

Effects of Swiss and Romanian provisions regarding servitudes upon community development concept

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Abstract: The purpose of our paper is to analyze the concept of “community development”, a plurality of mechanisms that aim to community welfare, and to focus on the role of civil and urban servitudes in this process. We shall focus on the servitudes’ characteristics, as they are emphasized in the Swiss Civil Code, the case study we shall mention being the reflection of the way entire cities seem to be in an incessant renewal process, which allows them to survive, despite the ever-changing nature of human activities. Inevitably, local community becomes an actor in this scene of solving large amount of collective problems, the concept of community development referring to the creation, recreation, rehabilitation of community conditions, that make possible collective welfare. Nevertheless, Romanian New Civil Code specifies the delimitation between servitude rights and legal limits for the exertion of property rights. From this point of view, we consider to be a real challenge the analysis of social tendencies and legal provisions regarding property rights and real servitudes, among legal systems of European countries, as they have both identical and different elements.

Keywords: community development; eco-quarter; servitude.

Introductory considerations on the concept of „community” and the community development

The aspects of human society are diversified, as they depend on the nature of human relationships. Therefore, we can talk about economical forms, societies with self-sufficient economies, or barbaric and civilized societies etc. Nevertheless, these relations vary, modify and multiply concordantly with the number of individuals that form the society [1].

According to contemporary sociology, the “group” notion has gradually started to appear in order to explain the way our civilized society works, in a divided, but yet unitary manner [2]. Therefore, social life is being organized in economical groups, specialized in economical activities, in religious groups, grounded on an unitary faith, in political groups, grounded on a leading unity, in scientific groups etc. One should say that every individual, in a particular manner, represents only a materialized form of the tendencies of the main group that he belongs to. Although the group may suffer, in its composition, different inner changes, its form and essence remain the same.

German sociologist Ferdinand Tönnies, who divided groups after their inner structure and their degree of evolution, achieved the most successful comparative analysis [3] regarding community (*Gemeinschaft*) and society (*Gesellschaft*).

Community is the group grounded on blood bonds, kindred, customs and faith, and society is a compound made of different interests and rational agreement. For Tönnies, while community is an organic link among individuals, society is something rational and new. In his opinion, there are three types of communities: the blood bond, local and spiritual communities.

Blood bonds [4] represent the most sustainable communities, as they start with tribes, continue with big patriarchal families, with German patriarchal families, and they have, even nowadays, a great power pressing upon particular individuals, family members. Local community represents the type of community which is no more grounded on common descendant, but on humans’ proximity, vicinity. It is not about an accidental approach, but a sustainable one, because only in these circumstances common customs and rules of life are being created. The village is such a representative community, where the link among people, beside the blood bond, is represented by the space bonding.

As regards spiritual communities [5], it seems that they developed in past forms of the society, because, once the evolution started, community seems to move back, bit by bit; therefore, instead of

unconditional solidarity among individuals that form a group, appears a solidarity of interests where the individual element is seen pretty clear.

Community is defined [6] as an enduring social structure, which includes a relatively small number of individuals with similar cultural grounds and social statuses, who live in a relatively big area and who enjoy viable relations of cooperation, which allows the exercise of efficient social control in that group.

Considering the assumption according to which the notion of community development is equivalent to the whole set of mechanisms employed to produce collective welfare, as this latter concept was grounded in market economy-based societies, one may rightfully ask oneself the following question: is collective welfare the result of an individual effort or, on the contrary, the product of joint efforts? If we were to adhere to the solidarity thesis, do we accept that, in order to prove their efficiency, such efforts should be analyzed at the level of local communities, narrow communities or, on the contrary, of the society?

Community development strategy innovation and efficiency depend on the use of unexplored resources: community and community effort [7].

According to sociological studies [8] regarding the role of community groups, many needs (specific to community) could be satisfied with the help of existent resources in that community (inner resources), the group being implicated in a self-supporting activity of establishing of certain autonomous and viable services.

The object of community development programs is community members' mentality changing, awareness raising and technical skills training, with a view to enhancing community prosperity.

1. Urban and civil servitudes in the Swiss Civil Code

Landed servitudes, provided by art 730 from Swiss Civil Code [9], are real rights that permit the owner of dominant estate to use the *servient* one. According to this article, servitude is a charge imposed to an estate in favour of another, which obliges the owner of the *servient* one to permit some acts of use coming from the dominant ownership, or to abstain from certain rights that he's entitled to [10].

The advantages of servitudes can have an economic nature (right of passing) or an aesthetic nature, but have to highlight a legal interest. For example, it will not be acknowledged a servitude that will obliges the neighbor to paint his house in white [11]. On the other hand, the owner of the *servient* estate can obliges himself to protect the „villa” characteristic of the estate. When a quarter of villa is built, thanks to the provisions of construction „police”, the servitude will have a mutual nature [12].

Servitudes, as real rights, are opposable not only to the owner of the *servient* estate, but to every third party. That is why the owner of the servitude can make a stand against acts that threaten to violate the servitude and are exerted by a renter, farmer or some other third party [13].

Servitudes divide in servitudes referring to the obligation of tolerating certain acts coming from the owner of dominant estate (*servitudes quae in patiendo consistunt*) or the obligation of abstaining from certain acts (*servitudes quae in non faciendo consistunt*). Affirmative servitudes are the servitudes of passing, rights upon mainstream, right to build. Negative ones are: servitudes of not exploiting a noisy activity, of not obstructing the neighbour's view by building different constructions.

According to another classification, there are foncier (landed) servitudes (art 730- art 744 Swiss Civil code) and personal servitudes (art. 745- art. 781 Swiss Civil Code). The foncier servitude is constituted in favour of dominant estate, and the personal servitude in favour of one private person named „beneficiary” and not in favour of an estate (usufruct, habitation and superficies rights) [14].

After their content, servitudes are being instituted in different areas, like constructions, drainage, plantations, industrial exploitations, passages, urban districts.

There are also conventional servitudes (created by contract) and legal servitudes, in which case the law permits, in certain conditions, to be imposed to the owner.

Legal servitudes are being born by registering in lands register and not directly, through the law effect: „le passage nécessaire” (art. 694 Swiss Civil Code), „le fontaine nécessaire” (art. 710 Swiss Civil Code).

Obligation of „doing”, of maintaining a certain thing, cannot be the object of a servitude [15], therefore the *in faciendo* servitudes are not equivalent to landed charges.

Anyway, an obligation of “doing” can be attached, as an accessory, to a servitude; that is the case when the owner of the *servient* estate engages to a positive action, such as the obligation to maintain the hydraulic pipe of the owner of the servitude [16]. Certain personal rights can very well be mistaken for landed servitudes. They cannot be the object of servitudes, but are pure personal obligations for the owner of *servient* estate. *Vice versa*, the establishment of servitudes is inadmissible in the situation when the obligation of doing a positive action is the main obligation, and the one of tolerating or abstaining from certain acts represents an accessory one. This is the situation of building a connection pipe on the neighbouring estate for the purpose of using electricity. In this case, the energy release is the main obligation, and the obligation of tolerating the pipe is the accessory one [17].

According to art. 730 (2) from Swiss Civil Code, the *in faciendo* obligations can only be attached as an accessory to servitudes, being born once they are inscribed in the land register. Assuming the owner of the servitude is entitled to fish from an artificial stream (lake or industrial canal), the owner of the *servient* estate is not impelled to do the maintenance of the installations, except for the situation when he lost the interest for these installations [18].

If the latter one allowed the draining of the stream, he would have to indemnify the owner of the servitude, as it has been established by the Decision pronounced by the Berne Higher Court at 25th of June 1989 [19]. Court has interpreted the provisions of art. 736, second paragraph, from Swiss Civil Code [20]. Damages cannot be recovered when servitude ceases to exist as a consequence of the water stream adjustment.

According to legal provisions, servitude is being established for the necessity of the dominant estate, and not for the necessity of the owner of servitude.

An estate can be constituted in favour of many estates, being permitted the so called „mutual servitude” [21].

For example, when building a quarter, all the buildings have a mutual servitude that obliges the owners to preserve the „villa” nature, being forbidden to exert commercial activities among these estates („exploiter des industries”). The same situation is the case of many owners who reciprocally constitute the right to use an exploitation road. In all of these cases, every servitude is being independent from the others, the extinction of one couldn’t affect the existence of the others.

According to art. 731 from Swiss Civil Code, servitudes are being established by their inscription in the lands register.

In certain cantons, the inscription was optional, but in others, the condition of registering the servitudes was requested only for certain servitudes, especially for the non- apparent ones. This procedure was grounded on the fact that it was very difficult to establish, in a complete manner, the totality of the existent servitudes at the moment of the constitution of registers and, in the same time, some servitudes had a relatively small importance.

Afterwards, Swiss Civil Code generalized the obligation of registering all servitudes in lands register.

In the view of Swiss doctrine, legal servitudes doesn’t represent authentic servitudes, being in fact just legal restrictions of the ownership [22].

Furthermore, it is not allowed to constitute servitudes to burden or in favour of an immovable, that doesn’t belong to the constituent of the servitude. On the contrary, is being accepted the constitution of servitudes regarding the openings that will be established in future, such as the right of passage in favour of a building that is about to be constructed.

One should notice that servitudes cannot be affected by suspensive, resolutory or potestative conditions or by uncertain terms (the death of an individual is considered to be a certain future event) [23].

It is important to mention that, according to Swiss Civil Code, there is no equivalent value between conditions that affect the existence of rights and the ones that affect the rights’ exercise, as the latter ones are admissible [24]. For example, the servitude of passage cannot be exercised when the road becomes impassable because it has been weather- bitten [25]. According to Romanian law, while the condition affects the very existence of rights and obligations, the term affects their exercise.

In case of expropriation, it may occur that servitudes which burden an estate to be in favour of a canton or of a locality, such as the servitude of passage.

These servitudes cannot be mistaken with servitudes of public law, because in the latter case it is about the constitution of a legal restriction of ownership, restriction that is provided by Public law [26].

The owner of two estates [27] can constitute a servitude that burdens one of the estates, in favour of the other, which also belongs to him [28]. Servitude right of the owner upon his own two estates was unknown before Civil Code from 1907.

The establishment of servitudes regarding the owner's personal estates reveals important privileges, from at least two points of view [29]:

1. Firstly, the landholder can reserve a preferentially rank towards all subsequent real rights. For example, the owner of an estate that contains a water source assigns the right upon source to an alimentary industry, but, in the same time, he reserves for him the advantage of obtaining the delivery of a certain number of liters per minute. Therefore, he will enroll the right in favour of the estate where the flux exists and this right will take priority of the one belonging to industry.

2. In case of plotting a considerable piece of land, the institution provided by art. 733 allows the avoidance of supplementary cost and work. For example, an entrepreneur parcels out his own estates and institutes, for every plot, a servitude that only permits the edification of villas, according to legal provisions in this matter.

As for the effects, before the alienation of an estate, the owner's right isn't kept under any limitation. Therefore, despite any opposition to build, he can work for the edification of the building. After the alienation of one of the two estates, servitude is opposable to the anterior owner of the two estates, as if it has been existing since its establishment. Assuming the owner covers up a window, after he had established a servitude of view, the latter acquirer of the dominant estate might ask the building demolition.

2. Case study. Concept of "eco-quarters"

From an historical point of view, an eco-quarter appears to be an urbanistic experimental form, that has been established at the end of XX-th century, among the countries from Northern and Central Europe, where the concept of „éco-villages” [30] developed, between the 1960's and 1970's. Their aim was to bring to attention certain principles regarding the environment, social and economic life, principles regrouped in the content of “sustainable development” concept, between 1999 and 2000. Nowadays, there are three categories of eco-quarters [31]: „proto-quarters”, characterized by a militant feature, „prototype quarters”, established between 1980's and 1990's, less numerous, established especially in countries from the Northern Europe and Germanic ones, quarters that have become famous (as the ones located in Fribourg, Malmö, Helsinki etc.) and „type quarters”, that have been established beginning with 1990's and, more again, in present, very numerous.

From a scientific point of view, the eco-quarter is a new built up and modified space which belongs to a town, in the centre or the proximity of an urban centre with a dense population, where environmental, social and economic principles regarding sustainable development are applicable. Term of „eco-quarter” started being used in 2008, by MEEDDM (Le ministère de l'Ecologie, du Développement durable et de l'Energie) [32], in a project competition regarding the development of some urbanistic practices in France.

This type of quarters also forms the object of interest for the Lausanne administration; therefore, Ecoquartier Association offered, in May 2013, towards public consultation the project named „LES PLAINES-DU-LOUP. Plan directeur localisé en vue de la réalisation d'un écoquartier” [33].

The project aims the establishment of many eco-quarters. Among these, one is aimed to be developed in the so-called „Les Plaines-du-Loup” area. From an ecological point of view, there are three levels the project refers to: national, regional levels and the one that refers to „Les Plaines-du-Loup” area, a location that connects the whole town with the entire region by means of ample green areas. Project also aims to the objective of fighting against the uncontrolled dispersal of human activities.

Town administration is the owner of property rights regarding the above mentioned area.

In order to ensure the continuity of movement for cars and foot-passenger, public servitudes are going to be constituted regarding the neighboring quarters. Works are going to be executed in a manner that will ensure that the owner will constitute superficies rights in favour of the builders who

will make edifications and will use the land for the entire period that has been anterior negociated with the owner.

At the end of this period, the land owner will recover the right of using the land and the finalized buildings. Annual, the owner of superficies rights will have to pay the land owner a certain rent (annuity).

3. Servitude rights versus legal limitation of property rights, according to Romanian New Civil Code

In Romania, the premise for a real urban legislation has been created after December 1989, when democracy and free market have been enabled. Firstly, land and construction legal areas have been provided (1991) and then, 10 years later, has been adopted the law regarding the urban planning rules (Law no. 350/ 6-th of July 2001).

Romanian Urban provisions are made of, most of them, by the adjustment (more or less successful) of different “pieces” [34] from other laws regarding connected legal areas.

In Romania, an essential role for defining the concept of “urban renewal”, a concept very popular in the legislations of different European countries, is being reserved to urban servitudes.

Regarding the possibility of imposing certain servitudes to public domain, certain opinions have been expressed.

On one hand, it has been expressed the opinion that is forbidden for servitudes to charge the public domain. This opinion has been promoted in papers of Administrative law, including in the treaty of professor Antonie Iorgovan [35]. Denial of servitudes’ establishment wasn’t absolute, as it was being admitted the possibility of creating servitudes charging public domain, under the condition of their compatibility with the nature and destination of goods, like servitudes of view or servitudes regarding the leaking water upon a public street.

We can observe the Romanian New Civil Code allows (under the compatibility condition) the institution of any kind of limits for public property, as they are provided for the private property. So are the former natural and legal servitudes provided by Civil Code of 1865.

It is noteworthy that this principle is being extended to private goods from public domain, such as the ones belonging to cultural heritage [36]. It has been mentioned the interdiction of charging these kind of goods with servitudes, but it also has been noted that are admissible those servitudes compatible with the objectives for which goods entered the patrimony, as long as those servitudes have been legally constituted.

Other authors of civil law, forces the legislator conception, saying that in reality, inalienability rule of the public domain works not as strong as in the case of servitudes. Thus, although is recognizing that, in principle, is not only prohibited the alienation, but also and dismantling public property rights, is admitted the validity of this categories special of “dismemberments” (resulting that would, in fact, and the unique situation of this kind).

It is noteworthy that every servitude, compatible with public use or interest, can be constituted upon goods that, by their nature, are of general use or upon goods of public interest that the collectivity gets the best of it, in an indirect manner (schools, hospitals, museums, etc.) [37].

As the law states, even if the servitudes (as generically defined by Law no. 213/1998 regarding public property) or legal limitations (that the New Civil Code refers to) were instituted before the goods entered public property and should there be a lack of aforementioned compatibility, they will automatically dissolve without the need for any such external decision. In practice, however, an administrative decision is needed to recognize the situation in fact, so that any uncertainty is eliminated. This decision can be contested in Court by the affected interested party (the beneficiary of the servitude). Based on this, the local administration is enabled to proceed and eliminate any and all installations, signage etc. that were the foundation of the servitude right.

In the last commentary regarding the Romanian Constitution [38], debates related to the possibility of establishing real rights upon public property, especially servitudes, have a certain relativity, taking into consideration the fact that legal writers have interpreted the provisions from art. 13 from Law no. 213/1998 [39] regarding public property in the direction of admitting real rights upon this type of property rights, and also, in the contrary acceptance, according to which servitudes that charge public property represent normal limits of exerting property rights.

We must also note the opinion that refers to the fact that Law no. 213/1998 permits only the constitution of some normal limits of property rights and not the institution of real servitudes, established by man's act.

Therefore, as long as the compatibility with the public use or interest is not affected by the third parties' rights, there is no problem if we admit the establishment of these servitudes charging public property. But these cannot be the classical servitudes, as defined by the Civil Code from 1865 and by Law no. 287/2009, because, in reality, public property rights cannot be dismembered. As such, there can be a genuine dismemberment, but, eventually, a special real right [40], derived from the public property right, or an simple limitation on the exercise of this right.

It is noteworthy that Law no. 351/2004 regarding gas legal regime refers to servitudes and rights that belong to the existing concessionaires in natural gas domain and that are exerted upon lands and other neighboring goods. These burdens are being instituted for the period of making rehabilitation, exploitation works and refer to the right of using lands, right of legal servitude, right of obtaining the suspension of certain activities that could affect goods or persons, right to access public utilities. Legal servitude is the one referring to underground or air passage on the neighboring lands and contains the right of installing networks, piping, lines and other equipment and also the access to the spot where the equipment is mandatory to be installed for interventions and repairs. The period the right of use and legal servitudes exist is strongly connected to the above mentioned equipment.

Among the servitudes of public utility, "urban servitudes" have their important role [41].

Law no. 350/2001 regarding urban planning includes general provisions regarding urban servitudes, passing the role of their detailing to technical-administrative regulations. The diversification of public services and proceedings had, inevitable, the effect of providing this kind of instruments in order to protect the public domain's annexes.

Nevertheless, the exertion of these special rights is not being let at the mercy of administration, in the most of the cases being necessary a convention with the owner of property rights or with the user of the private estate; in case of disagreement, a court order is being needed. From this point of view, Romanian doctrine differs from the French one, in the latter one being many voices who appreciate that the way public servitudes are being stipulated in France, conducts to numerous abuses, dictated by the administrative authorities.

It is noteworthy that in our legislative system, servitudes of public interest are exerted by compensating the particulars for damages they have to bear for the purpose of public interest.

Conclusions

It is noteworthy that the way real rights and limits for property rights are being stipulated it produces effects, in an almost automatically manner, in the social area, the concept of community development having in its own core the role of local community. As a collective action, community development is aimed to contribute to the modernization of entire quarters, having the consequence of the rehabilitation of urban centers, an action that is situated in the middle of European states' attention. From this point of view, redefining limits between public and private interest will depend on the way a balance is to be found between the two fundamental categories of interests.

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