

# CONSIDERATIONS ON THE EXPROPRIATION IN THE ROMANIAN CIVIL LAW

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## **Abstract**

Expropriation due to the cause of public utility constitutes an exception from the characters of absoluteness and inviolability of the private ownership right. The law rules strictly and through certain levels the procedure to be followed in the case of expropriation. The essential effect of expropriation is the one of translating the expropriated immobile good from private ownership to public one, through a juridical decision and free of any charges. The law foresees special protective measures for the expropriated owner, even offering him the possibility of reacquiring, under certain conditions, the respective immobile good. The involved sides, meaning the organ entitled to decide upon the expropriation and the owner who is to suffer its effects have the possibility to amiably convene, at any moment of the expropriation's course, upon the transfer of the private ownership towards the state.

## **Key words**

Public ownership; public utility; just and previous damage compensation; retrocession.

## **1. INTRODUCTIVE NOTIONS REGARDING THE PUBLIC OWNERSHIP IN ROMANIA**

The ownership right is a fundamental right of the human being, which is particularly protected juridically in all systems of law. Ownership and freedom are tightly connected, ownership being even considered as a guarantee of modern freedom.

According to its juridical regime, the ownership right may be either public or private. Public ownership is exerted under the regime of public law only by the subjects of public law, meaning the state itself and its administrative-territorial units. The goods belonging to public property are in principle, un-alienable, un-prescriptible and un-seizable, since they are extracted from the general civil circuit. On the contrary, the right to private ownership, which may belong to whatever subject of law, either to an individual or moral person, including to the subjects of public law. The essential fact to remember is that its exercising has a different appearance, because the goods that are under private ownership are within the general civil circuit, even though some categories of goods among them may be submitted to special regulation.

In Romania, the general legal frame of public ownership is constituted, firstly, of constitutional dispositions, respectively article 136 paragraph 2: "Property is public or private", paragraph 2. "Public property belongs to the state and to its territorial administrative authorities", paragraph 4 "The goods that are public property are not alienable".

In the Civil Code, article 475, paragraph 2 orders in the sense that "The goods that do not belong to individuals are administrated and cannot be alienated unless according to the procedures and modalities prescribed by the law", so that in article 476 of the Civil Code are enumerated the goods that are part of the public domain. Finally, the frame law for this matter is constituted by the law no. 213/1998, on public ownership and its juridical regime. Into the

normative frame, public ownership is the one subjective ownership right which belongs to the state itself and to its administrative-territorial units, upon the goods which either by their own nature or through a special statement of the law, are of public use or utility.

According to the law, public ownership is acquired through various ways: 1) through public acquisitions made under the conditions of the law, through expropriation for the cause of public utility; 2) donation acts or legacies, accepted by the Government, by the county council or by the local council, if the good in cause should enter the public domain; 3) through the passage of goods from the private domain of the state or from the one of the administrative territorial units to their public domain, for the cause of public utility; 4) expropriation due to a cause of public utility; 5) any other ways stipulated by the law.

It is important to remind that, according to art.44 paragraph 4 of The Romanian Constitution "are forbidden nationalizations or whatever other measures of compulsory passage to the domain of public ownership of some goods, on the grounds of a discriminatory affinity of their owners, either social ethnic, religious, political or of whatever other nature"

## **2. THE EXPROPRIATION – REGULATION, NOTION, OBJECT**

### **2.1 REGULATION**

As a principle, the ownership right, which provides to its owners three assets: *jus utendi*, *jus fruendi*, *jus abutendi*, must be exerted "within then limits established by the law". In the Romanian Civil Law, there are several categories of limitations brought to the ownership right, such as: 1) Limitations issued from the neighbourhood relationship, in order to ensure a common mutual tolerance; 2) Limitations issued from the possibility owned by the public authority, to make use of the underground of whatever immobile property, stated by art. 44 paragraph 5 of the Constitution; 3) Limitations issued from the temporary cession of some goods towards the forces vowed to the national defence or towards the public authorities, in exceptional circumstances (the requisition of goods). The general interest may lead, in some situations, not only to the limitations of the exercise of some assets of the ownership right, but even the loss of the right to private ownership in regard to immobile properties – lands or constructions – which might pass to the ownership of the state (public ownership).

The expropriation for the cause of public utility is stipulated, with an exceptional character, in art. 41 paragraph 3 of the Constitution of Romania " No one could be expropriated, unless for a cause of public utility decided upon according to the law, with a just and previous reimbursement of the suffered damages". A similar statement is foreseen by the art. 481 of the Civil Code. On the other hand, at 27-th May 1994, was adopted the Law no. 33 on expropriation for the cause of public utility, that contains dispositions able to assure the legal frame that is adequate to the expropriation procedures and to the establishing of indemnities, but also the defense of the right to private ownership.

Expropriation for the cause of public utility is an exception from the absolute and inviolable character of the right to private ownership. It operates a qualitative transformation of ownership, from private to public, in the conditions of the law.

Expropriation consists in the compelled passage of some determined goods from private ownership to public ownership, in view of the satisfaction of necessities of national or local interest, after a right and previous indemnity granted, established through agreement or on the basis of a judge's decision.

## **2.2 OBJECT OF THE EXPROPRIATION**

May be expropriated real goods owned by individual or juridical persons, with or without lucrative purpose, and also the ones being in the private ownership of communes, towns, municipalities and counties. Are concerned the immobles by their nature (art. 463-464 Civil Code), inclusively the crops that are still rooted and the fruits in the trees, yet unpicked [art. 465 paragraph (1) Civil Code].

The buildings according to their destination should be expropriated only if they would be joined to the fund in a permanent way, not being possibly separated without their deterioration or without deterioration of the building itself.

The dismemberments of the ownership right are immobile, through the object to which they apply. By principle, they are extinguished through the expropriation of the property, but yet cannot form the object of a separate expropriation. Servitudes established through human deed extinguish only if they would become incompatible to the natural and juridical situation of the object of expropriation [art.28 paragraph (20)]. On the right to superficies, it was shown that its structure, that lies in the right to property upon a construction or a plantation on the field issued from another person, combined to the right of use existing upon the respective field, imposes the simultaneous expropriation of the field and of the construction or plantation.

## **2.3 GOODS EXEMPTED FROM EXPROPRIATION**

Cannot be expropriated the buildings that are public property which belong to the state or to the administrative-territorial units that are and could be affected to a public utility through the will of the competent authority. Cannot be expropriated neither the goods that are the private property of the state, because this one, as owner, might affect to a public utility whatever of its goods. For the goods that are the private property of the administrative-territorial units, if the public utility is of local interest, expropriation would not be required, but only a decision of the competent organ of passing the good in public ownership would be enough.

## **3. PUBLIC UTILITY AND ITS DECLARATION**

### **3.1 THE WORKS OF PUBLIC UTILITY**

Public utility is declared for works of national or local interest. The law establishes the categories of works considered to be of public utility that might cause expropriation, leaving open the possibility of declaration, for any other works than the stipulated ones for the public utility, for every case separately, by law [article 7 paragraph (3)]. So, the legal enumeration doesn't have a limitative power. According to article 6 of the Law no. 33/1994, are of public utility the works concerning: prospections and geological explorations; extraction and processing of useful mineral substances; installations for the production of electrical energy; ways of communication, opening, alignment and broadening of streets; systems of supply with electrical energy, telecommunications, gases, thermal supply, water, sewerage; installations for the protection of environment; dammings and regularization of rivers, accumulation lakes for water sources and attenuation of floods; derivations of flows for water alimentations and for the deviation of high floods; hydrometrological stations, seismic warning systems, irrigation systems and draining systems; works of reaction against the depth erosion; buildings and land necessary to the construction of social habitations and of other social objectives for education, health, culture, sports, social protection and assistance, for

public administration and for juridical authorities; the salvation, protection and the revaluation of monuments, ensembles and historical sites, and also of national parks, of natural reservations and of nature's monuments; prevention and removing of the effects of natural disasters; earthquakes, floods, land slidings; defence of the country, public order and national safety.

The jurisprudence of the European Court of Human Rights established that the evaluation limit of public utility would be flexible. Thus, in the cause *James vs. the United Kingdom of the Great Britain and Northern Ireland* it was stated that “the notion of public utility is ample by its nature”, the manner in which it might choose its economical and social policies, being at the state’s latitude.

The public utility of the expropriation is declared by the Government for works of national interest, or by the county councils and by the Local Council of Bucharest' Municipality for the works of local interest. It is declared by law when, no matter the nature of works, would be submitted for expropriation cult houses, monuments, ensembles and historical sites, graveyards, other institutions of special national value or entire urban or rural localities. For works of local interest that might take place on the territory of various counties, a commission is constituted, made of the presidents of the respective county councils.

### **3.2 PREVIOUS RESEARCH**

The declaration of the public use is made only after a previous research made by commissions especially named by the Government, by the permanent delegation of the county council or by the general mayor of the capital city. The Commission appointed by the Government is composed of: - the representative of public central administration who is in charge of the coordination of the domain for which the respective work should be realized; - the representative of the Ministry of Public Works, - the representative of the Ministry of Public Finances; - the president of the County (Department’s) Council; - the chiefs of staff of the respective departments; - the mayors of the localities where the respective work of public utility is carried on. The commissions appointed for works of local interest are composed the representative of the Department’s Council and the representative of the respectively interested local Councils.

Previous research will establish if there are elements that would justify national or local interest, economical-social advantages, ecological or of any other nature advantages that would sustain the necessity of the works and that could not be realized in other ways than through expropriation, with the framing in the urbanistical and territorial arrangement plans, approved according to the law. The minutes that consign the results of the previously made research will be handed over to the Government, to the county council or the Local Council of Bucharest Municipality.

### **3.3 THE ACT OF DECLARATION OF PUBLIC UTILITY**

On the basis of the results of the previous research will be adopted the act of declaration of public utility, that is brought to public knowledge through its posting at the headquarters of the local council in the range of which the building is situated and by its publishing in the Official Monitor (for public utility of national interest) or in the local press (for public utility of local interest). Are not submitted to publicity the acts through which is declared the public utility for works concerning the defense of the country and the national safety.

### **3.4 THE CONTROL OF LEGALITY FOR THE DECLARATION OF PUBLIC UTILITY**

Even if the law doesn't expressly stipulate that, once brought to public knowledge, the declaration of utility, gathering the elements of an act-condition that enables the initiation of the procedure of expropriation, would be submitted to the control of its legality in this stage it still is, by the Constitutional Court, (when public utility was declared by law) or by the court of administratively disputed claims (when utility is declared through Governmental decision or through an act of the organs of local administration), without being able to examine the opportunity of the administrative act.

## **4. MEASURES TAKEN PREVIOUSLY TO EXPROPRIATION**

### **4.1 THE DRAWING OF THE PLAN OF BUILDINGS SUBMITTED TO EXPROPRIATION**

In this stage, the expropriator makes the plan of the buildings proposed for expropriation, indicating the name of the owners and the offers of indemnity, that are deposited at the local council of the locality where are situated the respective buildings, in view of their consultation by the interested persons. The public administration must take measures so that the interested persons could effectively consult these documents. The law doesn't establish a deadline until which they have to be deposited, so that they will be deposited immediately after they are realized.

Are not deposited the documents of the works concerning the defense of the country and the national safety, situation in which is deposited only the list of buildings, concerned owners, and the offers of indemnity too.

### **4.2 NOTIFICATION OF THE OWNERS AND OF THE HOLDERS OF THE REAL RIGHTS UPON THE BUILDINGS AND THE MINUTES THAT CLOSE THE PREVIOUS PROCEDURE**

The expropriator is obliged, in a term of 15 days from publication and on its expenses, to notify to the holders of the real rights on the aimed buildings the proposal of expropriation and the minutes that close the procedure previously to the declaration of public utility.

### **4.3 RIGHT TO OBJECTION**

Concerning the expropriation proposals, the owners and the holders of other real rights on the buildings in cause can object in a term of 45 days from the receipt of the notification. The mayor will receive and register the objections and will consign the offers of indemnity and the claims of the owners and of the holders of other real rights, handing over the file containing all documents and objections, to the General Secretariate of the Government or to the county council.

Objections are solved in a term of 30 days by a commission constituted through a decision of the Government, through a decision of the permanent delegation of the county council or through a disposition of the mayor of the capital city. The commission is made of 3 specialists from the activity field in which is realized the work of public utility, 3 owners of buildings from the locality where are sited the buildings and the mayor of the locality. The commission works under the guidance of a delegate of the Government or of the county council, following the case, in the quality of president, who doesn't have the right to vote.

The commission might accept the point of view of the expropriator or might reject it. It comes to a motivated decision that is communicated to the sides in a term of 15 days from its adoption. If the sides do agree on the problems connected to the expropriation, the commission consigns this agreement, under their signature. If the proposals of the expropriator should be rejected, it may come back with new proposals, with an appropriate restructuration of the plans.

The decision of the commission is submitted to the way of attack through contestation that may be promoted by the interested side, in a term of 15 days from its communication, at the appeal court in the range of which is situated the building, according to the administrative disputed claims' office.

## **5. PROPER EXPROPRIATION AND ESTABLISHMENT OF INDEMNITIES**

### **5.1 COMPETENCY**

The solution of the demands concerning the expropriation fall into the competency of the law courts in the range of which is situated the building proposed for expropriation.

The law court is competent to verify if are gathered all conditions required by the law for the expropriation and to establish the quantum of the indemnities and the amount incoming to the owners, the holders, other holders of real rights or to other persons that can justify a legitimate interest upon the building. So, the court cannot analyse the substantial problems concerning the expropriation, limiting itself to the analysis only of procedure aspects. But, in the situation in which is demanded the expropriation, only of a part from a building, and in which the owner solicits total expropriation, the court will appreciate if, in balance with the real situation, partial expropriation should be or not possible, and if the case should occur, the next step would be to order the total expropriation.

In this stage is possible the agreement of the sides, of which the court will take notice by a decision of expedient (271-273 Civil Procedure Code). If the sides don't come to terms one with another or don't agree upon the extent of the indemnities, the court will proceed to their establishment.

### **5.2 THE COMMISSION OF EXPERTS**

For this purpose the court will constitute a commission of experts (one named by the court and one for each side). The experts will take into consideration the price for which are ordinarily sold the buildings of the same type, in the same locality, at the date of the closing of the expertise report, and also the damages brought to the owner or to other rightful persons [article 26 paragraph (2)]. Will be deducted the indemnities incoming to the owner from the ones that are due to other persons. In case of partial expropriation, if the part of the building remaining un-expropriated should increase its value following the works that should be realized, the experts might be able to propose a diminishing of the granted damages. That can happened, *exempli gratia*, in the situation in which was expropriated a part of a real estate in order to realize a highway or a railway that should facilitate the access to the area.

### **5.3 INDEMNITY**

The indemnity is composed of the real value of the building and of the prejudice caused to the owner and to other rightful persons.

The indemnity granted by the court cannot be smaller than the one offered by the expropriator nor larger than the one claimed by the expropriated or by the interested person.

Taking into consideration that the decision pronounced by the court is submitted to the ways of attack stipulated by the law, it is possible that, at the moment of the payment, the indemnity might not correspond to the real value of the building and to the quantum of the produced prejudice, so that interested persons could claim the bringing up-to-date of the quantum of the indemnity so that it could remain “right”, as the law foresees.

## **6. EFFECTS OF EXPROPRIATION**

### **6.1 MAIN EFFECT**

The expropriated building passes from private to public ownership, through judgment, free of any charges. The transfer of the property right is produced as soon as the obligations imposed through the judgment have been fulfilled. The judgment through which was disposed the expropriation does not represent through itself the executory title and it could not have a translative effect of ownership if the compensations should not be paid. The payment is made in any way agreed by the sides. In the absence of the sides' agreement, the court decides upon and establishes the term of payment that cannot be larger than 30 days from the date of the definitive remaining of the judgment.

### **6.2 OTHER EFFECTS**

The main real rights derived from the property right – usufruct, use, occupancy, superficies – and also the granting are cancelled through the expropriation effect, while the holders have the right to compensations. The servitudes established through man's deed are cancelled only if they had become incompatible with the new situation.

The mortgage right and the special movable personal privilege that lay upon the expropriated building are rightly displaced on the established compensations, the law regulating a case of legal subrogation with a particular title.

All personal rights obtained by other persons on the building, like those issued from location are cancelled. If the expropriation should have as object buildings with an inhabitation destination, the evacuation of the persons that legally occupy them is made only after obtaining the assurance by the expropriator of the space to be inhabited at the request of interested persons. The judgment would establish the modality in which should be solved the problem of habitation.

### **6.3 TAKING INTO POSSESSION**

We have to underline that the taking into possession by the expropriator is going to be made on the grounds of the executory title released on the basis of a conclusion of the court, that finds accomplished the obligations regarding the compensation, not later than 30 days from the date of payment. When the expropriation had as object cultivated lands or plantations, the entrance into possession is going to be made after the crops were gathered, excepting the case in which the value of the non-gathered crops was included in the compensations. Exceptionally, the court can dispose through judgment the entrance into possession by the expropriator, in case of extreme urgency imposed by the immediate execution of some works that interest the defense of the country, the public order and national safety, or in case of natural calamities. In this situation the expropriator has the obligation to register in term of 30

days, on the expropriators' name, the sums established as compensations (art. 32). It was proved as motivated that in this situation as well, the moment of the transfer of ownership is the date of the payment of the compensations, any other interpretation being illegal and unconstitutional.

## **7. SUPPLEMENTARY MEASURES AIMING TO PROTECT THE OWNER OF THE IMMOBILE GOOD WHICH IS MEANT TO BE EXPROPRIATED**

The Law on expropriation foresees certain measures meant to complete the regime of protection ensured to the private interest. First, in the circumstance where the expropriation decides to rent the expropriated immobile good in location, before using it for the declared purpose for which it has been expropriated, the former owner has the right to a priority for being the inhabitant of the respective immobile good.

On the other side, the law settled for the expropriated owner the right to ask for and obtain the retrocession of the expropriated building and the priority right at the conclusion of it from the expropriator. According to art. 35 from the Law no. 33/1994, if the expropriated real estates should not have been used in term of a year according to the aim for which they have been taken over from the expropriated, respectively if the works were not started, the former owners could ask their retrocession, if a new declaration of public utility would not be made. The retrocession demand will be addressed to the law court, which, verifying its grounds, might dispose the retrocession. The price of the building will be established as in the situation of the expropriation and cannot be higher than the actualised compensation (art. 36). The judgment of the law court is submitted to the legal ways of attack.

About the judicial nature of the retrocession right, it was motivated that it is a relative, opposable *erga certa personam* right, respectively only to the expropriator, patrimonial, main, pure, simple and prescriptible, executive in the general term of 3 years that starts to flow from the delay term of a year foreseen by the law.

Finally, under the circumstance where the works for which the expropriation was accomplished were not realized, and the expropriator decides to alienate the immobile good acquired through expropriation, the former owner *has the right to a priority in acquiring it* (pre-emption right). The price that the former owner should have to pay could not be larger than the actualised, previously received reimbursement. In this sense, the expropriator is obliged to communicate to the former owner, in written form, its intention of selling the immobile good; this latter benefits him of a term of 6 days to decide if or not he wishes to acquire.

Once, the term passed, the expropriator is entitled to dispose freely of the immobile good. The conclusion of the alienation act concerning the previously expropriated immobile good, with another person than the formerly expropriated owner as the priority right of acquisition, foreseen by the law in favour of this latter, is infringed, is sanctioned by the law by the relative nullity of the respective act.

## **8. CONCLUSIONS**

The public interest is the only reason, which justifies limitations of the ownership right, being able to lead even to the loss of the private ownership right on immobile goods to the advantage of the state. Under the conditions established by the Constitution of Romania, by the European Convention of the Human Rights, by the Romanian Civil Code and by the



special laws, the taking over is to happen only after a just and previous reimbursement of damages.

In the actual Romanian legislation, the expropriation has the feature of being usually seen as an exception, but its utility becomes more and more obvious, under the circumstances where the infrastructure requires extension works and where whole localities from flood-like zones require to be totally relocated. In order to create an equilibrium between, on one side, the public interest and, on the other side, the defence of the right to private ownership, the actual Romanian legislation (Law nr. 33/1994) tries to provide an unitary regulation of this matter, regarding the expropriation procedures as well as the establishing and granting of the just reimbursement due for caused damages.

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