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THE PRIVATE PROPERTY RIGHT, CONSTITUTIONAL GUARANTEES AND ITS LIMITATIONS

552. 01 - CONSTITUTIONAL RIGHT

Law PhD Thesis Abstract

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CONCEPTUAL BACKGROUND OF THE RESEARCH

Relevance and importance of the discussed topic. The constitutionalisation of the private property right is a relatively recent approach in the scientific literature, it is a complex legal phenomenon, a new institution in the constitutional law of the Republic of Moldova, conceptualised by the modern doctrine following the development of the constitutional justice. In the opinion of the famous constitutionalist I. Guceac, constitutionalism, including the contemporary one, embodies a priority value in the context of the rule of law development [23, p.78]. According to the scientist Gh. Costachi, "the rule of law implies, first of all, the recognition and respect for the priority of the human being (of their rights, freedoms, and interests), and their realisation shall be ensured only through the primacy of law" [15, p.15].

The institution of private property is both a complex and interesting category, unique through its significance. This institution had exercised and impacted directly the development of the modern statehood, represents the material basis of the state power, confers it socio-economic, political, and legal stability, serves as a fundament for the market transformation, and constitutes a priority for the implementation of the state's social function. On the one hand, the constitutional private property right is the core element of an individual's existence, and the main element of a free economy in the society on the other hand. It characterises the degree of the human freedom, its position in relation with the other members of the society and of the state and, represents the economic fundament of the constitutional order.

In the Republic of Moldova, the property right, as an element of the economic system and the right to property, as a fundamental human right, were re-established from point zero. The rule of law, democracy, dignity, human rights, and freedoms were proclaimed as guaranteed supreme constitutional values. The accession to various international bodies and instruments facilitates the reforming and establishment of the system protecting the fundamental right to property in the Republic of Moldova. The vital components for the efficient and unrestricted right to private property are monitored globally and regionally to assess the capacity of the state to ensure a clear, stable, comprehensive, predictable, and safe legal framework through the functionality of the system of law in its entire complexity, capable to ensure the right of individuals to have private property and contractual freedom and to protect the owner against abusive expropriation, inefficient judiciary system, and corruption. The degree of the legal protection of property represents a decisive criterion

for the assessment of countries in relation to the degree of economic freedom *(Index of Economic Freedom),* determined through the assessment of states against 12 criteria, including the right to property, the efficiency of justice, government integrity, freedom of business, etc. The general score registered by the Republic of Moldova in 2019 is 59.1 points, thus ranking 97 out of 180 assessed countries [52], which signals serious shortcomings in relation to the rule of law and property right, in particular, protection of investors, expropriation risks, the functionality of the legal system, bureaucracy and corruption.

Description of the situation in the area under research and identification of the research problem

The relevance of our research topic is attributed to the theoretical and practical significance of the constitutional guarantees of the right to private property among the human and citizen's rights and fundamental freedoms in the Republic of Moldova. From the present perspective, we can see that most often, the issue of the right to private property in the legal science of the Republic of Moldova sought to be settled largely from the point of view of a single discipline, in particular, civil law. In the framework of the constitutional law, the subject under discussion seems to be explored insufficiently, despite the available research. Various topical aspects of this subject were approached in the works of local doctrinaires and practitioners such as A. Băieşu, A. Balan, L. Chirtoacă, E. Cojocari, V. Creţu, C. Cușmir, B. Negru, M. Poalelungi, D. Pulbere, V. Puşcaş etc. The concepts of the Russian scholars had considerable contribution to the development and elucidation of the private property law: S. A. Avakyan, G.N. Andreeva, M.V. Baglay, N.V. Vitruk, G.A. Gajiev, V.V. Goshulyak, V.V. Grebennikov, academician O. E. Kutafin, V. E. Chirkin, B. S. Ebzeev etc. At the international level, the research conducted by Gregory S. Alexander, Frank I. Michelman, John G. Sprankling etc. contributed to this subject matter as well.

The radiography of the scientific research in the private property law as an element of the constitutional system of the Republic of Moldova revealed a series of theoretical and practical issues: institutionalisation of the private property right in the constitutional law, the degree of direct applicability of the constitutional norms; safeguarding the right to property; the need to have an integral constitutional text and the (in)sufficiency of the text of a constitution; direct access to justice; differentiation of the private from public interests; lack of constitutional attention regarding the land/plots as objects of the private property right; legal regulation of the property within and beyond the civil circulation, in a narrow and broad sense, etc. In the Republic of Moldova, the division

between public and private law is a well-known fact, nevertheless, there is little scientific research dedicated to this area [10; 11].

The statistical data regarding the decisions pronounced by the Constitutional Court of the Republic of Moldova in the area of human rights have shown that the most numerous complaints refer to property protection – 32% (starting with the agrarian reform, privatisation and ending with matters related to monopoly and legislation).

According to the data in the Annual Reports on the Observance of Human Rights and Freedoms in the Republic of Moldova, given the number of petitions, they are violated quite often. The assessment of the international community, in the opinion of the ombudsman, is not favorable, and the evolution in the field of human rights shows, in 2016, "lack of progress and even aggravation of the situation in some segments" [42, p. 6], in 2017-2018, no significant developments have been reported and 2019 is considered to be "a year of stagnation in the field of human rights in the Republic of Moldova" [41, p.4]. Although the ECHR case law is commonly invoked in the judiciary acts of the national courts, the number of applications lodged against Moldova is still high – in 2019, ECHR registered a 3%-increase in the number of applications compared to 2018 [19, p.2].

A modern analysis of human rights and freedoms revealed the importance of its guarantees, the solemn declaration of freedoms is insufficient, and therefore, they need to be made more efficient. The guarantees of the right to property are fundamental for any democratic state that adopted market relations; therefore, these safeguards are constitutionally important [39, p.14]. The indicator of the democratic nature of the society does not consist of proclaiming, but providing conditions for the realisation of human rights. To study certain aspects related to the legal regulation of the constraints of the private property right is also a scientific issue related to the harmonisation of the relationships between the bodies of the state power in the RM, public authorities, and entities of private law.

The matters related to the compliance of the right to private property regulated by the Moldovan legislation with the international law and European legal acts regarding its realisation and protection, including, including when approaching the international courts. The compliance of the national legislation norms with the fundamental acts of international law serves as one of the core guarantees of human rights, including the right to private property in the Republic of Moldova.

The important scientific problem solved ensues from the multidimensional research and clarification of the incomplete aspects of the constitutional mechanisms regulating and legally

protecting the property right in the Republic of Moldova to enhance the direct action of the constitutional norms by aligning to the highest standards and advanced international practices.

Bearing in mind the formal rigours of this work, in our opinion, the research contributes to partial substitution of some gaps in the area of protection and observance of the fundamental right to private property enshrined in the Constitution of the Republic of Moldova.

The aim and objectives of the thesis. The thesis aims to evaluate the efficiency of the constitutional guarantees protecting the right to private property and to identify the reserves to increase the degree of direct applicability of the constitutional norms in the process of realisation of this fundamental right, including by making more efficient the direct access to the contentious constitutional court in the Republic of Moldova. In view of reaching the established goal, we formulated the following **research objectives** to provide a scientific solution to the problem:

- historic analysis of the institution of property through the lenses of factors influencing the essence, legal regime and configurations of the right to private property;
- evaluation of the concept of establishment of the right to private property in the Republic of Moldova;
- approach to the institution of the right to private property, of its guarantees and limitations, as elements of the constitutional right;
- establishment of the real estate right in the Republic of Moldova within the limits of the constitutional guarantees;
- approach to the capital market problem settlement through the lenses of private property right protection;
- clarification of the role of constitutionality review as a protection mechanism for the private property right;
- evaluation of the compliance of the national constitutional framework in the area of protection of the private property right to the norms of the ECHR Convention and ECHR case law;
- reasoning of some amendments of constitutional nature in view of adjusting the incomplete constitutional norms dedicated to the right to private property and expansion of the direct access to the constitutional jurisdiction for the protection of the fundamental right to private property.

Research hypothesis. The Constitution and the constitutional guarantees represent the core of cohesion and harmonisation of the entire system which safeguard the realisation of the right and fundamental freedoms, which determine the logical character of the legal subconstitutional framework in the area of human rights and fundamental freedoms. The declaration of constitutionality in the area

of protection of the private property right, as a fundamental right of a person, demands an increase in the degree of direct application of the Constitution, which has the role to create a strong fundament for the human rights and freedoms, to establish guarantees on the respect of rights, so that the protecting guarantees do not allow the change of the essence of the fundamental rights through ordinary means; direct application represents a guarantee of the loyalty towards the fundamental values protected by the constitution.

Synthesis of the research methodology and justification of the selected research methods. In the research process, we used both general and personal methods relevant to legal sciences, among which: the systemic analysis method, the logical method, the historic method, the dialectical method, the formal-dogmatic method, the formal legal method, the comparative-legal method, the sociological method etc.

The legal normative framework of the thesis is grounded in the Constitution of the Republic of Moldova, in the constitutional norms, ordinary laws, normative acts of other states, and in an array of international tools; additionally, we used extensively the data retrieved from the practice of courts, from the decisions and judgements of the Constitutional Court of the Republic of Moldova and of the European Court of Human Rights.

The theoretical aspect of the work ensues from the contributions of the following national and international scholars: I. Guceac, Gh. Costachi, A. Smochină, Gh. Avornic, A. Arseni, E. Aramă, T. Cârnaţ, V. Popa, E. Cojocari, V. Zaporojan, A. Băieșu, D. Pulbere, I. Deleanu, C. Bîrsan, V. Stoica, S. Băieș, S. A. Avakyan, S. S. Alexeev, G. N. Andreeva, M.V. Baglay, N.V. Vitruk, G.A. Gajiev, V. T. Kabyshev, O. E. Kutafin, V. V. Goshulyak, T. Ginsburg, D. S. Law, J. Sprankling, A. Rainer etc.

Scientific novelty and originality of the results of research consist in the evaluation of the sufficiency of the constitutional norms which create guarantees for the protection and respect of the fundamental right to private property. The research analyzes the quality of the constitutional vocation norms regarding the private property right and the constitutional justice through the prism of the theoretical-practical landmarks and the advanced experience of the European states. The profoundness and multidimensional nature of the research allow the development of proposals to modernise the constitutional framework of the Republic of Moldova with the aim to deepen the degree of embedment of the constitutional guarantees in the subconstitutional legislation governing the right to private property, to reinforce the judiciary practice of adjudication of litigations in this matter and to expand

the direct access of litigants to the Constitutional Court in line with the current trends in the area of constitutional justice.

The scientific originality of the work entails the combination of analytical techniques with elements of compared law which ensures a broad and multilateral approach to the topics investigated. Another characteristic of the research is the logical scrutiny applied to the content of some norms of the legal subconstitutional framework in the light of the constitutional guarantees of the right to private property, by identifying an imbalance between the wish to protect the public interest and severely limit the right to private property in certain areas such as the financial market.

The theoretical importance of the work lies in the multiaspectual research of the right to private property in the system of human rights and fundamental freedoms guaranteed by the Constitution from the perspective of historical evolution and compared analysis by suggesting some qualitatively new solutions to build the constitutional protection of the property right that will echo the trends of the modern constitutionalism at the regional and international level.

The applicable value of the work is determined by the possibility to translate into practice the recommendations formulated in the thesis by amending the constitutional norms which shall streamline the direct action of the constitutional norms in view of protecting the right to private property as a general value of the democratic society and as a vital and fundamental right of any individual.

Major scientific results to be defended

The norms of the Constitution of the Republic of Moldova form a complex, integral, and multifunctional system to enforce and protect the right to private property.

Adoption of the Constitution as the supreme law of the state guarantees the right to private property, generates the imminent impact of constitutionalisation of this fundamental right by reflecting the constitutional spirit, principles, and norms in the case law of the authority of constitutional jurisdiction, in the subconstitutional legislation, case law of the courts of law and in the activity of the public institutions.

The need to have an integral constitutional text and the (in)sufficiency of the text of the written Constitution is still subject of debates. The highly general and abstract nature of the constitutional norms could lead to neglect or treatment of the constitutional norms as simple statements. Thus, the protection of the right to private property requires the increase of the degree of direct application of

the Constitution. The direct application represents a guarantee of loyalty towards the fundamental values protected by the constitution.

The property right shall be protected as a vital need of a person against abuses, illegal expropriation, arbitrariness, and criminal persecution. The constitutional guarantees watch over the right of the owner to use and have control of their goods exclusively and perpetually, within the limits provided by the law and constitutional requirements. Through the spirit of the Constitution, the principles and guarantees to exercise the right to private property are interconnected with the duties of the owner to observe certain limits, to carry out certain tasks, and bear some consequences in relation to other owners or in the general interest of the society.

The constitutional guarantees are at the uppermost level in the system of legal guarantees, expressing the quintessence of the conceptual value of the protective functions of the state. Constitutional norms are not just statements having decorative functions, they represent special legal norms, separate from other norms, which act and shall be directly applied, independently from the fact that they were or not specified in the less abstract subconstitutional norms.

For the Republic of Moldova, the access to the Constitutional Court on exceptions of unconstitutionality represents an efficient way to defend the constitutional rights of the people and an efficient means to review the constitutionality of the normative acts that look at the rights and fundamental freedoms, including the right to private property, an extension of the mechanisms of protection of the human rights at the national level.

The implementation of the scientific results was approved in the lawyer's practice and carried out through the publication of theoretical conclusions and practical recommendations in scientific articles and through their presentation at national and international conferences which enriched the national theoretical and practical framework in the subject matter.

Approval of scientific results. The thesis was developed at the Doctoral School of Legal, Political and Sociological Sciences of the State University "Dimitrie Cantemir", specialty 552.01. CONSTITUTIONAL LAW. The work was assessed and approved by the extended guidance committee composed of seven specialists in the area.

Publications on the topic of the thesis – six scientific articles.

Volume and structure of thesis: an introduction, four chapters, general conclusions and recommendations, 161 pages of main text, a bibliography comprising 371 titles.

Keywords*:* Constitution of the Republic of Moldova, private property right, constitutional guarantees, the constitutionalization of property right, the right of land ownership, the financial-banking market, limitation on the private property right, internațional obligations, Constitutional Court, the exception of unconstitutionality, direct access to the authority of constitutional jurisdiction.

CONTENT OF THE THESIS

1. PRESENT STUDY ON THE SCIENTIFIC AWARENESS OF THE CONSTITUTIONALISATION OF THE PROPERTY RIGHT

The first chapter approaches some benchmarks of the constitutionalisation process of the law (without claiming these are exhaustive), related to the phenomenon of *rule of law* and constitutionalisation of the law, such as the concept of *constitutionalisation of the private law* and its content, determinant factors and some elements of compared law.

1.1. The Constitution of our country, adopted in 1994, expressly provides for, in art. 1, that the Republic of Moldova is a democratic state of law, in which the human dignity, their freedoms and rights, free development of the human personality, justice and political pluralism represent supreme values that are safeguarded. Thus, the new fundamental law has become a determinant factor and tool in the evolution of the political-legal system as a whole, as well as in the development of the legal order in our country, which goes beyond the acts of constitutional value which existed over the course of the history of our state [25, p.41]. The Constitution not only represents a simple totalization of the victories and achievements of society, but also proposes new development perspectives for society and the state, designing a program of activity, enshrining the fundamental principles of the entire economic, political, social and legal life of the state [1, p.7].

The doctrinal aspect of the local constitutionalism is reflected in many works that have been published lately in our country [21, 26, 22, 23, 24, 14, 2, 39, 7 etc.]. According to I. Guceac, the constitutionalism is a historic phenomenon that emerged together with the belief that wellbeing and justice can be achieved only with the support of the social self-governance. Therefore, the Constitution is the right of the society and not of the state. The goal of the latter is to defend the social priorities, freedom being the most important. In other words, the constitution defines the delimitation of the wellbeing and justice from the political power, thus regulating the relationships between the state and the society so that the state, being the guarantor of civil rights, ceases to politically control the society

[21, p.221]. Gh. Costachi rightly observed that currently there's no need to limit ourselves to the existence of the Constitution, to state and recognize its supremacy, its direct action on the societal relationships. In parallel, it is necessary to orient the attention of the state, of the society towards the essence, specificity, and importance of fulfilment of the Constitution, conscious and active involvement of everyone in this process to create, strengthen and jointly preserve a real and stable constitutional order dominated by the democratic principles of the rule of law [16, p. 73].

1.2. Property represents one of the oldest, important and broadly analysed institutions from the social, political, economic and legal viewpoint. In the contemporary epoch, the concept of property law represents the result of complex historical transformations of the legal thinking about the state and the law [45, p.214]. The institution of the property has been at the heart of the system of human conduct norms, from archaic societies until present days.

The evolution of the property law in the Romanian area demonstrates a direct connection between the territorial expansionism of the empires, political power, dictatorial regimes and the essence of the property law in certain historic periods on the territories beyond the Prut River, that is the former Bessarabia and the present Republic of Moldova.

The institution of the private property had reflected, in time, the feudal, capitalist and socialist characteristics for the regulation of the property relationships, and today, we witness the situation when it attempts fulfilling the difficult task to ensure stable, viable relationships under market economy conditions. The value of property in the Romanian area, in particular of real estate, represented the fundament which survived the times of unwritten law, securing the connection, unity and functionality of the key elements of the social life: economic freedom, labour, spirituality, capacity to administer, and justice.

According to the provisions of the 1866 Constitution, the right to private property had a sacred and inviolable character. The Constitution of 1923 also provides for the right to property, stipulating that the richness of the subsoil represents the state property, the property of any nature as well as the debts owed by the state shall be guaranteed, and it lays down that nobody shall be expropriated unless in case of public service situations and after a just and prior compensation enforced by the court of law.

After the unification of Bessarabia and Romania in 1918, three constitutions of the Romanian state were consecutively applied on the present territory of the Republic of Moldova: the Constitution

of 1866, the Constitution of 1923, and that of 1938, which was in force until 1944, when the Soviet troops took control over the territory of Bessarabia.

1.3. The change of the territorial-administrative subordination and the succession of the political regimes imminently brought major transformations in the regime of the property right, and in the system of property limitation and control over the property. The Soviet constitutions did not represent the product of the sovereign will of the people and were forcedly imposed. The socalled "constitutions" of the MSSR represent formal acts of political façade and the institution of the private property was not recognized either by law or by the state authorities. The private property was removed from the economic and social life, with a permanent preoccupation for the restriction of the citizens' property right. This is the period of state socialist property, cooperative property and personal property. The goods for personal use, as well as those used by the family members, would fall under the object of the property right. The majority of the goods, production means, including the lands, formed the state socialist property and belonged to the entire people, but, since the people did not have the quality of the subject of civil law, the socialist property right was exercised by the socialist state as a subject of public law.

After the fall of the communist regime, new regulations emerged in 1989 on the property right, foreseeing two forms of the property right: public and private property, followed by the provisions on the equal protection of private property, regardless of its holders with references to guarantees and protection of the private property.

The duty of the state to recognise, respect and protect the right to private property is an essential element in the constitutionalisation of human rights. The rule of law determines the degree of protection and application of the legal rights of the subjects of the private property right.

2. THE RIGHT TO PRIVATE PROPERTY IN THE CONSTITUTIONAL SYSTEM OF THE REPUBLIC OF MOLDOVA

Chapter 2 presents an analysis of the right to private property and its guarantees as elements of the constitutional law. Therefore, we examined the economic and legal components of the property and the legal conditions necessary for the economic component of the property to launch it in the legal circuit, whose vector is determined by the aims of the individual and of the society this individual belongs to. We analysed the general superior role of the constitutional norms to establish guarantees which are prominent in the system of legal safeguards, as well as the importance of direct, immediate

application of the Constitution – an overriding condition for the efficiency and functionality of the constitutional guarantees which ensure the exercise and protection of the right to private property. We made a synthesis of the international commitments of the Republic of Moldova regarding the protection of the right to private property and of the norms of the Constitution of the Republic of Moldova. Likewise, we described the goods that are protected by the effects of art. 9 and art. 127 of the Constitution and Article 1 of the Protocol No. 1 to the ECHR, by indicating the peculiarities of the establishment of the right to real estate in the Republic of Moldova.

2.1. The content of the constitutional right to private property is a complex reality. One of the main current trends is the intense broadening of the scope of the constitutional principles towards the area of private property. The Constitution includes core concepts, guidelines that form this legal model conceived to mirror the actual property relationships which develop in the society; this allows us to state that the role of the constitutional law is to protect the practical interest of the owners, to incentivise further development of other branches of law. The constitutional right to property encompasses, besides the subjective right to property, the protection guarantees of this right.

The literature review allows us to state that the problems in the implementation of the private property right in the constitutional system of the Republic of Moldova are insufficiently studied and they deserve closer attention. Different aspects of the property were approached in the works of the following local doctrinaires and practitioners: A. Băieşu [5]; M. Poalelungi [37]; V. Creţu, [18]; B. Negru, [32]; E. Cojocari [10]; D. Pulbere [39]; V. Puşcaş [40]; L. Chirtoacă [9]; A. Balan [4] etc.

The current issues related to property right are also tackled in the scientific works of the Russian constitutional scholars. Thus, the problem of the institutionalisation of the property right in the constitutional law is approached by V. V. Goshulyak [59, 58], G. N. Andreeva [54]; I. V. Prozorov [67] etc. The rapport between the subjects of the constitutional law, legal entities, and the people equated to these was treated by the renowned professor O. E. Kutafin [64]. The constitutional regulation of the private property is approached in several doctoral dissertations authored by L. R. Buhonova [56] and A. I. Vasilyanskaya [57]. The constitutional and legal regime of the property rights was reflected in the doctoral dissertation developed by J. M. Tsarikaeva [69]. The problem of the application limits and restrictions over the property relationships is approached in the work authored by A. A. Saurin [68]. The relationship between property, power and civil society was reflected in the monography of V. V. Grebennikov [60]. The study on the strengthening and implementation of the

constitutional guarantees of the private property right and private property protection are researched in the doctoral dissertations developed by K. V. Kachur [62]; M. S. Mazanaev [65] etc.

The fundamental principles of the Declaration of Sovereignty, the Declaration of Independence and the spirit in the Preamble to the Constitution of the Republic of Moldova on the supremacy of human rights and freedoms were transposed in a series of complex constitutional norms regarding the recognition and protection of the private property right, which define the economic nature, the correlation between the property and economic system, the social functions and legal safeguards of the property right. The constitutional norms on property or those supporting the exercise of the property right could be divided, conventionally, into several protection lines:

(i) Art.9, art. 33, art. 46 and art.128 expressly enshrine and guarantee the right to private property of the citizens of the Republic of Moldova, of individuals and legal entities, as well as of the stateless persons;

(ii) Art. 126 and art. 127 foresee the economic and social functions of the private property along with the public property, outline the duties of the state to establish conditions for the use of the property for economic reasons.

(iii) Art. 20 and art. 53 establish procedural guarantees to defend the property right by bringing the action into justice, including, against state authorities;

(iv) Art. 54 provides for guarantees against the illegal and disproportionate interferences into the exercise of the fundamental right to property.

(v) The norms on the Constitutional Court assure the respect of the constitutional guarantees in the process of regulation in areas affecting the constitutional guarantees aiming to defend the fundamental human right to property.

Thus, the institution of the private property, considering the specificity of its enshrinement in the Constitution, emerges as an institution of the constitutional law. Based on the norms on the private property right, multiple social, interhuman and interpersonal relations are being prioritized and regulated in the forms specific to the right.

2.2. Our research showed that the safeguards of the rights are not unanimously accepted in the doctrine. A comprehensive approach to the guarantees is proposed by A. S. Mordovets in the work "Теория государства и права: Курс лекций" (*The Theory of State and Law: lecture course*). According to the author, the guarantees represent "a system of socio-economic, political, moral, legal, organisational prerequisites, conditions, means and methods creating equal opportunities for

individuals to exercise their right, freedoms and interests" [66, p. 311]. The position of the estimable prof. S. A. Avakyan aligns to the same multidimensional perspective, thus defining the guarantees as "material, organisational, spiritual and legal conditions and foregoing prerequisites that transform the exercise of rights and freedoms into reality, as the fulfilment of a person or citizen's duties and assurance of their protection against constraints and illegal attacks" [53, p.804]. Based on the aforementioned, the availability of an array of guarantees determined from the perspective of a certain system providing for guarantees becomes obvious, hence the variety of classification criteria and the classification itself: general, special, individual, material, socio-economic, political, moral, legal, organisational guarantees etc. Therefore, we invoke the opinion of the doctrinaire B. S. Ebzeev, according to which "the guarantees determine the nature of the relationship between the person and the state, creates real preconditions for the exercise of rights and freedoms. But only in its entirety, in the relation of complementarity, they form a strong fundament on which to build the system of human constitutional rights realisation, since these rights cannot be assured only through economic or legal means" [70, p.25].

In the domestic practice and doctrine, the topic of the guarantees, human rights and freedoms is at the heart of discussions. Approaching the issue of guarantees, prof. I. Sedlețchi rightly noticed that this concept relies on the fundamental principles of humanity development: humanism, justice, lawfulness, equality etc. [44, p.235]. I. Creangă and C. Gurin, in their work "Rights and fundamental freedoms. The system of guarantees", define the legal guarantees as a set of social opportunities for a person to use all methods which are not prohibited by the law to protect their interests in the field of legal proceedings; thus, the authors highlight the person's active position [17, p.14]. U. Chetruș mentions two categories of safeguards: general-social (economic, political and ideological) and legal, attributing a special place to the legal ones. The legal safeguards of the citizens' rights and freedoms, in the opinion of the doctrinaire, "imply a totality of legal methods and means that support the realisation, protection and defence of the rights and freedoms, and the suppression of their infringement and restoration of violated rights" [8, p.311]. I. Moroșan refers to the totality of objective and subjective factors oriented towards the de facto realisation of the human rights and freedoms, removal of obstacles and limitation of the causes hindering their inappropriate realisation, as well as towards the protection of rights and freedoms against potential infringements [31, p.54]. I. Bâcu concluded that based on the analysis of the constitutional provisions, as well as of relevant literature, "one can identify the constitutional guarantees of the person's rights and fundamental freedoms that

refer to a) the functions of the state bodies; b) the constitutional provisions on the liability of the state and other subjects of law for the inappropriate realisation of the obligations in the area of rights and freedoms of the person; c) the constitutional provisions on the procedural guarantees for the protection and restoration of infringed rights and freedoms" [6, p.55].

Theories were developed on the classification of the guarantees for the protection of the human fundamental rights according to certain criteria; thus, to a great extent, the following are recognised: objective, organisational, special, and international guarantees [63, p.35]. The science of the constitutional law focuses mainly on the legal guarantees, i.e. those deriving from the Constitution, laws and other normative sources [55, p. 305]. Therefore, the main role in the system of the legal guarantees is played by the constitutional guarantees, directly enshrined in the Constitution and a series of legal acts regulating the basic social relations.

The purpose of the guarantees is to create an environment in which the proclaimed rights and freedoms become a *de facto* position for everyone. The availability of guarantees assures that the society and the citizens are confident that there's no right that shall not be used or applied. The rights, freedoms and duties of the person and of a citizen are deprived of a real content in absence of guarantees that would facilitate their realisation [34, p.253].

2.3. The Republic of Moldova has the general obligation to protect the fundamental right to property, to prevent and repress the violations of the property right and repair the prejudice brought to the affected right in line with the assumed international commitments. Thus, we shall mention the importance of the international, supranational guarantees which ensure the protection of the property right due to some standards that formed historically and were accepted by the world community, globally or regionally, thus bringing the protection of the property right to another qualitative level.

Although the ECHR case law is frequently invoked in the judiciary acts of the national courts, the number of applications lodged against Moldova is still very high: in 2018 Moldova ranked 5th out of the 47 Member States of the Council of Europe, with am addressability rate 2.5 times higher than the European average, which speaks of the low confidence in the domestic legal system. Based on the findings of the ECHR in the cases analysed in this work, we concluded that the Republic of Moldova shall enforce not only the negative obligations, by non-admitting the violation of the right to private property, but also the positive obligations, by adopting substantive and procedural mechanisms that are appropriate and sufficient for the regulation of the private property right in line with the European standards, both in the rapports between the state and private individuals, as well as in the rapports

between private individuals. The internal legal system shall protect the property right both through non-admission of illegal interferences, as well as by reducing the risk of violations of the private property right, repression of violations and provision of compensations for the loss suffered by the victims of the violation of the right to property.

2.4. Art. 9 of the Constitution of the Republic of Moldova refers to property in general, while the right to property is provided for in art. 46 of the Constitution. Para. (1) of art. 9 of the Constitution defines the content of property, which is composed of material and intellectual goods. Private property may concern any good, except the goods mentioned in art. 127 para. (4), which are exclusively public property. The objects of the property right protected through constitutional guarantees are the goods that represent any values useful to satisfy human interests.

At first glance, the constitutional norms analysed at 2.1. have an unlimited permissive character and do not foresee the goods that may be privately owned, except for the goods mentioned in para. (4) of art. 127 of the Constitution, which represent exclusively the public property. At the same time, the norms of the Civil Code (art. 315, art. 457) foresee the notion of the *civil circuit of the goods*, interpreted in the meaning that the law can limit or prohibit the free circulation of some goods which cannot be the object of the legal acts of civil law. Such exceptions are foreseen, for instance, in art. 5 of the Law no. 130 of 08.06.2012 on the regime of weapons and ammunitions prohibiting the procurement, possession, bearing, use, import, export and trade of some categories of weapons and ammunitions. Therefore, property right is not limitless, in the meaning of the goods that can belong to individuals and legal entities with property rights. The violation of such a limit shall entail the consequences foreseen by the law. We shall highlight that the forms of property are not immutable. They emerge, develop, change and disappear when the circumstances or the environment they exist in are changing.

2.5. The Republic of Moldova, like other former Soviet states, recognised the right to property on land, but the Constitution of the Republic of Moldova does not expressly regulate the real estate right, compared to the supreme laws of other states, which contain direct permissive provisions on the property on lands.

With the establishment of the national land legal framework, the evolution of the process of constitutionalisation of the right in this matter was greatly impacted by the vast case law of the Constitutional Court. In the process of carrying out the land and land ownership reform, the Constitutional Court had remarkably carried out its mission as a guarantor of the supremacy of the

Constitution, by issuing decisions to ensure the constitutionality of the land legislation, pronouncing numerous judgments on the Land Code and other normative acts in the land matter, which were decisive for the establishment of the right to real estate in the Republic of Moldova within the limits of constitutional guarantees [36, p.253].

3. LIMITS OF THE CONSTITUTIONAL GUARANTEES PROTECTING THE PRIVATE PROPERTY RIGHT

Chapter 3 approaches the constitutional obligations of the owner to observe some limits, to carry out some tasks and bear consequences in relation to other owners or in the general interest of the society, within the limits foreseen in the Constitution, by respecting some "common threads" found in art. 54 of the Constitution, delimiting the constitutional interferences from the legal and disproportional ones.

3.1. The constitutional norms analysed in subchapter 2.1., i.e. para. (2) art. 9, para. (2) art.127, para. (5) of art. 46, para. (2) of art. 46, para. (3) and para. (4) of art. 46, para. (4) art. 127, para. (2) art. 128, reveal the limitations and restrictions in exercising the property right.

Thus, the observance of the individual's fundamental property right does not exclude the imposition of some legitimate restrictions, within the limits determined by the Constitution, but these need to be well determined and clearly expressed, so that the restriction of any freedom could be easily recognised by the people concerned [50, p.14]. At the same time, art. 54 of the Constitution has certain "common threads" to delimitate the constitutional from the illegal and disproportional interferences: it is *prohibited to adopt laws that would suppress or diminish the human rights and fundamental freedoms* and there are criteria to review the constitutionality of interferences:

a) the restriction shall be foreseen in the law;

b) the restriction shall comply to the norms unanimously recognised by the international law;

c) the restriction shall be determined by a need in the general interest of the society;

d) the restriction shall be proportional to the situation which determined it and shall not affect the right or freedom.

Deprivation of property is one of the most serious interferences of the state in the exercise of the property right because it stripes the person of the goods they own, it "*destroys the property right"* by transferring the title from a person to the state, public authority or third party [51, p.134].

3.2. Expropriation is a notion used in the legislation of the Republic of Moldova for the transfer of the private property into public property, in the meaning of deprivation of property, in line with art. 1 of Protocol No. 1 of the ECHR. The law on expropriation on grounds of public interest, no. 488 of 8 July 1999 defines expropriation in art.1.

Para. (2) art. 46 of the Constitution establishes guarantees against arbitrary expropriation. The first constitutional condition for the protection of the right to property against abusive expropriation refers to the existence of a ground of public interest, established in line with the law. This condition is very important and helps to avoid the abuses, while the authorities must prove the *"a general public interest provided for in the law, that is obvious and demonstrated and, in it exercise of which the right to private property is affected".* [13, p.184]. Art. 2 of Law no. 488 as of 8 July 1999 delimitates the goods which may be entitled to expropriation on grounds of national or local interest, art. 5 describes the works of public interests, which justifies the expropriation, art. 6 provides for the declaration of the public interest in the sense and purposes of expropriation. An essential mandatory condition of expropriation that is imposed by the Constitution is the just and prior compensation, which justifies the idea that this is actually not expropriation, but an "*exchange of property, because a good or a reward covering the loss is offered instead of the expropriated good*" [13, p.184]. This condition is met if 1) the compensation that was offered is fully covering the cost of the good and the losses suffered subsequent to the expropriation and 2) the compensation was offered beforehand, prior to expropriation, not after the good was transmitted under the state's ownership. The right to just and prior compensation for expropriation derives from other constitutional provisions on the principle of justice, and is proclaimed as a supreme value and is guaranteed in para. (3) of art. 1 of the Constitution or the right of the party affected by a public authority to demand the compensation of the damage in line with art. 53 para. (1) of the Constitution [13, p.209].

Law no. 488 of 8 July 1999 was not commonly applied, which makes difficult the identification of problems related to the constitutionality of the legal regulations adopted in view of developing the reference provisions of art. 46 of the Constitution. The judicial practice highlights the availability of disputes arising from the expropriation of goods on the ground of public interest. The Constitutional Court issued a series of acts to settle the problems of the constitutionality of some legal norms having an impact on the property right through the lenses of expropriation: *Decision no. 11 of 11.05.2016 on the exception of unconstitutionality of the provisions of articles 377 para. (5) and 3715 para.(2) of the Law on financial institutions no.550 of 21 July 1995 (prohibition of transfer and*

withdrawal of monetary means from the bank accounts of the people affiliated to a commercial bank) [29]; Decision no. 30 of 01.11.2016 on the exception of unconstitutionality of article 19, para.(4), of the Law no. 303 of 13 December 2013 on the public service of water supply and sanitation [30]; Decision no. 69 of 14.12.99 on the review of constitutionality, art.14 para.(2) of the Law on energy no.1525-XIII of 19 February 1998 [28].

Violation of the right to the protection of property accounts for nearly 39% of the cases examined by ECHR against Moldova, including *Balan v. the Republic of Moldova no.19247/03, judgement of 29 January 2008, Article 1 of Protocol No. 1* – the quality of law in relation to the compensation for the violation of proprietary rights*; Dacia S.R.L v. the Republic of Moldova no. 352/04, judgement of 18 March 2008, article 6, Article 1 of Protocol No. 1* – lack of protection of private property following the annulment of privatisation in absence of convincing reasons and appropriate compensation; lack of protection aga1nst the discretionary competences of the state authorities to re-examine and annul the privatisation transactions [42, p.5]. On 26 June 2018, ECHR published its judgment in the case *Mocanu and Others v. Moldova, application no. 8141/07,* the Court having found the violation of Article 1 of Protocol No.1 to the ECHR Convention (protection of property), infringing the legal procedures of expropriation of agricultural lands owned by the applicants. This analysis reflects the fact that the norms on expropriation shall be enhanced, modernised and unified in view of actual protection of the right to private property [35, p.26].

3.3. The limits of the constitutional guarantees concerning the confiscation are analysed through the lenses of presumption of unlawfully acquired wealth, in the light of interpretations provided by the Constitutional Court, ECHR practice and the international instruments ratified by the Republic of Moldova. The constitutional norms and those embedded in the legal subconstitutional framework establish guarantees of the property right against the illegal and abusive confiscation of unlawfully acquired goods.

Art. 46 of the Constitution, para. (3), establishes the presumption of the unlawful nature of the acquired wealth: *the unlawfully acquired wealth cannot be confiscated, and the illicit nature of the acquisition shall be presumed.* Art. 46 of the Constitution, para. (4) refers to the *confiscation of proceeds of crimes or offences, in line with the provisions laid down in the law.* These guarantees are embedded and regulated within the legal subconstitutional framework: art. 501 para. (5), Civil Code; art. 536 para. (2), Civil Code; art. 542, Civil Code; art. 98, Criminal Code; art. 106, Criminal Code; art.106^1, Criminal Code; art. 330^2, Criminal Code; art. 439^7, Contravention Code.

The notion of *presumption* is commonly used in both criminal and civil substantive and procedural legislation. Since we did not identify any normative explanation of this term, we considered useful the explanations in the conclusions of Michal Bobek, advocate general in the case c-621/15 examined by the Court of Justice of the European Union [12]. Thus, the legal presumptions are elements of the civil and criminal legislation indispensably related to the probation in the civil and criminal process. Depending on the nature of presumption, the task of probation favours one of the parties to the litigation or to the case to be tried: either *pro* complaining party or *pro* defendant party [59, p.41]. In theory, legal presumptions are divided into absolute, *irrefragable*, those, against which no contrary proof is admitted and simple, relative, *refragable* presumptions which can be impugned, can be reversed by proof to the contrary; basically, every form of evidence is admitted [43, p.120].

The Constitutional Court has been referred to endorse the constitutional draft law for the removal of the text "*Lawful character of the acquisition is presumed"* from para. (3) of art. 46. The Court issued the positive opinion no. ACC1/2006 of 25.04.2006 [3] of the draft, stating that it shall not affect either the rights and fundamental freedoms of citizens or their guarantees. The constitutional norm establishing the presumption of the unlawful nature of the acquired wealth was interpreted and explained in a series of decisions of the Constitutional Court: no. 12 of 17 March 1997, no. 21 of 20 October 2011, no. 4 of 22 April 2013, no. 6 of 16.04.2015, in which the Court made reference to the presumption of the unlawful acquisition of wealth:

- the presumption established by paragraph (3), art. 46 of the Constitution does not prevent the investigation of the unlawful nature of the wealth, and the burden of proof rests upon the party invoking this nature. If the party concerned proves the unlawful acquisition of some goods by a person, these unlawfully acquired goods can be confiscated under the law;
- the lawmaker is free to establish the confiscation in all cases of unlawful acquisition of goods;
- the presumption of unlawful acquisition of goods represents the application of the principle of presumption of innocence enshrined in the Constitution and in the subconstitutional acts, as well as in the international human rights instruments.

Based on the interpretations of the Constitutional Court, the applicable international regulations, and the ECHR case law, we support the opinion that the presumption of unlawful acquisition of goods is a relative presumption, a proof determined by the constitutional norm, which can be refuted by contrary evidence [33, p.35]. In the same perspective, we noticed that such presumptions are absent in the constitutional acts of many European countries.

3.4. We analysed the subconstitutional legal framework regarding the limitation of the property right on the financial-banking market, based on the European policies and the ECHR case law outlining certain problems of constitutionality in the financial-banking legislation of the Republic of Moldova.

On the one hand, the regulations on the capital market aim to securely exercise the property right to the securities circulating on the capital market, including in the banking sector and on the other hand, they aim to serve the general public interest – functioning of the financial system which has to be stable and safe. Experts mention, among major objectives of the financial-banking regulations, the reduction of the systemic risks, the protection of investors, safeguards for minority shareholders, and a market based on the principles of fairness, efficiency and transparency. The regulations concern the issuers of securities, intermediate agents, bodies for collective investments, procedures for the issuance, primary placement of securities and their circulation on the secondary market, enhanced attention to majority shareholders, transactions between affiliated people that can get the control over issuers etc.

In the past few years, the legislation of the Republic of Moldova was subjected to multiple rather restrictive interventions, including the quality of securities holders, prior approval of acquisition of significant shares of securities of some issuers, and conditions for the ownership of a certain number of securities, which allows the exercise of control over the issuing entity. The rules of acquisition of the control packages and the consequences of the control situation, contrary to the applicable regulations, were changed and modelled according to the segment of the capital market that the activity of the controlled entity relies on. There is a constant instability of the legislative creation and of the Constitutional Court case law in this segment. In the last 6 years, the financial-banking legislation suffered multiple interventions that maintained some constitutional problems found by the Constitutional Court case law and that legislated restrictions which, in our opinion, differ from the policies of the European Union and from the practices of the developed countries in this area.

4. THE ROLE OF CONSTITUTIONAL JUSTICE IN THE DEFENCE OF THE RIGHT TO PRIVATE PROPERTY

Chapter 4 represents a study on the exercise of the constitutionality review by activating the mechanisms of the constitutional jurisdiction, in order to ensure the protection of the right as a social value and respect of fundamental rights guaranteed by the constitution against authorities' actions.

The chapter includes a synthesis of doctrinal approaches related to the constitutional justice and elements of compared law on the tendencies of the modern constitutionalism to secure the access of the individual to the constitutional justice, by outlining the role of the constitutional jurisdiction in the protection of the property right within the ECHR and advanced practices of the member states of the Venice Commission. We follow the evolution of the national legal framework regarding the individual access to the Constitutional Court, by outlining the gaps and reserves for the expansion of the direct access to the body of constitutional jurisdiction.

4.1. In compared law, the access of people to the constitutional justice is a controversial and less investigated topic. A separate role in assuring the constitutionality in the area of property relations is played by the constitutional review carried out by the Constitutional Court, established under art. 134 of the Constitution of the Republic of Moldova, which guarantees the supremacy of the constitutional norms on property. By virtue of para. (1) art. 134, the Constitutional Court is the only authority of constitutional jurisdiction in the Republic of Moldova.

According to V. Zaporojan, a former judge of the Constitutional Court, the emergence and development of the constitutional review constitutes one of the most important stages of constitutionalism [47, p.60]. The protection of human rights is one of the international and the legal duties of the state. The availability of the sanctions applicable in case of non-compliance with the provisions of the Constitution is of major importance because they attribute to the constitutional provisions the character of the legal norm and in their absence, the principle of supremacy of the constitution is a dead letter and it would be impossible to have a substantive distinction between constitution and ordinary laws" [27, p.54].

Modern constitutionalism is defined by its anthropocentric character based on human dignity, recognized as the supreme value of the state and society, whether the protection of dignity is or not enshrined in the text of the Constitution. Thus, the person acquired a central position in the constitutional law and therefore, their protection is the focus of the law and of the political power. When the restrictions in relation to individual freedoms are inevitable, they shall be legitimate, proportional and non-excessive [50, p. 11, p.14-16].

4.2. The comparative analysis of the experience of various states concerning the trends of the modern constitutionalism aiming to ensure the access of the individual to the constitutional justice showed that different systems of law apply specific forms of constitutionality review highlighting both positive and negative peculiarities. Today, the protection of human rights has become a prerogative

of the entire system of law. Constitutionalists put emphasis on the institutional openness of the right of the individual to access the constitutional justice for the protection of fundamental rights by lodging individual complaints against the norms that were or shall be applied in relation to the individual. The functionality and accessibility of the mechanisms for the constitutional adjudication have the power to induce definitive deep changes in the political and juridical culture, visible effects on the attitude and manner of action of the executive, legislative and judicial powers.

4.3. Citizens' direct access to constitutional justice through the procedure of removal of unconstitutionality exception is the most efficient mechanism for the penetration of the constitutional norms in the judicial system. Or, the constitutionality of the right cannot happen by itself, only by having sufficient norms in the Constitution. The viability of this phenomenon implies a volitional component, an element of political and judicial will creating conditions so that the constitutional norms are directly applicable and efficiently applied to the individuals who shall be entitled to invoke, in a dispute, the unconstitutionality exception of the applicable norms determining the solution in the tried case. The exercise of justice through the review of the constitutionality of laws is a "catalyser, a fundamental condition for the production of the constitutionalisation of the right" [46, p.109].

Contrary to other states that are members of the EU and/or to the ECHR, the citizens of the Republic of Moldova don't have the right to refer their matters directly to the Constitutional Court; they can have indirect access to the constitutional jurisdiction as litigants, via the courts of law, in a civil or criminal lawsuit. The norms of reference in this regard have considerably evolved in the past years. The role of the Constitutional Court was very active during the first years of independence of the Republic of Moldova, when the law-making process was extremely intense and indeed revolutionary, considering the urgent priorities to build the national legal framework in all areas, public authorities being obliged to respect the Constitution upon the adoption of normative acts to implement the policies reforming the economic and social systems. In the process of carrying out the land and land ownership reform, the Constitutional Court had carried out remarkably its mission as the guarantor of the supremacy of the Constitution through the decisions it pronounced in view of securing the constitutionality of the land legislation.

The decision of the Constitutional Court no. 2 of 09.02.2016, followed by the amendment to art.12^1 of the Civil Procedure Code represented an important step towards enhancing the individual access to the constitutional contentious court. There was an increasing number of referrals in 2019 compared to 2018: 235 referrals in 2019 compared to 212 referrals lodged in 2018. The share of

unconstitutionality exceptions in the jurisdictional activity of the Court was increasing compared to 2018: 82% of the total number of referrals lodged in 2019 were the unconstitutionality exceptions. Through the unconstitutionality exception, the Constitutional Court plays the role of guarantor of citizens' rights and fundamental freedoms as part of its fundamental function i.e. ensurance of the supremacy of the Constitution in the juridical system hierarchy [48, p.158].

The advanced experience of the European states and the recommendations of the Venice Commission allow us to deduce that there is room in the Republic of Moldova to improve the mechanism for the exercise of the constitutional review to increase the level of protection of citizens' fundamental rights.

GENERAL CONCLUSIONS AND RECOMMENDATIONS

The complex study on the doctrine and constitutional norms dedicated to private property, the analysis of the legal subconstitutional framework through the lenses of the norms, practices and international case law in the area of protection of the private property right allowed us to formulate the following general conclusions and recommendations:

1. The historical analysis of the institution of property in the Romanian area allowed us to note the direct relation between the political power, dictatorial regimes and the nature of juridical institutions during certain historical periods. These influences vary from the takeover and adjustment of progressive elements up to the change of the essence of the classical configurations of the private property right.
2. The change of political regimes led, imminently, to major transformations in the regime of the private property right, in the system of limitations and control of the property on the current territories of the Republic of Moldova. The natural evolution of property in the Romanian area, favourable to the progress, was put on hold at times when the right to private property was abrogated and the holders of such a right were persecuted or exterminated under false slogans.
3. The norms of the Constitution of the Republic of Moldova form a complex, integral and multifunctional system for the realisation and protection of property right. The constitutional norms under art. 9, 33, 46, 54, 126, 127 and 128 constitute the juridical form of property – an economic and juridical category – determine the place of property in the entire economic system of the society and at the heart of the human fundamental rights system, mirrors the relationships between people and the functions of the state in the process of production and distribution of material goods.

4. The constitutional guarantees express the quintessence of the conceptual value of the protecting functions of the state and are at the uppermost level in the system of legal guarantees. The constitution and the constitutional guarantees form the core of the cohesion and harmony of the entire system for the exercise of rights and fundamental freedoms determining the logical character of the legal subconstitutional framework in the area of human rights and fundamental freedoms.
5. The problem of having an integral constitutional text and the (in)sufficiency of the very text of the written Constitution is still a subject to be debated by constitutionalists. The generalising and abstract character is a separate quality of the constitutional guarantees, while the abstraction of the constitutional norms could foster tendencies of neglect and treatment of the constitutional norms as simple statements.
6. The subconstitutional legislation imposes the application of the Constitution in the activity of the legislator and of the administrative authorities in the pursuance of justice, however, the Constitution does not contain such norms.
7. We shall highlight the indispensable connection between the protection of the fundamental rights enshrined in the Constitution, such as the right to private property and the right to access justice in view of protecting the infringed right. At the same time, we could notice that the constitutional formula for the guarantees related to the protection of the right to property, limitation of this right, or sanctioning of the owner includes only references to the law (art.33 para. (2), art. 46 para. (2), (4), (5), art. 126 para. (2), art. 127 para. (4), art. 128 para. (2)), but not to the protection of justice. In our opinion, these norms are incomplete, because they reduce the degree of constitutional protection against abuses upon the regulation of norms regarding the forced cessation of the property right, against the will of the holder, as it is the case of forced sale and annulment of securities acquired without the authorization of the state competent bodies – NBM, NCFM. The administrative decisions of these authorities have as an effect the disestablishment of the right to property before and regardless of the solution of the court of law on (i) lawfulness of the administrative act. The administrative acts are, in essence, sanctioning acts depriving the holders of the acquired goods before the judicial verdict on the (un)lawful nature of the acquisition.
8. There is a lack of constitutional attention to land/plots as an object of the private property right. The Republic of Moldova recognized the right of property of land, but the Constitution of the Republic of Moldova does not regulate expressly the real property right, compared to the supreme laws of other states which contain direct permissive provisions on the real estate property. The real estate property,

"the fundament of the country", the natural and vital source for human existence, has been a lead value in the series of goods that can be the object of the private property right, right to land resources at the heart of the social economic reforms at all times and in all the countries.

9. Enforcement of rights regulated in the subconstitutional norms through the lenses of the guarantees enshrined in the Constitution would be illusory without the right of efficient access of the individual to the constitutional contentious court. The access to the Constitutional Court through unconstitutionality exception represents for the Republic of Moldova an efficient mechanism to defend the constitutional rights of the people and an efficient way to review the constitutionality of the normative acts with an impact on the rights and fundamental freedoms, an enlargement of mechanisms for the protection of human rights at the national level.
10. Decision no. 2 of 9 February 2016, by which the Constitutional Court opened the way to making more efficient the institution of unconstitutionality exception had an extremely beneficial impact in the area. The number of referrals lodged by the parties and by the courts of law through this tool is increasing. Of all lodged referrals, the share of unconstitutionality exceptions in the jurisdictional activity of the Court reached 82% in 2019.
11. The Constitutional Court of the Republic Moldova has gathered a positive practice in the area of fundamental rights protection. At the same, we have noticed that the reference norms in art.12^1 (current version) of the Civil Procedure Code regulating the indirect access to the Constitutional Court go beyond the limits of the amendments promoted in the Address of the Constitutional Court PCC-01/55 of 9 February 2016 by the Parliament of the Republic of Moldova.
12. At first glance, the lawmaker only made a clarification, a reinforced and corroborated interpretation of the provision of the Civil Procedure Code, which somehow facilitates the application of the previous paragraphs of art.12^1. But the judge has the authority to remove the exception of constitutionality of normative acts exclusively for the purpose and only during the settlement of a case – the judge can start this settlement in the court of law only after issuing a resolution undertaking that they accept the citation in line with art.168 of the Civil Procedure Code. When the exception of unconstitutionality has as object the scrutiny of a legal substantive norm determining the solution of the court of law on the merits of the dispute, the condition laid down in para. (5) art.12^1 does not affect the exercise of the right to access to the constitutional contentious court.
13. The realisation of the right to remove the unconstitutionality exception is equally important to ensure access to a legally established competent court of law, but the realisation of such a right may be

compromised by the application of certain norms of the Civil Procedure Code hindering the examination of the merits: the rejection of the application to reinstate the deadline for the execution of a procedural act – art.116, para. (5); refusal to accept for examination the citation – art.169, art. 459, para. (4); restitution of the citation – art.170; suspension of the lawsuit – art. 265, art. 266, art. 393, art. 459, para. (4); dismissal of the application – art.267, art. 268, art. 393; restitution of the application for appeal – art.369.

14. It is possible to overcome the access barriers in the examination of the merits of the case by lodging the second appeal in the higher courts, which adopt procedural solutions, hence, settle the case in line with para. (1) and para. (2) of art.12^1 of the Civil Procedure Code by applying relevant norms. Therefore, we believe that the removal of the unconstitutionality exception cannot be done a priori for all the cases before the acceptance of the citation, of the application for appeal, or of the application for the second appeal for examination on merits, as currently provided for under para (5) art.12^1 of the Civil Procedure Code.
15. The restrictions laid down in para. (5) art.12^1 of the Civil Procedure Code on the removal of unconstitutionality exception upon the examination of a second appeal against the decision or the judgement of the appellate court only when the application for the second appeal was declared admissible under the law, is, in our opinion, interference into the exclusive competence of the Constitutional Court, as provided for in para. 50, 82, 83, 101 of the Decision of the Constitutional Court No. 2 of 09.02.2016, since ordinary judges block the access of the parties to the constitutional jurisdiction body by the inadmissibility of the second appeal.
16. In our opinion, the gaps in the norms provided for in art.12^1 of the Civil Procedure Code under the current version are determined by the fact that the lawmaker failed to closely follow the Decision of the Constitutional Court No. 2 of 09.02.2016 and the Address of the Constitutional Court PCC-01/55 of 9 February 2016. The adoption of some extremely detailed conditions in para. (5) of art.12^1 of the Civil Procedure Code was due not only to some legislative techniques which are, in our opinion, ineffective. The Parliament did not comply with the Address of the Constitutional Court PCC-01/55 of 9 February 2016 in the part related to the appropriate amendment of art.4 para. (1) l. g), art. 25 of the Law on the Constitutional Court, as well as art. 4 para. (1) l. g) and art. 38 of the Code of Constitutional Jurisdiction, norms that shall determine the need, nature, and content of the reference norms in the Civil Procedure Code.

17. Indirect access of litigants to the Constitutional Court of the Republic of Moldova does not fully meet the criteria of an internal efficient remedy as laid down in Article 13 and Article 35 of the Convention, considering the current limits for the removal of the unconstitutionality exception by affected people and the mechanisms of the body of constitutional jurisdiction to award reparation for the claim for infringement of the right guaranteed by the Constitution.
18. In our view, the introduction of the institution of the individual constitutional second appeal into our legal system has become relevant.

In the event of initiating the process of Constitution revision in view of updating the Supreme Law, we shall come with some proposals to amend the constitutional guarantees having a direct impact on the realisation of the fundamental right to property:

1. *De lege ferenda*, we suggest a model of constitutional norm that would proclaim the principle of direct application of the constitutional norms safeguarding the fundamental human rights as it follows: "Article 4 para. (1) of the Constitution of the Republic of Moldova shall be supplemented with the phrase "*...and directly applicable*".
2. *De lege ferenda*, we see the need to strengthen the constitutional guarantee to broaden the formula to safeguard the property right, as it follows: "Article 46 of the Constitution of the Republic of Moldova shall be supplemented by inserting a new paragraph: *"(2)[1] Any interference of the state in the right of the person to enjoy their goods, with an effect of direct/indirect deprivation of property can take place only when there's an irrevocable court decision".*
3. *De lege ferenda*, in view of ensuring a more active role to the courts of law in the ex officio removal of the unconstitutionality exception, we propose the following amendments to art. 135 of the Constitution of the Republic of Moldova: *"Art. 135 para. (1) l. g) of the Constitution of the Republic of Moldova shall be supplemented by inserting the final phrase "by the national courts and by the national courts and courts of international commercial arbitration, which shall apply the legislation of the Republic of Moldova in disputes settlement".*
4. *De lege ferenda*, in view of establishing the right of a person to a direct constitutional second appeal, we propose the following amendments: *"Art.135 para. (1) of the Constitution of the Republic of Moldova, after l. a) shall be supplemented with l. a[1]) having the following content: "examines the constitutional second appeals of the persons lodged under the law, on the violation of a fundamental right guaranteed by the Constitution or an international treaty Moldova is part to through acts or omissions by a public authority or through an irrevocable decision;"*.

5. *De lege ferenda*, we think it's appropriate to exclude para. 5) of art. 12^1 of the Civil Procedure Code. Removal of the unconstitutionality exception of the legal norms applicable for the settlement of specific cases shall be possible at any stage of the proceeding, at the level of the court of law, appellate court and in the case of the second appeal.
6. We are in favour of amending the subconstitutional legislation so that the unconstitutionality exception can be removed not only before the common law courts, but also before courts of commercial arbitration which deploy a jurisdictional activity based on the arbitration convention.
7. The Constitution has also the mission to recognise the value of some lessons from the history of the state that concern certain processes and events, such as the forced nationalisation and the mass persecution of holders of real estate rights and production means. Therefore, it is appropriate to introduce direct prohibitions in the Constitution in the meaning of historic condemnation and prevention of violation of the principle of inviolability of the private property. Likewise, it is relevant to provide for, at the constitutional level, the prohibition of nationalisation or of any measures of forced transfer of goods into public ownership on grounds of social, ethnic, religious, political affiliation of holders or on other discriminatory grounds.

Potential future research directions related to the investigated topic:

1. The legal-constitutional regulation of forms of property on land in the RM.

2. Case law of the Constitutional Court of the Republic of Moldova on the limitation of the exercise of the property right.

3. Impact of the property right on other fundamental rights, i.e. on political rights.

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ADNOTARE

Păduraru Olga, „Dreptul de proprietate privată, garanții constituționale și limitele acestuia”, teză de doctor în drept, Chișinău, 2020

Structura tezei: introducere, patru capitole, concluzii generale și recomandări, 161 pagini de text de bază, bibliografie din 371 titluri. Rezultatele obținute sunt publicate în 6 lucrări științifice.

Cuvinte-cheie: Constituția Republicii Moldova, drept de proprietate privată, garanții constituționale, constituționalizarea dreptului de proprietate privată, dreptul de proprietate funciară, piața financiar-bancară, restrângerea dreptului de proprietate privată, angajamente internaționale, excepția de neconstituționalitate, acces direct la organul jurisdicției constituționale.

Domeniul de studiu: specialitatea 552.01 - Drept constituțional

Scopul lucrării constă în evaluarea suficienței garanțiilor constituționale de protecție a dreptului de proprietate privată și identificarea rezervelor pentru sporirea gradului de aplicabilitate directă a normelor constituționale în procesul de realizare a acestui drept fundamental, inclusiv prin eficientizarea accesului direct la contenciosul constituțional.

Obiective de cercetare: abordarea instituției dreptului de proprietate privată, a garanțiilor și limitelor acestuia, ca elemente ale dreptului constitutional, evaluarea conceptului de constituire a dreptului de proprietate în Republica Moldova; expertizarea compatibilității cadrului constituțional național în domeniul protecției dreptului de proprietate cu normele Convenției CEDO și jurisprudența CtEDO; argumentarea unor schimbări în vederea ajustării normelor constituționale lacunare.

Noutatea și originalitatea științifică a cercetării constă în evaluarea suficienței normelor constituționale care creează garanții de protecție și respectare a dreptului fundamental de proprietate privată. Cercetarea analizează calitatea normelor de vocație constituțională privind dreptul de proprietate privată și justiția constituțională prin prisma reperelor teoretico-practice și a experienței avansate a statelor Europene. Profunzimea și caracterul multidimensional al cercetării a permis elaborarea unor propuneri de modernizare a cadrului constituțional al Republicii Moldova, cu scopul a aprofunda gradul de penetrare a garanțiilor constituționale în legislația infraconstituțională, a consolida practica judiciară de adjudecare a litigiilor la acest obiect și de a lărgi accesul direct al justițiabililor la Curtea Constituțională, urmând tendințele actuale.

Rezultatele obținute care contribuie la soluționarea unei probleme științifice importante rezidă în identificarea aspectelor lacunare ale mecanismelor constituționale de reglementare și protecție juridică a dreptului de proprietate privată în Republica Moldova, fapt care a determinat fundamentarea intervențiilor de natură constituțională, în vederea eficientizării acțiunii directe a nomelor constituționale și elaborării unor propuneri de completare a garanțiilor constituționale cu impact direct asupra realizării dreptului fundamental de proprietate.

Importanța teoretică a lucrării constă în cercetarea multiaspectuală a dreptului de proprietate privată în sistemul drepturilor și libertăților fundamentale ale omului, care sunt garantate de Constituie, din perspectiva evoluției istorice și a analizei comparate, cu proiectarea unor soluții calitativ noi de consolidare a protecției constituționale a dreptului de proprietate, în concordanță cu tendințele constituționalismului modern la nivel regional și internațional.

Valoarea aplicativă a lucrării rezidă în posibilitatea materializării practice a recomandărilor formulate în teză prin modificarea normelor constituționale care vor eficientiza acțiunea directă a acestora în vederea protejării dreptului de proprietate privată ca valoare generală a societății democratice și ca drept vital și fundamental al oricărui individ.

Implementarea rezultatelor științifice a fost probată în activitatea de avocat și în publicarea concluziilor teoretice și a recomandărilor practice în articole științifice.

ANNOTATION

Păduraru Olga, „The private property right, constitutional guarantees and its limitations", PhD thesis in law, Chișinău, 2020

Thesis structure: introduction, four chapters, general conclusions and recommendations, bibliography of 371 titles, 161 pages of main text.

The research results have been published in 6 scientific articles.

Key words*:* Constitution of the Republic of Moldova, private property right, constitutional guarantees, the constitutionalization of property right, the right of land ownership, the financial-banking market, limitation on the private property right, internațional obligations, Constitutional Court, the exception of unconstitutionality, direct access to the authority of constitutional jurisdiction,

Research area*:* specialty 552.01-Constitutional Right.

The research goal and objective: The research goal consists in the determination of sufficiency of constitutional guarantees for protection of the private property right and identification of the possibility to increase the level of direct applicability of constitutional norms on the process of fulfillment of the given basic right, including through increasing the efficiency of direct access to the constitutional justice. For achieving this goal there were formulated the following **objectives for the research**: historical analysis of the property right institute; approach to the institution of the right to private property, of its guarantees and limitations, as elements of the constitutional right; assessment of the concept of formation of the private property right in the Republic of Moldova; assessment of compatibility of the național legislation in the field of property right protection with provisions of the ECHR Convention and ECHR jurisprudence; justification of some changes aimed to improve the constitutional norms and enhance direct access to the constitutional jurisdiction.

Scientific novelty and originality consist in the assessment of sufficiency of the constitutional norms providing guarantees on protection of the basic right for private property and identification of aspects connected with direct link between direct application of the constitutional norms and direct access to the constitutional justice.

The significant scientific problem solved in the research consists in the multilateral research and identification of the imperfection of constitutional mechanisms regulating and legally protecting property right in the Republic of Moldova for the purpose of increasing efficiency of direct application of constitutional norms according to the highest standards and the advanced practices.

Theoretical significance is conditioned by the comprehensive study of the property right in the system of fundamental human rights and freedoms guaranteed by the Constitution with account of historical evolution and comparative analysis for the purpose of development of qualitatively new decisions on consolidation of constitutional protection of the property right that correspond to the trends of modern constitutionalism at the regional and internațional levels.

Practical value of the research is determined by the possibility of practical materialization of the recommendations formulated in this work through changing the constitutional norms that will increase efficiency of their direct application aiming at the protection of the property right as a social value of democratic society and as a vital right of each individual.

Implementation of the scientific results has been proven in the activity of lawyer and in the publication of theoretical conclusions and practical recommendations in scientific articles.

АННОТАЦИЯ

Păduraru Olga, «Право частной собственности, конституционные гарантии и ограничения», докторская диссертация в области права, Кишинев, 2020

Структура диссертации: введение, четыре главы, общие выводы и рекомендации, библиография из 371 наименований, 161 страниц основного текста.

Полученные результаты опубликованы в 6 научных работах.

Ключевые слова: Конституция Республики Молдова, право частной собственности, конституционные гарантии, конституционализация права частной собственности, право собственности на землю, финансово-банковский рынок, ограничение права частной собственности, международные обязательства, исключение неконституционности, прямой доступ к конституционному правосудию.

Область исследования: специальность 552.01- Конституционное право.

Цель и задачи работы: Цель работы состоит в определении достаточности конституционных гарантий защиты права частной собственности и идентификация возможности повышения уровня прямого действия конституционных норм на процесс осуществления данного основного права, в том числе путем повышения эффективности прямого доступа к конституционному правосудию. **Задачи исследования**: исторический анализ института права собственности в румынском пространстве; исследование института права частной собственности, его гарантий и ограничений как элементов конституционного права, проанализировать становление концепции права частной собственности в Республике Молдова; оценить совместимость национального законодательства в области защиты права собственности с положениями Конвенции ЕСПЧ и юриспруденции ЕСПЧ; обосновать некоторых изменений, направленных на усовершенствование конституционных норм и расширения прямого доступа к конституционной юрисдикции.

Научная новизна и оригинальность работы заключаются в оценке достаточности конституционных норм, которые предусматривают гарантии по защите основного права частной собственности и выявление аспектов связанных с прямой связью между прямым действием конституционных норм и прямым доступом к конституционному правосудию.

Важная научная проблема, которая была разрешена, состоит в многостороннем исследовании и выявлении несовершенства конституционных механизмов регулирования и юридической защиты права собственности в Республике Молдова в целях повышения эффективности прямого действия конституционных норм согласно самым высоким стандартам и передовой практике.

Теоретическая значимость работы обусловлена многогранным изучением права собственности в системе гарантированных Конституцией основных прав и свобод человека, с учетом исторической эволюции и сравнительного анализа, с целью разработки качественно новых решений по консолидации конституционной защиты права собственности которые соответствуют тенденциям современного конституционализма.

Прикладная значимость работы определяется возможностью практической материализации разработанных рекомендаций в данной работе путем изменения конституционных норм которые повысят эффективность их прямого действия в целях защиты права собственности как общественную ценность демократического общества и как жизненно важное право каждого индивидуума.

Внедрение результатов исследования было осуществлено в деятельности адвоката, а также в публикации теоретических выводов и практических рекомендаций в научных статьях.

PĂDURARU Olga

THE PRIVATE PROPERTY RIGHT, CONSTITUTIONAL GUARANTEES AND ITS LIMITATIONS

552.01 - CONSTITUTIONAL RIGHT

Law PhD Thesis Abstract

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