The right of property and its social function

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Abstract

Rights of property are the main prerequisites for the existence of any political society, as it is an objective necessity for their normal functioning and continuity. Property and right of property are the constituent of autonomous life in the realization of the world of individual or collective goals, without the protection and guarantee of which, it is often stated that the respect and enjoyment of the entirety of other constitutional rights can not be imagined. Rights of property are presented and considered as one of the most important issues of legal and political doctrines, and it represents one of the fundamental issues of national and international policy.

The classic liberal property concept has dominated the modern legal and political debates and imagination. The property institution is often conceived as a *quasi* absolute subjective right, a concept that, in the modern era, competes with alternative concepts that have influenced both state policies and modern legal culture and consciousness, the consequences of which are reflected in legal systems. One of the most influential alternative concepts is the social function of property,[1] of course in modern legal culture the property is understood as an individual right, limited not only by the rights of others, but also by the public interest. Thus, modern legal thinking, although it regards it as a basic element of the normal functioning of the Rule of Law, the private property institution has given a new emphasis to this right, altering the basis for the attribution of property power by the fact that, the relation of the individual to his/her personality in a social organization, is considered as substantive to the juridical order, therefore the volume of ownership power may not be more unconditional. The social function can not be identified with the external limitation of ownership which is reserved to collectivity, but it is presented as an elitist, unifying expression of the assumptions of legal qualification, so as to identify the content of the considered situation.[2]

In the doctrine it is often argued that private property is indispensable for the ethical development of the individual or for the creation of a social environment in which people can progress as free and responsible agents, but that the property is no longer considered a myth, which was considered inviolable, as was the case with Article 29 of the Albertin Statute.[3]

It is enough to bear in mind the Aristotelian argument, which stated that property promotes virtues as prudence and responsibility, or Plato in his work "Republic"

[1] Articulated by French lawyer Leon Duguit in a lecture held in Buenos Aires in 1911. In his argument, it was emphasized that the property has not only external borders, but also internal borders.
[2] Quoted by Rodotà Stefano, in the book of Alpa Guido, Bessone Mario, Fusaro Andrea, "Poteri dei privati e disciplina della proprietà", Publishing house S.e.a.m., Rome 2002, pg. 379.
[3] The Albertin Italian Statute, 1848, in its Article 29, sanctioned that, "All properties, without exception, are intangible. However, when a legally justified public interest requires it, the properties may either partially or completely divest it against a fair remuneration in conformity with the laws".

when he argues that collective ownership is necessary to promote the importance of recognizing common interest, also to avoid social "disruption". According to the theory of natural law, with the main representatives of the 17th and 18th centuries John Locke and Thomas Jefferson, people by nature are free and equal and possess inalienable and intangible rights, which state power can only protect, but not restrict or cancel them, as the individual's rights and freedoms in essence constitute justice as a value. This was also the attitude of the founders of the nations of Western democracies inspired by the principles and innovative ideas elaborated by representatives of the illuministic theories in Europe, which thought that the protection of private property was conceived as a mission and one of the essential tasks of the state. Ownership is one of the constitutional rights that has undergone a significant transformation compared to its original configuration. First legal-constitutional acts [4] of the XVIII century, inspired by modern *natural ius*,[5] proclaimed the sacred and intangible character of the property, so the concept of private property was presented as being born before the state, and the latter had the duty to recognize and guarantee it. With the overthrow of philosophical theories influenced by *natural ius*, private property continued to resist and be at the center of philosophical doctrine as well as legal-constitutional provisions,[6] even advanced until it was considered an absolute subjective right, which was identified with the notion of liberty itself.

Keywords: property, right, law, social function.

Introduction

Like any other legal institute, the institute of property has adapted to the evolution of man. Until the man was closely connected to the land, property was the axis around which everything was rotated, as only through land use was provided the livelihood and the only property-related restriction was related to neighbors' relations, based on the principle *"neminem laedere"*[7]. With human emancipation and the need to live in an active society, in close contact with other individuals, this kind of property restriction did not meet the conditions for preservation and conservation of life in collectivity, so it began to be conceived differently, already in one solidarity view. Thus, property is not only considered as a right belonging to the individual, but it is also offered in the function of the collective interest of the society in which he lives.

[4] The United States Declaration of Independence, 1776; The French Declaration of Human and Citizens' Rights, 1789, Articles 2 and 17; Constitutional Amendments to the United States of America, 1787.

[5] Refer to the philosophical legal doctrines of Grotius, Hobbes, Locke and Kant.

[6] French Constitution of 1814, Articles 9 and 10; French Constitution of 1830, Articles 8 and 9; Belgian Constitution of 1831, Articles 11 and 12; French Constitution of 1848, Articles 11 and 12; Frankfurt Constitution of 1849, Title VI, Article IX, paragraph 164 ongoing, etc.

[7] The maxim "neminem laedere" is one of the essencial private law's principles. The statement "not to harm anyone" dates back to the times of Roman law. It is part of the Ulpianus's basic principles of rights "juris praecepta sunt haec: honeste videre, alterum non laedere, suum cuique tribere", in the Justinian's Digest.

Beginning in the second half of the twentieth century, various representatives of egalitarianism, socialism, etc., or traditional lawyers began to hold a critical attitude to the absolute concept of private property or property considered a "super-right" which stood on top the pyramid of fundamental rights and freedoms.[8] The result of these critical reflections was the awareness of the existence of the social dimension of ownership alongside the individual one. Starting with the German Constitution of Weimar in 1919, and in the future, the constitutional texts began to speak directly or indirectly about the social ownership function.[9] The Weimar German Constitution is the first fundamental legal act that sanctioned the social functioning of property and often in doctrine it serves as a line of demarcation between the liberal and enlightenment constitutionalism that sees property as a right pertaining to the individual and the constitutionalism of the XX century, which proves a great deal of care and attention to the need to guarantee solidarity with the social state. Of course, the clause of the social ownership function has nothing in common with the notion of ownership recognized in the socialist countries, which explicitly denied the private ownership of the means of production and only accepted private ownership over the means of consumption.[10]

Regardless of the controversial solutions that they offer, on one hand, the capitalist property over ownership concept (guarantee for any property) and on the other hand the Marxist concept (nationalization of means of production), it can be concluded that in actual modern society property is not considered absolute discretion of the individual over the item, but as a means by which anyone can and should cooperate in achieving goals of general interest. From this we can deduce that the right of ownership does not belong to that part of human rights that constitutions of modern law define as inviolable. Property can be defined as a "fundamental" right only if there is a clear distinction between inviolable fundamental rights and fundamental rights that do not enjoy the attribute of inviolability. If we want to identify which of these two groups belongs the right to property, we can say that it is part of the category of "derived or special" rights, which from a structural point of view have distinctive features in relation to "original or general" rights. In the constitutional texts, property belongs to the category of rights of economic character, and the content of its discipline follows the general principle of the social function rather than the freedom of the individual. For his part, Stefano Rodotà stipulates that the understanding of the constitutional guarantee is closely related to the social ownership function, when it claims that, "the constitutional legislature has protected the property by attributing a social function".

According to the traditional concept of subjective rights, the person to whom property ownership was attributed, in principle enjoyed the free exercise of this power without being limited by certain models of behaviour in relation to the recognized right, thus this subject of the right was unrestricted. Social function modifies this traditional scheme, foreseeing that the use of this power should not only fulfill the private interest, but wider the interests of the society in its complexity.

[8] The concept of absolute ownership implied the property with which it could be abused without limit, expressed in the terms 'ius utendi et abudenti'.

[9] Germany's Constitution of 1919, Article 153; The Spanish Constitution of 1931, Article 44; Germany's Basic Law of 1949, Article 14; The Spanish Constitution of 1978, Article 33; The Italian Constitution of 1948, Article 42.

[10] Constitution of the Socialist People's Republic of Albania, of 1946 and 1976.

Social function refers to objects as object of property right and not the opposite, the right of property over objects, and the term "function" means the power that is known to a particular subject to fulfill an interest of someone else. In some other cases, attempts have been made to distinguish between "limit function" from "impulsive function". In the *limit function* can be included the obligations and boundaries that are assigned to the right of property through the legal-civil provisions. From this point of view, the social function is perceived as useless and, among other things, as a political reason, while in the *impulsive function* may include the need to exercise its right according to the criteria of and sound economically use, but against this second variant of the function has had reactions throwing the hypothesis of exaggerated use of the right of property (Rescigno, 1988, 272).

The formula of the *social function* is used in the constitutional texts in an effort to find the balance between individual and public interest. Constitutional provisions that have as an object the right of private property, have as a general principle the social function and not the owner's freedom, and they sanction the need for the use of property for the benefit of all. The social function that the constitution seeks to provide, more than private property as a real property right over objects, primarily refers to property that is a subject of private property, such as land as the object of private right, at the same time it is an object of the public power that provides the social function. Thus, the social function appears more active and functional, even predominantly, not to say exclusive, where surrounding property objects establish a legal relationship that requires the co-operation of the others in its use. The social function seems destined to be identified with the fairness of social relationships arising from the legal relationship created over the object, between the owner and one or more of the specified subjects. But in this way, it is at risk of shrinking the novelty of the formula, certainly devised, with the aim of integrating the obligation into the structure of the real situation conceived in terms connoted by the tradition as "the right to exclude third parties" (Rescigno, 1988, 272).

On the one hand, the function is an obligation, while the right is a form of freedom. Although the property can not be both a function and a right, these two concepts can be identified even though with difficulty as common points, as the right of property recognizes certain limitations in favor of the general interest and the common tangential between the right of property and the social function are formalized in the constitutional founding act of legal systems, which have radically modified the nature of property.

It is worth underlining the fact that, the social function represents a principle applied in general terms and not in *expresis verbis*[11] used to show in a synthesized manner a complex of special obligations sanctioned by the relevant legal provision, but this does not constitute an obstacle, since the social function can operate in relation to any eventual situation in the area of property law, despite the existence of an explicit legal provision. The social function is considered as a central instrument of legal constitutional norms and social benefit is the foundation of the right of property, which in turn enjoys a conditional protection, so in other words, the protection accorded to private property does not surpass the starting limit of the sphere of interest or

[11] See: The Constitution of the Republic of Albania, 1998, Article 41.

public need, and above all, it is subject to the fulfillment of the latter. When individual interest collide with collective ones, "the individual's right must be withdrawn before such interest and subjected to them" (Messineo, 1943, 25).

The social function that is attributed to private property is not exclusively related to its boundaries, but to the overall content of property discipline. In the case when he closely refers to the boundaries of the right of property, he represents a notion of a negative nature aimed at the shrinking of property power, which with the decline of restrictions becomes completely full and free, but in the optics of political-social solidarity, the content of this ambiguous formula assumes a promotional role, in the sense that the disciplines of property forms must find an implementation to guarantee and promote the values upon which the legal order is based. So the social function is not static, but it has flexibility and at the same time is capable of adapting to legislative and factual changes and if it is metaphorically compared to a "discharge valve", it is easily observed that its nature is characterized by a strong elasticity that has been able to break the "absolute" character of property rights in meeting the urgent and general interest.

In this context, the social function of private property, although not an autonomous institute, appears as a structural element in the constitutional texts, which recognizes the legislators' power to resolve the eventual conflict between private interests and other interests, such as social importance, security, freedom and human dignity, in respect of constitutional principles. It should be understood from the foregoing that right of property should not only be considered as a form of sovereignty over the object, but also as a subjective legal situation that harmoniously becomes an integral part of the social context and does not contradict it. The right of property in its subjective dimension does not necessarily have to be concretized in terms of objectivity and exclusivity. Social function is presented as an external limitation of property rights as a general principle of the juridical order, which left untouched its nature as a subjective right, which is recognized and guaranteed only in the interest of its owner. Although in a doctrine there is not a uniform stand, we should not become slaves of the literal interpretation of constitutional norms, but we must be vigilant and faithful to the teleological interpretation which suggests that the social function is configured only in respect of those things, whose disuse causes harm to the collectivity, but not to the means of consume, for which only an individual function can be configured. While for Barassi, the social function is nothing more than a "synthetic formula created by doctrine" needed to recognize behaviors dictated by social solidarity, which finds its highest expression in the state, but it is also coexistence of conflicting private interests, which "must be harmonized with the private property regime" (Barassi, 1941, 84). But, lacking a safe reference term to distinguish between legitimate and illegal rights, it is difficult to determine the content of the recognition and guarantee that the constitution attributes to the right of property. The main problem lies in defining the right restriction that can be imposed on individual rights.

Public interest

According to what has been accepted until today by the doctrine, in public interest we understand an action that is in the good of all (Tartari, 2008, 624). Guaranteeing

and protecting the right to private property constitutes one of the substantial aspects of democratic society. No one shall be deprived of his property, except for reasons of public interest, under the conditions laid down by law and by the general principles of international law. Nonetheless, states are sovereign in drafting laws that regulate the use of property in accordance with the public interest, as the latter is assessed as a dynamic legal concept that takes various forms based on certain situations.

The European Convention on Human Rights preaches and ensures that state institutions must incorporate and consolidate the guarantee of rights and freedoms, by creating optimal conditions and appropriate spaces for society and all aspects of its activity, protecting both individual and collective interests within the framework of universal principles of justice and rationality of the law. Institutional autonomy should not, in an abusive way, affect individual interest, so any interference in the enjoyment of constitutional rights must have a vindicated purpose. According to the jurisprudence of the European Court of Human Rights, the first and most important requirement is that the intervention of public authorities must be lawful and proportionate. This international structure establishes the principle of peaceful enjoyment of ownership and legitimizes the deprivation of possession only "under the conditions laid down by law", also recognizes the right of Member States to control the use of property by strictly enforcing their legal order. On this basis, any measure taken that deprives the person by the right of property must have *a legitimate aim in the public interest*. The notion of public interest is very broad, and from the doctrinal point of view of judicial jurisprudence, it has been recognized that "undressing" from the physical and legal power of property, which is carried out as a result of state activities implementation in order to promote social justice in the community, it can be considered as "public interest". The term "public interest" does not necessarily have to guide us to a considerable number of individuals or to realize a general policy, it is essential to understand the essence of this legal notion, which focuses on balancing the restriction of property rights and the general benefit to society.

Restrictions on the exercise of the right to property, justified by the general interest, should not affect the essence of this right, the disruption of which may lead to the full dismissal of the owner from the right of ownership. It is not always easy to determine the report and find if the restriction is established or damaged or affects the substance of the right. Parliament adopts acts that not rarely regulate certain reports regarding possible restrictions on the right of property or its exercise. It is the Constitutional Court that, through its jurisprudence, determines the extent to which the limitation that can be imposed is to be set, so as not to break the substance of the owner's right over his property (Omari & Anastasi, 2008, 155).

The term "public interest" should be interpreted by closely associating the fundamental principles of justice, proportionality and the social state. Respect for these principles also constitutes the constitutional boundaries of the area of appreciation by states for the respect of the rights of property. Even if we approach Strasbourg's jurisprudence regarding its position with regard to the notion of *public interest*, is in its interpretations argues that Member States are recognized with a broader scope of assessment in the implementation of economic and social policies.[12]

[12] See further: Case "Jahn and Others v. Germany", decision of 22.01.2004 and 30.06.2005, Strasburg.

However, in order to consider constitutionally an interference with the right of property, it is not sufficient only the presence of a "legitimate purpose" in the "general interest", but there must be a reasonable proportional relationship between the measures taken and the intended purpose to be realized through the deprivation of the person from his property. The state as a regulator has the mission to set the boundaries between the general good of society and the right of particular groups. Thus, the mechanisms used by state instances should not overcome the scope of the assessment, but they have as an imperative duty to rationally assess the legitimate objective so as not to fail in maintaining a balance between the interests of seekers and the general interest. This situation requires a fair distribution of social and financial obligations that can not be addressed to a particular social group, under the common interest flag of the community regardless of the level of importance of this interest. Therefore, it is required a professional logic in considering whether the ultimate goal of undertaking the acts or measures taken trying to meet the socio-economic requirements, justifies the violation of the right of property. The principles of Rule of Law require the state to find adequate measures to regulate conflicting or socially sensitive situations (Sadushi, 2012, 581), since in the public interest it is not intended that this principle aims to harm a category or to place it under a discriminatory treatment without a reasonable and objective justification.

Constitutionalist Traja in his analysis of interest argues that, given the standing and jurisprudence of the Strasbourg Court, interest is conditioned by certain qualities, such as: it must be concrete, straightforward, safe and current. He goes on saying that, when the legal norm is in effect, the actual interest is usually related to the concrete consequences of its implementation or non-implementation, because norms that regulate behavior, ie mandatory binding norms, do not have continuous but discrete action, so they are applied everytime that respective legal facts arise. In this sense, there can be no abstract legal interest (Traja, 2012, 32). It can not be denied that the decision-making process of the constitutional panels, particularly in matters relating to rights of property, is always based on the principle of social justice and has made the balance between the individual right of property of importance to the public interest to which this right will be restricted. Fair balance of interests serves both to social justice and the principle of Rule of Law.

From the practice of ECtHR it is deduced that, it aims to orient member states to take appropriate and effective measures to resolve the problem when it is of general and permanent character, so that it is found that violations are such as to cause a considerable number of individuals. Thus, the overall disruption of the property protection system requires the taking of general measures at the national level, whether these legislative measures or not.[13] For expropriations made for public interest, European jurisprudence underlines that national authorities have a broader margin of appreciation because they are the ones that draft economic development strategies, but in any case without going beyond the reasonable targets sanctioned in the Convention. The Court supports its argument in several considerations: first, it argues that the national authorities know in detail the relevant societal exigencies.

[13] See further: Issues "Broniowski v. Poland, decision of 22.06.2004, "Hutten-Czapska v. Poland ", decision of 22.02.2005, Strasbourg.

They are also more competent in the objective assessment of the real situation and what can be rationally assessed as a public interest, compared to the reality in which an international judge may judge, despite their professional capacity. Secondly, the adoption of laws intending intervention to the right to property is interwoven with issues of political, economic and social nature, where for the sake of reality they differ from one democratic political society to another. All of these immense motives have made the Strasbourg Court to stay within a few strict and limited frameworks when it comes to explicitly defining the public interest and the general interest. It has repeated *quasi* in every issue with a property object that its surveillance over the legitimacy of the purpose pursued by the intervention is very limited.[14] Also, the Convention bodies do not stop in distinguishing between the public interest and the general interest, but consider all the political solutions achieved by the national state authorities as legitimate purposes. It seems that this approach is in concordance even with the theory that acknowledges that the public interest is the common interest of all members of the community. Since there is little difficulty in reaching a consensus among all members of the society on public policy, the definitions of the democratic majority will be considered valid, unless it is found that they are clearly unreasonable in the substance. Strasbourg's judicial panel is responsible for examining cases when the activity of the state administration violates human rights consecrated in the Convention text, but does not judge whether they are fair or not in principle.

State intervention in the right of property should aim at finding the medium of two or more interests intertwined with one another. From this perspective, the number of persons is not decisive in defining the public interest, but determinant is the fact to whom serves the purpose sought to be achieved and if the means by which this goal is sought to be achieved is legitimate. Balancing the public interest with the individual's interests in particular, is done not just in the context of one case, but in the context of the law and the situation in general.[15]

The same attitude is also found in the Strasbourg jurisprudence when it is argued that states should limit their interference to their limits, even they have a duty to seek alternative solutions, in attempting to achieve their aims in the least harmless way from the point of view of human rights.[16] So what emerges from the practice of the European Court is that deprivation of property ownership based on a policy formula or calculation to increase the performance of indicators of social justice within the community is legitimized as an intervention in favor of the public interest. It is also argued that measures taken by member states should be advertised not only important for a democratic society but, *inter alia*, as preferable and advisable (Van Dijk, Van Hoof, Van Rijn and Leo Zwaak, 2006, 880). Obligatory transfer of property in pursuit of the country's social, economic and political reforms may be justified with the aim of achieving a major interest such as the public interest, which may include measures taken by the authorities to build housing for a category of the persons in

[14] See further: Issues "Former King of Greece and Others v. Greece", decision of 23.11.2000, Strasbourg; "Ambruosi v. Italy", decision of 19.10.2000, Strasbourg; "Beyeler v. Italy", decision of 15.01.2000, Strasbourg, etc.

[15] See further: The Constitutional Court of Albania, Decision no. 10, date 19.03.2008.

[16] The case "Hatton and Others v. the United Kingdom", 2011, Strasbourg.

need.[17]

One of the most important criterias for the deprivation of rights of property is that it must necessarily be lawful, so in any analysis or interpretation that is made in relation to interventions by state authorities a special place has the principle of legality. The European Court argues that when considering the nature of state intervention, the term law and lawfulness is intertwined with the quality of the law and its incompatibility with the principles of the Rule of Law.[18] When the European judicial panel judges that the intervention does not meet the condition of the law, then it declares that the interference with the property right is illegal, judging as unnecessary the assessment of whether the intervention was or not proportional or the examination of the details if the national authorities were guided by the public interest to intervene in the right of property, or by the general interest.[19]

Internationalization of Rights of Property

Ensuring human rights and fundamental freedoms is considered as the foundation for the normal functioning of democratic states, as the political and juridical history of various civilizations points out that respecting and protecting the rights and freedoms package has a fundamental impact on political, economic and social development of a society of democratic character. Systematic violation of rights by state authorities has led to significant and historic initiatives for their protection and safeguarding, which have been formalized in several jurisdictional acts, as may be mentioned, Magna Carta Libertatum (1215), Bill of rights (1689), Independence Declaration of the United States (1776), Declaration of the French Revolution (1789), Universal Declaration of Human Rights (1948), The European Convention for the Protection of Human Rights and Freedoms (1950), The International Covenant on Civil and Political Rights (1966), etc., which have contributed to the international and national institutional progress and stability.

In order to expand the horizons of our analysis regarding the importance and relevance of the subject of this paper, let us make a trajectory on the content of the legal-community norms or international acts that have contributed to the recognition, modernization, guaranteeing and consolidation of the right of property. What is clearly concluded from the content of the international legal documents on human rights, as well as in the texts of the constitutional acts, does not give a definition of the concept of ownership and its content, leaving the competence and price of the judicial national panels the definition of which rights are included within the concept of ownership, even though it enjoys constitutional and international protection. Probably, including a definition of property into their subject would threaten constituting a limitation of the provisions on property rights.

[17] The case "Mellacher v. Austria", decision of 19.12.1989, Strasbourg.

[18] The case "James and Others v. the United Kingdom", date 21.02.1986, Strasburg.

[19] In the case of "Iatridis v. Greece", the complainant owned a land surface which he had in use and had built an open-air cinema where he exercised his activity, the Greek state authorities had withdrawn from the cinema by interrupting the activity. Although this order was annulled, the Greek authorities refused to take into account the complainant's claims to recover the land area where the cinema was established. This action was considered by the Court as an unlawful interference with the complainant's property right.

The first catalog of human rights and fundamental freedoms adopted by the General Assembly of the United Nations is the Universal Declaration of Human Rights, Paris, 10 December 1948. In its preamble it stipulates that: *"... all peoples and nations, having in mind this statement, should try to, through teaching and education, help in respecting these rights and freedoms and, by means of progressive national and international measures, ensure their general and true knowledge and application ... "*. The content of this international document also includes the right of property and, in particular, Article 17, which deals with the right of property, *inter alia*, provides that, "no one may be arbitrarily deprived of his property". This provision can be interpreted as a universal principle aimed at disciplining the expropriation institute in democratic national legal systems, which should prevent the expropriation process without reward.

However, it must be underlined that in respect of the Rule of Law, state's institutions must, through their activity, strictly apply the principle of legality, so in this context also in dealing with property issues, this important principle and vital to democracy is inevitable. This rule has been implemented since the French Revolutionary Declaration, which sanctioned the right of private property as sacred and inviolable by the state, accorded the right to expropriation in specifically limited cases, ie only under the legal reserve of public interest but under the obligation to compensate the expropriated subject.[20] It is clear that the late eighteenth century affirms the first forms of constitution of states of law, as well as a modern and revolutionary approach to the concept of right of property. Reforming the concept of property served to consolidate democratic states, but also transformed the market of property into a decisive factor for the economic development of any country with consolidated democracy or others aspiring to achieve high levels of Rule of Law performance.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, created in 1950 as a product of the Council of Europe [21], not only lists the catalog of human rights and fundamental freedoms, but in particular creates a legal certainty for individuals through protecting bodies and instruments, designed for this purpose. Sanctioning and guaranteeing the right of property in the provisions of this Convention [22], despite some member states' controversies that required property to remain an exclusive issue for their domestic institutions, shows its extraordinary importance in the development of democratic societies. For this reason, the regulation of rights of property is not left to the legal systems of member states alone, but the latter are burdened with the active obligation to take measures to create the necessary premises for the effective exercise of the right of property and its respect. Even in the original text of this Convention, a provision on the right to property was not initially provided, but was only included two years later in its first Additional Protocol, following a series of fierce debates among representatives of member states requesting to preserve exclusivity in defining the legal property regime and establishing a relationship between property protection and the general interest.

[20] The French Declaration of Human and Citizens' Rights, 1789, article 4.

[21] The Council of Europe was founded in May 1949, with the signing of the Statute of Europe by Denmark, France, Italy, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

[22] The European Convention on Human Rights, Protocol no. 1, Article 1, Adopted in Paris on 20 March 1952 and entered into force on 18 May 1954.

Despite the fact that property rights are not expressly defined in other Community treaties or sources, Article 345 of the Treaty on the Functioning of the European Union, provides that: *"The treates shall in no way prejudice the rules in Member States governing the system of property ownership"*[23]. In the decade when the Convention was drafted and approved, in the European continent existed a climate politically, socially and culturally unfavorable for the ownership-freedom equalization. Since the 1970s, the International Court of Justice affirms that fundamental rights are part of the "general principles" of the community order and that the right to property is an integral part of them. Moreover, the Luxembourg Court, which takes care to ensure the respect of the "general principles" by the member countries, lists the property in the very beginning of the category of fundamental Community rights[24].

The property institute, in order to find a unitary normative regulation on a continental scale, *a priori* from the point of view of legislative technique is needed in order to achieve a compact, though not identical, conceptualization in the legal culture of different countries. The EU Charter of Fundamental Rights, proclaimed in Nices in 2000, considers ownership as a right pertaining to the individual, thus as a subjective situation, which recognizes to the official subject a certain power over material goods. Article 17 expressly states that "*Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions"*, and that *"The use of property may be regulated by law in so far as is necessary for the general interest"*. It is immediately concluded that this provision, in an attempt to define the content of property rights, simultaneously provides a definition of it.

In the framework of the protection of human rights and fundamental freedoms, where an undeniable place is also evidenced by the right to property, for the member states of the Council of Europe raises the obligation to comply with the provisions of the European Convention on Human Rights and taking responsibility for eventual interference in rights of property.

The right to property is not embodied in the Convention, but was added in the First Protocol to the Convention, under the title "Protection of property", which states that everyone has the right to peaceful enjoyment of his property and the restriction of the right to property through expropriation can only be realized by law, for reasons of public interest and in respect of the general principles of international law.[25] The analysis and interpretation of some of the constitutional concepts that relate to the public interest, fair reward, compliance of the principles of justice, the principle of proportionality and the social state, are at the same time the constitutional boundaries of the scope of the evaluation space on which the lawmaker should be oriented towards respect of the right to property.[26]

[23] Refers to the consolidated version of the Treaty of the Functioning of the European Union, Part Seven: General and Final Provisions, 2008 (ex Article 295 TEC).

[24] The International Court of Justice, the Nold judgment of 1974, and the Hauer decision of 1979, Luxembourg.

[25] The European Convention on Human Rights, 1950, Protocol No. 1, 1952, Article 1, paragraphs 1 and 2: "Every natural or legal person in entitled to the peaceful enjoyment of his possessions. 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".

[26] The Constitutional Court of Albania, Decision no. 30, date 01.12.2005.

In a synthesized manner it can be concluded that member states have the obligation to respect the principles and legal norms of the Community and that the European Court of Strasbourg as a human rights defender and interpreter mechanism sanctioned by the Convention has the competence to assess the congruity of legislative parameters adopted by member states. In addition to these obligations, the Convention recognizes the Member States with a broad space of action to enact laws they deem necessary to regulate the use of property in accordance with the general interest or to ensure the payment of taxes, contributions and other fines .[27]

Conclusions and suggestions

From the above analysis emerges the competitive relationship between state authority and individual freedom, judged by the shift of the individual nature of property to the institutional one, by introducing private property as the foundation and prerequisite of economic development based on the free market. It is thus justified that the private property guarantee includes a complex of individual and collective values that define its social function in relation to the fulfillment of interests that deserve protection from the legal order.

Legal-constitutional provisions, as they rule in principle the right to property, leaving necessary space for it to become the subject of legal reserve. But this delegation that constitution makes to the law has provoked interpretations, which often do not find meeting points or common elements. Some argue that the legislator is free to establish a certain legal property regime, without the constitutional norms providing for prior guarantees for the content of these laws. But other authors of juridical literature, strongly affirm that the constitutional text contains substantive safeguards for the protection of private property rights, which are left in the discretionary and exclusive judgment of the constitutional court and support their position in the sentence expressly sanctioned "property is recognized and guaranteed by law"[28], from which it is deduced that property should preserve its constituent components and contradict that this right may be arbitrarily determined by lawmakers.

Another controversial issue in the doctrine, but also drawn to the attention of constitutional jurisprudence, is related to the identification indicators of the constitutional frameworks of the substance content of the right to property, which can not be affected by the laws. In other words, conditioning this constitutional right in favor of the priorities of the society or social benefits, can not go beyond the core of property content, altering its destiny diametrically. So, civil legislation can not go beyond the constitutional framework of the right to property, undoing it, or affecting to the extent that it returns the object to an unusable one or cause a total loss of its transaction value.

[27] The European Convention on Human Rights, 1950, Protocol no. 1, Article 1, 1952, paragraphs 3: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary with the general interest or to secure the payment of taxes or other contributions or penalties".

[28] The Contitution of the Republic of Albania, 1998, Article 41, paragraphs 1.

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