OVERVIEW OF OWNERSHIP AND ITS BORDERLINES WITH THE OBSERVANCE OF THE INJUNCTIONS RULED BY THE INTERNATIONAL COURT OF JUSTICE, THE EUROPEAN HUMAN RIGHTS COURT AND THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

ELENA-RALUCA DINU*

Abstract
Guaranteed for and preserved by many law abiding institutions and documents, starting with national ones, mentioning the regional treaties and completing with the universal deeds, the ownership seems to be detached from its classic conceit and appears as a common concept, but nevertheless with a variable content, based on a series of constant elements such as juridical tradition of different member states, their economical and social upraise and even historical and political implications. Ownership must be perceived as a double sided coin, its right side up being a country's normative system and the toss consisting of the international legal provisions that bring under regulation the most cherished material right of an individual. From time to time the coin lands on its brim, meaning that a conflict will be spawned between the two. It's not to be neglected that the international protection of this fundamental right can be achieved by subjecting it to a number of courts that created the Community acquis. Which of them had the most important contribution in establishing a guideline shall transpire from the pages of this article.

***Key words**: ownership deed, human rights, international courts, injunctions of the international judicial institutions referred to by Romanian courts, encroachment of a private property right*

Introduction

In spite of the fact that they have been functioning for quite a while, both the European Human Rights Court (Strasbourg) and the Court of Justice of the European Communities (Luxemburg) can't be perceived as anything more than dialogue mechanisms between the national courts. In order to invigorate this allegation, we should turn our attention at least to the sever injunctions of the romanian Constitutional Court that makes many refferals in its decisions to the rulings of the European Human Rights Court. In essence, this judicial institution upbraided the romanian state on the matter of inconsequence, incoherence and incapacity to frame a legal system that can be able to create a juridical security climate as well as for the numerous legislative gaps that can't be strewed in another way than by an autonomous approach of every judge in a litigation.

Out of the 47 signing states of the European Declaration of Human Rights, members of the European Council, Romania has the largest number of complaints registered when it comes down to laying the overall population over the number of offences claimed before the international institution, oscilating forwards and backwards between Rusia and Turkey. From 478 injunctions ruled by the European Human Rights Court, over half of them, 280 to be more precise, were given in relations to the encroachment of the ownership right, thus the interest that such a topic raises for a detailed analysis of the points made by the international courts when they enforced their decisions on the Romanian state.

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* Phd. Candidate, "Nicolae Titulescu" University, Bucharest (e-mail: dr_dinu_raluca@yahoo.com)
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A professional concern was put forth for this particular issue throughout the specialized literature, the subject being the main focus even for a phd. thesis. This fact underlines the timeliness of the item that makes the objective of the article that unfurls from here on.

In the paragraphs below I will give my best efforts in trying to capture the main particularities of the ownership right's borderlines in accordance with the conceit of the Strasbourg judges and he Luxemburg principal of proportions, in detecting the core of the private property concept and in shedding light on the institution of exerting use on assets in conformity with the general interest.

Overview of ownership and its borderlines with the observance of the injunctions ruled by The International Court of Justice, The European Human Rights Court and The Court Of Justice of the European Communities

The International Court of Justice had a diminished role in insuring the legal protection of ownership, mainly due to several circumstances like the fact that its organic writ (the Statute of the International Court of Justice[1]) invests the Court with resolving the judicial litigations solely on the basis of the member states'[2] consent and that the only parties that can raise an issue are the states themselves[3]. Qualified as the major juridical unit of the Organization, the International Court of Justice had insufficient means in order to proceed to offering an effective protection for the ownership right. Although the Statute is an almost universally signed treaty, so that at least in theory it had the ability to stress upon safeguarding the above mentioned right, it doesn't regulate any particular right, but nevertheless it accomplished heeding the interest of the international community over the necessity of vouching for human rights as well as for imanent personal rights, without segregating on cultural, ethnical or religious criteria. The Universal Declaration of Human Rights which can't be enforced on all of the member states, due to the fact that it hasn't a mandatary power is all the same the first international deed that incorporates a catalogue of the cardinal human rights and liberties. Art. 17 stipulates the private property ownership, concluding that every individual may detain one or several estates, on his own or alongside others and that no one shall be divested in an arbitrary manner of his property. Subsequently, two more treaties came into being (The International Pact for Civil and Political Rights; The International Pact for Economical, Cultural and Social Rights), but neither of them tied the ownership right to rules. All of these international documents were reunited under the generic denomination of The Human Rights Chart that may encompass the instrument referred to by the International Court of Justice when it tries a litigation. As I underlined anterior, the Chart is fairly irrelevant when it comes to conferring an international protection for the ownership right, this being the factor for which the regional systems that provide for the property right have an increased efficiency.

Since the international scene can't offer the solution for the moots that are brought before it, the interest for the matter grew on the European scale and on the Community level, the two proficient institutions in instrumenting the litigations concerning ownership being the European Human Rights Court and the Court of Justice of the European Communities.

In conformity with art. 1 of the First Protocol to the European Convention for the observance of human rights and fundamental liberties, denominated edgeways the Ownership Protocol, no private or juridical individual can be deprived of his property unless it is done for a public utility

[1] Art. 1 of the Statute stipulates that the International Court of Justice that was established by the United Nations Chart as the primary judicial unit of the Organization shall be encompassed and shall function in compliance with the provisions of this Statute.

[2] Art. 36 point 1 of the Statute postulates that the Court is competent to pass a judgment in the moots that the parties bring before it, as well as in all the others vexed questions that are listed by the United Nations Organization's Chart or that are referred to in the treaties and conventions effective at that certain time.

[3] Art. 34 of the Statute affirms that only the states are entitled to be parties in the issues that are brought before the Court; Ch. Dominсé, L'émergence de l'individu en droit international public, in L'ordre juridiqe international entre tradition et innovation, Recueil d'études, PUF, Genève, 1997, 109.

cause and with the compliance to all the provisions and to all the general principals of the international law. These proclivities don't inflict upon the right of the states to carry out any of the deeds that are considered to be necessary for regulating total utility of the assets in accordance with the general interest or in order to insure the excise tax payment, of other contributions or of fines. As I have already shown, art. 1, paragraph 1, second thesis of the Protocol stipulates the abridgement of property for public utility on the groundmap of the legal dispositions and the principals of the international public law.

The notion of deprivement of ownership rights is equivalent with that of dispossessing the entitled person of the asset itself and of all the attributes that bestowed on it and transferring the right to another's patrimony (most of the times, the state's). The capital manners through which the action is enforced are: expropriation, nationalization and, in exceptional cases, requisition. Although requisition is mainly a temporary limitation of one's right to dispose at his own will of the good, sometimes it resembles expropriation, meaning that the transfer of the property right is definitive and is done with the payment of a retribution.

Expropriation, the most common way to dispossess someone of the ownership right, is considered acceptable if it obeys a set of rules: the deprivement shall be enforced by internal juridical norms by each state on its own[4]; the action against the title holder shall be justified by a public utility interest; the dispossessing shall be in conformity with the general principals on the international law. To these three legal postulates, the Court added another two jurisprudential ones: the divesting shall be done with the defray of a counterbalance sum; the existence of an equilibrium between the deprivation and the pursued aim of it.

Nationalization is a form of expropriation, that has a specific trate, that in its classical configuration engages the lack of retribution, the existence of arbitrary or political[5] reasons for which the divesting is taking place and the fact that it's endorsed maily upon enterprises and industrial branches. This issue and foremost the consequences of the nationalizations from the comunist period, as well as the annulment of the decisions to reinstaurate the former owners in their rights by granting the annulment appeals promoted by the Romanian General Prosecutor have been parameters for which Romania was convicted before The European Human Rights Court, on top of the list being inscribed the repercussive cause of Brumarescu vs. Romania (1999). Therefore, the idea of nationalization[6] is not in itself abhorrent to the ownership right as it is guaranteed for by the Convention, this being the reason for which the Court granted permission to nationalize the aeronautical and naval industry[7], but the arbitrary one tells against the private property.

Another restraint entailed on the ownership right, or more precise on one of its prerogatives, is, in conformity with art. 1 paragraph 2 of the Convention, the use exertion of assets in accordance wih the general interest. In comparison with the deprivement of the ownership right, this manner of limitation reverberates solely on the use, meaning that the asset will not be transferred from one title holder to another, instead the exercise of the use will be restricted by the existence of a general

[4] Proffesor Corneliu Bîrsan, representative of Romania at the European Human Rights Court, considers that the concept of internal juridical norms should be perceived in extenso, meaning that it also includes decrees, injunctions or other law enforcing deeds, even the jurisprudence of some courts when this is thought to be a legal spawning grownd. He explains himself by underlining that different states conduct by different legal systems, so we shouldn't misinterpret the will of the European Convention of Human Rights. Nevertheless, we appreciate that in the Romanian ownership right cocoon, the conceit of "law in the sense conferred by the Convention" shall be used in the perspective of art. 44 of the Romanian Constitution, corroborated with art. 73 letter m) and the Decision of the Court no. 6/1992, thus the restrictive interpretation of organic law.

[5] G. Peiser, Droit administrativ. Fonction publique de l'Etat, territoriale et hospitalière. Domain public. Expropriation, réquisitions. Travaux publics, 15e édition , Dalloz, Paris, 1999, 136.

[6] On the problem of masked nationalizations B. Selejan-Guțan, Excepția de neconstituționalitate, All Beck , Bucharest, 2005, 262-263.

[7] Lighgow vs United Kingdom and North Irland Cause.

interest which must be appeased and the observance of the ratio between the abridgement and the greatness of the general interest. The control of the usage may manifest itself through dictating some obligations or active conduct (the bondage to crop the land or to plant trees for the improvement of the ecosystem) or, on the contrary, through limiting the conduct of the owner or drawing directory lines (adopting rule catalogues for exerting some professions, establishing barrier prices for certain goods, setting roof type lease prices[8], prelonging the lease contracts over the term agreed to by the parties). The legal provision asserts that the states are entitled to adopt the necessary law abiding measures, but nevertheless they will be subjected to the ratio control test of the Court. It decided to appraise the equilibrium by ruling in a favorable way in the following situations: prohibiting the owner to use as residence a construction building rigged up in a protected area[9]; the obligation enforced on some woodland owners to plant trees of a particular essence that would favor the protection of the ecosystem and the production of timber[10]; forbidding the emplacement of a mechanical repair shop in a residential location[11]; appealing to an urban plan in order to limit the building of other types of estates than the ones approved in the plan[12]; instauring legal provisions that prohibit applying the succesoral sharing institution to an agricultural areal, in order to maintain its economical viability[13]; classing an agricultural terrain as a natural site permanently under protection and exploiting it only by obtaining an authorization[14].

A special kind of usage control, even if sometimes it is the equivalent of the dispossession[15], consists of confiscating the asset as a complementary punishment for committing a crime. The jurisprudence of the Court accounts that the confiscation measure is legitimate as long as the state obliges to the just equilibrium between its own interest and those of the owner and takes notice of the level of liability or the type of prudence needed in the circumstances that involve the case. For example, confiscation was ruled as legitimate when it referred to more immoral publications[16] or to a vehicle used to commit a crime for the purpose of impending the owner to continue with the misconduct[17].

The Court stated that they won’t be perceived as overriding of art. 1 of the First Protocol of the European Human Rights Declaration the following: the legal provisions for declaring bankruptcy[18]; the recognizance of minoritary stake holders to sell their social parts for a price established by independent arbitrators, but preserving the right to buy them back, in the very same conditions[19]; the eviction of a person from a locative environment over which he didn’t posses any right[20]; the adopting by the national authorities of a legislation that restrains the right of the owner to cancel the lease contract that is in the proceeding stage[21]; adopting legal measures that roof the lease prices which had been anterior free settled[22]; sentencing a contractual party to paying indemnities to the other[23].

[8] Mellacher vs. Austria Cause.
[9] Herrick vs. The United Kingdom and Norh Irland Cause.
[10] Denev vs. Sweden Cause.
[11] Charter vs. The United Kingdom and North Irland Cause.
[12] Jacobsson vs. Sweden Cause.
[13] Inze vs. Austria Cause.
[14] Oerlemans vs. Holland Cause.
[15] Raimondo vs. Italy Cause.
[16] X vs. The United Kingdom and North Irland Cause.
[17] Raimondo vs. Italy Cause.
[18] X vs. Belgium Cause.
[19] Bramelid and Malmstrom vs. Sweden Cause.
[20] X vs. The United Kingdom and North Irland Cause.
[21] X vs. Austria Cause.
[22] Mellacher vs. Austria Cause.
[23] X vs. The United Kingdom and North Irland Cause.

Despite the analysis that I carried out, on the 4th of March 2008, the Court of European Human Rights ruled against Romania in a litigation based on the infringement of art. 1 of The Protocol. In the Burzo vs. Romania cause, the Court exceeded its attributions and substituted the national legislative organ even though it states that "although the Court doesn't possess the proficiency to substitute the national courts in an act of offering an interpretation of the internal juridical proclivities, it ascertains that the Appellate Court omitted to take into account one of the motives that the plaintiff claimed in the eviction matter that he brought before the court, on the fundament of which the inferior courts had granted the action, in the same manner in which it overstepped other arguments of the plaintiff, thus making the conduct of the Appellate Court an encroachment of the equitable trial principal". Furthermore, the European Court finds that "the restrictions that the owner-plaintiff had to endure in favor of the tenants (payment of a minimal lease price, the degradation of the asset) on a regular basis for several years are clearly disproportionate by comparison with the level of general interest that represented the motive for which he was deprived of the asset's use". In closing arguments, the Court referred to its constant jurisprudence in the matter of art. 1 of the Protocol, underlining the fact that O.U.G. 40/1999, whose provisions have been used by the Appellate Court to maintain the tenants in the locative area, represents a settlement of the use exercion that pursues a general interest. At the same time, the European Court marked the fact that while the prerogatives of art. 13 of O.U.G. 40/1999 weren't fulfilled, the Appellate Court hasn't made any mention of art 14 paragraph 2 of the same normative deed which stipulates that tenants who delay on a systematic basis the payment of the rent are not entitled to the renewal of the lease contract. The Court appreciated that the restrictions enforced upon the owner-plaintiff in favor of the tenants (the minimal retribution, the degrading state of the asset) weren't affiliated to the observance of the just equilibrium between the protection of the plaintiff's ownership right and the exigency of the general interest, meaning that, in this particular cause, art.1 of The Protocol suffered an infringement.

The guarantee and defense of the fundamental individual rights is also being encompassed by the European Court of Justice (the former Court of Justice of the European Communities). If we would trace a time schedule for the evolution of the ownership's observance on the Community grounds, the best place to start is the analysis of one case that became the head stone in the matter of encroachment over the private property right. In the absence of a catalogue that would inscribe all he fundamental rights, the Court of Justice of the European Communities, with the aid of Hauer vs. Land Rheiland-Pfalz[24] case (1979), consacrated at that time a principal of general application that forced all of the others to respect the fundamental rights and liberties. The Court stated that "the ownership right is ensured for in the Community juridical order, in acceptance with the member states' Constitutional conceptions, as always, reflected by the first additional protocol of the European Human Rights Declaration…" In that particular case, the plaintiff was denied the release of an authorization for planting grapevine on a square surface over which the petitioner had an ownership right. The interdiction would have been for a 3 year long period, because of a Community regulation that stipulated that planting any crop would be contrary to hazard proclivities. The plaintiff made the allegation that his ownership right was struck by inefficiency and he was disallowed to practice his profession, in the manner that the fundamental German law should be interpreted. Ruling for the defendant, the Court declared that there was no infringement of the ownership right due to the fact that the provisions of the Regulation 1162/1976 weren't inflictive, instead they were a type of restrictions that was generally spread throughout the Community member states, thus trying to implement a general interest.

In the circumstances that even though the Community law is the beneficiary of spremacy in comparison with internal normative systems of the member states, at the same time that the first isn't to clear in regulating rights and liberties or it does it at a lower standard than the national law, the

[24] T. Ştefan, B. Andreşan-Grigoriu, Drept comunitar, C. H. Beck , Bucharest, 2007, 154-158.

cold shoulder of the German people and of the Italians raises the question of knowing which of the two will be declared as having priority. The answer came through a decision of the Federal Constitutional Court of Germany that, although it was very controversed at the beginning, proved its efficiency on the long run, being followed by a number of other injunctions ruled on a unitary practice trend. The Solange 1 cause became the means of asserting that "the national proclivities regarding the fundamental rights must be perceived as reference points for the Community law, at the times when community organs can't guarantee a protective cover for these rights at the same level as the national ones may do it"[25]. The Maastricht Decision concluded that "the German constitutional court grants protection for the fundamental rights in cooperation with the Court of Justice of the European Communities".

A new high point on the stage of the evolution of fundamental rights and liberties on a Community level was represented by the legitimize of art. 6 of the Treaty for establishment of the European Union, which conferred the Court of Justice of the European Union proficiency in this matter. However, since the Union is not a party to the European Declaration, the Court will apply this convention not as an enforceable deed, but more as a source of inspiration.

The private property right has been regulated two more times, in 2004 in the text of the Treaty for the constituence of the European Union and again in 2007 in that of the Lisbon Treaty. In both cases, the treaties came with attachments of the rights' catalogue from the European Union's Fundamental Rights Chart, because the signing of the conventions would have meant the rights themselves would have acquired juridical force. The rejection that the two treaties faced at the referendum that several member states organized put the objective on a waiting list. Therefore the ownership, aside from having an European dimension, it also has a Community aura, that has grown on its own, but not without establishing a conexion with the one that is mentioned by the First Protocol to the European Convention regarding the defence of the individual's fundamental rights and liberties and not without being tinted by the jurisprudence of the European Human Rights Court.

Conclusions

There are two proficient juridical organisms on the European continent that can be addressed to with the plea to solve litigations regarding the enroachment of fundamental rights, this situation being the origin of the well assumed risk of obtaining different injunctions in similar cases. The formality of the coexistence was accomplished with the aid of the European Union's Fundamental Rights Chart and of the European Social Chart, which have the role to create a catalogue of the preconsacrated rights, to try to uniform their interpretation in front of the two courts and most important of all, to make talk at art. 17 about the regulation and guarantee of the ownership right: "every person has the right to benefit from his legally acquired assets, to use and dispose of them, as well as leave them as heritage. No man can be deprived of his property, unless it's for a public utility cause, in the strict conditions mentioned by the law and with the receivance in a just amount of time of a just retribution for his loss. The usage of the assets can be regulated through law as long as the respective action is in the general interest." Article 17 makes transpire on one hand the partially borrowed expression from the European Declaration of Human Rights and on the other hand the numerous shades of the formulation that were entailed by the judicial practice of The European Human Rights Court, for example the express consacration of the retribution's just character and the necessity for it to be paid in a fair amount of time.

On the Community level, a strong German law influence made itself sensed by enforcing for the first time in 1979 the principal of proportions in the Hauer Cause stipulating that "in realizing the pursued objective, the restrictions mustn't be perceived as disproportionate and intolerable inflictions

[25] G. Gornig, I. E. Rusu, Dreptul Uniunii Europene, second edition, C. H. Beck, Bucharest, 2007; I. E. Rusu, Problema legăturii dintre dreptul național și dreptul comunitar în practica Curții Constituționale Federale din R. F. Germania cu privire la drepturile fundamentale, RRDC 1/2006, 55 and the next pages.

in the owner's prerogatives that bring contiguity to the very essence of the ownership right". In the twenty year younger Standley cause, the Court of Justice of the European Communities points out that "even the authorities of the member states are obliged, whenever they regulate limitations of the ownership right, to obey the principle of proportions. The owner shouldn't be forced to bear any duties that overcome the absolute necessary for the pursued objectives to become reality".

The preoccupation manifested by the Strasbourg judges for defining the borderlines of the private property right, places its jurisprudence on a privileged staircase, thus any interpretation of The European Human Rights Declaration must be done by directing it to the judicial practice of the European Human Rights Court. A chronological glance over the decisions ruled by this institution will shad light upon the pulsing mechanism of the Declaration, trate that confers it a great adaptability to the economical, social and political reality that permanently undergoes transformations and reinterpretations.

The ownership right was the beneficiary of an elliptical regulation in the Treaty establishing the European Community which only underlined that the European Community will not prejudice the property regimes that are effectual in member states[26]. In harsh conditions, the observance of the ownership right faced a brick path, its protection being realized in a praetorian manner and by being sustained by the common constitutional traditions of the member states[27]. Although the Luxemburg judges were assigned only to watch over the abiding by the European constitutive treaties, they became real challengers for the ones in Strasbourg, in the matter concerning the protection of human rights.

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