

THE RIGHT OF PASSAGE - LEGAL LIMIT OF EXERCISING THE PROPERTY RIGHT

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Abstract

The most important legal limitation of exercising the private property right in case of the neighborly relations is that of the right of passage. This right balances two contradictory interests: on one hand, there is the interest of the owner who has no access to the public pathway but must benefit from a normal exercise of his property right and, on the other hand, there is the interest of the neighboring owner who must not be prevented from exercising his property right. Although it is an old institution, with deep roots in Roman law, the right of passage is still actual by the simple existence of the neighboring relations. In order to understand how it works, the current paper aims to present theoretical and practical issues regarding the creation, extent and exercise of the property right within in national and international context, in relation to the closest institution, the conventional passing encumbrance.

Keywords: right of passage, legal nature, encumbrance, conditions, exercise.

JEL Classification: K11, K15

1. Introduction

The private property right is guaranteed by article 1 of the first Additional Protocol to the European Convention on Human Rights², article 44 of the 1991 Constitution³ and the current Civil Code⁴.

According to article 555 first alignment of the Civil Code, private property is the holder's right to possess, use and dispose of a good in an exclusive, absolute and permanent manner, within the limits of law.

The attributes of the property right are possession, use and disposition. By law, the exercise of all these attributes can be limited in order to protect the general social and economic interests or in order to protect the rights of other people, provided that these restrictions do not impair on the substance of the property right or completely annihilate this right.

The legal limits of exercising the property right are classified in three categories:

- limits regarding the use of waters;
- limits which pertain to the neighboring relations;
- limits which apply to special situations.

The most important legal limitation of the exercise of the property right within the neighboring relations is represented by the right of passage.

The origin of the right of passage resides in old Roman law where it had a sacred character: the person who possessed a place where a grave was located, but had no way of reaching it, could simply force his neighbors to offer him a right to pass their land in order to reach the grave, in exchange for a certain amount of money⁵.

During recent times, although encumbrances were seen as an ancient and outdated institution, more suitable for a rural population and completely unfit for the needs of an urbanized society, the simple existence of the neighboring relations leads to the necessity to acknowledge a right of passage.

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² Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952 states that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law", available at <https://jurisprudentacedo.com/Conventia-CEDO/Protocolul-1.html> (accessed on 2.03.2020).

³ Republished in the Official Bulletin of Romania, part I no 767 of October 31st, 2003.

⁴ Published in the Official Bulletin of Romania, part I no 505 of July 15th, 2011.

⁵ Ph. Malaurie, L. Aynes, *Drept civil. Bunurile*, Wolters Kluwer Publishing House, Romania, 2013, p. 300.

In internal law, the right of passage is regulated in the content of Title II named Private Property, Chapter III, section 1 and 6, article 617-620 of the Civil Code.

According to article 617 of the Civil Code, the owner of the land who has no access to the public pathway is entitled to be allowed to pass through the land of his neighbor in order to exploit his own lands. The definition is a less rigorous version of the provisions of article 682 of the French Civil Code⁶ and the provisions of article 997 of the Quebec Province Civil Code⁷.

By analyzing the content of the above mentioned article, we notice that the creation of the passage right entails the simultaneous fulfillment of these conditions: the existence of two lands which belong to the different owners; one of the lands has no access to the public pathway and finally the passage must be achieved in order to exploit one's land.

The piece of land with no access to the public pathway will be called the dominant land and the piece of land which will be crossed will be called subservient land, even if the lawmaker is not consistent in the use of these terms. Thus, we can see that these terms are used in the final chapter regarding the passage right, whereas in the previous articles, the lawmaker uses the notions of land which has access and land which has access to the public pathway.

Despite the fact that it is a law provided right, its exercise often leads to neighboring conflicts, as the right of passage balances two contradictory interests: on one hand, there is the interest of the owner who has no access to the public pathway and who must benefit from a normal exercise of his property right, as a blocked land must never be a prison with no way out⁸ and, on the other hand, the interest of the owner of the neighboring land who must not suffer a violation of his property right. Given all these, the question of whether these regulations were violating the provisions of article 44 of the Constitution was asked. These provisions guarantee the property right. However, the Constitutional Court ruled as follows: "Even if, by granting a right to passage, the holder of the property right suffers a restriction of the attributes of his right, the legal regulation does not show any contradiction to article 44 of the Constitution. The property right is not an absolute right, it is subject to certain limitation, but these limitations, regardless of their nature, must not be confused with the suppress of the property right ... The law can regulate certain limits and restrictions in regard to the object of the right or some attributes of the right in order to protect the general social and economic interests or in order to protect the rights of other people (see Decision no 1435 of October 25th, 2011, published in the Official Bulletin of Romania, part I, no 901 of December 20th, 2011)".⁹

In this study, we will attempt to prove the utility of this institution, by presenting it from both a theoretical and practical perspective, national and international, in relation to the institution to which it has the most similarities, namely the encumbrance. In our endeavor, we will analyze the means of regulations of the passage right in French law, but also in the Quebec Province Civil Code, by observing the vision of the European Court of Human Rights in such a delicate matter as is the violation of the property right.

⁶"Le propriétaire dont les fonds sont enclavés et qui n'a sur la voie publique aucune issue, ou qu'une issue insuffisante, soit pour l'exploitation agricole, industrielle ou commerciale de sa propriété, soit pour la réalisation d'opérations de construction ou de lotissement, est fondé à réclamer sur les fonds de ses voisins un passage suffisant pour assurer la desserte complète de ses fonds, à charge d'une indemnité proportionnée au dommage qu'il peut occasionner." available at https://www.legifrance.gouv.fr/affichCode.do?jsessionid=4FBFE3C6E1147174428EB512F07C309D.tplgfr37s_2?idSectionTA=LEGISCTA000006150125&cidTexte=LEGITEXT000006070721&dateTexte=20200206 on 7.02.2010 (accessed on 2.03. 2020).

⁷"Le propriétaire dont le fonds est enclavé soit qu'il n'ait aucune issue sur la voie publique, soit que l'issue soit insuffisante, difficile ou impraticable, peut, si on refuse de lui accorder une servitude ou un autre mode d'accès, exiger de l'un de ses voisins qu'il lui fournisse le passage nécessaire à l'utilisation et à l'exploitation de son fonds." available at <http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991> (accessed on 17.03.2020).

⁸ Ph. Malaurie, L. Aynes, *op cit.*, p. 304.

⁹ Constitutional Court, decision no 609 of September 22nd, 2016 regarding the unconstitutional exception of the provisions of article 5 second alignment of Law no 51/2006 regarding public utility services, as previously changed by Law no 313/2015 for the change of Law no 51/2006, published in the Official Bulletin of Romania, part I, no 54 of January 18th, 2017.

2. The notion and legal nature of the right of passage

The above mentioned legal definition entails the need of two pieces of land which belong to two different owners: the owner of the piece of land who has no access to the public pathway and the owner of the neighboring piece of land. As opposed to the lawmaker's phrasing which exclusively refers to the owners of the pieces of land, the question of whether other people who hold the land in any other title except ownership, are entitled to be granted the right of passage arises. The doctrine is unanimous in acknowledging that any holder of a real right, as a part of the property right, is entitled to be granted the right of passage according to articles 617-620 of the Civil Code (except for the holder of the encumbrance right). Furthermore, recent court practice constantly ruled that the owner of the blocked land can request the granting of a right of passage, considering that he holds both *corpus* and *animus domini*, namely the intention to act as a true owner¹⁰.

On the other hand, for the same reasons, the holder does not have this possibility, as judicial practice stated that "the exercise of possession and use of the land by the holder does not allow him to request the creation of encumbrances, even if his interest is justified by a better use of the lands he holds. He does not possess for himself, but for the owner, thus it is possible, by accepting his ability to file a complaint requesting the creation of an encumbrance, to create a situation which is unfavorable to the owner of the land, who was not part of the trial"¹¹.

The notion of "land" is not defined by the Romanian lawmaker, as it was taken from the French Civil Code and the Quebec Civil Code. We believe it considers any immobile good, as defined in article 1 fifth alignment of Law no 7/1996 of cadaster and immobile publicity¹², namely the land, with or without construction, situated on the grounds of an administrative-territorial unit, belonging to one or more owners, which is identified by a unique cadastral number. For these reasons, the right of passage will be acknowledged for the exploitation of a land and for the exploitation of a construction. We state these by seeing the provisions of article 682 of the French Civil Code stated above. It is of no relevance if the lands are in private or public property, as the right of passage, as we are about to show, is not a part of the property right which is not compatible with public property.

In order to be in the presence of passage right, it is necessary for the lands to be neighboring, thus situated close to one another. We do not believe that it is necessary for the immobile to be located in close proximity or have a common boundary; for example, if a blocked land is surrounded by other blocked lands, the right of passage will be exercised throughout all the pieces of land which ensure access to the public pathway; in this case, there is a dominant land and a sub served land and several pieces of land, which are both dominant and sub served.

At the same time, it is necessary for one of the lands to have access to the public pathway. The notion of public pathway is defined in article 616 of the Civil Code and considers any road, seen as a terrestrial communication path, which is especially designed for road and pedestrian traffic and is opened to public circulation¹³. Railroads are an exception.

According to article 4 first alignment letter a) of Government's Ordinance no 43/1997 regarding the regime of roads¹⁴, the following roads are considered to be public and open to public circulation: those roads which ensure indiscriminating access of vehicles and people. Access to

¹⁰ Galati Appeal Court, decision no 94/2015 available at <https://legeaz.net/spete-civil-curtea-de-apel-galati-2015/servitute-decizia-94-2015-02-04-2015-vlv>, (accessed on 6.02.2020).

¹¹ Bucharest Appeal Court, fourth civil section, decision no 1326/25 June 2007 available at <https://legeaz.net/spete-civil/servitute-de-trecere-calitatea-de-1326-2007> (accessed on 6.02.2020).

¹² Republished based on the provisions of article III of Law no 150/2015 for the change and completion of Law regarding cadastral and immobile publicity no 7/1996, published in the Official Bulletin of Romania, part I, no 459 of June 25th, 2015.

¹³ Government's Ordinance no 195 of December 12th, 2002 regarding circulation on public roads, republished, published in the Official Bulletin of Romania, part I, no 958 of December 28th, 2002.

¹⁴ Published in the Official Bulletin of Romania part I, no. 221 of August 29th, 1997,

public pathway can be ensured by road or any other path, including a navigation route¹⁵.

A piece of land which has no access to public pathway is a blocked land, which has no possibility of reaching a public road; similar is the situation in which the access road to a public pathway is insufficient, dangerous and can't become accessible except by considerable work and investment which are of greater value than the value of damage paid to the owner of the land who could provide access.¹⁶

The same idea is found in article 997 of the Civil Code of the Quebec Province, which regulates the right of passage in favor of the owner whose land is blocked and has no access to the public pathway or whose access is insufficient, difficult or impracticable.

“The inconveniences and hardships caused by the passage to a public pathway are at the appreciation of the court, as they represent a particular situation. In any conditions, the court must consider the interest of the person who will bear the consequences of the encumbrance and not that of the beneficiary of the encumbrance right. Subjective civil rights, belonging to different owners, must be exercised so as none of these holders suffer a prejudice more significant than the normal inconveniences which result from the coexistence of these rights. By establishing the quality of a blocked land and the existence of an encumbrance, as a fundamental real right, it can't be mortgaged except for extraordinary circumstances”¹⁷.

The right of passage will have to be acknowledged when the holder of a land provides the land with a new destination, which is absolutely incompatible with the access he already has to the public pathway.

The situation of a land which has no access to the public pathway must result from a fortuitous case or a case of emergency¹⁸; on the contrary case, if the lack of access is due to the owner who claims the passage, it can only be established with consent from the owner of the land who has access to the public pathway and with the payment of double the damages awarded. If the lack of access results from a sale, exchange, divorce settlement or another legal act, the passage can only be requested from those who have acquired the land through which the passage was previously achieved; thus the passage will have to be ensured by the contractual party and not the owner of the neighboring land. Acknowledging the situation of a blocked land does not affect the passage right which results from the objective situation of the land. Thus, the person who acquired a blocked land, acquires, by the effect of law, the right of passage, even if it is not expressly stated in the documents, as it is an accessory right whose existence is presumed by law¹⁹.

The content of article 617 of the Civil Code states, without a doubt, that, in order for the right of passage to exist, it is necessary that the two pieces of land belong to different owners. In case the pieces of land are co-owned, there is no issue of a passage right as each of the owners exercises all the attributes of the property right over both lands.

Finally, the right of passage must be justified by the need to exploit the land which has no access to the public pathway. By „exploitation” we mean the valorizing of an immobile to any purpose, as long as it does not contravene to public order regulations, by the use of the residence and the agricultural, industrial, commercial use, and the passage must be allowed for all which is necessary for the normal use of the land²⁰. The right of passage will be acknowledged in regard to

¹⁵ Cour Superieure, Canada, Province de Quebec, District de Bedford, N°: 460-05-009669-015, 1er septembre 2016, pct. 31, available at http://concourspbm.ca/wp-content/uploads/2015/09/cpbm_20162017_jugement.pdf (accessed on 16.03.2020).

¹⁶ Ch.-P.-V. Bouillier, *Etude sur les servitudes d'utilite publique en general et en particulier sur les servitudes etablies par la loi entre proprietaires voisins dans un but d'interet public*, These pour le doctorat, Paris, 1873, p. 130, available at <https://gallica.bnf.fr/ark:/12148/bpt6k58416398/f14.item> (accessed 18.02.2020); also see Alba Iulia Appeal Court, civil section, Decision no 1114/25 November 2005 available at <http://portal.just.ro/57/Lists/Jurisprudenta/DispForm.aspx?ID=124> (accessed on 6.02.2020).

¹⁷ Craiova Appeal Court, civil section, Civil Decision no 1033/25.09.2007 available at <http://portal.just.ro/54/Lists/Jurisprudenta/DispForm.aspx?ID=360> (accessed on 6.02.2020).

¹⁸ C. Bârsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod civil*, Hamangiu Publishing House, Bucharest, 2015, p. 84.

¹⁹ Cour Superieure, Canada, Province de Quebec, District de Quebec, N° : 200-17-013626-106, 8 juillet 2011, page 6, point 22, available at <http://www.lexisnexis.ca/pdf/Jugement-01-Passage.pdf> (accessed on 16.03.2020).

²⁰ Cour de cassation, chambre civile 1, audience publique du mercredi 11 mai 1960, n Bull. 1960, I, no 254, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006954534> (accessed on 6.02.2020).

the nature of the blocked land and in the purpose of its use by the owner.

In conclusion, we can define the passage right as that certain right acknowledged by the law to the owner of the land or the holder of another real right or the possessor of a land which has no access to the public pathway, to pass through the land which belongs to his neighbor, in order to exploit his own immobile good.

In regard to the legal nature of the passage right, it is somewhat controversial. Why?

Because, on one hand, the origin of this right is a legal one, as law obliges the owner of the land who has access to a public pathway to ensure similar access to the owner of a blocked land. Thus, the origin of the right of passage is not the convention of parties, but the law.

On the other hand, it entails a limitation of the exercise of a property right within the neighboring relations, without the property right being emptied of its substance, as the holder of the subserved land has the freedom to use the good, to sell it or mortgage it; however, this limitation does not provide the owner of the subserved land a full exercise of his property right.

Given all these, the limits and means of exercise are established by the agreement of parties.

Although it appears similar to an encumbrance, it is not imposed by law. That is why we can state that the legal nature of the right of passage is a complex one, as it is a *sui generis* institution which doctrine qualified as a *lato sensu* legal encumbrance²¹.

As the owner of the subserved land is obliged to withheld from any act which might endanger the exercise of the passage right, *lato sensu* it represent a negative encumbrance.

3. The right of passage and the passage encumbrance

Although it is an encumbrance, the right of passage presents a series of particular traits, as there are significant differences between the two institutions, as we are about to show in the following part.

The legal right of passage is a *lato sensu* passage encumbrance seen as a legal limitation of the exercise of the property right in neighboring relations. This is why, the law acknowledged to the owner of the neighboring land only the right to be allowed to pass through the neighboring land. As opposed to this, the passage encumbrance stated in article 755 and the following of the Civil Code represents a real right, as a part of the property right, which provides the owner of the dominant land with the possibility to exercise certain prerogatives of the property right over the subserved land.

The right of passage arises from the objective situation of the land which has no access to the public pathway; it is rightfully awarded to the holder of the neighboring land, by the simple effect of law, whereas the passage encumbrance results from the convention of the parties or by usucapion, regardless of the situation of the lands. Thus, the passage right will be acknowledged only in case of necessity, whereas passage encumbrance can be formed based on utility. Thus, nothing prevents the owners of two adjoining lands to form, by their own convention, an encumbrance right, even if both lands have access to the public pathway; in this case, we are not in the presence of a legal passage encumbrance, as is the right of passage, but a passage encumbrance, established by the deed of a person, which will be governed by the provisions of article 755 and the following of the Civil Code. The right to enter into an agreement is a natural right of the citizen guaranteed by the virtue of its membership into the society²², enshrined internationally. In Quebec Province civil law, the right of passage is regulated as an alternative of the encumbrance right, as it will be exercised under the conditions of article 955 of the Quebec Civil Code only in the lack of the parties' agreement in regard to the exercise of an encumbrance right.

Thus, in the law of the Canadian province, the right of passage is a subsidiary right to the encumbrance right, as it gives priority to the will of the parties. In our internal law, the situation is

²¹ V. Stoica, *Drept civil. Drepturile reale principale*, third edition, C.H. Beck Publishing House, Bucharest 2017, p. 140.

²² R. West, *A tale of two Rights*, "Boston University Law Review", vol. 94, issue 3, may 2014, pp. 893-912, available at <https://www.bu.edu/bulawreview/files/2014/08/WESTDYSFUNCTION.pdf> (accessed on 1.04.2020).

reversed, as the passage right is by law awarded to the owner of the neighboring land by the simple objective situation of its land, without any agreement from the neighboring owners. However, we believe that nothing prevents the neighbors to conclude a convention in regard to the exercise of an encumbrance right, even in regard to a blocked land.

In regard to the time when the passage right arises, it corresponds to the time the land becomes blocked; thus, the owner of a land which has access to the public pathway will not be able to previously invoke the right to exercise a potential passage right, as long as his piece of land has access to the public pathway, it arises from the objective situation of the blocked land. As the agreement of the subserved land is not needed, the rules which govern the passage right must be interpreted in a restrictive manner. As opposed to this, as the encumbrance right does not result from necessity, it can be formed even in case of a future use of the dominant land.

The right of passage can't exist in the situation of the blocked land which was created by a material act of the owner, for example a building on the access road to the public pathway. In exchange, the encumbrance right, as it is of a conventional nature, can arise under any conditions.

In case of the right of passage, one of the lands is the dominant land and the other one is the subserved land, as the right of passage will only be acknowledged in the exceptional case in which a land has no access to the public pathway; this is why, we might consider the passage right is of an unilateral character. By exception, when a blocked land is surrounded by other blocked lands, the latter will be both dominant and subserved land, to the extent in which they ensure access to the public pathway. As opposed to this, a conventional encumbrance can always be of a unilateral character and of mutual character when each land has the quality of dominant and subserved land.

The right of passage arises based on the law, that is why it is of no relevance the capacity of the owners of the two adjoining lands. Thus, the passage right can mortgage immobile goods which belong to minors of people placed under interdiction, without special authorization from the court of law, as the provisions regarding lack of capacity are not applied in this matter. As opposed to this, the passage encumbrance right results from the parties' convention; as it is an act of disposition, the parties must have full exercise capacity. In case one of the lands belongs to a minor or a person placed under interdiction, the convention will be concluded by the legal representative and with the previous authorization from the court of law.

The passage right can be exercised over any land, regardless of whether it is of public or private property, whereas the passage encumbrance, as it is of conventional character, can only be formed over private lands, as public goods are inalienable. By exception, a passage encumbrance over a public property land is possible if it is compatible with public use and utility. Even if the lawmaker does not expressly state this possibility, as did Law no. 213 of November 17th, 1998 regarding public property and the legal regime of public property²³, but in article 300 first alignment letter g of the Administrative Code²⁴ it only references the granting of the encumbrance right, under the conditions of the law; thus, we appreciate that it continues to apply through the provisions of article 554 and 862 of the Civil Code, which regulate the limits of the exercise of the public property right and establishes the general regulations which apply in this matter.

This results in another difference, namely the fact that in case of the right of passage, the owners of the neighboring lands can be private or public owners, whereas the owner of the subserved land in case of the encumbrance right can only be a private person, as encumbrances are incompatible with public property, except for the above mentioned exception.

The lawmaker expressly states that one purpose of the exercise of the right of passage is the exploitation of the neighboring land. As previously shown, exploitation is the valorizing of the immobile good. The purpose of the passage encumbrance, as a part of the property right is represented by the use or utility of the land of another owner. According to article 755 second alignment, utility results from the economic destination of the dominant land, by increasing its

²³ Published in the Official Bulletin of Romania no. 448 of November 24th, 1998.

²⁴ Government's Ordinance no. 57 of July 3rd, 2019 regarding the Administrative Code, published in the Official Bulletin of Romania no 555 of July 5th, 2019.

comfort.

The extent and exercise of the right of passage is established by the parties' agreement resulting in a convention or by court decision in case the parties do not reach an agreement or by continuous use for 10 years. According to article 756 of the Civil Code, encumbrance can result from a legal act or by usucapion.

The termination of the right of passage occurs in the hypothesis in which the dominant land acquires another access to the public pathway. The passage encumbrance is terminated under the conditions of article 770 of the Civil Code by: consolidation, when both lands have the same owner; by renouncing from the owner of the dominant land; by reaching its term; by the definitive impossibility to exercise the right; by not using it for 10 years; by the lack of utility or by expropriation of the sub served land, if the encumbrance is contrary to the public utility of the expropriated land.

From a formal point of view, the right of passage arises from the objective situation of the blocked land; the limits and means of exercise are established by neighbor agreement, but the written form is not required. By exception, the written form is mandatory when the right will be noted in the cadastral register, in which case the convention of the owners of the neighboring lands will be concluded in authentic form or will be ruled upon by a court of law. The authentic form is required under the provisions of article 888 of the Civil Code regarding the cadastral registration. Thus, the written form is necessary in case of the passage right in case it will be registered in the cadastral register. However, in case of the passage encumbrance, as it is a real right, as a part of the property right, it will exclusively result from a legal act which must be concluded in authentic form *ad validitatem*.

The right of passage, as it is of legal nature and represents a mere limit in the exercise of the property right, arises without any subsequent formality. Encumbrance, as it is a real right, stated by article 885 of the Civil Code, will be exclusively acquired by registration in the cadastral register.

In regard to the cadastral register rules, the passage right will be noted in the cadastral register, whereas the passage encumbrance, as it is a part of the property right, will be registered in the third part of the cadastral register of the immobile good who is the sub served land and the second part of the cadastral register of the dominant land.

4. The extent and means of establishing of the right of passage

As previously shown, the right of passage occurs *ope legis* in the person of the holder of the blocked land resulting from the objective situation of the land which has no access to the public pathway.

However, the sole unilateral manifestation of will is not sufficient in order to exercise this right, as, according to article 619 of the Civil Code, the extent and means of exercise of the right of passage can be determined by the parties' agreement, by court decision or by continuous use for more than 10 years, namely by usucapion. Thus, the unilateral manifestation of will of the owner of the land which has no access to the public pathway will not be able to determine the means of exercise of the right, as it must meet the will of the owner of the neighboring land.

The exercise of the right of passage can be left to the discretionary will of the owner of the neighboring land, as it leaves room for abuse. This is why it occurs so as to bring minimal damage to the exercise of the property right of the land which has access to the public pathway. Thus, the owner of the land which has access to the public pathway will not be forced, under any circumstances, to provide the access which is more convenient for his neighbor, except for the case in which this deed does not create any prejudice greater than the payment made for granting access.

Also, the owner of the blocked land can't perform any actions which will prevent the owner of the neighboring land from fully exercising his property right. Practice ruled that, for example, it is forbidden for the owner of the blocked land to deposit a car on the passage way located on the

neighboring land which ensures access to the public pathway²⁵.

On the other hand, the latter can't have an abusive attitude and deny access to the public pathway for his neighbor. Furthermore, he can't decide on an unfavorable means of exercising the right of passage, unless it meets the purpose of the exploitation of the neighboring land.

For these reasons, the right of passage must be seen as a right provided to the owner of the dominant land, on one hand, and as an obligation for the owner of the sub served land, on the other hand. By exception, according to the provisions of article 618 second alignment of the Civil Code, when lack of access is caused by the owner who claims passage, it can only be established with consent from the owner of the sub served land and the payment of an amount double the damages. Thus, in this hypothesis, the acknowledgement of the right of passage is no longer an obligation for the latter.

In case the owners of the neighboring lands do not reach a consensus in regard to the means of exercise of the right of passage, it will be established by the competent court of law. The solution of the court will not be arbitrary or unpredictable²⁶; the judge must not establish the shortest road, but must consider the *opportunitate loci*. The right of passage must be exercised under the conditions of minimal damage to the property right of the owner or his activity, with respect of equity and a correct proportion between the advantage claimed by the dominant land and the prejudice suffered by the sub served land. The judge will conciliate the two parties and their interests, thus the value of the prejudice caused to the sub served land is covered by the value of the owed damages.

In case several neighboring lands have access to the public pathway, the passage will be made through the land which will suffer less prejudice. In this purpose, the owner of the blocked land will file a complaint against all neighboring owners, in order for the judge to decide on the land through which the passage will occur.

According to the above mentioned provisions of article 619 of the Civil Code, the extent and means of exercise of the right of passage can be determined by usucapion. In order for this to operate, the right of passage must meet all conditions of possession; on the contrary case, the owner of the sub served land can invoke the fact that a true passage encumbrance was never exercised, but a mere passage was tolerated based on the neighboring relations²⁷.

The expenses made to improve and preserve the land will be paid by the owner of the dominant land, as he is the one who profits from it. He "is entitled to perform all the necessary works to use the land, provided he does not bring upon changes which aggravate the state of this land"²⁸. By exception, the parties can reach a different agreement.

The right of passage will be exercised for free or in an onerous manner. Although the law does not expressly state this, we believe the rule is the onerous exercise of this right. This statement resides in the provisions of article 618 second alignment of the Civil Code which regulates the payment of double the damages as well as the provisions of article 620 of the Civil Code regarding the statute of limitation of the complaint for damages and the return of damages paid.

Damages must be paid to the owner of the sub served land considering the fact that he suffers a continuous prejudice resulting from his inability to exercise his owner prerogatives; according to article 998 of the Civil Code, any deed of man which causes a prejudice to someone else is forced to pay damages to the person who suffers a prejudice.

The value of payment will be established by the parties' agreement or by the court of law. In case the parties do not reach an agreement, an expert will determine the prejudice suffered by the owner of the sub served land as a result of his inability to use the land affected by the right of passage; the advantages obtained by the owner of the blocked land will not be considered. Thus, there must be just balance between prejudice and payment.

²⁵ Cour de cassation, chambre civile 3, N° de pourvoi: 16-25430, 21.12.2017, unpublished, available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036347562&fastReqId=733489735&fastPos=1> (accessed on 2.03.2020).

²⁶ ECHR, third section, Decision of May 31st, 2011 in case *Cernea and others vs. Romania*.

²⁷ Ch.-P.-V. Bouillier, *op cit.*, p. 136.

²⁸ ECHR, third section, Decision in the case *Vergu vs. Romania* of April 9th, 2013, definitive 9.07.2013.

According to article 620 of the Civil Code, the statute of limitation for the awarding of damages to which the owner of the sub served land is entitled to be paid by the owner of the dominant land, starts from the time the right of passage is established. Thus, the statute of limitation entails exclusively the right to damages and not the right of passage which is, according to the law, not subjected to the statute of limitation.

In case the right of passage is established based on usucapion, the issue of damages is not considered. In case the right of passage is terminated, the owner of the sub served land must return the paid damages, except for the damages he suffered in relation with the effective duration of the right of passage.

5. Conclusions

The right of passage is a simple means of exercising all prerogatives of the property right by the owner of a blocked land. Even if it was often seen as an ancient institution, it remains actual and of great importance. Its advantages are the fact that it arises to the benefit of the land which has no access to the public pathway, by providing an economical advantage, but also by the fact that it lacks the formalism of passage encumbrance.

Although the owner of the neighboring land is restricted in his full exercise of the prerogatives of his property right, this situation does not contravene to the provisions of article 44 of the Constitution, as the property right must be seen as an absolute right as long as it does not restrict the rights of other owners and respects the conditions of good vicinity. Or, as long as a land has no access to the public pathway, in order to respect the right of his owner, we must acknowledge and guarantee a right to pass through the neighboring land, provided there is minimal damage to that land. For all these reasons, we believe that the modern lawmaker was wise to maintain such an old but useful institution.

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