The Property Right and the Requirements of Environmental Protection[1]

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Abstract: The environmental protection has lately become an essential component of the concept of sustainable development, along with the economic, social and cultural components. Being an objective of public interest, the environmental protection and conservation are essential to ensure the habitat necessary for continuing the human existence. Considering this aspect, the limitation of ownership required by certain laws has both a social and moral justification, the environmental protection having a direct link with the level of public health, which is a value of national interest. The legal limits of the ownership are restrictions brought by the law, considering aspects regarding the general interest of society. In this article we intend to emphasize, on the analysis and comparison of legislation and case law, the nature of the relationship between ownership of property and environmental rights, as well as the limitations of property rights in favor of environmental protection. As a conclusion, the environmental easements meet a wide national and international recognition and guarantee, the holder of the property having to exercise it in the interest of the whole community, including the protection and conservation of the environment. At the same time, we must consider that the right to property and environment are fundamental rights guaranteed by the Romanian Constitution itself, which makes us conclude that they converge and mutually enrich across the fundamental duties as well.

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1. Introduction

The constitutional consecration of the right to a healthy environment has prompted the rethinking of the relationship between this right and the ownership of property,

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not only through the national and European legislation, but by jurisprudence as well, especially ECHR (Duţu & Duţu, 2011, p. 15). Even if no provision of the Convention does expressly establish the environment protection, "the society is ceaselessly concerned to preserve it", it is highlighted in a decision[1] stating that: "The environment represents a value whose defense rises in the public opinion, and, consequently, at the level of public powers a constant and supported interest. The economic imperatives and even some fundamental rights, such as ownership of property, should not be in a position to give precedence over the considerations related to environmental protection, especially when the state has legislated in the matter. Public authorities assume such responsibility that must be acknowledged by their intervention at the appropriate time in order not to deprive of any practical effect the provisions protecting the environment which have decided to apply." (Nicu, 2011, p. 240).

As mentioned in the specialized literature, the "property can only be protected to the extent where their functions need to respond; if it has to be protected, then ownership of property implies limitations that their moral finalities impose, their economic effectiveness and the general interest". (Bîrsan, 2007, p. 47)

2. The Relation between Ownership of Property and Environmental Law

The legal limits of the ownership of property represent those restrictions by law for reasons of general interests of the society (Anghel, 2010, p. 36).

In our country, the legal restrictions are doubled by the provisions of international conventions or by the decisions of international courts, predominantly the jurisprudence of European Court of Human Rights (Anghel, 2010, p. 36).

Among the general provisions we mention article 44, paragraph (7) of the Romanian Constitution[2], article 602 and the following from the Civil Code. The article 602, paragraph (1) states that the exercise of the ownership of property may be restricted by law or in public or private interest, and article 603 is devoted to the

[1] ECHR, The decision of 27 November 2007, case Hamer vs. Belgium, application no 21861/03. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:[%22826054%22],%22itemid%22:[%22001-83537%22]}.

[2] Article 44, paragraph (7) of the Constitution provides: "The ownership of property compels the compliance of the tasks on the environment and ensures good neighborliness, as well as the compliance of all other tasks, which by law or custom belong to the owner."

environmental protection rules and good neighborhood, establishing that "ownership of property obliges the environmental compliance of tasks and it ensures good neighborliness, as well as the compliance of all other tasks, which by law or custom belong to the owner."

It can be noticed from the analysis of the mentioned texts the social feature of the ownership of property, which resulted, along with the more enhanced interventionism, as shown in the specialized literature (Anghel, 2010, p 38), "the reinterpretation of the notion of easement or the decrease in importance of the private easement previously established by regulating some easements with identical content, but of public interest."

Extending the limitations that may be imposed on the ownership of property is a characteristic of the contemporary society, which requires a continuous adaptation and redefinition of the legal concepts in general (Crăciunean, 2008, p. 56).

In the specialized literature it was outlined the view according to which in the case of the easement for the environmental protection, we have a constitutional easement of public utility, with its own features (Duţu, 2004, p. 98).

Regarding the jurisprudence of the ECHR, the reporting of the environmental requirements to the demands of ownership of property is marked by the peculiarities of the domain and it meets its own evolution (Dutu & Duţu 2011, p 59). Thus, if initially it was noted that environment restrictions could be interpreted as interference on individual rights and freedoms guaranteed by the Convention and there will be allowed individual claims alleging environmental degradation, the court subsequently began to receive individual applications claiming restrictions to the rights recognized by the Convention, restrictions which under article 1 of Protocol no. 1^1, it pursues a legitimate aim, namely the protection of the environment on behalf of the collective interest.[2]

[1] It is the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952. According to article 1 "Every physical or legal entity is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and under the conditions provided for by law and by the general principles of international law. The previous provisions shall not affect the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or in order to secure the payment of taxes or other contributions or penalties."

[2] By the judgment from 2007 in Hamer v. Belgium it was opened a new stage in the jurisprudence of ECHR assessment and resolution of the relationship between attributes of ownership of property and demands of the right to a quality environment.

3. Specific Provisions Assigning Tasks in Environmental Law

Public utility easements can occur in extremely diverse domains: planning, construction, healthcare, cultural and artistic patrimony protection, waters, forests, etc., and they are governed by special laws. We will refer to some of these regulations or limitations of ownership of property over subsoil, ownership of property over agricultural land and the obligation for soil protection.

Regarding the easement resulting from the use of subsoil of any property, its source is represented by article 44, paragraph (5) of the Constitution, which states that "For works of general interest, the public authority may use the subsoil of any real estate with the obligation to indemnify the owner for the damage brought to the soil, plantations or buildings, and for other damages attributable to the authority". The compensation shall be agreed between the authority and the owner or, in case of disagreement, by the court (article 44, paragraph 6 of the Constitution). However, according to article 135, paragraph 2, letter d), the state must provide "(...) the exploitation of the natural resources consistent with the national interest". Also, E.G.D. no. 195 of 2005 stipulates in article 68, letter a) the obligation of all landowners to prevent the quality deterioration of the geological environment. Although mineral resources, according to article 1 of Law no. 85/2003, in the territory of the country and in the subsoil of the country, and the continental shelf in the economic zone of Romania in the Black Sea, shall be exclusively public property and they belong to the Romanian state, their exploitation is limited by law to the needs of environmental protection, being strictly prohibited the mining activities, and also imposition the easement right for such activities, for the land on which there are located historical monuments, cultural, religious, archaeological sites of particular interest, etc. (article 11, paragraph 1 of the Mining Law no. 85/2003). The law provides exceptions to this rule, exceptions which can be established by Government decision, with the acceptance of the competent authorities in the field and by establishing damages (article 11, paragraph 2).

Regarding the ownership of property over agricultural land and soil protection obligation, Law no. 18/1991 defines the land of Romania as: the "land of any kind, regardless of the destination, of the title on which they are owned or private or belonging of the public or private sector, represents the agricultural real estate of Romania". From this rule it results an establishment of a "legal regime management of protection" of all land, whether public or private ownership, which

means that ownership regime is "affected" by a regime of "domain". (Duţu & Duţu 2011, p. 85)

Article 74 of Law no. 18/1991 establishes that all holders of agricultural land - holders of the property, of other real rights or those who, according to civil law, have the capacity of holding or detention precarious, according to article 3 of that mentioned law, have the obligation to ensure their cultivation and soil protection[1]. The obligation to protect the soil, as environment task covers both owned public and private land.

In order to rehabilitate lands which by degradation and pollution have lost, wholly or partly, the production capacity, Law no. 18/1991, states that they are organized in perimeters of improvement[2], a new institution "legal - Environment" as described in the specialized literature (Duţu & Duţu, 2011, p. 91). According to the law, landowners are required to provide land perimeter of breeding for the purposes of applying the means and works set out in the improvement project, retaining the ownership of property. Including a land by the City Hall in the category of those established as breeding area is achieved, in principle, with the consent of the owner. If it does not agree, it triggers a special procedure, according to which the city hall will make motivated proposals to the prefect, who will ultimately decide. If it decides to include such land for breeding area, the local council has the obligation to assign the holder a corresponding land area, which he will use during the improvement works.

Where the state lacks of another similar field in the area, and the owner does not agree to receive a new land at a greater distance, it is applied the procedure of expropriation for public utility, after a fair and prior compensation, according to the law.

The measure for rehabilitation of agricultural land in the described situation is a severe limitation of the ownership of property by temporary deprivation of use, as determined by the protection and guarantee of the right to a healthy environment, being at the same time an expression of the obligation implied by the ownership of property, to respect the tasks on environmental protection.

[1] Soil protection and improvement is achieved by preventing and combating degradation processes and the soil pollution caused by natural phenomena or caused by economic and social activities.

[2] Defined by the Forest Code as "*degraded or unproductive agriculture field can be improved by afforestation, whose development is necessary from the point of view of soil protection, water regime, thus improving the environment conditions and biological diversity*."

4. Conclusion

In conclusion, given the content and its purposes, without prejudice, by the limitations imposed by the law, the prerogatives of other fundamental rights, especially the ownership of property, the right to a healthy environment determines the amplification and diversification of their significance in relation to the new requirements of the society. Based on these aspects, the ownership of property experiences a more enhanced circumscription of its attributes, of its meanings on protecting the environment.

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