary acts, Section 2 – Authentication of documents – from Law no. 36/1995 republished), mentioning what other people besides the notary public are entitled to authenticate documents, but also the limits of those powers (art. 8, art. 18 of Law no. 36/1995R). But authentication of legal documents among the living with incorporation or ownership transfer effect, and of acts on choosing, changing and winding matrimonial regime are the exclusive competence of the notary public. Authentication procedure of documents in real estate, but also those involving the movable property involves verifying certain documents, certain registry offices, checking the conditions of validity for document authentication as well as the agreement of the parties, identity and existence and validity of rights, all of which are elements that finally provide a high degree of protection of property rights.

Browse through these stages, collecting all documents and information necessary, the solemnity required by law to authenticate the document, verifying the identity of the parties, all these requirements established by law for the notary public, are intended to protect property rights of individuals as effective as possible. For the same reason the protocol was initiated and signed to allow notaries public access to database administered by the Direction of Population Records, in order to check the identity documents of Romanian citizens. In a similar way they proceeded when the new civil code regulated the establishment of the National Notary Registers that allow real time verification of matrimonial regime of the parties, verification of the existence and validity of special proxies, publication for information purposes and for enforceability of marital agreements, acts of liquidation of the matrimonial etc, the operation of these registers being governed by internal rules.

Adopting legislation on the organization and functioning of the land register, taking over provisions of the Civil Code regarding mandatory authentic documents to be allowed in the land register, linking land registry law with notary law is another way to prove the importance of the authentic act in the civil circuit of real estate.

Any act involving the exercise in any way of ownership right will result in an authentic document: the renunciation of ownership can be done through an authentic statement, the establishment of a mortgage, an easement, any dismemberment of ownership, but also alteration or extinguishment, all are subject to the authentic form of the document.

Following the rules of the new codes, and changes in other regulations, to achieve putting them in line with new regulations, the legislature intended to enhance the value of the authentic instrument, while establishing severe penalties for notary public, when he does not perform his duties properly.

The new civil code introduced many new elements, changed prior regulations or replaced those that did not correspond to reality.

Thus, as a novelty in the ownership, with direct application on family relationships, the legislature introduced by art. 317, the principle of patrimonial independence of spouses, thus eliminating the prohibition of sale between spouses under the old Civil Code; as a consequence there has been regulated distinct matrimonial regimes, (art. 329 and seq. NCC) as compared to the old Civil Code regulating only legal community regime, the new civil Code also introduced the concept of family housing (art. 321-322) – which restricts the right to dispose of one of the spouses, even if it is the sole owner of that property, but also the praecipuum clause (art. 333) under which the surviving spouse may take one or more unpaid goods before the division of inheritance, all these documents and legal reports are put into practice through the authentic instrument.

The contract of sale between spouses will be authenticated (required, whether it is real estate) matrimonial convention must be authenticated, under penalty of nullity (art. 330), the act of liquidation of the legal community must also be concluded in original form, the praecipuum clause should be inserted in matrimonial convention and the declaration of a property as a family home is done either by contract of sale (authentic) or through an authentic statement which will be based on the corresponding entry in the land register.

Ability to exercise in advance – for good reasons, guardianship court can recognize the minor who reaches the age of 16, full legal capacity, thus his right to make available documents relating to his property.

In property law, one of the most important legal relations is selling, which has undergone significant changes. The following changes can be highlighted:

- In art. 1650 NCC, it appears that the transfer of ownership is not the essence, but the nature of the contract, so that the contract can be represented as a dismemberment of ownership etc., or as another real right, such as a debt, inheritance rights, intellectual property rights, for most cases, the legislature requiring as a condition of validity of the document its authentic form as the most efficient way to reflect the rights and obligations of the parties, and to protect them;

- Through Art. 1654 legislature expanded occupational categories affected by the inability to purchase litigious rights which are for the court where it operates, including: judges, prosecutors, notaries, clerks, legal counsel, bailiffs, insolvency practitioners (the old regulation included only the categories of judges, prosecutors, lawyers and clerks); disregarding this prohibition is sanctioned by absolute nullity;

- If the price is fictional and ridiculous (art. 1665) the sanction is relative nullity, unlike existing regulation in the old Civil Code, according to which the penalty was an absolute nullity;

Legislature also established that the object of the sale may be a future good (art. 1658 – required transmission of ownership as a future obligation) which does not exist at the time of the agreement (unless that would sell legacy unopened), in which case

the property shall be submitted at the time the good will be achieved, and if the property is not achieved, the buyer can be forced to pay the price, unless you assumed this obligation in contract.

In terms of price – this should be fixed in money, to be serious and be determined or determinable (art. 1660-1662) – setting the price of money is the essence of sale, failure to do so is grounds for invalidity absolute; the new civil code regulates explicit conditions of determinable price, when not specifically determined in the contract; if the price is not determined within 1 year from the date of the contract, the sale is considered void, unless the parties agree to another mode of determining it;

Removal of retractable litigator who was covered in the old civil code art. 1402-1404, is another modification of the new Civil Code, the legislature wanted to once again protect the interests of individuals who bought a conflicting right.

Through Art. 1668-1670, was introduced the pact option – an act must take the form of an agreement that includes elements of the future contract, promissory no longer undertakes to conclude the contract in the future, but agrees to contract when it is concluded, consequently being required only the express consent of the recipient.

Another newly introduced provision establishes that the sale of another property (Art. 1683) is a valid contract, the seller has the obligation to convey the property to the buyer, even if in the setting of the act he was not the owner; the transmission will operate when the asset is acquired by the seller or when the contract is ratified by the owner; the penalty for not being good action is rescission of the contract, the buyer no longer having the annulment option.

In case of sale of the entire property in joint ownership (Art. 1683 paragr. 5), by one co-owner without the others – buyer can choose either to maintain the contract in conjunction with appropriately reduced price or demand rescission of contract, in case he would not have bought it if he had known from the beginning that he will not acquire full ownership, including claim damages.

Another novelty is art. 1684 regulating property reservation – Under this provision, the seller has the right to retain ownership of the property until full payment of the price, even if the property was delivered; property reservation should be specified in the contract in original and be registered in the land register, for enforceability against third parties.

Of course, there are many other new civil code provisions affecting the sale, but they are not absolutely necessary conditioned by the existence of an authentic act, but this kind of act may confer them enforceable value when appropriate. Examples:

A new way of solving the consequences of eviction (art. 1695), besides the classical (rescission of contract and refund price and damages) – the buyer can keep the property, paying to a third-party a sum of money mutually agreed or giving another good instead. The defaulting seller will indemnify the buyer the amount paid by him, plus statutory interest and related expenses.

Verification of the property by the purchaser before the sale, to see the apparent flaws in conjunction with the obligation of the seller to fix them (Art. 1707 et seq. NCC).

Mandatory denunciation of hidden defects (art. 1709); the deadline for reporting defects, if not provided for in the contract, is 3 months for construction and 2 months for other goods, starting from the discovery of the vice. Buyer may request the court to

compel the seller to eliminate the defect at its own expense, either substitute a similar property without flaws, or the court may decide a measure other than that requested by the customer, depending on the severity of the defects, the purpose and circumstances in which the contract was concluded.

Another novelty – warranty of the goods purchased when this warranty is offered for a certain period of time under the contract; this shall not be mistaken by warranty for hidden defects that has another regulation – the property will be repaired and not replaced. It shall be replaced only if repair is impossible to be performed or cannot be achieved within the period specified in the contract or if it exceeds 15 days. If not repaired/ replaced within a reasonable property, the buyer may request termination of the contract and price refund.

Ultimate in sales is location of payment – the amount will be paid at the location of property at the time the contract is concluded, if parties provide otherwise by contract. Old Civil Code stipulated that payment location should be where the good was delivered.

Another novelty brought by the Civil Code is the change of the legal nature of the right of passage, that in the old civil code was requested by owner of the place without access to the public road, and with the duty to award compensation to subdued fund owner (art. 616 of the old civil Code); under the new civil Code, the right of passage was included in the category of legal limitations, it is not extinguished if unused, having a certain way of annulment – in case the dominant fund gains access to public road, either naturally or subservient to another fund.

Introducing the trust institution in the legal civil relationships, institution that had not existed in our legislation until the entry into force of the new Civil Code, is also another way of protecting property rights. According to art. 773, this is the legal operation by which the constitutor transmits real rights to the fiduciary, claim rights, securities or other property rights to be exercised on behalf of a beneficiary; the goods subject to trust constitute a distinct mass of other patrimonial heritage. In order to get remuneration, the fiduciary handles or exercises and administrates these rights or property, for a specific purpose, to the benefit of another person (a third party or trustee, or the constitutor himself).

Thus, a person who has an ongoing credit secured by real estate can protect other goods in his heritage by establishing the trust of unencumbered assets. So if you get unable to repay the loan, and the creditor cannot satisfy the enforcement of the mortgaged property, he cannot turn to the property for which the trust was established, for the uncovered debt difference.

One sort of disadvantageous way of using the trust is the situation created by attracting personal liability, as provided in the Law on insolvency and bankruptcy. According to art. 138 of Law no. 85/2006 republished, management or supervisory and control bodies of a company (associates, directors, auditors etc.), can respond with their own property, for causing the insolvency in any of the ways set forth in subparagraphs a-g of this article. To protect these assets, the individuals may be fiduciary on their property, lenders no longer being able to turn against this category of goods, to the extent the court will decide liability of shareholders/ directors.

The main characteristic elements of the trust are reflected in the fact that on the one hand property of fiduciary patrimony can be traced only by creditors whose claims have been born in connection therewith, with the exception of the case in which a personal

creditor of the constitutor constituted and made enforceable, prior to the conclusion of the trust, a security interest over those goods, and on the other hand creditors of the constitutor can track goods only in the case of dissolution or declaration as inapplicable of the trust agreement (art. 786 paragr. 1 NCC)².

According to art. 774 of the Civil Code, trust is established by law or by contract concluded in authentic form, which proves once again, if necessary, the amount of special importance that the legislature has in view, the authentic act as a means of protecting the right property.

Also for the purpose to protect property rights, the maximum duration of the trust was limited to 33 years and in this period the goods covered by the trust cannot be tracked and/ or executed than under the terms of the civil code.

Regarding the new regulations on the Land Registry, included in the new Civil Code in Title VII, the most important change is the fact that it gives an effect of incorporation of rights to registration in the Land Registry (Art. 557 paragr. 4); this provision is applicable after completion of cadastre for each administrative-territorial unit, followed by open land books (art. 56 of Law no. 71/1996), at the request of the owners or ex officio.

It should be emphasized that the inclusion in the Land Registry is carried out under the authentic notary act, the final court decision, the certificate of inheritance or under any other document issued by administrative authorities in cases provided for by law (art. 888 of the New Civil Code).

Another effect given up by registration in the Land Registry and mentioned in the New Civil Code is the acquisitive, meaning that the purchaser of a real right, which was registered in the land registry on the basis of a legal consideration, is recognized as the holder of the registered right for his own purpose, even if the true holder demands, his author right is removed from Land Registry (Art. 901 paragr. 1 of the new Civil Code).

With regard to usucaption – as a way of acquiring ownership, the new Civil Code has brought fundamental changes. Such was regulated the 5-year tabular usucaption (art. 931 Civil Code), provided that the entry in the land register is made without legitimate cause but in good faith, and the property entered had been possessed for 5 years from the time of enrollment, possession being uncorrupted, thus the ownership right entered in the land registry, without any possibility of contestation. On the other hand, Civil Code regulated extratabular usucaption, when a person possessed the property for 10 years (art. 930 Civil Code), the owner of the property registered in the land registry died (or ceased to exist), or was placed a statement disclaiming property in the land registry or property has not been entered in the land registry. In these cases, in order to acquire ownership the owner is required to have registered an application for registration in the Land Registry before a third person had registered his application for registration, based on a legitimate cause, during or even after the expiry of usucaption.

The new civil code produced significant changes in all areas of regulation, but in matters of obligation these changes are substantial. This paper does not aim at dealing with all these changes, its purpose is to highlight the innovations on the authentic document analyzed as a means of protection of property.

² Andra Oprea, Mariana Sandu, *Instituția fiduciei, o premieră în legislația din România*, ziarul Capital (31.10.2012).

New Code of Civil Procedure repeatedly mentioned the authentic act and its probative value, particularly in property law. Changes brought by its enactment are critically important changes to the previous regulation, from the powers of the courts to the details of legal proceedings, including enforcement proceedings.

Thus, art. 85 regulates the mandate, which shall take the form of a genuine document, if the represented person is an individual – the legislature wanted to protect the interests of the person who has the right to set the limits of the mandate.

Art. 269 redefines the notion of an authentic document, which is a drafted document or, where applicable, received and authenticated by a public authority, a notary public or other person entrusted by a state public authority, in the form and conditions established by law. From a procedural standpoint, the authentic act is proof of identity of the parties, of their consent to the content, signature of the parties and date. Also, art. 270 regulates the proving value of the authentic act, which is full proof against any person, until it is declared as false, regarding the observations made by the person who authenticated the document, under the law, this recognition demonstrating the intention of the legislature to value the authentic act.

Also, the new Civil Procedure Code comprises notes on the revocation of the authentic act (art. 271), on the fact that an authentic document can be used as a model for comparison (art. 303), precisely because of its authenticity, and regulates the proving weight of a court decision, which is treated as an authentic document.

As a novelty, in the procedure of mediation, arbitration or partition, the Code of Civil Procedure establishes the authentic form, under penalty of nullity, for conventions on the transfer of ownership or constituting a real right on immovable property, the authentic document proving the importance of these regulations especially in the protection of individual property rights.

It is also reiterated the enforcement attribute of the authentic act in art. 638 paragr. 2 and art. 639, all statements referring to the existence, requirement, proving value of the authentic act across the entire code of civil procedure, in relation to the protection and exercise of ownership.

The conclusion of the issues raised in this paper is focused on the regulation of the special legislature considered it necessary for the authentic act, representing a vital tool in guaranteeing the exercise and protection of property rights of individuals.

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