

# The Right to Property in the Charter of Fundamental Rights of the European Union, Romania's National Legislation and the Case Law of the European Court of Human Rights

**Cristina Ramona Duță**

*Lecturer PhD, Faculty of Law, Ovidius University of Constanta, Romania  
duta\_cristina@yahoo.com*

**ABSTRACT:** During the communist regime between 1945-1989, the Romanian state, through various normative acts, took over private property goods to establish collective property. After the fall of the communist regime, a series of normative acts were adopted to return wrongfully taken property to the owners. This article aims to analyze, with reference to the normative acts adopted after 1989 and the jurisprudence of the European Court of Human Rights, to what extent the Romanian State has succeeded in ensuring an efficient mechanism for the restitution of property confiscated or nationalized by the communist regime, implicitly respecting the right to private property.

**KEYWORDS:** property rights, wrongful taking, Charter of Fundamental Rights of the European Union, Hauer v. Germany, Maria Atanasiu v. Romania

## Short introduction

In Romania, the legal regime of property in the communist state had as a predominant feature, in the field of property, the prevalence of collective property over individual property. The vast majority of socialist property came into being through the takeover of privately owned property (forests, farmland, mines, factories and even individual houses, the latter later demolished and replaced by some of the best-known symbols of the socialist regime - housing blocks), which together with the property already in state ownership created the two types of socialist property: cooperative and state socialist property.

In order to allow the takeover of private property, the legislator of the period 1945-1989 adopted a series of laws, which are now considered to be abusive, in disagreement with the Romanian Constitutions in force at that time. Thus, there are buildings that have been wrongfully taken over:

- a) real estate nationalized by Decree No. 92/1950 for the nationalization of real estate, with subsequent amendments and additions, by Law No. 119/1948 for the nationalization of industrial, banking, insurance, mining and transport enterprises, as well as by other nationalization acts;
- b) real estate seized through confiscation of property, following a court judgment of conviction for crimes of a political nature, provided for by criminal law, committed as a manifestation of opposition to the communist totalitarian system;
- c) real estate donated to the State or to other legal persons on the basis of Decree No. 410/1948 on the donation of graphic art enterprises, Decree No. 479/1954 on donations made to the State, etc., not concluded in authentic form, as well as real estate donated to the State or to other legal persons, concluded in the authentic form provided for in Article 813 of the Civil Code, in the latter case if the action for annulment or for a declaration of nullity of the donation has been admitted by a final and irrevocable court decision;
- d) properties taken over by the State for non-payment of taxes as a result of abusive measures imposed by the State, whereby the owner's rights could not be exercised;

- e) real estate deemed to have been abandoned on the basis of an administrative order or a court decision issued pursuant to Decree No. 111/1951 on the regulation of the situation of property of any kind subject to confiscation, confiscated, without heirs or without owner, as well as property no longer used by budgetary institutions, between 6 March 1945 and 22 December 1989;
- f) real estate taken over by the State on the basis of laws or other normative acts not published, at the date of takeover, in the Official Gazette of Romania, Part I, or in the Official Bulletin;
- g) real estate taken over by the State on the basis of Law No. 139/1940 on requisitions and which have not been returned or for which the owners have not received fair compensation;
- h) any other real estate taken over by the State with valid title, as defined in Article 6 para. (1) of Law No. 213/1998 on public property and its legal regime, as subsequently amended and supplemented;
- i) any other real estate taken without valid title or without observing the legal provisions in force at the time of the takeover, as well as those taken without legal basis by acts of disposition of the local bodies of power or state administration.

The Constitution of the Socialist Republic of Romania has limited the object of private property rights to the dwelling house and household buildings, the land on which they stand, and, according to the statute of agricultural cooperatives, production animals and small agricultural inventory (Article 9(3) of the Constitution).

In view of the extent of the measures to take over individual property into State ownership, it is obvious that a set of reparation laws must be adopted to allow, after 22 December 1989, either the restitution in kind of the property or the granting of fair compensation to the persons entitled.

### **Assets subject to reparation measures**

**Law No. 18/1991** created the necessary legislative framework for the retrocession of agricultural land, namely: productive agricultural land - arable land, vineyards, orchards, vine nurseries, fruit orchards, hop and mulberry plantations, pastures, hay meadows, greenhouses, solariums, seedbeds and the like -, land with forest vegetation, if not part of forestry planning, wooded pastures, those occupied by agro-zootechnical buildings and installations, fish-farming and land-improvement installations, technological and agricultural roads, platforms and storage areas serving the needs of agricultural production and non-productive land which may be developed and used for agricultural production; land used for forestry purposes, namely: wooded land or land serving the needs of cultivation, production or forestry management, land intended for afforestation and non-productive land - cliffs, ravines, boulders, gullies, ravines, streams - if included in forestry planning; land permanently under water, namely: minor riverbeds, lake basins at maximum retention levels, inland waterways and territorial sea bottoms; land within urban and rural settlements on which buildings are located, other settlement developments, including agricultural and forestry land.

**Law No. 112/1995** allowed the restitution in kind, by regaining the right of ownership, of apartments in which the former owners live as tenants or those that are vacant, and for the other apartments the granting of monetary compensation.

**Law No. 10/2001** was the most important step taken in Romanian society to regulate reparation measures granted to private owners of property taken over by the socialist state.

According to Article 1 of Law No. 10/2001 "(1) Buildings taken by the State, cooperative organizations or any other legal persons during the period from 6 March 1945 to 22 December 1989, as well as those taken by the State under Law No. 139/1940 on requisitions and not returned, shall be returned in kind, under the conditions of this law; (2) In cases where restitution in kind is

not possible, compensatory measures in equivalent form shall be established. Equivalent compensatory measures shall consist of compensation with other goods or services offered in equivalent by the entity entrusted under this law with the settlement of the notification, with the consent of the entitled person, or compensation granted under the conditions of the special provisions on the regime of establishment and payment of compensation related to wrongfully taken properties."

The law established, for the first time in the post-decembrist history, that the nationalization of private property was an abuse of the Romanian State, which contravened not only the provisions of the Romanian Constitutions of 1923, 1948 and 1965, but also the Universal Declaration of Human Rights of 1948. Thus, Article 17 of the Declaration proclaimed that "1) Everyone has the right to own property alone or in association with others; 2) No one shall be arbitrarily deprived of his property."

By entitled person, Law No. 10/2001 defined natural persons, owners of the real estate at the date of its wrongful taking; natural persons, associates of the legal person that owned the real estate and other assets at the date of its wrongful taking; legal persons, owners of real estate wrongfully taken over by the State, cooperative organizations or any other legal persons after 6 March 1945. The return of wrongfully taken property is conditional on proof of ownership at the time of the taking. The burden of proof lies, according to the Latin adage *actori incumbit probatio*, with the person seeking either restitution of the property or the granting of equivalent reparation measures.

**Law No. 247/2005** on the reform in the fields of property and justice, as well as some related measures adopted Title VII on the regime for the establishment and payment of compensation for wrongfully taken property, regulating *the sources of financing, the amount and the procedure for granting compensation for property that cannot be returned in kind*, resulting from the application of Law No. 247/2005. 10/2001 on the legal regime of certain properties wrongfully taken over during the period from 6 March 1945 to 22 December 1989, republished, of GEO No. 94/2000 on the restitution of certain properties that belonged to religious cults in Romania, with subsequent amendments and additions, approved with amendments and additions by Law No. 501/2002, O.U.G. No. 83/1999 on the restitution of real estate belonging to communities of citizens belonging to national minorities in Romania, approved with amendments by Law No. 66/2004, with subsequent amendments; also, the cases of granting compensation established under the Land Law No. 18/1991 and under Law No. 1/2000 for the reconstitution of the right of ownership of agricultural and forest land, requested according to the provisions of the Land Law No. 18/1991 and Law No. 169/1997, were put under this procedure. *In this way, an attempt was made to create a single - legal and institutional - framework for dealing with all situations where property confiscated by the state could no longer be returned in kind, and where respect for the rights of the former owners still required some form of redress.*

Finally, as a further argument of the legislator's intention to establish a unitary regime for the payment of compensation determined by the State under special laws, the inclusion within the scope of Title VII of situations for which a separate mechanism for the award of compensation already exists.

Thus, in Article 1(5) it was stipulated that the payment of compensation granted under Law No. 290/2003 will be made by the National Authority for Property Restitution, from the funds transferred for this purpose from the Ministry of Economy and Finance; it has thus come about that also for the property owned by Romanian citizens - land, buildings, crops - seized, retained or remaining in Bessarabia, Northern Bukovina and Herta Land, as a result of the state of war and the application of the Peace Treaty between Romania and the Allied and Associated Powers, signed in

Paris on 10 February 1947, compensation or indemnification is granted by an institution through Title VII of Law No. 290/2003, which is based on the provisions of the Law on the restitution of property. 247/2005.

The conclusion to be drawn from the analysis of Article 1 of Title VII of Law 247/2005 is that for all real estate taken over by the communist state, including land (in the countryside or outside it) or buildings - regardless of whether the time of takeover was indicated generically ("brought or taken over by the C.A.P." - Law 18/1991), regardless of whether they were confiscated from individuals (Law 10/2001) or legal entities, whatever their form of organization (commercial company, political party, non-profit-making legal entity - Law 10/2001, religious cult or national community organizations - O.U.G. 94/2000 and O.U.G. 83/1999 respectively), so for all properties taken over by the regime prior to 22.12.1989 ***which cannot be returned in kind the law provides only one alternative: compensation under the special law.***

The entry into force of ***Law No. 165/2013*** on measures for the completion of the process of restitution, in kind or compensation, of properties wrongfully taken over from the State during the communist period, during the settlement of the case, has indicated the institutional framework within which compensation is to be awarded and has established the concrete manner in which the compensation due will be calculated, and the court will also give effect to these legal provisions.

Adoption of Law No. 165/2013, which enshrines the principle of the immediate application of these legal provisions to notifications that have not been irrevocably resolved in administrative and/or judicial proceedings, including cases pending before the European Court of Human Rights, is the natural consequence of the case law of this European Court of Human Rights which, in a number of cases concerning violations of the provisions of Protocol 1 to the ECHR (e.g: *Viașu case*, *Faimblat and Katz case v. Romania*) identified a specific structural problem regarding the lack of restitution or compensation for nationalized assets, this European court *consistently noted the influence of the restitution system and in particular the delay in the compensation payment procedure.*

The European Court of Human Rights has stressed that "when a matter of general interest is at stake, the public authorities are bound to react in a timely, correct and most consistent manner" (*Vasilescu v. Romania*, 22 May 1998, f.51), "both the achievement of respect for property and the failure to react must strike a fair balance between the requirements of the general interest of the community and the imperatives of protecting the fundamental rights of the individual. In particular, there must be a reasonable relationship of proportionality between the means used and the aim pursued by any measure applied by the State, including measures depriving a person of his property. (*Atanasiu and Others v. Romania*, Decision of 12 Oct. 2010, p.67).

Law No. 165/2013 is a transposition into national law of the measures of a general remedial nature foreshadowed in the pilot judgment in the case of *Maria Atanasiu et al. v. Romania*, the Romanian legislator seeking through this normative act to implement in national law the principles of the ECHR in the field of respect for property rights and at the same time to maintain a balance between the general interest of the community, that is to say, between the legitimate objective of "public utility" and that of pursuing economic reform or social justice measures which militate in favour of a reimbursement below the current market value (*James and Others v. United Kingdom*, 8 July 1986, f.120) and the particular interests of the persons deprived of property who are entitled to benefit from these reparation measures.

*However, as the ECtHR has ruled in the above-mentioned case-law, in the situation of fundamental changes in a country's system, such as those presented by the transition from a totalitarian to a democratic regime of government and the political, legal and economic structure of the State, the adoption of large-scale economic and social laws on property restitution cannot*

*ensure complete justice in the face of the variety of situations in which the many persons concerned find themselves.*

It was thus held that the State has the right to expropriate property - including any rights to compensation enshrined in law - and to reduce the level of compensation by legislative means, recalling that what Article 1 of Protocol No. 1 requires is that the amount of compensation awarded for a deprivation of property by the State be "reasonably related" to the value of the property and that only a total lack of compensation is considered incompatible with Article 1 of Protocol No. 1.

Therefore, as Article 1 of Protocol No. 1 to the ECHR does not guarantee a right to full compensation in all circumstances, partial compensation is justified by legitimate public interest objectives. In this line of thought, the Romanian legislator, through Law No. 165/2013, sought a complete overhaul of the legislation on the restitution of property confiscated by the communist regime, leading to clear and simplified procedural rules, making the compensation system more predictable in its application, and the capping of compensation and their staggering over a longer period of time are measures to ensure this balance between the general interest of the community and the interests of former owners.

### **Respect for the right to property in accordance with the Charter of Fundamental Rights of the European Union**

The importance of guaranteeing the right to private property is also reflected in Community provisions. According to Article 17 of the Charter of Fundamental Rights of the European Union *“Everyone has the right to own, use, dispose of and bequeath property that he has lawfully acquired. No one shall be deprived of his possessions except in the public interest, in the cases and under the conditions prescribed by law and in return for fair and timely compensation for the loss he has sustained. The use of property may be regulated by law within the limits imposed by the public interest.”*

This article corresponds to the first article of the Additional Protocol to the ECHR which states that *“Every natural or legal person has the right to respect for his property. No one shall be deprived of his property except in the public interest and subject to the conditions prescribed by law and by the general principles of international law.*

The foregoing provisions shall be without prejudice to the right of States to enact such laws as they deem necessary to regulate the use of property in the public interest or to provide for the payment of taxes or other contributions, or fines.” It is a fundamental right common to all national constitutions. It has been repeatedly enshrined in the case-law of the Court of Justice, most notably in the Hauer judgment (of 13 December 1979 [1979] ECR 3727). The wording has been modernized, but under Article 52(3) this right has the same meaning and scope as that guaranteed by the ECHR, and the restrictions laid down therein may not be exceeded.

Also defining the principle of proportionality, Article 52 of the Charter states *“(1) Any restriction on the exercise of the rights and freedoms recognized in this Charter must be prescribed by law and respect the substance of these rights and freedoms. In accordance with the principle of proportionality, restrictions may be imposed only if they are necessary and only if they genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. (2) The rights recognized by this Charter which are the subject of provisions laid down in the Treaties shall be exercised under the conditions and within the limits laid down in the Treaties.”*

As stated by the Court of Justice of the European Union in Luxembourg in its judgment of 17 December 1970 in Internationale Handelsgesellschaft [1970] ECR 1125 and subsequently in its

judgment of 14 May 1974 in *Nold* [1974] ECR I-1125. 491), fundamental rights, including the right to property, form an integral part of the general principles of law, the observance of which it ensures; that, in protecting those rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, so that measures incompatible with the fundamental rights recognized by the constitutions of those States cannot be permitted in the Community; that international instruments for the protection of human rights, to which the Member States have cooperated or acceded, may also provide guidance which must be taken into account in Community law. This view was subsequently recognized by the Joint Declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case-law of the Court, refers, on the one hand, to the rights guaranteed by the constitutions of the Member States and, on the other, to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (OJ 1977 C 103, p. 1).

## Conclusions

Although respect for the property rights of persons entitled to reparation for property wrongfully taken by the Romanian State, either through restitution in kind or through the award of financial compensation, is well regulated in both national and Community law, as well as in the case law of the European Court of Human Rights, the restitution mechanism is far from effective.

In a recent decision of the European Court of Human Rights, the judgment in *Văleanu and Others v. Romania*, the Strasbourg court revealed the continuing inefficiency of the mechanism for restitution of property confiscated or nationalized by the communist regime, despite the new remedies available under Law No. 165/2013, which imposes an excessive burden on claimants by making it impossible to obtain restitution or any adequate compensation.

The ECHR stressed the importance of the Romanian State's obligation to take, in accordance with Article 46 of the Convention, additional general measures to address the persistent structural problem in the restitution mechanism, measures to simplify and clarify the procedures and criteria applicable when the execution of outstanding restitution decisions is objectively impossible, and the need for short, realistic and binding deadlines for the completion of pending administrative proceedings.

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