CONSIDERATIONS ON *DE FACTO* EXPROPRIATION AND INDIRECT EXPROPRIATION IN ROMANIAN LAW

Bogdan-Michael Ciubotaru[*]

Abstract

*The concept of **de facto** expropriation does not exist in the Romanian law. The cases that can be classified as a form of **de facto** expropriation are ignored by the Romanian law and by the courts in their practice. A creation of the European Court of Human Rights, **de facto** expropriation designates the situation where a person, being the owner of a good in legal terms, loses all the attributes of property to the State, without such deprivation of property attributes being the object of a legal act, and actually being a form of deprivation of property, to which the text of Article 1 of Protocol No. 1 to the Convention refers. In our legal system, the theory of indirect expropriation can find a threefold application: in the matter of permanent damages; in the matter of incorporations made by public works; in the incorporations made by special laws.*

Keywords: *de facto* expropriation, indirect expropriation, deprivation of property, public utility, permanent damages, *de facto* incorporation

[*] Bogdan-Michael Ciubotaru, Ph.D., is Lecturer and Dean of the Faculty of Law within "Mihail Kogălniceanu" University, Iași, Romania; contact: bogdan_ciubotaru@yahoo.com

1. *De facto* expropriation

On January 29th, 2009, the European Court of Human Rights (ECHR) ruled in the *Burghelea v. Romania* case. The European court's ruling introduced, for the first time in the cases against Romania, the concept of ***de facto* expropriation** and established the state's obligations whenever an asset is used for public utility.

In fact, the applicant was reconstituted her right to property by issuing the ownership title over an area of forest land located in the vicinity of an artificial lake managed by Hidroelectrica Company. In order to perform actions to achieve the lake extension, Hidroelectrica asked the local authorities to get the agreement in principle of the owners of the land that would be flooded to sell their real estate to Hidroelectrica. The applicant initially expressed such agreement and, based on it the electric company deforested and flooded her land. Subsequently, the applicant withdrew the original consent and brought an action in court requesting compensation for the use of her property. The action was dismissed primarily because there was an agreement for a future sale, which was not possible at that time because of the temporary ban on the alienation of land obtained by applying the provisions of Law no. 18/1991. Other actions, including a criminal complaint for disturbance of possession and an action for recovery, were unsuccessful.

At the time of trial by the ECHR, the applicant could not use the land whose owner she was, as it had been flooded and used by Hidroelectrica. The European Court received the application regarding the violation of her property right, allowed it and found a violation by the Romanian state of the applicant's right of property. Noting that the applicant could not exercise any of the attributes of her property rights, the European Court ruled that the applicant was a victim of *de facto* expropriation that could not be justified by her original agreement to sell the land, as long as the offer did not include a selling price, nor by the selling ban established by Law no. 18/1991. In fact, the Court found that although the Romanian state could resort to the provisions of the law on expropriation, it preferred to take possession of the applicant's land without paying any compensation to her. Under these circumstances, the applicant was imposed an excessive burden, that of supporting in an exclusive manner the public utility of the operation of a hydroelectric power station, thus her property right being violated.

The decision in the Burghelea case brings into question the notion of ***de facto* expropriation**. A creation of the ECHR, it designates the situation where a person, being the owner of a good in legal terms, loses all the attributes of property

to the State, without such deprivation of property attributes being the object of a legal act[1], and actually being a form of deprivation of property, to which the text of Article 1 of Protocol No. 1 to the Convention refers. The effects of *de facto* expropriation are actually identical to those of a formal expropriation[2].

The Court held that expropriation can also be a *de facto* one, when, though the person remains the formal owner of the property, he/she no longer has the essential elements of the property right: he/she has it, but cannot exercise it.

Generally, deprivation of property is admissible when three conditions are met: the legality of the measure, the justification of the measure by public utility and the proportionality of the measure with the purpose.

The requirement of the legality of the measure imposes the obligation of the measure being stipulated by law in order to be justified.

Regarding the justification of the deprivation of property by public utility, it is understood in a wide manner by the Court, who considers that public utility can come from any legitimate policy of social, economic or other nature. For example, public utility justifies expropriations for carrying out public works, nationalization of aviation industry, establishing a right of preemption of the state, a policy to merge land for better agricultural administration, the restitution of property confiscated during the Communist regime for reasons of unjust measures mitigation[3] etc.

As a principle, the proportionality concerning the deprivation of property is connected to the obligation to establish compensation for the lost property, calculated based on the loss suffered by the former owner. In order to maintain a fair balance between the general interests of the community and the private ones, the states must take care not to impose excessive burden on individuals, given the fact that the cost of taking public utility measures cannot be imposed on individuals, while it is the role of the state[4].

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[1] R. Chiriţă, *The European Convention on Human Rights. Comments and explanations*, 2nd Edition, C. H. Beck Publishing House, Bucharest, 2009, p. 790.

[2] L. Sermet, *La Convention européenne des Droits de L'Homme et le droit de propriété*, Ed. du Conseil de l'Europe, Strasbourg, 1998, p. 24.

[3] *Apud* R. Chiriţă, "De facto Expropriation. A Review of the Decision of the ECHR in *Burghelea v. Romania Case*", în *Studia Universitatis Babeş-Bolyai. Iurisprudentia*, no.2/2010, www. http://studia.law. ubbcluj.ro/articole.php?an=2010.

[4] *Ibidem.*

2. The theory of indirect expropriation

2.1. Characterization of indirect expropriation

Under certain circumstances, public authorities can acquire real estate belonging to private owners for the execution of public works, without recourse to the procedure laid down in the laws governing expropriation for public utility. The transmission of property results, in this case, either from a statutory provision, or from certain material facts which attract a permanent dispossession of the owner. Likewise, often, the execution of public works without imposing an incorporation of the neighboring funds, cause a decrease in their use and a limitation on the exercise of the right of property[5]. As these operations are due to public utility and, in addition, likewise expropriations carried out by the usual procedure, constitute an infringement of property rights and, on the other hand, fairness requires that the damage be repaired, in this analogy a legal basis was found to recognize the owners a claim for damages. Thus *the theory of indirect expropriation* was born.

Although the theory originated in France and is the result of specific circumstances in the evolution of French administrative law, it has a general character and is likely, with some reservations, to receive applications also in the Romanian law, serving as the basis of a legal systematization.

2.2. Indirect expropriation in France

In France, indirect expropriation is a creation of case-law, caused by the interest of the definitively dispossessed owners because of public work operations or who, from the same cause, were suffering permanent damages, to avoid administrative courts, addressing civil courts, which provide more guarantees of fair trial and before which they were on equal terms with the public administration authorities. This situation happens when the act of command, which constituted an infringement of property rights, was not susceptible of a way of reformation. The owner, unable to request its cancellation, was suffering a loss, because the principle of separation of powers did not allow for any appeal before civil courts.

The theory of indirect expropriation averted this difficulty. It appeared, therefore, in France as a corrective to unfair consequences arising from the strict application of the principle of separation of powers and the limitation of the powers of the two jurisdictions.

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[5] H. Barthélemy, *Traité élémentaire de droit administratif*, dixième éd., Librairie Arthur Rousseau, Paris, 1923, pp. 93-94.

Case-law gave indirect expropriation the most important applications in the following areas: a) permanent damages caused by the execution of public works; b) incorporation resulting from administrative decisions of delimitating public domain; c) *de facto* incorporation caused by the execution of public works[6].

a) Permanent damages in France

The first application of the theory of indirect expropriation was made by the case-law concerning permanent damages. It was admitted in France that, if through the execution of public works a building was suffering a permanent damage, the owner could not address the civil courts in order to obtain compensation. He/she was thus left to the arbitrary of the administration which, while being at the same time party and judge, could not resolve the claims with the required impartiality. Therefore, in order to give a stronger guarantee of private property, civil courts have tried to assume permanent damage litigation and the Court of Cassation recognized them this competence.

This case-law lasted until 1850, when the Court of conflicts decided that in the matter of permanent damages the competence belongs to the administrative courts. The solution adopted was based on the assumption that there can be no expropriation if there is no transfer of ownership, not even dispossession in whole or in part, but only a reduction of the value of the fund and of the use. Since then, the theory of indirect expropriation has ceased to be useful in the matter of permanent damages. It served, however, to definitively consecrate the entitlement to compensations. Meanwhile, the analogy established with expropriation set the rule that material damages alone can justify compensation, meaning only those which represent physical touch of the property, of access or of exploitation mode.

b) Incorporation due to public domain delimitation

The theory of indirect expropriation, removed from the permanent damages area, reappeared later in the matter of administrative acts of public domain delimitation. Although these operations could produce by mistake the incorporation of private property, the State Council first rejected the appeal for abuse of power, based on the violation of property rights. The case-law of the State Council actually gave dispossessions done this way a definitive character. Therefore, the Court of Cassation assimilated them to expropriations in order to recognize the civil courts' right to grant compensations claimed by the owners. Subsequently, the State Council declared admissible the appeal for annulment of the delimitation acts which constituted a violation of private property, and the legal

[6] *Ibidem*, pp. 617-619.

basis adopted by the Court of Cassation disappeared.

Incorporation, ceasing to have a definitive character, could not be treated as an expropriation. However, there were still cases in which the owner was interested to seek compensation, for example, in the cases when the deadline had passed, the appeal was not admissible.

The adopted formula, although beyond the limits of expropriation, continued to be intimately linked with the principle of this institution and it is involved in the rule that no one can be expropriated without being granted the compensation established by justice.

c) De facto incorporation to public works

The most interesting application of the theory of indirect expropriation was carried out in disputes arising from the execution of public works, when, by mistake, a portion of a neighboring property was incorporated into work.

The French case-law, closing for the owner the way of an action for restitution, found in the analogy between the definitive deprivation resulting from this situation and the ordinary procedure of expropriation, the legal basis necessary to consecrate the civil courts' competence to establish a compensation. It consisted of *a fortiori* reasoning: the principle that the court is competent when expropriation is accomplished by the normal rules that require forms of protection for the individual, involve even more this competence when expropriation is done without any form. It is therefore recognized the owner's right to compensation if the public administration had built a public building on the property it had assimilated, restitution not being possible given the rule that "the built public work cannot be destroyed".

From the examination of case-law results that, in the present state of French law, the theory of indirect expropriation includes the following elements:

- a legal and regular administrative operation. Although it resulted in the incorporation of a private property, the irregular operations cannot cause an indirect expropriation.

- the owner's dispossession. Permanent damages to property due to the execution of public works that do not involve dispossession are today the competence of the administrative courts and civil courts cannot treat them as expropriations in order to grant indemnities.

- an incorporation in the public domain or public work. It is necessary for the dispossession to be united also with an incorporation into the public domain, which alone can give it a definitive character and to differentiate it from mere temporary occupation of the building.

3. Indirect expropriation in the Romanian law

3.1. The original aspect of the issue

The theory of indirect expropriation, in the form it received the French law, has not yet been discussed in Romania. Although the courts have adopted some solutions close to the French theory, in the cases when - in the absence of a legal text - fairness requires the owners' compensation for the impairments of their property due to the execution of public works, yet they have not explicitly formulated it. Moreover, the entire field of public works has not yet been analyzed in terms of its particular legal character and the consequences their execution produces, directly or indirectly, to private properties.

This gap can have more explanations. Firstly, private law has been in Romania the general source to solving all conflicts of law, even of those who enter the field of administrative law. Secondly, ordinary courts have had a general competence that was not limited by that of the administrative courts.

The conflict of competence between the two jurisdictions, which created or, in any case, has contributed to the development of the French administrative law, was not present in Romania, as our administrative court ruled only on acts of authority. However, the courts required to fairly solve the conflicts on this matter and lacking a legal provision that would allow the granting of an indemnity, have found the solution to the problem in the constitutional principle of respect for the property rights, which in fact is the very foundation of expropriation, and have consecrated this way, explicitly, the theory of indirect expropriation.

In our legal system, the theory of indirect expropriation can find a threefold application:

- in the matter of permanent damages;
- in the matter of incorporations made by public works;
- in the incorporations made by special laws.

3.2. Permanent damages

In the Romanian courts it has been debated whether the owner whose property has been deprecated by a public work, executed by the public administration based on a legal administrative operation, is entitled to an action for damages. In other words, if the permanent damages caused by public works confer the owners the right to be compensated, an issue which in France led to the elaboration of the indirect expropriation theory.

The issue was discussed in our country especially when implementing the systematization plans in the communes, which involved some changes of the streets with respect to neighboring properties (erasures or corrections, raising or lowering the level etc.), because the riparian funds, even without being touched in their scope, could suffer significant material reduction due either to the loss of a facade or to difficulties of access etc. In this situation, the harmed owners could not base their claim for damages on the provisions of Article 998 et seq. Civil Code, that is the fault principle, as the authority works in accordance with the law, therefore in exercise of a right (*qui suo jure...*), and could neither invoke the theory of abuse of law.

In addition, there is no text stating that the owner may claim damages for impairment of property caused by the execution of public works. It would seem, therefore, that in legal terms, the owner could not find a legal basis for action for damages, no matter how unfair this solution would be.

The Romanian courts have allowed, however, the owners' claims based on the principle that any interference with the right of property or its exercise entitles them to compensation, regardless of fault [7]. It is understood that an analogy had been established between the proper expropriation and permanent damages, in order to justify the granting of compensation to the owner. Indeed, if the compensation does not come from fault, it can only be a financial equivalent of the right legally dissolved. Therefore, the employed elliptical formula involves the following reasoning: as expropriation made under the special law is conditioned by compensation under Article 41 of the Constitution, that is the payment of an amount intended to replace the lost fund in the owner's patrimony, the same way any dispossession or restriction of the property right, if done in legal form, gives the owner the right to compensation.

Analyzed this way, the solution coincides with the indirect expropriation theory formulated by the French case-law.

Lately, the case-law has admitted the theory of indirect expropriation and the right of the owner to compensation for permanent damages.

3.3. ***De facto*** *incorporation*

It should be noted that not every *de facto* incorporation, resulting from the execution of public works, may constitute an indirect expropriation. It is necessary

[7] In this respect the Court of Cassation, Section I, ruled through Decision no. 91/24.02.1909 (Cassation Bulletin 1909, p.145).

that the work be legally ordered and constitute a regular administrative operation. Therefore, the incorporations arising out of illegal operations are excluded, and so are those caused by abusive acts of the administration authorities, because they do not take away the owner's possibility to defend his/her rights and, therefore, they do not represent a permanent dispossession. They can be canceled by an action before the administrative courts.

Indirect expropriation through *de facto* incorporations refers therefore only to the cases when, during execution of legally authorized works, the organs of public administration, by negligence or error, incorporate a portion of a private property. We have seen that in France these incorporations were considered indirect expropriations only to allow owners a stronger guarantee of their right to apply to the civil courts, avoiding the less advantageous procedure of applying to administrative courts. This is important in Romania too, although it appears under a different aspect, because it can offer the legal solution to the conflict that arises between the administration and the individual, when the incorporation is done without the ordinary procedure of expropriation.

In our country, the question arises whether the owner is entitled to an action for recovery. It could be argued that the owner has this right because the administration has not acquired a conventional or a legal property title (under the special procedure of the law on expropriation).

Secondly, the Constitution requiring a prior compensation, the recognition of direct incorporation as a means of acquiring private property would consecrate an elimination of the guarantees of the property right and would allow the authority to actually confiscate a property in a diverted way.

However, the contrary solution seems fairer if we consider the special nature of the public work and the legal consequences of its implementation. A public work is an administrative operation of public power, which cannot be canceled by the courts as long as it is legally authorized. The action for recovery seems inadmissible, if we look at the problem from the point of view of the consequences of the execution of the work. In this respect, the operation can be treated as a case of accession, which, according to the former art.482 of the Civil Code, constitutes a manner of definitive acquisition. The French jurisprudence has applied this rule even when incorporation was done by an individual, in the case when a building was partly erected on a portion of the neighboring land. It admitted, in some cases, that if the one who built did it in good faith, the neighbor may not require the demolition of the building and he/she is only entitled to compensations for the lost land and the damage suffered.

To give this solution, the case-law is based on the tacit consent of the neighbor, resulting from the fact that during the execution of the work he/she has not protested in any way and on the consideration that the conflicting interests can be reconciled by way of compensation, without destroying the work performed.

The application given by case-law to the former art.482 of the Civil Code in the relations between neighbors, finds a stronger justification in the incorporations into public works because, in addition to good faith and tacit consent, there is a public interest in maintaining the work. The admission of the owner's action would result in the closure of the public service the work is intended to assure, so its completion gives it a definitive character; in addition, the property being incorporated into the public domain acquires, *ipso facto,* inalienability character. Moreover, restitution would be of no interest, because one could later execute the same work after completing the necessary forms for expropriation.

Summarizing, we can say that the owner cannot lose the action for recovery, unless the administrative operation by which the work was authorized is legal, the incorporation was done by mistake and in good faith and if the work has been completed.

If it is accepted that the execution of public works leads to a definitive dispossession, it is obvious that the operation takes the legal character of an indirect expropriation and the owner requires, based on the principle established in Article 41 of the Constitution, to be paid a fair compensation.

3.4. Legal incorporations

One can also consider as indirect expropriations the incorporations done by the administration for the execution of public works and consecrated by laws. These incorporations are caused either by individuals, when the execution of a work is a cause of impairment of property likely to completely reduce the use, or by the administration. Some of them give a right to compensation, while others represent free transfer.

Cases of legal incorporations entitling owners to compensation are present even since the adoption of the *Law on the regime of waters of June 27th, 1924* (article 39)[8], but also in the *Law on roads of August 6th, 1929* (Article 73)[9].

[8] "Art. 39 - When by temporary occupation of a land in the sense of art. 30 para. a) the owner is deprived of the use of this land for a longer period than that fixed by the authorization or if the land becomes unsuitable for cultivation or is depreciated, he/she may

In the category of free incorporations there is the acquisition of the land of the roads open by individuals without authorization. These incorporations were also stipulated by *the Law of Local Administration of 1929* (Article 124)[10].

The right of the authority to incorporate for free into the public domain the land destined to frontage to the road should not be viewed as a penalty, because in this case it would constitute a seizure forbidden by the Constitution. We must admit that the legislator understood to give the act by which the owner affects his/her land to public path, the intent of a consent of giving for free the land to the commune.

Conclusions

The concept of *de facto* expropriation does not exist in the Romanian law. The cases that can be classified as a form of *de facto* expropriation are ignored by the Romanian law and by the courts in their practice. The only remedy in such circumstances remains an amendment to the legislation on expropriation for public utility, as to allow a procedure whereby a person who faces a *de facto* expropriation is able to have the authorities compelled to start the expropriation procedure and to purchase the asset that is used in the interest of the community. Otherwise, situations can easily occur, as in the Burghelea case, in which individuals bear the cost of a public utility, which is abnormal and contrary to all the provisions regarding the protection of the right of property.

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request the establishment of compensation referred to in the previous article for a permanent servitude. If by the establishment of the servitude on the area of land required for authorized works, the remaining parts of the original fund are divided, so that they cannot be used for a continuous economic culture, the owner of the fund may also request compensation for the parts or to be expropriated".

[9]"Art. 73: The necessary land for the correction of an existing road, if the land of the new road remains on the same property which exceeds one hectare, it is taken without compensation in exchange for the land occupied by the old road. If the property is less than one hectare, or if on the land to be taken there are buildings, fences or other improvements to be eliminated, and also for the area of land taken in addition to the surface it has been agreed upon and no other agreement was reached, the owners will be compensated according to the law of expropriation".

[10]"Art. 124 para. 2: The streets and the dead end streets which have the character of public road and were established in violation of the law or regulations shall be taken into possession by the commune without compensation for the land owners who gave the street or dead end street this destination".

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