

# Considerations regarding the characteristic features of potestative rights under the Romanian civil law<sup>1</sup>

PhD. student **Silviu-Marian MUNTEANU**<sup>2</sup>

## **Abstract**

*Potestative rights are still representing an exotic category of subjective civil rights. We are saying that it represents an exotic category because, although in practice they are frequently encountered, the theoretical approaches regarding their general legal regime are extremely limited. Therefore, in the present study we will focus on identifying the characteristic features of potestative rights, as well as highlighting the similarities and differences between these rights and other categories of civil subjective rights. From this point of view, we will focus on the similarities and differences between potestative rights and debt and in rem rights, concluding that potestative rights are a category of intermediate rights, as it lends specific features from both, debt and rights in rem. Also, starting from the potestative rights definition provided by the scholars, we will analyze, one at a time, their defining elements and explain how these characteristic elements should be understood. Therefore, we will focus on the defining elements of potestative rights, namely: (i) the power of the potestator to change a legal situation involving the interests of another person; (ii) the bond of obedience; and (iii) the specific object.*

**Keywords:** *civil subjective right, potestative right, judicial power, judicial situation.*

**JEL Classification:** K15.

## **1. Preliminary aspects**

Potestative rights have (limitedly) caught the attention of the Romanian scholars only when it was necessary the creation of a supplementary theoretical framework for the explanation and proposal of new approaches to certain legal institutions and mechanisms. However, so far, the overall picture regarding the *modus operandi* and the legal regime of these rights is insufficiently outlined in the Romanian legal doctrine. The misunderstanding of potestative rights can lead to various practical problems because not always an option right can be integrated into the category of potestative rights. Therefore, this category of civil subjective rights can be particularly misleading. Professor Marian Nicolae warned on this issue by highlighting the errors to which Romanian authors and practitioners may be

---

<sup>1</sup> The present study represents an adapted section of the Ph.D. Research Report held at the Faculty of Law of the University of Bucharest on 27 June 2017.

I would like to thank my colleague Gabriela Olteanu for her valuable help with the English translation of the present study.

<sup>2</sup> Silviu-Marian Munteanu – Faculty of Law, University of Bucharest, Romania, silviu-marian.munteanu@drept.unibuc.ro.

predisposed. Thus, according to Professor Marian Nicolae, „it has come in our legal doctrine that everything that could not be labelled by the classical categories – rights *in rem* vs. personal rights - to be thrown into the saving category, open and, of course, very convenient, of so-called „potestative rights” or „intermediate rights” or „secondary rights” or „atypical rights”, rights which are not yet sufficiently defined and contoured, and which can encompass any legal situations that cannot be categorized in the usual manner, already known”<sup>3</sup> Therefore, in order to diminish the conceptual blurring of the potestative rights, we will highlight in this study the specific features of this category of rights, starting from the notion of potestativity.

## 2. The meaning of potestativity

For a long time the notion of potestativity has been understood and explained by reference to the notion of condition, as a modality of a civil legal act. Therefore, traditionally, this term was used to designate the discretionary power that a party may exercise over the legal relationship arising from it<sup>4</sup>. More specifically, by the term potestative it was commonly understood the possibility that a person has to influence the fulfillment of an event on which a concrete legal relationship depends<sup>5</sup>. The legal doctrine has identified two subclassifications of potestative condition<sup>6</sup>, namely: (i) simple potestative condition; and (ii) purely potestative condition. With respect to the purely potestative condition, it should be noted that such condition does not produce any effects<sup>7</sup> when the contracted obligation depends exclusively on the will of the bounded party<sup>8</sup>, since such obligation is equivalent with the lack of intent of the obligor<sup>9</sup>.

<sup>3</sup> Marian Nicolae, *Tratat de prescripție extintivă*, Ed. Universul Juridic, Bucharest, 2010, p. 440.

<sup>4</sup> Ionel Reghini, *Considerații preliminare privind drepturile potestative*, *Pandectele Române*, no. 4/2003, p. 236.

<sup>5</sup> Doru Cosma, *Teoria generală a actului juridic civil*, Scientific Publishing House, Bucharest, 1969, p. 276; Gabriel Boroi, Carla Alexandra Angheliescu, *Curs de drept civil. Partea generală*, 2<sup>nd</sup> edition, Hamangiu, Bucharest, 2012, p. 193.

<sup>6</sup> In the legal doctrine, the purely potestative condition has been defined as being „the condition of whose realisation depends exclusively on the party’s will” and the simple potestative condition has been defined as being „that condition of whose realisation depends on the party’s will and an external event or the will of a undetermined person”; Gheorghe Beleiu, *Drept Civil Român. Introducere în dreptul civil. Subiectele dreptului civil*, the 11<sup>th</sup> edition, revised and added by Marian Nicolae and Petrică Trușcă, Universul Juridic, Bucharest, 2007, p. 188.

<sup>7</sup> The sanction of the obligation affected by a purely potestative condition on the part of the obligor is differently regulated in other European countries. For example, according to art. 1174 of French Civil Code, the sanction for this kind of conditions is the – absolute – nullity – of the obligation: *Toute obligation est nulle lorsqu'elle a été contractée sous une condition potestative de la part de celui qui s'oblige*. Also, the same sanction may be found in the Italian civil law, giving the fact that art. 1355 from the Italian Civil Code provides: *È nulla l'alienazione di un diritto o l'assunzione di un obbligo subordinata a una condizione sospensiva che la faccia dipendere dalla mera volontà dell'alienante o, rispettivamente da quella del debitore*.

<sup>8</sup> According to art. 1403 din Noul Cod Civil: „*Obligația contractată sub o condiție suspensivă ce depinde exclusiv de voința debitorului nu produce niciun efect*” (the obligation contracted under a suspensive condition that depends exclusively on the debtor's will does not produce any effect).

<sup>9</sup> Marieta Avram, *Actul unilateral în dreptul privat*, Ed. Hamangiu, Bucharest, 2006, p. 163.

Therefore, it may be reasonably noticed a legal awareness regarding the risk that a party's power might have over the entire binding relationship. This aspect is based on the idea according to which the potestativity is nothing else than a manifestation of the power a person can have with respect to a legal relationship, and absolute power may have the vocation to corrupt legal relations until they are deprived of any substance<sup>10</sup>.

From an etymological point of view, the notion of potestativity was borrowed from the Latin term *potestas*, which means power. Being a generic term that may designate a manifestation of domination or legal advantages<sup>11</sup>, we can reach the conclusion that over the term of potestativity, the condition, as a modality of a civil legal act, does not have the vocation to acquire an exclusivity. After all, any civil subjective right is a representation of a legal power that a person has over others<sup>12</sup>. For this reason, relatively recent<sup>13</sup>, the term potestativity has (re)entered<sup>14</sup>

<sup>10</sup> The purely potestative condition is sanctioned by the law maker as it abducts a condition that is valid at the conclusion of legal acts, namely the condition of seriousness of consent. In essence, this condition is not fulfilled when the will was given under a purely potestative condition of the debtor, since it depends exclusively on the debtor's arbitrariness, regardless of whether the obligation has as its source a pecuniary or free interest contract, sinalagmatic or unilateral. *please see* Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod Civil - Comentariu pe articole*, Ed. C.H. Beck, Bucharest, 2012.

<sup>11</sup> Emmanuel Gaillard, *Le pouvoir en droit privé*, Ed. Economica, Paris, 1985, p. 137.

<sup>12</sup> Ion Deleanu, *Drepturile subiective și abuzul de drept*, Ed. Dacia, Cluj-Napoca, 1988, p. 23; Jean Dabin, *Le droit subjectif*, Dalloz, 2007, pp. 57-59; Răzvan Dincă, *Protecția juridică a intereselor private. Încercare de tipologie*, „Revista Română de Drept Privat” no. 1/2007, p. 104.

<sup>13</sup> Valeriu Stoica, *Drept Civil. Drepturi reale principale*, C.H. Beck, Bucharest, 2009, pp. 41-43; *Drepturi patrimoniale atipice*, „Dreptul” no. 3/2003, pp. 55-58; *Pot fi drepturile potestative exercitate abuziv?*, in *Abuzul de drept. In onoare Ion Lula*, Ed. Universul Juridic, Bucharest, 2016; Dan Chirică, *Denunțarea unilaterală a promisiunii sinalagmatice de vânzare-cumpărare în temeiul unei clauze de dezicere sau a unei clauze rezolutorii*, „Dreptul” no. 3/2001, p.32; *Promisiunea unilaterală de a vinde și de a cumpăra*, „Revista de Drept Comercial” no. 9/1999, pp. 45-46; Marieta Avram, *op.cit.*, pp. 110-169; *Notă la dec. Nr. 614/2002 a Curții Supreme de Justiție, s. civ.*, „Curierul Judiciar” no. 6/2002, p. 73; Ionel Reginiși, *op. cit.*, pp. 236-241; Marian Nicolae, *op. cit.*, p.440; Răzvan Dincă, *Protecția secretului comercial în dreptul privat*, Ed. Universul Juridic, Bucharest, 2009, pp. 392-394; for the Italian legal doctrine, please see Giuseppe Messina, *Scritti giuridici. V. Diritti potestativi. Diritti facoltativi. Simulazione assoluta. Usura e negozio usurario. Interpratazione dei contratti*, A. Giuffrè, Milano, 1948, pp. 41-57; for the Swiss legal doctrine please see Laurent L'Huillier, *La Notion du droit formateur en droit privé suisse*, Imprimerie du journal de Genève, Geneva, 1947; for the French legal doctrine Ibrahim Najjar, *Le droit d'option contribution à l'étude du droit potestatif et de l'acte unilatéral*, Librairie générale de droit et de jurisprudence, Paris, 1957; Corinne Saint-Alary Houin, *Le droit de préemption*, Librairie générale de droit et de jurisprudence, Paris, 1979, pp. 462-467; Stephané Valory, *La potestativité dans les relations contractuels*, Presses Universitaires d'Aix-Marseille, Aix-en-Provence, 1999; Fayez Hage-Chahine, *Essai d'une nouvelle classification des droits privés*, Revue trimestrielle de droit civil no. 1/1982, pp. 736-738; Andre Rouast, *Droits discrectionnaires et droits contrôlés*, Revue trimestrielle de droit civil, 1944, pp. 1-19.

<sup>14</sup> To my knowledge the first scholar who used the notion of potestative right was Professor Eugen Herovanu; *please see* Eugen Herovanu, *Principiile procedurii judiciare*, Institutul de Arte Grafice „Lupta” N. Stroilă, Bucharest, 1932, pp. 79-80; subsequently, this concept was used under the name of *secondary right*; *please see* Mihail Eliescu, *Unele probleme privitoare la prescripția extinctivă în cadrul unei viitoare reglementări legale*, „Studii și cercetări juridice” no. 1/1956, p. 258, Eleonora Roman, *Prescripția extinctivă*, în Traian Ionașcu (et. al.), *Tratat de drept civil, vol. I, Partea generală*, Academia Publishing House, Bucharest, 1967, p. 450.

in the Romanian legal doctrine in order to extend its domain of application to a certain category of subjective civil rights, generally called *potestative rights*. The need to integrate this category of civil subjective rights into the legal language has been felt as a result of the emergence of certain situations in which the classical classification of civil subjective rights proved to be insufficient. Therefore, the category of potestative rights is an eminently doctrinal<sup>15</sup> creation that arose after a large process of reconceptualization of civil subjective rights, followed by the reconfiguration of their traditional classification.

We therefore observe that the link between the potestative condition and the potestative right is represented by, without being confused with, the idea of power, an idea manifested through dominance or advantage over another person<sup>16</sup>.

However, these two notions – potestative right and potestative condition – are describing different judicial realities<sup>17</sup>. Therefore, the potestative right is a subjective right<sup>18</sup> which presents two characteristic elements (e.g. a bond of obedience which must be observed by the person bound to observe the potential holder's exercise of the right and the specific object of these rights consisting in a legal situation), whereas the potestative condition is a manifestation of contractual arbitrariness, which justifies according to art. 1403 of the New Civil Code, the ineffectiveness of an obligation when its exigibility is left in the absolute power of the obligor.

Therefore, in view of the arguments set out above, we conclude that the „notional expansion”<sup>19</sup> of potestativity in the Romanian legal language cannot be denied.

### 3. Potestative rights – an autonomous legal reality

The traditional classification of patrimonial rights in rights *in rem* and personal rights has often proved to be insufficient since the modern practice and legal theory have generated a series of institutions and concepts which, for being explained and justified, have triggered an ample creation process. These have been the constraints and rationales which led to the inclusion of potestative rights in the modern legal theory.

The first endeavours for acknowledging this category of civil rights came from the German legal environment<sup>20</sup>, where these rights were referred to as “Kann-Rechte” or “Rechte des rechtlichen Könnens”. Afterwards, they have been embraced

---

<sup>15</sup> Unlike the concept of (purely) potestative condition, which has a legal regulation, the potestative rights are the creation of the scholars.

<sup>16</sup> Emmanuel Gaillard, *op. cit.* p. 137.

<sup>17</sup> Stephané Valory, *op. cit.* p. 41.

<sup>18</sup> For the arguments that potestative rights (formateur) is a civil subjective right, *please see* Laurent L'Huillier, *op. cit.*, p. 64.

<sup>19</sup> Ibrahim Najjar, *La potestativité...*, p. 601.

<sup>20</sup> Ernst Zitelmann, *Internationales Privatrecht*, Ducker & Humblot, Leipzig, 1897-1912.

in the Swiss<sup>21</sup> and Italian<sup>22</sup> legal doctrine and referred to as “droits formateurs” and “diritti potestativi”, respectively, before being included in the French legal doctrine and referred to as “droits potestatifs”<sup>23</sup>, “droits discretionnaires”<sup>24</sup> or “droits contrôlés”<sup>25</sup>.

Romanian legal doctrine integrated the concept of potestative rights under a series of names, according to the legal doctrine sources where the notion had been identified. On the other hand, to my knowledge, the first Romanian author who used the notion of potestative rights in the Romanian legal language was professor Eugen Herovanu. In a study dedicated to the civil procedure principles, the renowned professor took the Italian notion of “diritti potestativi” and integrated it under the name of “potestative right”<sup>26</sup>. Thereafter, in a study on legal time limitation<sup>27</sup>, inspired by soviet doctrine, Professor Mihail Eliescu referred to what we call today potestative rights by using the notion of “secondary right” (*drept secundar*, in Romanian). However, the isolated endeavors of the two esteemed professors have remained singular for a long period of time, before the existence and utility of these rights was (re)discovered by Romanian scholars at the end of the 90s’ under the inspiration of French legal doctrine.

Even if the study of potestative rights has been only limited under the Romanian legal doctrine Romanian scholars’ endeavours have significantly nuanced their general features, without however establishing a general legal regime for such rights.

Under the Romanian legal doctrine, potestative rights have been integrated in a secondary category of civil rights, referred to by using the generic term of “atypical rights”<sup>28</sup>. The establishment of a new category of civil rights has been triggered by the fact that “some rights and their correlative obligations [...] cannot be compelled to integrate the sphere of rights *in rem* or personal rights”<sup>29</sup>. From this standpoint, the statement according to which potestative rights are atypical civil rights is correct, since, while being rights of a civil nature, they present a series of elements which are characteristic to both personal and *in rem* rights, without however being susceptible to be integrated in any of these categories. However, after a period of thorough analysis, implementation and acknowledgement of a given notion, institution or concept, the unnatural must either convert to natural or disappear. Since potestative rights are undoubtedly a legal reality<sup>30</sup>, their extinction from the legal language is not opportune, which is why I believe that a correct

---

<sup>21</sup> Laurent l’Huillier, *op. cit.*, p. 61 *et seq.*

<sup>22</sup> Giuseppe Messina, *op. cit.*, pp. 41-57.

<sup>23</sup> Ibrahim Najjar, *op. cit.*, pp. 100-111.

<sup>24</sup> Andre Rouast, *op. cit.*, pp. 1-19.

<sup>25</sup> *Ibidem*.

<sup>26</sup> Eugen Herovanu, *op. cit.*, pp. 79-80.

<sup>27</sup> Mihail Eliescu, *op. cit.*, pp. 229-300.

<sup>28</sup> Valeriu Stoica, *Drepturi patrimoniale atipice...*, pp. 56-58.

<sup>29</sup> *Idem*, pp. 33-34.

<sup>30</sup> Stephané Valory, *op. cit.* p. 25.

classification of civil rights must also cover the category of potestative rights, however not before being understood and their general legal regime addressed.

#### 4. The peculiarities of potestative rights

Starting with the definition set out by Ibrahim Najjar according to whom potestative rights are those civil rights the holder of which has the power to influence pre-existing legal situations (our note: which relate to the interests of others), by modifying them, extinguishing them or creating new legal situations, by means of an independent unilateral deed<sup>31</sup>, these rights appear to present a series of peculiar features.

As I will show below, conceptually wise, potestative rights are hybrid rights, atypical rights or intermediary rights, since they present features both of personal and *in rem* rights. Thus, unlike personal rights, potestative rights do not have a correlative obligation relating to a certain good, but a correlative obligation relating to a certain legal situation. At the same time, like personal rights, potestative rights have a passive subject which is determined and like rights *in rem*, they are exercised directly and unconditionally, without the intermediary of another person.

The peculiarity of potestative rights consists, thus, in a series of elements which renders this category of civil rights autonomous. Such autonomy is justified, especially by the fact that potestative rights cannot be naturally integrated in the traditional classification of patrimonial civil rights. This incompatibility of potestative rights stems from their peculiar features, namely: a) the legal power of the holder with respect to a legal situation, which affects other persons' interests; b) the obedience the passive subject; and c) their specific object, which is a legal situation.

**i. The legal power.** All civil rights are characterised by the power which the holder has with respect to a certain person, thing or, as we shall see, a certain abstraction. Under private law, the concept of *power* stems from the definitions elaborated in the legal doctrine with regard to the notion of civil right. The concept of *power of will*, proposed by Windscheid and Savigny, as well as the concept of *egoist power*, proposed by Ripert, are to be found at the basis of theories on civil rights<sup>32</sup>. The notion of power penetrated the usual legal language by means of the definitions on civil right as "an irreducible reality which is the essence of the right itself"<sup>33</sup>. The two major categories of patrimonial civil rights, namely personal rights and rights *in rem* have been equally defined by reference to the notion of power. The personal right has been defined as the power to request a certain person the performance of a certain deed and the right *in rem* the power of a person upon a certain good<sup>34</sup>. Nevertheless, the theory according to which the right *in rem* consists of the legal connection between a person and a good has been abandoned, the modern

---

<sup>31</sup> Ibrahim Najjar, *op. cit.*, p. 102.

<sup>32</sup> Răzvan Dincă, *Protecția secretului comercial...*, pp. 103-105.

<sup>33</sup> Emmanuel Gaillard, *op. cit.*, pp. 7-8.

<sup>34</sup> *Ibidem*.

conception with respect to the content of the right *in rem* being that of a connection between the holder of a right *in rem* and other persons (even if in this case we are in the presence of a general and undefined passive subject)<sup>35</sup>.

Although in the legal language the notion of power refers to the civil right, it has a different content than the power perceived from the standpoint of potestative rights. The peculiarity of potestative rights is that they grant the holder a power with respect to a legal situation, being completely different from rights *in rem* and personal rights, as well as the fact that these rights have an identified passive subject the situation of which the holder of the potestative right can modify unilaterally, without the defined passive subject being able to resist. Therefore, potestative rights do not grant their holders an immediate power with respect to a person or a good, as is the case of personal rights, which grant their holder the power to exercise the right directly with respect to a certain person or, as is the case of rights *in rem* which grant the holder the power to exercise the right directly upon a certain good<sup>36</sup>. It is precisely the fact that potestative rights do not present such immediate enforceability that warrants their inclusion in the category of secondary rights<sup>37</sup>.

Thus, potestative rights consist in “the power of their holder to intervene, on the grounds of its unilateral will, in pre-existent legal situations where other persons’ interests are also at stake”<sup>38</sup>. In this respect, potestative rights are characterised by the fact that their holder has the power to change the legal situation of another person without the latter being able to resist the exercise of such right<sup>39</sup>. Therefore, the holder’s power manifests itself by means of an unilateral legal act, but “unlike legal acts which are a direct expression of the principle of freedom of will, the exercise of the potestative right by means of a unilateral act are, directly, the expression of the legal power of such rights and only indirectly the expression the power of will”<sup>40</sup>.

**ii. The obedience relationship.** Another element particular to potestative rights is to be found in the obedience relationship between the potestative right’s holder and the person which must respect by the effects of the exercise of such right. If personal rights impose a specific correlative obligation upon other persons, having as object to give, do or refrain from doing a certain act, from a legal standpoint, the obedience relationship (*sujetion*) between the holder and the person who is held to respect the effects of the exercise of the potestative right has a completely different nature

In the legal doctrine, the obedience relationship has been defined as “the connection in the virtue of which a certain person is held to respect another person’s intrusion in its legal sphere, without however being subject to a specific

<sup>35</sup> Valeriu Stoica, *Drepturi reale principale*....., p. 26.

<sup>36</sup> Ibrahim Najjar, *op. cit.*, p. 102.

<sup>37</sup> In the French legal literature has been proposed the name „droits secondaires” or „droits moyens” and in the Italian legal literature has been proposed the name „diritti mezzzi” please see Ibrahim Najjar, *Le droit d’option*...., p. 103

<sup>38</sup> Valeriu Stoica, *Drept Civil*...., p. 41.

<sup>39</sup> Marieta Avram, *Notă*...., p. 73.

<sup>40</sup> Valeriu Stoica, *Drepturi patrimoniale*...., p. 55.

obligation”<sup>41</sup>. Consequently, the question arises whether for the purposes of the exercise of potestative rights, the passive subject has any correlative obligation. The response provided by the legal doctrine has been negative. If in the case of personal rights, the passive subject has the obligation to give, do or refrain from doing a certain act, and in the case of *in rem* rights the passive subject (general and undefined) has a negative general obligation enforceable *erga omnes*, in case of potestative rights the active subject has a mere *laissez faire* obligation<sup>42</sup>. Starting with this reasoning, the doctrine observed that this obedience obligation, specific to potestative rights does not have a defined legal value<sup>43</sup>, since “the potestative right relates mainly to the legal situation, the object of the potestative right and only subsidiarily to the so-called passive subject, which in most instances, consists of a number of persons which are or can be determined”<sup>44</sup>. Therefore, it must be noted that French doctrine has also upheld the argument according to which the obedience connection allows the holder of the potestative right to penetrate the legal sphere of another person.<sup>45</sup>

Therefore, the lack of a correlative obligation on the part of the passive subject is justified by the absolute nature of such rights, the exercise of which do not require the intermediary of other persons. Consequently, from the standpoint of potestative rights, the idea of correlative obligation is nothing but “a reminiscence of the same scholastic tendency to perceive the right from the point of view of a traditional legal relationship”<sup>46</sup>.

**iii. The specific object.** Having regard to the above, we have ascertained that potestative rights grant the holder the power to modify, by means of its own power of will, a legal situation which affects the interests of another person.

From the standpoint of potestative rights, the doctrine upheld the idea according to which the potestative rights have a specific object, which separates them completely from other categories of civil rights. Such object takes the form of a so-called *legal situation*, concept the content of which “is not precise, being, on the contrary, ambiguous and susceptible of intricacies and controversy”<sup>47</sup>. Such notion has been analysed especially in intertemporal and transitory law, the notion of legal situation being understood “in the broadest sense of the word, as designating or including not only the legal relationships between legal subjects, which are generated, modified or extinguished, as the case may be, by means of legal acts or deeds but also legal deeds (events and actions) which have the capacity to generate, modify or extinguish legal relationships, as well as the capacity and legal status of a certain person [...] or asset [...]”<sup>48</sup>.

---

<sup>41</sup> Fayeze Hage-Chahine, *op. cit.*, p. 736.

<sup>42</sup> *Ibidem*.

<sup>43</sup> Marieta Avram, *Actul juridic unilateral...*, p.145.

<sup>44</sup> Valeriu Stoica, *Drept Civil...*, p. 42.

<sup>45</sup> Stephane Valory, *op. cit.*, p.44.

<sup>46</sup> Marieta Avram, *Actul juridic unilateral...*, p. 145.

<sup>47</sup> Marian Nicolae, *Contribuții la studiul conflictului de legi în timp în materie civilă*, Ed. Universul Juridic, Bucharest, 2013, p. 109.

<sup>48</sup> *Ibidem*.



One of the legal scholars who have extensively addressed the notion of legal situation has been the French legal practitioner Paul Roubier<sup>49</sup>. In its work on civil rights and legal situations, the French author identifies two different categories of legal situations: (i) subjective legal situations; and (ii) objective legal situations. The author defines subjective legal situations as those “situations established regularly, either by means of a voluntary act, or on the grounds of the law, which mainly generate prerogatives advantageous to their beneficiaries and which they are free to waive”<sup>50</sup>. In addition, according to the same author, in case of objective legal situations, the legal norm is the one which prescribes a certain conduct and the imperative provisions are not set out with the purposes of serving interests, but with the aim to satisfy requirements of public order. Thus, the author considers that subjective situations can only consist of rights, whereas objective situations can only consist of obligations. Also, Paul Roubier finds that subjective legal situations have a predefined nature, whereas this is not necessarily the case for objective legal situations, existing, in his opinion, also legal reactional situations (*réactionnelles*), objective legal situations which do not present the predefined element. Nevertheless, the notion of legal situation must be construed in a very general manner as any situation which generates certain legal effects<sup>51</sup>. Thus, potestative rights have an immaterial object, the holder of the right being able, by means of its own expression of will to act upon a legal situation which involves the rights or interests of another person.

## 5. Conclusions

Potestative rights are closely linked to the notion of legal freedom of the persons that enters in legal relationships that contain such a right. On the one hand, if we look at the potestative right from the point of view of its holder, we notice that such right provides an extension of its sphere of freedom and, on the other hand, viewed from the perspective of the passive subject, we note that the potestative right imposes a limitation of its legal freedom. However, in the legal doctrine has been promoted the idea according to which the potestative rights may be a remarkable example of contractual domination, but they can also represent a mean of balancing the contractual relationships when they are recognized by law or by the judge.<sup>52</sup>

Even though an authentic theory of potestative rights is currently insufficiently outlined in the Romanian legal doctrine, we believe that the existence of these rights cannot be ignored. Even though the doctrinal approaches have signaled so far, the specific features of the potestative rights, a general awareness of their importance seems to be (still) at an early stage. However, as we have previously pointed out, the potestative rights represent an autonomous category of civil subjective rights,

---

<sup>49</sup> Paul Roubier, *Droits subjectifs et situations juridiques*, Dalloz, Paris, 2005.

<sup>50</sup> *Idem*, p. 73.

<sup>51</sup> F. Terre, *Introduction générale au droit*, Dalloz, 1996, n° 259.

<sup>52</sup> Cathy Pomart-Nomdedeo, *Le régime juridique des droits potestatifs en matière contractuelle, entre unité et diversité*, RTDciv., 2010, p. 209.

fundamentally different from other categories of civil subjective rights with which they may be confused. The specific elements set forth in this paper open up new research horizons and could be the sources of the reconceptualization of the civil subjective right as a whole.

### Bibliography

#### I. Treaties, courses and monographies

- 1 Corinne Saint-Alary Houin, *Le droit de préemption*, Librairie générale de droit et de jurisprudence, Paris, 1979;
- 2 Doru Cosma, *Teoria generală a actului juridic civil*, Scientific Publishing House, Bucharest, 1969;
- 3 Eleonora Roman, *Prescripția extinctivă*, in Traian Ionașcu (et. al.), *Tratat de drept civil, vol. I, Partea generală*, Academia Publishing House, Bucharest, 1967;
- 4 Emmanuel Gaillard, *Le pouvoir en droit privé*, Ed. Economica, Paris, 1985;
- 5 Ernst Zitelmann, *Internationales Privatrecht*, Ducker & Humblot, Leipzig, 1897-1912;
- 6 Eugen Herovanu, *Principiile procedurii judiciare*, Institutul de Arte Grafice "Lupta" N. Stroilă, Bucharest, 1932;
- 7 F. Terre, *Introduction generale au droit*, Dalloz, 1996;
- 8 Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod Civil - Comentariu pe articole*, Ed. C.H. Beck, Bucharest, 2012;
- 9 Gabriel Boroi, Carla Alexandra Angheliescu, *Curs de drept civil. Partea generală*, 2<sup>nd</sup> edition, Hamangiu, Bucharest, 2012;
- 10 Gheorghe Beleiu, *Drept Civil Român. Introducere în dreptul civil. Subiectele dreptului civil*, 11<sup>th</sup> edition, revised and added by Marian Nicolae and Petrică Trușcă, Universul Juridic, Bucharest, 2007;
- 11 Giuseppe Messina, *Scritti giuridici. V. Diritti potestativi. Diritti facoltativi. Simulazione assoluta. Usura e negozio usurario. Interpretazione dei contratti*, A. Giuffrè, Milano, 1948;
- 12 Ibrahim Najjar, *Le droit d'option contribution à l'étude du droit potestatif et de l'acte unilatéral*, Librairie générale de droit et de jurisprudence, Paris, 1957;
- 13 Ion Deleanu, *Drepturile subiective și abuzul de drept*, Ed. Dacia, Cluj-Napoca, 1988;
- 14 Jean Dabin, *Le droit subjectif*, Dalloz, Paris, 2007;
- 15 Laurent L'Huillier, *La Notion du droit formateur en droit privé suisse*, Imprimerie du journal de Genève, Geneva, 1947;
- 16 Marian Nicolae, *Contribuții la studiul conflictului de legi în timp în materie civilă*, Ed. Universul Juridic, Bucharest, 2013;
- 17 Marian Nicolae, *Tratat de prescripție extinctivă*, Ed. Universul Juridic, Bucharest, 2010;
- 18 Marieta Avram, *Actul unilateral în dreptul privat*, Ed. Hamangiu, Bucharest, 2006;
- 19 Paul Roubier, *Droits subjectifs et situations juridiques*, Dalloz, Paris, 2005;
- 20 Răzvan Dincă, *Protecția secretului comercial în dreptul privat*, Ed. Universul Juridic, Bucharest, 2009;
- 21 Stephané Valory, *La potestativité dans les relations contractuels*, Presses Universitaires d'Aix-Marseille, Aix-en-Provence, 1999;
- 22 Valeriu Stoica, *Drept Civil. Drepturi reale principale*, C.H. Beck, Bucharest, 2009.

## II. Articles

1. Andre Rouast, *Droits discrectionnaires et droits contrôlés*, „Revue trimestrielle de droit civil”, 1944;
2. Cathy Pomart-Nomdedeo, *Le régime juridique des droits potestatifs en matière contractuelle, entre unité et diversité*, RTDciv., 2010;
3. Dan Chirică, *Denunțarea unilaterală a promisiunii sinalagmatică de vânzare-cumpărare în temeiul unei clauze de dezicere sau a unei clauze rezolutorii*, „Dreptul” no. 3/2001;
4. Dan Chirică, *Promisiunea unilaterală de a vinde și de a cumpăra*, „Revista de Drept Comercial” no. 9/1999;
5. Fayez Hage-Chahine, *Essai d'une nouvelle classification des droits privés*, „Revue trimestrielle de droit civil” no. 1/1982;
6. Ionel Reghini, *Considerații preliminare privind drepturile potestative*, „Pandectele Române”, no. 4/2003;
7. Marieta Avram, *Notă la dec. Nr. 614/2002 a Curții Supreme de Justiție, s. civ.*, „Curierul Judiciar”, nr. 6/2002;
8. Mihail Eliescu, *Unele probleme privitoare la prescripția extinctivă în cadrul unei viitoare reglementări legale*, „Studii și cercetări juridice” no. 1/1956;
9. Răzvan Dincă, *Protecția juridică a intereselor private. Încercare de tipologie*, „Revista Română de Drept Privat” no. 1/2007;
10. Valeriu Stoica, *Drepturi patrimoniale atipice*, „Dreptul” no. 3/2003;
11. Valeriu Stoica, *Pot fi drepturile potestative exercitate abuziv?*, in *Abuzul de drept. In honorem Ion Lula*, Ed. Universul Juridic, Bucharest, 2016.