

ABOUT THE NECESSITY OF A NEW LAW ON EXPROPRIATION BY PUBLIC UTILITIES

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ABSTRACT: *Romania's EU membership implies for the national authorities the obligation to find means and methods for modernizing the state. This obligation implies, mainly, the harmonization of national legislation with the terms and conditions provided by international treaties, in order to realize public works with European financial sources. Within this framework, government activity witnessed a series of legal provisions on expropriation that does not satisfy the exigencies of present times. Thus, regarding this topic, new regulations entered into force (or will be adopted in the future). These special regulations affect the general legal regime of the right to property.*

KEYWORDS: *authorities, expropriation, right to property, harmonization.*

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1. THE PRESENT LEGAL FRAMEWORK OF EXPROPRIATION

Expropriation for public utility is one of the most severe interferences (legal interference) that can affect private real property. Scholars sustain that expropriation is not only a simple limitation¹ of the right, but it equals with a loss of the right².

Expropriation is regulated by art. 44 para. 3 of the Constitution that provides that „*Nobody will be subjected to expropriation, only for a cause of public utility, established in accordance with law, with e just and prior compensation*”. In the application of this constitutional provision, Law no. 33/1994 on expropriation was enacted³, law that provides the procedure for expropriation in order to satisfy a double fold purpose: the transfer of

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¹“Exproprierea reprezintă o limitare a conținutului normativ al dreptului” - Ioan Muraru, Elena Simina Tănăsescu, Drept constituțional și instituții politice, vol.I, ed. a 12-a, Ed. All Beck, București, 2005, p.177.

² Valeriu Stoica, Drept civil. Drepturile reale principale. Vol. I, Ed. Humanitas, București, 2004, p.363; Corneliu Bârsan Drept civil. Drepturile reale principale, ed. a 3-a, Ed. Hamangiu, București, 2008, p.57. In favor of this argument is the fact that the New Code of Civil Procedure is regulating expropriation at the Title called „the extinction of the property right”.

³ Published in the Official Journal of Romania no. 139 of 2 June 1994.

private property right on real property from private natural or legal persons to the public property of the state or of the territorial-administrative unit on one hand, and provides the legal framework for defending private property.

Other legal texts regarding the concept, conditions and the procedure of expropriation are:

a) Law no. 213/1998⁴ on public property and its legal regime, with modifications and completed, that provides at article 7 c., that expropriation is modality for acquisition of public property;

b) Article 481 of the Civil code provides that „*Nobody can be forced to give up his property, except for cause of public utility and receiving a just and previous compensation.*”

c) The New Civil Code (Law no. 287/2009⁵) at Article 562 para.3 provides that „*Expropriation can be made only for a cause of public utility established in accordance with law, with a just and prior compensation, established by agreement between the owner and the expropriator. In case of misunderstanding, compensation will be established by the court.*”

The present legal framework sets out the limits of the procedure (the administrative phase and the judicial one), the range of real property that can be subject to expropriation, the cases of public utility as well as the just and prior compensation⁶.

Economical evolution, administrative and judicial practice as well as the desire to limit the length of the expropriation procedure, led to the adoption of special provision in this field.

Are derogatory regulations necessary in the field of expropriation? Is it necessary for every public utility work described in Article 6 of Law no. 33/1994⁷ to have special regulations on the expropriation procedure and on the applicable guarantees?

⁴ Published in the Official Journal of Romania no. 448 of 24 November 1998. The law was modified and completed by E.O.G. 206/2000, Law no.713/2001, Law no.241/2003, Law no.47/2004.

⁵ Published in the Official Journal of Romania no. 511 of 24 July 2009.

⁶ For an exhaustive view on expropriation see Ioan Muraru, Elena Simina Tănăsescu (coord.) Constituția României. Comentariu pe articole, Ed.C.H. Beck, București, 2008, pp.451-456; Flavius Baias, Bogdan Dumitrache, Discuții pe marginea Legii nr.33/1994 privind exproprierea pentru cauză de utilitate publică, Dreptul nr. 4/1995, pp.18-28; Liviu Giurgiu, Considerații în legătură cu Legea nr. 33/1994 privind exproprierea pentru cauză de utilitate publică, Dreptul nr. 2/1995, pp.17-23; Valeriu Stoica, Exproprierea pentru cauză de utilitate publică, Dreptul nr. 5/2004, pp. 28-76; Eugen Chelaru Efectele juridice ale exproprierii pentru cauză de utilitate publică în Dreptul nr. 4/1998, p. 14, Marian Nicolae, Discuții cu privire la aplicarea în timp a art. 35-36 din Legea 33/1994 privind exproprierea pentru cauză de utilitate publică, Dreptul nr. 11/2000, p. 23-34.

⁷ Article 6 provides that the following works are of public utility: „geological explorations and prospects; extraction and processing of useful mineral substances; electricity production facilities; telecommunication channels, construction, enlargement of roads; electricity, telecommunications, gas, water, sewerage installations; facilities for the protection of environment; dam construction, water accumulation facilities, debit derivations for water alimentation; hydro-meteorological stations, earthquake and natural disaster warning systems, buildings and lands necessary for the construction of social, education, health, culture, sport, protection and social care facilities, as well as those necessary for the public administration and for the judiciary; works for the conservation of monuments, and of national parks; prevention and removal of the effects of natural disasters – earthquakes, floods; national defense, public order and national security“.

2. SPECIAL REGULATIONS ON EXPROPRIATION FOR PUBLIC UTILITY

The expropriation procedure⁸ described by Law no. 33/1994 proved to be an obstacle in the way of realization of urgent works such as those from the field of works and constructions, reason for why Law no. 198/2004⁹ on certain prior measures to the construction of roads of national, county or local interest. The law sets out certain prior measures to road construction, with the purpose to simplify expropriation procedure for cause of public utility. Among these measures, that are derogatory from common provisions, (Law no. 33/1994) we underline:

- the obtaining of approvals, authorizations, planning certificates is realized within a short period of time and (in some situations) by the application of silent¹⁰;
- the payment of compensations is made after the request of the owners or at the request of any interested person;
- in the case where there are more than one claimants, the amount of compensation will be recorded for all of them, and will be released when the courts will establish the holder of the property right (or of other real rights) without this affecting the transfer of property rights over the real property in question¹¹; This provision is „more than derogatory” given the fact that it is established by the Constitution that compensation in case of expropriation has to be *just*¹². Exceptions from the condition of prior payment of compensation are applicable only in situations of extreme urgency (national defense, public order, national security, natural disasters – Article 23 of the Law on expropriations).

⁸ A special procedure of expropriation is provided by Law no. 106/2008 on expropriation for construction of mines for lignite extraction, published in Official Journal no. 369 of 2008. This law makes reference to the expropriation procedure described in Law no. 33/1994, stating that only the courts of law can establish the amount of compensation and the transfer of property rights take place only after the payment: “ Art. 12 (1) In all of the cases in which, after the meeting of the commission mentioned in article 9 para. (1) there is no agreement between the parties about the amount of compensations, and in the cases when the notified persons did not participated at the negotiations, the expropriator asks the court, in accordance with Law no. 33/1994 on expropriation. (2) Claims make on the basis of the present law will be decided urgently, and terms will not be longer that 7 days”.

⁹ The law was published in the Official Journal of Romania no. 487 of 31 May 2004 and was modified by: E.O.G. 25/2007, Law no. 184/2009, E.O.G. 228/2008.

¹⁰ Art. 3 of Law no. 198/2004: (5) Planning certificates for works regulated by the present law will be issued for, and communicated to the National Company for Highways and Roads, for works that are of national importance, and to the local public authorities for works that are of local importance, in 10 days starting from the date of the documentations. (6) Opinions, agreements, permits and authorizations claimed by the planning certificate, with the exception of the environment agreement, will be issued for, and communicated to the National Company for Highways and Roads, for works that are of national importance, and to the local public authorities for works that are of local importance, in 25 days starting from the date of the documentations. (7) In accordance with the provisions of Emergency Ordinance no. 27/2003 on the procedure of silent approval, approved by Law no. 486/2003, planning certificates, opinions, agreements, permits and authorizations are considered as issued if they were not transmitted to the National Company for Highways and Roads, for works of national interest, and to the public authorities for works of local interest, within the terms mentioned in para. (5) and (6).

¹¹ Art. 5 of Law no. 198/2004 provides: „(5) in the situation when the compensations regarding the same real property are claimed by more persons, apparently entitled to claim, the compensations will be registered for all of them, and will be divided according to civil law. The Compensation will be paid only for the holders of property rights, whose rights were proved by authentic acts or by court decisions. Eventual proceedings in court will delay the payment of the registered compensation, but will not suspend the transfer of property rights.”

¹² Ioan Muraru, Elena Simina Tănăsescu (coord.) Constituția României. Comentariu pe articole, pp.454-455.

In this situation, the expropriator has the obligation to record the compensation for the benefit of the owner, and the expropriator will acquire only possession, owner will be the holder of the right (Article 18 of the Law on expropriation). The question is what are the road construction works that are of extreme urgency, that justify the payment of compensation without knowing who the owner really is, and moreover, how can property transfer take place before the payment. The constitutional provisions on road construction shouldn't be observed in what regards the *just and prior compensation*?

The law had undergone several constitutionality exams, but the Constitutional Court considered that the Provisions of Law no. 198/2004 are in conformity with the provisions of the fundamental law¹³, appreciating that the law as a whole, *contains provisions that assure that the legal framework on expropriation procedure, on the establishment of compensations, the defense of property rights and of the right to challenge through court the amount of the compensation, in accordance with the constitutional provisions and with the case-law of the European Court of Human Rights, that established that any deprivation of property should be provided by law, should be justified by a cause of public utility and has to be in accordance with internal law, also respecting the proportionality between the measure and its purpose (Case of James and others v. United Kingdom, 1986).*

3. OTHER DRAFT LAWS ON SIMPLIFYING EXPROPRIATION PROCEDURE

Law no. 198/2004 launched a "trend" on simplifying expropriation procedures, reason for why there is a draft law in public debate on certain prior measures to water management works.¹⁴ This draft follows the coordinates established by Law no. 198/2004 and proposes to regulate in a simplified manner the expropriation procedure in the case of water management works. The Explanatory memorandum of the draft¹⁵ argues that such a project is justified by:

- regulations concerning expropriation that contain *poor* provisions;
- long terms for the realization of expropriation in the situation where the majority of hydro-technical works are financed by international agreements to which Romania is a party and that contain rigorous terms and conditions on execution, or on reimbursement.

Problems that can appear in the case of such special laws regard their disparity with the general regulation of expropriation and (sometimes) with the constitutional provisions.

We propose to reveal some of these disparities in the following discussion.

The subject matter of the draft law gives rise to the following discussions:

a) *Article 2 of the Draft – By the present law there are of public utility construction works in the domains of water management, hydro-technical constructions and related works, works relating to permanent or non-permanent water accumulations, operating*

¹³ Constitutional Court Decision no. 166/2008, Constitutional Court Decision no. 929/2008, Constitutional Court Decision no. 910/2009, Constitutional Court Decision no. 1292/2009, Constitutional Court Decision no. 1648/2009, Constitutional Court Decision no. 114/2010.

¹⁴ For the integral text of the draft, see <http://www.sgg.ro/nlegislativ/docs/2010/03/k5dcfrhvypt21s483qb7.pdf>

¹⁵ For the integral text of the Explanatory Memorandum see <http://www.sgg.ro/nlegislativ/docs/2010/03/rfd3z81sxy6nbqjcvpm.pdf>

cantons, defense dams, hydrometrical constructions and installations, water quality measurement installations, works on the development, regularization or consolidation of river beds, hydro-technical channels, pumping stations as well as other hydro-technical constructions realized on water, works on the rehabilitation of wet zones.

It can be observed that this list of works declared as being of public utility resembles with some contained in Article 6 of Law no. 33/1994: “*Are of public utility the works regarding: ... construction of dams and regulation of rivers, water accumulations for water source and dilution of storms; debit derivation for water sources and for diversion of storms; hydro-meteorological stations, dangerous natural phenomenon warning and prevention systems, irrigation and draining systems*” fact that can lead to confusions on the procedure applicable to this kind of works.

b) Article 3 para. 4 and 5 of the draft

(4) *The lands necessary for the moving of utilities, for technological roads, temporary roads, deviation roads, as well as those necessary for pits can be expropriated and are under the applicability of the present law.*

(5) Lands expropriated in accordance with para. (4) are rendered, after the finalization of the construction, for the local administrations and cannot be sold.

Regarding para. 5 of Article 3, although the text is not provided by Law no. 198/2004, there is no description of the legal mechanisms by which such rendition can be made. The expropriated lands form part of the state’s public property and the way by which these lands can be transferred into the administrative-territorial unit’s public property is provided by Law no. 213/1998, at para. 1 of Article 9, which reads as follows: “*The transfer of a good from the public domain of the state into the public domain of a territorial-administrative unit is made on the request of the county council or of the General Council of Bucharest, or of the local council, by the decision of the Government.*” In this situation, neither the final part of paragr. 5 prohibiting the sale of such lands, is not necessary.

c) Article 4 para. 2, 7 and 8 of the draft

(2) The holders of any title over real property, affected by the feasibility study is obliged, after a prior notice, to allow the access for the necessary topographical measurements, geotechnical studies, and for any operation necessary for the feasibility study.

Regarding para. 2 it can be observed that a new legal norm is enacted that imposes the obligation to allow access to the land for measurements, without instituting sanctions for the case when this obligation is not complied with.

(7) In accordance with the provisions of Emergency Ordinance no. 27/2003 on the procedure of silent approval, approved with modifications and completed by Law no. 486/2003, planning certificates, approvals, agreements, permits and authorizations are considered as accorded, if these were not transmitted by the “Romanian Waters” National Administration, within the terms prescribed by para (5) and (6).

(8) In the case of silent approval of planning certificates, approvals, agreements, permits and authorizations, the competent authorities are obliged to issue the official document within 5 working days starting from the date of silent approval.

Paragraphs 7 and 8 of Article 4 refer to the procedure of silent approval provided by Emergency Ordinance no. 27/2003, approved with modifications and completed by Law no. 486/2003. We underline that such a procedure is not applicable to planning certificates, approvals, etc. necessary in this case, on one hand, and para. 8 imposes the obligation for the competent authority to issue the official document in the case of silent approval on the other hand. This procedure is contrary to that described in Emergency Ordinance nr. 27/2003, referred by para. 7. Thus, Article 8 of the E.O.G. no. 27/2003 provides that *“(1) When the claimant addressed, in accordance with Article 7 para (2) to the relevant public administration authority, he explains the existence of the silent approval regarding the authorizations and claims the official document that allows a certain activity, service or the exercise of a profession.*

(2) When the relevant public administration authority is not responding or is refusing to issue the official document that allows a certain activity, service or the exercise of a profession, the claimant can address to the court in accordance with the procedure established by the present emergency ordinance.”

d) Article 6 para.1 and 2 of the draft

(1) The payment of compensation for expropriated real property on the basis of Article 5 is made on the basis of requests from the holders of property right or from any other person who justifies a legitimate interest.

(2) The request for payment for the expropriated real property will contain the name and surname of the holder of the right, address, documents proving the existence of the rights. The request, together with other relevant documentation, in original or copies will be transmitted within 10 days from the public notice, by display at the headquarter of the local council where the real property is, of the tables provided in Article 5 para. (5).

In what regards para. 1 of Article 6, we consider that it is necessary a reformulation, having in view the fact that expropriation regards mainly property right over a real property, in the sense of its transfer from private property to public property. For these reasons, para. 1 should provide that “the payment of compensation ... will be made on the basis of requests from the owners, holders of other real rights as well as from any other person that justifies a legitimate interest”.

The formulation of para 2 of Article 6 does not consider the situation of legal persons, when omits to provide that the request should contain the name, headquarter and other identity elements of the legal person.

e) Article 10 para.3 of the draft

(3) The lawsuit made on the basis of the present article will be decided in accordance with the provisions of article 21-27 of Law no. 33/1994 on expropriation for public utility, in what regards the determination of compensations.

According to para. 3 of Article 10 from the Draft law, lawsuit based on this text will be decided in accordance with the provisions of article 21 – 27 of Law no. 33/1994, in what regards the determination of compensations. Such a reference could create difficulties in its application, due to the fact that the rules provided by article 21 – 27 of Law no. 33/1994 have in view the procedure for verifying the conditions of expropriation and also the determination of compensations, in such a manner as they do not allow the “separation” of the two aspects in the case of all of the paragraphs. For example, according to Article 23

para. 1, “at the proceeding on deciding the expropriation request it is necessary the mandatory presence of the prosecutor”. Starting from this provision it is not clear whether the participation of the prosecutor it is necessary also in the procedure provided for in Article 10 of the Draft. Moreover, it is not clear if the procedure of partial expropriation is applicable in the case of the draft.

f) *Article 11 para.1* of the draft

(1) Claims addressed to court for the determination of the right to compensation for expropriation and for the determination of the amount of the compensation, are without stamp duty and are in the competence of ordinary courts.

Having in mind the fact that Law no. 33/1994 provides that the tribunal in whose territorial range the real property subject to expropriation is located is the competent court to decide on claims relating to expropriation, and that the procedure described in the draft is a procedure for certain categories of expropriations, we believe that the competent court to decide should be the tribunal in whose territorial range is the real property located.

On the other hand, the draft, at para 3 of Article 10 provides for the procedure on claims from “persons not satisfied with the amount of compensations” there is reference to Article 21 – 27 of Law no 33/1994, articles that regulate this kind of lawsuits, thus the final part of para. 1 Article 11 (regarding the competence of ordinary court to decide upon lawsuits regulated by the text) can be eliminated, in order to avoid eventual confusions.

CONCLUSIONS

The presentation of the main regulations (some in the stage of drafts) has as purpose the finding that Law no. 33/1994 is not in accordance with present time exigencies.

Having in mind the fact that expropriation is, in all of the situations, regardless the nature of the work, o modality for the forced transfer of property rights, the procedure should be unique, and the constitutional prescripts should be respected in every situation. Expropriation cannot be more difficult (as a procedure) in some situations and easier is others (road construction, water management, and possibly in other fields in the future).

The transfer of property right has to be realized only after a *just and prior* compensation, regardless the nature of the public works.

All these considerations, entitle us to mention that a single law is preferred in the domain of expropriation, regardless the nature of the works, having in mind all the considerations that led to special regulations in the domain of expropriations.

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