INDIRECT/FACTUAL EXPROPRIATION (ATYPICAL FORM OF EXPROPRIATION)

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Abstract:
This research examines the notion of indirect expropriation as an atypical form of expropriation as an atypical form of expropriation. Our approach is important, because the expropriation as a form of public utility is a frequently debated topic in the literature, but contemporary doctrine has not comprehensively addressed such a large and current topic for the courts of law. This subject was debated only on a one-off basis and this motivates us to study its issues in a systematic way, which aims is to overlook over the essential issues that could lead to an overall understanding of this phenomenon – expropriation, including the phenomenon of indirect expropriation.

Key words*: property; expropriation; expropriation for reasons of public utility; public utility; private property; indirect expropriation; atypical form.*

INTRODUCTION

Expropriation for cause of public utility is a frequently debated topic in the literature, but contemporary doctrine has not comprehensively addressed such a large and current topic for the courts

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of law. This subject was debated only on a one-off basis and this motivates us to study its issues in a systematic way, which aims is not to overlook over the essential issues that could lead to an overall understanding of this phenomenon – expropriation, including the phenomenon of indirect expropriation.

The institution of expropriation has been known since ancient times. It's established that the first forms appears as early as in 1303, when Philippe la Bel ordered acquisitions *"nori as superfluitatem, sed ad convenientem necessitate et pro justo pretio"* [1] which is explainable by the historical conditions of development of the French where private property was already partially divided, unlike the Romanian country where state formations barely took shape.

Analysing the concept of expropriation, including indirect expropriation, it is important to start with the analysis of property rights. Thus, staring from the fundamental law of the Republic of Moldova, according to art. 9 of the Constitution of the Republic of Moldova and the acts regulating this right result in the rule of fullness of the right of private property, the exception being the right of public property. Thus, according to the constitutional provisions, the citizen are equal before the law and the public authorities without privileges and without any discrimination and the right to private property, as well as the claims on the state, are guaranteed. According to art. 46 of the Supreme Law, no one can be expropriated except for a cause of public utility, established by law, with fair and prior compensation. In other words, the state of the Republic of Moldova has the obligation to protect the property, regardless of its owner, as the protection of property is one of the major values of the rule of law.

According to the prolific scholar and professor of law U. Mattei[2], and cases of forced alienation of property must be viewed in terms of expropriation, which has many definitions: „the right of the state to compulsory alienation of private property (power of eminent domain)", „expropriation in the public utility" or simply „ taking". According to the author, the right of the state to the compulsory training of private property is as important, as dangerous, and naturally results from the

[1] J. Lemansurier, *Le droit de l'expropriation* (Paris: Ed. Economica, 2001), 26.
[2] У. Матеи and Е.А. Суханов. *Основные положения о праве собственности. (*Москва: Юристь, 1999), 384 с.

primacy of the law policy, power over principles. Therefore, any constancy of this right, in terms of its effectiveness and proper functioning, requires a significant degree of maturity on the part of the legal system, the presence of a strong, independent and reliable judiciary capable of withstanding the needs of the suddenly found state authorities.

Deprivation of property is one of the most severe interferences of the state in the realization of the property right, because it deprives the person of the property that belongs to him – it „destroys the property right" by transferring the title from a person to the state or other public authority or to another – the third one. In this context, the authors [1] are concerned with the problem of the existence of a certain limit until where effective protection of private property rights against abusive expropriation can be ensured. This concern is a common one for the European continent, it was established in the Declaration of the Rights of Man and of the Citizen of August 26 1789, art. 17, that „ Property being an inviolable and holy right, no one can be deprived of it, unless the public need, established by law, clearly requires it and on condition of a just and prior compensation" and the American, where the limitation of abusive expropriation was introduced in 1791 by the Fifth Amendment to the US Constitution, which prohibited the government from expropriating private property for public interest without fair compensation. Today, the limitation of abusive expropriation is regulated at the constitutional level, for example, the Constitution of the Kingdom of Belgium, art. 16 „ No one shall be deprived of his possessions except of the case of expropriations performed in the public interest carried out in the cases and in the manner established by law, in exchange for fair and prior compensation". One of the challenges of constitutional expropriation is that it is difficult to list exhaustively those public utility cases which justify the intervention in the exercise of a fundamental right by imposing legislative restrictions or limitations on compensations in the event of expropriation.

Expropriation in the notion used in the legislation of the Republic of Moldova for cases of transfer of private property into public property,

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[1] G. Bovey, *L'expropriation des droit de voisinage. Du droit prive au droit public* (Berne: Stæpfli, 2000); Lemansurier, Le droit de l'expropriation; J. Ferbos and A. Bernard, *Expropriation des biens. Procedure. Principe d'indemnisation, Compatibilité avec la convention européenne des droits de l'homme* (Paris: Editions Le Moniteur, 1998).

in the sense of lack of property according to article I of Protocol 1 of the ECHR Convention. At present, the importance and exceptional nature of the institution expropriation is found in the rules of principle, contained in article 46 paragraph 2 of the Constitution of the Republic of Moldova, which states that: „ No one can be expropriated only for a cause of public utility established according to the law, with right and prior compensation".

The idea that expropriation is a limitation of the property right specific to civil law relations is also found in par.1 art. 501 CC of the Republic of Moldova according to: „ No one may be forced to cede his property, except only for reasons of public utility and receiving a fair and prior compensation. Expropriation is carried out in accordance with the law". Likewise, the Civil Code stipulates that the right to property is guaranteed. The scope of this warranty applies to any property, real estate or furniture. The effects of the guarantee necessarily have repercussions on other real rights – the right of usufruct, the right of use, the right of habitation, the right of servitude, the right of surface, because their existence inevitably presupposes the existence of the property right.

In order to implement adopted the Law of the Republic of Moldova as the constitutional provisions on expropriation was the expropriation for the public utility[1]. This law sets out scope of the property which is the subject of expropriation and the framework within which this special procedure applies, from the act declaring public utility to the decision of the court having jurisdiction on the application. Art. 1 of the above mentioned law defines expropriation in art.1 „...expropriation means the transfer of property and property rights from private property to public property, the transfer to the State of public property belonging to an administrative territorial unit or, where appropriate, the transfer to the state or an administrative territorial unit of the property rights for the purpose of carrying out works for public interest reasons of national interest or of local interest, under the conditions laid down by law, after a right and prior compensation", the Law of the Republic of Moldova on the expropriation for public utility cause is supplemented by the Regulation on the method of prior investigation for declaring the public utility of the object of

[1] Legea Republicii Moldova cu privire la exproprierea pentru cauză de utilitate publica: nr. 488 din 08.07.1999. În: Monitorul Oficial al Republicii Moldova, nr. 42-44/311 din 20.04.2000.

expropriation, approved by Government Decision[1] establishes the unique method of prior research for declaring the public utility of the object of expropriation.

It is important to mention that transition of atypical expropriation to classical expropriation was a result of historical circumstances, both at national and European level, but it is important to know these historical stages, which are significant for our country.

Indirect (atypical) expropriation, for example, is not expressly defined by the Roman legislator, but is analyzed, staring with the interwar doctrine, by reference to the French case-law creation, and is topical in the same ways as it is at the time: permanent damages, actual incorporation, legal incorporation, etc.[2]

At the same time, according to the Civil Code of the Republic of Moldova there is atypical form of expropriation, regulated by art. 539 (1), by which the owner of a property is deprived of it, if under the law the person cannot own it. And we have the example of foreign nationals and legal persons from other states, who can acquire properties in the Republic of Moldova, except for the property on agricultural land and forest land [3]. The retention right is also expressly regulated in the Law of the Republic of Moldova on public expropriation, this being the reason, actually, for Romania to not regulate this in such a way.

The following author: A.M. Nicolcescu[4] mentions that should be regulated in the same manner because the procedure to which the legislation of the Republic of Moldova refers is strict in the structure and in the right of retention, as stipulated in the art. 2495-2499 of the Romanian Civil Code and is has a permissive nature, which can be interpreted by the generic form.

Moreover, there have even been cases of indirect expropriation regulated in the 19th century by French legislation on communications and roads, as well as in respect of mine roads or community interest, as

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[1] Hotărârea Guvernului Republicii Moldova pentru aprobarea Regulamentul privind modul de cercetare prealabilă pentru declararea utilității publice a obiectului exproprierii: nr. 660 din 15.06.2006. În: Monitorul Oficial al Republicii Moldova, nr. 95-97 din 23.06.2006.

[2] A.M. Nicolcescu, *Exproprierea pentru cauză de utilitate publică* (Bucharest: Universul Juridic, 2019), 47.

[3] S. Baieş et. al. *Drept civil. Drepturile reale. Teoria generală a obligaţiilor. Vol. II* (Chişinău: Cartier Juridic, 2005), 328

[4] Nicolcescu, *Exproprierea pentru cauză de utilitate publică*, 48.

well as in the regulatory acts for the establishment of telegraphic and telephone lines [1].

The European Court of Human Rights has used the notion of "de facto expropriation", for defining the effects of an action whereby the exercise of private property rights is limited in favor of the right of public property, without any legal act, but which is equivalent to a formal expropriation[2].

At the same time, it was established that "de facto expropriation", does not meet the requirement of "predictability", so that the interference was compatible with the principle of legality, without the applicant being able to be blamed for not initiating an action for damages.

In conclusion, the public authorities must not act at their discretion, avoiding a procedure which could end in its detriment, which is why we consider that, in such a situation, any compensation should include not only the equivalent of the damage caused, but also an amount to sanction non-compliance with the expropriation procedure itself, when the injured party does not agree to amicably assign his right, a kind of fine.

A classic case of indirect expropriation is represented by the situation in which public utility works are stared on the occupied land, in the absence of initiating the expropriation procedure and the owners prevented them from exercising the attributes of possessions and use. Consequently, compensation for non-use is fully justified.

Also, the repair of the damage can be done by forcing the one who is guilty of its production to restore the building in its initial state, through greening works return to the agricultural circuit of a land, through the action under obligation to do, also based on the principle of tortious civil liability, when the injured party does not want another location, its transfer being the essence of legal expropriation, not of fact.

However, in such a case the full repair of the damage may incur much higher costs than the value of the damaged or destroyed property, so the subsequent expropriation would be more equitable from this point of view, as this type of work is unlikely to take time and finally, causes an unavailability of the good, which can no longer be used according to the usual destination.

Another example that can be circumscribed to expropriation is in

[1] S.C. Burlacu, *Exproprierea pentru cauza publica* (Bucarest: LERAS, 2020), 23.
[2] Nicolcescu, *Exproprierea pentru cauză de utilitate publică*, 52.

fact can be found in Swiss doctrine and legislation through the notion of "expropriation of neighborhood right" [1] and, although this notion is not expressly regulated by the Law in reality such effect can also occur as a result of the formal or informal expropriation of a private property, and any damage to neighbor's (noise, dust, etc.) could not be repaired, in our opinion, except on the basis of tortious civil liability.

Compared to the Swiss doctrine, given that in some cases the exercise of the property right of the neighbor is limited excessively or totally, we can conclude that there are also cases of indirect expropriation of neighborhood rights or even the property of the neighbor.

In the Civil Code of the republic of Moldova the neighborhood relations are regulated by art. 587 regarding the admissible neighbouring influence, as well as by art. 588 regarding the infringement of inadmissibility. In view of the latter condition, the expropriation could be ordered, in our opinion, only for extreme cases, when it is inadmissibly attempted indirectly or through fault, but the damage is sufficiently serious in the sense shown by art. 588 CC to RM.

For the exposed situations, a distinction is made between de facto expropriation and indirect expropriation, but we would equate them in terms of effects, considering also that doctrine [2] concludes that the use of the name of expropriation "is improper, and the injured persons actually have other legal means of defenses, such as the action in the claim or in claims, related to the prejudicial action, respectively the claim, if the approach of the authority can be stopped, and the good may return to the undisturbed possession of the holder of the real right, or compensation when the good is no longer usable to previous standards, being practically impossible to be reused or even destroyed.

Even if this formula of expropriation has been criticized for its confusion, its use cannot be denied in the domestic jurisprudence of the European Court of Human Rights, given the reality of some of the situations it covers. In fact, it is a consequence of the legal approach of expropriation, but also in the opposite case, the evaluation criteria already established for this can be used, such as: nature and characteristics of the property, location, destination, its uses at the stage of the market, in relation to the supply-demand criterion, but also by

[1] Bovey, *L'expropriation des droit de voisinage. Du droit prive au droit public*.
[2] O. Puie, *Regimul juridic al terenurilor. Cadastru și publicitatea imobiliară asupra terenurilor* (Bucharest: Universul Juridic, 2014), 98.

concrete transactions having as similar or comparable real estate objectives.

At the same time, the assessment of the compensation must be reported at the time of the damage, respectively when the expropriation actually took place, but also here it is necessary to verify the moment when the illicit action is exhausted or, more precisely, when we should effective expropriation [1].

The examples presented are common, as are the detailed situations in some of the following sub-points, which we have assimilated to actual expropriations, but there are also singular situations that raise issues in terms of effects assimilated to a de facto expropriation or hypothetical situations that may be whenever it materializes in the form of a de facto expropriation.

One such example might be the formation of islands in a publicly owned river, by the action of erosion of the bank of the private owner, as a result of the diversion of the course of this river by the basin administration, with the consequence of widening the minor riverbed. In these conditions, we are not in the presence of avulsion, because the eroded piece did not stick to the land of another riverside owner, but was in the space of public property. It can be concluded that the injured party has the right to compensation, but also to the action before claim, following the principles already set out above, given that public property was not acquired under the law to be considered inalienable.

CONCLUSIONS

Therefore, we conclude that the concept of differential law should be expressly regulated in the light of the complexities which, however, are highlighted in different fields, but also in the light of the fact that judges are using this expression more and more often in order to reinforce the argument they report to the ECtHR case-law on indirect expropriation, and although we have previously shown that the use of this phrase is inappropriate, it goes without saying to define an effect as strong as it is of the expropriation itself.

As we have shown before, the reparation of the damage in case of expropriation can in fact have several alternatives, that is why the intervention of the legislator would be necessary in order to regulate fair

[1] Nicolcescu, *Exproprierea pentru cauză de utilitate publică*, 51.

alternatives for all parties involved, not only to establish a factual situation as a source of law. In fact, some practitioners even use the „ notion of de facto expropriation" in arguing solution, which we consider to be avoided until express regulation, and characterize it by the concomitant lack of right of use, possession and right of material disposition.

At the same time, the express regulation of de facto expropriation is not only based on the principle of full reparation of damage in civil law, but is also based on the criterion of classifying administrative acts as lawful and unlawful, namely the production of administrative law effects in both forms, illicit or illicit, even if they have as authors private persons, an element that places the expropriation itself, as a material fact, in the sphere of public law [1].

The need for legislation in this area is also expressed by the European Court of Human Rights in order to comply with the requirement of the principle of legality when the jurisprudence is inconsistent, being generally known that the first requirement of an interference with private property force, and in the 2 we approached we do not have a predictable norm that would respond to the desideratum of the practice.

Therefore, the new legal institution is also based on the imperative to respect the forms of legal institutions already expressly regulated, which are given efficiency by diversion from the original purpose, without considering that they cannot evolve, but in the context shown not the old institutions need changes, but the evolution of expropriations requires changes in the special law.

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