Legal Importance Of The Preliminary Stage Of Expropriation For The Cause Of Public Utility

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Abstract: Expropriation for reasons of public utility is a subject very often debated in specialized literature, but it is noted that the contemporary doctrine has not extensively addressed such a current and present field before the courts, but only occasionally, an aspect that motivates us to study the issue of expropriation for reasons of public utility and especially the procedure prior to expropriation (administrative procedure). In the Republic of Moldova in recent years, the topic is all the more current as the economic situation and, by way of consequence, the social situation are inextricably linked to the development of the infrastructure, and as a relevant part of it, the network of public roads, highways, etc. The legislative ambiguities at the present time and the political involvement to a large extent in the sphere of public administration determine the realization of a detailed analysis of the main theoretical and practical problems existing in the field of patrimonial relations of public authorities and the finding of viable solutions. Compared to those mentioned above, the present work aims to study the "phenomenon" of expropriation for public use, namely the administrative procedure - prior to expropriation for public use in relation to the provisions of the normative acts in force. Scientific research is all the more necessary for the fact that this law complements the common law in the matter, namely the Civil Code of the Republic of Moldova, which can cause non-unitary jurisprudence and inequities in practice. The considerations presented in the research are not exhaustive, but they are likely to underline the actuality of the topic and its importance on a socio-economic and legal level.

Key words: property, property right, expropriation for reasons of public utility, prior procedure, public utility.

1. INTRODUCTION

It is important that our scientific research begins with an analysis of the right to property, in order to show the role and contemporary constitutional position of the right to property, landmarks that reveal the importance of immersion in the domain of property and the exception to the rule, namely expropriation for the cause of utility public.

The authors define property, both in the economic and legal sense, as the ultimate expression of people's access to the possession, use and disposal of goods (Pop, 2001),the right to private property representing one of the fundamental rights (Favoreau, Gaia, Ghevontian, Mestre, Pfersman, Roux, Scoffoni, 2001) unanimously recognized by domestic and international instruments, in the foreground in the context of a modern society, in continuous transformation.

The property right is not only the most complete, but also the most stable right, constituting the main legal condition for a sustainable rotation of property (Sinaiskii, 2002)

The forced termination of subjective property rights, due to the special social significance of the institution of property itself, requires a particularly careful regulation by imperative norms of civil law. The termination of property rights in an objective sense, as a set of legal norms, is a unique example of the use of coercion by the legislator as a way to solve the most pressing social problems. At the same time, the forced termination of private property rights is a controversial and not fully developed tool in terms of the regulation of property relations that arise in society.

Nevertheless, expropriation for the cause of public utility represents a genuine exception to the absolute and inviolable nature of the right to private property, if not the most significant (Florescu, Rotaru, Olteanu, Safta, Martinescu, 2013).

Public authorities often abuse the legal opportunity to forcibly terminate private property rights. In some cases, the current civil legislation does not contain mechanisms to counteract the termination of private property rights carried out in conflict with public interests and with the owner himself. For an effective protection of property rights, it is very important to establish as precisely as possible, without allowing the possibility of broad interpretation, the legal norms that allow the expropriation of assets from a natural person or legal entity (even for the benefit of society).

The phenomenon of coercion in civil law has not been sufficiently studied and requires reflection in relation to the realities of modern society. Clarification of the theoretical content of such a category of civil law as forced termination of property rights, expropriation, including expropriation for public utility, has a special methodological and practical significance.

2. THE NOTION AND LEGAL NATURE OF EXPROPRIATION FOR THE CAUSE OF PUBLIC UTILITY.

We must mention that the foundations of property law have not changed profoundly, an aspect that results from the multitude of latin expressions established in private law, still used today, as well as from the majority of institutions preserved, at least in name, from the period when Justinian's legislation was drafted .

However, although expropriation has as its premise both private property and public property, we do not find this institution in Roman Law, under this name, but we find a similar concept from the period of Justinian's laws, namely the principles of public utility and law and prior compensation, the term and legal notion being taken over from the French in Romanian Law, then in the legislation of the Republic of Moldova. The main normative act that regulates expropriation in France is the Expropriation Code for Public Utility, entered into force in 1977, it being essential to remember that up to this point the evolution of the mentioned law was dominated by two diametrically opposed ideological currents: until the beginning of the century 20th, the procedure was intended to protect private property; after the First World War and the economic and social upheavals caused by the conflagration, it aims, on the contrary, to defend the general interest, being designed largely against private property(Ferbos, Bernard, 1998)

At the doctrinal level, expropriation for reasons of public utility is defined in France, similar to the native doctrine, as an administrative and judicial procedure through which the administration uses its coercive power to obtain ownership of an asset with the aim of achieving an objective of general interest (*Bernard., Hayghe, 2006)*

And in the Romanian doctrine we find such definitions, in the sense that expropriation is a legal institution under public law which consists in the forced acquisition, for a fee, for reasons of public utility, under the conditions of the law and under judicial control, of privately owned real estate(Chelaru, 1999).

Also, the Romanian author V. Stoica appreciates that expropriation is a complex legal operation, which produces specifically multiple effects, not only in terms of real rights, but also in terms of rights of obligations, a combination of legal relations in the content of which real rights are included, but and legal relationships containing claims (Stoica, 2017).

We also find in the doctrine the opinion according to which expropriation is an original way of acquiring the right of ownership, but also through the forced transfer of some goods from private property to public property, to satisfy some needs of national or local interest, with fair and prior compensation , amicably or judicially (Dogaru, Strîmbanu, 1996).

We agree with the opinion of the author, A. M Nicolcesu, who believes that in fact, expropriation has a double effect, of extinguishing a private property right, and of bringing it closer, which, paradoxically, is the antonym of expropriation (Nicolcescu, 2019).

The question of the nature of legal relations related to expropriation for the cause of public utility is debatable in legal science. Different points of view on this topic have been expressed in Russian specialized literature.

Some of the researchers believe that the legal relationships that appear in the process of expropriation for reasons of public utility are of a mixed nature (Altengova, 2012); followers of the second point of view, believe that the legal relations considered are built on the principles of public law (Sidotova, 2010), finally, the followers of the third point of view talk about the civil legal nature of such relationships (Kabytov, 2004).

We lean towards the idea of the civil legal nature of the legal relations regarding expropriation for public utility, although the basis for their appearance is the expropriation decision taken by an authorized body of state power or local administration, mean an administrative act. Moreover, the achievement of a balance between private and public interests in the regulation of relations regarding expropriation for reasons of public utility can be ensured by the regulations of civil law which, in turn, will guarantee the stability of property relations.

It is important to emphasize that in the preamble of the law of the Republic of Moldova on expropriation for reasons of public utility number 488/1999 there is an explicit definition of expropriation, namely through expropriere means the transfer of goods and patrimonial rights from private property to public property, the transfer to the state of public property belonging to an administrative-territorial unit or, as the case may be, the transfer to the state or to an administrative-territorial unit of patrimonial rights in the purpose of carrying out works for a cause of public utility of national or local interest, under the conditions provided by law, after fair and prior compensation.

3. ADMINISTRATIVE PROCEDURE PRIOR TO EXPROPRIATION FOR PUBLIC UTILITY CAUSES

As a process, the expropriation of a piece of land for reasons of public utility, for example, is the implementation by the bodies and authorized persons of the method of termination of the right of ownership provided by law within a complex set of legal facts (grounds) for termination, irremediably ensuring the loss of the legal link between the owner of this land and the land itself as a result of the application of state coercion measures.

The classic structure of expropriation is divided into the administrative stage and the judicial stage, but there are authors who prefer the declaration of public utility to these stages (Adam, 2013),forming a tripartite structure, in which the declaration of public utility constitutes an independent first stage.

The Constitutional provision found in art. 46, which guarantees the right to private property, nevertheless establishes the exception to its inviolability - expropriation for reasons of public utility. Also, the civil code of the Republic of Moldova lists expropriation among the causes of forced transfer of private property and refers to the special law on expropriation for reasons of public utility number 488/1999.

Although the Law of the Republic of Moldova on expropriation for reasons of public utility in detail the expropriation procedure, as a result of which the real estate is transferred from private ownership to public ownership, however highlights the stages of expropriation which are:

1) public utility and its declaration;

2) measures preceding the expropriation designed as a purely administrative phase;

3) expropriation and compensation determination.

However, we consider that regarding the object of expropriation, based on the large number of immovable, movable and patrimonial rights allowed for expropriation, this law is disproportionate in relation to the interests of the private owner.

The law in question does not provide real guarantees for the protection of private property rights, or at any time under the purported protection of public interests or public utility, a person inconvenient to the governing power may be deprived of his assets by means of a formal expropriation.

Analyzing the content of art. 4 and 6 of the Law of the Republic of Moldova regarding expropriation for reasons of public utility number 488/1999 we note that the holders of this procedure are representative institutions of the central or local public administration, depending on the public interest of the work being considered, but also the Parliament, when public utility is declared by law.

We can distinguish, therefore, between an active subject of the expropriation, represented by the mentioned owners, and the passive subjects, the expropriated persons, within a legal relationship under public law, in this initial phase of the administrative stage.

Author AM Nicolcescu (Nicolcescu, 2019) researching the issue of expropriation in Romania, but also researching comparative law, including making some comparisons of the legislation of the Republic of Moldova with the legislation of Romania, he mentions that, in the spirit of interwar doctrine and jurisprudence, it is believed that even today the right to take this measure is non-delegable, by its nature, if we relate the holder to the interest of a community and to the fact that that community gives the mandate of representation electively, according to which a local council cannot be mandated in this sense by the county council (Romania) or rationally (in the case of the Republic of Moldova) for to declare the public usefulness of an objective achieved in favor of the latter, and in the case of works carried out on the territory of several counties/districts, one cannot speak of a delegation at a higher level, because it is natural for a higher authority to check the

authorities in the territory and to supervise such work, decentralization allowing only limited attributions at the level of a certain administrative-territorial unit.

The initiative regarding the declaration of public utility rests with the public authorities and is carried out directly throughsubmission of the respective proposals orthe relevant agencies, in the manner provided by the legislation. The declaration of public utility is made only after conducting a preliminary investigation and only if all the conditions for expropriation, provided by law, exist (Şumleanschi, Nistor-Lopatenco, 2018).

The measures preceding the expropriation according to the law are designed as an administrative phase (Chirtocă, 2012).

3.1. Prior research

Prior research. Art. 7 of the Law of the Republic of Moldova regarding expropriation for reasons of public utility number 488/1999establishes the obligation of a preliminary investigation before the declaration of public utility, on the condition that the work is entered in the urban planning and land development plans.

This first sub-stage, as can be deduced from its name, is a preliminary one, given that it foreshadows the declaration of public utility, once the work has been registered in the mentioned plans, the character of national or local public interest of an objective cannot be predetermined , but the natural consequence of a specialized investigation (Burlacu, 2020).

Prior research for works of national interest according to art. 7 para. (2) and para. (3) of law number 488/1999,is carried out by the commissions established by the Government, including: a representative of the central public administration authority coordinating the field of activity for which the work of public utility is carried out, a representative each of the Ministry of the Environment, of the Ministry of Finance, of the Ministry of Economy, of the Ministry Infrastructure and Regional Development, as well as the president of the district and the mayor of the locality in whose territorial radius the public utility work is carried out. For works of local interest, including common interest, the preliminary research is done by the commissions appointed by the councils of the respective administrative-territorial units, made up of representatives of the local administrative authority that manages the field of activity for which the work of public utility is carried out, of the public administration local ones that coordinate the financial-budgetary field, from the representatives of the respective councils.

The preliminary research will establish the existence of the justifying elements of the national or local interest, the economic-social, ecological or other premises of the needs of the works, their inclusion in the town planning and land development plans, approved according to the law. The preliminary research will be done according to the procedures established by the regulation approved by the Government of the Republic of Moldova. The result of the investigation will be recorded in a report that will be submitted to the bodies that appointed the commission.

We support the opinions of the author AM Nicolcescu (Nicolescu, 2019), that the commissions should have as members and external specialists, who take into account the private interest to the same extent and propose from the very beginning the most fair solutions, balanced for both parties, because the court has limited means to verify , even through expertise, if the declaration of public utility is imperative, considering that all the documentation is issued by representatives of the public administration.

That is why, to the section dedicated to commissions, in a unitary regulation dedicated to expropriation, we would also add cases of incompatibility, similar to those provided by the Code of Civil Procedure, the composition of such a commission being difficult to challenge at present, as long as in this phase the procedure is unilateral.

We note that according to art. 8 of the Law of the Republic of Moldova regarding expropriation for reasons of public utility number 488/1999regulates that the act declaring the public utility of national and local interest is brought to public knowledge by posting it at the headquarters of the local council in whose radius the object of expropriation is located and by publication in the Official Monitor of the Republic of Moldova.We can interpret that only the final act of public utility is brought to public knowledge, a context in which we reiterate the previously stated idea that the entire procedure should be transparent and involve not only representatives of the public administration, ab initio, in order to guarantee its fairness, including through the possibility of access of interested persons to any document related to the first stage of expropriation, based on the organizational measures of the authorities.

He also mentions S. Burlacu (The Bachelor, 2020) it is not enough only to notify the owners or the other holders of real rights of the expropriation proposal and the preliminary investigation minutes, but it would be necessary that the declaration of public utility be also notified to them, in order to have the real possibility to take note of the administrative act represented by the declaration of public utility, considering that, without its annulment, the other subsequent acts issued in the framework of the expropriation procedure can no longer be annulled.

In such situations, the interested parties are actually prejudiced, as it can be seen from practical cases that the method of publicity chosen by the legislator is not an effective one for them, representing rather a formal variant of fulfilling the obligation to bring to public knowledge the intention of expropriation, in no way to protect the private interest of the people to be expropriated, therefore we consider that they are the first to be notified.

We propose that, the faculty of notating the declaration of public utility in order to expropriate a building should be transformed into an obligation to make the initiation of the expropriation procedure opposable to third parties.

We propose that the owner himself have the possibility to request the initiation of the expropriation procedure for his building, when the public utility works carried out in the area indirectly affect his possibility to later capitalize on his private property right at the same pecuniary level.

The opportunity is the very main side of such a measure, which must be verified as a priority to avoid abuses and the forced limitation of the right to private property when it is not imperative, as an expression of the excess of power.

3.2. Plan execution stage

The stage of public utility declaration is followed by the stage of execution of the plans including the lands and constructions proposed for expropriation, with the indication of the names of the owners, as well as the compensation offers. In this phase, after submitting the documentation to the competent institutions, those interested have the opportunity to consult it, with the exception of those related to the defense of the country and national security, in which case only the list of buildings proposed for expropriation, their owners and compensation offers is submitted to the local council .

Based on art. 9 of the Law of the Republic of Moldova regarding expropriation for reasons of public utility number 488/1999, the expropriator will execute the actions of submitting the expropriation proposal within 10 days from the publication of the public utility declaration act.

The proposals for the expropriation of the buildings and the minutes recording the results of the preliminary investigation are notified to the holders of the real rights, within 10 days from the publication, it being noted that until this moment the procedure is unilateral.

The owner of the object of expropriation is entitled to consent to immediate and fair compensation. This expropriation proposal will contain the notification addressed to natural and legal persons with real rights over the object of expropriation, the compensation offer, the method of transfer of assets and patrimonial rights or, as the case may be, the method of transfer of patrimonial rights.

The owner of the object of expropriation has the right to give his consent for an immediate and fair compensation.

In the case of land expropriation, the owner will be offered another land. If the cost of the proposed land is lower than that of the expropriated land, the expropriator will pay the difference between the cost of the expropriated house or the expropriated land of the proposed land.

Law number 488/1999 in art. 10 allows the expropriated person to object to the expropriation proposal. The reception is the act by which the expropriated puts forward its own requirements regarding the conditions of the expropriation. However, these proposals can be challenged based on an appointment, within 45 days of receiving the notification, to the body that made the expropriation proposal. The objections will be resolved within 30 days by a commission established by Government Decision for works of national interest and by decision of the local council for works of local interest or by decision of the respective local councils for works of common interest.

The commission will be made up of 3 specialists from the field of activity in which the public utility work is performed. They elect, by direct and secret vote, a president who will organize the commission's activity. Following the deliberation, the commission adopts a reasoned decision. The Commission will record in the decision, as the case may be, the agreement between the parties, under their signature. The commission's decision is communicated to the parties within 5 days of its adoption and will serve as the basis for determining the amount of compensation, which in no case can be lower than that established in the expropriation proposal.

The commission's decision is taken by secret vote according to art. 11 paragraph (5) of the Law on expropriation for public utility number 488/1999.

3.3. The agreement of the parties prior to the expropriation

The agreement of the parties prior to the expropriation. Called in the legal literature the subsidiarity of expropriation (Chelaru, 1998) represents the possibility offered by the law to the parties, for those interested to agree on the amount and nature of the compensation, in order to eliminate the cumbersome procedure of expropriation. Practically, the transfer of the ownership right is carried out through one of the ways of acquiring the ownership right, and one of the most well-known is the contract. Between the expropriator as the buyer and the holder of the property right or another real right, as the seller, a sale-purchase contract is concluded, in written form. Also, by agreement of the parties, an exchange of land or real estate can take place. If the object of the sale-purchase, exchange, etc., is formed by immovable property, according to art. 510 para. (2) of the Civil Code of the Republic of Moldova, the ownership right is acquired on the date of entry in the real estate register, with the exceptions provided by law.

The interested parties can agree both on the way to transfer the property, to transfer the patrimonial right, as well as on the amount of the compensation and its form, in compliance with the legal provisions regarding the substantive, formal and publicity conditions, without triggering the expropriation procedure. The agreement between the parties in this case will be notarized, the related expenses being borne by the expropriator (Dumitru, 2013).

After receiving the notification, the owner and holders of other real rights on the object of expropriation are obliged to take measures to preserve this object.

4. CONCLUSIONS

If the parties do not reach an agreement on the expropriation in the manner established above, the expropriation for reasons of public utility can only be done by court decision with fair and prior compensation. The main effect of the expropriation consists in the fact that, based on the final and irrevocable expropriation court decision, the property becomes the property of the expropriator, free of any encumbrances. At the same time, all real rights derived from property rights (usufruct, dwelling, surface area, servitude) are extinguished.

All this presented administrative procedure reveals the dominant position of the representatives of the authorities and its non-transparent character, at least in the initial phase, aspects that tilt the balance in favor of public property rights (Nicolcescu, 2019).

In fact, the criticism brought to the administrative phase regarding transparency and the real impossibility of currently canceling a public utility declaration could be the result of this concept and the fact that the expropriation procedure has not undergone major changes over time in the Republic of Moldova.

In conclusion, no society can exclude the idea of expropriation, but can only identify the most effective methods at a given time to protect the right to private property and resort to the extreme means of acquiring public property only in situations where necessarily imposes. Society should, therefore, develop in such a way as to avoid forced measures, as a guideline to follow in the conception and public policies.

For these reasons, the initiative regarding the regulation of this measure must equally belong to the holders of private property rights, but the measure as such must also be effectively avoided in most cases and resort to expropriation as the main means of solving the needs of order public only in exceptional situations. This is actually the essence of what must be pursued or avoided from the perspective of expropriation, that is why the term "guarantee" of private property used in art. 46 no longer seems to be contradictory, but the guarantee comes as a basic principle.

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