THE IMPACT OF THE CONSTITUTION OF ROMANIA ON THE REGULATION OF THE RIGHT TO PROPERTY

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Abstract. *The hierarchy of a state's normative system begins with the constitution, which is why the regulations contained within the normative acts with an inferior juridical force shall be in conformity with the constitutional ones. This is to be verified in the case of rules of civil law as well, as will be demonstrated by the analysis of the relation established between the rules that the Constitution of Romania and the Civil Code devote to the right to property.*

In what concerns the constitutional rules that are devoted to the right to property, we can distinguish between rules with direct application in the field of civil law and rules with indirect application. Both categories of rules are to be analyzed in this study, which also presents their content and the impact they had on the regulations specific to civil law in the matters: forms of the right to property; owners of the right to public property and owners of the right to private property; guaranteeing and protecting the right to private property; the characters and the content of the right to property; the limits of the right to property; expropriation due to a public utility cause and acquisition of the right of property over land by aliens and stateless persons.

In this context, the study also presents the major changes that were brought about by the entering into force of the Constitution in 1991 and then by its 2003 revision, in what the relevant regulations contained in the civil legislation are concerned.

Keywords: *constitutional rules, direct application, indirect application, right to property, public use and utility, private use and interest.*

1. Preliminaries. It has long become obvious that the regulation of the various social relations cannot be carried out exclusively by "pure" legal rules, belonging to a single branch of law, the legislator being often forced to adopt normative acts that we could call "composite". In fact, with the exception of codes, few normative acts may still be said to have in their content only legal rules which belong to one of the two major legal families, i.e. public law and private law.

In other words, interdisciplinarity has become a current legal phenomenon.

Not even the constitution can be said to be a "pure law". As highlighted in the doctrine, the regulating object of the Constitution is made up of two categories of social relations, i.e. of relations specific to constitutional law, which refer to the actual organization and exercising of state power and cannot be covered by legal rules belonging to other branches of law, and relations with a double legal nature, regulated both by constitutional law rules and by rules that belong to other branches of law.[1]

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[1] Please See I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice (Constitutional Law and Political Institutions),* vol. I, ed. 13, Ed. C.H. Beck, București, 2008, p. 19-20; Gh. Iancu, *Drept constituțional și instituții politice (Constitutional Law and Political Institutions),* Ed. C.H. Beck, București, 2010, p. 12-15.

From its status of fundamental law, located at the top of the normative system, the Constitution has nevertheless a privileged position, all the other laws with inferior juridical force being constrained to comply with its provisions.[2]

This conformity refers not only to the correspondence of the rules with inferior juridical force to the constitutional ones in terms of content and form, but also to the need for transposition of the constitutional rules and principles in other legal regulations[3]. Quite often, the ordinary legislator even reproduces constitutional provisions *ad litteram*, before drawing up the rules necessary for their implementation.

On the other hand, the constitution itself includes both provisions governing social relations in a direct and unmediated way and rules whose application is mediated, thus requiring the drawing up of other rules, specific to other branches of law[4].

Analysing things from the viewpoint of civil law, we will notice that these characteristics of the constitutional rules are better highlighted especially when one deals with the regulation dedicated to fundamental rights and freedoms. The best example in this respect is represented by the right to property, given both its importance and the extent of the constitutional provisions which are devoted to it. This is the reason why, in what follows, we will analyse the constitutional regulations which have a direct effect in the matter, as well as those regulations that were developed by the rules of civil law, in particular by those contained within the new Civil Code of Romania.[5]

The Constitution of Romania includes private property among the fundamental rights and outlines the basic principles of its juridical regime.[6] From the viewpoint of its juridical nature, this right belongs to the category of socio-economic rights and freedoms.

2. Forms of the right to property. In Art. 136 par. (1), the Constitution of Romania [7]stipulates that " Property is public or private", to further on state in the second paragraph that "public property is guaranteed and protected by law and belongs to the state or to the territorial-administrative units".

The existence of the two forms of property has thus been acknowledged: the right to public property and the right to private property. However, the right to property is unique; the right to public property and the right to private property are only its forms of manifestation, and not two actual and separate rights.[8]

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[2] Thus, the supremacy of the constitution is often talked about, it being regarded as a political and juridical reality, given its capacity to be placed at the top of all state and legal institutions - Gh. Iancu, *op. cit.,* p. 56.

[3] M. Andreescu, *Reflecții asupra conținutului normativ al constituției* (*Reflections on the Normative Contents of the Constitution*), Dreptul nr. 2/2013, p. 66.

[4] I. Muraru, E.S. Tănăsescu, *op. cit.,* p. 22; M. Andreescu, *loc. cit.,* p. 65-66.

[5] The New Civil Code of Romania – Law no. 287/2009 (further on cited as Civ. Code) entered into force on October 11, 2011.

[6] For further details on these principles, please see E. Chelaru, *Impactul revizuirii Constituţiei asupra regimului juridic al proprietăţii* (*The Impact of the Revision of the Constitution on the Juridical Regime of Property*), Dreptul nr. 2/2004, p. 5-14.

[7] The Constitution of Romania was adopted in 1991 and reviewed through Law no. 429/2003. After approval of the Revision Law by national referendum, the Constitution was republished in the Official Journal of Romania, Part I, no. 767/31 October 2003, its texts receiving a new numbering.

[8] For argumentation, please see E. Chelaru, *Drept civil. Drepturile reale principale (Civil Law. Main Real Rights),* 4th edition, Ed. C.H. Beck, București, 2013, p. 86.

The constitutional provision cited, with direct applicability, mentions who are the owners of public property, namely the state and the territorial-administrative units.

No other subject of law can be the owner of the right to public property.

At the same time, from its *per a contrario* interpretation, it can be deduced that any subject of law may be the owner of the right to private property, including the state and the territorial-administrative units.

The distinction mentioned is also expressed in Art. 553 Civ. Code, whose marginal name is "Forms of Property". According to the law text cited, "Property is public or private". The Civil Code also contains detailed rules devoted to public property in Title VI, Public Property, Book III.

The constitutional rules on public property are also elaborated on in Law no. 213/1998 on public property and its juridical regime.

At the same time, the Constitution also contains a rule with direct applicability related to the assets forming the exclusive subject of public property. It is the case of Art. 136 par. (3), which states that: "Subsoil riches of any nature, the air space, waters with hydropower availabilities and those which can be used for the public interest, beaches, territorial waters, natural resources of the economic zone and the continental shelf, as well as other assets established by law, shall be exclusively public property."

The provisions of Art. 859 par. (1) Civ. Code, devoted to the object of public property, simply reproduce those of Art. 136 par. (3) of the Constitution, although the explanation of the notions used by the constituent legislator would have been more useful.

The assets listed by the legal rules cited may be covered only by public property and never by private property, irrespective of the owner.[9] The list is not limitative, however, the law being able to establish other assets that can be exclusively public property.

Unlike the right to public property, whose object is limited on account of the functions of this property (ensuring *public use* and *public utility*), the object of the right to private property can be any asset, with the sole exception of the assets that, according to Art. 136 par. (3) of the Constitution, shall be exclusively public property.

Art. 553 par. (1) Civ. Code stipulates that all assets of *private use or interest* belonging to natural persons, legal persons under private or public law, including the assets that make up the private domain of the state and of the territorial-administrative units, shall be the subject of private property.

3. Guaranteeing and Protecting the Right to Private Property. The consequence of raising the right to property to the rank of a fundamental right is the attainment of protection not only in relation to other individuals or private organizations, but even in relation to the state.

According to another opinion, the right to property, which is considered as a fundamental right, is taken into account only in its relations with the public power governing its content and guaranteeing it.[10]

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[9] For the opinion according to which the provisions of Art. 136 par. (3) of the Constitution must not be construed as being the property of the State or of an administrative-territorial unit for a particular domenial asset, but only as affiliation of the object in question to the public domain, and not to the private sector, to the extent to which the object in question entered the property of the State or a territorial administrative unit on the basis of a valid title, please see V. Stoica, *Drept civil. Drepturile reale principale* (*Civil Law. Main Real Rights*), 2nd edition, Ed. C.H. Beck, București, 2013, p. 199-200.

[10] Gh. Iancu, *op. cit.,* p. 253.

We are not convinced of the truth contained in this statement and we believe that the right to private property is unique, regardless of the fact that legal rules belonging to different branches of law shape its juridical regime. The dissociation *fundamental law-subjective civil law* can only be made in methodological purposes, for a better analysis of the different features of this law.

As far as the relations with the state are concerned, the protection of the right to property shall be carried out, in the first place, against the legislator, who, in adopting laws governing the matter, will have to comply with the relevant constitutional provisions, a conduct that can be guaranteed by the establishment of the constitutionality control. Secondly, the protection shall be carried out in relation to the executive, through a jurisdictional control of the legality of administrative documents, but also in relation to courts, through the internationalization of the process of judicial protection of human rights.[11]

Art. 44 of the revised Constitution was entitled "Right to private property", and in par. (2) sentence I it rules: "Private property is guaranteed and equally protected by law, irrespective of the owner."

In addition to this provision with principle-value, the constitution also establishes a series of concrete guarantees of the right to property.

Thus, Art. 73 par. (3) letter (m) rules that the laws governing the general juridical status of property and of inheritance must be organic laws.

Art. 136 par. (5) stipulates that "private property shall be, in accordance with organic law, inviolable".

According to Art. 115 par. (6), "emergency orders cannot be adopted in the area of constitutional laws, cannot affect the regime of the fundamental institutions of the state, the rights, freedoms and duties provided for by the Constitution, the electoral rights and cannot include measures of forcible transfer of assets into public property". The right to private property belongs to the category of fundamental rights provided for by the Constitution, therefore its juridical regime cannot be affected by regulations contained in emergency orders.

By means of a provision stipulated by the revised Constitution, contained in Art. 44 par. (4), "Nationalisation or any other measures of forcible transfer of assets into public property based on the owners' social, ethnic, religious, political affiliation, or other discriminatory features shall be prohibited." This is a provision with direct applicability which could be invoked as a basis for potential legal proceedings.

Just like expropriation due to a cause of public utility, nationalisation is an institution of public law which results in the forcible transfer of the right to property over assets belonging to individuals. However, nationalisation is not just a particular case of expropriation, as important *characteristics* mark the difference between the two: nationalisation does not have to be preceded by a cause of public utility, it is provided for by law, and not by a judgment of the court, it has economic entities as its object (banks, businesses, etc.), which represent combinations of immovable and movable property, not only immovable property.[12]

On the other hand, nationalised assets do not automatically enter the public property of the state.

Forbidding "any other measures of forcible transfer of assets into public property" as well, on the basis of discriminatory criteria, the constituent legislator also hampered the misappropriation of the legal provisions concerning the expropriation due to a cause of public

[11] Please see D.C. Dănișor, *Drept constituțional și instituții politice* (*Constitutional Law and Political Institutions*), vol. I., General Theory, Ed. C.H. Beck, București, 2007, p. 541.

[12] In this sense, please see Y. Gaudemet, *Traité de droit administratif*. Tome 2. Droit administratif des biens, Ed. L.G.D.J., Paris, 2008, p. 425-426.

utility from the purpose they were issued for. Thus, the potential nationalisations hidden under the mask of expropriations are also avoided.[13]

However, the constitutional provisions cited do not prohibit in a categorical manner nationalisation as a mode of acquisition of the right to public property. The use of the conjunction "or" ("Nationalisation or – our emphasis, E.C.– any other measures of forcible transfer of assets into public property"), followed by the enumeration of the conditions under which this prohibition operates, shapes our conviction that the provision concerns both nationalisation and any other measure of forcible transfer of assets into public property, only if these measures are taken on discriminatory criteria. *Per a contrario*, nationalisation is allowed if it is not based on such criteria.

Thus, we do not exclude the possibility that, under exceptional circumstances, which threaten major public interests, the state can nationalise certain economic units.[14]However, such a nationalisation would be possible only with onerous title, because otherwise the other constitutional provisions that guarantee and protect property would be violated. An organic law should be adopted in order to reach such a result, but this does not constitute a present concern of the Romanian legislator.

Even if, for the moment, the matter has more of a theoretical aspect, the importance of such a constitutional provision is out of the question, all the more so because, in the rather recent past of Romania, the socialist nationalisation was used for the acquisition of the right to property by the communist state on the assets subject to nationalisation and for the qualitative change in the substance of this right, from private property into state socialist property. [15]. Among the stated purposes of nationalisations there was the liquidation of the economic power of those who, according to the language of those times, were part of the "exploiting class", but also the mass imposing of penalties on those who belonged to certain ethnic groups (particularly to the German ethnic group).

As we will see below, the civil legislator took these constitutional provisions into account when it regulated the characters, the content and the protection of the right to property.

4. Characters and Content of the Right to Property. The new Civil Code defines private property as follows: "Private property is the right of the owner to possess, use and dispose of an asset exclusively, absolutely and never-ending, within the limits established by law" [Art. 555 par. (1)]. In fact, this is the definition of the right to property in general, and not only of the right to private property.

The definition given by Art. 555 par. (1) Civ. Code to the right to property indicates that this is *absolute, exclusive* and *never-ending*.

The absolute character of the right to property emphasizes that its existence does not depend on any other right that should serve as a basis for the establishment.

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[13] Please see E. Chelaru, *Impactul revizuirii Constituţiei asupra regimului juridic al proprietăţii* (*The Impact of the Revision of the Constitution on the Juridical Regime of Property*), *loc. cit.*, p. 9.

[14] For the opinion according to which the Constitution did not exclude altogether nationalisation from among the procedures for forcible transfer of private property into public property, it being possible for the solving, in terms of reciprocity, of some interstate issues, please see I. Muraru, E.S. Tănăsescu, *op. cit.,* p. 177.

[15] For the presentation of the effects of socialist nationalisation, please see C. Oprisan, *Naţionalizarea şi efectele sale de drept civil (Nationalisation and Its Civil law Effects),* in the volume *Aspecte juridice ale naţionalizărilor în România (Juridical Aspects of Nationalisations in Romania)*, Ed. Ştiinţifică, București, 1968, p. 21 and the following.

The absolute character of the right to property makes it then prevail against all, all other persons being obliged to do nothing of the kind to bring prejudice to it. Closely related to this aspect is the inviolability of the right to property proclaimed in Art. 136 par. (5) of the Constitution.

The inviolability and incessibility by force of the right to property, provided for by the Constitution, are also facets of the perpetual character of the right to property. [16]

The content of the right to property is given by the prerogatives or attributes that they shall confer on the owner. Systematised, these prerogatives are structured in three categories: the right to own the asset (*jus possidendi*); the right to use the asset (*jus utendi*) and the right to dispose of the asset (*jus abutendi*).

The right of disposition is the only attribute whose estrangement results in loss of the right to property itself. The dismemberment of the other attributes of property will limit this right, but they will not be of such a nature as to lead to its loss.

These issues were noticed by the Constitutional Court as well when it decided that "the guarantee of the right to private property includes safeguarding all of the powers of this right and, in particular, of the right of disposition. The owner cannot be imposed, by law, under the contract terms, an obligation to which (s)he hasn't given his/her consent"[17].

We would like to mention here the regulation of action for the recovery of possession (Art. 563-566 Civ. Code) as well, which may be exercised for the defence of the property right against any usurper, including the state and the territorial-administrative units. [18]

In the case of immovable that entered legally, by way of privatization, in the exclusive property of legal persons governed by private law, the only way to order the transfer into public property is expropriation, in accordance with the provisions of the law.[19]

The transfer of certain assets from the private property of the state and of its territorial-administrative units into their public property can only be made if these subjects of law are owners of the right to private property over such assets. [20]

5. Limits of the right to property. As already shown, although the right to property is absolute, it is not unconfined. Establishing certain limits is imposed by the need to ensure a

[16] Please see G. Cornu, *Droit civil. Introduction. Les persones. Les biens*, Montchrestien, Paris, 2005, p. 451.

[17] Judgment no. 44/1996 (Official Journal of December 17, 1996).

[18] "The government decision to confer the possibility of transferring goods from the private property of natural persons to the public domain of the State or of the territorial-administrative units is null, as the government decision shall not constitute ownership right, shall not limit property of the state from private property of the natural or legal persons under private law, but shall lay down the legal regime distinguished only for state assets." H.C.C.J., Administrative and Tax Department, Judgment no. 4555 of November 23, 2007, published by *G.-V. Bîrsan, L. Craiu, B. Georgescu* in *Înalta Curte de Casație și Justiție. Jurisprudența Secției de contencios administrativ şi fiscal pe anul 2007* (*The High Court of Cassation and Justice. Case-law of the Administrative and Tax Department for the Year 2007*), Ed. Hamangiu, București, 2008, p. 214-220.

[19] Constitutional Court no. 121/1996 (Official Journal no. 101 of May 27, 1997).

[20] "The Government Decision on transferring an immovable property from private property into the public property of the state, issued whilst trampling on the fact that the same immovable property was restored to the plaintiffs by means of a final and irrevocable court ruling, is illegal and against the provisions of Art. 41 par. (3) of the Constitution of Romania" [Art. 44 par. (3) of the republished Constitution – (n.a.)] – HCCJ, Administrative and Tax Department, Judgment no. 5251/2005, Law no. 6/2006, p. 240.

balance between individual interests and the general interest, as well as by the social function that the property has.[21]

The existence of some limitations on the right to property is permitted by the provisions of Art. 44 par. (1) sentence II of the Constitution, according to which the content and the limitations of the property right shall be established by law. The new Civil Code develops these provisions by means of more provisions.

In the first place, reference should be made to the provisions with principle-value, contained in Art. 555, par. (1) Civ. Code, which, defining the right to property, also mention the situation where its prerogatives shall be exercised "within the limits laid down by law". Further on, mention should be made to the provisions of Art. 556 Civ. Code, entitled "Limits on the exercise of the right to private property", according to which "(1) The right to property may be exercised within the material limits of its object. These are the tangible limits of the asset which is the object of the right to property, with the limitations laid down by law.

(2) The exercise of many attributes of the right to property may be limited by law.

(3) The exercise of the right to property may be limited by the will of owner as well, with the exceptions provided for by the law."

These limitations represent either normal restraints of some of the attributes of the right to property or that relate to its object or, as required by the general interests of society or by the defense of the property right of the other subjects of law, or exceptional restraints, which can even lead to the owner's loss of the right to property, by expropriation due to a cause of public utility and in accordance with the provisions of the law.

Thus, the guarantee by the Constitution does not transform the right to property in an unconfined right.

The fact that it can be limited by law only is in itself a guarantee of the right to property. In relation to the provisions of Art. 53 of the Constitution, that regulate the restriction of certain rights and freedoms, the limitations that may be brought by law to the right to property should not touch the substance of this right, i.e. should not annihilate it, and must comply with the principle of proportionality[22], whilst the restrictive laws must have an organic character.[23]

As illustrated in doctrine, the legislator itself is limited by the constitutional provisions when it restricts certain freedoms, as it has the ability to act only if the intervention is necessary and only within the limits in which this intervention ensures the exercise of freedom.[24]

The content of the new Civil Code provisions expressly devoted to the limits of the exercise of the right to property (Art. 556; Art. 559 and Art. 602-629) shows that they are divided into *material limits* and *juridical limits*. In their turn, there are three types of juridical limits: *legal limits, conventional limits and judicial limits.*

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[21] For a description of the limits imposed on the right to private property and of their foundation, please see E. Chelaru, in the collective work *Noul Cod civil. Comentariu pe articole* (*The New Civil Code. Commentary on Articles*, the revised edition), coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei p. 611-613 și 666-692; Ed. C.H. Beck, București, 2012 and V. Stoica, *op. cit.*, p. 129-152.

[22] Constitutional Court, Judgment no. 19/1993 (Official Journal no. 105 of May 24, 1993).

[23] "The prohibition of alienation, even for a limited duration, thus eliminating any right of disposition of the owner, can be established only by an organic law" [Constitutional Court, Judgment no. 6/1992 (Official Journal no. 48/4 March 1993)]

[24] D.C. Dănișor, *op. cit.,* p. 543.

As far as the material limits of the land property right are concerned, Art. 559 par. (1) Civ. Code provides that "land property also covers the subsoil and the space above the land, in compliance with legal limits."

The *subsoil* is the natural extension of the soil, with which it forms a common body, which is why it belongs to the same owner. The right to property over the subsoil is nevertheless limited by law.

The limitations which Art. 559 par (1) Civ. Code refers to are set in the public interest and concern the property right the state has on some of the resources of the subsoil, targeted by par. (2) of Art. 559 Civ. Code, but also the right to property over underground works and facilities that the public authorities may carry out in the subsoil of any property, on the basis of Article 44. par. (5) of the Constitution.[25] These works and facilities limit materially the right to private property of the land owner on the subsoil, the volume that they occupy reducing the corporal dimension of the asset over which it exercises its attributes. The land owner will be compensated for the damage thus incurred.

The *space* above the land is not to be confused with the airspace, which, according to Art. 136 par. (3) of the Constitution, shall be subject exclusively to public property. It follows from the above that the vertical projection of the right to property over the soil is limited, the limitations being established by law, as stipulated in Art. 559 par. (1), final part Civ. Code.

Art. 559 par. (2) sentence II Civ. Code forces the land owner to observe the rights of the third parties on the mineral resources of the subsoil, springs and underground waters, works and installations and others of the kind, under the conditions and within the limits established by law.

Thus, partial limitations are imposed both on *the right of material disposition and on the right of use*, which constitute attributes of the right to private property. At the same time, the corporal dimension of the object of the right to property over the subsoil is also limited.

For example, in accordance with Art. 136 par. (3) of the Constitution, subsoil riches of public interest shall be exclusively public property. This category comprises petroleum, regardless of whether it is in the form of crude oil, condense or natural gas [in accordance with Art. 1 par. (1) of Law no. 238/2004 of petroleum, "Oil resources located in the subsoil of Romania and of the Romanian continental shelf of the Black Sea, bounded in accordance with international law principles and international conventions which Romania is a party to, shall be exclusively public property and shall belong to the Romanian state."], and the mineral resources referred to in the provisions of Art. 2 Law no. 85/2003 of mines, if they are of public interest.

As a consequence, the soil owner will not be able to perform drills or excavations to extract such riches and will also have to comply with the state rights over them. However, (s)he will be able to extract subsoil riches which are not of public interest.

6. Expropriation Due to a Public Utility Cause. The most severe limitations which may be brought on the right to property consisted of forced disposals of this right.

According to Art. 44 par. (3) of the Constitution, "No one may be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance", and the index of par. (6) of the same article shows that compensation shall be agreed upon with the owner, or by judgment of the court when a settlement cannot be reached. The constitutional texts cited created the conditions of forced disposal of the right to property,

[25] Which stipulates that "For projects of general interest, the public authorities are entitled to use the subsoil of any real estate with the obligation to pay compensation to its owner for the damages caused to the soil, plantations or buildings, as well as for other damages imputable to these authorities."

in accordance with the provisions of the law, and established the fundamental principles which such a law must comply with: expropriation can be ordered only for a cause of public utility; public utility shall be determined in accordance with the conditions laid down by law; in all cases, the expropriated owner must be compensated; compensation must be just and prior; compensation is ruled and set by court ruling.

In the case of the constitutional rules cited, we identify two ways of application.

Thus, under the aspect of the interdiction to order expropriation for reasons other than public utility and free of charge, they have direct applicability. For this reason, in the event of a dispute, the complainant could substantiate his/her request of annulment of the act of expropriation directly on constitutional provisions.

Other matters which constitutional rules refer to, explicitly or implicitly, (cases of public utility, the declaration procedure, the manner of establishing the compensation and others) have an indirect applicability, mediated by the laws governing the matter.

The provisions of Art. 562 par. (3) Civ. Code describe, in a slightly modified way, the constitutional provisions. Thus, according to the law text cited, “Expropriation can only be made for a public utility cause established according to the law, with prior and fair compensation, fixed by mutual agreement between the owner and the expropriator. In the event of disagreement on the compensation amount, it shall be established by legal proceedings.”

Law no. 33/1994 on expropriation due to a public utility clause also develops constitutional rules, at the same time aiming to ensure a balance between public interest and the right to private property. The above-mentioned desideratum is cited even in the preamble of the law, where it is shown that it shall include “provisions of such a nature as to ensure both the appropriate legal context for the procedures of expropriation and establishment of compensation and the protection of the right to private property”.

Among the expropriation premises, one must also refer to the provisions of Art. 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” As interpreted in the E.C.H.R. case-law, these provisions demonstrate that a person’s deprivation of property does not represent a violation of the right to property the respective owner has over the asset in question if the following conditions are met:

(a) the deprivation is laid down by law, i.e. by the internal rules applicable in this field;
(b) the deprivation is imposed by a public utility cause.
(c) the deprivation is in accordance with the general principles of international law;
(d) an adequate compensation of the owner of the right is ensured;
(e) the deprivation is proportional to the purpose for which it was carried out.[26]

The provisions set out by the European Convention on Human Rights must be complied with in both drawing up the relevant legislation and in its practical application because, in accordance with Art. 20 par. (2) of the Constitution, “If there are differences between the covenants and treaties on fundamental human rights which Romania is a party to, and internal laws, the international regulations shall take precedence, except where the Constitution or internal laws contain provisions which are more favourable”.

[26] C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole (European Convention of Human Rights. Commentary on Articles)*, ed. 2, Ed. C.H. Beck, București, 2010, p. 1696-1697.

Due to the exceptional character that the Constitution and the Civil Code assign to the disposal of the right to property by expropriation due to a public utility cause, all the prior measures foreseen by the law are imperative.[27]

7. Acquisition of the Right to Property over Land by Aliens. [28]As regards the regulation of the acquisition of the right to property by aliens, we cannot talk solely about the delimitation of the content of the private-law the rules from that of the constitutional rules, but also about the impact which the Treaty of Accession of Romania to the European Union had on this matter. On the other hand, the historical aspects also had an important role.

After overthrowing the communist regime in December 1989, the de facto government instated in Romania adopted Decree-Law no. 2 of December 27 concerning the setting up, organization and functioning of the Council of the National Survival Front and of the territorial councils of the National Survival Front, conceived as central, respectively territorial agencies, by means of which state power was exercised. Containing legal rules with a constitutional character, this Decree-Law dissolved all the power structures of the former dictatorial regime.

The Decree-Law cited contained no rules relating to the fundamental rights and duties of the citizens, for this purpose the socialist Constitution of 1965 being kept in force.[29]Although this Constitution protected the right to personal property, through special laws the lands had been taken out of the general civil circuit, the right to property over them being acquired only by legal inheritance.

The restrictive laws we referred to were also repealed in December 1989 and the liberalisation of the juridical movement of the lands created an opportunity to acquire the right to property over lands in Romania for the persons who did not have Romanian citizenship as well.

This situation lasted until February 20, 1991 when Land Law no. 18/1991 entered into force, a normative act which deterred the natural persons who did not have Romanian citizenship and did not live in Romania from acquiring property in land of any kind, by acts between the living.

The result was that both aliens and stateless persons, and Romanian citizens living abroad, could not acquire land in Romania other than by inheritance (legal or testamentary). The persons who belonged to these categories, who had entered into the possession of lands before the entry into force of the law, were obliged to alienate them within a period of one year from that date, under the penalty of the free of charge transfer of the lands in the propriety of the state and in the management of the Agency for Rural Development and Furnishing [Art. 47 par. (2) of Law 18/1991)].

The new Constitution of Romania entered into force on December 8, 1991, after its approval by national referendum. Through the provisions of Art. 41 par. (2) final sentence, the Constitution ordered: "Aliens and stateless persons may not acquire the right to property over land".

This rule, with direct application, established the inability of aliens and stateless persons to acquire property over land, regardless of the category of use. This inability was aimed at the acquisition by juridical acts between the living or for death cause, by inheritance, usucaptio or

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[27] Please see HCCJ Administrative and Tax Department, Dec. No 274/2006, Dreptul, no. 12/2006, p. 260-14.

[28] For this topic, please see E. Chelaru, *Drept civil. Drepturile reale principale (Civil Law. Main Real Rights)*, *op. cit.*, p. 213-218.

[29] Please see I. Muraru, E.S. Tănăsescu, *op. cit.,* p. 99.

accession. However, aliens and stateless persons were deterred only from the acquisition of the right to property over land, but not for the dismemberments of this right.

On the other hand, the constitutional provisions did not establish a special incapacity to have the quality of holder of the right to property over land in respect of these subjects of law, so that they could keep the previously acquired land in property. Referring to the provisions of Art. 41 par. (2) of the Constitution, the Constitutional Court declared the provisions of Art. 47 par. (2) and (3) of Law no. 18/1991 unconstitutional, as they forced aliens and stateless persons to dispose of the land acquired prior to the entry into force of this law.

Chapter IV of Law no. 18/1991, entitled "Juridical Movement of Lands", was repealed by Law no. 54/1998 on the juridical movement of lands, which, developing the constitutional provisions, ordered: "Aliens and stateless persons may not acquire the right to property over land.

The natural persons who have Romanian citizenship and reside abroad may acquire in Romania, by juridical acts between the living and by inheritance, land of any kind.

Foreign legal persons may not acquire land in Romania by juridical acts between the living or for death cause" (Art. 3).

The start of the negotiations for Romania's accession to the European Union imposed the revision of some of the Constitution provisions, including those that expressly prohibited aliens and stateless persons from acquiring the right to property over land. The revision of the Constitution completely changed the situation of Aliens and stateless persons from the point of view of the aspect under discussion. The desideratum was to comply with Community rules concerning the free movement of goods and capital.

Thus, Art. 44 par. (2) sentence II of the Constitution republished after being reviewed in 2003 ruled: "Aliens and stateless persons may acquire the right of private ownership of land only under the conditions resulting from Romania's accession to the European Union and other international treaties which Romania is a party to, on the basis of reciprocity, in accordance with the conditions laid down by an organic law, as well as by lawful inheritance".

The constitutional provision cited is drawn up in a positive way, with particular emphasis not on the prohibition of the acquisition of right to property over land by aliens and stateless persons, but on the cases in which and the conditions under which they may acquire such a right.

The constituent legislator regulated the matter by reference to two separate periods: the period between the entry into force of the law on the revision of the Constitution and the date of Romania's accession to the European Union and the period which begins on Romania's accession to the European Union.

During the first period, aliens and stateless persons were able to acquire the right to property over land in Romania only by *lawful inheritance*. The rule which allows aliens and stateless persons to acquire the right to property over land by lawful inheritance had a direct and immediate application. These categories of persons were not given the opportunity to benefit from any other way of acquiring the right to private property, including from testamentary inheritance. Aliens and stateless persons were further on able to acquire, without restrictions, dismemberments of the right to property over land.

Starting with Romania's accession to the European Union, the nationals of the other Member States, as well as stateless persons residing in their territories or in Romania, can acquire the right to property over land. The modes and the conditions for acquisition of this right are laid down by organic law.

The organic law referred to in the constitutional provisions of Law no. 312/2005 on the acquisition of the right to private property over land by aliens and stateless persons, as well as

by legal foreign citizens, which entered into force on January 1, 2007, when Romania became a member of the European Union.

The provisions of Art. 3 of this normative act enshrine the principle according to which the citizen of a Member State of the European Union, a stateless person domiciled in a Member State or in Romania, as well as the legal person constituted in accordance with the law of a Member State may acquire the right to property over land under the same conditions as those laid down by law for Romanian citizens and for Romanian legal entities. They must be interpreted in the context of Community documents, but also of their transposition in the Romanian legislation. For this reason, by 'Member States' we must understand not only the Member States of the European Union, but also Member States of the European Economic Area (EEA), i.e. Iceland, Lichtenstein and Norway.

In agreement with the provisions of the Treaty of Accession, which established a 7–year moratorium till the full liberalization of acquisition of the right to property over land by aliens and stateless persons coming from the states referred to above, the law provided for gradual measures of liberalization, depending on various categories of beneficiaries and destinations which the lands may have.

The 7-year deadline ended on the January 1, 2014.

The citizens of other states will come out from under the ban imposed by the Constitution if other international treaties which Romania will be a party to will contain provisions relating to the acquisition of the right to property over land, under conditions of reciprocity.

Still in accordance with the conditions laid down by organic laws, which are to be adopted in the future, legal aliens will acquire the right to property over lands. For the moment they are still struck by a total and absolute incapacity to acquire this right, an incapacity which does not concern the acquisition of the dismemberments of the property right.

The juridical acts concluded with failure to comply with the prohibition of the acquisition of the right to property over land by the subjects of law concerned shall be penalized with *absolute nullity*.

Both aliens and stateless persons, as well as foreign legal persons, will retain the right to property over the land they acquired before the legal provisions and the Constitutional ones, which established the prohibitions we referred to, entered into force.

Romanian legal entities with foreign capital do not fall under the regulations presented, the acquisition of the right to property over land being allowed to them by the legislation governing the juridical regime of direct foreign investments (Government Emergency Order no. 92/1997, with its subsequent amendments).

8. Conclusions. The analysis of the constitutional provisions dedicated to the right to property clearly shows the strong influence that fundamental law has on the content of civil law. The abundance of the regulations devoted by the Constitution to this subjective civil law is the consequence of the fact that property and the relationships that are formed around it are among the most important in our society. As a matter of fact, civil law is in a privileged position if we take a look at things from this perspective, the Constitution containing important regulations which also have as their object other rights with economic content, but also rights of personality.

As in the case of other constitutional rules, those devoted to the right to property shall contain in particular principles whose application requires the adoption of special rules. The presentation of the impact exerted by the entry into force of the Constitution of Romania in 1991 and then by its 2003 revision on the provisions of the inferior normative acts, which governed the juridical regime of property, was a good example in this respect.

However, the Constitution also contains rules which do not have to be further developed by inferior law provisions, respectively rules with direct application. We would like to

mention here the provisions of Art. 136 par. (1), which enshrine the forms of the right to property and indicate in a limitative manner the owners of public property; Art. 136 par. (3), which enumerates the assets that are exclusively public property or those in Art. 44 par. (4), which forbid nationalisation and any other measures of forcible transfer of certain assets into state property, if based on discriminatory criteria.

However, the Civil Code or other special laws often reproduce in full certain constitutional rules, after which there are inserted rules that either explain and make the practical application of the former possible, or develop them. This will not deprive the constitutional rules thus reproduced of the ability to be applied directly, the procedure being used for reasons of legislative techniques and to confer internal consistency to rules of civil law, which are obliged to comply with those with a superior juridical force, contained in the Constitution.

Of course, the dissociation we operated between constitutional rules with direct application and rules with indirect application has its degree of relativity, but it helped us understand better which are the means by which the Constitution directs the content of the regulations that are specific to private law.

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