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CONSIDERATIONS CONCERNING THE CONSTITUTIONAL AND EUROPEAN DIMENSIONS OF THE OWNERSHIP RIGHT AS STATED BY THE ROMANIAN JURIDICAL SYSTEM

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Abstract
The Romanian Civil Code of 1864 defines the ownership right as: " the right somebody has to enjoy and dispose of a thing in an exclusive and absolute way, yet within the limits determined by the law". The Romanian Constitution of 1991 (revised in 2003) contains cardinal stipulations regarding the private ownership (art. 44) and the public ownership (art. 136). It imposes, as a principle, that: "private ownership is equally guaranteed and safeguarded, in virtue of the law, whoever might be the right's owner". The European Convention on Human Rights has brought into the Romanian juridical system- since June 20-th 1994- the mechanism stipulated by the art.1 of the Additional Protocol nr.1, designed in order to generally protect the ownership right.Within this actual frame of norms, in the juridical Romanian system, the ownership right is a fundamental one, which is endowed with a particular construction of safeguarding means and which, ultimately, constitutes by itself the foundation of the whole system of the real civil rights.

Key words
Civil rights; ownership right; legal protection; safeguarding means.

1.Introduction

Ownership seems to be the central institution of the Romanian Civil Code, issued in 1864 (enforced since December 1-st, 1865). Of the three Books, two are concerned by "the goods" and "the ownership". The II-nd Book is entitled: "About goods and various modifications of ownership" (arts. 461-643) while the III-rd Book is entitled: "About the various ways through which ownership is acquired" (arts 644-1911). But the truth is that, really, the II-nd title of the II-nd Book, entitled "About ownership", reserved three articles only to the ownership right itself (arts 480-482).

Beyond statistics, the stipulations of the Romanian Civil Code, enforced and applied with no interruption for 145 years, do contain, in the matter of the ownership right, juridical solutions, which have preserved their full validity even nowadays. They do constitute the living expression of the ideas of constancy, stability and endurance, since they survived to the social and

political transformations, which in time have influenced the Romanian civil legislation.

At first, the Romanian Civil Code does define the ownership right in its art 481: "the right that somebody has of enjoying and disposing of a thing, in an exclusive and absolute way, yet within the limits determined by the law".

(The art 544 of the French Civil Code stipulates: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.").

Doctrine and jurisprudence constantly sustain that the juridical care of the ownership right is determined by these legal stipulations through enumerating its assets: jus utendi, jus fruendi and jus abutendi. Through the phrase "enjoying" (of a thing), the legislator meant to signify the assets of "possession" and of "use made of", while the asset of "disposing of" is mentioned separately.

Secondly, the art 481 Civil Code stipulates: "Nobody could be forced to give up on his ownership, except only for a cause of public utility and receiving a just and previous damage restoration")

(art. 545 of the French Civil Code stipulates: "No one may be compelled to yield his ownership, unless for public purposes and for a fair and previous indemnity").

Finally, the art 482 Civil Code rules the "accession principle" in the matter of ownership: "The ownership over a mobile or immobile thing gives right over everything which is produced by this thing and over everything that is, accessorily, united to this thing, either in a natural or artificial way.

(art. 546 of the French Civil Code stipulates: "Ownership of a thing, either movable or immovable, gives a right to everything it produces and to what is accessorily united to it, either naturally or artificially. That right is called right of accession.").

As the stipulations of the Romanian Civil Code were applied and interpreted in time, the juridical assets of the ownership right came to be outlined: this right is considered to be: "absolute", "exclusive" and "perpetual". The absoluteness of the ownership right should be seen in the sense of the fact that its owner has the exercise of all prerogatives over the respective thing. He may take advantage from the entire usefulness provided by this thing and may conclude whatever juridical acts that would benefit to his own interests. Yet the legislator is able to establish the limits of the exercise allowed to the ownership right, aiming to ensure a just equilibrium between the owner's interests and the general interest. Due to its exclusiveness, the ownership right appears, for its owner, as a "monopoly", since the owner is entitled to exercise "alone" all the prerogatives provided by this right.

Finally, the ownership right does exist independently from its exercise by whoever, since, as a principle, the owner is free to make no use at all of his good. The perpetuallity of this right bears the consequence that the most willful mean of protecting the ownership, juridically, namely the revendication lawsuit is not subject to extinctive prescription (as a principle, the passing of time does not affect it at all).

2.Constitutional stipulations able to guarantee and to preserve ownership

The Romanian Constitution in its II-nd Title: "Fundamental rights, freedoms and duties", II-nd Chapter, "Fundamental right and freedoms", contains stipulations, which guarantee for and preserve the private ownership right (art. 44) as well as the guarantee given to the inheritance right (art 46). On the other side, in its IV-th Title "Economy and public finances", art 136- with the specific denomination: "The Ownership"-it contains general stipulations in the matter of ownership, regulations concerning the public ownership as well as the fundamental principle of the private ownership's inviolability.

Initially, we will point out the fact that, since the Constitution places the private ownership right among the fundamental rights of the citizens, the restriction of this right's exercise could operate "only in virtue of the law" and only if it would be imperative" due to the causes stipulated by the Constitution. Thus, according to the Constitution's art 53, the exercise of some right may be restrained: "The exercise of certain rights or freedoms may solely be restricted by law, and only if necessary, as the case may be: to defend national security, public order, health, or morals, the citizens' rights and freedoms; to conduct a criminal investigation; to prevent the consequences of a natural calamity, disaster, or extremely severe catastrophe. Such restriction may only be ordered if necessary in a democratic society. The measure must be proportional to the situation which has engendered it and applied in a non-discriminatory manner, without prejudice to the existence of the right or freedom in question."

Yet the respective restriction ought to be strictly suitable to the situation that has determined it and it could, in no way, trouble the existence itself of the respective right.

3. "The right to property and to debts which incur on the State shall be guaranteed. The content and limits of these rights are established by law".(art 44 alin 1). "Private property is equally guaranteed and protected under the law, irrespective of its owner."(art 44 alin 2).

The ownership right pertains to the domain of the constitutional protection, no matter if the goods concerned should be mobile or immobile. Even if the text should expressed by refer only to the "claims towards the state", it would undoubtedly concern any other claim which: "was found or established by a judicial decision placed in res judicata".

The doctrine admits that the ownership right bears a significant social function, which imposes for it to be exercised "in the conditions stipulated by the law". The Constitutional Court has stated that, through the law, some limits and restrainings could be established for this right, either concerning its object or some of its assets, for the purpose of protecting some general social and economical interests or of defending the rights of other persons.

However, it is essential that such restrictions should in no way effect the ground itself of this right, that the ownership right could never be completely annihilated.

4. No one may be expropriated except for a cause of public utility established subject to the law, with just compensation paid in advance.(art 44 par. 3).

Initially evoked by the art 481 Civil Code, the expropriation consists in the forced passage into the sphere of public ownership of some immobile goods that would be necessary for some works pertaining to the public interest, in exchange with an indemnification. For this, two defining conditions ought to be fulfilled: "the public utility cause, established according to the law", "fair compensation paid in advance".

It is important to underline that expropriation is decided and indemnification is established in its amount only through a judicial decision.

When public utility should pertain to the general interest, the expropriation's beneficiary would be the state. For a local interest, the beneficiary would be the respective administrative-territorial unit.

In order to apply these constitutional stipulations the Law nb.33/1994 on expropriation for a cause pertaining to public utility. This law rules upon matters concerning:

a)the sphere of the immobile goods which may constitute the object of expropriation;

b)the concept of public utility and how it comes to be declared.

c)the preliminary measures taken for the purpose of expropriation.

d)the resolution of demands for expropriation by the judicial courts;

e)the indemnification criteria and its effective payment in regards to the expropriated owner.

The indemnification ought to be: a)"fair" meaning that it should cover the immobile good's real value, as well as the prejudice caused to the owner and to other persons involved; b)"previous" in the sense that it ought to be

effectively paid before the transfer operation concerning the ownership right.

The constitutional principle of guaranteeing the private ownership against undue expropriation does impose to this severe measure, which might be taken versus the private ownership, the features of equality and predictability.

5. Nationalization or any other measure of forcible transfer of assets into the public property on account of the owners' social, ethnic, religious, political affiliation or any other discriminative feature is prohibited (art. 44 par. 4)

The constitutional revision of 2003 has introduced the forbidding of nationalization. But even before this moment, the Constitutional Court has constantly stated against nationalization, and it pointed out that nationalization, as a juridical procedure, is not suitable to the constitution's stipulations.

From the constitutional value stated for the ownership right, it results that it's fundamental features and the transfer modalities pertain to the Constitution's level, not to the one of the law.

There from rises the conclusion that a law could not modify, add to or infringe the explicit Constitutional stipulation. Thus the unique possibility for a forced passage of some goods from private ownership to the public one is expropriation, since nationalization is excluded.

6. The possibility for the public authority to make use of the underground beneath whatever immobile property

According to the Constitution's art 44 par. 5:" For projects of general interest, the public authority may use the subsoil of any immovable property, having 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 the authority."

This limiting of the ownership right takes the concrete form of a temporary real right of usage belonging to the state or to its administrative-territorial units granted for the duration then would be executed the works pertaining to the general interest. As a principle, this usage right should be exerted for free. Yet, if the utilization of the underground beneath the property should cause damages, the owner would be untitled to indemnification. It could be established through the involved sides' agreement (the owner and the public authority).

If such an agreement should lack, the judicial court would establish the indemnification.

7. The right to property compels to respect for the duties relating to environmental protection and assuring neighborliness, as well as to other duties binding on the owner in accordance with the law or as is customary. (art 44 alin 7)

The constitutional principle of preserving the ownership right does not exclude the respect owed to the "ownership's charges." The juridical protection reserved to ownership does admit restrainings imposed by "its moral finalities, its economical efficiency and by the exigencies of the general interest. The constitutional norm does evoke the ownership's "ecological function" and its juridical pertaining side effects. Thus, it imposes the respect of the "charges concerning the environment's protection." Urban aesthetics and the city's specific interests could also create limits for the ownership right.

The ownership right obliges to the respect of the "charges concerning the assurance of a civilized neighborhood". This constitutional stipulation gives an explicit form to the idea that the neighborhood relationships do impose a limit to the exercising of the ownership right, for the purpose to ensuring a common peacefully tolerance. To exert the ownership right "within the limits determined by the law", involves as well the respect of the social convenience rules in the case of neighborhood relationships. The Civil Code establishes a series of limits for the features of the ownership right that are determined by neighborhood relationships.

8.The Confiscation. The art 44 par. 8 of the Constitution states that: "Lawfully acquired wealth may not be confiscated. Lawfulness of acquirement shall be presumed." Similarly:" Any goods intended for, used, or resulting from criminal offences or misdemeanors may be confiscated only under the terms laid down by the law"(Art. 44 par. 9).

Alike expropriation, the confiscation represents more than a simple limiting of the private ownership right. Confiscating, as a taken action signifies even the depriving for the owner, of his ownership right. Under this circumstances, the confiscation action to be possibly taken-is ruled by constitutional norms:

The presumption of licitness for the acquired wealth is therefore instituted as a special protective shield. Until contrary evidence, whatever person is protected by this constitutional presumption. In a concrete situation, whoever assets the illicitness is an acquired wealth ought as well provide evidence to support his statement.

The legislation concerning criminal offences and contraventions does explicitly state the cases and circumstances required for the effectively given order to confiscate the goods that might be destined, used to or resulted from perpetrated crimes or contraventions.

9.Guaranteeing and preserving of the public ownership.

In a restrictive enumeration of the tertium non datur, type the constitution's art 136 par 1 establishes that Romanian specific taxonomy of the ownership right "Property may be public or private.". It continues by stating that "Public property is guaranteed and protected by law, and belongs to the State or territorial-administrative entities".

It is an admitted fact that as it results from the constitutional stipulations, the relationship between the two types of ownership is the following: private ownership constitutes the rule, while public ownership constitutes the exception.

The subjects of the public ownership right are restrictively determinated by the constitutional norms. They are the state and its administrative-territorial units. When discussing of the public ownership's right owners in Romania, only other subject of law than the formers, either an individual or a juridical person, is excluded.

The administrative-territorial unites are: the communes, the cities and the departments. As moral persons pertaining to public law, they are the owners of the public ownership right over the goods pertaining to the public domain. The attributions regarding the management of these goods are exerted by the local councils, respectively by the Department's Council.

The art 136 par.3 of the Constitution draws the list of good which are, exclusively, the object of public ownership:

a)the underground's richness, pertaining to the public interest;

b)the air space;

c) waters with an energy potential which may be utilized for purposes of national interest;

d)the beaches, the territorial sea, natural resources in the economic zone and continental shelf;

e)either goods, enumerated by the organic law.

The essential difference between the private and public laws consists in the different juridical regimes to which obey the two forms of the ownership right. Essentially, the goods which are the objects of public ownership are not to be alienated, are not subject to prescription or to seizure.

The inalienability of the goods in public ownership consists into the fact that they cannot be alienated through means that are specific to civil law, that is to say through juridical civil acts allowing the ownership translation. The juridical disposition exerted upon the goods in public ownership is

performed through procedures that are specific to administrative law. Under circumstances expressed by stated by the organic law, the goods in public ownership can be: "entrusted for administration", "granted", "located to" ("rented or leased") or "given into free usage".

The unprescriptiveness of the goods in public ownership consists in the fact that they could not be required by other persons through acquisitive prescription or through a bona fidae possession over the mobile goods.

Goods in public ownership are also enchased which means that they could not be submitted to a forced seizure. The creditors of the state and / or of its administrative-territorial units are unable to initiate the procedure of forced seizure upon the goods in public ownership. Furthermore, the state and its administrative-territorial units are unable to constitute real pledges over these goods, in order to guarantee for their assumed obligations.

10.The European Convention on Human Rights and the protection of ownership in the Romanian law

About the juridical force of international regulations in respect to the internal juridical order of Romania, the Constitution, in its art 11 par 2 states:" Once ratified by Parliament, subject to the law, treaties shall be part of domestic law." and the Constitution's art 20 also states: "The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party. Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions."

The European Convention on Human Rights was elaborated in the frame of the Council of Europe and signed in Rome, November 4th, 1950, was ratified by Romania through the law nr. 30 of May 18th 1994, published in the Official Monitor number 135 of May 31st, 1994. For Romania, the Convention was enforced since June 20th 1994, when the ratifying instruments were deposited at the General Secretariat of the Council of Europe.

According to the above-mentioned constitutional norms, after being gratified, the Convention has become an integrated part of the Romanian law system, thereby directly applicable. An eventual disagreement between an internal norm concerning a right protected by the Convention-as in the case of the ownership right-and the stipulations of the Convention itself could be, in matters of procedural means raised in front of whatever Romanian public authority which would be competent to apply the respective norm. Such a problem could be invoked, even more plausibly, in front of the judicial courts, on the ground of the principle establishing the

free access to justice. In such a situation, the internal norm that would be contrary to the Convention becomes inapplicable, the cause having to be solved in a direct respect of the Convention's stipulation.

On the other side, the norms contained by the Convention and by its Additional Protocols ought to be interpreted and applied in respect to ECHR, since they, together, form a "conventionality block". Under these circumstances, the stipulation of the Additional Protocol nr. 1 and the Court's jurisprudence in the matter of ownership's protection are directly applicable to the Romanian internal law. Through the interpretation of the art 44 from the Constitution corroborated with art 1 of the Additional Protocol nr. 1 and with the jurisprudence of the Strasbourg Court, the constitutional protection of the ownership right comes to be extended. The Court's jurisprudence had to decide on a particular question: How to apply the stipulation of Additional Protocol nr. 1, art 1, in the case of the restitution of goods, which, in various ways had come to be owned by the formal totalitarian states. Such was the Romanian case. A few rules may be retained in this matter. Firstly, the Convention does not explicitly guarantee, for an individual or a juridical person, the right to acquire a good. Secondly, the Convention's protection has to be applied only to "actual goods" what is to say to the goods that are, legally speaking, into the patrimony of the person which claims that his ownership right over this goods has been infringed. Finally the Convention does not protect the patrimonial value as, about which the respective person does not express "a legitimate hope" at least of acquiring them.

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