VICTOR MARCUSOHN

MIJLOACE JURIDICE DE DREPT CIVIL PRIVIND PROTECȚIA MEDIULUI

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Prefaţă

Lucrarea domnului Victor Marcusohn abordează un domeniu vast de instituţii şi reglementări, dintre care cele referitoare la ocrotirea mediului înconjurător se evidenţiază prin noutatea şi complexitatea lor, înfăţişând o însemnătate profundă pentru dezvoltarea durabilă a societăţii umane şi presupunând efortul conjugat al unor mijloace dintre cele mai diferite, reprezentând numeroase discipline tehnice şi ştiinţifice.

Dintre valorile economice şi sociale ce fac obiectul ocrotirii juridice, mediul reprezintă un domeniu special, ce presupune adaptarea mijloacelor puse la dispoziţie de diferite ramuri ale dreptului, iar dintre aceste mijloace dreptul civil asigură, în egală măsură, prevenirea oricăror atingeri aduse valorilor ocrotite şi, dacă asemenea atingeri s-au produs, repararea pagubelor pricinuite.

Demersul autorului se vădeşte a fi, în aceste condiţii, ambiţios şi neobişnuit de întins. Mai întâi, pentru că domeniul abordat cuprinde numeroase zone încă neexplorate sau tratate numai parţial. În al doilea rând, datorită faptului că ocrotirea mediului nu reprezintă doar o problemă de interes strict naţional, devenind o preocupare cu caracter universal, care presupune mijloace juridice adecvate colaborării între state şi, tot astfel, examinarea aprofundată a elementelor specifice altor sisteme de drept, aşadar studierea dreptului comparat. În fine, atât ocrotirea mediului, cât şi mijloacele juridice prin care aceasta se realizează cunosc o evoluţie deosebit de rapidă, ceea ce presupune nu numai înţelegerea mecanismelor existente la un moment dat, ci şi anticiparea evoluţiei elementelor respective.

Bineânţeles că, dintr-o lucrare cu o asemenea întindere, nu putea să lipsească analiza modului în care aportul dreptului civil – drept eminamente de sorginte privată – a crescut considerabil în ultimii ani în cadrul raporturilor juridice de drept al mediului. Dacă o asemenea analiză are în vedere, în primul rând, exercitarea prerogativelor de către proprietar asupra bunului său, respectiv numeroasele limitări impuse acestora de către reglementările de urbanism, de proiectele şi

reglementările referitoare la protecţia peisagistică şi deci a mediului, efortul autorului a fost, neîndoielnic, absolut remarcabil, privind documentarea, sintetizarea şi sistematizarea unui volum uriaş de legislaţie, de doctrină şi de jurisprudenţă. Demersul autorului are, însă, în vedere – am putea afirma, mai ales – şi numeroasele probleme ce decurg din analiza specificităţii prejudiciului comis asupra mediului, în contextul reglementărilor comunitare şi naţionale, atingerile aduse mediului reprezentând un prejudiciu specific; aceasta explică de ce anumite noţiuni, împrumutate din dreptul civil, au fost adaptate dreptului mediului, pentru a putea asigura identificarea persoanei responsabile sau, mai precis, debitorii obligaţiei de a repara prejudiciul ecologic. A treia faţetă a demersului ştiinţific al autorului este, de asemenea, cât se poate de importantă, aceasta referindu-se la rolul, tot mai important, ocupat de contract în dezvoltarea actuală a dreptului mediului.

Prin bogăţia materialului înfăţişat, prin precizia şi rigoarea tratării, prin fineţea analizei, prin claritatea şi logica expunerii, ca şi prin bogăţia contribuţiilor originale pe care le cuprinde, lucrarea domnului Victor Marcusohn reprezintă o deplină şi, putem spune, strălucită izbândă a talentului şi pasiunii autorului.

Prof. univ. dr. Marilena Uliescu

„Legal instruments of civil law for environmental protection”

In the PhD thesis entitled ***„Legal instruments of civil law for environmental protection”***, we tried to approach a large area of both civil law and environmental law, meaning the legal instruments of civil law destined to protect de environment, initiative capable of giving birth to many important elements of novelty.

First of all, we observe, even from the title, that the thesis has a dual character, being at the border of two fields of law: civil law and environmental law.

Even though it had some problems in achieving its maturity, as a field of law, we believe that environmental law has succeeded in the last years to attain this objective, obtaining even an important place among other fields of law, being a „living” law, which leads to a more concrete view of the right to nature and which makes us even rethink the relations between humans and nature. More than any other field of law, environmental law promotes solidarity in space and time, reconciliation and the reestablishment of the threatened equilibriums, its purposes being both essential as existential, becoming even universal.

When we reflect on the efficiency of this field of law, we must keep in mind its conceptual roof. Therefore, in order to understand if the means of applying environmental law are well adapted to its purposes, we must convene on the fact that “environmental law” and the “right to a healthy environment” are two inseparable notions, the first one finding its legitimacy in the second one.

Nevertheless, the legitimacy of environmental law is not given only by the positive obligations inserted in different laws and regulations, but also by the superior demands of environmental ethics, because there are such elements as the quality of life, the common goods or the ecosystems, which cannot be evaluated or quantified, any calculation in this sense remaining mainly theoretical.

Even though this doctorate thesis, leaves from the idea that environmental protection rules are strictly rules of public law, in the last years we observe an increase of civil law elements in the field of environmental protection. Environmental law becomes more and more a law of the citizens, to act against those considered responsible for the attaints on their environment. The civil and commercial trials have a large contribution in giving birth to a private environmental law, oriented mainly towards repairing the environmental damages. At world level, we are witnessing an increase in the trials oriented directly against the polluter and not only against the state, considering the general right of any citizen in obtaining an indemnification of the damage they suffered.

Also, the attaints on the environment are considered to be a specific damage, which explains why some notions, specific to civil law, were adapted to environmental law, in order to be able to identify the responsible person or, more precisely, the debtors of the obligation to repair the ecological damage.

The PhD thesis is structured in three parts: ***property right and environmental protection – limitations of property right by legal regulations for environmental protection; prevention and remedying environmental damage, in the context of European and national regulations; the role of contract in environmental protection***, structured, at their turn, in chapters and sections.

Therefore, the objective of this study is to verify the righteousness of the theory according to which civil law attains an important evolution thanks to the instruments of environmental protection: a new relation between the owner and its goods, a compensation, as complete as possible, for the environmental damage and the role of the contract in the evolution of environmental law.

The first part of the thesis, concerning the property right and its limitations in general, and especially the limitations for environmental protection purposes, starts with a chapter dedicated to the *evolution and history of the property right and its limitations*. Starting from the classical opinion according to which, in the context of relations between private owners, property is seen essentially as an absolute right, conferring to the owner all the prerogatives of the property right,

with no other limits than somebody else's right, nevertheless, the property right has a broad social function, more precisely: *it is limited by its social function*.

Beyond its historical particularities, the notion of property knows nowadays some common developments, its significations being different, according to the two main topics where it's applied: private law, which governs the relations between particular owners and remains under the sign of the nineteenth century liberalism and constitutional law, which defines the guarantees related to the property right and governs the relations between the particular owners and the state. From this last perspective, the great majority of the national modern legal systems establishes supplemental limits to the constitutional guarantees of the property right (for example, the state can trespass a property right for "a public utility cause", respectively when the unlimited exercise of this right can cause a prejudice to the general interest).

Nevertheless, the connection between rule and exception has modified nowadays, especially if we take into consideration the number of limitations imposed to the prerogatives of the property right by the town-planning regulations, or by the regulations related to the environmental and landscape protection. The area and the exercise of the property right cannot be unlimited, because in order to be safeguarded, the property right should be *limited*, according to its *moral finalities, its economical efficiency and the demands of the general interest*.

It is highlighted the way in which the current relation between property and environment has many aspects and if, on one hand the significant increase of legislation related to the environmental protection has undoubtedly influenced the property right as an absolute right, on the other hand, we can notice how, from an historical perspective, the environmental issue has initially been analyzed through the property right regulations. This aspect has started a process of adapting the regulations initially designed to protect the property, to new situations, which haven't been studied before, by special rules or regulations.

In this context, in the first chapter of the thesis, we considered necessary to give a short examination of the *historical evolution of the property right and its limitations*, starting from the definition and the classification of the real rights in general and continuing with the evolution of the property right and its limitations, starting from Roman law, in order to understand the actual shape and limitations of the property right.

Therefore, in the same chapter we have an entire section designated to the actual regulation of the property right, both public and private, in the Romanian legislation, starting from the provisions of the Constitution and those of the New Civil Code. In this context, it is important to show that the current scientific research was born under the sign of a new Romanian Civil Code (NCC)[1], which made us understand the way in which this fundamental legal act distinguishes between public property and private property.

The lawmaker shows that the property right can be exercised within the material limits of its object with the abridgements established by law. Therefore, the exercise of the private property right can be limited by law, but also by convention, with some exceptions established by law.

As a personal opinion, it seems important to show that even today, in the Western world, an increased number of legal issues related to property, make the object of different cases concerning wet lands, endangered species protection, land use etc. This basically means a way of exercising public control on private property.

In other words, the issue seems to have moved, from the title of property to the land use control.

Nevertheless, if we focus our attention towards property over land, the first question is if the essence of the problem has changed, or just the way in which we perceive the problem is different.

[1] The New Civil Code, adopted by Law no. 287/2009, published in the Official Journal no. 511 of 24 July 2009, modified and completed by Law no. 71/2011 for the republishing of the New Civil Code, published in the Official Journal no. 505 of 15 July 2011, modified by the Governmental Emergency Ordinance no. 79/2011 regulating the necessary measures of implementing Law no. 287/2009 – the Civil Code, published in the Official Journal no. 696 of 20 September 2011.

We can argue that when the use of a private property land is restricted in order to preserve the habitat of certain protected species, or when a building is registered as a historical monument, the issue remains focused on the differences between the use of a private property land and a public property land. The public interest is to protect animals threatened with extinction, natural reserves or wild habitats. The private interest is to lift all land use restrictions, in order to make it more profitable.

On one hand, private interest might be characterized as "reckless development", "selfish behaviour" or even "abuse of rights". On the other hand, restrictions might be overwhelming, unjust or unfair.

Undoubtedly, the legal literature was confronted in the twentieth century with the complexity of regulations related to property. Nevertheless, these problems always existed. New difficulties emerged with the segregation between the administrative regulations and the private law tradition surrounding the property over land.

If in the nineteenth century and in the first part of the twentieth century, the fundamental idea had been that the use of land is determined by the form of property, thanks to the evolutions registered during the last three decades by the mechanisms of market economy, both in the former communist countries and in the Third World countries, a powerful offensive of private property was perceived. Recognizing, at constitutional level, the private property right as a fundamental right, represents a positive evolution in the establishment of this right, and the Romanian Constitution of 1991 represents no exception in this sense, stating at article 44 (2) that *"Private property is equally guaranteed and protected by law, irrespective of the owner"*.

Another novelty of this scientific research is to show the way in which property right and its limits were received by the jurisprudence of the European Court of Human Rights. Even though the right to a healthy environment is not guaranteed *per se* by the European Convention of Human Rights, by using the mechanism of "indirect protection", becomes possible to protect the individual right to environment, meaning when another right guaranteed by the Convention is violated. By the jurisprudence of the ECHR it was established an indirect protection of the right to a healthy environment,

which should be perceived as a new step in the process of enforcing the human right to a healthy environment in Europe.

In this view, we emphasized the recent case law of *Tatar vs. Romania*, case which shall probably remain as main reference in recognizing the right to a healthy environment. By its decision the Court observed that pollution could interfere with a person's private and family life by harming his or her well-being, and that the Romanian state had a duty to ensure the protection of its citizens by regulating the authorizing, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health. The Court also pointed out that authorities had to ensure public access to the conclusions of investigations and studies. It reiterated that the State had a duty to guarantee the right of members of the public to participate in the decision-making process concerning environmental issues. It stressed that the failure of the Romanian Government to inform the public, in particular by not making public the 1993 impact assessment on the basis of which the operating license had been granted, had made it impossible for members of the public to challenge the results of that assessment. The Court concluded that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the company's activity might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, within the meaning of Article 8, and more generally their right to enjoy a healthy and protected environment.

The second chapter of the first part is dedicated to the difficult approach of *defining and classifying the limits of property right*, considering the different opinions expressed by the doctrine, but also the different legal provisions regulating this situation, primary those of the New Civil Code. First of all, we should distinguish between the *material limits* and the *juridical limits* of the property right, distinction based both on the differences between property right and its object and on the role played by the legal will. If the material limits of the corporal goods are basically its physical limits, in the light of the provisions regulated by the New Civil Code, the juridical limits of exercising the private property right should be classified in *legal*