The Legal Regime of Expropriation in Romania

Vasilica NEGRUŢ[1]

Abstract: The exercise of ownership of (private) property is not absolute, it may be subject to some restrictions, limitations. These limitations may be determined by the public interest and they may even lead to the loss of property through expropriation for public utility. The legal institution is being analyzed both by experts in civil law and by the administrative experts, and the expropriation for public utility, a measure having the exception feature granted by the Constitution and the Civil Code, is widely debated in the recent years, given the need to achieve some works that serve to the public utility. In this study we propose, based on the law, doctrine and jurisprudence, to deepen the legal regime of expropriation for the public utility. We specify that we consider only the legislative act that establishes the general legal framework of expropriation, which is Law no. 33 of 1994[2].

Keywords: expropriation; public domain; public property; legal regime

1. Introduction. Short Considerations on the Expropriation Evolution in Romania

The expropriation, a way of establishing the public domain based on a particular procedure, regulated by an organic law, experienced, over time, an evolution, most of the times, imposed by the contextual social development and it has depended on, as shown in the specialized literature, "*the way how it is seen the property itself*" (Podaru, 2011, p. 151). Thus, in ancient Greece, the expropriation was decided by the community, while in ancient Rome the expropriation was initially unthinkable, the property being considered an absolute right over the assets. Later, however, the expropriation for the case of public utility has been explicitly regulated in the imperial constitutions. (Podaru, 2011, p. 152)

[1] Professor, PhD, Dean of Faculty of Law, "Danubius" University of Galati, Romania. Address: 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: vasilicanegrut@univ-danubius.ro.

[1] Republished in Official Monitor no. 472 of 05.07.2011.

In the old French law, there was no question of expropriation, because the property was not an absolute right. Any real estate field considered two categories of property rights, i.e., eminent property, which belonged to the sovereign and useful property that belonged to the sovereign noble class. After the French Revolution of 1789, the King was stripped of his domain, the French nation became the true owner of the property in the public domain. However, the idea of private expropriation occurs, being seen as a means of "protecting private property against possible abuses of authorities", in accordance with the provisions of the Universal Declaration of Man and Citizen (David Beauregard-Berthier, 2007, p. 235).[1] This document officially establishes for the first time, the institution of expropriation, the right to ownership was proclaimed as a natural and intangible right, opposed to state sovereignty, proclaiming that no one can be expropriated, except for a case of public utility and only after a fair and prior compensation. (Giurgiu, 1997, p. 110)

In Romania, the expropriation for a case of public utility was regulated for the first time by Law for expropriation a case of public utility, in 20 October 1864, which underwent numerous changes to repeal Decree no. 417/1949, by the communist regime, which had just installed, the depositions of the law becoming incompatible with the political exigencies of the new government, concerned about the removal of the distinction between private law and public law regime. (Giurgiu, 1997, p. 110)

After 1989, by the new Constitution (revised in 2003), the right to ownership was considered, according to article 136, paragraph (5), an absolute right guaranteed and protected equally by the law, regardless of the owner (article 44, paragraph 2).

The adoption of Law no. 33/1994 on expropriation for a case of public utility was based on two articles of the Constitution, that establish the ownership limits, respectively, article 44, paragraph (3), according to which "*no one may be expropriated except in the case of public utility, established by law, with a fair and prior compensation*" and article 44 paragraph (5) "*for works of general interest, the public authority may use the subsoil of any real estate, with the obligation of compensating the owner for the damage brought to the soil, plantations or buildings, and for other damages imputable to these authorities*."

As stated in its preamble, the Law no. 33/1994 was adopted by taking into account the exceptional feature conferred by the Constitution and the Civil Code, ceding by the expropriation of the right to private property, the "right whose protection is achieved by ensuring and protecting it by the law, equally regardless of its owner."

[1] According to article 17 of the Universal Declaration of Human and Citizen of August 26, 1789, ownership was declared an "inviolable and sacred" right, as opposed to the state sovereignty, and the expropriation could be imposed only for "public necessity" and only after a prior and fair compensation.

Law no. 33/1994 was subject to successive changes, due to cumbersome procedure used to implement it, especially in the development of the road network.[1]

It should be mentioned also that all the legislation in this area has been prepared in compliance with article 1 of Protocol no. 1, additional to the European Convention on Human Rights, according to which "*Every physical or legal entity is entitled to a peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the case of public utility and under the conditions provided for by law and by the general principles of international law.*"[2]

2. The Legal Regime of Expropriation

In the doctrine of the interwar period (Onişor, 1930, pp. 599-600), the expropriation is considered as that operation which aims at correcting the distribution, particularly the immobile assets for the benefit of social classes, whose interests rose to the rank of general interest of the State. Considered as an act of great importance in building the rule of law (Giurgiu, 1997, p. 112), Law no. 33/1994 contains provisions for expropriation procedure[3] and effective protection of the right to private property rights.

The legal nature of the expropriation was widely disputed among authors of civil and administrative law (Albu, 2008, p. 68). Thus, the first ones defined expropriation as "*a legal institution of public law that consists of forced purchase, with onerous title, for the case of public utility, under the law and under the judicial control, of private property assets*" (Chelaru, 2000 p. 26) or as a restriction / limitation of canceling the right to ownership. (Filipescu, 1993, p. 184)

The authors of administrative law define expropriation as a "forced crossing in the public property, by a judgment, of privately owned assets, with a fair and prior compensation, based on a case of public utility" (Balan, 2007, p. 82) or as "*a forcible transfer of ownership, in whole or in part of an immovable asset in the general interest and with a just and prior indemnity*." (Beauregard-Berthier, 2007, p. 229)

In the specialized literature it is shown that expropriation must be analyzed, before becoming a limit or a restriction of the right to private property, starting from the positive

[1] It is the Law no. 198/2004 on measures prior to the construction of highways and national roads, as amended by Law no. 184/2008 repealed by Law no. 255/2010 on expropriation for a case of public utility, necessary for achieving some objectives of national, county and local interest.
[2] The Protocol, entered into force on May 18, 1954, was ratified by Romania by Law no. 30/1994.
[3] According to Law No. 33/1994, the expropriation procedure comprises four steps: declaration of public utility (Chapter II); preparatory expropriation measures (Chapter III); Expropriation and establishing compensation (Chapter IV); paying the damages and the institution of the expropriator (Chapter V).

effects that it produces as a way of establishing the public domain, for the purpose of public interest and public utility. (Albu, 2008, p. 67)

From the content of the Law no. 33/1994 we conclude the following principles that determine the legal status of the institution: a) the expropriation is a means of forced acquisition of some immobile assets necessary for the execution of works of public interest (Giurgiu, 1997, p. 113); b) the expropriation is legal only in the case where there is a public utility. Otherwise, in the Romanian legal system it "is not designed the expropriation of private interest" (Podaru, 2011, p.151); c) the expropriation cannot be conceived without a fair and prior compensation; d) the expropriation is achieved under a special procedure established by the organic law in our legal system.

Originally conceived as a process of compulsory acquisition of public domain dependencies (Giurgiu, 1997, p. 114) subsequently the declared scope of work for which it is declared the public utility has expanded considerably. Thus, from the first Constitution of Romania it results that the public utility in the purpose of expropriation could declare the communicated works, sanitation and works for the defense of the country. The 1923 Constitution expanded the scope of the works for the declaration of public utility, including works of cultural interest, and also the works required by the general direct interests of the state and public administrations.

Currently, the scope of works for public utility is established by article 6 of Law no. 33/1994.[1] We appreciate that the list of public works in this article is not exhaustive, an aspect which can be notices from the interpretation of article 7, paragraph (3), which states that for any work other than those mentioned in article 6, the public utility is stated for each case, by law. According to article 5 of the law, public utility declares itself for the works of local or national interest, something that highlights the exceptional feature of this legal operation of acquiring public property.

The Constitution of 1938, article 16, paragraph (4) gave a definition of the notion of case of public utility, stating that it is "*likely to be useful simultaneously to all and everyone actually or eventually*".

[1] According to article 6 it belongs to public utility the following works: geological prospects and explorations: mining and processing minerals; plants for electricity production; means of communication, openness, alignment and widening roads; power supply systems, telecommunications, gas, heating, water, sewage; environmental facilities; dams and river control, reservoirs for flood control and water sources; derivations of flow capacity for water supply and for flood deviation; hydro-meteorological stations, seismic and warning systems and prevention of dangerous natural phenomena and alarming the population, irrigation and drainage systems; works for preventing deep erosion; buildings and land necessary for the construction of social housing and other social objectives: education, health, culture, sport, social security and assistance; public administration and judicial authorities; rescue, protection and improvement of monuments, and historic sites and national parks, natural reservations and monuments; prevention and eliminate the natural disaster - earthquakes, floods, landslides; defending the country, public order and national security.

The acclaimed Professor Cornelius Bîrsan, Judge at the European Court of Human Rights considers that the notion of "public utility" is not as accurate as possible, it does not require a special demonstration, being related to a concept as vague as the "general interest" (Bîrsan, 2010, p. 1716). The quoted author considers that what is specific to the European system in this area, however is imposing the international control exercised by the European Court on "*their assessment achieved by the states on how they intend to sacrifice economic interests of individuals in the private domain by depriving them of their property, by bringing to the fore some general interests."*[1]

Therefore, the public interest is determined by the purpose of the expropriator (the state or the territory-administrative units), which will always consist in carrying out works of public utility (Albu, 2008, p. 70). The Public utility declaration, issued in compliance with article 8 of the law[2], meets, as described in the specialized literature, all the elements of an administrative action (Giurgiu, 1997, p. 117). In the jurisprudence[3] it was stipulated that the act retains this feature, even if takes the form of law, and statements emanating from the local councils are genuine administrative acts of authority, subject to the control of the courts based on the Law of administrative contentious.

Regarding the compensation, it must be "prior and fair", as mentioned in article 1 of the law. This principle requires the expropriator[4] the obligation to fully cover the damages suffered by the landlord and the other holders of the real rights over property subject to expropriation. As shown in article 26 of Law no. 33/1994, the "*compensation consists of*

[1] The Court's decision on the cause JAMES ET AUTRES c. Royaume-UNI (February 1986) states that the term "public interest" is broad in its own nature, so that the taking of property according to the laws involve the examination by competent state authorities of the economic, political and social problems, to which there may be profound differences in a democratic state. The Court considers it natural for the national legislator to have the freedom for pursuing a particular economic and social policy and to comply with the way it conceives the imperatives of "public interest", unless this assessment proves manifestly its lacking of any national basis (paragraph 46). http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-62065#{%22itemid%22:[%22001-62065%22]}; http://jurisprudentacedo.com/Cauza-Burghelea-impotriva-Romaniei-Expropriere-de-fapt.-Obligatia-statului-de-a-expropria.html (paragraph 35); http://www.hotararicedo.ro/index.php/article_access/view_article/249 (pt. 2.2).

[2] For the declaration of public utility it is required in all cases, according to article 8 of Law no. 33/1994, conducting a preliminary investigation which will determine whether there is evidence supporting the national or local interest, the economic and social, environmental or any other benefits, supporting the need of works and it cannot be achieved in other ways than by expropriation and integrating it in the urban plans and territory landscaping approved according to the law - Constitutional Court Decision no. 105 of February 27 2014, published in the Official Monitor no. 371 of 20 May 2014 (http://www.legalis.ro/2014/05/22/opinie-separata-la-decizia-curtii-constitutionale-nr-105-din-27-februarie-2014/).

[3] Decision no 17/1931 of the High Court of Cassation and Justice, Section III; Decision no. 287/1935 the Court of Appeal, Section IV, quoted by (Tarangul, 1944, p. 377).

[4] According to article 12, paragraph (2), it can be expropriator the: State, by bodies designated by the government, for the works of national interest, and counties, cities, towns and villages, for the works of local interest.

the actual value of the building and the damage caused to the owner or other entitled persons. When calculating the amount of compensations, the experts and the court will take into account the price used for selling buildings of the same kind in the administrative-territorial unit, at the date of the report, and also the damage brought to the owner, depending on the case, to the other entitled persons, taking into account the presented evidence."

The specialized literature shows that in practice the expropriation is rarely disputed. Most often there are invoked the compensations[1] (Podaru, 2011, p. 215). The same author points out that this issue requires the analysis of the following aspects: general principles of establishing damages; the judicial procedure of establishing damages; the elements of compensation; the time when it was determined the amount of movement of property subject to expropriation[2]; sharing the compensation between the various entitled persons. Without going into a detailed analysis of these issues, it can be found in the doctrine and judicial practice that compensation should be paid in money, to be complete and to cover all the damage caused by expropriation.[3]

In our opinion it is very important the provision in article 28, which sets the time of ownership of property transfer on the assets subject to expropriation, i.e. the fulfillment of the obligations imposed to the expropriator by court order. In the absence of an agreement between the parties, the court determines the method for the payment of compensation, a term which cannot exceed 30 days from the date of the final judgment (article 30).

The issuance of the enforceable title and the institution of the expropriator are achieved later, based on the conclusion of the court, which finds the fulfillment of compensation within 30 days since its payment.

3. Conclusion

Since 1989, the right to private ownership has been redesigned. Considered by the Constitution (article 136, paragraph 5) an absolute right guaranteed and protected equally by the law, regardless of the holder (article 44 paragraph 2), the ownership has certain limits set by the very fundamental act, one of which being the possibility of expropriation for a case of public utility. Expropriation for the case of public utility is an "exorbitant way of acquiring public property" as a way in which the state or administrative - territorial units

[1] http://legeaz.net/spete-civil-HCCJ-2010/decizia-401-2010. By the decision no. 404 / A of the June 8, 2010, the Court of Appeal of Bucharest determined that the market value of a property is given by the "supply and demand game itself and not the price limits set by the public notaries guide at the county level." See also (Florescu, 2011, p. 115).
[2] http://www.judiciarapractica.com/2013/11/expropriere-termenul-de-la-care-se-pot.html; http://legeaz.net/spete-civil-iccj-2009/decizia-4988-2009.
[3] http://legeaz.net/spete-civil-iccj-2010/decizia-4386-2010.

acquire ownership in view of a general interest. The legal regime for the expropriation for the case of public utility is determined by the principles from Law no. 33/1994, on the basis of the provisions of the Protocol 1, additional to the European Convention on Human Rights, which take into account: the legality of the measure (deprivation of property); to be determined by a case of public utility, after a just and prior compensation; to be according to the principles of international law and proportionate to the aim pursued in establishing the expropriation.

4. References

Podaru, Ovidiu (2011). *Drept administrativ, vol. II, Dreptul administrativ al bunurilor/Administrative Law, vol. II, Administrative Law of assets*. Bucharest: Hamangiu.

Apostol, Tofan Dana (2004). *Drept administrativ/Administrative Law*. Vol. II. Bucharest: All Beck.

Beauregard-Berthier, Odille de David (2007). *Droit administratif de biens*/*Administrative Law of assets.* 5th Edition. Paris: Editeur Gualiano, EJA.

Giurgiu, L. (1997). *Domeniul public*/*Public domain.* Bucharest: Tehnică. Seria Repere Juridice.

Albu, Emanuel (2008). *Dreptul administrativ al bunurilor/ Administrative Law of the assets*. Bucharest: Editura Fundaţiei *România de Mâine.*

Chelaru, E. (2000). *Curs de drept civil. Drepturile reale principale*/*Course of Civil Law. The Main real rights*. Bucharest: All Beck.

Baias, F. & Dumitrache, B. (1994). Discuţii pe marginea Legii nr. 33/1994 privind exproprierea pentru cauză de utilitate publică/ Discussion on the Law no. 33/1994 on expropriation for a case of public utility. *Dreptul/The Law* no. 4/1995.

Bălan, Emil (2007). *Dreptul administrativ al bunurilor/Administrative law of assets*. Bucharest: C. H. Beck.

Filipescu, I. (1993). *Drept civil. Dreptul de proprietate şi alte drepturi reale/Civil Law. The right to ownership and other real rights.* Bucharest: Proarcadia.

Onişor, V. (1930). *Tratat de drept administrativ Român*/*Treaty of Romanian administrative law*. Bucharest: Cartea Românească.

Bîrsan, C. (2010). *Convenţia europeană a drepturilor omului. Comentariu pe articole*/*European Convention on Human Rights. Comment on articles*. 2nd Edition. Bucharest: C.H. Beck.

Florescu, Gabriela (2011). *Exproprierea pentru cauză de utilitate publică. Practică judiciară/Expropriation for a case of public utility. Judicial practice*. Bucharest: Hamangiu.