

PRIVATE PROPERTIES IN PROTECTED NATURAL SPACES: THE ROLE OF PROPERTY REGISTRATION *

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ABSTRACT

Private properties in Protected Natural Spaces (from now on, PNS) are allowed in Spain, even in national parks. Certainly, we can't mistake public domain with PNS. Because of this, to speak of private property in those is not something inviable, since the primordial public purpose is not the ownership of the property - contrary to the public domain - but the limitations or restrictions that this ownership has on the environment of an PNS. We must use all existing resources to protect the environmental. In the present paper it discusses how one can be the Land Registry and the different facets that it can reach.

KEY WORDS

Private property, Land Registry, environmental protection, land information.

I. PROPERTY RIGHT AND SOCIAL FUNCTION.

The Spanish Constitution (from now on, SC) recognizes, within its First Title dedicated to the Rights and Fundamental Freedoms, the right to private property¹. In this way, although the right to the private property is configured as a fundamental right of the citizens, undoubtedly the SC delimits its content in attention to what the laws establish about the social function that this property. Parallely to this, the principle is established that one will only be able to deprive somebody of their right of property when a social interest or public utility exist to justify this. The conclusion to which we must arrive, starting from what we have exposed, is not another than the right to the

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¹ Concretely, the article 33 stipulates: "*1. The right is recognized to the private property and the inheritance. 2. The social function of these rights will define its content, in accordance with the laws. 3. Nobody will be able to be deprived of their properties and rights but for justified cause of public utility or social interest, by means of the corresponding compensation and with conformity stipulated by the laws*".

private property should be respected by the State, but that the proprietors have in turn delimited inherent faculties to their right because of the social function that the property fulfills in each moment and place, as well as that all proprietor must be aware that in any moment he can be deprived of his right provided there are reasons (of public utility, or social interest) that justify this.

In my opinion, in harmony with what is foreseen in the constitutional text, our Civil Code expresses, from now on, CC, (and it in spite of the fact that its writing is previous to the promulgation of our Constitution). In this sense, the article 348.1° CC establishes that "*the property is the right to enjoy a thing, without more limitations than those established by the laws*". Nevertheless, this precept has been criticized on the part of the civilist doctrine because, from a technical point of view, the property should not be defined as a "sum of powers" and, because from a political point of view, the legal definition bears implicit an antisocial idea of absolute power over a thing. In spite of, I consider that the sense of the civil precept is the one that should continue reigning in a Social and Democratic State of Right as ours: a proprietor has all the faculties that emanate from his subjective right of property with the only limitations that the laws, direct and even also indirectly, impose him. This way, the right of property can continue configuring as it has been it along the History: the proprietor is the owner of the real right par excellence, of an absolute right and *erga omnes*, characterized by the generality, abstraction, elasticity, exclusivity and perpetuity, although limited from its same origin for the *social function* that this property should fulfill in each moment as well as for the possibility (exceptional, in any event) that causes exist that, in opinion of the public powers, indicate the necessity to deprive him of its right.

But it is necessary to keep in mind that the fixation of what should be understood by *social function* that the property is a labour reserved for the Law, because of which the Regulation former *ex novo* could never be used (although, it is clear that it can concrete the public purpose end that the Law previously fixed), because it cannot be other the conclusion to which you arrive after the interpretation of the articles 33.2 and 53.1 SC. Therefore, what should be understood by *social function* that the property fulfills is something that one doesn't leave to the discretion of the public powers, but rather the legislator takes charge of concreting. Because of this, the Law 4/1989 of PNS considers that the public purpose that defines the social function of the property is the protection of the recognizable natural values in the protected spaces as well as the survival of natural species and animals. In spite of what we have exposed, it is evident that in each concrete case the reach and content of the social function each property fulfills will finally be determined and be concentered in attention to determined parameters that will be able to differ assisting to the concurrence of multiple causes. This interpretation gives the option to the public powers (that, in definitive, look after the interest of the collective and not of the individual) to be able to value and to discern the exact social function of the right of property and of the faculties that with general character the same imply, in attention to the function that in face of the society this property should fulfill, function that can be so important and of such an entity that could

derive, even, in the privation of the right of property to its legitimate owner on behalf of the public powers. This right would not disappear but rather would pass on to another holder, the State (and it would very probably become public domain) that would have acquired it derivatively. Therefore, the expropriation is configured as the most drastic of the decisions that can be taken against the owner, and it would bear the transformation of a mere possibility (all holder of a right of property knows that it is possible that it can be expropriated) in a reality. Because of this, the expropriation has been configured, from the constitutional text, like an exception, and the taking of this decision should always be properly motivated at the same time that the proprietor that is deprived of their right is reimbursed economically.

But it is evident that the social function of the property also has an important limit: the essential content of the right of property. It would be absurd to maintain a proprietor in their right if at the same time he's deprived of all the utilities and uses that the same one can generate. If it were necessary, it's obvious that the proprietor should be reimbursed because their right has been deprived of all the inherent faculties and, *a priori*, it seems to be that the purchase of this land and, ultimately, the expropriation of the same ones, would be the most appropriate thing.

II. THE ENVIRONMENT AS A LIMIT TO THE RIGHT OF PROPERTY.

Most of the doctrine considers that the environment is not configured constitutionally as a fundamental right (the Constitutional Tribunal has even established more than once that not all the constitutional precepts are susceptible of constitutional help), but as a guidance principle of social and economic politics, as a asset or collective interest informant of the juridical order². Therefore, if we reach the conclusion that the environment is a collective interest, it is clear that the prevision of the article 128 of the SC ("*all the wealth of the country in its different forms and whoever were its ownership is subordinated to the general interest*") must also be related to the environment, in such a way that the conclusion to which it would be necessary to arrive is that all the wealth of the country (and certainly, the property of the land is), independently of its owner it is subordinated, among others, to the general interest of the preservation of the environment. In this way, the right of private property of land finds an abstract and uncertain, but determinable limit in each concrete case that bears limitations for the Sunday holders.

² The SC, inside it's Title I, says in it's Chapter III (Of governing principles of the social and economic politics) the article 45: "*1. Everybody entitled to enjoy an appropriate environment for the person's development, as well as the duty of conserving it. 2. The public powers will look after the rational use of all the natural resources, with the purpose of protecting and improving the quality of life and to defend and to restore the environment, leaning on the indispensable collective solidarity. 3. For those who violate what is established in the previous section, in the terms that the law fixes will establish penal sanctions or, in its case, administrative, as well as the obligation of repairing the damage caused*".

On the other hand, the article 148 1. 9 establish that the Autonomous Communities will be able to assume competitions on "*the administration as regards protection of the environment*", being specified in the article 149. 1. 23 that the State has exclusive competence on the "*basic legislation on protection of the environment, without damage to the faculties of the Autonomous Communities of establishing additional norms of protection.*"

In this way, we can observe how our Constitution contemplates the environment in two very different parts, in the article 45 under the heading of the guidance principles of social and economic politics and that she given origin to an extensive and rich debate about if the environment is a right, a subjective right or, simply, a guidance principle, and in the articles 148 and 149 located in the territorial organization of the State, and that, to the margin of other discrepancies don't exist as for its consideration as a matter object of distribution of competitions.

III. LIMITATIONS OF THE PRIVATE PROPERTY LOCATED IN PROTECTED NATURAL SPACES.

The general rule that exists in this matter is that the declaration of a certain territory as PNS doesn't include the change of Sunday ownership of it, in such a way that there are numerous private proprietors that have land declared as PNS in the practice. The Administration has many prerogatives (similar to the existent ones for the public domain) to limit and to define the faculties that the proprietors of land declared as PNS possess. Certainly, these limitations can be of very different nature and vary in intensity, because of which it is interesting to try to specify when these affect the essential content of the right, being due, in consequence, to reimburse the Sunday holder.

3.1. The mandatory expropriation of the private property.

In my opinion, the declaration of an PNS like National Park should be incompatible with the existence of private property inside its territorial environment. The fact that there only exists thirteen National Parks in the whole Spanish territory at the present time together with to that the declaration of the same should be made by state Law that declares the conservation of this territories of general interest, gives us an idea of the concrete and particular singularities that a certain environment should possess to be able to be declared National Park. The National Parks are PNS barely transformed by the exploitation or human occupation and whose natural beauties, singularity of their fauna, flora and geomorfologics formations or representativeness of their ecosystems confer a great relevance to the conservation of their ecological, aesthetic, educational and scientific values that are of general interest for being representative of the main Spanish natural systems.

Because of this it is clear that these spaces are those that possess the biggest protection grade in our country. All this makes the territorial environment that covers the National Parks is the perfect candidate to be affected as public domain, given the characteristics that these properties possess (inalienability, inembargability, imprescriptibility). In my opinion, without necessity of entering *a priori* to value the concrete case, we should part from the maxim that in these cases the reasonability of the expropriatory measure is more than justified in attention to the entity of the property that one wants to protect (a territory declared National Park). If it weren't like that it would be the exceptions to the general rule that confirms it and can exist and in this way, justify maintenance of the holder's right in certain situations (think, for example, in properties located on the border of the Park with a completely integrated use in the habitat).

3.2. Juridical regime of the private property in an PNS that has not been declared National Park.

Certainly, the limitations that the proprietor has of an area located in an PNS are not few besides that, the mandatory expropriation hovers over their right in a more pressing way more than over the other proprietors. However, it doesn't impede that both figures (this is, right of private property and PNS) can cohabit in harmony, provided, that is that, the public powers carry out a conscious supervision of the reality of the land as well as of the activities that the private holders carry out. As the protection of the PNS is configured as an social interest englobable inside the social function inherent to the concept of private property, all these limitations and/or obligations are not compensable. It doesn't prevent, however that in the practice the public, powers conscious, that in occasions the economic payment of individuals to comply the normative can be considerable, summon public grants guided to finance a part of this expense. In this sense, some of the initiatives of some CCAA are praisable those that have decided to subsidize the private proprietors a part of certain works that redound in benefit of the conservation of the PNS.

Parallely to that exposed it is necessary to bring up another idea already pointed out previously: although it is certain that the right of property is configured by the social function that this property fulfills, and that implies the protection of a public purpose legally delimited, it is also true that the limitations should not end up annulling the essential content of the right and leave it empty of content. Because of this, it is also clear that the holder of the right must be autonomous and self-sufficient to be able to exercise all the essential faculties of the right that have not been affected by the respect towards the social end to protect. This way, the intervention of the public powers find a clear limit: the autonomy with which the Sunday holder should be develop with relationship to the exercise of all those faculties that cohabit harmoniously with respect to the end of general interest.

This way, the private property declared PNS serves at the same time to two types of interests that appear indissolubly associated: the proprietor's individual interest and the public interest of the society. Among the most frequent limitations that will be reasonably adopted depending the entity of the public purpose that one wants to protect, are the following ones: among the obligations of not doing (that are the most habitual in what refers to PNS) are the prohibition of certain uses (agricultural, industrial, tourist, etc.), the prohibition of construction or limiting the type of building, subjecting certain performances to the previous authorization of the competent authority, etc.; among the obligations of doing we can highlight the one of maintaining under certain conditions the property; and among the most frequent loads, limited real rights of preferable acquisition in favor of the public entities and of servitude (of different classes). All these limitations constitute for each proprietor a concrete delimitating framework of their right of private property that should be bounded inside those parameters but that, inside them, has full freedom of performance, being applicable therefore, all the compatible norms of private right with the existent limitations in each concrete case.

IV. PROPERTY REGISTRATION AS AN INSTRUMENT FOR ENVIRONMENTAL PROTECTION

Property registration was initially not devised as an instrument for environmental protection³ (in fact, this possibility was never considered). However, the situation is completely different nowadays. Property registration could work as an instrument for environmental protection in the sense that preventive measures are taken in order to reduce as much as possible the risk of damage to the environment⁴. Natural resources have been degraded very rapidly and the last decades have witnessed a strong urban growth⁵. Property registration has the power to protect soils, subsoils, coasts, inland waters or even groundwater⁶. Thus, property registration must work as an instrument for environmental protection in our country. Property registration is carried out by a highly skilled public servant⁷ and fulfils the role of a public service⁷ with social

³ The property registry is basically a legal registry created to guarantee the legal security of the legal real estate. A registered property constitutes a domain characterized by its belonging to an owner. V. García García, J. M., "La finca como base del sistema inmobiliario" in *Revista Crítica de Derecho Inmobiliario*, nº 625, 1994, p. 2442; Figueiras Dacal, M., *El sistema de protección jurídica por el Registro de la Propiedad. Síntesis de su explicación teórica y de su aflicción práctica*, Ed. Dijusa, Madrid, 2001.

⁴ V. De Cózar Escalante, J. M., "Principio de precaución y medio ambiente" in *Revista Española de Salud Pública*, Vol. 79, nº 2, March-April 2005, pp.133-144.

⁵ V. Razquin Lizarraga, J. A., "La integración entre urbanismo y medio ambiente: hacia un urbanismo sostenible" in *Revista Jurídica de Navarra*, nº 42, July- December, 2006, p. 58 y ss.

⁶ V. Francisco de Asís Palacios Criado, "Introducción al medio ambiente, territorio y Registro de la propiedad" in *Ponencias y Comunicaciones presentadas al IX Congreso Nacional del Medio Ambiente. Cumbre de desarrollo sostenible*, <http://www.conama9.org>, Madrid, December 2008; Salazar Mániz, J. L., "Medio ambiente y registro de la propiedad, una interacción mutua: el derecho de acceso a la información ambiental y en apoyo de la sostenibilidad" in *Ponencias y Comunicaciones presentadas al IX Congreso Nacional del Medio Ambiente. Cumbre de desarrollo sostenible*, Madrid, December de 2008, p. 14.

⁷ V. Jesús López Medel, *Teoría del Registro de la Propiedad como servicio público*, 3ª ed., Reimpresión-Colegio Oficial de Registradores de la Propiedad, Madrid, 1991.

interest⁸. Any contribution to the protection of the environment must be taken into account. Property registration must be considered very important since it has the necessary technical means for this purpose.

In my opinion, property registration has limits too. Today, it cannot provide a perfect and integrated environmental protection (therefore, new administrative registers have been created). It should be pointed out here that, under the rogatory principle, citizens are free to decide whether or not to register their properties in the Land Registry; according to the general rule, registration is not constitutive⁹. An express request by the entitled is required for the registration (article 6 of the *Ley Hipotecaria; Spanish Mortgage Law*; from now on, ML)¹⁰. In addition, the legal transaction must be mentioned in the article 3 of the ML. Accordingly, if the legal transaction is not registered in the Land Registry¹¹, all the information recorder in the Public Deed by the Notary could only be consulted during the Notarial Protocol. It is much more complicated in the case of private documents because there is no record of the transaction (a priori).

Another perspective is also possible: as mentioned above, property has a social function by constitutional mandate; therefore, it has certain limits (these limits vary according to the patrimonial importance of the object itself, being the real state one of in which property right social function becomes more relevant).

Logically, certain circumstances such as the property being located in an area where birds live or with contaminated soil¹² cannot be overlooked by the interested people consulting the registry information. All these specificities must be recorded in the Land Registry and might be enforceable against the property¹³.

On the contrary, a property in good state of conservation provides economic added value¹⁴. The same would occur if information (by the competent authority) guarantying the environmental cleanup of a property which had been previously

⁸ In the same sense, V. Francisco de Asís Palacios Criado, "Registro de la propiedad y medio ambiente: Orden y progreso" in *Ponencias y Comunicaciones presentadas al XV Congreso Internacional de Derecho Registral*, Colegio de Registradores de la Propiedad y Mercantiles de España, Madrid, 2007, p. 755 y ss.

⁹ V., in this sense, Mercedes Fuertes López, *Urbanismo y publicidad registral*, 2ª ed., Marcial Pons, Barcelona-Madrid, 2001, p. 272.

¹⁰ Mariano Va Aguaviva, "Resumen Ejecutivo del Estudio en la modalidad Expert's Corner" in *Medioambiente y publicidad registral. El Registro de la Propiedad y Mercantil como instrumento de la sostenibilidad*, p. 15.

¹¹ In some occasions, the registration in the Property Registry is constitutive of right (such as for example, mortgage).

¹² The current concept of "contaminated soil" excludes the soil naturally contaminated, that is, the soil contaminated by the action of the environment.

¹³ Francisco Corral Dueñas, "El agrarismo en la publicidad registral" in *Revista Crítica de Derecho Inmobiliario*, nº 657, January, 2000, p. 858.

¹⁴ Francisco de Asís Palacios Criado, "Registro de la propiedad y medio ambiente: Orden y progreso" in *Ponencias y Comunicaciones presentadas al XV Congreso Internacional de Derecho Registral*, Colegio de Registradores de la Propiedad y Mercantiles de España, Madrid, 2007, p. 758.

catalogued as contaminated was recorded in the Land Registry. However, planning restrictions to meet environmental concerns would result in a diminishment of the property value (at least initially)¹⁵. All these factors, that is, the existence or the absence of limitations and/or prohibitions which are mandatorily to be met by the owner will have a direct impact on the positioning of the property in the property market. The only justification for these limitations is the particularity of the object itself (that is, the land). According to VA AGUAVIVA, the land is to be understood as a natural resource and its exploitation must be consistent with sustainable development¹⁶.

These factors have helped decide how to articulate environmental protection through Property Registry in a real and effective way (using the numerous advantages and tools which Property Registry has to achieve this purpose). Similarly, they have led to a conclusion: considering the problematic convergence between the Registry and the versatility of the legal asset aimed to protect (the environment²), some problems of efficacy are to reveal¹⁷.

V. RIGHTS AND OBLIGATIONS CONCERNING THE REGISTRY.

According to me, the following classification is valid (on the basis of the classification by VA AGUAVIVA)¹⁸:

4.1.- Obligations.

1º.- Limitations to access the Registry. The access to the Registry is limited with regard to certain issues. We can find a clear example in the article 22 (Ley de Montes; Law 43/2003; 21st November; section 1). This Law on Mountains establishes that private forests need a favorable report by the owners of the public domain¹⁹.

2º.- Limitations to free transferability. According to article 1112 CC, rights are transferable (unless otherwise agreed). The limitation or prohibition of this right should remain the exception. However, in the case of a property located in a contaminated area,

¹⁵ Francisco de Asís Palacios Criado, "Registro de la propiedad y medio ambiente: Orden y progreso" in *Ponencias y Comunicaciones presentadas al XV Congreso Internacional de Derecho Registral*, Colegio de Registradores de la Propiedad y Mercantiles de España, Madrid, 2007, p. 758.

¹⁶ V., José Luis Salazar Mániz, "Medio ambiente y registro de la propiedad, una interacción mutua: el derecho de acceso a la información ambiental y en apoyo de la sostenibilidad" in *Ponencias y Comunicaciones presentadas al IX Congreso Nacional del Medio Ambiente. Cumbre de desarrollo sostenible*, Madrid, December 2008.

¹⁷ V. STC 102/1995, 26 June (P. Mendizábal Allende).

¹⁸ Mariano Va Aguaviva, "Resumen Ejecutivo del Estudio en la modalidad "Expert's Corner" in *Medioambiente y publicidad registral. El Registro de la Propiedad y Mercantil como instrumento de la sostenibilidad*, pp. 14 y 15.

¹⁹ V. RDGRN, 20 April 2007.

it is possible to limit the right of the owner to dump some waste, even if he is allowed to do so in theory.

The so-called preferential acquisition rights can be limited too (in particular, refusal and pre-emptive rights). The ones legally established in favor of the competent authority are relevant from an environmental point view. As already stated, since they are legally recognized, registration in the Land Registry³ is not required.

These limitations can eventually lead to prohibition to dispose, that is, deprivation or restriction of the right to dispose. Only the expressly mentioned in the article 26 of the mortgage law²⁰ have the right to dispose.

3°.- Easements. Easements must be registered in the Property Registry to be enforceable against third parties, except for the legally established and the visible ones.

4°.- Obligation to inform about a certain relevant environmental situation. The owner of a property with a relevant situation for the future buyer must inform about it conform to the principle of good faith. According to the article 27.4, Law 10/1998, 21st April, the owners of properties where any potentially contaminating activity have been carried out are obliged to register this information in the Public Deed, so that the Registrar subsequently records it in a marginal note²¹. In some occasions, the Administration must have to inform the Property Registry about any such situation. This is the case of the Land Law (Ley de Suelo, 2008)²². Under this law, the Forest Administration (with a view to registration) is obliged to let the Registry know about the situation of burned forest land.

5°.- Precautionary and preventive measures, such as for instance environmental-related administrative proceedings or prosecution. Expropriation is possible as well. Were this the case, the purchasing administration must identify the affected owners in the Public Register (Ley de Expropiación Forzosa; art. 3.2, Law Obligatory Expropriation Act, 16th December 1954)²³.

6°.- Corrective measures. The Administration can impose certain properties corrective measures prohibiting doing certain activities (for example if the property is located in a

²⁰ V., Lluís Roca-Sastre Muncunill, "Las prohibiciones de disponer y el Registro de la Propiedad" in *Derecho Hipotecario. Fundamentos de la publicidad registral*, 8ª edición, Tomo III, Bosch, Barcelona, 1995, pp. 467-552; Francisco Javier Gómez Gállego, "Comentarios al art. 26 de la Ley Hipotecaria" in *Comentarios al Código Civil y Compilaciones Forales*, Dir. Manuel Albaladejo y Silvia Díaz Alabart, Tomo VII, Vol. 4º, 1999, p. 172 y ss.

²¹ For problems concerning the ownership: STS (3rd October and 22nd November 1963).

²² V., Reynaldo Vázquez de Lapuerta, "El registro de la propiedad, los suelos contaminados y la finca como garantía de la responsabilidad medioambiental" in *Ponencias y Comunicaciones presentadas al IX Congreso Nacional del Medio Ambiente. Cumbre de desarrollo sostenible*, <http://www.conama9.org>, Madrid, December, 2008.

²³ The Property Registrar records in a marginal the request for information. Similarly, in the case of urgent expropriations, it is possible to make a preventive annotation about the affected property.

National Park)²⁴ or obligations (for example, cleaning and decontaminating the soil of the property). The same applies to holders of licenses carrying out a potentially contaminating business activity.

7°.- Punitive action. Noncompliance or administrative infringements can result in fines or precautionary suspension of certain activities, among other penalties. Registration in the Property Registry is necessary condition to ensure the implementation of these penalties.

4.2.- Rights

1°.- Licenses, concessions and administrative approvals. Both licenses and administrative concessions whose purpose is the regulation of the exploitation of resources can have access to the Property Registry²⁵.

2°.- Technical and financial support to carry out the planned measures in environmental programmes. Subsidies are the administrative support most common tool. Properties registered in the Property Registry which have received financial support will have to pay this money back.

²⁴ V. STS (30th October 2006) about private land allocation in the National Park Cabo de Gata.

²⁵ V. arts. 31, 44, 60 y ss., 175 y 301 RH.