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## Conditions of Expropriation and its Implications on Property Rights

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**Abstract:** Expropriation for reasons of public utility is a frequently debated topic in the literature, but it is found that contemporary doctrine has not addressed such a current and present field before the courts, but only occasionally, which motivates us. To study its problems, in a systematic way, which aims not to omit the essential issues that could lead to an overall understanding of the phenomenon of expropriation. The importance and timeliness of the expropriation investigation for reasons of public utility lies in the fact that the institution guarantees the right of property, containing regulations regarding the expropriation, that constitute real guarantees of the right of private property. According to the fundamental law, the most severe limitations that can be brought to the property right are those regarding the forced cessions of this right, which can be achieved by expropriation for a cause of public utility, established according to the law, with right and prior compensation.

**Keywords:** expropriation; public expropriation; public property; private property; compensation

### 1. Introduction

The institution of expropriation has incited doctrinaires to several opinions as to its nature. According to some, expropriation is considered a limitation of the inviolable nature of the property, a legal restriction of the property right, as well as a way of acquiring the public property right (Chirtoaca, 2012). Others consider expropriation a real way to end ownership (Urs & Ispas, 2013).

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On the other side of the barricade is the doctrinaire I. Adam (2000), who denies the theory that expropriation would be a way of terminating the right to property, given the perpetual and transferable nature of the right to property. In other words, the right of ownership is extended by its transfer from one patrimony to another, from one person to another.

By expropriation we can understand the transfer of goods and patrimonial rights from private property to public property, in order to perform works for public utility of national interest or local interest, provided by law, after a fair and prior compensation (Chirtoaca, 2012).

In another formula, expropriation for reasons of public utility is presented as a set of jurisdictional acts and operations, by which the state and the units administrative burdens impose, forcibly, the transfer of ownership of real estate owned by individuals and legal entities, for the purpose of public utility and in exchange for a fair or prior indemnity.

Expropriation occurs only if the parties do not agree on another method of transferring the publicly owned land or lands. If the parties agree that the transfer of the expropriated land takes place in another way, the conditions of validity and publicity required by law for the legal act to be concluded must be complied with (Burlacu, 2020).

## **2. The Legality of Deprivation of Property, the Importance of Public Utility and Deprivation of Property Rights must be in Accordance with the Rules of International Law - as Conditions of Expropriation.**

From the analysis of the regulations regarding the expropriation for the cause of public utility and the definitions analyzed above, the exceptional character of this institution is outlined. At the same time, viewed from the perspective of European human law, the expropriation appears, according to art. 1 Protocol no. 1 of the European Convention on Human Rights, acceptable under the following conditions:

*Legality of deprivation of property.* Interference with the right to property falls subject to the requirement of legal certainty or legality. The lawfulness of deprivation of property presupposes the fulfillment of 2 requirements: firstly, there must be a law within the meaning of the Convention under which deprivation is effected, secondly the law itself must fulfill those qualities which the Court has determined in its case law. that is, to be accessible, accurate and unpredictable. The notion of “law” is an

autonomous notion, proper to the Convention, namely it should not be taken only its formal meaning: the legal norms contained in the normative acts adopted by the Parliament. For the purposes of the Convention, the law is any mandatory and general rule, whatever its formal source, which mandates the conduct of the individual (Bîrsan, 2010).

Therefore, for the deprivation of property to meet the condition of legality it is necessary to be provided by law, and the law must meet the criteria of accessibility and predictability (Olteanu, 2007). Therefore, the positive obligations of a State under Article 1 of the First Protocol may it consists in adopting clear and precise legislation and ensuring a coherent practice of national jurisdictions in an established field. Lack of legislative coherence and divergences of case law can create “a general climate of legal uncertainty and insecurity” (Bîrsan, 2013).

*Deprivation of property to be done for an interest of public utility.* The notion of public utility is broad in its very nature, which is widely understood by the Court, considering that it can come from any legitimate social, economic or other policy.

The Court has ruled that it will comply with the decision of the legislature on what is in the public interest, unless it is without reasonable cause.

The public interest has been accepted as an end, so far in all cases. The Court considers that, thanks to a direct knowledge of society and its needs, the authorities are, in principle, better placed than an international judge to determine what is of public utility.

The Court acknowledged that the notion of public utility is likely to vary in time and space. Thus, what justified an expropriation at some point may not justify it 15 years later. In the system of protection provided by the Convention, it is primarily the task of the national authorities to rule on the existence of a matter of public interest which may justify a deprivation of property, so that the Court must recognize a certain margin of appreciation for them (Bîrsan, 2010). Therefore, the national legislator has a wide latitude to pursue a certain economic and social policy, and the European court has shown that it respects the way it conceives the imperatives of public utility, unless this assessment proves to be manifestly lacking. of any national basis. In this regard, L.Chirtoaca (2012) argues that public authorities know first and foremost the needs of society to determine which work is in the public interest and no judge, expert or other person can have a better understanding of the situation; (Adam, 2002).

*Deprivation of property must comply with the rules of international law.* Included in a multilateral international treaty such as the European Convention on Human Rights, this condition should come as no surprise. However, the question can be asked what its meaning is, since the provisions of the Convention are, as a rule, directly applicable in the legal systems of the Member States, on the one hand, and on the other hand, as provided in art. 1 of the Convention, the Contracting States

Do they recognize any person who is subject to their jurisdictions with the rights and freedoms they regulate?

The doctrine of the Convention has stated that “when a treaty refers to the principles of international law, it can be stated with certainty and without the slightest doubt that it is so, because it was intended to be concealed, under a formula of apparent consensus, the persistence of a serious disagreement between negotiators; in other words, it came out of the impasse in a way acceptable to all, but each kept his point of view on the merits of the problem, which could not be resolved, which happened with the rule set out in Article 1 Protocol no. 1; „, reference was made to the rules of international law due to the fact that it was not possible to reach an agreement on the issue of knowing to what extent the indemnity obligation should be among the conditions of deprivation of property(Ojoga, 2017).

### **3. Compensation - Essential Condition of Expropriation for Reasons of Public Utility.**

*Compensation.* A mandatory essential condition of expropriation imposed by the Constitution is fair and prior compensation, which justifies the view that it would not be an expropriation, but an “exchange of ownership, because instead of the expropriated property another good or reward is offered covering damage” (Constitution of the Republic of Moldova). This condition is met if 1) the compensation offered fully compensates for the cost of the property and the damage suffered as a result of the expropriation and 2) the compensation took place previous, before the expropriation, not after

the transfer of the property into the state one. The right to fair and prior compensation in case of expropriation also derives from other constitutional provisions on the principle of justice, proclaimed as the supreme value and guaranteed in para. (3) in art. 1 of the Constitution or the right of the injured person by a public authority to request reparation according to art. 53 para. (1) of the Constitution.

However, the jurisprudence of the bodies of the Convention has taken over the necessity of compensating the owner of the expropriated property from the general principles of international law and has imposed it for any situation of deprivation of property recognized by these texts. In the absence of an indemnity, art. 1 of Protocol no. 1 would only ensure an illusory and ineffective protection of the right to property. Therefore, the obligation to compensate the owner is a requirement of jurisprudential creation, imposed by the Convention so that a deprivation of property does not violate the provisions of protection established in art.1 Protocol no. 1. In order to satisfy the requirements of the Convention, the compensation must meet two conditions: it must be proportionate to the value of the property, although it does not necessarily present full compensation and must be paid within a reasonable time (Poalelungi, 2015).

However, the Court admitted that the violation of art. 1 does not, however, guarantee in all cases the right to full compensation for the loss suffered. Legitimate public utility objectives, such as the implementation of certain economic or social justice reforms, may militate for an indemnity below the market value of the good. The European Court has shown that in situations involving the indemnification of broad categories of persons through legislative measures that may have important economic consequences for the whole of a state, national authorities must have a great discretion not only in choosing measures to guarantee the rights patrimonial or to regulate the property relations, but also to have the necessary time for the application of such measures; their choice may involve a reduction in the indemnity for deprivation of property or the restitution of goods of a lower value than the property from which an owner has been deprived. Deprivation of property without granting insurance compensation can only be justified in exceptional cases.

The indemnity must be established and paid as close as possible to the time of taking over the property, the European court ruling that the payment of the indemnity after deprivation of property is not in itself condemnable, except for an unjustified delay, extended in time. An excessive delay in the payment of the allowance aggravates the financial loss of the data subject, due to the effects of monetary devaluation, and can in turn be seen as a serious violation of the substance of the property right, affecting the proportionality between community and private interests.

The court held that “*Expropriation is one of the most severe measures that can be taken regarding the right to private property, because it is not just a simple limitation of the right, but leads to its loss*”, and the expropriation is to be preceded by a fair and prior compensation of the owner of the property. In the absence of compensatory

compensation, “Article 1 of Protocol No. 1 would provide only an illusory and ineffective protection of property rights, in total contradiction with the provisions of the Convention (Păduraru, 2020).

#### **4. Proportionality - as a Condition of Expropriation for Reasons of Public Utility.**

*Proportionality.* The so-called “fair balance” theory is known, which must be respected between the violation of individual law and the need for public utility.

The possibility conferred on the state by the fundamental law to expropriate property for reasons of public utility does not imply a discretionary power in this respect. The authorities must respect the principle of proportionality - the inconvenience imposed on the owner by deprivation of property must be in reasonable proportion to the general interest pursued by the act of expropriation. Existence

a relationship of proportionality between the deprivation of property and the purpose pursued through it, or so to speak the conciliation of two contrary interests, the individual of the right holder and the social one, which belongs to the state, as an exponent of the general interest (Ojoga, 2017).

Not every public interest justifies interference in the sphere of individual freedom and property. The construction of a newsstand is undoubtedly a work of public interest, but does not justify the expropriation of part of the outer courtyard of a house. In addition, expropriation is not justified if the work can be carried out at similar or same costs - on land already owned by the state or when, in order to achieve the objective, it is sufficient to encumber the property with a real right, for example an easement (Balan, 2015).

In assessing whether a fair balance has been struck or if the complainant has been required to bear an excessive and disproportionate burden, the Convention bodies examine the circumstances throughout, examining issues of legality, duration, procedural safeguards and the effect on the complainant. , whether the compensation is effective.

The purpose of the principle of proportionality is to guarantee the protection of the right to property of natural and legal persons from any abuses and illegalities by the state. Thus, the state must have good reasons to put in place any interference with the right to property, which will be not only legal and pursuing a legitimate aim of

protection of the general interest, but also necessary in order to achieve that goal and in the same .

At the same time, the notion of “de facto expropriation” is also encountered in the practice of the European Court. Invention of the Court, it designates that situation in which a person, who is the owner of a good from a legal point of view, loses all the attributes

the right of property in favor of the state, without this deprivation of the attributes of property being the object of a legal act, being a form of deprivation of property, to which the text of art. 1 of Protocol no. 1 to the Convention. The effects of actual expropriation are, in fact, identical to those of a formal expropriation. As the Convention aims to protect “concrete and effective” rights in order to determine whether a deprivation of property has taken place, the Court will not only examine if a formal dispossession or expropriation has taken place, but will look beyond appearances and analyze the reality of the disputed situation. to see whether the situation in this case amounts to a de facto expropriation (Croitoru, 2010).

Proportionality must maintain a fair balance between the general interests of society and the private ones. The state has an obligation not to charge a persons or group of persons excessive obligations or burdens. Proportionality in the matter of expropriation for reasons of public utility must be inextricably linked to the obligation to establish compensation for the lost property, calculated in relation to the loss suffered by the former owner.

If the amount granted as compensation is far from being reasonable against the expropriated property, we will be in the presence of a violation of the property right. In other words, for example, the state can be sanctioned even when for the expropriation of an agricultural land it did not take into account the damage caused by depriving the person of the income he obtained from the expropriated agricultural area even though he paid the intrinsic value of the land. Opposite situations must also be taken into account when, in the case of a partial expropriation, it is possible that, as a result of public works, the value of the other part of the property will increase substantially. In such cases, logically, the expropriator has the right to offer an indemnity less than the intrinsic value of the expropriated property, but the state has no right to use this presumption. In case of serious imbalances between the value of the property and the indemnity granted, the state risks being convicted for violating the property right. No less important with regard to the principle of proportionality is that the indemnity be granted within a reasonable time from the

moment of loss of property, or the excessive delay in the payment of the indemnity aggravates the losses suffered due to monetary devaluation, increase in prices for similar goods, etc. Chirtoaca, 2012.

## 5. Conclusions

We consider that if in a draft *law ferenda* the stated conclusions and conditions will be taken into account, the value of this law will be considerably improved. It excludes abuses by the expropriator and eliminates violations of the rights of the expropriated person.

Therefore, we conclude that being a serious way of infringing not only the exercise but also the normative content of the property right, expropriation for public utility remains the only way, accepted by democratic countries, to transfer property by transforming the right of private property into public. Here, the state must be aware that the existence of a public utility encumbering a person's private property gives rise to a positive obligation of the state to expropriate the property by offering financial compensation to the owner of the property.

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