

The environmental limitations of the property right

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Abstract:

Sometimes, the two rights, the property right and the environmental right, are considered to be antagonistic, in the doctrine and jurisprudence they have attempted to reconcile them. In this work, we shall try to emphasise the fact that the Constitution must be revised, in order to highlight the protection and guarding of a "natural property" of any of the persons belonging to society.

The property right cannot be considered to be a convention, as this right exists irrespective of the agreement between the parties, and denying this right does not lead to its abrogation, but to a violation of a natural right.

As for the two fundamental human rights, things seem to be simple, but they are not; we must also learn from the experience of other countries, but we also need to improve the laws which do not confine the owner's responsibility. Each owner must comply with certain limits regarding the environment, in order to be able to enjoy their property in a harmonious, healthy and useful manner.

Keywords: *property right, environmental right, natural property, legislation*

For starters, we should consider the terminology of the word *property*. The property term comes from the Latin word *proprietas / proprietatis*, and it means own, undivided [1].

Considering the terminology of the word *property*, we can see that the concept of *property right* is especially complex. This concept is considered to be the result of a long evolution of life and juridical thinking within the continental law system. [2].

The property right has been discussed as far back as the epoch of the Twelve Tables, when the land came to be divided, making the transition from the collective property to the individual property. So, the property right appears at the same time as the state and law, and would disappear at the same time as their disappearance. [3]

The property right is inherently natural [4], it does not depend on any organization of society, as this rights derives from the human personality and freedom [5].

When we speak of property, we cannot exclude the owner, who is the holder of the property right [6], i.e. he is entitled to exert, in their own name and in their own power, the prerogatives granted by this right.

In the doctrine, they have given several definitions of property: Property has been defined by Prof.S.G.Longinescu as: *the most complete entitlement which the positive law acknowledges for us, to a determined corporal thing which has an individual existence* [7].

K. Marx defined property as the *individual's appropriation of nature within and by means of a particular social form* [8].

The French Civil Code, by the regulation of art. 544, has defined property as the *right to enjoy and dispose of things in the most absolute manner, provided they are not used in a manner prohibited by statutes or regulations* [9].

Property has emerged as a private property, based either on occupancy, i.e. seizing the objects of nature, or on labour, or on a social convention. [10]. Property has been regulated as a central institution [11] as far back as the Civil Code of 1865, while the Constitution of 1923 has continued to regulate it, as well as the current Civil Code, but also the Constitution of 2003.

Article 555 of the current Civil Code [12] stipulates (1) *The private property is the holder's right to possess, use and dispose of the asset in an exclusive, absolute and perpetual manner, within the limits set by the law.*

By means of the definition of the property right provided by the Civil Code, one consecrates the vision of an absolute (quality which aims at the erga omnes opposability of the property right), inviolable and inalienable right, which regards any object, whether *natural or made*, living or dead, corporeal or incorporeal (incorporeal assets such as clientele – Cause VAN Marle c. Holland, 1986, Iatridis c. Greece, 1999).

In other words, the property right is defined by itself, and not in relation to other rights. The property right is the only right that allows the holder to exert all the prerogatives it grants, in their own power and interest. [13].

The Constitution of 1923 guaranteed the property right of any kind, and the claims on the state, and provided that nobody could be expropriated unless it was for a case of public utility, and after a rightful and previous reimbursement set by the court of law [14].

The Constitutions of 1948 and 1952 provided the waiver of the public domain, and the Constitution of 1965 stipulated that the production means were a socialist property. Starting with the provisions of the 1991 Constitution, the property became unassignable, indefeasible and intangible.

The Constitution of October 2003 stipulated, in art. 41 align. (2), that *private property is equally regulated and protected by the law, irrespective of the holder. Foreign citizens and stateless persons may acquire private ownership of lands only under the terms as may arise from Romania's accession to the EU and from other international treaties to which Romania is a party, on a reciprocal basis, in accordance with an organic law, as well as by way of statutory inheritance.*[15], [16].

Although it mainly aims at other purposes, especially economic, property also directly contributes to the protection of natural factors.

Preoccupations related to the protection of the natural environment have appeared and developed in time. When we say natural environment [17], we say demography, fauna, flora, geographical environment, etc. All these factors configure and influence all the components of the right.

The preoccupations related to the *natural environment* have led to the occurrence of certain juridical norms, such as the Environmental Law – Law 265 of 29 June 2006 for approving Governmental Emergency Ordinance 195/2005 regarding environmental protection.

Objectively, the property right on the natural objects is a civil law institution, whose rightful norms regulate the ecological property relation as a state of natural appearance.

In relation to the environmental right, the property right implies certain obligations regarding environmental protection. These obligations are achieved

by adopting an environmental policy, in agreement with the economic development programs, as the state has the duty of coordinating the environmental protection activity [18], [19].

The right to a healthy environment is also provided by the Romanian Constitution in art. 35. We can find similar constitutional regulations in Spain, Portugal, Croatia, Hungary, Slovenia, and Moldova. The right to a healthy environment is also acknowledged at international level [20].

The duty of observing the environment lies with the owner. Thus, art. 603 of the Civil Code includes the rules regarding the environmental protection and good neighbourhood, as well as those regarding the compliance with the other duties which, according to the law or habit, lie with the owner.

By means of these rules regarding the neighbourhood relations, they have set both admissible limits of pollution, and the correlative obligation that the damages be borne by the polluter. Living on good neighbourhood terms with the others entails bearing certain normal consequences resulting from this state, the availability of a series of pollutions and damages which are admissible up to a certain threshold. The good neighbourhood terms also imply bearing certain obligations by everybody, in order to make cohabitation more pleasant.

Among the conduct and good neighbourhood norms, one can mention:

- The owners of the lands are obliged to contribute to the delimitation of the property boundaries.
- In the construction field, one must comply with the minimum 60 cm distance to the boundary line.
- The water that drips from the eaves must not fall on the neighbour's property
- The trees must be planted at least 2 m away from the boundary line, except for those under two meters high, plantations and hedges.
- The viewing windows must be built 2 meters away from the neighbours.

The empowerment based on the neighbourhood relations should be a preliminary phase, parallel to the legal one, which would not eliminate the possibility of resorting to the court of law.

The property right must be exerted dependent on the compliance with the concurrent rights. *Freedom consists in being able to do everything that is not harmful to the other person: the exertion of the natural rights of each person has no limits, except for those providing the other members of the society with the possibility to enjoy the same rights. (Article 4 of the Declaration of the Rights of Man and of the Citizen imposed such limits to the property right, limits related to the exertion of concurrent rights. Such a limitation tinges with the inviolable and sacred nature of the property right, and rejects the idea of an absolute right, in an arbitrary sense [21].*

In order to be sanctioned, the neighbourhood disturbances must not necessarily be excessive; it is enough for them to be abnormal. The current civil code maintains the civil subjective liability, having, as a juridical base, guilt and the need to sanction the doer, regarding the liability for one's own actions, but also regulates objective liability cases, which are the rule regarding the liability for somebody else's deed [22].

The significant increase of the juridical regulations regarding the environmental protection has affected the traditional concept of property. The phenomenon is expressed by complex limitations of the property right from the perspective of the exigencies of the major ecological interest, and on the other hand, by recording a tendency of ecology patrimonialization, by means of the emergence of a category of environmental public assets, the affirmation of the concept of joint patrimony [23]. As far back as 1993, the Commission and European Court of Human Rights have acknowledged the fact that environment can be considered a patrimonial value, thus the property incorporates the environment [24].

From the ECHR jurisprudence, one could conclude that environment *is a value whose protection suscitates, according to the public opinion, and*

consequently also for the public authorities, a constant and sustained interest. The property right should not take precedence over the relative considerations regarding environmental protection.

Constraints of the property right can be admitted, on condition that the just balance between the - individual and collective - interests are complied with in presentia [25].

The jurisprudence of the EU Court of Justice has stated that the *property right is part of the general principles of the EU law, which does not however appear as an absolute prerogative, but must be taken into account in relation to its function in the society.* As a consequence, one can bring restrictions to the use of the property right only if they actually respond to the objectives of general interest aimed at by the Union, and are not, in relation to the purpose aimed at, a disproportioned and intolerable intervention, which would reflect on the very essence of the rights guaranteed this way [26].

Conclusions

The concept of property right has been affected in time, due to the increasing number of juridical regulations regarding environmental protection.

In the classical legislation, property has generated an effort of adaptation to the new situations, such as those caused by pollution, by means of the rules related to good neighbourhood and repression of the abnormal neighbourhood disturbances.

Nowadays, the property right has been ascribed, on the one hand, a series of complex limitations of its attributes from the perspective of the exigencies of the major ecological interest, and on the other hand, certain tendencies of *ecology patrimonialization* have been recorded by the emergence of *public environmental assets*.

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