

# The Notion and Legal Space of Exercising the Right to Ownership

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## Abstract

The aim of this article is to address the institute of the right to ownership, as a basic legal category, but also as one of the fundamental human rights that is regulated and guaranteed by a host of international legal instruments and documents. Following a brief historical overview, the article highlights the concept, legal nature and importance of the right to ownership in all legal systems, with particular emphasis in the Republic of Macedonia. The right to ownership is a real right, which entitles the holder to exercise the fullest power over a thing (*ius utendi, fruendi et abutendi*). The fact that the right to ownership is absolute, exclusive and individual, it does not mean that it is unrestricted. On contrary, in every civilized society there are a multitude of reasons that justify the limitation of the right to ownership. These reasons may be: economic, environmental, public health, cultural, etc., and may be stipulated by statutes, decisions of a state institution (administrative or judicial) and legal transactions. In this context, the article refers to the limitations of the right to ownership in the legal system of the Republic of Macedonia.

**Keywords:** The right to ownership; Law; Limitation

## Introduction

The right to ownership represents one of the most important institutes of civil law and the primary institution of property law. This is a complex institution through which legally is expressed and regulated the fundamental socio-economic relations [1]. The character of socio-economic relations is determined by the ownership of the means of production, and this fact stipulates the dominant form of ownership in every legal order [2]. As a consequence, there is not a unique definition for the right to ownership that would apply to every economic and social order.

If we refer to the historical development of right to ownership, we can conclude that to every particular social order corresponds a specific form of ownership, and historically, collective ownership emerged and existed before the individual ownership.

The institute of ownership has been developed as a result of continuous confrontation between two opposing concepts of ownership - the collective and individual one [3].

According to the collectivist concept of ownership, an item belongs to the collective, while individuals have some specific rights, which allow them to have limited legal power over the item. The joint (collective) ownership derives from tribal ownership, and is typical for Medieval Europe [4].

The individualistic concept of ownership emerged in the era of slavery, more precisely in Roman law, and the Romans consider it as full and exclusive power over a thing (*plena in re potestas*). This concept of individual private ownership as absolute power over things is faithfully expressed in Roman maxim: "*ius utendi fruendi et abutendi res sua quatenus juris ratio patitur - the right of the owner to use, take fruits and dispose freely with his item, to the exclusion of every other person*" [5]. In the era of slavery, this concept was applied to the extreme, and this is best evidenced by the fact that slaves were considered as talking objects and as such they were treated as objects of private ownership.

In medieval Europe the dominant form of ownership was collective. The feudal law recognized the ownership of feudal lords over the land and the means of production as well as the ownership of the peasants and craftsmen over tools for production. In fact, it was a divided ownership, i.e. the property entitlements were divided between several

entities. The collectivist concept of ownership which dominated this period exerted pressure and marginalized the individualistic concept.

With the gradual reception of the Roman law by European countries, the individualistic concept reemerged again and as a consequence it eliminated the collectivist concept [6]. The capitalist social system which rose from the ashes of the feudal system proclaimed the freedom of movement and competition, equality of the owners, and above all, the right to private ownership as inviolable and sacred right.

The dominant form of ownership in the socialist system was a specific property. It was known as social ownership and was characterized by associated labor, use and disposition of the means of production by workers. Besides the social ownership the Constitution guaranteed the limited private and personal ownership [7].

The concept of the right to ownership, which has evolved from the older laws, has been contextually transformed from a simple human contact with an item to a legal interaction between people about things. Seen from this perspective, ownership could not have been treated only as a legal issue, but as an economic as well, because ownership in the beginning was encountered as an economic appropriation of the attributes of an item by humans, and only after the emergence of state, it was considered as a legal power of human over it. In this context, there is a need to make the difference between the notion of right to ownership and the economic notion of acquisition, as well as between economic and legal owner [8].

Economic owner is a person who acquires an attribute of an item, regardless of whether he is entitled to do it or not (such as thief). A thief is only an economic owner and not a legal owner of an item. His ownership relation with the item is in essence a simple economic relationship. He utilizes the economic attributes of the thing, according

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to an unlawful act (theft), without having any lawful title that could justify the exploitation of the economic attributes of the thing.

Legal owner is every person that utilizes the economic attributes of a thing and has a valid lawful title over it. A lawful title for the acquisition of ownership is a legal transaction which includes (contract, testament and unilateral declaration of will), a decision of a court or administrative agency and statutes adopted by the Parliament.

The legal owner has the right to exercise the right of ownership in the most absolute manner, whereas the economic owner utilizes a thing as long as the legal owner does not get the possession of it through judicial proceedings.

While the legal owner enjoys legal protection, economic owner does not enjoy it, on the contrary the act through which he apprehended the thing is qualified as a specific criminal offence and he has to bear responsibility for it.

In reality, it is most common that the same person is both economic and legal owner of a thing, which means that at the same time he has the right over the thing and the right to utilize the attributes of that thing [9].

The legal systems of different countries pay a special importance to the right to ownership. This is evidenced by the fact that the right to ownership is regulated by constitutional norms. The Constitution of Macedonia guarantees the right of ownership and its inviolability. Article 30 stipulates that "no person may be deprived of his/her property or of the rights deriving from it, except in cases concerning the public interest determined by law" [10].

## The Notion of the Right of Ownership

In modern legal systems that are part of the continental European legal family, the institute of ownership is individually conceived. According to this concept, ownership is a real right which gives to its bearer full power over a thing, as long as it is permitted and protected by the legal order [11].

The right of ownership is a subjective right that entitles the bearer to possess, use and dispose of an item as long as it is not contrary to law or to the rights of third persons.

In the various definitions about the right to ownership, three are dominant: ownership is a legal power, a subjective right and has a social function.

The classical Roman law perceived ownership as exclusive and complete power over a tangible, namely as a sum of property entitlements. Pandectists followed the Roman definition of ownership and affirmed it as full power over a thing.

The French civil code and other European codes that followed it were under the influence of the natural law theory, therefore proclaimed the right of ownership as an absolute power over a thing [12].

According to the French Civil Code (1804): the right to ownership is the right to enjoy and dispose of an item in the most absolute manner, provided the owner does not take actions that are prohibited by law or other acts [13].

The Austrian General Code (1811) defines the right to ownership as the right of the owner to do with his assets whatever he pleases, excluding all others [14].

The German Civil Code (1896) stipulates that: the owner of a thing

may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence [15].

According to the Swiss Civil Code (1907): the owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. He or she has the right to reclaim it from anyone withholding it from him or her and to protect it against any unwarranted interference [16].

By analyzing the abovementioned definitions we can discern some key elements common for all of them: ownership is considered as power and subjective right, the right of owner is absolute and exclusive; its limits are stipulated by law and the rights of third persons, object of this right are things. Only in exceptional cases, other goods and rights may be considered as object of ownership.

In the Law on ownership and other real rights in the Republic of Macedonia, the right of ownership is defined as a legal relationship. The content of this right comprises the right of the owner to possess, use and dispose of his item according to his own will, if it is not in collision with the law or with a right of another person [17].

The Law on ownership and other real rights when determines the content of the right of ownership, it enumerates three entitlements: possession, use and disposal. It is certain that the lawgiver in the right to enjoy has included the entitlement to use as well. Moreover, from an economic perspective there is no difference between use and exploit (take fruits) because in their broader meaning both deal with the economic use of things. However, in legal terminology there is a distinction between use and exploitation. The criterion is whether the item is capable to produce natural or civil fruits or not. If it is, then it is exploited, if not, it is used.

The new formula of our legislation, which stipulates the prohibition of the owner to exercise his right in collision with law and the rights of other persons, is transplanted from contemporary European codes.

## Limitations on the Right to Ownership

The right of ownership is a right that gives the owner the full power over a certain item. The fact that it provides full and exclusive power to legal entities does not mean in any way that the right to ownership is unrestricted.

The absolute character of the right to ownership was transferred from Roman law to the European civil codes of the nineteenth century. These codes, particularly the French civil code, under the influence of the natural law theory affirmed the absolute character of the right to ownership by treating it as an individual and exclusive right, total and sovereign, as well as eternal. However, if today we refer to the provisions of the European civil codes we will notice that none of them claims that the rights of ownership to treat as the absolute right, but, of all the codes in question, even the most absolute powers are introduced in legal frames.

Although the Law on ownership and other real rights, (2001) warns that the right of ownership of real right is broader in contemporary terms, however, it cannot exist as a sacred and inviolable right. The right of ownership may be limited due to the existence of public interest set by law, but also because of the existence of the interests of third parties, private interest. This Law also requires third parties to refrain from actions that would affect the property rights of another person [18]. So, although the ownership from the terminological aspect

is unlimited, the legal power of the owner, always more or less is limited by general and special legal constraints.

Political and legal basis of the right of ownership restriction is in need of adjustment of civilized coexistence of a human community, of a certain territory. There are many reasons that guide the limitation of ownership, such as economic, ecological, health, cultural etc. The limitations of the right of ownership act as a counterweight to its potential absoluteness, which could have made it socially unacceptable [19].

Any limitation of the right to ownership is oriented towards restriction of the freedom to use and dispose of the item. But, given that the right to ownership is guaranteed by the Constitution, it can only be restricted under certain conditions in accordance with the law and the Constitution; it is hereupon a legal restriction right to ownership.

### Statutory limitations of the right to ownership

Statutory limitations are all those restrictions that are directly or indirectly based on acts of Parliament. These are: 1. Limitations of the right to ownership based on acts of Parliament or by-laws (statutory limitations) 2. Limitations of the right to ownership that are based on the decision of a particular state institution (judicial or administrative) 3. Limitations of the right to ownership set from the owner by a declaration of will, if this limitation is allowed by statute [11] (limitations based on legal transaction). All statutory limitations can be general and specific.

**General legal limitations of the right to ownership:** General limitations of the right to ownership are those that restrict the exercise of any ownership right. In modern legal systems, these limitations are explicitly mentioned in constitutional and statutory provisions. According to article 9 of the Law on ownership and other real rights (2001), such limitations are:

The prohibition to use of a thing contrary to its nature and destination

**a) The prohibition to use a thing contrary to its nature and purpose as well as contrary to the general interest which defined on law:** In the Law on ownership and other real rights the content of the right to ownership is determined as “the right of the owner to possess, use and dispose an item according to his own will, if it is not in collision with law and the rights of third persons”. The lawgiver has ordered the owner to respect the constitutional principle according to which: “bearers are required to realize the right to ownership in accordance with the nature and purpose of the object of that right, as well as general interest set by law” (for example, agricultural land should be used for planting) [20].

The criterion ‘nature of the thing’ has to do with the importance of a type of thing, which derives from its natural attributes and from its treatment in society as well. For example, bread according to its nature is considered a consumable item and the right of usufructs cannot be constituted over it. Hereupon, the limitation exists on the type of property rights that can be constituted over it.

The criterion ‘destination of the thing’ limits the exercise of property rights as well. The exercise of real rights over auxiliary things is realized through the exercise of rights on the main thing. This means that the sale of an object built according to the right of long-term lease as a property right (the object is a pertinence of the right of long-term lease) will be implemented through the right of long-term lease.

The criterion ‘general interest determined by law’ can be expressed by the demand of lawgiver that agricultural parcels be joined through compassing of land, so they can be utilized more rationally and the agricultural land could satisfy the need of the community.

The prohibition to exercise the right to ownership contrary to the purpose for which it was created and recognized by law or contrary to the public morality [21]. Under this provision the abuse of right to ownership is not the only illegal but also morally impermissible.

The prohibition to exercise the right to ownership for harming or preventing others in the exercise of their own right. When a person that commits a harmful act is aware that by exercising his right causes harm to another, especially when he does it willfully, it represents an abuse of the right to ownership (for example, playing music at a high volume in order to disturb the neighbor). As an example of obstruction of others in their right is the case of the conclusion of the contract of gift with a third party with the aim of bypassing the right to priority of purchase of the joint owner, co-owner and neighbor.

**b) The obligation to perform a certain action:** According to this, the holder of the right to ownership is required to perform certain actions on a person, e.g. when an immovable is burdened with real burden, the owner is obliged to undertake certain actions for the benefit of the persons who enjoy this the right.

**c) The obligation to make concessions:** According to this, the owner of a real estate is obliged not to undertake certain actions, namely to make concessions in favor of certain real estate, e.g. put certain installations which would excessively hamper the use of the real estate of the neighbor.

**d) The obligation to certain endurance:** According to this, the owner is obliged to endure when his item is used by a third person, although in other cases he might not be obliged to endure, for instance in the case of real servitude.

### Specific statutory limitations of the right to property

Specific statutory limitations are those which, due to the interest and protection of state security, nature, the environment and human health, the lawgiver limit the exercise of the right to ownership over certain items in certain situations [22]. Specific statutory limitations are: a) the restrictions in order to protect the interests and security of the state, nature, the environment and human health, b) Restrictions on the items on the general interest of the Republic of Macedonia. c) Neighboring rights and d) transmissions.

**Restrictions for the protection of the interests and security of the state, nature, the environment and human health:** The right to ownership is a right guaranteed by the Constitution; therefore the conditions under which it may be limited or expropriated are determined by law. In Macedonia the act that regulates the conditions under which the right to ownership may be expropriated or limited is the Law on Expropriation under which the right to ownership might be expropriated in whole or in part when it comes to public interest. In accordance with the Constitution, the law stipulates that if a property is expropriated or restricted, rightful compensation not lower than its market value is guaranteed [23].

**Restrictions regarding the items of general interest for the Republic of Macedonia:** Such items include: natural resources, flora and fauna, items used in general use, construction land, forests, agricultural lands, pastures and waters, as well as items and objects of special cultural and historical importance [24].

Items, which on the basis of Constitution or special laws are proclaimed as separate items of general interest for the Republic, are owned by state. Items of general interest that are owned by state can be given for use to natural and legal persons under conditions determined by the Law on concessions [25].

Items of general interest for the Republic of Macedonia enjoy special protection and the rights over them can be limited in accordance with law. Thus, the exercise of the right to ownership associated to forests, pastures, construction and agricultural land, and construction land are regulated by special legal acts. According to the Law on forests, the owner has the right to cut down the forest without permission [26-28].

**Neighbor's right:** The neighbor right is a mutual and considerate exercise of the right to ownership in such a manner that they authorize the owner of one real estate, concerning the exercise of its right to ownership, to request from the person who is an owner of another neighboring real estate, for its benefit to endure, let through or do something that is related to its real estate, as well as to request delineation from the neighboring real estate.

The consequences of the factual proximity of real estate's may be the possibility of a collision and competition for property entitlements between their owners. Such situation raises the necessity of legal regulation of relations between the owners of neighbor real estates. Law on ownership and other real rights stipulates that the neighbor's right is mutual and considerate exercise of the right to ownership. In this context, the norms of this law authorize the owner of a real property regarding the exercise of his ownership to request the owner of the neighboring real estate endure, let through or do something that is related to its real estate [25].

In addition, the owner of the real estate is entitled to request from the owner of the neighboring real estate to endure, let through or do something for the sake of mutual and careful exercise of the right to ownership. This right belongs to the possessors whose right derives from the right of ownership [26].

The concept of neighbor right is based on the need of correlative exercise of ownership entitlements over neighboring real estates. As a consequence, the neighbor right is allowed to be exercised only to an extent and manner that will limit, burden, or any other way disturb as little as possible the neighbor who has to endure, let through or do something.

All neighbor rights are formulated in the form of: a) entitlements, b) obligations to do something (e.g. the obligation of collecting rain water from a roof) or c) prohibitions not to do something (e.g. prohibition to change the natural flow of water) [27].

#### a) Neighbor entitlements

**1. The right to cut branches and roots from a third party tree:** The neighbor right is of the owner to pull out tendons and roots from neighbor's tree, and to cut and keep or use branches of the tree as well as part of the trunk which is found in the air space above its real estate [28]. The owner of the real estate has the right to seek compensation for damages caused by tendons, roots and branches of the third party's trees.

**2. The right of entering third party's real estate:** The owner of an animal, a swarm of bees and other items that have come to a third party's real estate can in a reasonable period of time enter there and take them back even without the permission of the owner of real estate. If the animals, flock of bees or the other items which are found on a

third party's real estate or their movement caused damage to the owner of the real estate where those items were found, or if the owner of the real estate had necessary related costs, the owner has the right to compensation of damages and to keep the item until the damage or the costs are fully compensated [29].

**3. The right to use a third party's real estate or carrying out work:** The owner of real estate, namely the building on which it is necessary to carry out work needed for its use or utilization, can temporarily use the real estate. After the completion of the work he should bring back the real estate to the condition it had previously been and to compensate the caused damage. At request of the owner of the real estate a just compensation is paid [30].

**4. The right to undertake necessary measures to prevent the collapse of a building:** When there is serious danger that someone's building or some other part of someone's real property will collapse which would cause danger to a neighboring real estate, the owner whose real estate is in danger is entitled to undertake all the necessary measures to prevent the causing of damage, as well as to request insurance against the occurrence of future damage [31].

**5. The right to establish or renew the boundaries:** A boundary is a mutual border line which delineates neighboring land lots. If the signs that establish the boundaries between two real estate's are damaged to such an extent that they are unrecognizable, the each of the neighbors has the right to request from the court in a non-contentious procedure for establishing the boundaries to establish renew or correct the boundary [32].

**6. The right of co-ownership on over trees on boundaries:** The Law on ownership and other real rights based on the principle 'superficies solo cedit' stipulates that the trunk of the tree belongs to the owner of the real estate from which land the tree grew, regardless of where the branches spread or where the roots of the tree spread. According to this, a tree that has grown on the boundary is co-owned by the neighbors on the both sides of the land boundaries [33].

**7. The right of co-ownership over fences:** Fences between neighboring real estate's (walls, fences, fences, live fences, etc.) as well as items that serve as signs of boundaries are co-owned by neighbors on both sides, unless it is proven that they are owned by one of them. Co-ownership over fences differs from standard co-ownership because this is not divisible. In fact, it can be used by each of the neighbors from its side up to half of its width, without endangering and preventing its neighbors to exercise the same right. The co-owners share solidarity responsibility for damages that could be caused to a third person [34].

#### b) Neighbor obligations

**1. The obligation to establish and maintain the fence:** A fence which is located exclusively on a real estate of one owner and is established to separate one land from form the land of neighbor is not co-ownership, but it is owned by the person on whose land it is located. Maintenance costs are covered by the person on whose land it is located.

**2. The obligation to take all the necessary measure for the rain that drains from its building not to fall on the real estate of the neighbor** [35].

#### c) The neighbor prohibitions

**1. The prohibition to undermine third party's real estate:** The owner of a real estate is not allowed to undermine or undertake



something on its real estate that would put into danger the stability of neighboring real estate. The owner of the neighboring real estate has the right to request the undertaking of measures (installment of special constructions) that will prevent the cause of damage. The owner of the real estate who has installed the special construction in order to secure the stability of neighbor's real estate is responsible for any damage that would occur in connection with it [36].

**2. The ban on changing natural water flows:** The owner of the land must not change at the expense of another land the direction or force the natural water flow that runs across its land. Furthermore, the owner of the land in the lower flow of the water must not create or set up obstacles to the flow of water, neither the owner from the upper flow of the water is allowed to do something that which would to a great extent burden the land in the lower flow [37].

**d) Emissions:** The term emission means the use of a real estate that could adversely affect the use of another real estate. Impacts which in natural way are transmitted from one real estate to another will be considered emissions when they would cause significant harm to the owner of the real estate.

The owner of real estate is obligated during its use to abstain from actions and to remove the causes that originate from his real estate and which lead to difficulties in using of other real estate's (transmission of smoke, unpleasant odors, warmth, sooth, quake, noise, release of waste waters etc.), above the usual measurements considering the nature and purpose of the real estate and local circumstances [38].

Emissions are divided into direct and indirect emissions

**1) Direct emissions:** are those in which the action is directed directly in a way that solid, liquid and gaseous substances stop in third party's real estate (e.g. water flow, waste thrown out the window in the neighbor's real property). Direct emissions are prohibited, but they are allowed only when there is a legal basis for such behavior. Therefore the owner of neighboring real estate has the right to request cessation of the disturbance and compensation of caused damage [39].

**2) Indirect emissions:** are those in which neighboring real estate accidentally or under the influence of force majeure has faced major obstacles that originate from actions in neighbor's real estate (e.g. due to air pressure, smoke from the chimney of the neighbor moves to the neighbor's garden) [40].

The indirect emissions can be permissible emissions and impermissible ones. Permissible are those emissions where the difficulties in using of other real estate do not exceed the amount which is common, considering the nature and purpose of the real estate and local circumstances.

Impermissible emissions are those through which the use of other real estate's is made difficult beyond extent which is usual or which create significant damage considering the nature and purpose of the real estate and local circumstances [41].

Owners of real estate which have been subject to indirect impermissible emissions (smoke, noise, dust, steam, sewage, etc.) are entitled to require avoidance of their causes and compensation for caused damages.

### Limitations based on legal transactions

In addition to the statutory limitations, the right to ownership can be burdened and conditioned by the valid legal transaction.

The limitation through the prohibition to alienate or burden an item: this prohibition acts against third parties, if it is created for the benefit of a spouse, child, parent, adoptee or the adopter and if recorded in the public books.

The limitation with term or condition: The right to ownership may be limited, so that the end of right of ownership of the previous owner and its acquisition from the subsequent owner depends on the fulfillment of a condition or the passage of time. If the limitation is to have effect on third parties it needs to be registered in the public books.

The limitations for securing claims. The right to ownership may be limited in order to secure a claim, with the creation of pledge or mortgage. In this case the right to ownership is limited because the pledge holder does not have the right to use and exploit the item, but only the right to effect payment to the pledge holder once the pledged claim falls due.

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