THE CONTRIBUTION OF THE ROMANIAN CONSTITUTIONAL COURT TO ESTABLISH THE RELATION BETWEEN THE RIGHT TO PROPERTY AND THE RIGHT TO A HEALTHY ENVIRONMENT

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Abstract

The present study aims to establish the relation between the right to property and the right to a healthy environment from the perspective of the jurisprudence of the Romanian Constitutional Court.

The relation between these two fundamental rights is emphasized by the limitations brought to the attributes of the right to property by the exigencies of the environmental protection. Nowadays, in the context of a more and more polluted environment, property rights are becoming more and more pronounced to circumscribe their attributes of environmental significance.

The study starts from the presentation of the environmental limitations of the exercise of the property right established by the constitutional provisions and continues with an analysis of the main decisions of the Constitutional Court pronounced in this matter.

Our analysis allows us to conclude that the right to a healthy environment contributes significantly to the strengthening of property rights by reference to the requirements of individual welfare and those of the survival of humans and species.

Keywords: *the right to a healthy environment, the right to property, limitations, Romanian Constitution, the jurisprudence of the Romanian Constitutional Court.*

1. Introduction

The judicial literature[1] considers that property is the basis of the development of human society, being the premise for each economic activity. Over time, this has been treated as a fundamental issue, as well as of the collective existence. It has provided the possibility for individuals to acces and to appropriate natural assets or created by their activities. This possibility, however, has determined the man to gradually give up his symbiosis with the natural environment and to begin a struggle against the nature, permanently seeking to master it. It is an undeniable fact that the miraculous balance of nature and harmony between ecosystems is in danger. One must not ignore the fact that the success of the economic development, remarkable, has affected this balance. Paradoxically, in the age in which the man has became the "master of the planet", he realized that he cannot escape the "laws of the nature" and that he entirely depends on the natural environment.

By referring to this new order, the contemporaneity insists on the contemplation of people's mission of being the guardians of nature and of finding the much-desired balance between economic development and the protection of the environment. For the achievement of this mission, a very important and difficult role was attributed to the law.

The emergence of environmental norms has not been achieved without confrontation but has been supported by a strong consensus that finds its rationale in the categorical imperative of surviving spaces, species, and even in the imperative of human survival. Thus, the statement of certain norms for the environmental protection has established an interaction between the right of individuals to a healthy environment and the traditional right to property.

This interaction has developed and transformed into a complex relation, of mutual conditions and interdependence. Through environmental protection – seen as a major public interest – it is achieved a balance between the individual rights and the general exigences of life.

2. About the limitations of the performance of the right to private property in favor of environmental protection

The right to property is considered as the most important patrimonial right. It represents the fundament for all the other real rights and secures the means of life necessary to an individual. This importance of the right to property for individuals and society has led to its

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[1] C. Bîrsan, Drept civil. *Drepturile reale principale* (Bucharest: Hamangiu, 2013), 33; E. Chelaru, *Legea nr. 10/2001 privind regimul juridic al unor imobile preluate abuziv în perioada 6 martie 1945-22 decembrie 1989 comentată şi adnotată* (Bucharest: All Beck, 2001), 3.

regulation at an international, European, communitarian and national level[2].

In Romania, the regulation of the right to property has had an accelerated evolution after 1990 regarding its statement as fundamental right and as civil subjective law. Starting from the fact that the right to property is the only real right providing to its owner the complete performance of the attributes of an asset, were stated means of restitution, restoration and establishment of the private property, as well as means for its protection[3].

Currently, Art 44, Para 2 Line 1 of the revised Constitution states the right to property, mentioning that "Private property is guaranteed and protected equally by the law, regardless of its owner". The second thesis of the article mentions that the limitations and the content of the right to property shall be established by the law. Para 4 states that no one shall be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance.

Regarding the Romanian Civil Code, it defines property in Art 555 Para 1 as being "the right of the owver to exclusively, absolutely and continuous possess, use and dispose of an asset, according to the law".

Starting from these provisions, the judicial literature defined the right to property as being "the real right which offers its owner the attributes of possession, use and disposal (*jus possidendi*, *jus fruendi* and *jus abutendi*) of a private asset, attributes which may be exclusively, absolutely and continuously performed within the material and legal limits"[4].

The statement and guarantee of human rights do not exclude the possibility of their limitation. In this regard, it has been shown that "the existence of certain unconditioned rights, theoretically cannot be accepted within a constitutional democratic system. The absence of the limits and conditions for performance stated by laws, constitutions or international judicial instruments can lead to arbitrary or abuse of rights, because it would not allow the differentiation between legal and illegal behavior. The existence of certain limits for the performance of some fundamental rights is justified by the constitutional protection or by the protection through international legal instruments of important human or state values"[5].

Both the Universal Declaration of Human Rights, as well as the two International Covenants of 1966 admit the existence of limitations regarding the exercise of certain rights. This possibility is also found in Art 53 of the Romanian Constitution restricting some rights and fundamental freedoms, but only as exceptions, temporary and conditional, without affecting the very substance of the right[6].

The reasons which could generate the limitation of the exercise of certain rights are of strict interpretation. These are stated by Art 53 of the Constitution and aims: the defense of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

From the constitutional provisions, there are three essential conditions, which must be observed cumulatively in order to be able to restrict the exercise of certain rights, namely: the limitation can be stated only by the law, reasoned by the existence of situations identified by norms, aiming the public interest and the protection of the fundamental rights; the limitation shall be proportionate with the situation generating it; the limitation shall be temporary and not harm the substance of the right or of the fundamental freedom[7].

The provisions of Art 53 must be interpreted in relation to Art 44 Para 1 second thesis of the Constitution, according to which the content and limits of the right to property are stated by the law, as well as in relation to Art 44 Para 7 which states that the right to property compels to the observance of duties relating to environmental protection and insurance of neighborliness, as well as of other duties incumbent upon the owner.

The legal fundament of the limitation is completed by Art 620 of the Civil Code, which states that: "(1) The law may be the limit of the performance of the right to property either for a public interest, or a private one. (2) The legal limits for private interest can be temporarily altered or removed through the parties' agreement. for the opposability to third parties it is necessary the fulfilment of the advertising formalities required by the law".

The content of Art 44 Para 7 of the Constitution is reiterated by Art 603 of the Civil Code. Art 603 states a legal limit, having as starting point the public interest of environmental protection. According to Art 1 of the G.E.O No 195/2005 on environmental protection states that "it represents a major objective of public interest".

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[2] See also E. Chelaru and A. Pîrvu, *Drept Civil. Drepturi Reale* (Pitești: University of Pitești Publishing-house, 2016), 17; E. Chelaru, *Drept civil. Drepturile reale principale în reglementarea Noului Cod civil* (Bucharest: C.H.Beck, 2013), 44-67.

[3] For more details, see: Aspazia Cojocaru, „Reflectarea exigențelor constituționale în legislația României referitoare la dreptul de proprietate", în *Buletinul Curții Constituționale* no. 2 (2009), (https://www.ccr.ro/uploads/Publicatii%20si%20statistici /Buletin%202009/cojocaru.pdf)

[4] V.Stoica, *Drept civil. Drepturile reale principale* (Bucharest: C.H.Beck, 2009), 93.

[5] M. Andreescu and A. Puran, *Drept constituțional. Teoria generală și instituții constituționale* (Bucharest: C.H. Beck, 2016), 264-265.

[6] A se vedea: R. Duminică, „Limitations of the right to property in favor of environmental protection in Romanian law", International Interdisciplinary Conference *Constitutional Right to Property – Methods of Violation and Means of Protection*, University of Rzeszow, Poland, 11-12th October 2018.

[7] Andreescu and Puran, *Drept constituțional. Teoria generală și instituții constituționale*, 254-255.

The judicial literature8, regarding the obligations for environmental protection, has considered them as extremely complex, being adopted "based on the principles and strategic elements leading to sustainable development" (Art 1 Para 1 of the G.E.O No 195/2005). Acording to Art 6 of the Ordinance, the environmental protection represents an obligation of the central and local public administration authorities, as well as an obligation for all natural and legal persons.

Though both the constitutional text, as well as Art 603 included in Chapter 3 of the Civil Code (Legal limits for the right to private property), Section 1 (Legal limits) use the term "tasks" for environmental protection, we appreciate along other theoreticians[9] that these norms "establish a limitation in the performance of the right to property, not in the meaning of as hindrance, as an obligation of not to do, but in the meaning of the legal obligation of to do". More specifically, the owner has the obligation to comply with the tasks on environmental protection.

Under the conditions stated by Art 626 of the Civil Code, "if the public order or good morals are not violated", there are possible environmental limitations of the right to property through legal acts.

Beyond the limitations of the right to property stated by the Constitution, the Civil Code and the G.E.O No 195/2005, we find important limitations stated by other special normative acts, among which we mention: Law No 50/1991 regarding the authorization of construction works, the General Regulation of Urban Planning approved by Government Decision No 625/1996, the Water Law No 107/1996, Law No 350/2001 on spatial planning and urban planning, Law No 46/2008 on the Forest Code, Law No 18/1991 on land resources etc. As an example, we enlist the most known limitations on the right to private property stated by special laws: limitations of the right to property through land-use measures; restrictions on the exercise of the property right through urbanism plans; limitations of the property right through the protection of historical monuments; limitations of property ownership attributes for priority archaeological interest areas; special expropriation for ecological public utility; legal servitude of the protection and security of energy capacities; property rights limitations resulting from the protection of water resources; property rights limitations on the protection of soil, subsoil and terrestrial ecosystems; protected area regime and property ownership attributes; limiting the use of goods through environmental protection requirements; servitude of the hunting ground etc.[10].

In this context of amplifying the limitations of the right to property for environmental protection, the concept of property is being redefined. Thus, we are talking about an environmental property set up to describe situations where purchases or attributions of property rights are made, in order to improve the protection of the environment and natural resources[11].

The notion of *Environmental Property* has been established by common law specialists and it is considered as a component of the evolution of the concept of property. This concept has emerged simultaneously with the international affirmation and constitutionalization of the right to environment, so it arose the issue of ecological exigencies in the performance of this right in relation with the other fundamental rights in general, and especially with the right to property. The declared purpose of the notion of environmental property is that of establishing the situations in which a property title has been granted or acquired for the environmental protection or its preservation[12].

3. The contribution of the Romanian Constitutional Court in the establishment of the relation between the right to property and the exigencies of the environmental protection

Over time, in accordance with the jurisprudence of the European Court of Human Rights, the Constitutional Court has established through its own jurisprudence that the right to property is not absolute, thus it can be limited through legal provisions.

Notified with requests for non-constitutionality of different norms aiming the environment protection, invoking the violation of Art 44 of the Constitution referring to the right to private property, the Constitutional Court has mentioned that the legislator has the competence to establish an appropriate legal framework for the performance of the attributes of the right to property, without harming the general or particular legitimate interests of other subjects of law, thus stating a few reasonable limitations of its performance[13].

As mentioned by the judicial literature[14], in accordance with the principle of proportionality, the limitations brought to the right to property shall be reasonable. It means that those limitations shall have to be appropriate for guaranteeing this fundamental right.

Also, by applying the principle of proportionality in the area of the protection of the right to property, the Court has stated that it refers to the compliance with the obligations in the area of the environment protection, obligations established for general interest. Thus, the state is authorized to establish norms for the protection

[8] Bîrsan, Drept civil. Drepturile reale principale, 72.
[9] A. Duşcă, Dreptul mediului (Bucharest: Universul Juridic, 2014), 35.
[10] Duminică, „Limitations of the right to property in favor of environmental protection in Romanian law".
[11] V. Marcusohn, „Protecția mediului prin intermediul instrumentelor economice și impactul acestora asupra dreptului de proprietate", în Revista Română de Dreptul Mediului, nr. 1 (2012): 23.
[12] M. Duțu and A. Duțu, Dreptul de proprietate și exigențele protecției mediului (Bucharest: Universul Juridic, 2011), 192.
[13] Decisions of the Constitutional Court No 121/2004, No 143, 166, 537, 616, 860 din 2007, No 826/2008, No 558/2010.
[14] Andreescu and Puran, *Drept constituțional. Teoria generală și instituții constituționale*, 294.

of agriculture, silviculture, domestic animals etc. The Court has also underlined that these norms are constitutional for as long as the obligations stated are reasonable.

In this regard, as an example, it has been stated in the jurisprudence of the Constitutional Court that the natural and legal persons have certain obligations established by the law in the area of the environment protection and insuring this fundamental right and that these obligations "cannot be seen as violations of fundamental rights (…) such as the right to property"[15].

In shaping the relation between the right to property and the right to a healthy environment, it has relevance and worth being debated about, the Decision No 824/7 July 2008[16] on the exception of unconstitutionality of Art 71 of the G.E.O No 195/2005 on environmental protection.

More specifically, by analyzing the exception of unconstitutionality, the Court has stated that its author claimed, mainly, the unjustified limitation of the right to property stated by Art 44 Para 1 of the Constitution. The invoked reason was that the criticized legal text forbids and sanctions the change of the destination of the lands set as green spaces and/or as such foreseen in the urbanization documentation, the reduction of their surfaces or their relocation, irrespective of their legal regime.

The Court stated that the provisions of Art 71 of the G.E.O No 195/2005 have been included in the current regulation by Art 1, Point 1 of the G.E.O No 114/2007, adopted based on Art 115 Para 4 of the Constitution. In the issuance of this act, as stated by its preamble, it has been taken into account the "the degradation of the green spaces on the territory of Romanian localities, caused by their destruction as a result of the development of economic and social activities", aiming "the improvement of the environmental features and life quality by increasing the green areas in localities", the protection and sustainable development of life standards of their inhabitants.

Therefore, the Court stated that "the protection and guaranteeing the right to a healthy environment, stated by Art 35 of the Constitution, represent the purpose of Art 71 of the G.E.O No 195/2005 on environmental protection". Moreover, the Constitutional Court emphasized that the right to property invoked by Art 44 of the Constitution is not absolute, aspect continuously emphasized in its jurisprudence.

Moreover, the Court mentioned that "the limitation of the exercise of the right to property (…) also has a moral and social justification, given that the rigorous compliance with these norms represents a major objective for the protection of the environment, thus of the existing green areas, having a direct connection with the level of public health, which represents a value of national interest".

Therefore, the Court has dismissed as unreasoned the request for unconstitutionality according to which the examined legal provisions are contradictory with Art 44 Para 1-2 and Art 53of the Constitution, regarding the right to property and the limitation of the exercise of certain rights or freedoms, because "the measure ordered by the criticized legal text does not harm the substance of the right, establishing only an objective and reasonable limitation, in accordance with the fundamental principles"[17].

Another litigation through which the Constitutional Court has contributed in shaping the relation between the right to property and the exigencies of the environmental protection is the Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008. The authors of the exception for unconstitutionality have claimed that the criticized provisions are unconstitutional because they violate the right to property, taking into consideration that these provisions compel the natural persons owing a forestry fund to provide guard services through a forest district.

As effect of the examination of the exception for unconstitutionality, the Court has stated that "according to Art 44 Para 1 of the Constitution, the content and limits of the right to property shall be established by law"[18]. Also, the court underlined, by maintaining its previous point of view[19], that "based on these constitutional provisions, the legislator has the competence to establish the legal framework for the performance of the right to property, within the principle sense given by the Constitution, so that it does not collide with the general or particular legitimate interests of other subjects of law, thus stating certain reasonable limitations in its capitalization, as a guaranteed subjective right".

The Court also mentioned that the constitutional provision allows the legislator that, in considering certain specific interests, to state rules harmonizing the incidence of other fundamental rights than the property

[15] Decision of the Constitutional Court No 1623/3 December 2009 on the exception for unconstitutionality of Art 96 Para 3 Point 1, related to Art 94, Para 1, Let b) of the G.E.O No 195/2005 on environmental protection, published in the Official Gazette, Part 1, No 42/19 January 2010.

[16] Decision of the Constitutional Court No 824/7 July 2008 on the exception for unconstitutionality of Art 71 of the G.E.O No 195/2005on environmental protection, published in the Official Gazette No 587/5 August 2008. For an analysis of this decision, see also: Duțu and Duțu, *Dreptul de proprietate și exigențele protecției mediului*, 80-81.

[17] Decision of the Constitutional Court No 824/7 July 2008 on the exception for unconstitutionality of Art 71 of the G.E.O No 195/2005on environmental protection, published in the Official Gazette No 587/5 August 2008.

[18] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[19] Decision of the Constitutional Court No 59/17 February 2004, published in the Official Gazette, Part 1, No 203/9 March 2004.

right in a systematic interpretation of the Constitution, so that they will not be suppressed by the regulation of the property right. Not least, the Court has mentioned that Art 44 Para 1 of the fundamental law allows the establishment of legal limitations in the performance of the property right, as constantly stated by its jurisprudence[20], with the purpose of protecting the public interests, such as the interest in sanitation and public health, the social, cultural-historical, urbanistic and architectural interests etc., with the condition that these legal limitations do not harm the very substance of the property right[21].

Regarding the provisions of the Law No 46/2008, the Court has stated that Title 2 and 3 refer to strict rules concerning the obligations of the owner of a forestry fund, regardless of the form of ownership, on the obligation of compliance with the forestry regime and the rules on environmental protection, of forestry arrangements, as well as other obligations. These obligations are an application, legislatively, of the constitutional provisions of Art 44 Para 7, according to which "the right to property compels to respect for the duties relating to environmental protection and assuring neighborliness, as well as to other duties binding on the owner in accordance with the law or as is customary".

Also, the Court has added that in "the virtue of the fact that the forest represents an asset of national interest, the legislator has established a strict legislative framework in the area of the content of the property right over it"[22]. The legislator has established in this respect the content of the property right over the forest/forestry fund, especially for a correct application of Art 44 Para 1 and 7 of the Constitution. Thus, the measures stated by the legal provisions are obligations imposed for the owner in considering the asset in order to insure the sustainable development of the forest/forestry fund.

As a conclusion, given the aimed legitimate purpose, the Court has rejected the exception for unconstitutionality and stated that "that the special regime governing the use attribute, including the obligation for the owners to conclude the management contract/forestry service, is appropriate, necessary and proportionate, respecting a fair balance between the general interests of the company and the particular interests of right-holders property"[23].

Constantly, the Court's jurisprudence[24], that the imposition of standards in terms of urban planning and spatial planning, as well as ensuring security in construction, is a general interest. Thus, the legislator may adopt necessary and customary laws in the field of construction in order to determine the use of the goods in accordance with the general interest, without the property being lipped by its substance.

By way of example, we present the considerations grounding the Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning[25].

In this case, the author of the objection of unconstitutionality argued that the provisions of Art 47 Para 5 are unconstitutional insofar as they permit the modification of the rules on land occupation and the location of the constructions and the related facilities through a zonal urban plan, without the consent of the neighbors affected by the new changes, "which limits the exploitation of the property right as guaranteed by Art 44 Para 7 of the Romanian Constitution".

As effect of the examination of the exception for unconstitutionality, the Court has stated that Art 44 Para 1 of the Constitution states the possibility of establishing legal limits for the performance of the property right, for the protection of certain public interests: for general or fiscal economic interest, in the public interest, in the interests of sanitation and public health, in the social, historical, urban and architectural interest etc., with the condition that these legal limitations do not harm the substance of the property right. According to the criticized legal text, the Local Urbanistic Plan establishes regulations regarding the rules on the building regime, the function of the area, the maximum allowed height, the utilization rate of the land, the percentage of the territorial occupation, the removal of buildings from alignment and the distances to the lateral and posterior limits of the plot, the architectural characteristics of the buildings, the admissible materials. Under these conditions, the Court has stated that the "legislator has the competence to establish the legal framework for the performance of the property right, so that it will not collide with the general or particular legitimate interests of other

[20] Decision of the Constitutional Court No 469/2011, published in the Official Gazette, Part 1, No 473/6 July 2011.

[21] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[22] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[23] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[24] See also the Decision of the Constitutional Court No 918/23 June 2009; Decision of the Constitutional Court No 77/14 March 2002; Decision of the Constitutional Court No 150/22 February 2007; Decision of the Constitutional Court No 1344/22 October 2009; Decision of the Constitutional Court No 1124/23 September 2010.

[25] Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning, published in the Official Gazette, Part 1, No 473/06 July 2011.

subjects of law"[26] and has concluded that "through the criticized regulation, the legislator only expressed these imperatives, within the limits and according to its constitutional competence, the criticized text not being contradictory with the invoked constitutional provisions"[27].

4. Conclusions

The jurisprudence mentioned by way of example represents a proof of the contribution brought in time by the Constitutional Court to the definition of the relation between the property right and the exigencies of environmental protection.

The norms regarding the environmental protection limiting the performance of the property right are seen in different areas, such as: water, soil, subsoil and terrestrial ecosystems' protection, in the area of protecting the human settlements etc., but it is important to mention that these limitations are accepted and considered as legitimate only if they do not harm the existence of the right. Also, as it is emphasized by the Constitutional Court's jurisprudence, these limitations of the property right must be reasonable, namely appropriate for guaranteeing this fundamental right.

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[26] Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning, published in the Official Gazette, Part 1, No 473/06 July 2011.

[27] Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning, published in the Official Gazette, Part 1, No 473/06 July 2011.